Section 100A and trust reimbursement agreements: where are we at?

Mark West, Principal, West Garbutt

March 2023

Table of contents

1. The current ATO guidance

The current ATO guidance is TR 2022/4, together with an accompanying Practical Compliance Guideline **PCG 2022/2**.

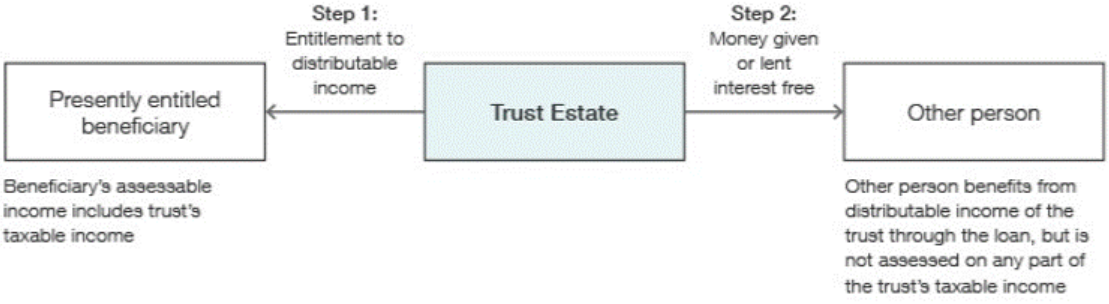
1.1 History

The history of the current ATO guidance on section 100A starts with the administrative position published on the ATO website in July 2014, titled "Trust taxation – reimbursement agreement" (https://www.ato.gov.au/law/view/document?DocID=SGM/trusttaxation) – still referred to at paragraph 54 of PCG 2022/2 (under Date of effect) on the basis that the ATO will "*stand by*" that 2014 administrative position if more favourable to a taxpayer's circumstances.

This a fairly meaningless concession. The July 2014 ATO guidance made general statements and did not state a reasoned legal basis for the ATO views. It was more in the nature of an "ambit claim".

Example 1 of that July 2014 guidance includes the following (emphasis added):

> *"Example 1 - trust estate*
>
> *The trustee of a trust estate makes a beneficiary entitled to trust income.*
>
> *Instead of paying the amount of trust income to the beneficiary, the trustee gives, or lends on interest-free terms, the money to another person. The other person benefits from the trust income but is not assessed on any part of it.*
>
> *The arrangement does not constitute ordinary commercial or family dealing.*
>
> *This arrangement would generally constitute a reimbursement agreement if it was intended that the beneficiary who was made presently entitled to the trust income pays a lower amount of tax than would have been payable by the person who actually enjoyed the economic benefits of that income."*



Consistent with the sense of this example, from 2014 the ATO's focus has been to seek to interpret section 100A by reference to tax purpose. (The other family dealing examples offered in 2014 were uncontroversial, being related to a trust established under will and to family lending at commercial terms.)

The ATO commenced audits on this basis, some of which are still ongoing.

But taxpayers had to wait until 23 February 2022 before the ATO was prepared to provide a public statement of the claimed *legal basis* for its views, by way of draft Taxation Ruling TR 2022/D1 and accompanying draft Practical Compliance Guideline **PCG 2022/D1**. This despite the ATO promising since October 2018 to provide such a draft ruling. The long history of the repeatedly deferred estimated dates for delivery of the draft ruling has since been (unhelpfully, for taxpayers) deleted from the ATO website.

During this time, taxpayers under audit also experienced delays with the issue of ATO position papers. When ultimately provided, such position papers were described as the "TCN approved view", in advance of the issue of TR 2022/D1.

We are aware of such audit position papers being issued in December 2020, a very long time after the July 2014 ATO guidance and also after numerous earlier promised dates for the draft ruling.

The long delay in the public issue of TR 2022/D1 is difficult to understand, when audits had already been commenced.

When finally issued, TR 2022/D1 sought to accommodate the ATO's views to the decision of Logan J. in *Guardian AIT Pty Ltd ATF Australian Investment Trust v Commissioner of Taxation* [2021] FCA 1619 (handed down on 21 December 2021) - but noted the decision was on appeal and, in parts, maintained alternative views.

TR2022/4 and PCG 2022/2, as issued on 8 December 2022, include material differences from TR 2022/D1 and PCG 2022/D1 – largely due to the ATO seeking to accommodate the decision of Thawley J. in *BBlood Enterprises Pty Ltd v Commissioner of Taxation* [2022] FCA 1112 (handed down 19 September 2022).

Not long after the issue of TR 2022/4, the Full Federal Court appeal in *Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust [2023] FCAFC 3* was handed down (on 24 January 2023). The ATO has yet to publicly acknowledge any differences in TR 2022/4 from the *Guardian* full court appeal decision.

All this history has been difficult for taxpayers under audit.

Where exactly do the ATO views sit now, per TR 2022/4?

1.2 TR 2022/4 – general approach

Paragraph 5 of TR 2022/4 sets out the ATO approach at the highest level. Fully extracted, that paragraph states (emphasis added);

> *"5. This Ruling provides the Commissioner's view about these arrangements and the 4 basic requirements for section 100A to apply, namely that:*
>
> - *The following 3 requirements are satisfied:*
>
> – '**Connection requirement**' – broadly stated, the present entitlement(or amount paid or applied for the benefit of the beneficiary) must have arisen out of, as a result of or in connection with a reimbursement agreement (being an **agreement, understanding or arrangement** that has the 3 qualities described in the following points in this paragraph).
>
> – '**Benefit to another requirement**' – the agreement must provide for the payment of money or transfer of property to, or provision of services or other benefits for, a person other than that beneficiary.
>
> – '**Tax reduction purpose requirement**' – a purpose of one or more of the parties to the agreement must be that a person would be liable to pay less income tax for a year of income.
>
> - *The '**ordinary dealing exception**' is n ot satisfied – the agreement must not be one that has been 'entered into in the course of ordinary family or commercial dealing'."*

More comment is made below (under ''Issues with the ATO guidance'') but, at this point, it can be noted that stating the structure of section 100A this way - particularly the characterisation by the ATO of tax purpose matters as relating to a

requirement rather than acknowledging the absence of tax purpose as an *exception* (just like the ordinary dealing exception) - does not accord with the words of section 100A.

The grouping in TR 2022/4 of the meaning of "agreement" with the "arose out of" requirement also tends to distract from the primacy, and starting point, of the existence of a "reimbursement agreement" under the structure of section 100A – *before* any consideration of the exceptions for no tax purpose and for ordinary dealing.

It is reasonable to expect that adherence to the *exact structure* and the *exact words* of section 100A would provide the most reliable guidance. Such re-grouping by the ATO in TR 2022/4 appears to be an attempt to elevate tax purpose.

1.3 Agreement

In paragraphs 66 to 70 of the Appendix 1 – Explanation part of TR 2022/4, the widest possible approach to the existence of an agreement is taken, relying sometimes on case law from section 260 and other provisions. There appears to be an intention to regard repeated cooperation, such as occurs within families, as constituting an agreement.

This is particularly evident from comments in paragraphs 69 and 70 (footnotes omitted) about such matters as tacit adoption, concerted action, an understanding over a period of time:

> *"69. Consistent with the approaches of the Courts where the meaning of the words agreement, arrangement or understanding have been otherwise considered:*
>
> *…*
>
> - *While an 'arrangement or understanding' must have been entered into consensually, the parties' acceptance or adoption may be tacit and it is not essential that they be committed or bound to support it. The arrangement may be both informal and unenforceable, and the parties may be free to withdraw from it or to act inconsistently with it, notwithstanding their adoption of it. An arrangement or understanding may lack formality and precision.*
>
> *70. An agreement could be:*
>
> - *informal concerted action by which 2 or more parties may arrange their affairs towards a purpose; an example in the particular context of section 100A would be an 'arrangement or understanding' that the beneficiary would act in accordance with the wishes of another person or group, or*
> - *an understanding that the parties will implement a series of steps undertaken individually or collectively by those parties over a period of time, or*
> - *the actual implementation of such a series of steps."*

Further, at paragraph 74 (footnotes omitted), emphasis on conduct before and after the time an entitlement arises seeks to extent what will constitute an agreement:

> *"74. Where a present entitlement arises from an agreement or a payment or application of trust income results from an agreement, naturally, the relevant agreement must be in existence at the time when the present entitlement arises or the payment is made or funds applied. However, the existence of*

that agreement might be established by evidence of the conduct of the parties before and after that time."

It is suggested the ATO will need to modify some of its comments[1] to allow for the *Guardian* appeal decision, in which it was held that a beneficiary must be a part of the agreement - where a payment to the beneficiary and accordingly some payment *by* the beneficiary is proposed as part of the agreement[2].

1.4 Connection requirement

The breadth of the ATO's view about a present entitlement arising from a reimbursement agreement is probably best summarised in paragraph 73 (footnotes omitted) (emphasis added):

> *"73. It is sufficient for there to be a connection between the reimbursement agreement and some other act, transaction or circumstance from which the entitlement has arisen. If the beneficiary's present entitlement or the payment or application of income to or for them was* ***one of the consequences of*** *any act, transaction or circumstance that occurred in 'connection with' or 'as a result of' the reimbursement agreement, this aspect of subsections 100A(1) or (2) would be satisfied. The existence of such a connection will depend on the facts of a particular case."*

Taxpayers should take care about the evidence they should retain and be able to present, in addressing the onus the ATO will demand be satisfied in respect of claims about what would have been distributed to the beneficiary absent any reimbursement agreement - per paragraph 76 (footnotes omitted):

> *"76. The taxpayer has the onus of establishing a reasonable expectation that the beneficiary would have been presently entitled to the original amount if the reimbursement agreement had not been entered into. A 'reasonable expectation' requires more than a possibility. It involves a prediction as to events which would have taken place if the reimbursement agreement had not been entered into. The prediction must be sufficiently reliable for it to be regarded as 'reasonable."*

1.5 Benefits to another

The wide scope of how a benefit may arise to someone other than the beneficiary is set out in paragraphs 79 and 80.

This includes (consistent with the *BBlood* decision, commented on below) that a reimbursement agreement does not need to involve a payment **to** – and so a "reimbursement" back **from** - a beneficiary.

> *"79. Subsection 100A(7) does not limit who can be the provider of the money, property, services or other benefits. It also does not require that a benefit be provided directly.*
>
> *80. Similarly, it is not a requirement of subsection 100A(7) that the 'relevant trust income', to which the beneficiary is presently entitled or has paid or applied for their benefit, also be the precise form or amount of the benefits that are provided to another person under the agreement. It is sufficient that someone other than the beneficiary benefits, such as by the provision of money, property, services or other benefits, whether directly or indirectly*

[1] For example the comments in paragraph 68.

[2] *Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust* [2023] FCAFC 3 at paragraph 111(2) with reference to comments by Hill J in *East Finchley Pty Ltd v Federal Commissioner of Taxation* (1989) 90 ALR 457 at 474 and 475.

procured by (or in connection to or as result of) the beneficiary's present entitlement (or the income paid or applied for the beneficiary)."

1.6 Tax reduction purpose

The ATO adopts from the words of section 100A(8) (and from the *BBlood* decision to be commented on below) a view that it is the tax *"purpose of one or more parties to the agreement"*[3] that is relevant – not the tax *purpose or effect* of the agreement.

Paragraphs 84 and 85 (footnotes omitted) summarise the narrowness of the bases on which a tax purpose may be taken *not* to exist:

> *"84. An agreement is entered into for a tax reduction purpose if any of the parties to the agreement entered into the agreement for that purpose. For there to be a tax reduction purpose, it is not necessary that an alternative postulate be established, so as to identify a specific amount of tax that would be avoided by an identified person, though such matters may be identifiable in many cases. In* BBlood*, Thawley J observed that:*
>
> > In the context of a discretionary trust for example, where a trustee has very broad discretions, it would often be difficult, if not impossible, to say with certainty what would have occurred were it not for the relevant agreement.
>
> *85. To meet the tax reduction purpose requirement:*
>
> - *the person whose tax liability is to be reduced or eliminated need not be a party to the reimbursement agreement*
> - *the income tax liability to be reduced can be in relation to any year of income, meaning that a purpose of deferring tax to a later year would be sufficient to demonstrate the tax reduction purpose*
> - *a person can have a purpose of securing a reduction in tax for subsection 100A(8) even where that purpose is not achieved84 or ceases to be held at some time following the entry into the agreement*
> - *there is also no requirement that the tax reduction purpose be the sole or dominant purpose of the party or parties for entering into the agreement. It need only be one of the purposes of the relevant party or parties for entering into the agreement"*

1.7 Ordinary dealing

As for TR 2022/D1, the ATO's views on the ordinary dealing exception are likely to remain the most contested parts of TR 2022/4 – especially about what is in the course of ordinary *family* dealing.

The **Appendix** to this paper extracts, for comparison, the ATO's 'old' comments in TR2022/D1 and its 'new' comments in TR 2022/4, in response to the 'Alternative view' that tax avoidance (the way the ATO refers to tax purpose) is not relevant to the ordinary dealing exception.

The ATO has had to adapt its views expressed in TR 2022/D1, as a consequence of the *BBlood* decision.

[3] Paragraph 86 of TR 2022/4.

In TR 2022/D1 the ATO sought to directly apply the predication test from *Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1[4] as the meaning of *"entered into in the course of ordinary family or commercial dealing"* in section 100A[5].

Because Thawley J in *BBlood* did not mention *Newton* in his reasoning on the *"ordinary family or commercial dealing"* exclusion, the ATO has in TR 2022/4 altered its reasoning to be about a supposed "core test" of family and commercial **objectives**[6]:

> *"98. The core test is that ordinary family or commercial dealing is explained by the family or commercial objectives that the dealing will achieve…"*

The ATO still seeks, albeit less directly, to rely on the *Newton* reasoning by making those objectives primarily about tax purpose, as illustrated by paragraphs 99 and 100 (footnotes omitted) (emphasis added):

> *"99. The method for applying the core test is to ask whether a dealing can be explained by, or is founded in, the achievement of family or commercial objectives.* ***In one sense, this closely parallels the predication test*** *in former section 260, first expressed in* Newton *and applied in later High Court authorities on that section. Under the predication test, as originally formulated by Lord Denning on behalf of the Judicial Committee of the Privy Council, for the Commissioner to establish that an arrangement had the purpose or effect of avoiding tax, that purpose had to appear on the face of the arrangement. If having regard to the overt acts by which an arrangement was implemented, it was 'capable of explanation by reference to ordinary business of family dealing, without necessarily being labelled as a means to avoid tax', section 260 would not apply.*
>
> *100. The Courts that have considered section 100A and observed that the wording of the ordinary family or commercial dealing test derives from the decision in* Newton *have also cautioned that there are differences in the statutory tests as between sections 100A and 260.* ***Notwithstanding these differences, the principles drawn from the authorities on former section 260 can be helpful in demonstrating whether family or commercial objectives explain, found or (to adapt the language of the section 260 cases) are the predicate of the dealing to which the core test is being applied****."*

In expounding these (new) views about family or commercial *objectives*:

(a) the core test is stated to involve "an inquiry into what the objectives of the dealing are, whether the transactions achieve that objective and whether they are better explained by achieving some other objective"[7];

(b) it is maintained that *lack of artificiality* does *not* make a dealing *ordinary*[8];

(c) but contrivance, artificiality, (excessive) complexity and being tax-driven are advanced as pointing against ordinariness[9]

[4] Where the different expression used in the judgment – not the section – was *"capable of explanation by reference to ordinary business or family dealing"*.
[5] Paragraphs 78 and 79 of TR 2022/D1.
[6] Paragraph 98 of TR 2022/4.
[7] Paragraph 105 (beginning) of TR 2022/4.
[8] Paragraph 105 (end) of TR 2022/4.
[9] Paragraph 105 (dot points) TR 2022/4.

In essence, the dichotomy (from *Newton*) that a dealing cannot be both tax-driven and be ordinary is sought to be maintained[10].

Paragraph 106 sets out instances (of an arrangement) which call for close examination of whether the contrivance, artificiality, (excessive) complexity and tax-driven factors – that indicate non-ordinariness - exist:

> *"• the manner in which an arrangement is carried out has contrived or artificial features*
>
> *• family or commercial objectives could have been achieved more directly; for example, could the arrangement instead have simply or directly provided the benefit to the person who actually benefited, such as by making that person presently entitled to trust income*
>
> *• the complexity of the arrangement and the presence of additional steps that achieve no commercial purpose*
>
> *• the conduct of the arrangement is inconsistent with the legal and economic consequences of the beneficiary's entitlement (such as an asset or funds representing the entitlement are purportedly lent to others without any intention of being repaid).*
>
> 107. [sic - appears a formatting error] *Where income entitlements have actually been remitted to the beneficiary, amounts were subsequently returned or other benefits or services were provided, by way of gift or otherwise to another person (such as the trustee, another beneficiary or an associate, whether by the beneficiary or by the trustee either independently or under a power of attorney)."*

The ATO repeats from TR2022/D1, and elevates to an example in TR2022/4, a family member's medical costs as a contextual fact for family objectives accepted as *not extraordinary*[11]:

> ***Example 1 – identifying family objectives***
>
> *96. In an income year, family members agree to gift their trust distributions to one family member, Paul, who has significant medical bills. The arrangement is implemented via trust distributions to the family members and a gift by each of them to Paul. That Paul has significant medical bills is not a part of the agreement; however, it is a highly relevant contextual fact which demonstrates the content of the family objectives.*

The ATO introduces in paragraphs 109 to 113 of TR 2022/4 the idea (and examples) of cultural factors that may explain gifting between family members.

> ***Example 2*** *– cultural practice of gifting*
>
> *110. Azra is a member of an extended family whose members' cultural values include grandparents gifting money or goods to younger members of the family during the festive season. This cultural practice is relevant in considering whether transactions that involve Azra gifting money to her grandchildren out of funds from a trust distribution she has received have been entered into in the course of ordinary family or commercial dealing.*
>
> ***Example 3*** *– cultural practice to support older relatives*
>
> *111. Jack lives by the practices that have been common for centuries in the culture that he draws his heritage from. One of those practices is that*

[10] Paragraph 28 of TR 2022/4 - *"If the objective of a dealing can properly be explained as the payment of less tax to maximise group wealth, rather than some other objective which is a family or commercial objective, it is not an ordinary family or commercial dealing."*

[11] Paragraph 96 of TR 2022/4, drawn from paragraph 83 of TR 2022/D1

children will meet the needs for shelter and living of their parents and other older relatives when they are no longer participating in the workforce. This is founded in notions of respect for elders and is practiced irrespective of what means those relatives would have to fund their own needs from available resources. This cultural practice is relevant in considering whether Jack's direction to the trustee of a trust to apply his entitlements to meet mortgage repayments for his aunt, who has retired from her employment working in a factory, is in the course of ordinary family or commercial dealing.

112. Cultural factors refer to the distinct and observable ideas, customs or practices of people or certain groups within a society. The existence of a cultural factor which is not widely understood in the broader community can be demonstrated by evidence. As the core test is applied to the whole of the agreement, rather than the individual steps, whether the presence of a cultural factor determines if a dealing is entered into in the course of ordinary family or commercial dealing will depend on the facts of the case.

***Example 4** – cultural practice of not accepting entitlement*

113. Max and the trustee of a trust he controls agree to distribute certain income of the trust to Asher, a non-resident who for religious reasons will not accept the entitlement. While Asher's beliefs are a cultural factor that explains why the entitlement will not be called for, in these circumstances they do not, without more, explain the objectives for making the resolution to distribute in the first place.

These cultural examples are the closest the ATO comes to directly addressing whether "simple" family sharing or joint consumption of income/assets is ordinary. Even then, the favourable examples[12] are heavily limited by:

(a) gifting during a festive season; and

(b) the gift being made irrespective of what means the giftee relative would have to fund their own needs – and described as based on a practice that has been *"common for centuries"*!

2. Update on the case law

2.1 BBlood[13]

It should firstly be noted that this decision is on appeal to the full Federal Court (the hearing for which was held recently).

Example 11 in TR 2022/4 appears to relate to the type of arrangement dealt with in *BBlood*.

While the taxpayer in this case was unsuccessful, the reasoning adopted by Thawley J in his decision is very helpful to taxpayers in general – particularly by providing some clear guidance in respect of the exclusion from an agreement under s 100A(13) of *"an agreement, arrangement or understanding entered into in the course of ordinary family or commercial dealing"*. The following comments focus on what was held regarding that ordinary dealing exception.

It is sufficient for present purposes to note the arrangement as one in which:

(a) the terms of a trust through which a share buy-back was later passed was amended;

[12] Paragraphs 110 and 111 of TR 2022/4.
[13] *BBlood Enterprises Pty Ltd v Commissioner of Taxation* [2022] FCA 1112 (handed down 19 September 2022).

(b) that amendment caused the share buy-back amount treated as an assessable dividend for tax purposes, but which was capital for general trust purposes, to be retained in the trust as capital;

(c) the tax liability for the assessable dividend amount passed to a company beneficiary as part of the net income of the trust, so that with franking credits tax was limited (i.e. no "top-up" tax over the company rate was paid); and

(d) the capital amount was later passed out to individuals without further tax.

After stating the provisions of section 100A[14], Thawley J identified the issues raised for the potential application of section 100A as follows (emphasis added)[15]:

> *"The issues raised by s 100A in its potential application to the present case include:*
>
> *(1) Issue 2(1): whether there was an **agreement, arrangement or understanding** and, if so, whether it included the "initiation of" and "planning for" the Illuka Park steps as opposed to the agreement to implement, and implementation, of the transaction;*
>
> *(2) Issue 2(2): whether the agreement, arrangement or understanding was **entered into in the course of ordinary family or commercial dealing**;*
>
> *(3) Issue 2(3): whether a "**reimbursement agreement**" for the purposes of s 100A requires that the "payment" referred to in s 100A(7) be, in substance, a reimbursement for the relevant beneficiary being made presently entitled to the income of the trust;*
>
> *(4) Issue 2(4): whether, in the terms of s 100A(8) and (9), any party to the "agreement" entered into the agreement 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;*
>
> *(5) Issue 2(5): whether, in the terms of s 100A(1)(b), any or all of BE Co's present entitlement to income of the IP Trust **arose out of** the "reimbursement agreement" (if there was one) or arose by reason of any act transaction or circumstance that occurred in connection with, or as a result of the reimbursement agreement."*

Thawley J *did not mix* the questions of:

- agreement
- arose out of

as the ATO does in TR 2022/4 and, in his following analysis, treated *both* the matters of

- ordinary dealing
- tax purpose

as *separate* exceptions, in accordance with the words of section 100A.

[14] Ibid at paragraphs 71 to 75.
[15] Ibid at paragraph 76.

Agreement

Regarding an agreement, it was held[16] that the "Iluka steps"[17] were an agreement within section 100A(13).

But Thawley J rejected ATO submissions that initiation and planning were part of the agreement[18], stating at paragraph 90:

> *"90. There either is or is not an "agreement" (which can include a non-legally binding "understanding") within the meaning of s 100A(13). If the Commissioner contends that there is one, he should identify it. A statement that the "agreement" includes "initiation" and "planning" says nothing about what the contended "agreement" is."*

Ordinary family or commercial dealing

Regarding the ordinary dealing exception, Thawley J **firstly** directs attention[19] to the relevant statutory question as being whether:

- the agreement was entered into in the course of ordinary family or commercial dealing. He stresses that it is not whether individual steps carried out in implementing the agreement, viewed in isolation, could be characterised as steps entered into in the course of ordinary family or commercial dealing; and
- the agreement was entered into in the course of ordinary family or commercial dealing, not whether the agreement was an ordinary family or commercial dealing.

It is made clear[20] that individual steps might be considered – but the statutory question is different.

Secondly, Thawley J acknowledges[21] that this statutory question *"is distinct to the inquiry about purpose required by s 100A(8) and (9)"* and then explains[22] some matters that may be looked at in determining the statutory question.

Those matters include:

- what is "said to be" the object to be achieved by a dealing - in the course of which the relevant agreement was entered into;
- the relevance, to the claimed object, of particular steps under the agreement;
- whether particular steps might be explained by objectives different to the objectives "said to be" behind the ordinary or commercial dealing;
- that a dealing might not be an ordinary family or commercial dealing if it is overly contrived, or artificial; and
- that a dealing might not be an ordinary family or commercial dealing if it involves more than is required to achieve the relevant objective – such as additional steps not necessary to achieving the (claimed) objective.

It is noteworthy that no mention of the decision in *Newton v FCT* (1958) 98 CLR 1 is made by Thawley J in relation to s 100A(13).

---

[16] *BBlood Enterprises Pty Ltd v Commissioner of Taxation* [2022] FCA 1112 at paragraph 83.
[17] Ibid described at paragraphs 19 to 28.
[18] Ibid at paragraphs 84 to 90.
[19] *BBlood Enterprises Pty Ltd v Commissioner of Taxation* [2022] FCA 1112 at paragraph 91
[20] Ibid at paragraph 92.
[21] Ibid at paragraph 94.
[22] Ibid at paragraphs 94 to 96.

Thirdly, consistent with these observations about tax purpose, in explaining[23] the relevance of the decision in *FCT v Prestige Motors Pty Ltd* (1998) 82 FCR 195 to determining the relevant statutory question under s 100A(13), Thawley J is careful not to refer to tax purpose as the determining factor but to instead cite the references made in Prestige Motors to an absence of:

- *"commercial motivation"* for one transaction[24];
- *"commercial justification"*, leaving *"the only explanation for the entry into the agreement as the elimination or reduction of tax liabilities"*[25]; and
- *"commercial necessity or justification for the transaction"* or *"commercial reason to raise capital from outside the group"*[26].

Ultimately, Thawley J held the arrangements were not entered into in the course of ordinary family or commercial dealing after he considered the various attributes of the arrangement as a whole – which included but was not limited to its objectives.

It is worth extracting the relevant paragraphs[27] in full (emphasis added), given their importance as direct authority on the ordinary dealing question:

> *"The agreement comprising the Illuka Park steps as a whole was not an agreement "entered into in the course of ordinary family or commercial dealing". Nor was the agreement to implement the Illuka Park steps. Whether the agreement is viewed as the agreement to enter into the steps, or the steps as a whole,* ***the agreement was unusual****. Its* ***complexity was not shown to be necessary to achieving a specific outcome*** *sought to be achieved by a dealing aptly described as "an ordinary family or commercial dealing". It was* ***not explicable****, for example, as having been entered into* ***for family succession purposes****.* ***Nor*** *was it explicable as having been entered into as part of an* ***ordinary commercial dealing****.*
>
> *101 As I have said, whilst it may be relevant to the statutory inquiry, it is* ***not necessarily persuasive that an individual step can be seen to be "ordinary"****. Viewed in isolation, the generation of income in IP Co of about $300,000 might be something done in the course of an ordinary family or commercial dealing. Even that is doubtful because this was the* ***first time this had occurred and was accordingly not consistent with the historical behaviour of the parties****. Moreover, this component of the Illuka Park steps does not suggest that the agreement to implement the Illuka Park steps or the agreement comprising all of the Illuka Park steps were "ordinary".*
>
> *102 It might be said that a buy-back is an ordinary commercial transaction. The statutory question, however, is whether the agreement as a whole was entered into in the course of an "ordinary family or commercial dealing". In any event, even viewed in isolation, the applicants* ***did not establish a sensible commercial or family rationale for adopting the buy-back procedure****. As is explained further below, the explanations given for the buy-back component of the agreement are unlikely. The buy-back was* ***not conducted for the purpose of simplifying the corporate structure***

[23] *BBlood Enterprises Pty Ltd v Commissioner of Taxation* [2022] FCA 1112 at paragraph 97
[24] FCT v Prestige Motors Pty Ltd (1998) 82 FCR 195 at 222F-G.
[25] Ibid at 223C.
[26] Ibid at 223E-F.
[27] *BBlood Enterprises Pty Ltd v Commissioner of Taxation* [2022] FCA 1112 at paragraphs 100 to 104.

***as suggested**. **Nor was it done for succession planning purposes as suggested**.*

*103 It might be said that the **variations to the IP Trust Deed** were, viewed in isolation, an ordinary family or commercial transaction. Although relevant, that is not the issue. **The issue is whether the agreement as a whole was entered into in the course of a family or commercial dealing**.*

104 Having examined the agreement as a whole, I am not satisfied that the agreement to implement the Illuka Park steps was an agreement which was entered into in the course of ordinary family or commercial dealing. I am also not satisfied that the agreement comprised of the Illuka Park steps as a whole was an agreement which was entered into in the course of ordinary family or commercial dealing."

Tax purpose

There was extensive reasoning stated in respect of tax purpose[28]. It is sufficient to say here that the exclusion was held to be a narrow one, a summary of which may be drawn from the following extracts[29]:

"162 This language is broad, focussing simply on the question of whether the purpose was of securing that "a person" in "a year" of income pay either no tax when that person otherwise would have or less tax than that person otherwise would have paid.

163 Section 100A(8) does not expressly or implicitly require identification of what income tax would have been payable or necessarily by whom or in which year."

2.2 *Guardian* FFC appeal[30]

Regarding section 100A, the most important reasoning the full court appeal decision has added to that of the earlier (single judge) *Guardian* decision by Logan J, is the reasoning supporting there being no agreement within the meaning of section 100A(13) – and accordingly that there could not be any "reimbursement agreement" for the purposes of section 100A(7)[31].

An interesting part of the full court's reasoning was a rejection of the ATO's arguments seeking to draw on Part IVA case law, about attributing the purpose of an adviser to a client, to support the client being a party to an agreement[32].

The reasoning incidentally highlighted the important difference between Part IVA and section 100A – that the focus of section 100A is on the *existence of a relevant agreement*, **not** on *purpose*[33]:

"123 … the entire object of s 177D is to require a conclusion be drawn in respect of the purpose of a party based on the factors specified in s 177D. That purpose is not the party's actual subjective purpose but an attributed purpose …

---

[28] *BBlood Enterprises Pty Ltd v Commissioner of Taxation* [2022] FCA 1112 at paragraphs 128 to 177.
[29] Ibid at paragraphs 162 and 163.
[30] *Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust* [2023] FCAFC 3 (handed down 24 January 2023) – an appeal from *Guardian AIT Pty Ltd ATF Australian Investment Trust v Commissioner of Taxation* [2021] FCA 1619 (handed down 21 December 2021).
[31] *Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust* [2023] FCAFC 3 at paragraph 125.
[32] Ibid at paragraphs 121 to 123.
[33] Ibid at paragraph 123.

124 The inquiry in relation to the existence of a reimbursement agreement in s 100A is different. It requires the existence of an "agreement" (as defined in s 100A(10)[sic]*) invoking, as it does, a requirement of consensus and adoption. The scope for attribution in that context is far more limited."*

Also, regarding expectation versus agreement[34]:

"111 … By contrast, an expectation that an arrangement will be entered into after the creation of the present entitlement is not sufficient for the purposes of s 100A."

3. Issues with ATO guidance

3.1 Compendium to TR 2022/4

In considering the issues raised below regarding TR 2022/4, the Compendium to TR 2022/4 (providing ATO responses to comments received on Draft Taxation Ruling TR 2022/D1) can be a useful source of additional insight into the ATO reasoning underlying TR 2022/4:

https://www.ato.gov.au/law/view/document?LocID=%22CTR%2FTR2022EC4%2FNAT%2FATO%2F00001%22&PiT=99991231235958

This is particularly so because some of the issues raised are matters that were also raised in respect of TR 2022/D1, but which the ATO has not accepted or to which the ATO has not fully responded.

3.2 Approach in TR 2022/4 - versus the words and structure of section 100A

As already previewed above in section 1.2, there is a reason to question the ATO's overall approach as set out in paragraph 5 of TR 2022/4, of:

- *"The following 3 requirements are satisfied:*
  - *'Connection requirement'*;
  - *'Benefit to another requirement'*;
  - *'Tax reduction purpose requirement'*; and
- *The 'ordinary dealing exception' is not satisfied"*

It is true that these four dots points also appeared, but as *equal* points, in TR 2022/D1 (and with hindsight did not get the attention deserved at that time). But, in TR 2022/4, the ATO has sought to exaggerate the incorrect distinction between tax purpose as a requirement and the ordinary dealing as an exception, by the grouping the three requirements together separately from what is represented as a sole exception.

By doing so, paragraph 5 of ATO 2022/4 incorrectly represents both the words of section 100A and the approach taken in the case law.

It:

(a) distracts from the primacy, and starting point, of the existence of "reimbursement agreement" in applying section 100A; and

(b) misrepresents the role of the tax purpose (in misstating it as a *requirement*) by both:

[34] *Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust* [2023] FCAFC 3 at paragraph 111.

(i) taking tax purpose to be part of the positive process of determining what arrangements are *included* in a "reimbursement agreement" – rather than correctly reflecting the *absence* of tax purpose as solely a basis for *exclusion* from what is the correct primary focus - of whether there a "reimbursement agreement"; and

(ii) by that incorrect statement of the role of tax purpose – also failing to adhere to the limitation of the relevance of questions of tax purpose to consideration of the **entirely *separate* and *equally important*** second exception, of ordinary dealing.

It is difficult to understand why the words of section 100A are not more faithfully reflected in TR 2022/4. After all, it has been eight years since the ATO first commenced agitating section 100A matters, with its 2014 examples.

It invites the conclusion that it is a deliberate decision, made to advance (continue) the ATO's preferred views about tax purpose being more central to the operation of section 100A than the actual words of section (and the case law) allow.

3.3 Scope of agreement

The approach adopted in TR 2022/4 of claiming the existence of an agreement:

- based on tacit adoption, concerted action, an understanding over a period of time[35]; and
- from conduct of before and after the time an entitlement arises[36],

goes too far.

It is now inconsistent with the reasoning from the *Guardian* full court appeal and needs to be revised (narrowed).

It is noteworthy that:

- while the ATO seeks to adopt the widest possible views of "agreement" so as to find a "reimbursement agreement" from informal understandings;
- in contrast, when addressing what is an ordinary family dealing, the ATO does not seek to recognise/discuss the many and long-term understandings that exist in any typical family (regardless of culture) - including about the sharing of financial, physical, emotional, etc resources - that make up the *course of ordinary family dealing*.

3.4 Ordinary dealing – "core test" concept

TR 2022/4 introduces the new concept of the "core test" relating to, and seeking to limit, the ordinary family or commercial dealing exceptions. Such a core test has no direct case law basis.

While in *BBlood* Thawley J had reference to objectives in applying the ordinary family dealing exception, objectives were not (and were not stated to be) the core test. Objectives were part (only) of the overall consideration undertaken by Thawley J.

In TR 2022/4, the ATO has "repackaged" its prior references to and focus on tax purpose, as drawn from *Newton*, to instead be "family objectives" as part of this claimed core test - while still retaining the same "predication test" reasoning from *Newton*.

[35] Paragraphs 69 and 70 of TR 2022/4 as noted earlier.
[36] Paragraph 74 of TR 2022/4 as noted earlier.

There is nothing in *BBlood* that prioritises objectives as a core test, much less tax-related objectives. Only (what will be referred to here as) a "whole of dealing" approach - considering all of the actual steps taken, complexity, artificiality, objectives, etc - as undertaken by Thawley J in *BBlood* is authorised by that decision.

The comment is made in TR 2022/4 (at paragraph 28) – *"If the objective of a dealing can properly be explained as the payment of less tax to maximise group wealth, rather than some other objective which is a family or commercial objective, it is not an ordinary family or commercial dealing."*

This comment is an express continuation (re-packaged) of the ATO's prior tax purpose-based reasoning from *Newton*.

The ATO's refusal to depart from its *Newton* derived approach is also indirectly evident from the ATO's persistence (see the **Appendix**) in equating "tax avoidance" with having a "tax purpose" when considering the ordinary dealing exception. This labelling (in advance) of certain behaviour as tax avoidance flags the preconceived conclusion the ATO wishes to see realised from section 100A (i.e. that the section applies to confirm tax avoidance), regardless of the actual words of section 100A.

Under the "whole of dealing" approach undertaken in *BBlood*, ordinariness is not excluded by having a tax purpose/objective. Ordinariness is instead judged by reference to (all) the types of matters noted in TR 2022/4 at paragraph 27 – whether artificial or contrived, overly complex, the objectives, the actual steps, extra steps (but without some overriding tax purpose related exclusion).

In that context, there is usually no conflict between what is ordinary and what is commonplace in family dealings – which includes the "simple" and frequent decisions by adult family members (based on the whole complexity of family relationships, values, etc) to share resources within the family.

The distinction that the ATO has sought/still seeks to maintain from *Newton* – to exclude tax influenced family cooperation from being ordinary - does not apply, on a proper reading of section 100A and the case law.

3.5 Simple family sharing – what medical conditions justify sharing?

This ATO's refusal to acknowledge "simple" family sharing as ordinary in the context of reimbursements agreements reflects in the ATO's Example 1 in TR 2022/4, regarding Paul's medical expenses being funded by gifts from family members (noted under section 1.7 above).

The ATO acknowledgement that Paul's medical costs are a relevant contextual fact or circumstance suggests that there must be some such "special" reason for family sharing of resources, for it to be ordinary.

This approach is both unnecessary on the words and structure of section 100A and naturally leads to challenges - such whether the ATO intends to publish guidance on what medical conditions qualify as sufficiently "special" to justify family sharing being ordinary.

In its refusal to engage with simple family sharing as being objectively ordinary, the ATO is reserving to itself the right to make what will necessarily amount to value judgements, when it seeks to undertake a more in-depth assessment of a family's interactions. Such a more in-depth assessment of simple sharing within a family is not required (or authorised) by the words and structure of section 100A.

3.6 Simple family sharing – not so different between cultures

Rather than introducing new concepts that are not supported by the words of section 100A, such as cultural issues, TR 2022/4 should have directly addressed

the simple and commonplace acts of sharing and of collective use/consumption within families.

The words of section 100A refer to 'family', not culture as now introduced in TR 2022/4.

That simple family sharing (including to maximise wealth) may be regarded as non-ordinary can only be a sustainable argument under the tax purpose-based reasoning from *Newton* - by which ordinary family dealing is mutually exclusive with a tax purpose-based arrangement.

TR 2022/4 acknowledges[37] that *BBlood* did not contain a reference to *Newton* in Thawley J's reasoning on the ordinary dealing exception - which is in conflict with TR 2022/4's claim of *BBlood* as legal authority for the ATO's *Newton* based reasoning in respect of the ordinary dealing exception.

4. Agreement and reimbursement agreement

So, where are we on the questions of agreement and reimbursement agreement?

The meaning of the complete phrase "reimbursement agreement" is drawn from two provisions within section 100A:

- section 100A(13), which provides a definition for "agreement"; and
- section 100A(7) which sets out when an agreement becomes a reimbursement agreement.

Those sections, when considered together, set out when a set of arrangements will be a reimbursement agreement.

4.1 What is an "agreement" in section 100A(13)?

Section 100A(13) defines "agreement as follows (our emphasis):

> *"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**."*

There are three features to note in the definition:

- "agreement, arrangement or understanding" is very broad drafting which is likely to capture most if not all arrangements;
- whether or not there is an enforceable arrangement is irrelevant – this means informal arrangements such as non-binding discussions between parties are potentially an agreement for the purposes of section 100A; and
- finally, an arrangement is not an agreement where it is entered into in the course of ordinary family or commercial dealings – which is considered under its own heading below.

The phrase "agreement, arrangement or understanding" is drafted very broadly.

[37] Paragraph 197 of TR 2022/4

But, despite this breadth, there must still be an *actual* agreement – the *Guardian* full court decision tells us that there must be *consensus and adoption*[38]. And it must occur *before* the present entitlement arises[39].

The ATO may wish to point to a pattern of behaviour between trustees and beneficiaries within a family as evidence of an agreement – such as repeated occurrences over years of distributions to beneficiaries who then allow the value of the distribution to be used for the benefit of/controlled by other family members.

ATO can be expected to claim that an agreement exists from circumstances of tacit adoption, concerted action, an understanding over a period of time and/or conduct of before and after the time an entitlement arises.

But if each of the trustee and the beneficiary act unilaterally in each of their decisions to distribute and to not call upon payment, respectively, such a pattern of conduct does not constitute an 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.

While the correspondence of (genuine voluntary cooperation evidenced by) such unilateral behaviour for mutual benefit would not be credible in non-family (commercial) situations, it is entirely to be expected in family situations.

But, to resist ATO claims, families will need to be attentive to establishing *evidence* of such *genuine unilateral* (even if cooperative) actions. The practical suggestions at the end of the paper are partly directed to that evidence.

4.2 Reimbursement agreements under section 100A(7)

A "reimbursement agreement" involves an agreement that:

- **provides for** certain actions or outcomes; and
- those actions or outcomes are - 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.

The act of making the beneficiary presently entitled (usually the unilateral act of the trustee) does not "provide for" the actions or outcomes noted in the second dot point.

This fits with the view that it is not the distribution itself with which section 100A is concerned, regardless of the tax planning that may be behind the distribution. Something more – the relevant "agreement" – is needed to cause (to provide for) the actions or outcomes.

As for the actions/outcomes listed, they will often be the everyday ways a person will always consume or use their assets or choose to pass value to another person.

When a person:

- buys something in a shop - they "pay money" to another person.
- pays a bill for themselves or a relative – they "pay money' and/or "provide benefits' to another person.
- donates money - they "pay money" to another person.
- gives a gift of property – they "transfer property".
- helps in the family business – they "provide services".

[38] Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust [2023] FCAFC 3 at 123
[39] Ibid at paragraph 111

The scope of these actions/outcomes is vast. As the *BBlood* facts show, the actions/outcomes can even arise (by a benefit arising to another) without the beneficiary receiving and passing on any value.

But section 100A does not apply to most of such actions/outcomes because:

- they will not have been *provided for* under any *agreement* - *before* the person became present entitled to a trust distribution; and
- even if so provided for, either:
  - no person will have entered into the relevant agreement with the required tax purpose; or
  - the relevant agreement will have been entered into in the course of ordinary dealing.

The attention of section 100A is always focussed on the *agreement* that *provides for* these *actions/outcomes* - as the essence of what defines a "reimbursement agreement".

On the words of the section, questions of tax purpose do not cause anything to be *included* in section 100A, only for certain agreements to be *excluded*. This is as one of the two *separate and independently operating* exceptions. The other, of course, is the ordinary dealing exception discussed following.

5. Ordinary family or commercial dealings

Where are we on the meaning of *"entered into in the course of ordinary family or commercial dealing*"?

As will be apparent from the earlier comments, the ATO has sought (still seeks) to interpret the ordinary dealing exception in section 100A(13) as limited by tax purpose in the manner of the reasoning from *Newton*.

It is submitted that this has never been the correct law:

- from the words of the section and principles of statutory interpretation; and
- from the (albeit limited) direct case law.

In TR 2022/D1 the ATO failed to *fully* cite the comments made by Hill and Sackville JJ in *FCT v Prestige Motors Pty Ltd as trustee of the Prestige Toyota Trust 98 ATC 4241 at 4262* (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."*

Thawley J in *BBlood* applied *Prestige Motors* and did not adopt the *Newton* dichotomy – so the ATO has adjusted its comments in TR 2022/4. But, in TR 2022/4, the ATO has still sought to retain that dichotomy - recall[40]:

> *"28. If the objective of a dealing can properly be explained as the payment of less tax to maximise group wealth, rather than some other objective which is a family or commercial objective, it is not an ordinary family or commercial dealing."*

Against these current ATO views (which may need to be dealt with in an audit), it is submitted the correct approach, supported by the case law, is to determine whether an agreement has been *''entered onto in the course of ordinary family or commercial dealing"* on the basis of the "whole of dealing" approach undertaken in *BBlood.*

The cases on section 100A to date have involved arrangements with some special element. This is unsurprising, in that those special elements are what have led to the dispute. This is not to say that any special elements necessarily mean that the ordinary dealing exception cannot apply to family or commercial matters.

But because commercial dealings can generally be expected to be conducted on a basis of self-interest, a strong tax reduction purpose – even though that is not itself the test - tends to result in commercial dealings that are "non-ordinary" in objective ways, even ignoring tax purpose. This has been the story of the historical case law dealing with section 100A (e.g. *Prestige Motors*).

While *BBlood* related to a family, there were special elements - such as the change of trust deed and the resulting separation of the tax liability from the benefit of the capital part of the share buy-back.

The simplest scenario - of sharing and collective use/consumption within families (by family members gifting and lending to each other) - has not been the subject of direct judicial consideration. But (from direct experience) ATO auditors have been regarding such family sharing and collective use/consumption as "non-ordinary" and subject to section 100A in audits since 2014.

Applying the "whole of dealing" approach undertaken in *BBlood* to the simple *family sharing* scenario, **should include a recognition that the relevant *ordinary family dealing* in the course of which such simple *family sharing* occurs, is inseparable from the wider family relations**.

Such family relations are 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 (as the ATO seeks to maintain) tax purpose is the primary measure.

It is submitted as being in the course of ordinary family dealing, in a modern context:

- 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.

[40] Paragraph 28 of TR 2022/4

- for all family members to contribute to the family wealth, as they choose/are able – not just parents to children, also adult children to parents/wider family.
- for 'unexpended' family wealth 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 co-operate 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 it is what families do, in the ordinary 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 then not calling on that entitlement to be paid but instead allowing the value that entitlement represents to be used for family purposes, should be taken to be an ordinary family dealing.

It is also part of this family co-operation 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).

In terms of the types of matters noted in TR 2022/4 at paragraph 27, such simple sharing and collective use/consumption within families is not artificial or contrived, is not overly complex, achieves family objectives (of *funding* whatever is the object of the sharing or collective use/consumption) and does not involve any extra steps.

Any suggestion that the trust distributions "should have" gone direct to the persons with whom the family member chooses to share, ignores that it is not an *extra* step for a family member beneficiary to be genuinely made entitled to trust income, so that they may choose to share (or not to share) that entitlement at *their* discretion.

6. Entitlement arose out of

Even if an agreement exists, does the "arose out of" nexus exist?

The subject present entitlement must be one that "arose out of' or "arose by reason of" the reimbursement agreement (or any act, transaction or circumstance that occurred in connection with, or as a result of the agreement).

Where the family member would be entirely free to use their entitlement at their sole discretion, can it correctly be said that the entitlement (the distribution decision) arose out of the reimbursement agreement?

If the trustee would have distributed the same way – for family reasons – regardless of what the beneficiary chose to do with their entitlement, the distribution would have been made and the entitlement would have arisen even if the reimbursement agreement had not existed.

Acceptance - for personal reasons of family affection, family obligation, etc – of the "risk" of the family member not complying with any prior *expectation*, breaks the "arose out of" nexus between any reimbursement agreement and the creation of the entitlement.

In such circumstances, it could not be said that - but for the transactions which form part of the reimbursement agreement - the present entitlement would not have arisen.

These are important issues that need addressing in family situations in determining whether a present entitlement is one that "arose out of' or "arose by reason of" any claimed reimbursement agreement.

Even if the meaning of "agreement" may be wide enough to extend to unenforceable and implied understandings of which a trustee may be party, the very loose nature of such an "agreement" is consistent with a trustee - who still chooses to make a distribution in family situations (based only on such an "understanding") - having made that distribution independently of any such "agreement" and instead because of reasons of family affection, obligation, etc.

7. Practical suggestions to avoid and manage the risks

From all of the above, there are steps that can be suggested for taxpayers to take, to help avoid/manage section 100A risks. The following comments focus on family situations, being seen as the area most in need of guidance.

As a first step, taxpayers should avoid poor trust administration matters by:

- advising all beneficiaries of their entitlements each year – *in writing*;
- obtaining the *written authority* of beneficiaries for the non-payment of their entitlements, or for the payment (as satisfaction) of their entitlements to other persons or as loans/goods/services for other persons. Such authority could be by way of collective confirmation after the relevant payments, loans etc have been made.

It is important that this advising, and obtaining of confirmations from, beneficiaries does **not become a "paper exercise"**. Care should be taken to create an environment in which the beneficiary is genuinely made aware that they may call for direct payment of their entitlement and that they alone may authorise or not authorise its satisfaction by being otherwise used/directed.

Ensuring the trust can demonstrate a financial position (from available funds or from borrowings against trust assets) to make payment of a beneficiary's entitlement (if called to do so) would be helpful (adding credibility).

It can be seen that the above matters are directed to supporting that any sharing of their entitlement will be a unilateral act of the beneficiary.

Remember that, in an audit or dispute, beneficiaries may be called upon in formal interviews with the ATO or, ultimately, to given evidence in court, to confirm these matters.

So that there is **no agreement** when the trust distribution is made, it would seem to be better for trustees not to discuss intended distributions with potential beneficiaries – only advise them afterwards.

To enhance access to the **ordinary dealing exception,** bearing in mind the onus of proof rests on taxpayers, attention should be given to maintaining some records evidencing what is "ordinary family dealing" for the particular family. This may involve keeping a record of the (or summarising, now, the past) pattern/history of substantive sharing of the family resources across the family.

This is not to suggest that families need to track all of their collective expenditure - though the more that can be proven the better.

But it will assist to be able to demonstrate/prove a pattern of substantial and material family sharing – such as funds shared/collectively deployed to fund family

houses, as family loans, as support provided for family members in illness, misfortune, etc.

To support that the trust distribution did not **arise out of** any reimbursement agreement, the trustee should be prepared to confirm and evidence that they distributed to the beneficiary in the full expectation of paying the beneficiary their entitlement in cash if called upon by the beneficiary to do so - accepting that any other outcome would be entirely the unilateral choice of the beneficiary.

Also, a trustee should be prepared to confirm that their distribution decision is not related to any services the beneficiary may have provided/will provide to any party (e.g. to a family business) - but only flows from their status as a beneficiary.

APPENDIX – What has changed on tax purpose and ordinary family dealing

OLD - TR2022/D1 (extract, footnotes omitted, emphasis added)

Tax avoidance not relevant to ordinary dealing exception

160. It has been put to the Commissioner that the question whether the objective facts of the arrangement demonstrate tax avoidance does not affect the interpretation of 'ordinary family or commercial dealing' in subsection 100A(13).

161. The alternative view acknowledges that the words 'ordinary business or family dealing' are drawn from *Newton*, where it was pointed out by the Judicial Committee of the Privy Council that the categories of ordinary dealings and dealings for which there was a tax avoidance purpose were mutually exclusive for the purposes of section 260. However, proponents of this alternative view draw attention to the following observation by Hill and Sackville JJ 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.*

162. It is argued that the context of section 100A is different to section 260, with the effect that tax avoidance does not bear on the meaning of the words 'ordinary family or commercial dealing'. Within that context, the question of tax avoidance is reserved for subsection 100A(8).

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).**

164. In *Newton*, the Privy Council had formulated a predication test to determine whether the conditions of section 260 were satisfied. For the Commissioner to establish that an arrangement had the purpose or effect of avoiding tax, that purpose had to appear on the face of the arrangement. It followed that if, having regard to the overt acts by which an arrangement was implemented, it was capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax, section 260 would not apply. The primary meaning of the phrase 'ordinary business or family dealing' contained an element of not being a means to avoid tax.

165. This has been confirmed by later decisions of the High Court where arrangements that achieved considerable familial or commercial objectives were held not to be 'ordinary family or business dealing'. In *Peate v Commissioner of Taxation (Cth)*, the High Court upheld assessments raised under section 260 for an individual, who was a partner in a medical partnership that had been re-organised into a multi-tiered corporate structure, despite the apparent commercial and familial benefits achieved. In the leading majority judgment, Kitto J (with whom McTiernan and Owen JJ agreed) explained:

> *The arrangement in the present case, considered objectively as is thus required, may well seem to be characterized by several purposes and effects, some of them unconnected with taxation, including the protection of individual members of the group against liability for negligence; the making of superannuation provision for employees, including doctors employed to assist the group; the better organization of the group's activities and particularly its methods of accounting; and the making of provision for the*

doctors' families. (All of these purposes … were actually contemplated in the formation of the plan.) But the question remains, whether the overt acts that were done under the plan are fairly explicable without an inference being drawn that tax-avoidance is a purpose of the arrangement as a whole. Menzies J. thought they were not, and with respect I agree.

166. Members of the Court in *Gulland* concluded that the meaning of 'ordinary business or family dealing' in section 260 was determined by the tax avoidance context in which it was used. Dawson J explained that the 'reference to ordinary business or family dealing is a reference by way of example to transactions capable of reasonable explanation by reference to considerations other than avoidance of tax'. Gibbs CJ further observed that the phrase adopted by the Privy Council 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''.

167. Regarding section 100A, in *Prestige Motors* the Court characterised the overt circumstances of the arrangement entered into by the parties to test whether there was ordinary commercial dealing. The Court observed that a straightforward agreement for the transfer of one entity in the group (Perron Investments) to another (LSP) 'might well be characterised as ordinary family or commercial dealing'. However, the Court also observed absence of any commercial motivation for the sale, the replacement of LSP as trustee, the issue of further units, making of distributions to the unitholder to be offset against tax losses and making interest payments to another entity that would act in the Perron group interests. In light of this evidence, the Court characterised the sale as '… one element of a larger one-off transaction designed to avoid tax, and … not an agreement entered into in the course of ordinary commercial dealing'.

NOW - TR2022/4 (extract, footnotes omitted)

Tax avoidance not relevant to ordinary dealing exception

191. It has been put to the Commissioner that the question whether the objective facts of the arrangement demonstrate tax avoidance does not affect the interpretation of 'ordinary family or commercial dealing' in subsection 100A(13).

192. The alternative view acknowledges that the words 'ordinary business or family dealing' are drawn from Newton, where it was pointed out by the Judicial Committee of the Privy Council that the categories of ordinary dealings and dealings for which there was a tax avoidance purpose were mutually exclusive for the purposes of section 260. However, proponents of this alternative view draw attention to the following observation by Hill and Sackville JJ 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.

193. It is argued that the context of section 100A is different to section 260, with the effect that tax avoidance does not bear on the meaning of the words 'ordinary family or commercial dealing'. Within that context, the question of tax avoidance is reserved for subsection 100A(8).

194. Reference is also made to this observation of Thawley J in *BBlood*:

The inquiry about whether the agreement was "entered into in the course of ordinary family or commercial dealing" within the meaning of s 100A(13) is distinct to the inquiry about purpose required by s 100A(8) and (9).

195. While the Commissioner accepts that the requirements of subsection 100A(13) differ from the purpose required by subsections (8) and (9), the

Commissioner nonetheless considers that if the objective facts of the arrangement demonstrate tax avoidance, those facts **can be** relevant for whether or not a dealing is ordinary family or commercial dealing.

196. The core test for section 100A, as explained in this Ruling, **can involve** the inquiry into what is sought to be achieved by the dealing and whether the steps that comprise the dealing would achieve that objective**. If the steps that comprise the dealing reveal that the objective of the dealing is something other than a family or commercial objective (such as the payment of less tax), the core test will not be satisfied.**

197. This formulation of the core test **derives from** the judgment of Thawley J in *BBlood*, which did not contain a reference to Newton in respect of this test. Although Thawley J did refer to subsection 100A(13) having a 'distinct' operation from subsections 100A(8) and (9), his Honour additionally observed:

> *That does not mean that one cannot look at the object of what was sought to be achieved by a dealing said to be an ordinary family or commercial dealing in the course of which the agreement was entered into or that one cannot assess whether particular steps were relevant to achieving that object.*

198. Thawley J concluded that a dealing might not be 'ordinary' if it is contrived, artificial, or involves more than required to achieve the relevant objective. **Therefore, if there are particular steps that are not relevant to achieving a family or commercial objective, but are more clearly related to tax avoidance, that may take the dealing outside of being an ordinary dealing**.