



***PS LA 2002/11 - Fixed vs non-fixed trusts and consideration of whether a beneficiary has a fixed entitlement to a share of income or capital under subsection 272-5(1) of Schedule 2F to the Income Tax Assessment Act 1936 including requests to exercise the Commissioner's discretion under subsection 272-5(3)***

 This cover sheet is provided for information only. It does not form part of *PS LA 2002/11 - Fixed vs non-fixed trusts and consideration of whether a beneficiary has a fixed entitlement to a share of income or capital under subsection 272-5(1) of Schedule 2F to the Income Tax Assessment Act 1936 including requests to exercise the Commissioner's discretion under subsection 272-5(3)*

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# ATO Practice Statement Law Administration

PS LA 2002/11

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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:** Fixed vs non-fixed trusts and consideration of whether a beneficiary has a fixed entitlement to a share of income or capital under subsection 272-5(1) of Schedule 2F to the *Income Tax Assessment Act 1936* including requests to exercise the Commissioner's discretion under subsection 272-5(3)

**PURPOSE:** To advise that all requests for advice involving the consideration of whether fixed entitlements exist under section 272-5 or whether a trust is a fixed trust must be forwarded to the Losses Centre of Expertise

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## STATEMENT

1. The Losses Centre of Expertise has responsibility for administering Schedule 2F to the *Income Tax Assessment Act 1936* ('ITAA 1936') - the Trust Loss measures - including the consideration of whether a beneficiary has a fixed entitlement to a share of the income and/or capital of a trust under subsection 272-5(1) and the exercise of the discretion under subsection 272-5(3).
2. As it is essential that all references to the provisions of the Trust Loss measures are interpreted and applied consistently by the Commissioner in the various legislative contexts, all requests for advice received in respect of persons having fixed entitlements to income and/or capital of a trust under subsection 272-5(1) and/or exercise of the discretion under subsection 272-5(3) must be directed to the Losses Centre of Expertise. This includes all requests for advice received as to whether a trust is a fixed trust or a non-fixed trust where reference is made to the definitions in the Trust Loss measures (sections 272-65 and 272-70 respectively). Attachment A lists legislative references where the terms 'fixed entitlements'/'fixed trust' need to be considered under the Trust Loss measures.

## EXPLANATION

3. The Trust Loss measures were introduced to restrict the recoupment of prior year and current year losses and debt deductions of trusts in order to prevent the transfer of the tax benefit of those losses or deductions. The Losses Centre of Expertise has the responsibility for administering all of the Trust Loss measures.

4. In order to determine whether a trust is a fixed trust, it must be established that persons have fixed entitlements to all of the income and capital of the trust (section 272-65). Subsection 272-5(1) provides that for a person to have a fixed entitlement to the income or capital of a trust, the person must have a vested and indefeasible interest in a share of the respective income or capital of the trust. If a person does not have vested and indefeasible interests in the income and/or capital of the trust, the Commissioner may exercise a discretion under subsection 272-5(3) that a person does have a fixed entitlement.
5. Consideration of whether a beneficiary has a fixed entitlement to income and/or capital of a trust and the exercise of the discretion was originally designed only for purposes of the operation of the Trust Loss measures. However, since the introduction of the Trust Loss measures, the requirement of persons to have fixed entitlements to income and/or capital has also been incorporated in other tax legislation (for example, the 'ultimate beneficiary statement' rules in Division 6D of the ITAA 1936 applying to 'closely held trusts', and the CGT scrip-for-scrip rollover provisions contained in subdivision 124-M of the *Income Tax Assessment Act 1997*).
6. It is essential that section 272-5 is consistently interpreted and applied by the Commissioner in the various legislative contexts and that the discretion be exercised only in the special kinds of circumstances with which it was intended to deal. All requests for advice received where consideration has to be given to interpretation and application of the Trust Loss measures are to be forwarded to the Losses Centre of Expertise.

**Amendment history**

<b>Date of amendment</b>	<b>Part</b>	<b>Comment</b>
21 May 2012	Contact details	Updated.
6 August 2008	Contact details	Updated.

*subject references:* deemed fixed entitlement; fixed entitlement; fixed trust;  
non-fixed trust; trust losses; vested and indefeasible  
interest

*legislative references:* ITAA 1936 Sch 2F  
ITAA 1936 Sch 2F 272-5  
ITAA 1936 Sch 2F 272-65  
ITAA 1936 Sch 2F 272-70  
ITAA 1936 Div 6D  
ITAA 1936 Part IIIAA Div 1A  
ITAA 1997 Subdiv 104-E  
ITAA 1997 Subdiv 115-A  
ITAA 1997 Subdiv 118-G  
ITAA 1997 Subdiv 124-M  
ITAA 1997 Subdiv 165-B  
ITAA 1997 Subdiv 165-F  
ITAA 1997 Subdiv 170-D  
ITAA 1997 Subdiv 328-F

*file references:* 2002/006208

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## ATTACHMENT A

*NB The provisions listed in this Attachment are relevant to legislation enacted at the time of issue of this Law Administration Practice Statement; should further legislation be enacted that also refers to Schedule 2F re fixed entitlements/exercise of the discretion etc, then this Law Administration Practice Statement will also apply to that legislation.*

### *Income Tax Assessment Act 1997*

SUBDIVISION	SECTION	TOPIC
104-E	104-70	Capital gains tax and trusts
	104-72	
115-A	115-50	Discount capital gains
118-G	118-510	Capital gains tax and venture capital
124-M	124-781	Capital gains tax and scrip-for-scrip rollover
	124-795	
	124-810	
165-B	165-45	Working out a company's taxable income
165-F	All sections	Ownership of a company by non-fixed trusts
170-D	170-265	Company as a member of a linked group
328-F	328-380	Entities eligible to be STS taxpayers

### *Income Tax Assessment Act 1936*

Schedule 2F		Trust loss provisions
Division 6D	102UC	Ultimate beneficiary statements
Part IIIAA, Divisions 1 and 1A	160APA	Franking of dividends
	160APHD	