Section 100A and tax purpose

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The view that tax purpose limits the extent of the "ordinary family and commercial dealing" exclusion from the meaning of "reimbursement agreement" in s 100A of the *Income Tax Assessment Act 1936* is central to the views expressed in TR 2022/D1. This view is claimed to be supported by past case law. But a disciplined analysis of the exact words of s 100A in the context of the approach to statutory interpretation prescribed by the High Court, and past case law, raises serious questions over the correctness of this approach in TR 2022/D1. Instead, the words of s 100A (and the context provided by those words) support a meaning of "ordinary family and commercial dealing" directed to the objective characteristics of the steps and actions taken under a reimbursement agreement — without regard to purpose. This approach is particularly relevant to "ordinary family dealing" where, unlike commercial dealing, it is ordinary for steps and actions to be taken, with characteristics reflecting long-term cooperation with other family members and a lack of self-interest.

Introduction

In TR 2022/D1, issued on 23 February 2022, the ATO acknowledges an "alternative view" (the second acknowledged) in Appendix 3, headed "Tax avoidance not relevant to ordinary dealing exception".

Predictably but disappointingly,[1] the ATO dismisses that alternative view without a proper consideration of the issues.

The ATO introducing that alternative view as "tax avoidance" is unhelpful, when the view is simply that:

- under the principles of statutory interpretation set out consistently by the High Court, the meaning of "ordinary family dealing" should be ascertained from the words, and context provided by those words, in s 100A of the *Income Tax Assessment Act 1936* (Cth) (ITAA36); and
- those words, and that context, do not support that the "ordinary family dealing" exclusion in s 100A should be read down by reference to tax purpose.

The meaning of ordinary commercial (as well as family) dealing is equally affected but because commercial dealings can generally be expected to be conducted on a basis of self-interest, strong tax purposes tend to result in commercial dealings that are "non-ordinary" in other objective ways, even ignoring tax purpose. This has been the story of the historical case law dealing with s 100A.

Family dealings are far more complex. They are relationship-based, not transactional. Consequently, they are long-term and, by their nature, are not self-interested in the same way as commercial dealings. Tax purposes can very well co-exist with other family *purposes* and *actions* that do not follow self-interest, and which may seem "non-ordinary" if tax purpose is the primary measure. Hence, the tax purpose question is typically more acutely relevant to the ordinary family dealing exclusion.

This article seeks:

- to more fully explain the technical basis for the "alternative view" as previously raised in the paper by Alex Whitney and this author, "Trusts — 100A reimbursement agreements; identifying and reducing taxpayer risks", presented at The Tax Institute's Qld Tax Forum in May 2021 (May 2021 paper); and accordingly
- to question the ATO's approach as set out in its recently issued TR 2022/D1 and consequently in its associated PCG 2022/D1.[2]

It is not proposed here to deal with s 100A more widely, only this tax purpose question as it relates (mainly) to "ordinary family dealing".

The May 2021 paper can be reviewed for the author's views on other aspects of s 100A. Extracts from that May 2021 paper are used here only to help define the critical nature of the tax purpose question, and to explain the "alternative view".

When one considers the statements and examples used throughout TR 2022/D1 and PCG 2022/D1, it is submitted that this tax purpose question is the critical difference between how taxpayers see s 100A (and how s 100A has been applied for the past 40 years by the ATO) and the views now being advanced by the ATO.

With respect, the author understands the view about tax purpose in s 100A as advanced in this article to be narrower than that expressed by Logan J in *Guardian AIT Pty Ltd ATF Australian Investment Trust v FCT*.[3] As cited by the ATO (and later noted below), Logan J seemed to accept[4] the relevance of the history of the phrase "in the course of ordinary family or commercial dealing", as coming from *Newton v FCT*,[5] to s 100A.

Still, Logan J warned that:[6]

> "These observations are, with respect, helpful in terms of an understanding of the 'old arguments'. But the position remains that they are not a substitute for the text adopted by parliament."

Also, importantly, Logan J's comments on tax purpose were not strictly part of the *ratio* of the *Guardian AIT* decision, which the author understands to have been that there was no "agreement" as defined.[7]

In any case, the author expects the tax purpose issue to be very relevant in the appeal of *Guardian AIT*.

As in the May 2021 paper, even if others take different views of the relevance of tax purpose to the meaning of ordinary family dealing, this article will have served a purpose if it contributes to a more detailed and disciplined analysis of the law, represented by the exact words of s 100A, relating to that critical issue. Only on that basis will taxpayers and the ATO achieve greater certainty of the effect, and practical implications, of s 100A.

Aspects of an "agreement" generally

It assists the discussion that follows to first reflect that any "agreement" can be referred to by way of different features of the agreement:

- a **purpose** — which might be said to set the *direction* of the agreement, what it aims to achieve (where there may be multiple such aims);
- the **steps or actions** prescribed (or provided for) under the agreement — which might be described as the *journey*; and
- an **outcome or effect** (from the steps/actions) — which should (if all goes well) accord with the purpose (but where there may be multiple outcomes to match multiple purposes), and which might be described as the *destination(s)*.

A journey can have its own features independent of the underlying direction or the destination. It is logically possible that a journey could be the focus of a test of "ordinariness", without being always controlled or defined by the direction set or the destination reached. Such an approach may be deliberately adopted to test the desired "ordinariness" of the actions or steps in an objective way, while deliberately excluding questions of purpose or effect.

When s 100A(13) refers to the exclusion from an agreement (and therefore exclusion from a reimbursement agreement) of family or commercial dealings which have a certain "ordinary" nature, it is legitimate to question what aspect of the subject agreement is being tested for its "ordinariness".

In short, this article seeks to highlight that:

- s 260 ITAA36,[8] to which *Newton's* case[9] related, was a provision directed to the *purpose* or *effect* of an agreement,
- while s 100A is a provision directed to the *steps or actions* prescribed under an agreement.

This is a significant difference to which, in the author's view, insufficient express attention has been directed to date. But this difference is submitted to have been implicitly accepted in the past. It explains why s 100A has been administered in a far less controversial manner for the last 40 years, before the ATO has sought to test how the section could be made to apply more widely, with its 2014 guidance and following examples.

By starting from the assumption that the meaning of "ordinary family dealings" derives from *Newton's* case, admittedly based on certain observations (but only observations) in the case law,[10] the ATO in TR 2022/D1 (and indeed the discussion generally with taxpayers and advisers) has tended to focus on what is ordinary within that "purpose or effect" context derived from *Newton*.

The ATO states that "a dealing is not ordinary family or commercial dealing merely because it is commonplace or involves no artificiality".[11] Aside from the noteworthy narrowing of "ordinary" adopted here by the ATO (by discarding any requirement of artificiality for something to *not* be ordinary), the particular view of ordinariness developed from this point further in TR 2022/D1 is "trapped" in its insistence that the meaning comes from *Newton*.

This is evident, for example, in para 27,[12] which states that "to be in the course of ordinary dealing, the transactions between family members and their entities must be capable of explanation as achieving normal or regular familial or commercial ends". Ends means outcome or effect, as directed by a pre-existing purpose.

Where exactly does this "purpose or effect" context come from in s 100A?

As explained below, the words of s 100A(7) that cause agreements to be reimbursement agreements are about the steps or actions under the subject agreement. They are not about purpose or effect. The context of the words "ordinary family or commercial dealing" in s 100A is in relation to such reimbursement agreements involving steps or actions, where they are used to identify the exclusion of (such reimbursement) agreements "entered into *in the course of* ordinary family or commercial dealing" (emphasis added).[13]

This is a significantly different context to one using "ordinary family or commercial dealing" to identify agreements entered into for a purpose or which have a particular purpose or effect.

Attention is directed to different aspects of an agreement by the different contexts.

It is submitted that s 100A can operate perfectly well (and correctly, as it has for 40 years) on this "steps or actions" basis, achieving its statutory purpose (and only that purpose) as was intended by parliament.

Wishing to maintain a focus on the correct legal interpretation of s 100A, this article does not seek to engage with the history of s 100A, from which a reader can obtain a sense of the purpose of s 100A, in a wider non-statutory interpretation sense.

The author would refer readers to the historical summary included in Michael Butler's excellent 2019 article, "Section 100A: when is a dealing between members of a family not in the course of ordinary family dealing?", presented at The Tax Institute's 2019 National Convention, which provided a comprehensive review of the history of the provision.

Words and structure of s 100A: relevance of tax purpose

We must start with the text of the section itself.

The key "operative" provision is s 100A(1), which deems a beneficiary to not be presently entitled to income of a trust estate where that entitlement arises out of a "reimbursement agreement". That section is quoted below:

> "(1) Where:
>
> (a) apart from this section, a beneficiary of a trust estate who is not under any legal disability is presently entitled to a share of the income of the trust estate; and
>
> (b) the present entitlement of the beneficiary to that share or to a part of that share of the income of the trust estate (which share or part, as the case may be, is in this subsection referred to as the ***relevant trust income***) *arose out of a reimbursement agreement* or *arose by reason of* any act, transaction or circumstance that occurred in connection with, or as a result of, a reimbursement agreement;
>
> the beneficiary shall, for the purposes of this Act, *be deemed not to be, and never to have been, presently entitled to the relevant trust income*." (emphasis added)

If s 100A applies, the amount of income to which the beneficiary is deemed not to be entitled to is taxed to the trustee at the trustee taxation rates. There is no amendment period restriction on s 100A.[14]

The nexus between the present entitlement subject to potential adjusted treatment (from taxation to the beneficiary to the trustee) and a "reimbursement agreement" is provided by way of the words "arose out of" or "arose by reason of".

From the start, it can therefore be noted that s 100A does not test the act of distributing to the beneficiary, including for some tax avoidance purpose. Section 100A asks:

- whether there is a "reimbursement agreement", as defined; and then
- whether the present entitlement "arose out of" or "arose by reason of" that agreement (or any act, transaction or circumstance that occurred in connection with, or as a result of, the agreement).

(Section 100A(2) applies the same treatment as s 100A(1) to beneficiaries who have actually been paid amounts, or had amounts applied to their benefit from, the income of a trust estate. It is otherwise identical to s 100A(1).)

Section 100A(7) is the first of the key "interpretative" provisions in s 100A. That section is quoted below:

> "(7) Subject to subsection (8), a reference in this section, in relation to a beneficiary of a trust estate, to a *reimbursement agreement* shall be read as a reference to an agreement, whether entered into before or after the commencement of this section, that *provides for* the *payment of money or the transfer of property to, or the provision of services or other benefits for, a person or persons other than the beneficiary or the beneficiary and another person or other persons*." (emphasis added)

A "reimbursement agreement" therefore requires a payment of money, transfer of property, provision of services or other benefit to pass to a person other than the beneficiary that is presently entitled.

This is a very wide scope. Beneficiaries will always do these things — referred to as "actions or steps" in this article — in the normal course of consuming or otherwise directing the use of their trust entitlement. For example, even if a beneficiary receives their trust entitlement fully in cash, the beneficiary will make payments and transfers to other people as they spend that entitlement.

The key points from s 100A(1) and (7) are whether there is an "agreement", as defined:

- that provides for these things — the actions or steps; and
- out of which or by reason of which, the subject trust entitlement "arose".

Section 100A(8) modifies s 100A(7) to *exclude* agreements without a tax purpose. The section is quoted below:

> "(8) A reference in subsection (7) to an agreement shall be read as *not* including a reference to an agreement that was *not* entered into for the purpose, or for purposes that included the purpose, of securing that *a person who, if the agreement had not been entered into, would have been liable to pay income tax* in respect of a year of income would *not be liable to pay income tax* in respect of that year of income or would *be liable to pay less income tax* in respect of that year of income than that person would have been liable to pay if the agreement had not been entered into." (emphasis added)

That s 100A(8) must be read with s 100A(9), quoted below:

> "(9) For the purposes of subsection (8), an agreement shall be taken to have been entered into for a particular purpose, or for purposes that included a particular purpose, *if any of the parties to the agreement* entered into the agreement for that purpose, or for purposes that included that purpose, as the case may be." (emphasis added)

Therefore, a reimbursement agreement will not exist where the agreement was not entered into for the purpose (either sole or with other purposes) of reducing the income tax payable of a person.

The "person" does not have to be the beneficiary presently entitled, the person receiving benefits under s 100A(7) or any other specific person.

The s 100A(8) exclusion will not apply if any of the parties to the agreement had a tax reduction purpose.

The author's reading is that this must mean a subjective purpose because it relates to each individual, not the overall objective purpose or effect of the agreement or a scheme. This can be contrasted with the determination of objective purpose required under Pt IVA ITAA36.

It may be arguable that it is one or more of the parties to the agreement who must have the requisite purpose (rather than another person, such as a controller) but, due to the wide definition of agreement, this distinction may only be academic.

In summary, the author's understanding is that there is stated in s 100A a "non-tax purpose" exclusion, but it is a very narrow exclusion — narrower than a lack of an objective tax-related purpose.

With respect, the author understands this to be a narrower view of exclusions under s 100A(8) and (9) than provided by the process followed by Logan J in *Guardian AIT*.[15] (The author would be happy to be proved wrong on this point.)

The sole mention of tax purpose in s 100A is in this *exclusion* under s 100A(8) and (9) — as a reference to the *lack* of tax purpose. On the words of s 100A, tax purpose does not cause inclusion of any "agreements", as defined.

Section 100A(13) is, in the author's view, the critical subsection to consider in detail, because it:

- sets out a very wide meaning of an "agreement" — which causes the concept of "reimbursement agreement" to be very wide; and then
- contains what are the substantive exclusions from (that otherwise very wide scope of) "reimbursement agreement".

Section 100A(13) defines agreement to be:

> "… any *agreement, arrangement or understanding*, whether formal or informal, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings, *but does not include* an agreement, arrangement or understanding *entered into in the course of ordinary family or commercial dealing*." (emphasis added)

This subsection gives the basis of the "ordinary family dealing" or "ordinary commercial dealing" exceptions to s 100A.

There is fundamental disagreement between taxpayers and the ATO about the interpretation of the ordinary family dealing exclusion, mainly over how much of the meaning of the term "ordinary family dealing" in s 100A can properly be drawn from *Newton's* case[16] (from which the wording appears to have been derived).[17]

Key observations from the wording for the relevance of tax purpose

The focus of s 100A is not purpose — tax or otherwise — and the exclusions from what is a reimbursement agreement must be given effect.

The focus of the section is whether there is a reimbursement agreement, as objectively defined, and whether the stated exclusions from that concept apply — not whether the act of distributing the trust income in a particular way has a tax purpose.

The concept of "reimbursement agreement" relates to objectively stated actions or steps that may be taken by any beneficiary in the ordinary course of consuming or directing the use of their entitlement.

Tax purpose — or, more correctly, the lack of it — arises in connection with s 100A only as a very limited exclusion from such a reimbursement agreement.

The exclusions that substantively prevent s 100A from applying to all of those circumstances in which a beneficiary ordinarily consumes or directs the use of their entitlement are the ordinary family or commercial dealing exclusions from the meaning of "agreement".

It is acknowledged that those exclusions are directed to agreements:

- **entered into** — which directs attention to the beginning of an agreement, at which point purpose *could* be a focus; and
- **in the course of** — which is used in contrast to the wording in s 260 ("so far as it has or purports to have the purpose or effect"). It does not direct a consideration of purpose but that the agreements to be excluded must be part of a wider context of ordinary family or commercial dealing.

In the overall context of the words of s 100A and, specifically, of reimbursement agreements as defined, it is submitted the "in the course of" context would usually be that of ongoing family relations in a typical family that shares and "collectively consumes" family resources over time.

On the words, tax purpose is not a part of the exclusions for ordinary family or commercial dealing. Without more, the words do *not* require that:

- a *presence* of tax purpose should limit the scope of these ordinary family or commercial dealing exclusions — thereby expanding the scope of s 100A; or
- an *absence* of tax purpose should expand the scope of these ordinary family or commercial dealing exclusions — thereby reducing the scope of s 100A.

Those ordinary family or commercial dealing exclusions operate to limit an agreement, arrangement or understanding "that provides for" the objectively stated actions or steps which would otherwise be included within the meaning of a "reimbursement agreement".

Accordingly, when applying the concept of ordinary family or commercial dealing in s 100A, it is submitted that the context requires the exclusion (from a reimbursement agreement) of an agreement, arrangement or understanding the steps or actions of which have the objective characteristics of being entered into in the course of family or commercial dealings that are "ordinary" in the way a

beneficiary takes actions or steps to consume or direct the use of their entitlement — those actions being what define a "reimbursement agreement".

Tax purpose is not relevant to this exclusion on the words unless some extra meaning of "ordinary family dealing" is to be imported onto s 100A from elsewhere. Otherwise, on the words of s 100A, tax purpose is relevant only as a (limited and separate) exclusion.

Of course, such an importation of meaning is what the ATO advances in TR 2022/D1.

TR 2022/D1: a tax avoidance section and a composite phrase

TR 2022/D1 includes many references to s 100A being an "anti-avoidance provision" (7 times) and to tax avoidance generally (14 times).

The anti-avoidance nature of s 100A is elevated by the ATO to be the relevant statutory context for the phrase "ordinary family or commercial dealing":[18]

> "78. Statutory context is relevant. Section 100A is an income tax anti-avoidance provision. As observed in the leading judgment of Hill and Sackville JJ in *Prestige Motors* [footnote 44]*:*
>
> > The wording of the exclusion in s 100A(13) derives from the judgment of Lord Denning, on behalf of the Privy Council, in *Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1, at 8. There his Lordship, in discussing s 260 of the ITAA, contrasted an arrangement implemented in a particular way to avoid tax with 'transactions that are capable of explanation by reference to ordinary business or family dealing'.
>
> 79. The essential feature of ordinary family or commercial dealing is that it is ordinary. Consistent with the approach of the Court in *Newton*, dealing is ordinary where a person can examine the acts and predicate that they can be explained by the familial and/or commercial objects they are apt to achieve without further explanation. [footnote 45] This predication test is an evaluative standard that requires an examination of the facts and circumstances of each case. It is the test by which the composite phrase 'ordinary family or commercial dealing' is interpreted in the statutory context in which it appears (an anti-avoidance provision). This test cannot be substituted with an approach that classifies transactions by reference to a dictionary meaning or synonym for the word 'ordinary' separate from statutory context. Dealing is not ordinary just because it is commonplace. [footnote 46] Similarly, dealing can fail to be ordinary dealing even where it is not artificial. [footnote 47]"

The footnotes are also relevant to understanding the ATO approach:

> "44 [*FCT v Prestige Motors Pty Ltd as Trustee of the Prestige Toyota Trust*], at [221–222], per Hill and Sackville JJ, Beaumont J agreeing. That the Parliament had deliberately chosen to use the phrase 'ordinary family or commercial dealing' in the text of subsection 100A(13) following *Newton* has been more recently confirmed in *Guardian* at [137–138], per Logan J.
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> 45 In the formulation in *Newton*, without further explanation was 'without necessarily being labelled as a means to avoid tax'. See the following passages from *Newton:*
>
> > Their Lordships are of opinion that the word 'arrangement' is apt to describe something less than a binding contract or agreement, something in the nature of an understanding between two or more persons — a plan arranged between them which may not be enforceable at law. But it must in this section comprehend, not only the initial plan, but also all the transactions by which it is carried into effect — all the transactions, that is, which have the effect of avoiding taxation, be they conveyances, transfers or anything else. …
> >
> > Applying these principles to the present case, the first question is — Was there an arrangement? The answer is 'Yes'. The whole complicated series of transactions must have been the result of a concerted plan; and the nature of the plan is to be ascertained by the overt acts done in pursuance of it.
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> 46 Gibbs CJ in *Commissioner of Taxation (Cth) v Gulland* [1985] HCA 83 (*Gulland)* observed that the phrase adopted by the Privy Council in Newton was intended to '… refer to what was normal or regular, rather than to what had become common or prevalent' and was made 'by way of contrast to the words "without necessarily being labelled as a means to avoid tax" …'.
>
> 47 In our view, the observations of Logan J in *Guardian* at [144–5] are illustrative of a type of dealing that is not ordinary family or commercial dealing; and are not strictly contrary to the view that there may be other categories of dealing which similarly cannot be so classified."

In this way, the ATO seeks to import the tax avoidance purpose as relevant to limiting the exclusion represented by "ordinary family dealing" in s 100A.

Further understanding of the ATO thinking can be drawn from the specific comments made in Appendix 3 in rejecting the alternative view.

Only there[19] (far removed from the ATO's earlier reference, per para 78 cited above, to comments made by Hill and Sackville JJ about *Newton*) does the ATO acknowledge the warning included in the immediately following paragraph in *Prestige Motors*:

> "There is a danger that, when words used in a judgment are translated into the legislation, the change of context may alter the meaning of the words from that which they originally bore."

The ATO also chooses to omit the end of the same paragraph which states that tax purpose was *not* the basis of the decision in *Prestige Motors*.

For this reason, it is useful to cite the full paragraph:[20]

> "*There is a danger that, when words used in a judgment are translated into the legislation, the change of context may alter the meaning of the words from that which they originally bore.* It is clear from both the judgment of the Privy Council and from the language of the High Court on the same case (*Federal Commissioner of Taxation v Newton* (1957) 96 CLR 578) that s 260 was regarded as involving a dichotomy. A transaction was either stamped as one entered into to avoid tax or as one about which it could be predicted that it was entered into in the course of ordinary family or commercial dealing. In the former case the transaction was caught by s 260; in the latter case it was outside the section. *We do not need to decide in the present case whether s 100A imports a similar dichotomy. In particular we do not need to decide whether if an agreement is shown to have been 'entered into in the course of ordinary commercial dealing', the operation of s 100A is spent, regardless of whether the commercial purpose was subsidiary to the purpose of tax avoidance. In our view, none of the transactions was entered into in the course of ordinary commercial dealing.*" (emphasis added)

The ATO tries to "reintroduce"[21] tax purpose as the basis for the decision in *Prestige Motors* to support rejecting the alternative view, that tax purpose is not relevant to the meaning of "ordinary family or commercial dealing".

But if Hill and Sackville JJ are to be taken to mean what they said, they did not decide *Prestige Motors* based on tax purpose. No such statement appears in the judgment. It is not possible to reconcile the statement by Hill and Sackville JJ that they did *not* need to decide on the dichotomy point, with a *ratio* of the decision based on rejecting commercial "ordinariness" because of tax purpose, that is, if Hill and Sackville JJ (as the ATO incorrectly claims[22]) held tax avoidance purpose to be the reason that the commercial agreements were not ordinary.

Per para 167 of TR 2022/D1, tax motivations were noted but it was the design of certain steps and the lack of commercial justification for certain steps (that the steps existed at all, eg the raising of money from NMLA) that led to the conclusion "none of the transactions was entered into in the course of ordinary commercial dealing"[23] — not the tax purpose itself of those steps.

The last sentence of para 167 omits relevant comments and also appears to misquote from *Prestige Motors* in relation to the first (business purchase) arrangement. The correct full quote is:[24]

> "Mr Bloom did not suggest that there was any commercial motivation for the sale of the Business. In the circumstances, the sale can be seen as one element of a larger one-off transaction designed to avoid tax. It cannot be described as an agreement entered into in the course of ordinary commercial dealing."

The comments are about motivation and description of the agreement. They were deliberately (given the earlier comments about not needing to decide on the dichotomy) *not* framed in terms of tax purpose.

The comments by Hill and Sackville JJ are therefore properly understandable as a decision based on the objective characteristics of the (steps or actions of the) dealings (although the likely tax-related motivations were noted), where those characteristics were not regarded as "ordinary commercial dealing".

It is para 163 of TR 2022/D1 that most concisely summarises the ATO thinking against the alternative view:

> "163. We do not agree with the argument referred to in paragraph 162 of this Ruling. Section 100A is an income tax anti-avoidance provision and the composite phrase 'ordinary family or commercial dealing' derives from the judgment of Lord Denning in *Newton*. Section 260 was also an anti-avoidance provision and *Newton* reflected the contemporary meaning of ordinary family or commercial dealing as adopted by the Commonwealth Parliament in subsection 100A(13)."

In the following paragraphs in Appendix 3, the ATO then seeks to support its position by reference to various (s 260) cases — the very cases challenged by the alternative view as irrelevant.

> "... s 100A is not a tax purpose-based section ... 'ordinary family (or commercial) dealing' is also not a tax purpose-based exclusion."

This para 163 can be regarded as identifying what is objectionable about the ATO reasoning:

- whether s 100A being an income tax anti-avoidance provision is a sufficient statutory context to influence how "ordinary family or commercial dealing" should be interpreted — different tax avoidance sections have different wording;
- why "ordinary family or commercial dealing" should be treated as having any special meaning "derived" from *Newton*, when the words, and context from those words, in s 100A do not require such a special meaning; and
- how it can be permissible for the ATO to claim to identify what was the meaning in the mind of parliament, as the claimed "contemporary meaning" of "ordinary family or commercial dealing", from anything other than the words of s 100A.

Statutory interpretation case law

General

The often-cited statement by the majority of Hayne, Heydon, Crennan and Kiefel JJ in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*[25] instructs how statues are to be interpreted:

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy."

The following comments by French CJ (who was not part of the majority cited above, but decided the case the same way as part of the plurality) from *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*[26] also reflect that same accepted general approach to interpreting a statute:

> "The starting point in consideration of the first question is the ordinary and grammatical sense of the statutory words to be interpreted having regard to their context and the legislative purpose. That proposition accords with the approach to construction characterised by Gaudron J in *Corporate Affairs Commission (NSW) v Yuill*[27] as:
>
> > ' … dictated by elementary considerations of fairness, for, after all, those who are subject to the law's commands are entitled to conduct themselves on the basis that those commands have meaning and effect according to ordinary grammar and usage.'
>
> In so saying, it must be accepted that context and legislative purpose will cast light upon the sense in which the words of the statute are to be read. Context is here used in a wide sense referable, inter alia, to the existing state of the law and the mischief which the statute was intended to remedy …"

It is useful to also understand from *Alcan (NT) Alumina* that, in rejecting the Commissioner of Territory Revenue's second argument — propounding a view of context in the "widest sense"[28] which was linked to an argument, accepted by the Court of Appeal, that the legislature would not have intended a reduction in revenue by certain past changes[29] — the majority warned that:[30]

> "Fixing upon the general legislative purpose of raising revenue carried with it the danger that the text did not receive the attention it deserves."

Further:[31]

> "There is nothing express in the text of relevant parts of the Act, as enacted, or in amendments made to the Act in 1979 or in 1987 which supports the Commissioner's contention, upheld in the Court of Appeal, that the definition of 'lease' in the legislation did not apply when dealing with a 'conveyance' of a lease. As can be seen from the extracts set out above, essentially the Court of Appeal's reasoning *was not based on the text, but on an inference that the text would not apply because it would be surprising if the legislature intended to sever from a lease something which contributed to its value on a conveyance*. However, in terms, the definition of 'lease' in the Act, as amended over time, was always capable of applying both to the grant of a lease and to the conveyance of a lease. Relevant amendments to the Act up to and including the 2000 amendments were all assessed by the Court of Appeal by reference to a generally ascertained intention to amend the legislation to increase the revenue rather than by reference to the express terms of the Act. *The effect of that approach is to impute erroneously a statutory intention which destroys the effect of a clearly expressed definition*." (emphasis added)

Finally, in response to an "other argument" by the Commissioner of Territory Revenue centred on the "purposive approach to statutory interpretation which has emerged and is now well settled",[32] the response of the majority was:[33]

> "Given the basis on which this appeal is to be allowed, it is not necessary to deal with these arguments beyond the making of two points. First, *tax statutes do not form a class of their own to which different rules of construction apply; they are to be construed by application of the settled principles referred to above*. Secondly, *the fact that a statute is a taxing Act, or contains penal provisions, is part of the context and is therefore relevant to the task of construing the Act in accordance with those settled principles*." (emphasis added)

It is very difficult, from the above, to see how the ATO's comments in para 163 of TR 2022/D1 (and elsewhere in TR 2022/D1) noted above are consistent with the High Court's instructions on the interpretation of (tax and other) statutes.

Why is the meaning of the phrase "ordinary family or commercial dealing" to be coloured by:

- the context of s 100A being an anti-avoidance section — when that seems a context, at the "widest level", similar to the approach rejected in *Alcan (NT) Alumina*;
- a meaning drawn from *Newton's* case, when that case is not even mentioned in the explanatory memorandum to the Bill that introduced s 100A and *Newton* dealt with a materially different section. The s 260 context of *Newton* was a section about purpose, where the (ordinariness) distinction was being drawn based on purpose. Section 100A is a section about reimbursement agreements — defined as being about how beneficiaries act to consume or direct the use of their entitlement — a completely different context. See the attempted representation in Diagrams 1 and 2; and
- a claimed "contemporary meaning" of "ordinary family or commercial dealing" had by parliament but not to be found in the words of s 100A?

Interpreting a specific term: Hunger Project Australia

The ATO's position of attributing a meaning to "ordinary family or commercial dealing" from sources outside s 100A

also seems in conflict with *FCT v Hunger Project Australia*,[34] a case where use of a specific term from one context was rejected when sought to be applied in another.

In that case, the relevant term was "public benevolent institution". Relevant extracted comments from the unanimous decision of Edmonds, Pagone and Wigney JJ in the Full Federal Court follow:

> "38. Whilst past judicial statements concerning the ordinary meaning of a word or expression can often assist in divining the meaning of the word or expression, the common understanding of the meaning of an expression may change over time depending on the particular expression in question. When the question is whether a particular institution is a public benevolent institution, the answer depends on *the common or ordinary understanding of the expression at the relevant time. The question is not to be approached as a legal question to be dealt with by the mechanical application of past authority, irrespective of the present current understanding of the expression in the currently spoken English language*: *Ambulance Service (NSW) v Deputy Commissioner of Taxation* (2002) 50 ATR 496 at [40]–[42] (*Ambulance Service*).
>
> …
>
> 41. As for the reliance on s 8(5) of the EDA Act [*Estate Duty Assessment Act 1914 – 1928* (Cth)], it is difficult to see how the terms of a different Act dealing with a different taxation regime can assist in divining the common or ordinary meaning of the expression public benevolent institution in the FBTA Act [*Fringe Benefits Tax Assessment Act 1986* (Cth)]. The fact that in 1928 the legislature chose to separately exempt from estate duty, inter alia, a 'public benevolent institution' and a 'fund established and maintained for providing money for the use of such institutions' does not mean that the common understanding of a public benevolent institution over eighty years later cannot include an institution that is primarily involved in fund raising.
>
> …
>
> 45. We should add that we do not consider that it is correct to approach the issue of the ordinary meaning or common understanding of an expression used in a statute as if the answer can necessarily be gleaned from the apparent intention of Parliament in the statute, or other statutes that may use the expression. As Allsop J, as his Honour then was, put it in *Ambulance Service* at [80], *the inquiry is not 'a legal question based on defined criteria or a question the answer to which is capable of being divined from the intention of Parliament in a statute, but, rather, to be part of an enquiry as to the meaning or usage of a phrase in the language, though one illuminated by legal authority*.'" (emphasis added)

This approach adopted by the Full Federal Court in *Hunger Project Australia* is consistent with the doubts expressed in *Prestige Motors* — that the meaning of "ordinary family or commercial dealing" in s 100A today cannot be drawn from *Newton's* case, with its tax purpose orientation derived from the "purpose or effect" context in s 260.

It is relevant to note that, in contrast to the legislation and phrase considered in *Hunger Project Australia*, s 260 was within the same Act as s 100A. But it is submitted that the different words of each section create as great a point of distinction as existed in *Hunger Project Australia* (even if sections in the one Act).

Also, while *Newton* was decided before the enactment of s 100A, the words "ordinary family or commercial dealing" are not the exact words used in *Newton* (they were "ordinary business or family dealing") *and* they appear "only" in the judgment and not in the legislation.

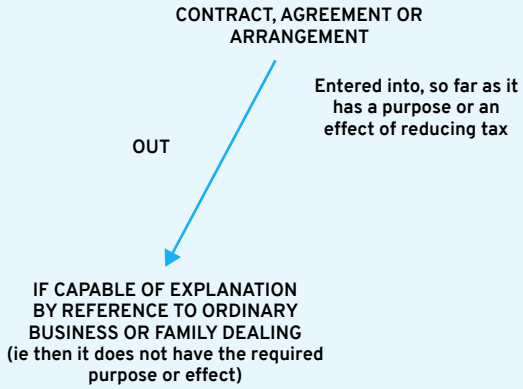
Based on *Hunger Project Australia*, the proper wording and context of "ordinary family and commercial dealing" in s 100A and the "present current understanding of the expression" (from para 38 as extracted above) must now be taken into account when applying the exclusions from reimbursement agreements based on that term.

Diagrammatic summary: s 260 versus s 100A contexts

Based on these principles of interpretation, it is submitted that the s 100A concept of excluding agreements entered into in the course of ordinary family or commercial dealing from the meaning of reimbursement agreements, as contrasted with the *Newton* s 260 based approach to ordinary business or family dealing, can be represented in Diagrams 1 and 2.

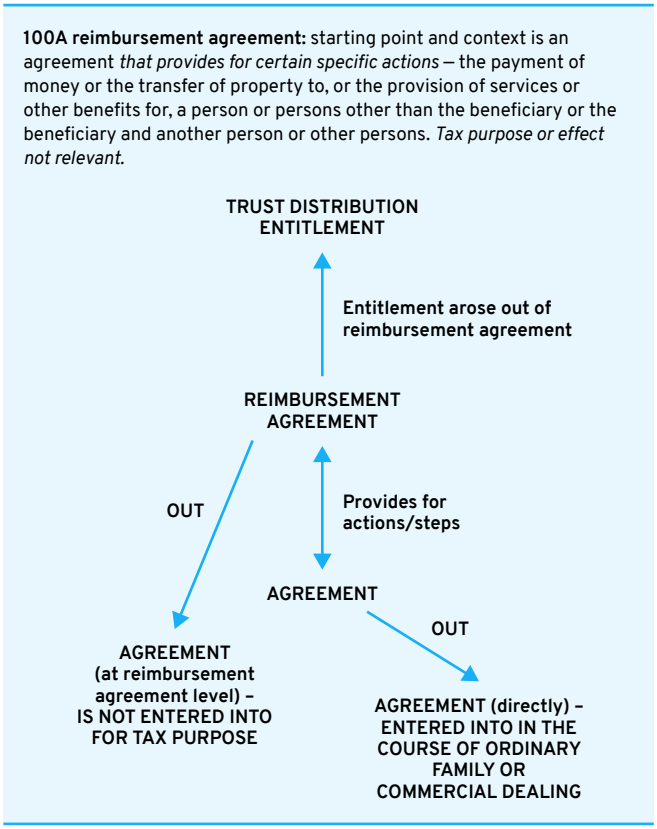
Diagram 1. Representation of s 260

Section 260: starting point and context is a contract, agreement or arrangement that has the purpose or effect of altering tax.[35]



(While not directly relevant to the point of this article, it is worth noting that Pt IVA is similarly a purpose-directed/based provision, structured to address schemes where "it would be concluded … [having regard to the specific objective matters] … that the person, or one or more persons, who *entered into or carried out* the scheme or any part of the scheme did so *for the purpose of*: [enabling a tax benefit]" (emphasis added).[36] Accordingly, s 100A continues to have a distinct scope of application, different from Pt IVA.)

Diagram 2. Representation of s 100A



Ordinary family or commercial dealing

So where does this leave s 100A in terms of tax purpose and "ordinary family dealing"?

A summary is sought to be made below.

Irrelevance of the Newton meaning of ordinary family (or commercial) dealing

As already noted above, discussion around ordinary family dealing and ordinary commercial dealing traditionally starts with *Newton's* case. However, it is submitted that *Newton's* case provides little *useful* guidance on how to interpret s 100A, despite arguably being the judicial origin of the expression "ordinary family dealing" or "ordinary commercial dealing".

Newton's case was based on s 260, which was concerned with voiding arrangements entered into to avoid taxation. As a starting point, it should be noted that the section involved in *Newton* (s 260) made no textual reference to ordinary family or business dealing.

Instead, ordinary family or business dealing was considered by the Privy Council in *Newton* in the context of the concept of "predication" – a concept which is no longer the core of the anti-avoidance rules (including s 100A). In *Newton*, the Privy Council considered that, for s 260, you must be able to predicate that the arrangement was for the purpose of avoiding tax, if it was "capable of explanation by reference to ordinary business or family dealing", then the arrangement was *not* predicated on the avoidance of tax, meaning s 260 could not apply.

This was a relevant dichotomy, when considering s 260, as a means to construe purpose or effect. If the arrangement could be explained as an ordinary family dealing, it was held not to be for the purpose of avoiding tax – where purpose or effect was the relevant issue in the Privy Council's consideration of s 260. The section included those "purpose or effect" (of reducing tax) words (but not any express "ordinary family or commercial dealing" exclusion) when identifying the contract, agreement or arrangement to which it applied.

The comments already noted above by Hill and Sackville JJ in *Prestige Motors* are a strong basis for hesitancy when seeking to rely on *Newton*. Those comments are repeated again below in full (different emphasis added):

> "*There is a danger that, when words used in a judgment are translated into the legislation, the change of context may alter the meaning of the words from that which they originally bore*. It is clear from both the judgment of the Privy Council and from the language of the High Court on the same case (*FCT v Newton* (1957) 96 CLR 578) that *s 260 was regarded as involving a dichotomy*. A transaction was either stamped as one entered into to avoid tax or as one about which it could be predicted that it was entered into in the course of ordinary family or commercial dealing. In the former case the transaction was caught by s 260; in the latter case it was outside the section. *We do not need to decide in the present case whether s 100A imports a similar dichotomy*. In particular we do not need to decide whether if an agreement is shown to have been 'entered into the course of ordinary commercial dealing', the operation of s 100A is spent, regardless of whether the commercial purpose was subsidiary to the purpose of tax avoidance. In our view, none of the transactions was entered into in the course of ordinary commercial dealing."

This is a very important paragraph in *Prestige Motors*. It starts by striking a note of caution that seeking to import the meaning of words used in the context of *Newton's* case into s 100A may lead to a misinterpretation – a prescient warning.

The paragraph then goes on to query whether s 100A imports the same dichotomy as s 260, ie the predication issue.

The justices in *Prestige Motors* explicitly refrained from ruling whether such a dichotomy existed. But the fact that the justices felt that they could determine that the dealings were not ordinary commercial dealings without ruling on this dichotomy is itself informative.

At the very least, it means that *Prestige Motors* is authority that finding a tax (avoidance) purpose is not necessary for the exclusion in s 100A(13) *not* to apply. The dealings under consideration can be found to *not* be "ordinary" on other bases.

Unfortunately, *Prestige Motors* left unanswered the question of whether a tax (avoidance) purpose can be a relevant consideration when determining whether an arrangement is (not) an ordinary family or commercial dealing.

Equally, *Prestige Motors* is certainty *not* authority that a tax (avoidance) purpose alone prevents a dealing from being an ordinary (family or) commercial dealing.

But, independently of *Prestige Motors*, the irrelevancy of the *Newton*-sourced meaning of "ordinary family or business dealing" (with its "purpose and effect" orientation) to an interpretation of the similar (but not identical) "ordinary family or commercial dealing" term in s 100A is supported (actively so — beyond the mere warning in *Prestige Motors*) by the statutory interpretation cases discussed earlier. From those cases:

- "the task of statutory construction must begin with a consideration of the text itself" — and the text of s 100A does not require (or allow) the introduction of a tax purpose element into the meaning of "ordinary family or commercial dealing". This is because to introduce that purpose element restricts the scope of the "ordinary family or commercial dealing" exclusion, so as to impermissibly expand the scope of s 100A on a basis not to be found in the text; and
- *Hunger Project Australia* (decided after *Prestige Motors*) is authority against the very thing warned against by Hill and Sackville JJ in *Prestige Motors* — the importation of the meaning of a term from a materially different statutory context. For s 100A, that is the importation of the meaning of "ordinary family and commercial dealing" from the s 260 context with its purpose-based dichotomy.

Finally, it is relevant to specifically note the dates of the case law discussed:

- *Prestige Motors* — 1998;
- *Alcan (NT) Alumina* — 2009 (before the ATO's 2014 examples); and
- *Hunger Project Australia* — June 2014 (again, before the ATO's initial July 2014 examples).

Characteristics (of steps or actions), not purpose

As discussed earlier in respect of *Prestige Motors*, from the comments in the judgment following the above (twice) cited extract, the basis on which the ordinary commercial dealing exclusion was held not to apply was the objectively "non-ordinary" commercial characteristics of the (steps or actions taken under the) whole of the arrangements.

It is submitted that this is the correct way to apply s 100A — that it is the characteristics of the actions or steps under an agreement relating to the consumption or use of a beneficiary's trust entitlement, not the purpose of the agreement or of distributing to the beneficiary, that determines whether there is an ordinary family or commercial dealing.

In the context of the definitions of "reimbursement agreement" and "agreement", the rules of statutory interpretation support that the exclusion for ordinary family (or commercial) dealing is directed to the "ordinariness" of the actions or steps to which attention is directed in the definition of "reimbursement agreement" — how beneficiaries consume or use their entitlements. There is no basis to insert tax purpose into that reasoning. The words of s 100A, and the context of those words, do not allow or require it.

In applying this view, weighing ordinary family dealings could perhaps come to be considered to be similar to weighing the nature of a deduction. It is the "essential character" of an expense that determines its nexus as incurred to derive income or in the course of carrying on a business, not the intention.

This analogy is raised because that principle makes the deduction provisions workable, consistent with the legislative text, without overstating the factual analysis needed to apply the tax law.

It is to be expected (and hoped) a similar workable approach, consistent with the legislative text of s 100A, would be sought and favoured by the courts.

(In the author's experience and view, the ATO's focus on tax purpose "overloads" the facts required to be considered to apply s 100A because the meaning of ordinary family dealing is taken by the ATO to be affected by virtually anything and everything — family relations, relative tax rates, relative family wealth etc. As a consequence, intrusive enquiries into private matters and formal interviews have been used, to date, by the ATO in seeking to apply its "tax purpose" based interpretation.)

The structure of the text in s 100A is relevant

The structure of s 100A is part of the context and is relevant to how the provision should be applied.

Of relevance here is the separation of tax avoidance purpose matters into a separate exclusion, that is, s 100A(8). This is a strong indication that a consideration of tax purpose is not part of interpreting "agreement" as defined in s 100A(13).

The author's reading of s 100A is that a consideration of whether an agreement has a tax avoidance purpose only occurs at the reimbursement agreement level, once it is satisfied that there is an "agreement" at all — as defined in s 100A(13) and reflected in Diagram 2 — which of course involves the (earlier) *separate exclusion* from "agreement" for ordinary family or commercial dealing. This reinforces that the consideration of tax purpose is a separate exercise to the consideration of ordinary family or commercial dealing.

This, in turn, supports that it is the characteristics of an agreement that determine whether the agreement was entered into in the course of an ordinary family dealing or ordinary commercial dealing, not the purpose of those dealings.

What characteristics are "ordinary" in family dealing?

The concept of ordinary family dealing requires further detailed thought, which this article does not attempt to fully address.

As opposed to ordinary commercial dealing, "ordinary family dealing" has had effectively no judicial consideration until recently with *Guardian AIT* — any other case where it could have been an issue was instead decided on other grounds.

But *Guardian AIT* was strictly decided on the agreement point — and the ATO is already seeking to limit the case to its facts. In any case, on the facts, and with respect, *Guardian AIT* did not (it did not need to) address the "ordinary family dealing" question as fully and directly as proposed by this article — in terms of definitively deciding whether "tax purpose" is relevant to that concept in s 100A.

In line with the comments in *Prestige Motors*, taxpayers seeking to rely on the ordinary family dealing exclusion should expect to have to convince the courts that the arrangements are in fact explainable as — have objective characteristics of — "ordinary" family dealing.

In attempting to discharge that onus, there are a number of further unanswered questions when it comes to ordinary family dealing which may have to be confronted, for example, whether "ordinary" suggests that it is an objective test on a "whole community" basis, or whether "ordinary" refers to what is ordinary for a specific family (ie whether it is a subjective test).

In the context of other areas of law, particularly in family or succession law, the courts have been willing to consider what value might be expected to be shared within families. For example, the development of family provision applications (by which a family member may seek a greater share of a deceased's estate) had its origin in a view that a parent had a natural obligation to make provision for their child or spouse.

The author queries whether, when considering what constitutes ordinary family dealing in the context of s 100A, the courts would cast back to these family or succession law principles.

The author ventures that an ordinary family dealing, in a modern context when it comes to individual family members' consumption or use of value or wealth, would include:

- for the "caretakers" of family wealth (typically parents) to be trusted to manage the family wealth for best possible return and use — conduct which is undertaken based on the very natural goal of seeking to maximise family wealth through prudent management to, among other things, ensure sufficient finances for future emergencies, care for family members who cannot finance their own care (due to age, illness or mental incapacity) or preserve value for successive generations of the family;
- for all family members to contribute to the family wealth as they choose — not just parents to children, but also adult children to parents/wider family; and
- for "unexpended" family wealth in any one year to be returned to/concentrated in a family trust, including possibly the family trust from which the trust entitlements originally flowed — as that trust structure, by which no one family member owns that wealth, may best provide (non-tax-based) protection against the risks of claims against any one family member.

Family members, including beneficiaries of family trusts, can naturally be expected to cooperate in these endeavours for the simple reason that families have long-term emotional connections. If a more mercenary view is required, family members do so because, by participating in this management, the family member can expect benefits to return to them if they require them in the future, due to illness or incapacity, or through intergenerational wealth transfer. Either way, joint management and consumption of their assets and income is what families do, in the ordinary (and non-artificial) course.

If a family cooperating to prudently preserve and deploy its wealth is ordinary, then the scenario where:

- a trustee makes a beneficiary presently entitled to income;
- that beneficiary unilaterally chooses not to call on that entitlement to be paid; and
- the beneficiary instead allows the value that entitlement represents to be satisfied by being used for family purposes,

should (in the author's view) be taken to be an ordinary family dealing.

It is also part of this family cooperation that family members often do not require a detailed accounting of their entitlements, as long as there is trust in the "caretakers" of the family wealth (typically parents).

Ideally, it is hoped that the courts interpret "ordinary family dealing" in s 100A as an objective concept by reference to a typical family.

The alternative, a subjective basis or one otherwise requiring evidence of what is ordinary for each individual family, would require families to detail and provide evidence of internal family dealings — which by their nature are intensely private matters (eg affected by illness, divorce, relationship issues etc) — in the public domain of the courts.

Referring back to the treatment of deductions where subjective purpose is sometimes considered where the objective nexus is not apparent, it may be that the courts will establish an objective concept by reference to a typical family but entertain specific and subjective evidence of what is ordinary in a particular family where the facts vary from that objective concept.

Conclusion

In an article published in 2010,[37] Peter Walmsley, Deputy Chief Tax Counsel of the ATO, addressed the matter of "ordinary family dealing" and Pt IVA. In that article, it was stated:[38]

> "The drafters of Pt IVA were faced with two principal difficulties:
>
> …
>
> However, the first, and the more important, was the necessity, in the context of general provisions, to *distinguish behaviour affected or indeed motivated, subjectively, by taxation considerations — which covers a lot of behaviour that is normal, expected and wholly inoffensive or even desirable — from artificial tax avoidance*. The distinction that they derived from the cases was that between ordinary commercial and family dealing and its opposite. But they were advised not to use the actual words 'ordinary commercial or family dealing' — wisely, in the author's opinion, as they are a little too vague and too subjective." (emphasis added)

Instead, in Pt IVA, the approach was adopted of setting out indicia or factors by which different kinds of dealing may be (objectively) distinguished:[39]

> "The end result remains the same: if the scheme does not 'bespeak *the purpose of tax avoidance*' (once again to use a phrase from the old case law), having regard to those factors, it is ordinary dealing *in the relevant sense*; and if it does, it is not." (emphasis added)

Section 100A represents an alternative approach to an anti-avoidance provision, that does not have as its primary mechanism (its relevant sense) a test of purpose.

Not all tax avoidance provisions need to primarily test purpose.

Rather, s 100A primarily tests the characteristics of the steps and actions under agreements, independent of their purpose. The meaning of "ordinary family and commercial dealing" in this context (in this relevant sense) does not draw its meaning from *Newton's* case, which was concerned with another tax purpose-directed/based provision (s 260).

There is nothing exceptional or "loose" that can be claimed to arise from such an operation of s 100A. As noted by Mr Walmsley, there is behaviour that may be affected or indeed motivated, subjectively, by taxation considerations — which covers a lot of behaviour that is normal, expected and wholly inoffensive or even desirable.

In particular, many normal family interactions/dealings will be affected or motivated to some extent by taxation considerations but can still be normal, expected and wholly inoffensive or even desirable.

By its words and structure, s 100A is not intended to apply to such family interactions/dealings.

Despite the fact that the apparent scope of s 100A is vast, by s 100A(7) including in the meaning of reimbursement agreement virtually all of the ways that a beneficiary may consume or direct application of their trust entitlement, some family dealings are deliberately removed from this vast scope by the "ordinary family dealing" exclusion from agreement in s 100A(13).

Just as s 100A is not a tax purpose-based section, the exclusion from s 100A based on "ordinary family (or commercial) dealing" is also not a tax purpose-based exclusion.

This was (and is) a deliberate design feature of the provision.

This article has sought to highlight and support this position.

The article questions the preconception that the meaning of "ordinary family and commercial dealing" can and must come from outside s 100A, from *Newton's* case.

As stated in the introduction, this article seeks to encourage a more detailed and disciplined analysis of the law as represented by the exact words of s 100A (free from current preconceptions). Only on that basis will taxpayers and the ATO achieve greater certainty of the effect, and practical implications, of s 100A.

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West Garbutt

References

1 Disappointingly because the ATO acknowledges that this alternative view has been "put to the Commissioner" in discussions, and an attempt to explain it has been made in a paper by Alex Whitney and the author, "Trusts — 100A reimbursement agreements; identifying and reducing taxpayer risks", presented at The Tax Institute's Qld Tax Forum on 27 to 28 May 2021. But the ATO has chosen, in its long-awaited draft ruling TR 2022/D1, not to fully explain and respond to that view. This article seeks to expand on the technical basis for the alternative view.

2 The ATO claims, as at para 47 of PCG 2022/D1, to have provided guidance on its "administrative position" on s 100A by examples published on its website since July 2014, available at www.ato.gov.au/law/view/document?DocID=SGM/trusttaxation. But those examples have been wholly unsupported by any publicly stated, detailed technical analysis until the issue of TR 2022/D1. The examples failed to even raise, much less comment on, various technical issues (including the "alternative view" the subject of this article) and pre-existing (in 2014) statutory interpretation case law. In the author's view, this raises a serious issue over whether those examples can be regarded as genuine guidance by the ATO.

3 [2021] FCA 1619.

4 [2021] FCA 1619 at [137] and [138].

5 (1958) 98 CLR 1.

6 [2021] FCA 1619 at [140].

7 [2021] FCA 1619 at [154]–[155], [173] and [174].

8 Section 260 started with: "(1) Every contract, agreement, or arrangement made or entered into, orally or in writing, whether before or after the commencement of this Act, shall *as far as it has or purports to have the purpose or effect* of in any way, direct or indirectly …" altering the incidence of income tax, relieving tax liability etc (emphasis added).

9 (1958) 98 CLR 1.

10 *FCT v Prestige Motors Pty Ltd as trustee of the Prestige Toyota Trust* 98 ATC 4241 at 4262, where reference is made by Hill and Sackville JJ to the "ordinary commercial dealing" exclusion wording being derived from Lord Denning in Newton's case.

11 Para 23 of TR 2022/D1.

12 Para 27 of TR 2022/D1.

13 S 100A(13), the meaning of which flows onto and must be read with s 100A(7).

14 S 170(10) ITAA36.

15 [2021] FCA 1619 at [158] ff.

16 (1958) 98 CLR 1.

17 *Prestige Motors Pty Ltd as trustee of the Prestige Toyota Trust* 98 ATC 4241 at 4262, where reference is made by Hill and Sackville JJ to the "ordinary commercial dealing" exclusion wording being derived from Lord Denning in Newton's case.

18 Paras 78 and 79 of TR 2022/D1.

19 Para 161 of TR 2022/D1.

20 *FCT v Prestige Motors Pty Ltd as trustee of the Prestige Toyota Trust* 98 ATC 4241 at 4262.

21 Para 167 of TR 2022/D1.

22 At the end of footnote 54 to para 93 of TR 2022/D1.

23 98 ATC 4241 at 4262.

24 *Prestige Motors* 98 ATC 4241 at 4262.

25 [2009] HCA 41 at [47].

26 [2009] HCA 41 at [4].

27 [1991] HCA 28.

28 [2009] HCA 41 at [44].

29 [2009] HCA 41 at [50].

30 [2009] HCA 41 at [51].

31 [2009] HCA 41 at [52].

32 [2009] HCA 41 at [56].

33 [2009] HCA 41 at [57].

34 [2014] FCAFC 69.

35 As noted earlier, s 260 started with: "(1) Every contract, agreement, or arrangement made or entered into, orally or in writing, whether before or after the commencement of this Act, shall *as far as it has or purports to have the purpose or effect* of in any way, direct or indirectly …" altering the incidence of income tax, relieving tax liability etc (emphasis added).

36 Section 177D(1) ITAA36.

37 P Walmsley, "Tax avoidance and succession planning: Pt IVA and ordinary family dealings", (2010) 14(2) *The Tax Specialist* 70. (The author is grateful to David Hughes for drawing his attention to this 2010 article by Mr Walmsley, when an earlier version of the current article was presented to the Tributum Club tax discussion group in Brisbane.)

38 Ibid at p 74.

39 Ibid at p 74.