

# ***PS LA 2004/1 (GA) (Withdrawn) - Lodgment opportunity for family trust and interposed entity elections***

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! This practice statement has been withdrawn. The opportunity has now lapsed.

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# Practice Statement Law Administration

(General Administration)

**PS LA 2004/1 (GA)**

*This practice statement has been withdrawn. The opportunity has now lapsed*

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**FOI status: may be released**

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*This Practice Statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by ATO officers unless doing so creates unintended consequences. Where this occurs ATO officers must follow their Business Line's escalation process.*

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**SUBJECT:** Lodgment opportunity for family trust and interposed entity elections

**PURPOSE:** To clarify the circumstances under which an entity which has not lodged a family trust election or interposed entity election may now do so.

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## STATEMENT

1. This practice statement sets out the one-off opportunity to enable family entities to lodge a family trust election (FTE) and/or interposed entity election (IEE) that was required to have been lodged with a previous year's return, with their tax return for the 2004 income year. It recognises that at the time taxpayers were required to lodge FTEs and IEEs, many other aspects of change in the tax system affected taxpayer and tax practitioner workloads. Therefore, as a matter of practical compliance and sensible administration, the Commissioner is prepared to accept FTEs and IEEs, subject to the following advice, specifying a year up until the 2003 income year.
2. The opportunity is only available to entities that have acted as if they were a family entity. An entity will satisfy this requirement if at all times from the beginning of the specified income year until 30 June 2004:
  - the entity passes the family control test, and
  - the entity has made no distributions of income or capital to persons other than the individual specified in the FTE, or members of that individual's family group.
3. This practice statement will apply to trusts electing to be family trusts for the purposes of:
  - the trust loss measures

- the company loss measures, or
  - the franking credit trading measures.
4. Where a FTE may be provided to the Tax Office in accordance with this practice statement, an IEE may also be provided for those companies, partnerships and/or trusts that elect to become a member of that family group.
  5. Entities satisfying the requirements in paragraphs 2 and 4 may specify a year in the relevant range of income years as the year in respect of which they request the Commissioner to treat the election as having been made:
    - 1995 to 2003 income years for trust loss purposes
    - 1997 to 2003 income years for company loss tracing purposes, or
    - 1998 to 2003 income years for franking credit trading purposes.
  6. Some entities may have already lodged an election for a specified income year. The Tax Office's position has been that these entities were not able to specify an earlier year, as the transitional rules were no longer available to them. These entities will be able to ask the Tax Office to treat the election already lodged as applying from an earlier specified income year, provided that:
    - the requirements set out in this practice statement are satisfied (refer paragraphs 2, 4 and 5), and
    - no other changes are being made to the election.
  7. Entities will not be permitted to revoke a previously lodged election unless this revocation is in accordance with subsection 272-80(6) of Schedule 2F to the *Income Tax Assessment Act 1936* (ITAA 1936).
  8. Entities that wish to take advantage of this opportunity, but that are not required to furnish tax returns for the 2004 income year, must provide details of the election within 2 months of the end of the 2004 income year. To be eligible the entity must satisfy the requirements set out in paragraphs 2, 4 and 5 above.
  9. Entities making an election specifying the 2004 income year, and not wishing to request that that election be treated as applying from some earlier income year should make and provide details of that election in accordance with sections 272-80 (FTE) or 272-85 (IEE) of Schedule 2F to the ITAA 1936.
  10. In some instances taxpayers may wish to seek an amendment to an assessment to give full effect to an election made under this practice statement. As a general rule, amendments will only be possible where the statutory period for an amendment has not expired.
  11. Where there is a signed settlement deed covering a disputed assessment between the Tax Office and a taxpayer, the taxpayer will be unable to seek an amendment. Where there is no signed settlement deed in place, taxpayers will be able to request an amendment provided that the amendment time limits have not expired.

## EXPLANATION

12. The trust loss measures were introduced in the *Taxation Laws Amendment (Trust Losses and Other Deductions) Act 1998* (Trust Loss Act). The legislation was enacted on 16 April 1998 and applies to 1995 and later income years. These measures included the legislative concept of the 'family trust' and the 'family group'. A family trust and family group as defined receive concessional treatment under the trust loss measures.

13. Amendments to the company loss legislation allow a non-fixed trust that owns shares in a company to benefit from the family trust concession (sections 165-207 and 166-165 of the *Income Tax Assessment Act 1997* (ITAA 1997)). These measures apply for the 1997 and later income years.
14. A beneficiary of a non-fixed trust that receives a distribution consisting of franked dividends derived by the trustee will generally be unable to demonstrate an entitlement to franking benefits under the 45 day rule, unless they can take advantage of the small shareholder exemption. The making of a FTE increases the ability of such a beneficiary to obtain access to franking credits. These measures apply for the 1998 and later income years.
15. Broadly, a family trust is subject to concessional treatment.
  - Most of the trust loss measures do not apply to them, or apply in a modified way.
  - Under the company loss recoupment rules, where the relevant interests in a company are held by a family trust, the trustee of the family trust will be taken to own the interests as an individual.
  - For the purposes of the franking credit trading measures, where a trustee is a qualified person and the trust has elected to be a family trust, the 45 day rule, an anti-franking credit trading rule, is less likely to apply to deny a beneficiary entitlement to franking credits.
16. To become a family trust, the trustee of the trust must make and lodge a FTE with the Tax Office (section 272-80 of Schedule 2F to the ITAA 1936).
17. There will also be situations where a related entity will need to make and lodge an IEE to become a member of the family group. Where family members (including another family trust of the same primary individual) do not have fixed entitlements, directly or indirectly, and for their own benefit, to all the income and capital of an interposed entity, it will be necessary for that interposed entity to make an IEE for it to be included as part of the family group (section 272-85 of Schedule 2F to the ITAA 1936).
18. A consequence of making a FTE or IEE is that any distributions (broadly defined) of income or capital outside the family group of the specified individual will be taxed at the top marginal rate applying to individuals plus Medicare levy.
19. Failure to make or lodge a FTE will not necessarily result in the denial of losses or franking credits. Losses and franking credits may still be available, even without the making of an election, if taxpayers can pass alternative tests for losses or qualify for the small shareholder exemption in relation to franking credits. It is recommended that taxpayers consider carefully the need to make an election, prior to lodging it with the Tax Office.
20. An entity only needs to make an FTE or IEE once. Once made and lodged that election remains in place and carries forward unless it can be revoked or the entity ceases to exist.
21. The ability to revoke a FTE is extremely limited (subsection 272-80(6) of Schedule 2F to the ITAA 1936). An IEE is unable to be revoked in any circumstances.
22. Subject to transitional provisions, an entity making an FTE or IEE is required to lodge that election in the tax return for the specified income year (subsections 272-80(2) and 272-85(2) of Schedule 2F to the ITAA 1936). Where an entity requires

extra time to provide the election, they should request an extension of time to lodge the return for the specified income year.

23. Where an entity is not required to lodge a return for the relevant income year, details of the FTE or IEE are to be lodged within 2 months of the end of that income year or such later time as the Commissioner allows.
24. Those entities wishing to make an FTE or IEE for the 1998 income year for trust losses, or the 1999 income year for company losses and franking credit trading, were able to specify an earlier election year under transitional measures. Entities could specify:
  - 1995, 1996 or 1997 for trust losses
  - 1997 or 1998 for company losses, and
  - 1998 for franking credit trading.

This ensured that an entity could access the family trust concession or make a related IEE from one of these earlier years, provided the entity met the family control test at the relevant times (Transitional items 22, 22A, 23 and 23A of Schedule 1 to the Trust Loss Act.)

25. Entities making an FTE or IEE for trust loss purposes specifying the 1998 or an earlier income year were required to make the election at the time of lodging their 1998 tax return. Details of those elections were required to be lodged with the Tax Office as part of the entity's 1999 tax return. (For full details of the lodgment requirements of FTEs and IEEs for the purposes of the trust loss measures, refer <http://atogovau/distributor.asp?doc=/content/31830.htm>)
26. Entities making an FTE or IEE for company loss or franking credit trading purposes specifying the 1999 or an earlier income year were required to lodge elections as part of their 2000 tax return (or their 1999 tax return where that return was lodged after 31 May 2000).
27. For full details of the lodgment requirements of FTEs and IEEs made for company loss purposes, refer <http://atogovau/distributor.asp?doc=/content/31831.htm>.
28. For full details of the lodgment requirements of FTEs and IEEs for franking credit trading purposes, refer <http://atogovau/distributor.asp?doc=/content/31834.htm>.

*subject references*

family trust  
interposed entity  
family trust election  
interposed entity election  
trust loss measures  
company loss measures  
franking credit trading measures

*legislative references*

*Taxation Laws Amendment (Trust Losses and Other Deductions) Act 1998*  
*Taxation Laws Amendment (Trust Losses and Other Deductions) Act 1998* transitional items 22, 22A, 23 and 23A of Schedule 1  
*Income Tax Assessment Act 1997* section 165-207  
*Income Tax Assessment Act 1997* section 166-165  
*Income Tax Assessment Act 1936* section 272-80 of Schedule 2F  
*Income Tax Assessment Act 1936* subsection 272-80(2) of Schedule 2F  
*Income Tax Assessment Act 1936* subsection 272-80(6) of Schedule 2F  
*Income Tax Assessment Act 1936* section 272-85 of Schedule 2F  
*Income Tax Assessment Act 1936* subsection 272-85(2) of Schedule 2F

*Related public rulings*

*Related practice statements*

*case references*

*file references* 04/4578

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