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16 July 2025

Dear Sir/Madam,

Submission on Amendments to the Family Trust Election provisions

CPA Australia is Australia's leading professional accounting body and one of the largest in the world. We represent the diverse interests of more than 175,000 members in over 100 countries and regions.

Executive Summary

This submission highlights the concerns regarding the current application of tax laws affecting family trusts, specifically focusing on Family Trust Elections (**FTEs**), Interposed Entity Elections (**IEEs**), and Family Trust Distributions Tax (**FTDT**). While these provisions were originally introduced to prevent the misuse of trust tax losses, their current implementation is leading to unintended consequences, disproportionately harsh penalties, and significant financial distress for many Australian family businesses, including tradies and primary producers.

Background

The trust loss provisions, enacted from 9 May 1995, introduced FTEs and IEEs to provide exceptions for trusts managed for the benefit of a family group. FTDT was introduced as an anti-avoidance measure, applying to distributions made outside the defined "family group". Importantly, the Government's original expectation was that FTDT would be "optional" and would "never need to be paid", serving primarily as a deterrent against tax avoidance.

Current concerns

Despite this original intent, the Australian Taxation Office (**ATO**) has identified a number of issues with the provisions and has made it clear that it is bound to apply the law as written, resulting in significant FTDT liabilities being imposed (or being at risk of being imposed) on taxpayers. The core issues contributing to these problems include:

- **Technical drafting flaws and complexity:** The provisions are incredibly complex, leading to historic misunderstandings and the imposition of FTDT due to potential technical deficiencies. This can occur even when distributions remain within the "economic" family group and no mischief is involved.

- **Self-executing nature of FTDT and lack of Commissioner's discretion:** The ATO views FTDT as a 'self-executing' tax, meaning the Commissioner has no discretion to ignore its application, limit its period, or extend time for revocations or variations.

- **Unlimited period of review:** FTDT is not subject to the normal period of review limitations found in section 170 of the *Income Tax Assessment Act 1936* (ITAA 1936), leading to liabilities accumulating over many years, potentially back to 1996. This can result in exponential tax and General Interest Charge (GIC) liabilities for even minor or repeated errors. For instance, a $400,000 FTDT liability from 2004 could result in a current total liability of approximately $5 million, including GIC.

- **Difficulty in evidencing valid elections:** Many elections were made decades ago, and many taxpayers have not retained physical signed records, leading to disputes over their validity.

- **Limited opportunities to alter FTEs:** There is restricted ability to vary or revoke FTEs or IEEs, even for genuine mistakes or unforeseen events like the death of a test individual, which can result in inadvertent breaches and ongoing liabilities.

- **Disproportionate tax imposition:** FTDT is levied on the full distribution even if only a small portion ultimately goes to a non-family member, overstating the "benefit" to outsiders. There is also a risk of double taxation on distributions to corporate beneficiaries where FTDT has already been paid.

Impact on the tax profession

The increasing number of significant FTDT liabilities places considerable pressure on the accounting profession, leading to increased litigation risk for historical liabilities that were unforeseeable at the time. The absence of a statutory limitation period means claims can arise many years after the original event, and professional indemnity insurers may reject claims. This situation discourages professionals from preparing income tax returns or offering tax advice, particularly in areas involving discretionary trusts, potentially reducing the availability of advisory services.

Proposed reforms

We believe that FTDT should serve its original purpose as a deterrent for clear and intended breaches, but the legislative framework must provide appropriate options for inadvertent errors. Our recommendations do not seek to change the fundamental object of the provisions but aim to restore a fair balance between enforcement and professional accountability. The key recommendations include:

- **Introducing a statutory time limit on FTDT Liabilities:** We recommend aligning FTDT with the review periods in section 170 of the ITAA 1936, ideally by making FTDT subject to assessment by the Commissioner and limiting GIC accrual. Exceptions could be maintained for "Loss Scheme Cases" or cases involving fraud or evasion.

- **Granting the Commissioner's discretion:** We propose allowing the Commissioner discretion to accept elections as valid, limit review periods to four years (outside "Loss Scheme Cases" or cases involving fraud or evasion), or reduce FTDT liability to reflect only benefits genuinely passed outside the family group.

- **Addressing technical deficiencies:** This includes clarifying the evidencing of elections, removing the approved form requirement prospectively, validating elections made under ATO guidance, allowing for retrospective variations and revocations, and enabling FTDT payment to facilitate retrospective elections where minor breaches occurred. Further, it addresses ensuring FTDT is limited to benefits genuinely passing outside the family group, mitigating double taxation for corporate beneficiaries, expanding the family control test for companies, and clarifying the application of IEEs.

We acknowledge the ATO's significant responsibility in administering tax laws and have aimed for a balanced approach in our proposals, recognising that their interpretations are based on the text of the legislation. Our intention is to ensure the ATO is supportive of these necessary amendments.

Please see attached Appendix A for a summary of key recommendations and Appendix B for details of our submission. We would also like to highlight our Conflict declaration and without prejudice section in Appendix B of this submission.

We urge the Government to urgently review the operation of the family trust election provisions to ensure that the policy achieves its intended purpose without penalising families for technical errors and to restore certainty to taxpayers and the tax profession.

If you have any queries, please contact Jenny Wong, Tax Policy Lead on jenny.wong@cpaaustralia.com.au or Alexis Kokkinos on Alexis.Kokkinos@pitcher.com.au.

Yours sincerely,

Jenny Wong

Jenny Wong
Tax Policy Lead

Alexis Kokkinos
Taxation Centre of Excellence Chair

Submission Contents

Appendix A

Summary of recommendations

Follow is a summary of the recommendations contained in this submission.

Recommendation 1

The FTDT liability should not apply automatically and should be subject to an assessment or determination by the Commissioner.

Recommendation 2

The FTDT liability should be subject to a limited period of review consistent with the rules contained in section 170 of the ITAA 1936. Exceptions could be provided where the case is a Loss Scheme Case or case of fraud or evasion. Reform options should be considered to ensure that the appropriate time limits occur with respect to FTDT and associated liabilities (such as GIC).

Recommendation 3

We recommend that a GIC limit be introduced, such that GIC be limited to the last four years (outside of a Loss Scheme Case).

Recommendation 4

A Commissioner’s discretion should be introduced into Schedule 2F, allowing the Commissioner the discretion to: (a) accept a prior Election as valid with respect to an entity (irrespective of whether the conditions have been satisfied or not); (b) limit the period of reviewing FTDT liabilities to four years (if there is no indication of loss trafficking arrangements or fraud or evasion); and/or (c) determine to reduce the FTDT liability by an amount of the benefit that, in the view of the Commissioner, represents an amount that has been provided to members that are not part of the family group. The Commissioner’s discretion could be limited to arrangements that are not determined to Loss Scheme Cases (consistent with PCG 2016/16, paragraph 56).

Recommendation 5

In the absence of a record showing an Election having been made in the approved form, where: (i) the taxpayer has electronic records that evidence that an Election ought to have been made (e.g., taxpayer portal extracts or unsigned copies of an Election); and (ii) the taxpayer has acted in manner that is not inconsistent with such an Election being in place (e.g., has lodged income tax returns identifying an Election has been made); then (iii) the electronic records can be used as prima facie evidence of the relevant Election having been made in an approved form.

Recommendation 6

Where there is competing electronic evidence in relation to an Election, the taxpayer should be given the opportunity to rely on the electronic record that accords with the way in which the family group has been administered.

Recommendation 7

The ATO should modify the income tax return for future years, so that the return can also constitute an approved form for entities required to lodge a return. As a minimum, the income tax return should include the specified individual and income year of the Election. To the extent that the provisions only allow for one approved form, it should be made clear in Schedule 2F that more than one approved form can be made by the Commissioner.

Recommendation 8

The requirement to make an Election in an approved form should be removed prospectively. This should be replaced with the ability for the taxpayer to make an Election and a requirement to notify the Commissioner of the Election having been made. Similar to subsection 103-25(2) of the ITAA 1997, the way in which the taxpayer prepares it's income tax returns should constitute sufficient evidence of the making the relevant Election.

This change, coupled with Recommendation 7 (i.e. changes to the income tax return disclosures), should reduce the instances of dispute in respect of whether an Election has been made by the taxpayer in the future.

Recommendation 9

An Election, made in good faith by a taxpayer consistent with their understanding of ATO administrative practice or guidance provided to the taxpayer, should not be taken to be an invalid due to a particular, if the particular is consistent with the taxpayer's understanding of that administrative practice or guidance.

Recommendation 10

The provisions should allow for corrections (variations or revocations) to be made where no mischief is present so that:

- They are not limited to being in respect of an income year, being the specified income year or one of the four subsequent four income years.
- Consistent with the making of FTEs, variations and revocations are able to be made retrospectively, if the relevant conditions are satisfied retrospectively.
- Variations can be made in respect to the specified income year, in addition to the specified individual.
- As a consequence of the above, variations and revocations can be made in an approved form at any time if they are not linked to a specific income year.

Recommendation 11

The requirement that only single variations be allowed under subsection 272-80(5B) should be lifted to cater for unforeseen events (multiple deaths in a family). Rules linked with the control test in section 269-95 can provide integrity around this proposed amendment.

Recommendation 12

Allow an entity to choose to make a retrospective Election (or vary an Election) that triggers FTDT (and GIC) on any past distributions outside of the family group.

Recommendation 13

The provisions be amended to allow a 12-month period (after the end of the income year) for FTE's to be made in respect of a deceased individual where the trust existed at the time of the individual's death.

Recommendation 14

Alternatively, an FTE made for a current income year, that is made before 30 June, should be taken to be valid if the family control test is ultimately passed on 30 June. If the family control test is not passed, the earlier purported Election would be taken to never have been validly made.

Recommendation 15

To the extent that there are no integrity issues, a similar limited extension should be provided for deceased estates and testamentary trusts related to the death of an individual.

Recommendation 16

The provisions should be amended to allow an IEE to be revoked interests are held by an entity outside the family group, in a similar way to the current ability to revoke FTEs for fixed trusts.

Recommendation 17

It should be clarified that the provision should be applied on the assumption that a choice to make a retrospective Election by an entity (including other entities in the group) is assumed to be valid for the purposes of testing the conditions of making an Election. It should be clear that this is applied to one or more entities seeking to make a retrospective Election.

Recommendation 18

An amendment should be made that limits the FTDT for a distribution made to an entity outside of the group only to the extent that fixed entitlements in it are not held by members of the family group. An approach similar to that with respect to incomplete distributions in section 269-75 would achieve this effect.

Recommendation 19

Where FTDT is payable on a distribution of income to a beneficiary, that income should retain its NANE character when paid (indirectly) to an individual through one or more interposed entities (e.g., as a dividend to a shareholder of a company that derives the distribution).

Recommendation 20

We recommend that the family control test be expanded for companies so that companies that are effectively owned by the family group can make an IEE.

Recommendation 21

The provision should clarify that only one IEE is sufficient to bring an entity within the same family group of multiple trusts that have made FTEs with the same specified individual.

Appendix B

A. Detailed submission

Conflict declaration and without prejudice

1. For the purposes of Division 30 of the *Tax Agent Services Act 2009*, and in particular, the amendments to the Code of Conduct by the *Tax Agent Services (Code of Professional Conduct) Determination 2024* (**Determination**), all of the comments made in this submission are directly relevant to clients and potential client circumstances. There are some aspects of this submission which may affect ongoing litigation with the Australian Taxation Office (**ATO**).

2. However, we have tried to ensure that comments and suggestions in this submission are balanced and consistent with the policy, principles and intention of the rules as we understand them.

3. The examples, issues and recommendations contained in this submission have been developed based on direct feedback received by public practitioners on real live cases and disputes with the ATO, including those received by the party signing this submission. The majority of recommendations may have a direct impact on such cases and may result in a benefit to taxpayers. Accordingly, we highlight that there would be material conflicts in respect of the submission and we would encourage Treasury to discuss all recommendations and issues with the ATO.

4. Within this submission, we refer to views of the ATO. We note that there are limited public views on the provisions. Where there is a public statement of the view, we have provided a reference to that view. However, to the extent that there is no public statement on the view, we note that our reference is simply an understanding of the ATO view. No comments in this document should be attributed to the ATO other than those found publicly.

5. We note that our comments with respect to the ATO are not intended to be construed in a negative or disrespectful manner. We recognise that the ATO is charged with the serious responsibility of administering the taxation laws and that the ATO genuinely believes that their interpretations are based on the text of the legislation. For the purposes of this submission only, we have accepted these ATO views and have proposed changes to address issues which we believe to be inconsistent with the purpose of the legislation.

6. We also note that this submission should not be taken to prejudice any party with a view that is taken to the contrary (given ongoing litigation on a number of core issues). Accordingly, this submission should not be read as an acceptance of the technical position of the ATO on matters identified in this submission.

Background

7. The trust loss provisions were introduced by the insertion of Schedule 2F to the *Income Tax Assessment Act 1936* (**ITAA 1936**)[1] with effect from 9 May 1995. The provisions contain three main measures, dealing with: (1) the ability for a trust to utilise prior year tax losses; (2) the ability for a trust to claim bad debt deductions; and (3) schemes that may otherwise take advantage of trust losses or deductions (i.e. the income injection rules).

8. The concepts of the Family Trust Election (**FTE**) and Interposed Entity Election (**IEE**) (referenced in this submission together as the **Elections**) were developed as key components

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[1] All legislative references in this document are to Schedule 2F to the ITAA 1936 unless stated otherwise.

of the trust loss provisions to deal with the treatment of non-fixed trusts (i.e. discretionary trusts) and to provide exceptions from the general rules for trusts (and other entities) that were administered for the benefit of a family group.

9. As the Elections provide an exception from the integrity rules contained in Schedule 2F, a new tax was also introduced in the provisions, known as Family Trust Distributions Tax (**FTDT**). FTDT is imposed under the *Family Trust Distribution Tax (Primary Liability) Act 1998*[2] at the top marginal rate plus Medicare levy. FTDT is also imposed on additional entities under the *Family Trust Distribution Tax (Secondary Liability) Act 1998*[3].

10. FTDT is only imposed on an entity that has made an Election where distributions are made by the entity to a person that is not a member of the "family group" (as defined in section 272-90). In a recent publication[4], the ATO have outlined their view that the nature of FTDT is a self-executing tax, which means that the Commissioner believes that there is no discretion as to whether to issue an assessment or not. Furthermore, the provisions are not subject to a period of review in respect of the tax to which a trustee and directors of a corporate trustee are generally jointly and severally liable. The above points are succinctly made by the ATO in their online publication.

> ***Family trust distributions tax – what you need to know***
>
> *…*
>
> *The Commissioner has no discretion to ignore the application of FTDT, cannot limit the period FTDT applies and has no power to extend the time to revoke or vary elections.*

11. The FTDT provisions provide a significant deterrent for entities that have made an Election from distributing to entities outside of the family group. However, the Government of the day that introduced the measures did not expect that the provisions would be breached by taxpayers. The Explanatory Memorandum (**EM**) went so far as to say that the tax would be "optional". This expectation is clear from both the Second Reading Speech and the Explanatory Memorandum. We believe this explains why no concessions or discretions were included in the provisions.

> ***Extract from Second Reading Speech by the Hon Chris Miles M.P.***
>
> <u>*Family trusts*</u>
>
> *Family trusts (as defined) that distribute only to members of the family group will generally not be affected by the proposed measures. The income injection test will generally apply to family trusts only where income is injected from outside the family group. A trust will become 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 will be levied at the top marginal rate applying to individuals, plus Medicare levy. The family trust distribution tax is an anti-avoidance measure designed to ensure that the tax benefit of a family trust's losses cannot be transferred to non-family members. The government hopes the tax will never need to be paid.*
>
> <u>*Extract from the Explanatory Memorandum*</u>

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[2] Sections 3 and 4 of the Family Trust Distribution Tax (Primary Liability) Act 1998 (Cth)
[3] Sections 3 and 4 of the Family Trust Distribution Tax (Secondary Liability) Act 1998 (Cth)
[4] https://www.ato.gov.au/businesses-and-organisations/business-bulletins-newsroom/family-trust-distributions-tax-what-you-need-to-know

11.2 This tax need not ever be paid by any trust or interposed entity and in that sense is optional. The tax only becomes payable if a trust or interposed entity makes a distribution or confers a present entitlement that is inconsistent with its election to be treated as a family trust or member of the family group of a family trust.

12. While this was the expectation, this is not the outcome that is currently occurring. The ATO as administrators are required to apply the law as it reads. Due to the way in which the provisions have been drafted, and due to a lack of discretion afforded to the Commissioner within the provisions, the Commissioner has been required to apply the provisions in a manner that is resulting in significant FTDT liabilities being imposed on taxpayers. Even though many of these positions do not seem to be consistent with the policy of the provisions, we understand that the Commissioner feels that he is not able to move from those positions (as outlined in the online guidance).

13. As an example, certain staff members at the ATO recently publicised that a non-fixed trust (e.g., a unit trust that is wholly owned by the family group or discretionary trust controlled by the family group) cannot retrospectively make an FTE where it has distributed to an entity which the non-fixed trust wholly owns (Aco).[5] This issue is explained further at section 0 of this submission. While the retrospective election (if effective) would bring both the unit trust and Aco within the family group, the view that was espoused is that the conditions precedent to the election as not satisfied (i.e., the provisions are worded such that you must satisfy the conditions first before making the election). Accordingly, FTDT would be imposed in this scenario due to a potential technical deficiency in the provisions (even though all distributions have remained inside the “economic” family group).

14. The FTDT provisions are incredibly complex. Historic misunderstandings of how the Elections work, evolving group structures, and new public views being provided by the ATO are all contributing to potential FTDT liabilities that are vastly in excess of any perceived mischief. In most cases, we believe that there is no mischief, and that the outcome is purely due to drafting errors that can be applied back to 1996.

15. Historically, FTDT matters have not been the focus of ATO activity. Accordingly, until recently, the ATO has not prioritised education on the Elections (both internally and externally) and has not generally indicated its views on the provisions. We believe there has also been an insufficient investment in systems that could assist taxpayers with properly understanding whether they have made valid elections or not or whether there have been inadvertent breaches of the provisions. All of these have contributed to potential issues accumulating over a large period of time. When coupled with an unlimited amendment period, this is resulting in an increasing number of FTDT technical issues being discovered and applied by the ATO in a retrospective manner.

16. We understand that FTDT tax liabilities imposed by the Commissioner have been reported in the press as being significant (in some articles the amounts are quoted as being hundreds of millions of dollars). We understand that many of these instances do not involve cases of mischief and that the tax leakage in many cases has been determined to be significantly less than the amount of the FTDT that is sought to be imposed by the ATO. We have provided an example in Section 0 of this submission that demonstrates how a $400,000 FTDT liability imposed in respect of the periods to 30 June 2004 could result in a current liability of circa $5m.

17. Articles published by the Australian Financial Review (**AFR**) have summarised these key concerns. On 30 April 2025, the AFR published the article “‘*It’s all pervasive’: ATO’s blitz on family trusts threatens financial ruin*” which outlines the severity of the issue. This message was

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[5] 20 November 2024 webinar titled “Family Trust Distribution Tax – what you need to know” - https://tv.ato.gov.au/media/bi9or7orckqt3o. In particular, refer to the example of Blue Trust from 36:30 of the webinar.

reinforced by the article published on 2 May 2025 titled "*The family trust blunder that could send you bankrupt*".

18. FTEs are now used as a mechanism to provide concessions within other provisions of the ITAA 1936 and *Income Tax Assessment Act 1997 (Cth)* (**ITAA 1997**) (together, the **Tax Acts**). This includes: (1) the franking credit provisions[6] which allows franking credits to pass-through a family trust; (2) the company loss recoupment provisions[7] which allows a family trust to be treated as an individual; (c) the company income injection provisions[8] which allows a family trust to be treated as having a shareholder interest in a company; (d) the small business restructure provisions[9] which allows satisfaction of the continuity of economic ownership of assets for certain family trusts; and (e) concessions to the TB statement disclosure rules[10]. Accordingly, the use of the Elections is embedded in many provisions of the Tax Acts.

Impact on the tax profession

19. The accounting profession is already under considerable pressure from rising client demands, increasingly intricate tax legislation, enhanced regulatory obligations and a growing tendency toward litigation. Even seemingly minor missteps in the provision of tax advice or other taxation services can result in severe financial repercussions for firms, particularly when legal proceedings are initiated. Professional indemnity insurance remains one of the most complex and unstable areas of risk management for practitioners.

20. The rise of significant FTDT liabilities will amplify these challenges as we expect that tax practitioners may face legal action for historical liabilities that were unforeseeable at the time. The absence of a statutory limitation period means claims could arise many years after the original event. Insurers may also reject claims on the basis that the risks were pre-existing or insufficiently disclosed.

21. This type of environment will only result in professionals being discouraged from offering tax advice or even tax compliance services, particularly in areas involving discretionary trusts, and may ultimately reduce the availability of advisory services – especially among small and mid-sized firms.

22. The reforms proposed in this submission are critical to bring the provisions into alignment with historical tax administration principles and should help restore a fair balance between enforcement and professional accountability.

Reforms proposed

23. We understand that broad policy reform to the Election provisions may be difficult, as it is likely to require extensive consideration as to the effect that such reforms would have on all of the provisions which rely on Elections. However, there are key technical issues that we believe could be addressed to ensure that FTDT is not being imposed by the ATO in a manner that is inconsistent with the objects and the intention of the provisions.

24. We believe that FTDT should be seen as a deterrent, and that it should apply in cases where there is a clear and intended breach, or circumvention, of the provisions. However, appropriate options should be available in the legislative framework to ensure that the FTDT is truly "optional" in many cases where the breach is inadvertent or due to an error, as outlined in the EM to the provisions.

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6 Former section 160APHL(10) of the ITAA 1936
7 Section 165-207 of the ITAA 1997
8 Section 175-95 of the ITAA 1997
9 Section 328-440 of the ITAA 1997
10 Section 102UK and 102UT of the ITAA 1936

25. Additionally, in circumstances where the imposition of FTDT is appropriate, there should be limitations on its imposition (from a time limit perspective) so that the liability is not overly disproportional to the relevant tax mischief being addressed and that taxpayers can proceed with appropriate certainty regarding their tax affairs.

26. This submission contains a number of suggestions for reforming Schedule 2F, with the aim at addressing some of the key concerns with the current disproportionate effect of the provisions as currently drafted. We have provided two clear options within this submission (noting that these options are not mutually exclusive):

    26.1. <u>Option 1: Minimal changes</u> – Minimal changes could be made to the provisions if the Government were to introduce: (1) a statutory time limit on FTDT related liabilities (see Section C of this submission); and (2) were to introduce an appropriate discretion for the Commissioner (see Section D of this submission). This approach would help to future proof the number of issues related to FTDT.

    26.2. <u>Option 2: Address technical deficiencies</u> – A number of minor and technical amendments could be introduced to deal with the core issues identified to date. While this option would address current issues, it is likely that additional amendments may be required in the future. While this option would not include a Commissioner's discretion, we believe it should be coupled with a statutory time limit as outlined in Section C of this submission.

27. Our recommendations do not seek to change the fundamental object of the provisions, or its use in many of the provisions of the Tax Acts. Instead, we have provided recommendations that we believe would allow for the appropriate administration of the provisions in line with what we believe to be its original intent and would help restore a fair balance between enforcement and professional accountability.

A. Overview

28. This part outlines a number of core issues with the provisions relating to FTDT and options for amending the provisions to deal with those issues. Section C (dealing with unlimited time periods) and Section D (providing a Commissioner's discretion) contains a principles-based approach to addressing the issues, while Sections E to Q provide recommendations to deal with technical issues. These solutions are not mutually exclusive, and we believe that addressing the unlimited review period is perhaps the most material issue in the provisions that needs to be address.

29. The technical issues raised in this submission are not in any particular order. The nature of the FTDT liability is that any one of the technical issues can result in significant liabilities being imposed for a long period of time. Accordingly, in our view, all of these items are equally important to address.

30. We highlight that some of the changes outlined in this submission (on their own) may not be favourable to taxpayers if the reform option is accepted without complimenting reform options. For example, deeming Elections to be valid in certain cases is proposed in this submission to address the administrative record keeping issue and reduce litigation on this issue. However, this reform option is likely to increase FTDT exposures if additional reforms options are not implemented to address historical errors made by the same taxpayer.

31. Where this may be the case, we have highlighted complimenting reform options within this submission. We believe it is important that reform options be considered together as a package to minimise the potential adverse impacts that may occur where administrative solutions are also being addressed.

B. Materiality of the issue

Overview

32. Due to the unlimited period of review, a minor breach of the provisions can result in material FTDT and General Interest Charge (**GIC**) liabilities. In many cases, where the trust has a similar annual distribution pattern, the same error can be repeated many times, over a long period of time.

33. For example, if an FTE is held to be invalid by the ATO, it can result in distributions (made to the entity by an entity with an Election) treated as having been made repeatedly outside of the family group. This can be the case even where the recipient is within the same economic family group and there is no mischief involved.

34. The following examples demonstrate how the unlimited period of review results in significantly disproportionate tax liabilities on a single breach of the provisions. The examples further demonstrate that if the error is repeated on an annual basis, the effect on the liability is exponential.

Examples of the issue

Basic facts

35. Assume there is a small business group that consists of three trusts, Trust A, Trust B and Trust C. Trust C has made a valid FTE in its 2000 income tax return, while Trust A and Trust B have made an election in accordance with *Law Administration Practice Statement* PS LA 2004/1 (**PS LA 2004/1 (GA)**) (an administrative retrospective election that was provided by the ATO but not supported in law). All three trusts were created on 1 July 1999.

36. Assume that, over a 26-year period spanning 1 July 1999 to 30 June 2025, Trust C has made annual trust distributions to Trust A and Trust B equal to $212,766 (being 100% of the profit for the year).

Furthermore, assume that there are interest free loans provided between Trust A and Trust B for all years, such that the trusts may not satisfy the requirements to make a retrospective election under section 272-80(4A) of Schedule 2F[11]. The amount of FTDT on a single distribution would be equal to $100,000 (i.e., 47% of $212,766).

Example – single breach

37. Assume that the Elections made under PS LA 2004/1 (GA) are held to be invalid for the 30 June 2000 income year only due to a minor technical issue with the Election (but valid for all other years). In this case, the FTDT primary liability would be equal to $100,000.[12] The amount of GIC that would have accrued since that time would be equal to $1,404,585 (see Attachment Calculation A), resulting in a total liability of $1,504,585.

Example – small number of breaches

38. Using the same facts, assume that the ATO holds that retrospective Election made under PS LA 2004/1 (GA) is invalid only for the initial years (i.e. for the four income years before 30 June 2004), whereby from that date the ATO accept a valid FTE is in force for the relevant entities. In this alternative case, the FTDT primary liability would be equal to $400,000 (i.e., 4 x $100,000). The amount of GIC that would have accrued since that time would be equal to $4,616,276 (see Attachment Calculation B), resulting in a total liability of $5,016,276.

Example – large number of breaches

39. Using the same facts, assume the ATO holds that the elections by Trust A and Trust B are invalid for all income years (i.e. they were not validly made in accordance with the legislative requirements of the provisions). This would result in FTDT primary liability equal to $2,600,000 (i.e., 26 x $100,000). The amount of GIC that would have accrued since that time would be equal to $11,873,941 (see Attachment Calculation C), resulting in a total liability of $14,473,941.

Conclusion

40. The above examples demonstrate the significance of this issue and the impact it could have on small to medium businesses in these types of cases. In our view, the overwhelming majority of cases with potential FTDT exposures do not involve the kind of mischief contemplated by these provisions. They involve family groups distributing income to family members (or controlled entities of such family members) where technical errors have occurred with respect to compliance within the provisions (e.g., completing a form incorrectly or in the incorrect year).

41. These exposures are arising mainly as a result of technical issues with the provisions, compounded over a significant period of time. The recommendations contained within this submission are therefore targeted at these core causes of the issue, in order to reduce the potential exposure of FTDT for many family businesses.

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11 That is, each trust has provided a benefit to another trust not within the family group, which is regarded by the ATO as a precondition to making valid retrospective election.

12 For simplicity, we have assumed an FTDT rate of 47% in this section but acknowledged that the rate has ranged between 46.5% to 49% since the inception of FTDT. The amounts in the examples should not vary materially to the actual FTDT rate applicable during the relevant years.

C. Period of review

Explanation of the issue

42. The review of self-assessment in 2004 identified a number of core concerns with 'uncertainty' in our tax system[13]. It outlined that"

    42.1. Under the self-assessment system, taxpayers frequently encounter uncertainty regarding the application of tax laws to their specific circumstances or may be unaware of certain entitlements.

    42.2. This uncertainty can have significant adverse effects on taxpayers, the administrative system, and the economy as a whole.

    42.3. It can result in additional costs for taxpayers, such as paying extra tax, incurring GIC and penalties, or bearing the expenses of significant professional advice and litigation if the Tax Office identifies a shortfall.

    42.4. Uncertainty can affect taxpayers' perceptions of the fairness of the tax system, potentially impacting the level of voluntary compliance.

    42.5. Economic implications also arise from uncertainty, as taxpayers may hesitate to engage in economically beneficial transactions without assurances about their tax consequences.

43. To mitigate uncertainty, it is crucial to provide earlier finality to taxpayers who have made genuine efforts to comply with tax laws. By shortening the period during which their assessments can be amended to increase their liability, taxpayers can gain peace of mind. While there are legitimate cases for having an unlimited amendment period (for example in cases of fraud or evasion), the majority of cases dealing with FTDT exposures are unlikely to fall within this category.

44. FTDT is not subject to the period of review limitations in section 170 of the ITAA 1936. As there is no assessment of FTDT, a liability for FTDT can be imposed automatically on the happening of a distribution outside the family group.

45. While we recognise that FTDT was introduced in the context of the trust loss rules, and that the unlimited period of review was intended to cater for loss trafficking arrangements, the provisions are now applying to ordinary family and commercial dealings that do not involve any such arrangements.

46. In the context of the FTDT provisions, the ATO have made it clear that they are not able to limit their administration of the law to the existing amendment periods of section 170 of the ITAA 1936. This can be compared to the administrative treatment of time limits for trustee assessments, where the ATO administratively apply the time periods consistent with section 170 of the ITAA 1936 under *Law Administration Practice Statement PS LA 2015/2* (**PS LA 2015/2**). The continuation of an unlimited period of review in the current circumstances is unwarranted.

Examples of the issue

47. Examples have been included in Section 0 of this submission to demonstrate the magnitude of the liabilities that occur due to an unlimited period or review.

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[13] Review of Aspects of Income Tax Self Assessment Discussion Paper March 2004, Federal Treasury.

Recommendations

48. In order to address this issue, we recommend that the FTDT provisions be amended so that existing rules contained in section 170 are applied to FTDT liabilities. We believe there are at two aspects that should be considered.

    48.1. Firstly, to address the Commissioner's view that FTDT is automatic, we recommend that the law be changed so that FTDT only happens upon an assessment by the Commissioner. This should remove the automatic creation of a liability and thus could provide administrative options to the Commissioner similar to PS LA 2015/2. The process of assessment can be incorporated with the process of the assessment of income tax. That is, any entity with an Election is required to disclose in its income tax return the amount of distributions made during the year subject to FTDT. It is preferable that this be contained within an income tax return rather than a separate return to minimise compliance costs. This will also prompt taxpayer to consider FTDT on an annual basis which reduces instances of mistakes and otherwise makes for easier compliance should FTDT be triggered and the taxpayer wishes to pay it more easily.

    48.2. Secondly, the FTDT provisions could be made specifically subject to the same rules contained in section 170 of the ITAA 1936. If there is an annual assessment made of FTDT, the period of review commences following the issue of a notice of assessment. That is: (a) the two-year amendment period applies to certain individuals, small or medium businesses; (b) the four-year amendment period applies to other entities; and (c) that there be no period of limitation in relation to a "Loss Scheme Case". We recommend that the period of review commence from the latter of the time an income tax return for the trust is lodged or would be required to be lodged for the income year in which the distribution arose. This recommendation is in line with PS LA 2015/2 (being the administrative practice that occurs for trusts).

49. We note that the legislation contains other limited amendment period rules (for non-income tax liabilities) which may assist in developing a special amendment period rule for FTDT liabilities. For example, Subdivision 214-C of the ITAA 1997 contains rules governing the amendment of franking returns.

50. In relation to our reference to a Loss Scheme Case, we have borrowed this concept from the ATOs Practical Compliance Guidelines on the trust loss provisions (contained in Schedule 2F). In paragraph 56 of *Practical Compliance Guideline PCG 2016/*16, the Commissioner states he will not provide his discretion to treat trusts as fixed where, broadly, there is a loss trafficking scheme or fraud or evasion. We believe this is consistent with the objects of the FTDT provisions and thus believe that they would provide appropriate integrity with respect to the unlimited amendment period and its original intention.

51. To the extent that the above reform options are not adopted, we believe it is critical that a limit be placed on GIC that is accrued on the liability. To the extent that the case is not a Loss Scheme Case, we recommend that GIC be limited to a four-year period.

Recommendation 1

The FTDT liability should not apply automatically and should be subject to an assessment or determination by the Commissioner.

Recommendation 2

The FTDT liability should be subject to a limited period of review consistent with the rules contained in section 170 of the ITAA 1936. Exceptions could be provided where the case is a Loss Scheme Case. Reform options should be considered to ensure that the appropriate time limits occur with respect to FTDT and associated liabilities (such as GIC).

Recommendation 3

We recommend that a GIC limit be introduced, such that GIC be limited to the last four years (outside of a Loss Scheme Case).

D. Commissioner's discretion

Explanation of the issue

52. The Commissioner has outlined that he is unable to apply a discretion with respect to the FTDT provisions. Furthermore, the Commissioner has also stated that FTDT liabilities are automatic and thus do not involve an assessment by the Commissioner[14].

53. Similar to Division 7A, we believe that the serious implications of applying the provisions (i.e., the quantum of liabilities being imposed in respect of FTDT) warrant a sensible Commissioner's discretion to be included within the provisions that deal with: (i) technical deficiencies in the provisions; (ii) honest mistakes; and (iii) inadvertent omissions.

Examples of the issue

Overview

54. The following examples are used to demonstrate potential issues that may arise with respect to the Election provisions, and how a Commissioner's discretion could provide a sensible result in such cases.

Example – IEE is invalid

55. Assume that Aco is wholly owned by Trust A and that Trust A has made a family trust election with respect to John Smith. Assume that Trust B has made a family trust election with John's father, Bill Smith. Assume there are other entities in the group that have made FTEs with respect to Bill Smith. On Bill's death, John wishes to make an IEE for both Trust A and Aco, so that they can be part of the Bill Smith family group. He lodges an income tax return in purported compliance with the provisions.

56. Some years later, in an ATO audit, it is held that while Trust A can make an IEE, Aco does not meet the conditions in subsection 272-87(3) to make an IEE. Accordingly, the annual distributions that have been made to Aco from the Bill Smith group are subject to FTDT.

Example – Error by the tax agent

57. Michelle Wilson is the daughter of Adriana Wilson. Adriana has retired and no longer is involved in the business. All family controlled trusts have made FTEs in respect of Adriana. The accountant for the group is asked to prepare a new FTE in respect of Trust A that was established during the income year. The accountant mistakenly chooses Michelle to be the test individual of Trust A. As Michelle has very little knowledge of the provisions, she signs the form. Profits of other trusts in the group that have made FTEs with Adriana as the test individual have been distributed to a wholly owned company of Trust A annually (Aco).

58. Some years later, in an ATO audit, the ATO identify that Trust A is not a part of the family group. Michelle and her accountant explain that the error was clerical, and it was intended that Adriana

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14 https://www.ato.gov.au/businesses-and-organisations/business-bulletins-newsroom/family-trust-distributions-tax-what-you-need-to-know

should have been the test individual. The ATO do not allow a variation to occur as the Trust has distributed to an entity outside of the Adriana Wilson family group (i.e. Aco). Furthermore, the ATO does not accept that a clerical error can be rectified.

Example – Unit trust with an employee share scheme

59. The ABC Unit Trust is owned 100% by Trust A, which has made an FTE with respect to Liz Taylor. The ABC Unit Trust holds 100% of the shares in a company, Aco. The ABC Unit Trust has provided an interest free loan to Aco. During the 30 June 2015 income year, the ABC Unit Trust issues 0.05% of its units to employees as part of an employee share (unit) scheme. As a consequence, the ABC Unit Trust is no longer 100% owned by Trust A.

60. During the 30 June 2016 income year, a distribution of $2m is made to the ABC Unit Trust by Trust B, which has also made a family trust election with respect to Liz Taylor. Of this, $1,000 is distributed to the employees, while the remaining $1,999,000 is distributed to Trust A.

61. Some years later, in an ATO audit, the ATO identify that the ABC Unit Trust is not part of the family group, as it is not 100% owned by Trust A. The ABC Unit Trust attempts to make an FTE, however due to the loan made to Aco, the ATO do not accept that a valid Election was made. FTDT applies to the whole of the $2m distribution, even though only $1,000 is ultimately distributed to non-family group members.

Example – Issue repeated for a number of years

62. The ATO identify that Trust A has inadvertently breached the FTDT provisions for 30 June 2025. The ATO seek to review the prior four years and identify the same issue in respect of those four years. The ATO feels it is currently compelled to examine the same issue to the inception of the provisions (being to 30 June 1996). Assume that the ATO does not believe this case involves loss trafficking or fraud or evasion and that it is due to a technical oversight in respect of the provisions by the taxpayer. The taxpayer is subject to an extensive review and exponential FTDT (and GIC) liability.

Recommendations

63. The above examples demonstrate the harshness of the provisions where a technical error in the application of the provisions occurs.

64. We recommend that a Commissioner’s discretion be included in the provisions to assist with addressing these issues. We believe that the discretion should be targeted to address at least one or more of the following three things: (a) to accept an Election as being valid with respect to an entity (irrespective of whether the conditions have been satisfied or not); (b) to limit the period of reviewing FTDT liabilities to four years (if there is no indication of arrangement being a Loss Scheme Case); and/or (c) determine to reduce the FTDT liability by an amount of the benefit that, in the view of the Commissioner, represents an amount that has been provided to members that are not part of the family group. In relation to the examples, the following could be the outcomes of applying this discretion:

    64.1. First example, the Commissioner could treat the invalid IEE as being valid for the purposes of the provisions.

    64.2. Second example, the Commissioner could allow for the honest mistake to be corrected (i.e. to change the test individual to Adriana).

    64.3. Third example, the Commissioner could reduce the amount of the FTDT to the component that ultimately is passed on to non-family group members, being $1,000.

    64.4. Fourth example, as the arrangement does not involve a Loss Scheme Case, the ATO could limit the review to the prior four years of income.

65. We understand that the ATO may be reluctant to accept a very broad discretion be contained in the provisions. However, we believe that the discretion (as outlined above) could be refined so that it can assist the ATO in being able to administer the law in a sensible manner. Accordingly, we believe that a Commissioner's discretion may assist in significantly reducing the incidence where the Commissioner is required to adopt an overly technical position by virtue of a strict interpretation of the law..

66. Furthermore, we believe that limiting the discretion to non-Loss Scheme Cases (similar to paragraph 56 of PCG 2016/16) would ensure that the discretion can be applied in a sensible manner similar to the fixed trust discretion provided to the Commissioner.

Recommendation 4

A Commissioner's discretion should be introduced into Schedule 2F, allowing the Commissioner the discretion to: (a) accept a prior Election as valid with respect to an entity (irrespective of whether the conditions have been satisfied or not); (b) limit the period of reviewing FTDT liabilities to four years (if there is no indication of loss trafficking arrangements or fraud or evasion); and/or (c) determine to reduce the FTDT liability by an amount of the benefit that, in the view of the Commissioner, represents an amount that has been provided to members that are not part of the family group.

The Commissioner's discretion could be limited to arrangements that are not determined to Loss Scheme Cases (consistent with PCG 2016/16, paragraph 56).

E. Evidencing that a valid election has been made

Explanation of the issue

67. Prior to 2005, Elections were required to be made in the income tax return of the trust, company or partnership.[15] As a result, many taxpayers did not retain records of the election having been made beyond the required record keeping timeframes. Unlike other kinds of elections and choices under the Tax Acts, the ATO have maintained the Election status of entities on various iterations of its taxpayer portals. Implicitly, many taxpayers have used this information to confirm whether an Election has been made in respect of the respective entity (rather than the original form).

68. The *Tax Laws Amendment (2004 Measures No. 7) Act 2005* amended Schedule 2F from 2005 to allow entities to make elections at any time in relation to an earlier income year,[16] providing the election was in writing and in the approved form. The accompanying EM noted that the change was:

> *"… in response to concerns that the requirements to make a valid family trust election are too inflexible. The amendments aim to provide greater flexibility and remove the possibility of any ongoing uncertainty surrounding when family trust elections and/or interposed entity elections can be made."*

69. Despite the provisions being clear that the approved form does not need to be submitted to the Commissioner, ATO publications (including the approved form itself) suggest that the form should be submitted together with the income tax return.[17] While there is no indication that the ATO is retaining these forms for these purposes, the ATO has seemingly continued to update the taxpayer portals with this information.

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15 Former subsections 272-80(2) and 272-85(2).
16 In relation to Elections specifying income year ended 30 June 2004 or later.
17 https://www.ato.gov.au/forms-and-instructions/family-trust-election-revocation-or-variation-2024-instructions/how-to-make-a-family-trust-election

70. We are aware that in recent audits and review products, the ATO has been examining the validity of the elections that have been made. This includes assertions that elections have been made based on indications on their systems, as well as arguments that there is no evidence that an FTE has been made.

71. In the recent case of *Widdup v Deputy Commissioner of Taxation* [2023] FCA 145 (**Widdup**) in which the Commissioner sought to argue that a trust had made an FTE despite no party having an original or copy of an election in the approved form. In paragraph 35 of the Federal Court's decision, it is clear that the Commissioner sought to infer that an FTE was made and infer who the specified individual was. Despite trust income tax returns indicating the FTE status of the trust with a 2009 year, no return ever indicated who the specified individual was in that case.

72. The validity of an FTDT can impact on a taxpayer both favourably and unfavourably. In most cases, taxpayers will need to rely on the fact that a valid Election has been in place where it has received distributions from other entities in the family group that have made Elections or to utilise concessions such as the use of tax losses and flow-through of franking credits. Alternatively, where an FTE is not in place, a trust making distributions outside the family group may not be subject to FTDT but may miss out on access to these tax concessions. Accordingly, the validity of an Election has been one of the critical issues with respect to ATO and taxpayer disputes.

73. Many Elections that are being relied upon by taxpayers were made (in many instances) over 25 years ago. Many taxpayers have changed tax agents several times since the original election was made. People involved with the trust at the time are likely to have no recollection of making an election, do not have a copy of the original election, or may have since passed away or closed business. Taxpayers are naturally finding it difficult to find paper records of the original Elections that may have been made more than twenty years previously when asked by the ATO to provide copies.

Recommendations

74. We believe it is important that the provisions allow a taxpayer to choose to treat an Election as having been made in an approved form where: (i) they do not have a record of a completed paper copy of the Election containing a declaration signed by the person required to do so; however, (ii) there are electronic records on the ATO's systems that are consistent with the purported Election, and, (iii) they have acted on the basis that an Election was made in an approved form with respect to a test individual (and the taxpayer can evidence that they understood such an Election was in place).

75. We note that we are only recommending that the Election is taken to have been in an approved form with respect to a test individual in a particular year. We are not suggesting that the provisions should deem the Election to be valid. For example, if the family control test was not otherwise satisfied, this recommendation is not seeking to deem the Election to be valid in such a case. Accordingly, the proposed amendment is rather minor in nature and merely deals with difficulties of evidencing historical elections in order to provide certainty to taxpayers and the ATO.

76. We note that a similar concept to this recommendation was used in *Tax Laws Amendment (2010 Measures No. 1) Act 2010*, which introduced section 275-10 into the *Income Tax (Transitional Provisions) Act 1997* regarding capital account elections. In that case, where a taxpayer had previously lodged an income tax return for gains or losses on either capital or revenue account for prior years, and the treatment in the prior years were consistent with the newly made election, the transitional provisions prevented an amended assessment unless there was written consent provided by the trust or there was fraud or evasion.

77. Similarly, a taxpayer should be in a position to rely on an Election having been made where the taxpayer understood that such an Election was in place and has an electronic record that provides evidence that such an Election has been made.

78. It is important to clarify that we believe only the taxpayer should be to choose to rely on the electronic records in this way. For longstanding disputes, for example where the ATO is applying FTDT over many years (in some cases, decades), and where FTE and GIC liabilities have continued to exponentially accrue, it would be inappropriate for the ATO to be given an ability to essentially deem

that an Election has been made, if the assumption is not in the taxpayer's favour. In recognition of the issues that we have outlined above, that have been exacerbated by the uncertainty and confusion of the ATO portals and documentation requirements, taxpayers should be able to elect to confirm the status of their historical FTEs.

79. Going forward, we recommend that administrative changes be made by the ATO that provides for easier compliance with section 388-50 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) (**TAA 1953**) (the approved form provision). For example, we believe that the ATO should modify the income tax return particulars to allow the return to also constitute an approved form. We believe that minimal changes would be required (for example, including the name of the test individual in the income tax return section dealing with Elections). As the ATO portal now records all income tax return labels for prior returns (dating back to 2014), this simple change could also provide evidence of an Election having been made in the income tax return without the need to maintain a separate database. As some taxpayers do not lodge income tax returns, we recommend that this change be an optional approved form, and that the legislation cater for more than one approved form.

80. While in the majority of cases this change will assist taxpayers in evidencing that they can rely on an Election, we highlight that, as outlined above at paragraph 70, this recommendation could prejudice taxpayers that cannot validly evidence that an Election has been made by an appropriately authorised person (and thus could in itself give rise to significant tax liabilities). Accordingly, it is important that this amendment does not prejudice taxpayers. It is also important that this recommendation is accompanied by other amendments dealing with historical mistakes and errors.

Recommendation 5

In the absence of a record showing an Election having been made in the approved form, where: (i) the taxpayer has electronic records that evidence that an Election ought to have been made (e.g., taxpayer portal extracts or unsigned copies of an Election); and (ii) the taxpayer has acted in manner that is not inconsistent with such an Election being in place (e.g., has lodged income tax returns identifying an Election has been made); then (iii) the electronic records can be used as prima facie evidence of the relevant Election having been made in an approved form.

Recommendation 6

Where there is competing electronic evidence in relation to an Election, the taxpayer should be given the opportunity to rely on the electronic record that accords with the way in which the family group has been administered.

Recommendation 7

The ATO should modify the income tax return for future years, so that the return can also constitute an approved form for entities required to lodge a return. As a minimum, the income tax return should include the specified individual and income year of the Election. To the extent that the provisions only allow for one approved form, it should be made clear in Schedule 2F that more than one approved form can be made by the Commissioner.

F. Elections and approved forms

Explanation of the issue

81. As outlined earlier, and as demonstrated by *Widdup's* case, disputes with the ATO on FTDT matters are likely to commence with determining the validity of Elections and whether a valid Election has been made by a taxpayer. This is because the FTDT liability depends on whether an Election has been validly made.

82. Section 272-80 states that an "election must be in writing and in the **approved form**." Section 388-50 of Schedule 1 to the TAA 1953 is also clear that a document is in the approved form "**if, and only if**" certain criteria are satisfied, including that it meets all of the requirements of the ATO's approved form.

83. This raises the question as to whether an Election is invalid where a single part of the Election does not meet the requirements of the approved form. The approved form for FTEs has remained largely unchanged over the years. The following table outlines the current requirements of section 388-50 and the requirements of the ATO's approved form for FTEs.

Ref	Requirement	Form
(1)(a)	It is in the form approved in writing by the Commissioner for that kind of return, notice, statement, application or other document.	The FTE and IEE form are listed as an approved form by the ATO[18].
(1)(b)	It contains a declaration signed by a person or persons as the form requires.	Declaration requires a signature from the trustee or, if the trustee is a company, the signature of the public officer of the corporate trustee. If there is more than one trustee of the trust at the time the FTE is made or a FTE is revoked or varied, a separate sheet of paper must be attached with the details and signature for each additional trustee.

18 https://www.ato.gov.au/forms-and-instructions/approved-forms-consolidated-list-by-tax-topic/income-tax, NAT number 2787.

Ref	Requirement	Form
(1)(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.	The form explicitly states certain information (in Section 1, 2, and 3 must be completed). This includes: • The use of the form • Full name and address of the trust • Details on central management and control • Full name, TFN, residency status of each trustee • Income year of the election • Commencement time for the election • Details of the test individual • Additional details when revoking •
(1)(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).	Not applicable, as the form does not need to be provided to the Commissioner. While not required by law, the ATO's instructions state that the "completed form can be sent to us at the address below[19]."

Example of issue

84. As an example, the ATO's approved form for FTEs requires a declaration to be signed by the trustee, or where the trustee is a company, the public officer of the trustee.

85. Where the trustee is a corporate entity (which we believe is the case for a large majority of trusts), it is questionable whether the trustee (itself) can sign the form (as the document does not provide for the directors of the trustee to sign the form). Accordingly, where there is a corporate trustee, there is a question as to whether the form requires a public officer's signature in order to be valid.

86. However, many trustees and trusts do not appoint a public officer. This appears to be consistent with the requirements of section 252 and 252A of the ITAA 1936 which do not appear to mandate the requirement of a public officer in many cases involving a discretionary trust (e.g., an Australian resident passive investment trust is unlikely to require a public officer).

[19] https://www.ato.gov.au/print/section/a833b5f1-1c8d-4406-97d7-d59f10e04027#ato-Makeafamilytrustelection

87. Furthermore, the ATO's online portal systems do not appear to provide the ability for a corporate trustee to appoint a public officer where the trustee does not possess a tax file number. Again, this would be the case for an overwhelming majority of corporate trustees that only act in that capacity and do not carry on activities or lodge an income tax return in their own right. It is noted that this systems issue was raised out of session with the ATO through the National Tax Liaison Group (NTLG) trust working group in 2013. Contributors to this submission have correspondence with senior officers of the ATO at the time outlining the deficiencies of the online portal system. The ATO's response at the time was that each trustee could write a letter to the ATO to manually request the appointment of a public officer to each trustee company. However, no public guidance appears to have been provided on this issue since that date and there appears to be no system changes that have addressed this issue.

88. We further note that even if a trustee company subsequently followed this guidance, this would not assist in remedying a previously made Election, as it would need to be in the approved form at the time of the Election (which could date back to an Election involving the 1996 income year).

89. In the absence of a duly appointed public officer, many forms may have been signed by other persons associated with the trustee. For example, it may have been a director of the trustee that signed the declaration. We highlight that the office of public officer cannot be implied as strict requirements must be observed in order for a person to validly by made a public officer.[20]

90. Where a director of the trustee signs the declaration, it is noted that the Constitution of the trustee may require two or more directors to be signatory to documents. Recent cases such as *Carter v Federal Commissioner of Taxation* [2020] FCAFC 150 have held that resolutions are invalid where this requirement is not satisfied.

91. In current disputes with the ATOs on Elections, there are questions as to whether the signature is that of a person who was required to make the declaration and also whether the relevant signature contained on the form is that of an authorised person. In many cases, there is only a name and no signature.

92. The case of *M W McIntosh Pty Ltd and Another v Federal Commissioner of Taxation* [2009] FCAFC 88 explored the administrative powers of the Commissioner in relation to elections and approved forms. In that case, the Court considered the administrative power to provide an extension of time for submitting an approved form. While not on point, we believe the case demonstrates the strict nature in which the Court may interpret the provisions dealing with approved forms. Additionally, the case of *St George Bank Limited v FCT* [2009] FCAFC 62 highlights the strict nature of elections (particularly where Parliament uses the language of "only if") as the Court held the election in that case was not valid where some information requested was not provided on the form.[21]

Recommendations

93. Given the recent dispute activity in this space which has involved both taxpayers and the Commissioner arguing for both the existence and lack of existence of valid Elections, legislative amendments should be considered to reduce the uncertainty regarding whether an Election was made in an approved form.

94. As most taxpayers would be seeking to rely on a valid Election being in place, we believe it is appropriate that the provisions do not deny a historical Election from being made simply due to non-substantive issues. Reference is made to **Recommendation 5** (which would deem certain Elections to have been made in an approved form). We believe that this recommendation could deal with this situation.

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[20] Section 252 of the ITAA 1936 and regulation 15 of the *Income Tax Assessment (1936 Act) Regulation 2015*.

[21] Stone J (with whom the other two judges agreed) stated at [36] that "It is difficult to imagine why the legislature would have used such a singular express as "is effective ... only if" unless it intended that failure to supply the information, as requested, would result in the election being ineffective. Put another way, if the language used was not sufficient to determine the matter, what could Parliament have said if it intended the election to be ineffective in such circumstances."

95. Going forward, we also request consideration as to whether an approved form is required. We note that the issues with approved forms that were identified in *McIntosh* resulted in the removal of the "approved form" requirement in section 703-50 of the ITAA 1997 for the purposes of making an election to form a tax consolidated group (which dealt with the issue outlined in *McIntosh*). We believe that it is possible that a rule (similar to that contained in section 103-25(2) of the ITAA 1997) could be introduced, whereby the way the trust prepares its income tax return could (in itself) constitute sufficient evidence of the making of the relevant Election. If the trust tax return were to include additional details (as outlined by **Recommendation 7** above), we believe that this could help to deal with the majority of disputes on this issue going forward.

96. As outlined in Section D of this submission, while this change will assist many taxpayers in evidencing that they can rely on an Election, we highlight that this recommendation could prejudice taxpayers that cannot validly evidence that an Election has been made by an appropriately authorised person (and thus could in itself give rise to significant tax liabilities). Accordingly, it is important that this amendment does not prejudice taxpayers. It is also important that this recommendation is accompanied by other amendments dealing with historical mistakes and errors.

Recommendation 8

The requirement to make an Election in an approved form should be removed prospectively. This should be replaced with the ability for the taxpayer to make an Election and a requirement to notify the Commissioner of the Election having been made. Similar to subsection 103-25(2) of the ITAA 1997, the way in which the taxpayer prepares it's income tax returns should constitute sufficient evidence of the making the relevant Election.

This change, coupled with **Recommendation 7** (i.e. changes to the income tax return disclosures), should reduce the instances of dispute in respect of whether an Election has been made by the taxpayer in the future.

G. Validity of elections made under ATO practice statement or guidance

Explanation of issue

97. PS LA 2004/1 (GA) provided a one-off opportunity for entities to make FTEs or IEEs in the 2004 income tax return and (contrary to the law at the time) to treat those as being effective from an earlier income year. There is a risk that some of these Elections were not made in accordance with the legislation and thus are invalid Elections. We note that the practice statement is not a binding document. Additionally, paragraph 3 of PS LA 2004/1 (GA) states that the practice statement will only apply for the purposes of the trust loss measures, company loss measures or franking credit trading measures. Notably, it does not state that it applies for the purposes of other measures, most significantly, FTDT.

98. Section 0 of this submission provide examples that demonstrate the magnitude of the FTDT that could occur in a very basic case where Elections made under PS LA 2004/1 (GA) are held to be invalid. We believe it would be inappropriate for the Commissioner to administer the law on this basis, however we are concerned that the Commissioner may be required to review his position on Elections made in accordance with PS LA 2004/1 (GA) in instances where such Elections were not validly made in accordance with the law.

Recommendations

99. We believe that **Recommendation 5** provides a sound basis for dealing with the majority of Elections and approved form issues. However, this recommendation may not deal with historical Elections made

under administrative concessions or non-binding advice of the ATO. We note that we are aware of instances where taxpayers have followed non-binding advice from ATO in respect of Elections, only to find that the advice was incorrect (and thus the Election being incorrect).

100. We recommend that the provisions extend to situations where a historical Election has been made by a taxpayer in a manner that they believe to be consistent with ATO administrative guidance. In such a case, if there is a particular of the Election that is held to be incorrect, that such Elections are not taken to be invalid if the particular arose reasonably in accordance with the administrative guidance.

101. For example, if the particular is in relation to the year in which the Election is lodged, and the taxpayer has made an error in respect of that particular in trying to apply the administrative guidance in good faith, the Election should not taken to be invalid simply due to that particular.

Recommendation 9

An Election, made in good faith by a taxpayer consistent with their understanding of ATO administrative practice or guidance provided to the taxpayer, should not be taken to be an invalid due to a particular, if the particular is consistent with the taxpayer’s understanding of that administrative practice or guidance.

H. Limited opportunities to alter the FTE once it has been made

Explanation of the issue

102. Currently, if an FTE has been made, only the specified individual can be varied where the distributions have been made in a manner that would comply with an FTE for a different specified individual in earlier years.

103. Other than in special circumstances relating to relationship breakdowns, subsections 272-80(5A), (6A) and (6B) permit a variation or revocation to be made only in respect of an income year which is the year specified in the Election or one of the next four income years. A variation is only permissible in relation to the specified individual (and not the year specified in the Election).

104. There are already strict controls in place that require that any conferrals of present entitlement to income or capital, or distributions of such, have been made to the individual to be specified in the variation. These controls provide safeguards around which entities can make a variation. If a trust that had not yet made an FTE can retrospectively go back and make the FTE, there appears to be no policy reason why the trust can't in the same circumstances vary the Election.

Example of issue

Example – Prospective application of variation and revocations

105. The ATO has published a view that an income tax return that has been lodged cannot be amended to include an FTE revocation.[22] Under this view, a variation or revocation is generally only available prospectively – that is, the provisions require an Election to have been made such that a variation or revocation can *subsequently* be made with prospective effect only.

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22 https://www.ato.gov.au/businesses-and-organisations/trusts/in-detail/family-trusts-concessions

106. For example, if a trust lodges an income tax return on 15 May 2025 in respect of the 2024 income tax return, it is the ATO view that the trust cannot amend the 2024 income tax return to correct the Election, even if the amendment is sought very shortly after the lodgment of the original return.

107. Whether or not the ATO view is correct, we outline that there should be no policy reason why a variation or revocation should not be possible in an amended return (and thus be prospective only). The ability to properly amend the return would help address many of the issues being faced today with incorrect Elections made in prior years. Given the ATO view on this issue, legislative clarity is required to allow taxpayers to appropriately vary or revoke in prior years.

108. We note that both the variation (subsection 272-80(5A)) and revocation provisions (subsection 272-80(6A)) contain integrity rules that test prior year conferrals of distributions, prior year bad debts, losses and franking credit utilisation.

Example – Genuine mistakes and errors

109. Currently, there is no ability to correct obvious errors. For example, a trust may have received a benefit from a family group in the 2020 income year. Accordingly, it may make a retrospective Election specifying the 2020 income year so that the trust is covered by the family group.

110. If it is discovered afterwards, through an ATO audit, that a benefit was also in fact received by the trust in an earlier year (say the 2018 income year), the trust would have made a genuine mistake in electing 2020 as its specified income year.

111. There is currently no legislative provision to allow the trust to amend the specified income year. We see no reason why genuine mistakes and errors should not be capable of being corrected by taxpayers, subject to appropriate integrity provisions being contained within the measures.

Example – Inconsistencies between revocation, variations and elections

112. The rules regarding variations and revocations are not consistent with the rules regarding the making of Elections. At present, a retrospective Election can be made in accordance with subsection 272-80(4A) all the way back to the 2005 year. This requires a consideration of up to 20 years of historic distributions (to satisfy the requirement that all distributions made during the intervening period were made to entities within the family group of the person that is being specified in the Election).

113. By contrast, a variation only requires consideration of distributions in a four-year window, between the start of the specified year and the income year for which the variation is to take effect. A revocation requires consideration of the utilisation of tax concessions within that same four-year window.

Example – Single variation

114. The provisions currently allow only a single variation to be made. However, it could be the case where there are multiple deaths in the family that occur in a short period of time. For example, on the death of a parent, the Elections may be varied so that the child becomes the test individual. To the extent that the child passes away in the following income year, subsection 272-80(5B) would not allow a subsequent variation to another member of the family group.

115. We note that the “control test” in section 269-95 allows the control to be changed to a lineal descendent in the case of the death of an individual (see subsection 269-95(2)) without being considered a change of control for loss testing purposes. Likewise, there should be an ability to vary the FTE for a second time that it is consistent with the control test. If this is allowed in a limited way so that only the spouse or lineal descendants (spouse, children or grandchildren) of the original specified individual can be nominated under the variation, then such a variation would have little or no mischief, as it would not expand the family group in any meaningful way (other than allowing the group to operate with an appropriate test individual).

116. By replacing the test individual with a child of the earlier test individual, the varied Election would only bring in relatives of the new test individual’s spouse within the group in accordance with paragraph 272-95(1)(a). At the same time, the new test individual’s aunts, uncles and cousins, who were

otherwise members of the original individual's family group (i.e. the original test individual's brother, sister, nephew or niece), would be taken out of the new family group . Accordingly, we believe that there is little risk of mischief by way of loss trafficking by altering the family group in this way (which would also restrict the group in the future).

Recommendations

117. We recommend that amendments be made to ensure retrospective variations and revocations can both be made, and to ensure that genuine mistakes and errors can be fixed (subject to appropriate integrity provisions being introduced, similar to subsections 272-80(5A) and (6A)).

118. We also request that the limitation on making a single variation be lifted under subsection 272-80(5B). Provided that the new test individual is consistent with the control test requirements (contained in section 269-95) we do not see an integrity risk with this second recommendation.

Recommendation 10

The provisions should allow for corrections (variations or revocations) to be made where no mischief is present so that:

- They are not limited to being in respect of an income year, being the specified income year or one of the four subsequent four income years.
- Consistent with the making of FTEs, variations and revocations are able to be made retrospectively, if the relevant conditions are satisfied retrospectively.
- Variations can be made in respect to the specified income year, in addition to the specified individual.
- As a consequence of the above, variations and revocations can be made in an approved form at any time if they are not linked to a specific income year.

Recommendation 11

The requirement that only single variations be allowed under subsection 272-80(5B) should be lifted to cater for unforeseen events (multiple deaths in a family). Rules linked with the control test in section 269-95 can provide integrity around this proposed amendment.

I. Remove restriction on retrospective elections and allow for payment of FTDT

Explanation of issue

119. Retrospective Elections are limited if the entity has made any distributions outside the family group since the start of the specified income year. This restriction can often lead to a disproportionate outcome where minor breaches have occurred.

120. The ATO take a very broad interpretation of the meaning of the word "distribution". This view is contained in *Taxation Determination TD 2017/20*. For example, the forgiveness of a debt can constitute a distribution to a third party in certain circumstances. Accordingly, it can be very difficult to satisfy the requirements of making a retrospective Election under section 272-80(4A).

Example of issue

121. For example, Trust X may have distributed $1m to Trust A and $1,000 to Trust B in the 2023 income year. Trust A and Trust B have made FTEs with different test individuals. Trust X seeks to make an FTE with effect from 2023 in order to join the family group of the person specified in Trust A's FTE. Currently, Trust X would not be able to do so as it had distributed outside the family group of that individual in 2023, even though that distribution was 0.1% of the income.

122. Assume further that the distribution to Trust A is a distribution of franked dividend income (with $428k of franking credits attached). The $1,000 distribution to Trust B would prevent Trust X from making an FTE such that the franking credits would not be able to be utilised by the beneficiaries of Trust X. It may be a more appropriate outcome to simply allow the FTE (and associated GIC) to be paid on the $1,000 distribution rather than prevent the making of the retrospective Election.

123. Similarly, any variations that would otherwise be restricted due to distributions having been made outside the family group should not otherwise be restricted if instead FTDT is paid with respect to the distributions that would have otherwise prevented the variation from being made.

Recommendations

124. Due to the breadth of the meaning of the term "distribution" in Schedule 2F, we recommend that taxpayers are not denied the ability to make a retrospective Election where a distribution has been made outside of the family group and the taxpayer is willing to pay historical FTDT and related tax liabilities. This outcome may be preferred where making a historical Election would significantly reduce the exposure to FTDT liabilities and GIC. This recommendation is consistent with the FTDT being an "optional" tax as outlined in the original explanatory memorandum to the provisions.

Recommendation 12

Allow an entity to choose to make a retrospective Election (or vary an Election) that triggers FTDT (and GIC) on any past distributions outside of the family group.

J. Variation of FTEs in connection with succession planning

Explanation of issue

125. In addition to the variation and revocation rules being overly restrictive when it comes to correcting errors, they also present difficulties when it comes to the death of a test individual and succession planning.

126. In *ATO Interpretive Decision* ATO ID 2014/3 (**ATO ID 2014/3**), the ATO have taken the view that FTEs cannot be made in respect of a deceased individual. Accordingly, where a taxpayer passes away, any trusts that were formed during that income year, or in a subsequent income year, are not capable of joining the family group other than by making an IEE. This can mean that FTDT can occur if there are any current year or future year transactions between the entities. We also note that, in many cases, IEEs cannot be made and accordingly many transactions that have occurred during will become subject to FTDT.

127. ATO ID 2014/3 outlines the integrity risk if Elections were to be made in relation to a deceased individual. That is, if such Elections were to be made, there would be no restrictions in choosing a test individual that could allow for a very large family group. Accordingly, amendments to address this issue should be minor and targeted.

Example of issue

128. To demonstrate the issue, assume that the mother (being the test individual) passes away and the daughter continues to operate the business. Assume that a new trust was created during the income year (or subsequent) which deals with the old group. The daughter may wish for the specified individual in the group trusts to be updated to her, so that future trusts specifying the daughter (and entities in which those trusts hold interests) can also be within the family group.

Recommendation

129. We refer to **Recommendation 10** (lifting restrictions on retrospective Elections) and **Recommendation 11** (lifting restrictions on single variations). We note that adopting these two changes would help to deal with this issue and would help to provide integrity around the variation of previous Elections.

K. The specified individual must be alive at the time the election is made

Explanation of issue

130. As outlined earlier, if a taxpayer dies unexpectedly, the ATO takes the view (in ATO ID 2014/3) that it is not possible to nominate the taxpayer as the specified individual in respect of any other trusts. Further, even if the death of a specified individual is foreseen, it may not be possible to pre-emptively make an FTE specifying that person for a trust established in the current income year as the family control test can only be tested at the end of the income year.

131. This makes it difficult in respect of new trusts created in an income year, especially where the trust has already interacted with other entities within a family group.

132. ATO ID 2014/3 outlines the integrity risk if Elections were to be made in relation to a deceased individual. That is, if such Elections were to be made, there would be no restrictions in choosing a test individual that could allow for a very large family group. Accordingly, amendments to address this issue should be minor and targeted.

Example of issue

133. Trust A is the main operating trust of the group and has made an FTE with respect to John Smith. Trust A carries on the business of owning a hotel. During the year Trust B is established to conduct management activities of the hotel. It incorporates a wholly owned company (Bco) to carry on this service.

134. During the year, Trust A and Bco engage in a number of dealings (e.g., an interest free loan or a trust distribution to Bco) that could result in the FTDT being applied unless Bco is part of the family group of John Smith. On 29 June of the same income year, John Smith passes away. Under ATOID 2014/3, it is not possible for Trust B to make an FTE with respect of John Smith. Furthermore, as Trust B has not made an FTE specifying John Smith as the test individual, it is not possible for Bco to make a valid IEE to join the family group of John Smith. Accordingly, FTDT will be imposed in this case.

Recommendations

135. To address the issue of death, a minor targeted amendment is proposed to allow a trust (that existed on the day of their death) to make an FTE in respect of the deceased individual. Note that this would only therefore include *inter vivos* trusts and not deceased estates and testamentary trusts which do not come into existence during the life of the individual.

136. The amendment should allow the Election to be made up to 12 months after the end of the income year in which the individual passed away, or a further time as allowed by the Commissioner. This time period caters for trusts that either lodge or do not lodge an income tax return and would not result in absurd outcomes like allowing a person to be specified as the test individual who had died centuries ago

137. Further, or alternatively, so as not to require entities to wait until 1 July to make an Election, an FTE made for a current income year (i.e. before 30 June) should be taken to be valid if the family control test is ultimately passed on 30 June. If the family control test is not passed, the earlier purported Election would be taken to never have been validly made. We note that this additional recommendation should be available to all trusts and not only those where the test individual has died.

138. As similar issues occur for deceased estates and testamentary trusts, we recommend consideration of an extension to this recommendation that could be made for such trusts.

Recommendation 13

The provisions be amended to allow a 12-month period (after the end of the income year) for FTE's to be made in respect of a deceased individual where the trust existed at the time of the individual's death.

Recommendation 14

Alternatively, an FTE made for a current income year, that is made before 30 June, should be taken to be valid if the family control test is ultimately passed on 30 June. If the family control test is not passed, the earlier purported Election would be taken to never have been validly made.

Recommendation 15

To the extent that there are no integrity issues, a similar limited extension should be provided for deceased estates and testamentary trusts related to the death of an individual.

L. Subsequent sales of shares and units

Explanation of the issue

139. There is an anomaly in the provisions such that there is an inability for companies or non-fixed trusts to revoke an IEE if the shares or units are sold. If a company or unit trust (that is not a fixed trust) with an IEE is sold, the IEE cannot currently be revoked. But a fixed trust (or a trust treated as if it were a fixed trust by the Commissioner[23]) that has made an FTE, can revoke its FTE following a sale of the units pursuant to subsection 272-80(6). The current ability to revoke IEEs for family group owned entities in subsection 272-85(5A) is limited based on the year the FTE to which it relates commenced and is not consistent with subsection 272-80(6) which provides for an ability to revoke many years after the initial FTE was made where fixed entitlements begin to be held by an entity outside the family group.

[23] In accordance with PCG 2016/16.

140. While there is limited utility in an IEE for a company or unit trust, historically many taxpayers made IEEs by accident or prior to the change in law making such Elections unnecessary. Many taxpayers did not take the limited opportunity to revoke such Elections. There is now limited ability for these entities to be sold or to bring in new investors.

Examples of the issue

141. A discretionary trust (ABC Trust) owns all of the shares in ABC Co. The trust also owns all of the units in a fixed trust (XYZ Trust) which owns 100% of the shares in MNO Co. ABC and XYZ have made FTEs while ABC Co and MNO Co have made IEEs (which have not previously been revoked).

142. As part of a business sale, Listed Co is seeking to acquire all the units in XYZ Trust, and all the shares in ABC Co and MNO Co. While the FTE in respect of XYZ Trust can be revoked under subsection 272-80(6), there is no ability for the IEE in respect of the companies to be revoked. Distributions made by those entities in the future are likely to subject to FTDT. As FTDT is not an income tax, this result will occur irrespective of those entities joining the Listed Co tax consolidated group.

Recommendations

143. We recommend amendments that allow IEEs to be revocable, similar to a fixed unit trust, where the shares in a company or a non-fixed unit trust are otherwise sold to a third party in an arm's length transaction.

144. We note that if **Recommendation 10** or **Recommendation 12** (removal of time requirements on revocation of Elections) is adopted, this recommendation may not be necessary.

> **Recommendation 16**
>
> The provisions should be amended to allow an IEE to be revoked interests are held by an entity outside the family group, in a similar way to the current ability to revoke FTEs for fixed trusts.

M. Restriction on making retrospective elections due to the lack of an election itself

Explanation of issue

145. Certain staff members at the ATO have taken a view that a non-fixed trust cannot make an FTE with retrospective effect where it has distributed to an entity (without a valid Election) in which it holds an ownership interest.[24]

146. While we do not know if this is the official ATO interpretation (as it has not been the subject of any public ruling), we understand that this position is based on a view of the law that the requirement that the trust must not have distributed to entities outside the family group from the beginning of the specified income year acts a precondition to the making of a retrospective election. Where the trust has distributed to a unit trust or company which it owns (e.g. even a 0.01% interest), the view taken by some at the ATO is that that unit trust or company cannot be a member of the family group under

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[24] Refer to the example of Blue Trust on slide 15 in ATO's "Family Trust Elections – What you need to know" webinar of 21 November 2024, at approximately 36:30.

subsection 272-90(5) as an "entity owned by family" until the FTE is made, as some of the fixed entitlements in the entity are owned by the entity that has not yet (but is seeking to) make an FTE.

147. If the trust did have an FTE in force in the relevant income year, then that unit trust or company would be a member of the family group. In effect, we believe this interpretation results in a somewhat circular application of the provisions, i.e., that a trust cannot make a retrospective FTE because the trust does not already have an FTE in place.

148. We understand that it is currently the ATO view that an election cannot be made until the income year has passed (i.e. as the family control test needs to be satisfied at the end of the income year under section 272-80(4)). Accordingly, if the year is the first income year in which the trust exists, this view would make it impossible to satisfy the requirements of section 272-80(4A) in these cases as the trust would have breached the "distribution" requirement in a previous year of income (even though a distribution has been made to a wholly owned entity).

Examples of the issue

Example – Single trust making a retrospective election

149. A trust holds 1% in a company (Aco), with the remaining 99% held by an individual member of the family group. The trust made a distribution to the company in the 2025 income year and seeks to make an FTE on 1 July 2025 specifying the 2025 income year.

150. Under the view above, this does not appear to be possible. This is because trust has made a distribution to a company (Aco) that is outside of the family group (being a condition for making the retrospective Election).

151. If this view were applied more broadly, together with the ATO view that an Election cannot be made until 30 June has passed (i.e., in order to satisfy the family control test), this could mean that a substantial number of Elections that have been made to date would be regarded as being ineffective.

Example – Multiple trusts making a retrospective election

152. Assume that there are two trusts, such that each trust has provided benefits to the other trust during the 30 June 2025 income year. On 1 July 2025, each trust seeks to make an FTE with respect to John Smith (the test individual). However, as each trust has made a distribution to a trust which has not made an FTE, the ATO may argue that the precondition to making an Election has not been satisfied.

Recommendations

153. The key issue is whether the conditions contained in subsection 272-80(4A) are a precondition to the making of the Election. If they are (in accordance with the ATO view), the provisions should be amended to clarify that the test is to be conducted on the assumption that an Election had been made by the relevant entity (where such an Election is indeed made by the entity). This would extend to multiple entities making such an Election to deal with the second example.

154. The ATO has acknowledged on their website that an IEE can reverse an IEE:

> *When FTDT arises, your clients must include the family trust distribution tax payment advice with each FTDT payment. The Commissioner has no discretion to ignore the application of FTDT. However, in some circumstances, your clients may be able to reverse FTDT by making an FTE or IEE specifying an earlier income year.*[25]

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[25] Family trust elections - what you need to know | Australian Taxation Office. See also examples on Family trusts concessions | Australian Taxation Office

155. Accordingly, a similar logic should also apply when seeking to make an FTE with retrospective effect. The proposed amendments would assist in reversing the effects of any prior defects (which currently cannot be corrected due to the view that is taken by the ATO on the operation of a retrospective Election).

Recommendation 17

It should be clarified that the provision should be applied on the assumption that a choice to make a retrospective Election by an entity (including other entities in the group) is assumed to be valid for the purposes of testing the conditions of making an Election. It should be clear that this is applied to one or more entities seeking to make a retrospective Election.

N. FTDT is not limited to benefits that pass outside the family group

Explanation of the issue

156. Currently, FTDT is payable on any entitlement or distribution that goes to an entity that is outside the family group. In many cases, where there is an interposed entity, the entitlement or distribution may flow through the interposed entity to members in the family group.

157. As the indirect distribution is not taken into account, the provisions currently overstate the effect of the 'benefit' to outsiders. This is a common issue that occurs where the interposed entity is owned by a small number of outsiders (e.g., where employee interests are issued by the entity).

Examples of the issue

158. For example, a trust that has made an FTE in a prior year makes a distribution to a unit trust for which 99% of the units are held by a company wholly owned by an individual in the family group, with 1% of the units held by a non-related individual (e.g., a key employee).

159. The minority shareholding prevents the unit trust from being a member of the family group, meaning the distribution is caught by the FTDT provisions. Despite 99% of the distribution ultimately being paid to the individual within the family group, FTDT is payable on the full amount of the distribution, with no compensating adjustment.

Recommendations

160. To the extent that a distribution is made to an entity outside of the family group, the quantum of the FTDT should be reduced by the proportion of fixed entitlements in the entity that are otherwise owned by members of the family group.

161. In the previous example, as the family group owns 99% of the units, FTDT would be payable on the component that indirectly is provided to the non-family individual (being 1%). This amendment should help to ensure that the FTDT imposed is not vastly disproportionate to the perceived mischief.

Recommendation 18

An amendment should be made that limits the FTDT for a distribution made to an entity outside of the group only to the extent that fixed entitlements in it are not held by members of the family group. An approach similar to that with respect to incomplete distributions in section 269-75 would achieve this effect.

O. FTDT paid in relation to distributions to companies

Explanation of issue

162. Generally, a distribution from a trust on which FTDT is payable will not be assessable and is non-assessable non-exempt income (**NANE**) of the beneficiary.[26] For trusts, that income retains its character if it is then paid out to an ultimate beneficiary.

163. However, there is uncertainty where the FTDT is paid in respect of a distribution to a corporate beneficiary, who then distributes the income to an individual (via a dividend). As the payment of the FTDT does not generate a franking credit in the franking account,[27] there is a risk that the later dividend is treated as an unfranked dividend. This would result in a total tax rate equal to 94% on the distribution subject to FTDT.

164. Therefore, despite tax already having been paid on that income at the top marginal tax rate, the ultimate recipient of that income may still be required to pay additional top up tax on that income, without the benefit of any franking credits.

165. The issue arises due to the drafting of paragraph 271-105(1)(c). The requirement is satisfied if, after taking into account any previous application of the subsection, 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**. It could be argued that the condition is satisfied on the subsequent dividend paid to the ultimate recipient. However, to the extent it is not, the NANE exclusion does not apply to the subsequent dividend paid by the company resulting in double taxation.

Examples of the issue

166. As an example, if a trust distributes $100 to a corporate beneficiary outside the family group, FTDT of $47 becomes payable by the trustee. The company will be taken to have derived $100 of NANE income upon payment of the FTDT. A subsequent dividend will result in up to another $47 of tax being paid by the individual receiving the dividend if the company cannot pass this amount on as either NANE to the recipient or does not have franking credits to frank the dividend. This could result in an additional 47% tax rate being paid on the dividend and an effective tax rate of 94%.

Recommendations

167. We do not believe it is appropriate to tax income at a rate of 94%. We recommend that this issue be addressed so that the income retains its character as NANE where the amount is paid through interposed entities to an ultimate individual person. A simple modification would be to modify the provision to ensure that the NANE exclusion applies to all persons receiving the amount either directly or indirectly.

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26 Section 271-105.
27 See ATO Interpretive Decision ATO ID 2004/859.

168. We note that this is consistent with the view taken with respect to the NANE rules and withholding under section 128D of the ITAA 1936. *ATO Interpretive Decisions ATO ID 2002/93* and *ATO ID 2002/94 (withdrawn)* outline the application of this view. Similarly, paragraph 152-125(1)(b) treats CGT concession payments as retaining their exempt status where the payments are made directly or indirectly to a relevant individual.

169. Accordingly, this is a common practice that occurs for NANE income, which we believe can be addressed with minor modifications to the current provision.

Recommendation 19

Where FTDT is payable on a distribution of income to a beneficiary, that income should retain its NANE character when paid (indirectly) to an individual through one or more interposed entities (e.g., as a dividend to a shareholder of a company that derives the distribution).

P. Family control test and wholly-owned entity rule for IEEs

Explanation of the issue

170. There are a number of companies that have made an IEE, which may not technically satisfy the requirements to make an IEE (even though the entity is economically owned by the family group). This is due to a number of deficiencies in the family control test contained in subsection 272-87(3) in relation to companies as compared to subsection 272-87(2) for unit trusts.

171. A company only satisfies the family control test if members of the specified individual's family group hold greater than 50% of the fixed entitlements to income or capital of the company. Notably, this only includes members of the individual's family and other family trusts with the same specified individual. However, although an entity that has made an IEE is defined as being part of the family group (see subsection 272-90(4)), the entity is not included when examining the family control test for IEEs. Furthermore, unlike subsection 272-87(2), a very narrow set of criteria is used in determining whether the family group controls the company. Accordingly, even if family members control the distribution policies of a company, this would not be sufficient by itself for the company to pass the family control test.

172. There appear to be more cases being identified where companies may have purported to make an IEE, which may not comply with the technical requirements of subsection 272-87(3), potentially resulting in FTDT becoming payable.

173. Additionally, paragraph 272-90(5)(c) and paragraph 272-87(3)(c) only take into account interests held by trustees that have made FTEs for the purposes of determining whether, respectively, an entity is a member of a family group due to being wholly owned or whether an entity can satisfy the family control test. Neither provision considers interests held by trustees that have made IEEs.

Examples of the issue

174. A group of trusts have made FTEs with respect to John Smith as the specified individual. One of those trusts is the ABC Trust. John Smith passes away and a new trust is subsequently established (New Trust) which holds 100% of the shares in Aco. Aco receives a distribution from ABC Trust. In this case, the New Trust can make an IEE with respect to ABC Trust and John Smith. However, Aco cannot make an IEE, as it does not pass the family control test using the limited tests in subsection 272-87(3).

175. If, instead, Aco was a unit trust, the family control test under subsection 272-87(2) would be satisfied if the family group could simply remove or appoint the trustee of the unit trust or could control the distributions of income or capital of the trust.

176. Additionally, if the IEE of New Trust (and the specified individual of the trust to which it relates) was taken into account under the family control test and the “entity owned by family” test, Aco could automatically join the John Smith family group and/or be able to make an IEE in respect of the ABC Trust.

Recommendations

177. There does not seem to be any policy reason to exclude a company making an IEE in the exact same scenario as a unit trust seeking to make an IEE. We therefore recommend that minor amendments are made to section 272-87 and section 272-90(5) that allow: (i) entities with an IEE to be part of the family group for the purposes of testing whether their subsidiaries can make IEEs or automatically join the family group as an entity owned by the family; and (ii) to expand subsection 272-87(3) to cover scenarios contemplated by subsection 272-87(2).

178. We do not believe this recommendation would unnecessarily expand the scope of entities that can form part of a family group. Firstly, such entities would genuinely be controlled by member of a particular family. Secondly, given the restrictions on making multiple IEEs in subsection 272-85(7), our proposed change could only bring a subsidiary within one additional family group (e.g. a company wholly owned by a trust with both an FTE and an IEE). Lastly, it is not unusual for entities to be part of multiple family groups as an entity owned by natural persons could form part of dozens of family groups (i.e. depending upon the number of family members there are pursuant to section 272-95).

Recommendation 20

We recommend that the family control test be expanded for companies so that companies that are effectively owned by the family group can make an IEE.

Q. Clarify whether IEEs are in respect of an individual or a trust

Explanation of the issue

179. Section 272-85 states that making a valid IEE for an entity results in an entity becoming a member of the family group of an individual.

180. However, other provisions suggest that an IEE is made in respect of a particular family trust (e.g. see the rules regarding variations of FTEs and revocations of Elections).

181. While the ATO is currently silent on this issue, we believe that the better view of the provisions is that once an IEE is made, the entity becomes part of the family group in its entirety and does not need to make an IEE in respect of every trust in the group.

182. However, the ATO previously held the view that all trusts that had a valid FTE needed to make an IEE in respect of each trust in the group (contained in *ATO Interpretive Decision ATO ID 2004/697*). This ATO ID has been withdrawn due to amendments made to the FTE provisions. However, it is unclear whether the ATO would hold the same view with respect to IEEs.

183. Where there are a large number of entities within the group, making an IEE with respect to each trust can result in significant compliance issues (for no additional benefit). It further increases the risk of an unintended error and FTDT applying in cases not involving any mischief. That is, should the ATO

argue that an IEE was required with respect to every other trust in the family group, this would give rise to FTDT even though the relevant entity (e.g. a recipient of a distribution) has made an IEE.

Recommendation

184. We recommend that the law be clarified by removing any references in relation to IEE that suggests that the Election is only made in respect of a particular trust.

185. While no modification should be required to the core provision, being subsection 272-90(4), an example of a provision that should be modified is subsection 272-80(1). This provision states that the interposed entity Election is made in respect of "the family group of the individual specified in the family trust election" and thus implies that an Election is in respect of each trust.

Recommendation 21

The provision should clarify that only one IEE is sufficient to bring an entity within the same family group of multiple trusts that have made FTEs with the same specified individual.

ATTACHMENT CALCULATION A
CALCULATION OF GIC FOR FTDT LIABILITY
CASE 1: SINGLE INSTANCE

Quarter Ending	GIC Daily Rate	Days in Quarter	Opening Balance	FTDT	GIC Interest	Closing Balance
July – September 1999	0.0003484931	92.00	-		-	-
October – December 1999	0.0003487671	92.00	-		-	-
January – March 2000	0.0003573770	91.00	-		-	-
April – June 2000	0.0003729508	92.00	-	100,000.00	-	100,000.00
July – September 2000	0.0003825137	92.00	100,000.00		3,581.08	103,581.08
October – December 2000	0.0003786885	92.00	103,581.08		3,671.59	107,252.67
January – March 2001	0.0003797260	90.00	107,252.67		3,728.03	110,980.70
April – June 2001	0.0003797260	91.00	110,980.70		3,901.22	114,881.92
July – September 2001	0.0003257534	92.00	114,881.92		3,494.46	118,376.39
October – December 2001	0.0003273973	92.00	118,376.39		3,619.20	121,995.59
January – March 2002	0.0003090411	90.00	121,995.59		3,440.24	125,435.83
April – June 2002	0.0003098630	91.00	125,435.83		3,586.76	129,022.58
July – September 2002	0.0003243835	92.00	129,022.58		3,907.85	132,930.43
October – December 2002	0.0003276712	92.00	132,930.43		4,067.62	136,998.05
January – March 2003	0.0003243835	90.00	136,998.05		4,057.88	141,055.93
April – June 2003	0.0003219178	91.00	141,055.93		4,192.60	145,248.53
July – September 2003	0.0003227397	92.00	145,248.53		4,376.68	149,625.21
October – December 2003	0.0003238357	92.00	149,625.21		4,524.09	154,149.30
January – March 2004	0.0003363388	91.00	154,149.30		4,790.15	158,939.45
April – June 2004	0.0003434426	92.00	158,939.45		5,101.26	164,040.70
July – September 2004	0.0003418033	92.00	164,040.70		5,239.46	169,280.16
October – December 2004	0.0003398907	92.00	169,280.16		5,376.08	174,656.25
January – March 2005	0.0003405479	90.00	174,656.25		5,435.03	180,091.28
April – June 2005	0.0003460274	91.00	180,091.28		5,760.02	185,851.30
July – September 2005	0.0003473973	92.00	185,851.30		6,034.79	191,886.09
October – December 2005	0.0003457534	92.00	191,886.09		6,200.79	198,086.88
January – March 2006	0.0003460274	90.00	198,086.88		6,264.88	204,351.75
April – June 2006	0.0003454794	91.00	204,351.75		6,525.45	210,877.20
July – September 2006	0.0003526027	92.00	210,877.20		6,951.66	217,828.86
October – December 2006	0.0003613699	92.00	217,828.86		7,362.32	225,191.18

ATTACHMENT CALCULATION A
CALCULATION OF GIC FOR FTDT LIABILITY
CASE 1: SINGLE INSTANCE

Quarter Ending	GIC Daily Rate	Days in Quarter	Opening Balance	FTDT	GIC Interest	Closing Balance
January – March 2007	0.0003663014	90.00	225,191.18		7,546.23	232,737.41
April – June 2007	0.0003663014	91.00	232,737.41		7,887.21	240,624.63
July – September 2007	0.0003663014	92.00	240,624.63		8,245.63	248,870.26
October – December 2007	0.0003767123	92.00	248,870.26		8,774.75	257,645.01
January – March 2008	0.0003866120	91.00	257,645.01		9,223.91	266,868.92
April – June 2008	0.0004013661	92.00	266,868.92		10,036.46	276,905.39
July – September 2008	0.0004030054	92.00	276,905.39		10,457.24	287,362.62
October – December 2008	0.0003909836	92.00	287,362.62		10,522.64	297,885.26
January – March 2009	0.0003221918	90.00	297,885.26		8,762.88	306,648.14
April – June 2009	0.0002783562	91.00	306,648.14		7,865.63	314,513.77
July – September 2009	0.0002775342	92.00	314,513.77		8,132.78	322,646.55
October – December 2009	0.0002821918	92.00	322,646.55		8,484.90	331,131.45
January – March 2010	0.0003000000	90.00	331,131.45		9,060.96	340,192.42
April – June 2010	0.0003057534	91.00	340,192.42		9,596.79	349,789.20
July – September 2010	0.0003232877	92.00	349,789.20		10,558.12	360,347.33
October – December 2010	0.0003216438	92.00	360,347.33		10,820.69	371,168.02
January – March 2011	0.0003293151	90.00	371,168.02		11,163.59	382,331.61
April – June 2011	0.0003265753	91.00	382,331.61		11,530.87	393,862.48
July – September 2011	0.0003287671	92.00	393,862.48		12,092.97	405,955.45
October – December 2011	0.0003249315	92.00	405,955.45		12,316.69	418,272.13
January – March 2012	0.0003174863	91.00	418,272.13		12,258.69	430,530.83
April – June 2012	0.0003106557	92.00	430,530.83		12,480.27	443,011.09
July – September 2012	0.0002912568	92.00	443,011.09		12,029.46	455,040.55
October – December 2012	0.0002901639	92.00	455,040.55		12,309.12	467,349.67
January – March 2013	0.0002805479	90.00	467,349.67		11,948.80	479,298.47
April – June 2013	0.0002726027	91.00	479,298.47		12,036.92	491,335.39
July – September 2013	0.0002690411	92.00	491,335.39		12,311.51	503,646.90
October – December 2013	0.0002630137	92.00	503,646.90		12,333.87	515,980.77
January – March 2014	0.0002627397	90.00	515,980.77		12,344.94	528,325.71
April – June 2014	0.0002638356	91.00	528,325.71		12,836.38	541,162.09

ATTACHMENT CALCULATION A
CALCULATION OF GIC FOR FTDT LIABILITY
CASE 1: SINGLE INSTANCE

Quarter Ending	GIC Daily Rate	Days in Quarter	Opening Balance	FTDT	GIC Interest	Closing Balance
July – September 2014	0.0002654794	92.00	541,162.09		13,378.34	554,540.43
October – December 2014	0.0002638356	92.00	554,540.43		13,623.16	568,163.59
January – March 2015	0.0002671233	90.00	568,163.59		13,822.92	581,986.51
April – June 2015	0.0002564383	91.00	581,986.51		13,739.09	595,725.60
July – September 2015	0.0002506849	92.00	595,725.60		13,897.12	609,622.73
October – December 2015	0.0002504109	92.00	609,622.73		14,205.59	623,828.32
January – March 2016	0.0002519126	91.00	623,828.32		14,464.00	638,292.32
April – June 2016	0.0002535519	92.00	638,292.32		15,062.39	653,354.71
July – September 2016	0.0002461749	92.00	653,354.71		14,964.21	668,318.92
October – December 2016	0.0002393443	92.00	668,318.92		14,877.58	683,196.50
January – March 2017	0.0002400000	90.00	683,196.50		14,915.77	698,112.27
April – June 2017	0.0002405479	91.00	698,112.27		15,448.18	713,560.45
July – September 2017	0.0002391781	92.00	713,560.45		15,873.56	729,434.02
October – December 2017	0.0002383562	92.00	729,434.02		16,170.31	745,604.33
January – March 2018	0.0002389041	90.00	745,604.33		16,203.15	761,807.48
April – June 2018	0.0002402740	91.00	761,807.48		16,838.26	778,645.74
July – September 2018	0.0002454794	92.00	778,645.74		17,782.88	796,428.62
October – December 2018	0.0002454794	92.00	796,428.62		18,189.01	814,617.64
January – March 2019	0.0002449315	90.00	814,617.64		18,154.44	832,772.07
April – June 2019	0.0002454794	91.00	832,772.07		18,809.99	851,582.06
July – September 2019	0.0002339726	92.00	851,582.06		18,527.23	870,109.29
October – December 2019	0.0002186301	92.00	870,109.29		17,676.60	887,785.89
January – March 2020	0.0002161202	91.00	887,785.89		17,630.93	905,416.82
April – June 2020	0.0002155738	92.00	905,416.82		18,134.22	923,551.04
July – September 2020	0.0001939891	92.00	923,551.04		16,628.95	940,179.99
October – December 2020	0.0001939891	92.00	940,179.99		16,928.36	957,108.34
January – March 2021	0.0001923288	90.00	957,108.34		16,709.75	973,818.10
April – June 2021	0.0001920548	91.00	973,818.10		17,167.34	990,985.43
July – September 2021	0.0001928767	92.00	990,985.43		17,739.91	1,008,725.35
October – December 2021	0.0001920548	92.00	1,008,725.35		17,979.86	1,026,705.21

ATTACHMENT CALCULATION A
CALCULATION OF GIC FOR FTDT LIABILITY
CASE 1: SINGLE INSTANCE

Quarter Ending	GIC Daily Rate	Days in Quarter	Opening Balance	FTDT	GIC Interest	Closing Balance
January – March 2022	0.0001928767	90.00	1,026,705.21		17,976.32	1,044,681.52
April – June 2022	0.0001936986	91.00	1,044,681.52		18,575.59	1,063,257.11
July – September 2022	0.0002191781	92.00	1,063,257.11		21,655.15	1,084,912.26
October – December 2022	0.0002550685	92.00	1,084,912.26		25,756.62	1,110,668.88
January – March 2023	0.0002756164	90.00	1,110,668.88		27,891.33	1,138,560.20
April – June 2023	0.0002865753	91.00	1,138,560.20		30,077.95	1,168,638.15
July – September 2023	0.0002986301	92.00	1,168,638.15		32,547.32	1,201,185.48
October – December 2023	0.0003054794	92.00	1,201,185.48		34,231.79	1,235,417.27
January – March 2024	0.0003109290	91.00	1,235,417.27		35,449.20	1,270,866.46
April – June 2024	0.0003098361	92.00	1,270,866.46		36,741.43	1,307,607.89
July – September 2024	0.0003103825	92.00	1,307,607.89		37,871.25	1,345,479.14
October – December 2024	0.0003109290	92.00	1,345,479.14		39,037.68	1,384,516.82
January – March 2025	0.0003128767	90.00	1,384,516.82		39,534.30	1,424,051.12
April – June 2025	0.0003060274	91.00	1,424,051.12		40,208.81	1,464,259.92
July – September 2025	0.0002953425	92.00	1,464,259.92		40,325.57	1,504,585.49
Totals				**100,000.00**	**1,404,585.49**	**1,504,585.49**

ATTACHMENT CALCULATION B
CALCULATION OF GIC FOR FTDT LIABILITY
CASE 2: LIMITED INSTANCES

Quarter Ending	GIC Daily Rate	Days in Quarter	Opening Balance	FTDT	GIC Interest	Closing Balance
July – September 1999	0.0003484931	92.00	-		-	-
October – December 1999	0.0003487671	92.00	-		-	-
January – March 2000	0.0003573770	91.00	-		-	-
April – June 2000	0.0003729508	92.00	-	100,000.00	-	100,000.00
July – September 2000	0.0003825137	92.00	100,000.00		3,581.08	103,581.08
October – December 2000	0.0003786885	92.00	103,581.08		3,671.59	107,252.67
January – March 2001	0.0003797260	90.00	107,252.67		3,728.03	110,980.70
April – June 2001	0.0003797260	91.00	110,980.70	100,000.00	3,901.22	214,881.92
July – September 2001	0.0003257534	92.00	214,881.92		6,536.25	221,418.17
October – December 2001	0.0003273973	92.00	221,418.17		6,769.57	228,187.74
January – March 2002	0.0003090411	90.00	228,187.74		6,434.82	234,622.57
April – June 2002	0.0003098630	91.00	234,622.57	100,000.00	6,708.88	341,331.45
July – September 2002	0.0003243835	92.00	341,331.45		10,338.27	351,669.72
October – December 2002	0.0003276712	92.00	351,669.72		10,760.97	362,430.69
January – March 2003	0.0003243835	90.00	362,430.69		10,735.19	373,165.88
April – June 2003	0.0003219178	91.00	373,165.88	100,000.00	11,091.60	484,257.48
July – September 2003	0.0003227397	92.00	484,257.48		14,591.80	498,849.28
October – December 2003	0.0003238357	92.00	498,849.28		15,083.29	513,932.57
January – March 2004	0.0003363388	91.00	513,932.57		15,970.32	529,902.88
April – June 2004	0.0003434426	92.00	529,902.88		17,007.55	546,910.43
July – September 2004	0.0003418033	92.00	546,910.43		17,468.32	564,378.75
October – December 2004	0.0003398907	92.00	564,378.75		17,923.82	582,302.58
January – March 2005	0.0003405479	90.00	582,302.58		18,120.36	600,422.93
April – June 2005	0.0003460274	91.00	600,422.93		19,203.86	619,626.79
July – September 2005	0.0003473973	92.00	619,626.79		20,119.93	639,746.72
October – December 2005	0.0003457534	92.00	639,746.72		20,673.39	660,420.11
January – March 2006	0.0003460274	90.00	660,420.11		20,887.05	681,307.15
April – June 2006	0.0003454794	91.00	681,307.15		21,755.80	703,062.95
July – September 2006	0.0003526027	92.00	703,062.95		23,176.78	726,239.73
October – December 2006	0.0003613699	92.00	726,239.73		24,545.92	750,785.65

ATTACHMENT CALCULATION B
CALCULATION OF GIC FOR FTDT LIABILITY
CASE 2: LIMITED INSTANCES

Quarter Ending	GIC Daily Rate	Days in Quarter	Opening Balance	FTDT	GIC Interest	Closing Balance
January – March 2007	0.0003663014	90.00	750,785.65		25,159.07	775,944.72
April – June 2007	0.0003663014	91.00	775,944.72		26,295.91	802,240.63
July – September 2007	0.0003663014	92.00	802,240.63		27,490.87	829,731.51
October – December 2007	0.0003767123	92.00	829,731.51		29,254.96	858,986.47
January – March 2008	0.0003866120	91.00	858,986.47		30,752.44	889,738.91
April – June 2008	0.0004013661	92.00	889,738.91		33,461.49	923,200.40
July – September 2008	0.0004030054	92.00	923,200.40		34,864.34	958,064.75
October – December 2008	0.0003909836	92.00	958,064.75		35,082.39	993,147.13
January – March 2009	0.0003221918	90.00	993,147.13		29,215.38	1,022,362.51
April – June 2009	0.0002783562	91.00	1,022,362.51		26,223.95	1,048,586.46
July – September 2009	0.0002775342	92.00	1,048,586.46		27,114.64	1,075,701.09
October – December 2009	0.0002821918	92.00	1,075,701.09		28,288.60	1,103,989.69
January – March 2010	0.0003000000	90.00	1,103,989.69		30,209.18	1,134,198.87
April – June 2010	0.0003057534	91.00	1,134,198.87		31,995.61	1,166,194.48
July – September 2010	0.0003232877	92.00	1,166,194.48		35,200.70	1,201,395.18
October – December 2010	0.0003216438	92.00	1,201,395.18		36,076.10	1,237,471.27
January – March 2011	0.0003293151	90.00	1,237,471.27		37,219.33	1,274,690.60
April – June 2011	0.0003265753	91.00	1,274,690.60		38,443.84	1,313,134.44
July – September 2011	0.0003287671	92.00	1,313,134.44		40,317.86	1,353,452.30
October – December 2011	0.0003249315	92.00	1,353,452.30		41,063.74	1,394,516.04
January – March 2012	0.0003174863	91.00	1,394,516.04		40,870.38	1,435,386.42
April – June 2012	0.0003106557	92.00	1,435,386.42		41,609.12	1,476,995.54
July – September 2012	0.0002912568	92.00	1,476,995.54		40,106.11	1,517,101.65
October – December 2012	0.0002901639	92.00	1,517,101.65		41,038.52	1,558,140.17
January – March 2013	0.0002805479	90.00	1,558,140.17		39,837.19	1,597,977.37
April – June 2013	0.0002726027	91.00	1,597,977.37		40,131.01	1,638,108.38
July – September 2013	0.0002690411	92.00	1,638,108.38		41,046.47	1,679,154.85
October – December 2013	0.0002630137	92.00	1,679,154.85		41,121.04	1,720,275.89
January – March 2014	0.0002627397	90.00	1,720,275.89		41,157.93	1,761,433.82
April – June 2014	0.0002638356	91.00	1,761,433.82		42,796.38	1,804,230.20

ATTACHMENT CALCULATION B
CALCULATION OF GIC FOR FTDT LIABILITY
CASE 2: LIMITED INSTANCES

Quarter Ending	GIC Daily Rate	Days in Quarter	Opening Balance	FTDT	GIC Interest	Closing Balance
July – September 2014	0.0002654794	92.00	1,804,230.20		44,603.27	1,848,833.47
October – December 2014	0.0002638356	92.00	1,848,833.47		45,419.51	1,894,252.98
January – March 2015	0.0002671233	90.00	1,894,252.98		46,085.52	1,940,338.50
April – June 2015	0.0002564383	91.00	1,940,338.50		45,806.03	1,986,144.53
July – September 2015	0.0002506849	92.00	1,986,144.53		46,332.90	2,032,477.43
October – December 2015	0.0002504109	92.00	2,032,477.43		47,361.34	2,079,838.77
January – March 2016	0.0002519126	91.00	2,079,838.77		48,222.87	2,128,061.64
April – June 2016	0.0002535519	92.00	2,128,061.64		50,217.88	2,178,279.52
July – September 2016	0.0002461749	92.00	2,178,279.52		49,890.56	2,228,170.08
October – December 2016	0.0002393443	92.00	2,228,170.08		49,601.75	2,277,771.83
January – March 2017	0.0002400000	90.00	2,277,771.83		49,729.04	2,327,500.88
April – June 2017	0.0002405479	91.00	2,327,500.88		51,504.12	2,379,005.00
July – September 2017	0.0002391781	92.00	2,379,005.00		52,922.34	2,431,927.34
October – December 2017	0.0002383562	92.00	2,431,927.34		53,911.70	2,485,839.04
January – March 2018	0.0002389041	90.00	2,485,839.04		54,021.17	2,539,860.21
April – June 2018	0.0002402740	91.00	2,539,860.21		56,138.63	2,595,998.84
July – September 2018	0.0002454794	92.00	2,595,998.84		59,288.00	2,655,286.84
October – December 2018	0.0002454794	92.00	2,655,286.84		60,642.03	2,715,928.87
January – March 2019	0.0002449315	90.00	2,715,928.87		60,526.75	2,776,455.61
April – June 2019	0.0002454794	91.00	2,776,455.61		62,712.35	2,839,167.97
July – September 2019	0.0002339726	92.00	2,839,167.97		61,769.65	2,900,937.62
October – December 2019	0.0002186301	92.00	2,900,937.62		58,933.64	2,959,871.25
January – March 2020	0.0002161202	91.00	2,959,871.25		58,781.38	3,018,652.64
April – June 2020	0.0002155738	92.00	3,018,652.64		60,459.34	3,079,111.98
July – September 2020	0.0001939891	92.00	3,079,111.98		55,440.78	3,134,552.76
October – December 2020	0.0001939891	92.00	3,134,552.76		56,439.02	3,190,991.77
January – March 2021	0.0001923288	90.00	3,190,991.77		55,710.18	3,246,701.95
April – June 2021	0.0001920548	91.00	3,246,701.95		57,235.77	3,303,937.72
July – September 2021	0.0001928767	92.00	3,303,937.72		59,144.74	3,363,082.46
October – December 2021	0.0001920548	92.00	3,363,082.46		59,944.71	3,423,027.17

ATTACHMENT CALCULATION B
CALCULATION OF GIC FOR FTDT LIABILITY
CASE 2: LIMITED INSTANCES

Quarter Ending	GIC Daily Rate	Days in Quarter	Opening Balance	FTDT	GIC Interest	Closing Balance
January – March 2022	0.0001928767	90.00	3,423,027.17		59,932.90	3,482,960.07
April – June 2022	0.0001936986	91.00	3,482,960.07		61,930.86	3,544,890.93
July – September 2022	0.0002191781	92.00	3,544,890.93		72,198.10	3,617,089.03
October – December 2022	0.0002550685	92.00	3,617,089.03		85,872.37	3,702,961.40
January – March 2023	0.0002756164	90.00	3,702,961.40		92,989.46	3,795,950.86
April – June 2023	0.0002865753	91.00	3,795,950.86		100,279.66	3,896,230.52
July – September 2023	0.0002986301	92.00	3,896,230.52		108,512.53	4,004,743.04
October – December 2023	0.0003054794	92.00	4,004,743.04		114,128.52	4,118,871.56
January – March 2024	0.0003109290	91.00	4,118,871.56		118,187.34	4,237,058.90
April – June 2024	0.0003098361	92.00	4,237,058.90		122,495.63	4,359,554.53
July – September 2024	0.0003103825	92.00	4,359,554.53		126,262.46	4,485,816.99
October – December 2024	0.0003109290	92.00	4,485,816.99		130,151.31	4,615,968.29
January – March 2025	0.0003128767	90.00	4,615,968.29		131,807.05	4,747,775.34
April – June 2025	0.0003060274	91.00	4,747,775.34		134,055.84	4,881,831.19
July – September 2025	0.0002953425	92.00	4,881,831.19		134,445.14	5,016,276.33
Totals				**400,000.00**	**4,616,276.33**	**5,016,276.33**

ATTACHMENT CALCULATION C
CALCULATION OF GIC FOR FTDT LIABILITY
CASE 3: MULTPLE INSTANCES

Quarter Ending	GIC Daily Rate	Days in Quarter	Opening Balance	FTDT	GIC Interest	Closing Balance
July – September 1999	0.0003484931	92.00	-		-	-
October – December 1999	0.0003487671	92.00	-		-	-
January – March 2000	0.0003573770	91.00	-		-	-
April – June 2000	0.0003729508	92.00	-	100,000.00	-	100,000.00
July – September 2000	0.0003825137	92.00	100,000.00		3,581.08	121,707.77
October – December 2000	0.0003786885	92.00	121,707.77		4,314.12	126,021.89
January – March 2001	0.0003797260	90.00	126,021.89		4,380.43	130,402.32
April – June 2001	0.0003797260	91.00	130,402.32	100,000.00	4,583.93	252,486.26
July – September 2001	0.0003257534	92.00	252,486.26		7,680.10	260,166.35
October – December 2001	0.0003273973	92.00	260,166.35		7,954.24	268,120.60
January – March 2002	0.0003090411	90.00	268,120.60		7,560.92	275,681.52
April – June 2002	0.0003098630	91.00	275,681.52	100,000.00	7,882.93	401,064.45
July – September 2002	0.0003243835	92.00	401,064.45		12,147.47	413,211.92
October – December 2002	0.0003276712	92.00	413,211.92		12,644.14	425,856.06
January – March 2003	0.0003243835	90.00	425,856.06		12,613.85	438,469.91
April – June 2003	0.0003219178	91.00	438,469.91	100,000.00	13,032.63	569,002.53
July – September 2003	0.0003227397	92.00	569,002.53		17,145.37	586,147.90
October – December 2003	0.0003238357	92.00	586,147.90		17,722.86	603,870.77
January – March 2004	0.0003363388	91.00	603,870.77		18,765.12	622,635.89
April – June 2004	0.0003434426	92.00	622,635.89	100,000.00	19,983.87	760,119.76
July – September 2004	0.0003418033	92.00	760,119.76		24,278.23	784,397.98
October – December 2004	0.0003398907	92.00	784,397.98		24,911.31	809,309.29
January – March 2005	0.0003405479	90.00	809,309.29		25,184.46	834,493.75
April – June 2005	0.0003460274	91.00	834,493.75	100,000.00	26,690.35	978,684.09
July – September 2005	0.0003473973	92.00	978,684.09		31,778.89	1,010,462.99
October – December 2005	0.0003457534	92.00	1,010,462.99		32,653.07	1,043,116.06
January – March 2006	0.0003460274	90.00	1,043,116.06		32,990.54	1,076,106.60
April – June 2006	0.0003454794	91.00	1,076,106.60	100,000.00	34,362.71	1,227,969.30
July – September 2006	0.0003526027	92.00	1,227,969.30		40,480.54	1,268,449.85
October – December 2006	0.0003613699	92.00	1,268,449.85		42,871.89	1,311,321.74

ATTACHMENT CALCULATION C
CALCULATION OF GIC FOR FTDT LIABILITY
CASE 3: MULTPLE INSTANCES

Quarter Ending	GIC Daily Rate	Days in Quarter	Opening Balance	FTDT	GIC Interest	Closing Balance
January – March 2007	0.0003663014	90.00	1,311,321.74		43,942.82	1,355,264.55
April – June 2007	0.0003663014	91.00	1,355,264.55	100,000.00	45,928.43	1,518,692.98
July – September 2007	0.0003663014	92.00	1,518,692.98		52,041.99	1,570,734.96
October – December 2007	0.0003767123	92.00	1,570,734.96		55,381.52	1,626,116.48
January – March 2008	0.0003866120	91.00	1,626,116.48		58,216.35	1,684,332.83
April – June 2008	0.0004013661	92.00	1,684,332.83	100,000.00	63,344.75	1,865,177.58
July – September 2008	0.0004030054	92.00	1,865,177.58		70,437.78	1,935,615.37
October – December 2008	0.0003909836	92.00	1,935,615.37		70,878.30	2,006,493.67
January – March 2009	0.0003221918	90.00	2,006,493.67		59,024.96	2,065,518.63
April – June 2009	0.0002783562	91.00	2,065,518.63	100,000.00	52,981.26	2,235,999.89
July – September 2009	0.0002775342	92.00	2,235,999.89		57,819.10	2,293,818.99
October – December 2009	0.0002821918	92.00	2,293,818.99		60,322.45	2,354,141.44
January – March 2010	0.0003000000	90.00	2,354,141.44		64,417.89	2,418,559.32
April – June 2010	0.0003057534	91.00	2,418,559.32	100,000.00	68,227.26	2,604,286.58
July – September 2010	0.0003232877	92.00	2,604,286.58		78,608.42	2,682,895.00
October – December 2010	0.0003216438	92.00	2,682,895.00		80,563.31	2,763,458.31
January – March 2011	0.0003293151	90.00	2,763,458.31		83,116.32	2,846,574.63
April – June 2011	0.0003265753	91.00	2,846,574.63	100,000.00	85,850.85	3,049,925.48
July – September 2011	0.0003287671	92.00	3,049,925.48		93,643.46	3,143,568.94
October – December 2011	0.0003249315	92.00	3,143,568.94		95,375.87	3,238,944.81
January – March 2012	0.0003174863	91.00	3,238,944.81		94,926.78	3,333,871.59
April – June 2012	0.0003106557	92.00	3,333,871.59	100,000.00	96,642.58	3,548,014.17
July – September 2012	0.0002912568	92.00	3,548,014.17		96,342.24	3,644,356.41
October – December 2012	0.0002901639	92.00	3,644,356.41		98,582.05	3,742,938.47
January – March 2013	0.0002805479	90.00	3,742,938.47		95,696.24	3,838,634.71
April – June 2013	0.0002726027	91.00	3,838,634.71	100,000.00	96,402.05	4,052,536.76
July – September 2013	0.0002690411	92.00	4,052,536.76		101,545.37	4,154,082.14
October – December 2013	0.0002630137	92.00	4,154,082.14		101,729.86	4,255,812.00
January – March 2014	0.0002627397	90.00	4,255,812.00		101,821.11	4,357,633.11
April – June 2014	0.0002638356	91.00	4,357,633.11	100,000.00	105,874.51	4,581,007.62

ATTACHMENT CALCULATION C
CALCULATION OF GIC FOR FTDT LIABILITY
CASE 3: MULTPLE INSTANCES

Quarter Ending	GIC Daily Rate	Days in Quarter	Opening Balance	FTDT	GIC Interest	Closing Balance
July – September 2014	0.0002654794	92.00	4,581,007.62		113,249.36	4,694,256.97
October – December 2014	0.0002638356	92.00	4,694,256.97		115,321.84	4,809,578.81
January – March 2015	0.0002671233	90.00	4,809,578.81		117,012.85	4,926,591.65
April – June 2015	0.0002564383	91.00	4,926,591.65	100,000.00	116,303.21	5,160,394.86
July – September 2015	0.0002506849	92.00	5,160,394.86		120,382.00	5,280,776.87
October – December 2015	0.0002504109	92.00	5,280,776.87		123,054.10	5,403,830.96
January – March 2016	0.0002519126	91.00	5,403,830.96		125,292.51	5,529,123.47
April – June 2016	0.0002535519	92.00	5,529,123.47	100,000.00	130,475.95	5,777,099.43
July – September 2016	0.0002461749	92.00	5,777,099.43		132,316.69	5,909,416.12
October – December 2016	0.0002393443	92.00	5,909,416.12		131,550.72	6,040,966.84
January – March 2017	0.0002400000	90.00	6,040,966.84		131,888.32	6,172,855.17
April – June 2017	0.0002405479	91.00	6,172,855.17	100,000.00	136,596.08	6,426,951.25
July – September 2017	0.0002391781	92.00	6,426,951.25		142,971.24	6,569,922.49
October – December 2017	0.0002383562	92.00	6,569,922.49		145,644.03	6,715,566.52
January – March 2018	0.0002389041	90.00	6,715,566.52		145,939.77	6,861,506.29
April – June 2018	0.0002402740	91.00	6,861,506.29	100,000.00	151,660.14	7,130,666.43
July – September 2018	0.0002454794	92.00	7,130,666.43		162,851.74	7,293,518.17
October – December 2018	0.0002454794	92.00	7,293,518.17		166,570.98	7,460,089.15
January – March 2019	0.0002449315	90.00	7,460,089.15		166,254.32	7,626,343.48
April – June 2019	0.0002454794	91.00	7,626,343.48	100,000.00	172,257.73	7,916,101.20
July – September 2019	0.0002339726	92.00	7,916,101.20		172,224.68	8,088,325.89
October – December 2019	0.0002186301	92.00	8,088,325.89		164,317.37	8,252,643.26
January – March 2020	0.0002161202	91.00	8,252,643.26		163,892.87	8,416,536.13
April – June 2020	0.0002155738	92.00	8,416,536.13	100,000.00	168,571.32	8,702,607.45
July – September 2020	0.0001939891	92.00	8,702,607.45		156,694.32	8,859,301.76
October – December 2020	0.0001939891	92.00	8,859,301.76		159,515.67	9,018,817.43
January – March 2021	0.0001923288	90.00	9,018,817.43		157,455.73	9,176,273.16
April – June 2021	0.0001920548	91.00	9,176,273.16	100,000.00	161,767.56	9,455,540.71
July – September 2021	0.0001928767	92.00	9,455,540.71		169,266.34	9,624,807.06
October – December 2021	0.0001920548	92.00	9,624,807.06		171,555.79	9,796,362.85

ATTACHMENT CALCULATION C
CALCULATION OF GIC FOR FTDT LIABILITY
CASE 3: MULTPLE INSTANCES

Quarter Ending	GIC Daily Rate	Days in Quarter	Opening Balance	FTDT	GIC Interest	Closing Balance
January – March 2022	0.0001928767	90.00	9,796,362.85		171,521.98	9,967,884.83
April – June 2022	0.0001936986	91.00	9,967,884.83	100,000.00	177,239.96	10,262,624.79
July – September 2022	0.0002191781	92.00	10,262,624.79		209,016.88	10,471,641.67
October – December 2022	0.0002550685	92.00	10,471,641.67		248,604.51	10,720,246.18
January – March 2023	0.0002756164	90.00	10,720,246.18		269,208.84	10,989,455.02
April – June 2023	0.0002865753	91.00	10,989,455.02	100,000.00	290,314.29	11,397,269.31
July – September 2023	0.0002986301	92.00	11,397,269.31		317,421.28	11,714,690.59
October – December 2023	0.0003054794	92.00	11,714,690.59		333,849.20	12,048,539.79
January – March 2024	0.0003109290	91.00	12,048,539.79		345,722.10	12,394,261.89
April – June 2024	0.0003098361	92.00	12,394,261.89	100,000.00	358,324.70	12,870,086.59
July – September 2024	0.0003103825	92.00	12,870,086.59		372,746.52	13,242,833.11
October – December 2024	0.0003109290	92.00	13,242,833.11		384,227.01	13,627,060.12
January – March 2025	0.0003128767	90.00	13,627,060.12		389,115.01	14,016,175.13
April – June 2025	0.0003060274	91.00	14,016,175.13	100,000.00	395,753.81	14,529,428.94
July – September 2025	0.0002953425	92.00	14,529,428.94		400,139.01	14,929,567.96
Totals				**2,600,000.00**	**11,873,941.27**	**14,473,941.27**