



Public advice and guidance compendium – PCG 2022/2

❶ Relying on this Compendium

This Compendium of comments provides responses to comments received on Draft Practical Compliance Guideline PCG 2022/D1 *Section 100A reimbursement agreements – ATO compliance approach*. It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Summary of issues raised and responses

Issue number	Issue raised	ATO response
All legislative references in this Compendium are to the <i>Income Tax Assessment Act 1936</i> , unless otherwise indicated.		
Inappropriate parameters for the white zone		
1	The ATO's views expressed in the 2014 website guidance Trust taxation – reimbursement agreement (Fact sheet) were never fully developed, which led to significant uncertainty. Accordingly, it is not an appropriate document from which a temporal line can be drawn.	We published the Fact sheet on our website in response to a request from the tax profession; refer to the minutes to the National Tax Liaison Group (NTLG) meeting held in September 2013. It was prepared in close consultation with members of the NTLG and the professional associations to raise awareness of the provision within the tax profession. The Fact sheet clearly stated that we considered it was possible for section 100A to apply to dealings between family members. Also, that whether an arrangement will be considered as part of an ordinary family or commercial dealing will depend upon the facts and the circumstance of the particular arrangement and that merely dealing between members of a family group is not sufficient. Following the release of the Fact sheet, we presented at numerous seminars, describing the types of arrangements that were being examined in our compliance activities. The Fact sheet was used as the reference point of our compliance approach. It attracted significant attention in the tax profession and reiterated that we were carefully examining section 100A in our compliance activities.

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Clarification of the meaning of ‘arrangements that continue before and after 1 July 2014’		
2	Greater clarity is sought on the meaning of ‘you have entered into an arrangement that continues before and after that date’. When is an ‘arrangement entered into’?	Taxation Ruling TR 2022/4 <i>Income tax: section 100A reimbursement agreements</i> deals with when an ‘arrangement is entered into’. In order for section 100A to apply in respect of an arrangement, it is necessary that the agreement, arrangement or understanding must be in existence at the time the relevant present entitlement arises. Whether an arrangement is the same or not can only be determined by the facts. An arrangement continues before and after 1 July 2014 where, under an agreement, a beneficiary became presently entitled to trust income before 1 July 2014 and under the same agreement becomes presently entitled to trust income on or after 1 July 2014. Example 2 has been added to the final Guideline to explain this.
3	It is unclear whether the Guideline will apply to arrangements that were not covered by the Fact sheet.	The date of effect section of the final Guideline addresses the Fact sheet and our approach to beneficiaries’ entitlements to trust income that arose before 1 July 2022. This Guideline sets out that we will follow the Fact sheet where it is more favourable than the Guideline in respect of entitlements that arose before 1 July 2022. The Fact sheet provides a broad description of section 100A (including the ordinary family or commercial dealing exclusion and interaction with Division 7A) and identifies other relevant integrity provisions. There are 5 examples included to illustrate these. The final Guideline sets out that we will not dedicate compliance resources to consider section 100A in respect of entitlements that arose before 1 July 2022, where taxpayers demonstrate to us that they have taken reasonable care in following the Fact sheet in determining that section 100A does not apply. There are other scenarios not contemplated in the Fact sheet that the final Guideline addresses. It is not our intention to limit the final Guideline to what was already covered in the Fact sheet.

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Can reliance on the Fact sheet be extended?		
4	Can the exception for situations covered by the Fact sheet (this situation arises where the 'actual recipient' of a presently entitled beneficiary's unpaid entitlement has entered into and repaid a loan on commercial terms, but without additional requirements; for example, for common control, use of funds) be extended beyond 30 June 2022 as an ongoing green-zone example?	We have clearly articulated in the final Guideline and public forums that the Fact sheet can be relied upon for entitlements arising before 1 July 2022 to the extent it is more favourable to the taxpayer's circumstances than this Guideline. This will continue to be our position. The view in the advice products (TR 2022/4 and this Guideline) does not represent a change in policy or interpretation and is consistent with how section 100A has been applied in compliance activities, private advice requests, objections and articulated in seminar presentations since 2014.
Consideration of a risk matrix		
5	Green-zone scenarios could be enhanced to improve its utility by creating a risk rating similar to Practical Compliance Guideline PCG 2021/4 <i>Allocation of professional firm profits – ATO compliance approach</i> using effective tax rate as the metric.	Potential arrangements covered by the Guideline can vary widely. It is not feasible to cover the field of possible scenarios within a mathematical risk rating model. Further, it is not appropriate to use an effective tax rate as an arbiter of section 100A risk. For example, <i>BBlood Enterprises Pty Ltd v Commissioner of Taxation</i> [2022] FCA 1112 (<i>BBlood</i>) concerned a high-risk arrangement that had an effective tax rate of 30% while there are low-risk arrangements at different tax rates.
Clarification on how mixed funds can be used		
6	There is uncertainty regarding the operation of Green zone: scenario 1 of the draft Guideline, including how mixed funds are treated and inclusion of undefined terms such as 'joint family purposes' and 'dependant'.	We have simplified Green zone: scenario 1 in the final Guideline to remove reference to the term 'joint family purpose'. Green zone: scenario 1 now refers to the funds being used to benefit one or more of the beneficiary's spouse or dependants. A dependant includes a beneficiary's child or stepchild under the age of 18 years or a person who is financially dependent on the beneficiary.
Gifts or non-commercial loans explained by ordinary familial or commercial objects		
7	It would be useful for the ATO to provide further examples of what other gifts and non-commercial loans could be explained by ordinary familial or commercial objects. For example, it may be argued that the provision of a non-commercial loan or a gift from parent to child (because of the family relationship) to assist them to start up a business, or to	Paragraphs 25 to 32 of TR 2022/4 provide our view of what is an ordinary family or commercial dealing. Whether an arrangement is an ordinary family or commercial dealing depends on the facts of the case. The circumstances surrounding why a beneficiary chose to gift or loan an amount to another party is fact dependant. It is not appropriate for the Guideline to set a bright line test of this nature.

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	travel or buy a car, would also fall under the ordinary dealings exception.	Examples 8 and 10 of TR 2022/4 outline arrangements which concern gifts and non-commercial loans between family members in the context of section 100A. Green zone: scenario 4 of the final Guideline includes arrangements relevantly identical to Examples 6 to 10 in TR 2022/4¹ which conclude that the arrangement would likely be entered into in the course of ordinary family or commercial dealing.
Grandparents paying for school fees		
8	It is relatively common for grandparents to pay for or contribute to the cost of their grandchildren's school fees. It would be useful for the ATO to provide a green-zone arrangement that covers this scenario.	That a behaviour is relatively common is not necessarily determinative of the level of risk that section 100A may apply. Potential arrangements covered by this Guideline can vary widely and the level of risk concerning section 100A depends on the facts. It is not appropriate for the Guideline to provide an example that specifically describes every arrangement or variation thereof. Our experience with different scenarios concerning grandparents paying school fees for their grandchildren is that the level of risk where section 100A could apply depends on the facts and circumstances. While some arrangements are low risk and do not raise concerns, some appear to be contrived and considered by us to be high risk.
More complex and costly		
9	Implementation and management of Green zone: scenario 3 of the draft Guideline would be time consuming for advisors and expensive for family groups.	We disagree. To make it easier to comply, we have split Green zone: scenario 3 into scenario 3A and scenario 3B of the final Guideline to separately list the principles that apply to individuals and companies or trusts. Implementation and management of arrangements in Green zone: scenario 3 where it relates to: corporate beneficiaries – should be a continuation of the status quo for the majority of trustees; that is, continuing to comply with Division 7A obligations

¹ Refer to Examples 6, 7 and 8 (applying the facts in paragraph 143 only), 9 (excluding the facts in paragraph 147) and 10 (excluding the facts in paragraph 153) in Appendix 2 of TR 2022/4.

Issue number	Issue raised	ATO response
		controllers, their spouses and those employed in managing the business – is intended to be straight forward; that is, provided the underlying funds continue to be used in the trust, it would be in the green zone.
More guidance needed on trust-to-trust distributions		
10	Further guidance on trust-to-trust distributions would be beneficial.	We have expanded the green zone to include trust distributions to a beneficiary acting as trustee of another trust. This is now included as scenario 3B of the final Guideline, which provides that a trustee can lend money to another trustee provided that the 'trustee working capital condition' is satisfied. The trust beneficiary must be in the family group, not be an exempt entity, and the terms on which the entitlement is made available for a trustee retention of funds is by way of loan on 'commercial terms'.
Trust-to-trust distributions in the green zone		
11	Can arrangements involving distributions of income to a trustee beneficiary ever fall within the green zone?	The green zone has been broadened to include trust distributions to a beneficiary acting as trustee of another trust. Refer to our response at Issue 10 of this Compendium.
Distributions to loss trusts in the green zone		
12	The Guideline should provide a green zone for what are acceptable distributions to loss trusts, covering cases involving both a trustee retention of funds or no trustee retention of funds.	We have expanded the green zone to include trust distributions to a beneficiary acting as trustee of another trust. Green zone: scenarios 2 and 3B of the final Guideline would include arrangements where a trustee beneficiary has losses.
Green zone scenario 3 too narrowly drafted		
13	Distributions to family members that are employed in the business should not result in failure of the green zone.	The green zone identifies arrangements where no further information is required to establish that an arrangement is low risk. New Green zone: scenario 3A of the final Guideline does not state that a distribution to a family member will result in the green zone being failed. Where an individual does not control a trust, is not the spouse of the controller or is not employed in the management of the business, we may

Issue number	Issue raised	ATO response
		require further information to ascertain the level of risk in respect of a beneficiary's unpaid entitlement.
Guidance should not impose an obligation to enter into a section 109N compliant loan in situations not involving a private company		
14	Using the term 'associate' in paragraph 21(b)(iii) of the draft Guideline appears to create a requirement for taxpayers to enter into section 109N loan arrangements even where no private company is involved. Further clarity is required as to whether this is intended.	New Green zone: scenario 3B of the final Guideline sets out criteria where we do not require further information in accepting that an arrangement is low risk. Those criteria allow the trustee to satisfy the 'trustee working capital condition', where they lend the funds on 'commercial terms' (see paragraph 25 of the final Guideline). Loans made that meet the requirements set out in Division 7A are accepted as being on 'commercial terms' (whether or not Division 7A actually applies to those loans).
Restrictions on associate's use of funds not appropriate		
15	The ATO should remove the requirement that the associate that borrows the funds use those funds in the working capital of a business or for investment purposes. So long as the trust generates a commercial return on the loan, it should not matter that the associate uses the funds for private purposes.	Green zone: scenario 3 of the final Guideline sets out criteria where we do not require further information in accepting that an arrangement is low risk. We limited the 'use of funds' criteria in Green zone: scenario 3 so as to broaden that criteria to allow private use of funds which would involve additional criteria to delineate what is low risk, which would increase the complexity of the scenario.
16	The use of funds condition should provide (where a distribution occurs to a trust or individual) that the funds can also be lent to associates on an interest-free basis so long as it is represented as a loan in the relevant trust accounts.	We disagree. Green zone: scenario 3 of the final Guideline sets out criteria where we do not require further information in accepting that an arrangement is low risk. Further information may be required to ascertain risk in respect of an arrangement that includes an interest-free loan made by the trustee.
Control requirement not commercially realistic		
17	Green zone: scenario 3 of the draft Guideline should be broadened to apply to the adult children of the controller of the trust. It should be enough that a grown adult documents their wish to leave funds in trust for the purposes which the ATO already states are reasonable.	The circumstances surrounding why a beneficiary chose not to call for payment of their present entitlement depends on the facts. New Green zone: scenario 3A of the final Guideline sets out criteria where we do not require further information in accepting that an arrangement is low risk. We limited the range of beneficiaries in Green zone: scenario 3A as a broader range of beneficiaries would involve additional criteria to delineate what is low risk, which would increase the complexity of the scenario.

Issue number	Issue raised	ATO response
18	The requirement that where the beneficiary is an individual that either they or their spouse is a trustee or controls the trust is inappropriate and should be replaced with the requirement that the beneficiary must simply be part of the family as outlined in section 272-95 of Schedule 2F.	We disagree. Green zone: scenario 3 of the final Guideline sets out criteria where we do not require further information in accepting that an arrangement is low risk. Where an individual does not control a trust, is not the spouse of the controller or is not employed in the management of the business, we may require further information to ascertain the level of risk in respect of a beneficiary's unpaid entitlement. This Guideline does not prevent trustees distributing to other beneficiaries and borrowing funds from those beneficiaries. The narrowness of the green zone reflects that we would need to make further enquiries to assess the risk.
Control of the corporate beneficiary		
19	Point 3 of paragraph 20 of the draft Guideline refers to a trust being controlled by an individual and/or their spouse. Point 4 of the same paragraph refers to a company being controlled by the individual (but not their spouse). For consistency, the corporate beneficiary should also be able to be one that is controlled by the spouse of the controller of the trust.	Green zone: scenario 3B of the final Guideline has been expanded to state that the beneficiary will satisfy the requirements for making a distribution to a company if either it is within the family group for the purposes of Schedule 2F or if it is controlled by either the person who controls the trust or the spouse of that person.
Clarification of the meaning of key terms		
20	The following terms used in the draft Guideline should be defined: • control • 'use of funds' in relation to indirect benefits • working capital • investment assets • maintaining' an investment asset • active business • associate.	We are conscious about keeping the Guideline as simple as possible. With this in mind, we consider that defining terms that are generally understood in the community would increase complexity. We have removed some terms from the final Guideline and for others have defined those terms within the Guideline where they are not generally understood and aid in applying the Guideline. In addition, the term 'associate' has been replaced in the final Guideline with the concept of a 'family group' as used in Schedule 2F. We considered this appropriate since many trustees and tax practitioners should be familiar with the provisions in Schedule 2F in managing their tax compliance obligations.

Issue number	Issue raised	ATO response
Further clarity sought for 'use of funds' condition		
21	In many cases, a trustee may retain and hold funds representing a trust distribution in a reserve fund for working capital or for the acquisition of investment assets, and so on. It would be useful for the ATO to clarify whether or not holding funds in this way, for a period of time, would satisfy the 'uses the funds' aspect of paragraph 21 of the draft Guideline.	The reference to holding the funds in the 'trustee working capital condition' is intended to cover a trustee retaining funds for future use for working capital or acquiring investments.
22	Scenario 3 of the draft Guideline is too restrictive in the requirement that an individual be employed in the management of a business that the trustee conducts.	Scenario 3A of the final Guideline allows an individual to meet alternative criteria. Scenario 3A, concerns trustees retaining funds in respect of the trust entitlements of particular individuals, covers both trusts carrying on a business and trusts that undertake investment activities. This is explained in paragraph 25(c) of the final Guideline. Where an individual beneficiary is not in the scope of scenario 3A, further information may be required in considering any section 100A risk.
Satisfying debt and the 'use of funds' condition		
23	Do the following repayment of debt scenarios satisfy the use of funds condition: - the use of funds to pay off a debt used to finance investments - the use of funds to pay off debt to an associate; it is uncertain from the associate's perspective whether they have benefited from the use of funds or merely replaced one asset (loan receivable) with another (cash) - the use of funds to repay intra-group loans to simplify loan arrangements of a group	Under Green zone: scenario 2 of the final Guideline, a beneficiary will meet the requirements of receiving and using their present entitlement to trust income where the funds are used to repay debt of the beneficiary. See paragraph 23(b) of the final Guideline. Under the 'trustee working capital condition' in scenario 3 of the final Guideline, and subject to the other requirements in scenarios 3A and 3B of the final Guideline being satisfied, the green zone may apply to a trustee that uses funds to repay debt in the course of carrying on a business or repay debt used to acquire, maintain or improve investment assets.

Issue number	Issue raised	ATO response
	the use of funds to repay a loan owed to another beneficiary or to pay an outstanding unpaid present entitlement (UPE) (that is, where it could be said that the loan or UPE was previously retained for working capital or investment purposes)?	
Amber zone instead of blue zone		
24	It would be more practical if the ATO used amber as opposed to blue as the medium level of risk. This would be consistent with the approach used in PCG 2021/4.	The blue zone was not intended to convey a level of risk as being between the green and red zones. The intention was to convey that the Guideline did not assess the level of risk. To provide a better user experience, the final Guideline no longer includes the blue zone. Instead, the green zone has been expanded to cover a greater range of scenarios and the red zone is more clearly defined.
Further clarity sought for ‘trustee exercising a power’		
25	In relation to paragraph 26 of the draft Guideline, what is meant by ‘trustee exercising a power’ and if the trustee exercises a power of re-characterisation of income, is this problematical?	The statement in the Guideline refers to a trustee that exercises a power or discretion concerning the computation of distributable income where the exercise of power causes a difference between trust law income and taxable net income in circumstances where a smaller difference would otherwise have arisen had the power not been exercised. The exclusion from the green zone reflects that we may need further information to ascertain whether there is a risk that section 100A applies. Taxpayer Alerts TA 2013/1 <i>Arrangements to exploit mismatches between trust and taxable income</i> and TA 2016/12 <i>Trust income reduction arrangements</i> contain examples of where trustee powers have been exercised to create differences. The Federal Court in <i>BBlood</i> found that section 100A applied to a reimbursement agreement that involved a difference between trust law income and taxable net income – the difference was facilitated by an amendment made in the trust deed.
The need for there to be a reimbursement agreement should be clear		
26	Certain exclusionary factors should only apply (gift or disclaimer and so on) if made under a reimbursement agreement.	Paragraph 2 of the final Guideline makes it clear that its purpose is to set out our compliance approach to manage risk. At paragraph 10(c) of the final Guideline, we have included an overt statement that there is no reimbursement agreement where there was no

Issue number	Issue raised	ATO response
		agreement, arrangement or understanding to provide the benefit at the time the beneficiary became presently entitled. We accept the legal basis for excluding benefits that are not provided under a reimbursement agreement. We have made this clear in TR 2022/4. We have concerns about how, other than as a restatement of law, this can be converted into a risk filter suitable and easy to apply in the Guideline.
Clarification sought on meaning of unpaid present entitlement 'converted into a loan'		
27	What does '[t]he beneficiary makes a gift of their trust entitlement or an associated amount receivable from the trust (for example, if the UPE was converted into a loan)' mean? It would be useful for the ATO to clarify this point.	We have updated the exclusion from the green zone in the final Guideline to make it clear that it is a gift of the funds received in satisfaction of the beneficiary's present entitlement to trust income or payment of funds by the trustee such as where the payment concerns the trustee repaying a debt to the beneficiary where the debt is the result of converting the beneficiary's entitlement into a loan.
Set-offs should be within the green zone		
28	Paragraph 26 of the draft Guideline states that arrangements involving dividends and set-offs by corporate beneficiaries are not considered green-zone arrangements because the source of the funds that satisfies the beneficiary's entitlement can be traced back to the beneficiary. This funding method is common practice and in many cases is the only way in which taxpayers can fund the repayment of their Division 7A loan. Such arrangements (with no additional features such as the individual beneficiary not enjoying the economic benefit associated with the trust distribution) should be considered green-zone arrangements.	The green zone is concerned with behaviours where we do not require further information in ascertaining that there is a low risk of section 100A applying. The Guideline does not create a blanket exclusion from the green zone for transactions involving the set-off of obligations between parties (including between a trustee and beneficiary). Green zone: scenario 2 of the final Guideline states that a beneficiary will have received and used their entitlement where a beneficiary's trust entitlement is used to repay a liability of the beneficiary. While the scenario does not specifically mention set-offs, where a beneficiary borrows money from the trustee and the beneficiary uses its subsequent trust entitlement to repay that liability by way of set-off, this would be within the scope of the beneficiary benefiting from its trust entitlement in scenario 2. This is in contrast to an exception to the green zone concerning beneficiaries making payments to trustees that are set-off against the beneficiaries' entitlements. Examples given include corporate beneficiaries paying dividends against the beneficiaries' trust entitlements or receipt of minimum yearly repayments. We recognise that arrangements such as this are not uncommon and pose a level of risk that will require a deeper understanding

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		(before we can be satisfied there is a low risk of section 100A applying) than would be required for examples within the green zone.
Unitisation of unpaid present entitlements for market value should be within the green zone		
29	It is considered that the risk factor identified by the ATO in relation to the unitisation of UPEs into units in a unit trust is inappropriate and should be either deleted or amended to refer to circumstances where the issue price of the units exceeds market value.	We disagree that this should be included in the green zone. The green zone is concerned with behaviours where we do not require further information in ascertaining that there is a low risk of section 100A applying. Market value alone is not determinative of whether or not an arrangement is entered in the course of an ordinary family or commercial dealing. Satisfying a trust entitlement through a set-off against paying a subscription for units in that trust will satisfy some of the basic elements of the definition of a reimbursement agreement and may mean we require further information to ascertain the risk concerning section 100A. Furthermore, market valuations can be imprecise and may require closer examination by us.
Inappropriate 'catch all'		
30	The last dot point in paragraph 26 of the draft Guideline (the arrangement involves one or more features that may be explicable by a tax avoidance purpose) appears to be a 'catch all' and should be replaced or updated to better reflect what should be excluded from the green zone.	We accept that this 'carve out' is broader than required and provides less certainty to taxpayers as to when an arrangement will be excluded from the green zone. We have updated paragraph 32 of the final Guideline with 3 more specific exclusions from the green-zone scenarios so that taxpayers and their representatives can understand the circumstances that will exclude an arrangement from the green zone.
Clarification of appropriate connector		
31	It is unclear whether the 2 dot points in paragraph 30 of the draft Guideline should be read with an 'and' or an 'or' separating them. We recommend amending paragraph 30 to insert the appropriate connector.	Paragraph 30 of the draft Guideline should have read as having the word 'and' between the 2 dot points. These dot points, which expressed common traits of the red-zone scenarios, have been omitted in the final Guideline. Paragraph 14 of the final Guideline includes a list of principles to guide you as to whether an arrangement may be lower or higher risk when it is not covered by the white, green or red-zone scenarios.

Issue number	Issue raised	ATO response
		Paragraph 27 of TR 2022/4 has a list of matters that may be relevant to whether the ordinary dealing exception in subsection 100A(13) applies. These matters are included in the red-zone scenarios in the final Guideline.
Clarification sought on whether the red zone is intended to be exhaustive		
32	The Guideline does not make it clear whether the red-zone scenarios are merely examples of situations that might fall within the red zone based on the general principles set out in paragraph 30 of the draft Guideline or whether these scenarios are intended to be exhaustive.	The scenarios described in the red zone are an exhaustive list. The principles that were previously described in paragraph 30 of the draft Guideline described common features of the scenarios which explained as to why these scenarios have a high risk where we would dedicate compliance resources. We will update the Guideline as further arrangements come to light.
Headings of the red zone scenarios too broad		
33	The headings to each of the red-zone scenarios might indicate a broader scope of the red zone than the specific circumstance outlined.	It is the description of the scenarios and not the headings which detail the arrangements that fall within the red zone. The headings are useful in drawing a reader's attention to the particular topic covered in a red-zone scenario with the text appearing under the heading providing the detail relevant to ascertaining whether an arrangement is in the red zone.
Clarification sought on 'gifting' entitlements		
34	In relation to a beneficiary 'gifting' their entitlement to another beneficiary, could this extend to the trustee, whereby the beneficiary 'gifts' their UPE to the trust that conferred the entitlement, or to another trust?	Red zone: scenario 1 of the final Guideline describes a fact pattern consistent with Taxpayer Alert TA 2022/1 <i>Parents benefitting from the trust entitlements of their children over 18 years of age</i> . In relation to beneficiaries more generally gifting their entitlements, paragraph 32 of the final Guideline excludes this from the green zone which reflects the need to make further enquiries to assess the risk.
35	Does the ATO consider asset protection as a reasonable and ordinary family reason to gift UPEs to a trust? Where this is a one-off transaction, rather than an ongoing arrangement, will the ATO consider this to be an ordinary family dealing?	Whether an arrangement is an ordinary family or commercial dealing depends on the facts of the case. Paragraphs 25 to 32 of TR 2022/4 provide our view of what is an ordinary family or commercial dealing. The circumstances surrounding why a beneficiary chose to gift or loan an amount to another party depends on the facts of the case. It is not appropriate for the Guideline to set a bright line test of this nature. We acknowledge that there are circumstances in which an arrangement undertaken for asset protection can be an ordinary dealing. We have

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		concerns about how, other than as a restatement of law, this can be converted into a risk filter suitable and easy to apply in the Guideline.
Clarification on the distinction between volunteering assistance and being coerced		
36	A clearer distinction should be made between an adult child who volunteers financial assistance to their parents and a minor who is forced or coerced to agree to an arrangement at an age where they are not capable of doing so. The ATO should provide an example of an ordinary and uncoerced family dealing.	No amendments are proposed to the Guideline. Whether a beneficiary chose to volunteer financial assistance or was coerced into doing so depends on the facts and surrounding circumstances of the case. It is not appropriate for the Guideline to set a bright line test of this nature. We have concerns about how, other than as a restatement of law, this can be converted into a risk filter suitable and easy to apply in the Guideline. Refer to TA 2022/1 which outlines our concerns with arrangements where inappropriate tax outcomes are obtained by accessing the tax-free thresholds and lower marginal tax rates of family members.
Ordinary family dealings not addressed as low risk		
37	The reference to 'loan-back' arrangements of present entitlements owed to adult child beneficiaries either to the trustee or to parents implies that a level of commerciality should be adopted by members of a family group. It would be very unusual for families who use trust structures for asset protection, wealth creation and succession purposes to implement formal 'commercial' loan agreement terms between the trustee and a beneficiary.	We disagree. The Guideline does not require or imply that there be commerciality by members of a family group. Whether the family members have genuine asset protection, wealth creation or succession purposes depends on the facts of the case. It is not appropriate for the Guideline to provide an example that specifically describes every arrangement or variation thereof.
38	Clarify treatment where an adult child's UPE is used to repay a parent's credit entitlement.	We consider that such arrangements pose a level of risk and should be excluded from the green zone. The circumstances surrounding why the beneficiary chose to repay another beneficiary's credit entitlement depends on the facts of the case. Therefore, we would need to make further enquiries to assess the risk.

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A 'loan' does not disturb where the economic benefit of the entitlement rests		
39	Dot point 3 and 4 of paragraph 31 of the draft Guideline, to the extent that the economic benefit of a distribution remains with a beneficiary, the commentary in Red zone: scenario 1 of the draft Guideline should be amended; that is, remove reference to loan on the basis that the beneficiary's entitlement to the economic benefits of the distribution are not disturbed by the trust (or the beneficiary for that matter) lending the funds to another party.	We disagree. Subsection 100A(10) explicitly includes a 'loan' within the definition of a 'payment of money' per subsection 100A(7). Example 15 of the final Guideline concerns non-resident parents being made presently entitled to franked dividends where the resident son retains the use of the funds and the entitlements remain unpaid or are converted into loans. We see arrangements where the entitlements appear to be motivated by the non-resident beneficiary's tax preferred status while providing the use of those funds to a resident. Many of these arrangements involve situations where the funds are used to acquire assets that are not liquid, which will likely impede the non-resident's ability to receive the funds.
Clarification that loans made to parents or caregivers that satisfy the 'use of funds' condition are not red zone		
40	It is argued that this red-zone scenario should read as follows: funds that represent the entitlement are made available to the parent or other caregiver of the beneficiary by way of loan or gift (unless it is a loan made by the trustee that satisfies the 'use of funds condition' described in paragraph 21(b)(iii) of this Guideline).	We agree. The final Guideline has been updated to make it clearer that the third point under Red zone: scenario 1 does not apply where Green zone: scenario 3A of the final Guideline is satisfied. In reflecting on the suggestion, we are mindful that Green zone: scenario 3A of the final Guideline may lead to some behavioural change whereby children are made controllers of a trust merely to satisfy the scenario. We will consider it high risk (and therefore not within the green zone) where giving children control of a trust is simply to cause Green zone: scenario 3A to be satisfied.
Clarification sought on the significance of non-resident beneficiaries in Red zone: scenario 1		
41	In Red zone: scenario 1 of the draft Guideline, it is noted that distributions to non-resident beneficiaries are singled out for special attention. It is unclear as to why arrangements involving distributions to non-resident beneficiaries should, in principle, be ranked as higher risk than arrangements involving distributions to resident beneficiaries. In this regard, it is noted that there would seem to be some potential overlap between this scenario and the retention of funds example in Green zone: scenario 3 of the draft Guideline.	The inclusion of non-resident beneficiaries reflects observations from our compliance activities where we see section 100A risks around non-resident relatives of resident controllers of a trust being made presently entitled to trust income, particularly amounts that are subject to withholding tax provisions or not subject to further tax due to income having a foreign source. Our concerns with appointing trust income to non-resident beneficiaries are reflected in Taxation Rulings IT 2344 <i>Income Tax : trust schemes with non-resident beneficiaries : assessing guidelines : determination of objections</i>

Issue number	Issue raised	ATO response
	Would green-zone status override red-zone status in these circumstances?	<i>: settlement guidelines and IT 2466 Income tax : trust distributions of group interest to non-resident beneficiaries : determination of objections.</i> We have updated Red zone: scenario 1 of the final Guideline to state that the non-resident beneficiary is a relative of the controller of the trust. This will significantly reduce any overlap between Green zone: scenario 3A and Red zone: scenario 1. While Green zone: scenario 3A of the final Guideline will generally take priority over Red zone: scenario 1 in respect of loans, we are monitoring behavioural change around increasing the number of individual controllers of a trust so that the arrangement may satisfy Green zone: scenario 3A.
Implications of unpaid present entitlements and unrelated loans		
42	Where part or all of the present entitlement remains unpaid and there is a separate transaction that has no direct connection to the initial transaction to loan funds to another beneficiary, will the ATO consider this as a red-zone arrangement?	Whether or not there is a section 100A risk depends on the facts and circumstances. For the set of facts described here, it is not apparent that the arrangement falls within the red zone. Note that, the detailed information reflected in the question is generally not known by the ATO at the outset of a compliance review. In this type of scenario, subject to any additional facts or the application of any other scenarios in the Guideline, we may seek to ascertain: • why the beneficiary was made presently entitled • why that entitlement remains unpaid, and • whether there is a connection between the beneficiary's entitlement and the loan made by the trustee to another beneficiary, including the source of funds used by the trustee. We encourage taxpayers to maintain records that would readily enable these questions to be answered and that support the timely resolution of any compliance activities.
Factors other than marginal tax rate are relevant in determining whether a scenario is high risk		
43	Red zone: scenario 1 of the Guideline should consider factors other than the marginal tax rates of the individual family members involved in the arrangement when considering if an arrangement is high risk or low risk and therefore be excluded from the red zone. For example, the	While these matters can be relevant when ascertaining risks concerning section 100A on a case-by-case basis, we have concerns about how these factors can be converted into a risk filter that are suitable and easy to apply in the Guideline.

Issue number	Issue raised	ATO response
	assets and debts of the individuals involved may better explain why a family member lends or gifts amounts to another.	We would encourage taxpayers to maintain records such as these to support their position and resolve compliance activity we undertake in a timely manner.
Clarification of Red zone: scenario 2 and whether 100% of the income needs to circulate		
44	Does the following arrangement satisfy the criteria for Red zone: scenario 2 of the Guideline, noting that particular private groups prefer to have corporate beneficiaries wholly owned by the trusts that distribute to those beneficiaries as a cost saving? The arrangement involves an operating company that pays franked dividends each year to a discretionary trust, that discretionary trust appoints the franked dividend from the operating company to a corporate beneficiary wholly owned by the trust, a loan agreement is entered into between the trust and corporate beneficiary, the minimum yearly repayments are funded by franked dividends paid by the corporate beneficiary back to the trust, with the franked dividends paid by the corporate beneficiary then appointed to individuals.	The arrangement that is described does not satisfy all of the criteria of Red zone: scenario 2 of the Guideline. In particular, we have now made it clear at paragraph 36(e) of the final Guideline that the trust income to which the corporate beneficiary is entitled to in year 2 includes an amount attributed to the dividend paid by the corporate beneficiary in year 2. The arrangement cannot satisfy the green-zone scenario in respect of the corporate beneficiary's entitlement to trust income. With the minimum yearly repayments from the trustee to the corporate beneficiary set off against the franked dividend paid by the corporate beneficiary, the green-zone exclusion at paragraph 32(e) of the final Guideline applies. Where we see a company made presently entitled to income in consecutive years and that company's trust entitlement or minimum yearly repayments being satisfied by way of set-off against dividends paid by the company, it poses the question as to why the company is made presently entitled since the subsequent dividend may suggest that the company has no need for the funds from the trust to which it was made entitled.
45	The wording in the sixth dot point in paragraph 33 of the draft Guideline provides that to fall into Red zone: scenario 2, the trust need only appoint some of the subsequent year's income to the company and that might or might not include the franked dividend from the company. This captures scenarios that are genuinely not 'washing-machine' activity. Accordingly, a better application of compliance resources will be if the Guideline provides an exclusion from Red zone: scenario 2 that reflects a genuine absence of washing-machine activity.	Red zone: scenario 2 in the final Guideline has clarified that the income entitlement of the corporate beneficiary is required to include an amount that is referable to the dividend paid by that corporate beneficiary in the same income year. The red-zone scenario will not be satisfied where a different beneficiary is entitled to the income attributed to the franked dividend paid by the corporate beneficiary to the trustee.

Issue number	Issue raised	ATO response
Unintended consequences under paragraph 37 for managed investment trusts		
46	Paragraph 37 of the draft Guideline is worded too broadly and should be reconsidered. As it stands, the paragraph is capable of applying to fixed unit trusts with 1,000 unrelated investors that are managed investment schemes. The ATO should consider how Red zone: scenario 3 of the draft Guideline would apply to Collective Corporate Investment Vehicles (CCIVs) and consider treating this as low risk given CCIVs are highly regulated and would generally only be used in commercial dealings.	We have updated Red zone: scenario 3 of the final Guideline so it only applies in respect of units issued by a closely held trust as defined in section 102UC.
Consistency needed between this Guideline and TA 2016/12 relating to trust income reduction arrangements		
47	The statement in paragraph 40 of the draft Guideline should be expanded to be consistent with TA 2016/12, which covers similar trust income reduction arrangements. TA 2016/12 states that the ATO is not concerned where the differences result from amounts not traditionally regarded as trust income (for example, capital gains) or are as a result of proper accounting. The final Guideline should adopt these same exclusions from Red zone: scenario 4.	We disagree. We do not accept that arrangements involving a deliberate mismatch between the income of the trust estate and the trust net income pose a level of risk below the red zone. We have released 2 Taxpayer Alerts concerning differences between trust law income and taxable net income of trusts, being TA 2013/1 and TA 2016/12. TA 2013/1 was concerned with differences explained by capital gains, while TA 2016/12 concerned trustees undertaking steps to create differences. The red-zone scenario considers that section 100A risks can arise in respect of differences attributed to ordinary concepts as well as re-characterising income into capital. The facts in <i>BBlood</i> involve a difference between trust law income and taxable net income attributed to share buy-back proceeds that are treated as a franked dividend for tax law purposes. The share buy-back proceeds are likely to be a capital receipt under ordinary concepts for most trusts.
Clarification sought on what actions constitute contrivance		
48	It would be helpful if the ATO provided further guidance on what it considered to be 'contrivance'. Is this merely where the income of the trust differs due to the tax income of the	We have replaced the reference to 'contrivance' in the final Guideline and instead outlined that Red zone: scenario 4 covers actions that affect the computation of trust distributable income in such a way that it is directed at

Issue number	Issue raised	ATO response
	trust (except for franking credits)? There are a multitude of reasons (other than franking credits) why there may be a difference between accounting and taxable income.	causing it to be different from the trust net income. It could involve amending a trust deed, a trustee determining what is income and capital of the trust, and a choice to undertake a transaction or arrangement in order to create a difference.
Red zone: scenario 5 is drafted too broadly and needs clarification		
49	The criteria adopted in Red zone: scenario 5 in paragraph 42 of the draft Guideline is too broad as it would capture almost all distributions from a trust to any beneficiary with revenue or capital losses.	We agree. We have updated Red zone: scenario 5 of the final Guideline to make it clearer that this scenario does not apply to beneficiaries who are members of the same family group as the distributing trust. Furthermore, updated Red zone: scenario 5 does not apply where a green-zone scenario applies to a loss beneficiary's entitlement.
50	Paragraph 42 of the draft Guideline should be explained more clearly. In particular, what is meant by the economic benefit associated with trust net income being utilised by an entity other than the beneficiary should be expanded upon?	We have removed the word 'economic' from the comparable paragraph 46 of the final Guideline. This paragraph is concerned with someone else having use of the funds to which the loss beneficiary is presently entitled.
51	Clarify treatment where loss beneficiary uses funds to repay loans taken out originally to fund losses and whether it depends on if the lender is a related party or not.	Under Green zone: scenario 2 of the final Guideline, a beneficiary will meet the requirements of receiving and using their present entitlement to trust income where the funds are used to repay debt of the beneficiary.
Examples cross-referenced with TR 2022/4		
52	We recommend that the examples in the Guideline should be reworked so examples in draft Taxation Ruling TR 2022/D1 <i>Income tax: section 100A reimbursement agreements</i> , where section 100A might or would apply, are also used in the Guideline and other examples are at least cross referenced.	The final Guideline complements, and should be read together with, TR 2022/4, which sets out the ATO's interpretative position on the application of section 100A. It is not considered necessary to duplicate content across the 2 documents. The examples in the final Guideline illustrate scenarios which explain our risk framework for which we determine whether to dedicate compliance resources. Given the risk focus, the examples in the Guideline intentionally do not deal with whether or not section 100A applies in the scenarios.

Issue number	Issue raised	ATO response
Examples should include the counterfactual		
53	The examples in the draft Guideline should be expanded to explicitly state the relevant counterfactual that would result in a greater amount of tax being paid.	We disagree. The purpose of this Guideline is to explain how we differentiate risk and how we manage that risk through our compliance approach to section 100A. The relevance of a counterfactual is addressed in TR 2022/4.
Clarification sought for the background facts		
54	The background facts in paragraph 52 of the draft Guideline are relevant to Examples 2 to 6 of the draft Guideline. The Guideline should be re-drafted so that this is made clear at the beginning of each example.	The decision to limit the background facts was to simplify the draft Guideline by avoiding unnecessary repetition. We have updated the final Guideline to outline the facts within each separate example.
55	The background facts should also clarify whether Good Pty Ltd is a base rate entity paying the 25% company tax rate. For the reader, this has a bearing on ATO thinking about whether there is any tax avoidance purpose (vis-à-vis the 30% rate payable by a 'passive' investment company).	Whether Good Pty Ltd pays tax at 25% or 30% is not a material consideration with respect to the risk of section 100A applying in the examples. We note that <i>BBlood</i> concerned an arrangement that had a tax rate of about 30% (where franked dividends were included in the assessable income of a corporate beneficiary in the year ended 30 June 2014).
Examples should redirect the reader back to the features of the zones to which they relate		
56	Cross-references should direct the reader to the paragraphs containing the 'features described in the red zone' (paragraph 58 of the draft Guideline).	Where relevant, the conclusions in the examples direct readers to specific features or indicate that the arrangement does not have any features described in the particular zone.
Nature of the businesses change in examples when other facts essentially the same		
57	The nature of the business carried on in Examples 2 to 6 of the draft Guideline varies from example to example (homewares, florist, newsagent), notwithstanding the other background facts remain basically the same. It is unclear why this variation in facts is necessary.	The nature of the business is purely for illustration purposes. It is not an indicator of risk for the given set of facts in those examples.
Relevant examples should address flow through treatment of franking tax offset entitlements		
58	For completeness, given that Example 3 of the draft Guideline involves investment in (presumably Australian Securities Exchange) 'listed shares', reference by way of a	While we recognise that the scope of arrangements involving trust distributions are very broad, we consider that it is not practical to provide examples that specifically describes every arrangement or variation thereof.

Issue number	Issue raised	ATO response
	footnote should be made to the flow-through treatment of any franking tax offset entitlements to the presently entitled beneficiaries.	We consider that the examples in the final Guideline are sufficient to assist taxpayers in understanding the application of our risk framework.
Example 4 – fails to address the risks associated with running small businesses		
59	Example 4 of the draft Guideline does not canvas the inherent riskiness of running a small business (that is, there may be insufficient funds to pay the UPEs).	Example 12 of the final Guideline demonstrates an instance in which a green-zone scenario is satisfied. Taxpayers should consider whether their business structure will support them to best meet their needs and personal circumstances. In the event that the trustee has insufficient funds to satisfy the UPE and instead used a dividend payment from the corporate beneficiary to service the UPE, this will take an arrangement outside of the green-zone scenario. Further information may be required to ascertain the risk of section 100A applying.
Example 6 – not commercially realistic		
60	Example 6 of the draft Guideline is odd in that, for a government funded under-graduate place at an Australian university, there is little incentive to pay fees while undertaking study, except to obtain the 10% HECS-HELP up-front discount. The lack of incentive might motivate the trustee to retain part of the \$18,000 as a UPE. The Example should clarify that the source of the funding to pay the university or tuition fees of an adult beneficiary should not change the outcome and such arrangements should continue to be treated as low risk; for example, the beneficiary sources the funds to meet the cost of those fees either from a third-party deposit-taking institution or from their parents, then later directs the trust to repay the bank or their parents out of their trust entitlement. In either case, the source of the funds to meet the cost of the fees does not change the tax outcome.	The choice of expenditure described in that Example is for illustration purposes. While we recognise that the scope of arrangements involving trust distributions are very broad, we consider that it is not practical to provide examples that specifically describes every arrangement or variation thereof. We consider that the examples in the final Guideline to be sufficient to assist taxpayers in understanding the application of the risk framework.

Issue number	Issue raised	ATO response
Example 7 – adult children willingly and knowingly agreeing		
61	Example 7 of the draft Guideline makes no mention of the involvement (if any) of Simon and Sam (both now adults) in the arrangement. Does the ATO acknowledge that these 2 beneficiaries could, willingly and knowingly, agree to this arrangement based on the view within the family that it is appropriate for their parent (Bronwyn) to be reimbursed for the challenges she endured (perhaps as a single parent though this is unclear from the example) to send her children to what is assumed are expensive private schools? Would such engagement with Simon and Sam alter ATO thinking?	A dealing is not an ordinary family dealing merely because all the parties to the dealing are family members. While we recognise that the scope of arrangements involving trust distributions are very broad, we consider that it is not practical to provide examples that specifically describes every arrangement or variation thereof. We consider that the examples in the final Guideline to be sufficient to assist taxpayers in understanding the application of the risk framework.
Example 8 – what is meant by lending their entitlements?		
62	In Example 8 of the draft Guideline, it is unclear what is meant by 'lending their entitlements'. How does this occur?	We have updated the final Guideline to clarify that it is lending the funds representing the entitlements.
Example 8 – a 'loan' does not disturb where the economic benefit of the entitlement rests		
63	Disagree with Example 8 of the draft Guideline, namely that as the economic benefit of the amounts distributed to Sylvia and Sylvester are retained as loans to their son. They are still legally able to call on those loans at any time and there should be no requirement to charge interest on a loan within a family group.	We disagree. Subsection 100A(10) explicitly includes a 'loan' within the definition of a 'payment of money' per subsection (7). We would consider why Sylvia and Sylvester were made presently entitled when funds representing those entitlements flow in a different direction. Also refer to Issue 39 of this Compendium.
Residency in Example 8 should be made clear		
64	Example 8 of the draft Guideline assumes Thomas is a tax resident of Australia. This is relevant and should be made clear.	We agree. Example 15 of the final Guideline has been updated to clarify that the beneficiary is a resident of Australia.
The mischief within Example 9 should be made clear		
65	Further commentary should be included in Example 9 of the draft Guideline to explain the reason why it is in the red zone for section 100A purposes despite the fact it is a	There is no requirement to identify the specific amount of tax avoided. Thawley J in the decision in <i>BBlood</i> explains that '... section 100A does not operate by a mechanism which makes the identification of a specific amount

Issue number	Issue raised	ATO response
	reinvestment scenario similar to Example 11 of the draft Guideline (noting the Division 7A implications). The Example should be clearer as to what tax benefit is being achieved and why section 100A should apply given the apparent mischief involved.	of tax avoided a necessary component of identifying a 'tax avoidance' purpose.'
Example 9 – unitisation of UPEs for market value		
66	Reconsider whether investment in a related unit trust will be red zone if made at market value.	Arrangements involving market value consideration can still be reimbursement agreements where the focus is on the provision of the benefit under subsection 100A(7). For example, if an arrangement is intended to provide a benefit to a particular person and that person sought to disguise the benefit by transferring an asset to the presently entitled beneficiary for market value consideration, there is still the possibility the arrangement does not satisfy the ordinary dealing exception.
Example 9 – power to issue units not evidence of an agreement		
67	A trust deed granting the trustee power to issue units in satisfaction of a distribution is not evidence of an agreement. Would Example 9 of the draft Guideline not be categorised as red zone if the trust could only offset a UPE against the subscription for more units under a bilateral agreement with unitholders?	Example 16 of the final Guideline illustrates an arrangement being in Red zone: scenario 3. Noting the criteria for Red zone: scenario 3, a bilateral agreement for issuing units at market value would not satisfy that scenario.
Example 11 is unrealistic		
68	Consider Example 11 of the draft Guideline to be unrealistic in that it is highly unlikely for a controller of a trust to come across a previously unknown entity who coincidentally happens to have tax losses and proceeds to make distribution to that unknown entity. A more realistic example would involve a valid family trust election which would trigger Family Trust Distribution Tax in these circumstances.	We disagree that Example 18 of the final Guideline is not realistic (previously Example 11 of the draft Guideline). We continue to identify taxpayers that enter into arrangements as described in the example. It is considered realistic that a trustee may not make a family trust election where there is a potential negative tax consequence attributed to making an election.

Issue number	Issue raised	ATO response
Entitlement paid and used for beneficiary's benefit		
69	The draft Guideline does not state anywhere that the most basic case of funds being paid to the presently entitled beneficiary and used for their own benefit is a low-risk arrangement. This basic case should be expressly covered by a green zone to avoid all doubt.	Paragraph 2 of the draft Guideline stated that section 100A does not apply where no one else benefits under an arrangement. Paragraph 10(b) of the final Guideline replicates the same. Paragraph 14 of the final Guideline sets out matters that attracts our attention in dedicating compliance resources. The first matter mentioned is that someone else benefits.
Temporary retention of funds by the trustee		
70	The final Guideline should contain a green-zone example that involves a temporary retention of funds only (for example, where the distributions are paid out by lodgment day of the trust's tax return).	New Green zone: scenario 2 of the final Guideline has been added to cover situations where there is a time lag of up to 2 years for the trustee to pay out the beneficiary's entitlement.
Entitlement paid and used for tax deductible purpose		
71	Arrangements entered into involving the distribution of trust income followed by a tax-deductible contribution to a complying superannuation fund or a charity should be considered as ordinary tax planning arrangements and expressly noted to be within the green zone.	Paragraph 20 of the final Guideline includes Green zone: scenario 1, where beneficiaries make personal superannuation contributions, which is considered low risk.
Trust-to-trust distributions		
72	It is critical that the Guideline provides a green zone for what are acceptable distributions to loss trusts, covering cases involving both a trustee retention of funds or no trustee retention of funds.	The final Guideline includes a new green-zone Example 13 for situations where a loss trust or company beneficiary are presently entitled to trust income and those beneficiaries are members of the same family group (as defined in the tax law) as the distributing trust. Where there is a loss beneficiary, it must continue to be solvent, particularly if the loss beneficiary uses the trust entitlement to fund an equity distribution.
Testamentary trusts		
73	The Guideline should clarify 100A treatment for testamentary trusts. Arrangements involving life tenancies in testamentary trusts and estates will likely be caught by these sections of	The final Guideline includes a new green-zone Example 10 where there is a testamentary trust that is maintained for the benefit of an individual and the trustee reinvests income to which the individual is presently entitled.

Issue number	Issue raised	ATO response
	the draft Guideline, despite the fact that they are often not established with a tax reduction purpose.	Example 6 of TR 2022/4 also includes a testamentary trust example with the Guideline stating in Green zone: scenario 4 that any arrangement that is relevantly identical to an example in that Ruling, which concludes that the arrangement would likely be entered into in the course of ordinary family or commercial dealing.
Ordinary family or commercial dealings		
74	Additional examples of green-zone arrangements of ordinary family and commercial dealings should be added to the Guideline, including types of gifts and non-commercial loans that could be carved out of section 100A by virtue of the ordinary family and commercial dealings exception.	The final Guideline includes Green zone: scenario 3A, where arrangements in which a particular individual's trust entitlements are retained by the trustee and used for working capital without those entitlements being recognised as loans and placed on commercial terms. The final Guideline includes, in Green zone: scenario 4, those arrangements that are relevantly identical to Examples 6 to 10 in TR 2022/4², which conclude that the arrangement would likely be entered into in the course of ordinary family or commercial dealing. That Ruling does include examples concerning gifts and non-commercial loans. It is to be noted that it is not possible to provide examples covering all situations as there is a need to balance coverage with likelihood. Taxpayers with unique circumstances should engage with us if they require certainty regarding their arrangements.
Set-offs		
75	The Guideline should include an additional example which involves a trust satisfying its related-party liabilities through offset arrangements involving distribution entitlements. Despite its common occurrence, it is difficult to apply the Guideline in its current form in any certainty to this example, however, it is considered to be a low-risk scenario with no tax mischief which risks being categorised as a red zone, or, at best, a blue-zone arrangement.	Green zone: scenario 2 of the final Guideline states that a beneficiary will have received and used their entitlement where a beneficiary's trust entitlement is used to repay a liability of the beneficiary. While the scenario does not specifically mention set-offs, where a beneficiary borrows money from the trustee and the beneficiary uses its subsequent trust entitlement to repay that liability by way of set-off, this would be within the scope of the beneficiary benefiting from its trust entitlement in scenario 2. This is in contrast to an exception to the green zone concerning beneficiaries making payments to trustees that are set-off against the beneficiaries' entitlements. Examples given include corporate beneficiaries paying

² Refer to Examples 6, 7 and 8 (applying the facts in paragraph 143 only), 9 (excluding the facts in paragraph 147) and 10 (excluding the facts in paragraph 153) in Appendix 2 of TR 2022/4.

Issue number	Issue raised	ATO response
		dividends or subscribing for units in a trust which are set-off against the beneficiaries' trust entitlements. The underlying concern is that such set-off arrangements may not see the beneficiary being genuinely better off to the extent that the entitlement has been set-off against the payment. This underlying concern reflects why we may need further information in considering any section 100A risk.
Use of a bucket company		
76	The Guideline should include contrasting examples which cover the use of a 'bucket company' (private company beneficiary) which receives a trust distribution with the following alternative scenarios: • where the trust distribution is immediately paid to the company, and • where the trust distribution is not immediately paid to the bucket company but is put onto a Division 7A loan agreement so the trust can use the funds as working capital.	Paragraph 10 of the final Guideline outlines when section 100A will not apply to an arrangement. Examples 11 and 12 of the final Guideline outline arrangements where a trust distribution to a private company is not immediately paid and then loaned back to the trust.
Should provide examples of what are ordinary family or commercial dealings		
77	The ATO should provide examples of what does not come within section 100A because it is an ordinary family or commercial dealing.	TR 2022/4 outlines our view of what satisfies the ordinary family or commercial dealing exemption. Examples that illustrate the exemption are included in that Ruling. It is not considered necessary to duplicate content across into the Guideline. Further, the green-zone scenarios in the final Guideline illustrate arrangements that are low risk where there is a lesser likelihood of us applying compliance resources because they may be considered to be entered into in the course of ordinary family or commercial dealings.
Value judgments should not be included in the Guideline		
78	Value judgments underlying the concept of ordinary family or commercial dealing from TR 2022/D1 have flowed through to the draft Guideline. They should be removed or alternatively	We disagree that the Guideline includes value judgments. The Ruling outlines our interpretation of trust arrangements that meet the scope of an 'ordinary family or commercial dealing' and the final Guideline discusses our risk-based approach to those arrangements.

Issue number	Issue raised	ATO response
	should be transparent about the assumptions that are used when making determinations about family dealings.	We have historically maintained, in the Fact sheet and public forums, that the question of whether an arrangement was entered into in the course of ordinary family or commercial dealing will be assessed or determined on a case-by-case basis taking an objective view of all of the relevant facts and circumstances, and that merely because all parties to a dealing are family members will not suffice for the dealing to be considered part of an ordinarily family dealing.
What evidence is required for record keeping purposes?		
79	The ATO should clarify what evidence it requires that will be accepted in support of the taxpayer's position.	Paragraph 50 of the final Guideline has been updated to better describe the types of records that should be kept (where relevant). We have described the types of records that will support taxpayers to help resolve compliance activities in a timely manner.
Trust law versus tax law record keeping		
80	It is established trust law that the trustee has no obligations or trust duties to substantiate the use of trust distributions or for beneficiaries to be aware of their distribution entitlement. It follows that no such requirement is necessary for distributions to be considered to have been made for familial purposes and to come within the exemption for ordinary family (or commercial) dealings.	This Guideline recognises that dealings between family members are typically conducted with a greater level of informality than dealings between unrelated parties The purpose of the Guideline is to explain our risk framework for which we determine whether to dedicate compliance resources. Within this context, the Guideline supports taxpayers to better understand the types of records that will support them to demonstrate that an arrangement is within the green zone.
Balancing the unlimited amendment period for section 100A with record-keeping requirements		
81	Given that section 100A has an unlimited amendment period, the ATO needs to consider providing guidance on record keeping obligations for the purposes of finalising the Guideline. For example, would the ATO expect financial statements, trust resolutions, bank statements, correspondence and so on to be kept to support a position?	It is noted that taxpayers would be required to keep records for the affairs of the trust, notwithstanding the record-keeping requirements for tax purposes. We encourage taxpayers to maintain adequate and relevant records to support their contentions. For further information on record keeping, refer to the final Guideline and web guidance.

Issue number	Issue raised	ATO response
Safe harbours should be included in the Guideline		
82	A safe harbour for distributions made to closely-related beneficiaries should be created to reduce the compliance costs of conforming with section 100A.	No amendments are proposed to the final Guideline. The Guideline sets out how the ATO differentiates compliance risk for a range of trust arrangements to which section 100A may apply by providing a risk assessment framework with examples of the arrangements that will attract our attention, identify those arrangements that are in a safe zone and when we will not seek to apply compliance resources. As section 100A is based on the individual facts and circumstances of a case, it does not lend itself to a bright line test resulting in a set safe harbour.
The Guideline should not be applied retrospectively		
83	It is imperative that the Guideline not be made retrospective.	Our standard approach is that the law applies from the date of effect of the legislation. Usually, we apply our view of the law from this date, and the general power of administration cannot be applied to accept non-compliance with the law. To allay concerns regarding this: • We have clearly articulated in this Guideline and public forums that the Fact sheet can be relied upon for entitlements arising before 1 July 2022. This will continue to be our position. • The view in the advice products does not represent a change in policy or interpretation and is consistent with how section 100A has been applied in compliance activities, private advice requests, objections and seminar presentations since 2014. We will also continue the practice of presenting new case typologies to the General Anti-Avoidance Rules (GAAR) panel before section 100A is applied to those typologies. We will consider what further governance processes are appropriate to ensure that section 100A is not applied inappropriately where a taxpayer's affairs are otherwise being considered outside the period of review or where a taxpayer claims that they have taken reasonable care in applying the Fact sheet to determine section 100A did not apply to their entitlement arising before 1 July 2022.

Issue number	Issue raised	ATO response
Section 100A assessments outside the ordinary amendment period		
84	The ATO ought to have an administrative practice of not issuing assessments pursuant to section 100A for periods outside of the ordinary amendment period unless there is fraud or evasion or egregious schemes seen in cases such as <i>Prestige Motors</i>.³ The Guideline should contain guidance as to when the ATO will use the unlimited amendment period. A suggested approach is within 4 years of lodgment except in most serious cases with fraud, evasion or blatant anti-avoidance.	We recognise that the application of section 100A, an anti-avoidance provision with an unlimited period of review, must not be applied without sufficient oversight. We will have administrative safeguards to ensure there is a consistent approach and the provision is not applied inappropriately. Also refer to our response to Issue 83 of this Compendium.
Meaning of ‘administrative position reflected’		
85	In terms of the date of effect, it is unclear what is meant by ‘the Commissioner will stand by any administrative position reflected in the Fact sheet’ as: - the examples and commentary in the Fact sheet were very fact and case specific - some examples only dealt with high-risk cases of section 100A - other examples included facts which (in most cases) would be different to an actual taxpayer's circumstances. To provide certainty, the reference to an arrangement reflected in an administrative position of the Fact sheet should be clearer.	The administrative position outlined in the Fact sheet applies to present entitlements to income of a trust estate arising before 1 July 2022. Where a trustee demonstrates to us that they have taken reasonable care in relying on the Fact sheet concerning why section 100A does not apply in respect of an entitlement arising before 1 July 2022, we will not dedicate compliance resources to consider section 100A. Also refer to our response to Issue 83 of this Compendium.

³ *Commissioner of Taxation v Prestige Motors Pty Ltd as Trustee of the Prestige Toyota Trust* [1998] FCA 221.

Issue number	Issue raised	ATO response
Language of date of effect		
86	The language of the date of effect in the Guideline should be consistent with the comparable paragraphs in TR 2022/D1.	The Ruling and Guideline both state that they apply before and after their date of issue. There are some differences in the wording in TR 2022/4 and this Guideline in relation to the date of effect as that Ruling is our view of how the tax laws apply, whereas the final Guideline sets out the risk assessment framework and our compliance approach to a range of trust arrangements to which section 100A may apply.
Second drafts should be released		
87	Second drafts of the ATO guidance should be published for further public consideration.	While the Guideline is being finalised without the release of a second draft, we circulated how we planned to respond to consultation feedback together with drafts of some specific proposed changes, including the additional examples to the professional bodies (and other key stakeholders) so that they could consult with their members on the proposed changes and provide us with feedback. Throughout the extended consultation period, we have sought and considered a wide range of feedback and we have taken it all into account in the final Guideline to promote certainty and provide transparency of our views to the community.
Voluntary disclosure regime		
88	There should be a voluntary disclosure regime for red-zone arrangements including full remission of penalties.	No amendments are proposed to the final Guideline. The imposition of penalties and interest will be considered on a case-by-case basis in line with our standard practices and procedures. We encourage taxpayers to inform us of mistakes by making a voluntary disclosure. If you make a voluntary disclosure, you can generally expect a reduction in the administrative penalties and interest charges that would normally apply. For more information, see Voluntary disclosures in the approved form.

Issue number	Issue raised	ATO response
Interaction between section 100A and other areas of the law		
89	The final Guideline should include guidance on the potential dual application between section 100A and: • Division 7A • the <i>Fringe Benefits Tax Assessment Act 1986</i> • CGT event C2 in section 104-25 of the <i>Income Tax Assessment Act 1997</i>.	Guidance on the interaction between section 100A and other areas of the law is outside the scope of this Guideline. However, we note that with respect to Division 7A, we have stated in paragraph 38 of TR 2022/4 that in the case of a corporate beneficiary, where the entitlement is taken by section 100A not to have arisen, there will be no entitlement which could be the subject of a loan to the trustee under section 109D. Division 7A in those circumstances would not operate in respect of the entitlement.
Application of the general anti-avoidance rules		
90	Most, if not all, of the arrangements identified in the draft section 100A guidance could be dealt with adequately and efficiently (positively or negatively) by the GAAR and other integrity measures introduced over the last 4 decades without resorting to section 100A.	We disagree. Section 100A is a specific integrity rule that applies to certain reimbursement arrangements and Part IVA is a GAAR that is applied as a provision of last resort. The application and operation of section 100A is not on 'all fours' with Part IVA so it cannot be said definitively that the GAAR will apply to most, if not all, arrangements to which section 100A would apply.
Further ATO guidance material sought		
91	Recommend that for this and any other major changes in ATO policy and interpretation, the ATO publish a simple to understand 'What has changed and Why?' flyer that accountants can send to their clients.	As a general proposition, we agree that where there is a change in our policy and interpretation, we should explain publicly what has changed and why. However, in this instance our view does not represent a change in policy or interpretation and is consistent with how section 100A has been applied in compliance cases, private rulings and objection decisions since at least 2014. Our view has also been publicised in seminar presentations since at least 2014. The advice products exist within a larger framework of administrative measures that have been used to promote certainty and confidence in the administration of the law. These include a Taxpayer Alert (TA 2022/1), web guidance, training and education. We partnered with the professional associations to run numerous information sessions on the draft Guideline when it was released in February 2022. A variety of virtual and face-to-face sessions were held, largely in a webinar, panel or Q&A style format. We also spoke at numerous professional body events about the advice products.

Issue number	Issue raised	ATO response
		On finalisation of the advice products, we will renew our focus on supporting the professional associations to educate practitioners to ensure they have a clear understanding of the final Guideline.
Guardian decision		
92	There is concern whether the release of these products at this time is premature given the recent Federal Court decision in <i>Guardian AIT Pty Ltd ATF Australian Investment Trust v Commissioner of Taxation</i> [2021] FCA 1619 (<i>Guardian</i>) in favour of the taxpayer and the subsequent ATO appeal to the Full Federal Court.	This Guideline communicates our assessment of risk in relation to tax law compliance issues and consequential resource allocation intentions. Hence, our preferred course was not to wait for the appeal decision to be handed down to finalise the Guideline as we want to provide certainty of our views to the community as soon as practicable. Paragraph 53 of TR 2022/4 acknowledges that the decision in <i>Guardian</i> is a current source of law that has been taken into account. TR 2022/4 includes a summary of the case and identifies where we maintain views being contested in the appeal of this decision as appropriate.
Explanation of internal decision-making procedures		
93	The Guideline should outline the internal ATO decision-making protocols which apply before a section 100A assessment is made. This is an area of ATO administration requiring the careful use of judgment by experienced, senior ATO officers and should be reviewed by the GAAR panel.	No amendments are proposed to the final Guideline. Where we form the view that a present entitlement to trust income arose from a reimbursement agreement, the case team supported by a relevant technical branch, will follow the due decision-making process before an assessment (or amended assessment) can be issued. Since 2017, we have had a practice that where a new section 100A case fact pattern is identified, it is presented at a special sitting of the GAAR panel for their consideration and guidance. Since then, section 100A has not been applied unless the case satisfied a typology that had been presented to the GAAR panel. We will continue this practice of seeking GAAR panel oversight on a fact pattern basis. We have adequate internal processes and review mechanisms to effectively understand when cases might not be covered by existing GAAR advice. We will work on giving sufficient visibility to the market on new and emerging trends that we identify as a concern. We appreciate that the application of section 100A, an anti-avoidance provision with an unlimited period of review, must not be applied without sufficient oversight.

Issue number	Issue raised	ATO response
		We will consider what further governance processes are appropriate to ensure that section 100A is not applied inappropriately where a taxpayer's affairs are otherwise being considered outside the period of review or where a taxpayer claims that they have taken reasonable care in applying the Fact sheet to determine section 100A did not apply to their entitlement arising before 1 July 2022.
Availability and resources for test case funding		
94	Paragraph 6 of the draft Guideline should address the availability of ATO test case funding and link to relevant resources.	Taxpayers and their advisors that wish to find more information about the availability and criteria for test case funding should refer to the Test Case Litigation Program page on our website.
Need for there to be evidence of an agreement		
95	The Guideline should acknowledge a requirement for there to be substantive evidence of a pre-existing agreement in order to enliven the provision. It would not be reasonable for taxpayers to bear the burden of proving that there was no relevant agreement.	We disagree. No amendments are proposed to the final Guideline. This Guideline should be read in conjunction with TR 2022/4, which sets out our interpretative position on the application of section 100A. An agreement may be inferred from the surrounding circumstances or the conduct of the parties. Where a present entitlement arises from an agreement or a payment or application of trust income resulting from an agreement, naturally, the relevant agreement must be in existence at the time when the present entitlement arises, payment is made or funds applied. However, that existence can also be established by evidence of the conduct of the parties before and after that time.