TR 2022/4EC - Compendium

Australian Government
Australian Taxation Office

Public advice and guidance compendium – TR 2022/4

Relying on this Compendium

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

Summary of issues raised and responses

Issue number	Issue raised	ATO response
All legislative references in this Compendium are to the *Income Tax Assessment Act 1936* (ITAA 1936), unless otherwise indicated.		
Statutory interpretation and relevance of extrinsic context		
1	The interpretive position in the draft Ruling fails to properly account for the extrinsic materials that accompany the Income Tax Assessment Amendment Bill (No. 5) 1978, which introduced section 100A into the Australian Parliament (Parliament). For this reason, it fails to conclude that section 100A only applies to arrangements described in those extrinsic materials or to arrangements having 'similar characteristics'. The interpretive position also fails to account for the context of the amendments, which includes their historical context, and Parliament's conferral of an unlimited period of review for section 100A. These elements of context lend additional support to the conclusion that the operation of section 100A should be limited to egregious schemes like those described in the extrinsic materials and does not extend as a matter of law to the range of examples described in the draft Ruling.	We acknowledge that there are prominent references in the extrinsic materials that can be understood to mean that Parliament was paying particular attention to certain kinds of arrangements at the time of the enactment of section 100A. The Explanatory Memorandum to the Income Tax Assessment Amendment Bill (No. 5) 1978 (the EM) refers to trust-stripping arrangements and observes that '[t]he particular tax avoidance arrangements rely on a nominal "beneficiary" being introduced into the trust and being made presently entitled to income of the trust …'. Similar references appear in the Notes to Clauses in the EM. We do not agree that these references either do or should limit the scope of the provisions so that it only has operation for trust-stripping arrangements or for arrangements that are similarly or equally egregious. We consider that the view we take is supported by the weight of judicial commentary, including the Full Federal Court in *Commissioner of Taxation v Prestige Motors Pty Ltd as Trustee of the Prestige Toyota Trust* [1998] FCA 221 (*Prestige Motors*), where the Court considered an argument that the operation of the section should be read down by reference to the extrinsic materials. The Court concluded that the examples in the extrinsic materials were '… intended to be illustrative, and not an exhaustive statement of the transactions … subject to the legislation'. While the Court (in finding that section 100A applied to arrangements that were not traditional trust-stripping

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		arrangements) observed that the section was 'framed broadly enough to catch … arrangements having similar characteristics' that should not be confined, in our view, to arrangements that are similarly or equally egregious. We further consider that, insofar as the text of section 100A is to be understood in the context of its enactment, it is not correct to regard only the immediate historical context concerning the tax avoidance schemes that were prevalent at the time. Regard can also be had to the legislative context in which the section has been enacted (Division 6), which has the object of allocating tax liability in relation to the receipts of a trust estate. We have addressed this issue at paragraphs 177 to 183 in Appendix 3 – Alternative views of the final Ruling.
2	The draft Ruling uses terms not commonly used in practice or defined in tax law: • 'financially advanced', as it appears in paragraphs 115 and 127 of the draft Ruling • 'ordinary familial or commercial objects', as it appears in paragraphs 25 to 28 of the draft Ruling • 'separate trust', as it appears in paragraphs 121 to 123 of the draft Ruling • 'predication test', as it appears in paragraphs 79 and 164 of the draft Ruling, and • 'evaluative standard', as it appears in paragraphs 21, 79 and 80 of the draft Ruling. None of the terms have been used by the judiciary or Parliament. Their use introduces unnecessary complexity into the Ruling. Some of the terminology also raises the concern that the Commissioner is improperly importing value judgments into the administration of section 100A. The terms should be excluded from the final Ruling.	The issue has been noted. The terms 'financially advanced', 'ordinary familial or commercial objects', 'separate trust' and 'evaluative standard' have been omitted from the final Ruling. We have used the term 'predication test' as this is a phrase that is commonly used by authors to describe the decision in *Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1 (*Newton*). While the term is retained at paragraph 99 of the final Ruling, we have made changes to the surrounding text on 'ordinary family or commercial dealing' to explain how the family or commercial objectives achieved by a dealing must be the predicate of that dealing for the exception to be satisfied.

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Connection requirement and benefits to another		
3	The view expressed in paragraphs 6 and 9 of the draft Ruling, about when a present entitlement or payment or application of benefit has a relevant connection to a reimbursement agreement, is impermissibly wide and unsupported by the case law. The final Ruling should address this issue.	We have not made changes in response to these comments. Paragraphs 8 and 13 of the final Ruling set out that the connection need not be a direct causal connection. It is sufficient for the present entitlement to have arisen from (or relevant payment or application to have resulted from) another act, transaction or circumstance that occurred in 'connection with' or 'as a result of' the reimbursement agreement. These parts of the Ruling simply repeat the language that is used in the ITAA 1936.
Agreement		
4	The draft Ruling's position on the meaning of the phrase 'agreement, arrangement or understanding' in subsection 100A(13) should be narrowed. It should not be interpreted so broadly as to capture any course of conduct. The definition should be informed by the limits on the meaning of 'scheme' in section 177A enacted at around the same time and the definition of 'agreement' in subsection 100A(13) should not be of wider scope. The meaning of 'scheme' in subsection 177A(1) extends to: (a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings; and (b) any scheme, plan, proposal, action, course of action or course of conduct.	We do not agree. We maintain the position in the final Ruling and interpret the words 'agreement, arrangement or understanding' used in subsection 100A(13) in the context where they appear. As explained in the draft Ruling, the words 'arrangement' and 'understanding' extend the ordinary meaning of agreement and an agreement for the purposes of subsection 100A(13) can involve a degree of informality. This has been confirmed by the Courts; see, for example, *Guardian AIT Pty Ltd ATF Australian Investment Trust v Commissioner of Taxation* [2021] FCA 1619 (*Guardian*) at [132], per Logan J. This, however, does not extend the meaning of 'agreement' to capture any course of action. We accept, as the Courts have observed, that there must in fact be an accord between 2 or more persons at the time when a present entitlement or payment or application for benefit happens.
5	The draft Ruling does not emphasise that for the conditions in section 100A to be satisfied, there must be an agreement that involves present entitlement to or payment or application of trust income. The section cannot be satisfied where, absent an agreement, there is only an entitlement, payment or application for the benefit of the corpus of a trust estate. This point should be emphasised to assist taxpayers and their advisors in managing their tax affairs.	We agree with the comment and have made a clarifying amendment in paragraph 6 of the final Ruling.

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6	The draft Ruling's position at paragraph 153 that the existence of an agreement can be inferred from repetition and common control is incorrect. The fact that certain things happen is not sufficient evidence that an agreement exists. Insofar as this reasoning is extended, without apparent qualification, to examples of parents gifting amounts to children (paragraph 115 of the draft Ruling) or adult children beneficiaries gifting their entitlement (Example 4 of the draft Ruling), those examples are incorrect.	We agree that mere repetition and common control alone do not necessarily amount to an agreement; however, they may (when assessed in the broader factual context of each case) infer one. We consider that the broader context in which the relevance of repetition is to be considered is that an 'arrangement or understanding' can be tacit and the parties can be free to withdraw or act inconsistently with the terms of an arrangement or understanding (see paragraph 69 of the final Ruling). The revised examples in the final Ruling also acknowledge that repetition may be explicable by familial or commercial objectives.
7	The position in paragraph 8 of the draft Ruling on the meaning of the phrase 'agreement, arrangement or understanding' in subsection 100A(13) is incorrect where it states that 'the agreement can be a plan comprising a series of steps undertaken individually or collectively' and observes that an agreement can be implied or discerned based on conduct that has happened after the present entitlement has arisen. There is case law support for the conclusion that at the time the present entitlement has arisen, there must be an agreement 'that provides for' the outcome to which the other tests in the section are to be applied (Kiefel J in *Raftland Pty Ltd v Commissioner of Taxation* [2006] FCA 109) or expressed in an alternative '… it must be possible to conclude that *something* answering the description of "reimbursement agreement" in s 100A(7) pre-existed the present entitlement' (Logan J in *Guardian* at [132]). The final Ruling ought to take the view that in order for an 'agreement, arrangement or understanding' to exist, it must be sufficiently defined and understood at that time so that the parties' rights and obligations can be understood.	We have made it clear in the final Ruling that an agreement, arrangement or understanding must be in existence at the time a present entitlement arises, which includes a case where the agreement and entitlement are simultaneous. We maintain the view that conduct after the date of entitlement can be relevant evidence that, taken together with other evidence, can support that an agreement, arrangement or understanding was in existence at an earlier time. We do not agree with the point that for an agreement, arrangement or understanding to exist it must be sufficiently defined and understood at that time so that the parties' rights and obligations can be understood. This is particularly so given our view that an 'arrangement' or 'understanding' need not necessarily involve the creation of rights and obligations.
8	The statement in paragraph 67 of the draft Ruling (that for the definition of reimbursement agreement in subsection 100A(7), a benefit provided to another person can include a payment or other indirect benefits such as to the	The terms of subsection 100A(7) are very broad. The common practices referred to would need to be examined in the context of section 100A as a whole. While a payment to a member of a beneficiary may be within the term 'other benefits' in subsection 100A(7), that transaction (in most cases) would

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	holder of equity, shares, units of a similar interest in the presently entitled beneficiary) has the effect that the range of common transactions potentially affected by the operation of section 100A is broad. This extension could inhibit or discourage what have been very common practices prior to the release of the draft Ruling. The final Ruling should clarify the ATO's view as to when a payment to a member of a presently entitled beneficiary would or would not be a payment for subsection 100A(7) that would attract the operation of section 100A.	be expected to be explained by the commercial objectives it achieves. Also, commonly, a distribution to a beneficiary who then makes a distribution to its members would not involve a tax reduction purpose. The conditions for the operation of the section (and the way in which they interact) have been explained in the public advice and this is intended to resolve these concerns.
9	The content in paragraph 11 of the draft Ruling on the operation of subsection 100A(5) could be expanded to explain how to identify when a beneficiary could reasonably be expected to have been presently entitled to an amount if the reimbursement agreement had not been entered into.	The observations of the Federal Court at first instance in *BBlood Enterprises Pty Ltd v Commissioner of Taxation* [2022] FCA 1112 (*BBlood*) (subject to appeal to the Full Court) are broadly in line with the content on subsection 100A(5) in the draft Ruling. This is explained in paragraph 75 of the final Ruling. It is open to a beneficiary to establish that they would nevertheless have been presently entitled to some specified lesser amount. How this would be demonstrated would depend on the particular facts that concern the present entitlement or payment or application for benefit, including how those facts have been relevant to the existence of the reimbursement agreement. We do not consider that further guidance on what is a fact dependent question is suitable for the Ruling. We will continue to monitor how this issue is working in practice and the need for supplementary web guidance or other public advice.
10	The content in the draft Ruling on the operation of subsections 100A(3) and (3A) requires clarification.	Paragraphs 61 to 62 of the final Ruling have clarified the expression of these concepts, including to make it clear that section 100A may apply (depending on the circumstances) to the present entitlement of the beneficiary of the interposed trust.
11	Paragraph 15 of the draft Ruling is incorrect where it asserts that for the definition of reimbursement agreement in subsection 100A(7), there is no requirement that the benefits mentioned in that subsection be 'otherwise referable to the	We do not agree. The identified passage from the draft Ruling represents the Commissioner's position that has been upheld by the Federal Court in *BBlood*. As at the date of issue of this Compendium, the case is currently on appeal to the Full Court.

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	share of trust income the beneficiary is presently entitled to receive, was paid or that was applied on their behalf'. Reading subsection 100A(7) and subsections 100A(1) and (2) together, there must be some referability or rational basis on which to link the 'relevant trust income' to the benefit. The outcome described in Example 8, to the extent that it relies on the position in the draft Ruling, is also incorrect.	
Tax reduction purpose requirement		
12	Paragraph 19 of the draft Ruling does not accurately express the legal position about when, for subsections 100A(8) and (9), an adviser's purpose can be relevant to the identification of the purpose of an agreement. The draft Ruling does not adopt case law, including the High Court in *Commissioner of Taxation v Consolidated Press Holdings Ltd* [2001] HCA 32 (*Consolidated Press*) at [95], about imputed knowledge and when an adviser's purpose can be imputed to a client. The final Ruling should clarify, consistent with the statements of the Court in *Prestige Motors*, that the purpose of an adviser can be relevant for subsection 100A(8) when either the adviser is: • a party to the agreement, or • not a party to the agreement, but a party is aware of the purpose of the adviser and acts according to that purpose.	We have updated the final Ruling to clarify when the purpose of an adviser is relevant for subsection 100A(8). The Ruling states the Commissioner's position that the purpose of an adviser can be relevant for subsection 100A(8) in the following circumstances: • the adviser is a party to the agreement (as was found by the Federal Court at first instance in *BBlood,* and • the adviser is not a party to the agreement, but a party acts in accordance with the adviser's advice. In the first circumstance, where the adviser is party to an agreement or understanding to implement the various steps of the transaction (as described in *BBlood* at [138]), the adviser's purpose is directly relevant. In the second circumstance, where the adviser is not party to the relevant agreement (for example, considering the actual transaction steps as the agreement), the adviser's purpose is relevant by attribution to the taxpayer. Drawing on observations in cases such as *Commissioner of Taxation (Cth) v Bidencope* [1978] HCA 23, *Commissioner of Taxation v Gregrhon Investments Pty Ltd* & Ors [1987] FCA 655, *Consolidated Press* and *Millar v Commissioner of Taxation* [2016] FCAFC 94, the Commissioner's position is that the adviser's purpose can be attributed to a party who enters the relevant agreement in accordance with the advice of the adviser.
13	The ATO's interpretation of the tax reduction purpose test in paragraphs 70 to 75 of the draft Ruling is incorrect, as it does not recognise that the test in subsection 100A(8) requires that a counterfactual or alternative postulate be established.	We do not agree. The identified passage from the draft Ruling represents our position, as argued in *BBlood* and upheld by the Federal Court at first instance.

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	This threshold requirement, which derives from the text of the subsection where it refers to income tax a person 'would have been liable to pay', has been identified by the Court in *East Finchley Pty Ltd v Commissioner of Taxation* [1989] FCA 720; 90 ALR 457 at [474] and in *Guardian* at [163–172].	Our position is detailed in paragraphs 22, 84 and 184 to 190 of the final Ruling.
14	The statement in the draft Ruling that the tax reduction purpose in subsections 100A(8) and (9) need not be a dominant purpose of an agreement is incorrect. The ATO ought to have concluded, as the High Court concluded of a similarly drafted provision (section 177E) in *Consolidated Press*, that despite the absence of the word 'dominant' from the text of the provision, the tax reduction purpose need not be the dominant purpose of the agreement in order to cause the definition of reimbursement agreement to be satisfied. This construction would allow an arrangement to have multiple purposes (including a tax purpose) without the present entitlement being caught by section 100A.	We do not agree. That the Courts have imported a dominant purpose test into a similarly worded provision does not determine the issue. We note that the Federal Court in *BBlood* observed that the test in subsection 100A(8) was not a dominant purpose test and viewed at [132] that '… it is sufficient that it was "a" purpose, even one which could not be said to predominate any other co-existing purpose'. Our position does not have the effect that every arrangement with a tax purpose that meets the 'connection' and 'benefit to another' requirement would be caught by section 100A. It is possible for an arrangement with a tax purpose to be entered into in the course of ordinary family or commercial dealing where that dealing is nonetheless explained by the family or commercial objectives that it achieves.(see paragraphs 98 and 108 of the final Ruling).
15	The ATO has failed to properly account for the decision of the Federal Court in *Guardian* in making the draft Ruling. The Commissioner should make amendments to ensure that the conduct of administration is not inconsistent with the legal duties that the ATO has set out and acknowledged in the Decision Impact Statement for *Commissioner of Taxation v Indooroopilly Children Services Pty Ltd* [2007] FCAFC 16. In *Guardian*, the Court established legal precedent for the application of each element of section 100A, including the tax reduction purpose test and the exception for ordinary family or commercial dealing. The Ruling should not be finalised until the Court proceedings in *Guardian* are concluded. If the Ruling is finalised before that time, it should be based on the law including the decision of the Court in *Guardian.*	We agree that the decision of the court in *Guardian* is a part of the law and have recognised this in the final Ruling. The decision was, in substantial part, based on conclusions of fact about the non-existence of the particular agreement the Commissioner had alleged. Those conclusions of fact were not inconsistent with any aspect of the draft Ruling. To the extent that other observations of the Court could be construed as being inconsistent with the position taken in the draft Ruling, we have taken prompt action to contest these observations by appealing to the Full Court. We have included a summary of the case in paragraphs 48 to 50 of the final Ruling.

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Ordinary family or commercial dealing		
16	The draft Ruling interpretation of the phrase in subsection 100A(13) 'entered into in the course of ordinary family or commercial dealing' is narrow and complex to understand and apply in practice. The Ruling should identify simple proxies for when there is no reimbursement agreement for subsection 100A(7) or where there is an 'ordinary family or commercial dealing'. Suggested proxies are for whether there is: • 'ordinary family or commercial dealing', for an unpaid present entitlement could be based on whether the distribution continues to be recognised as a debt owed to the beneficiary in the accounts of the trust • a reimbursement agreement, a de minimis exception where only a fraction of an entitlement arises in connection with an agreement that provides for a payment or benefit to another • a reimbursement agreement, an exception where the beneficiary receives their trust entitlement in full and pays tax upon it.	The Ruling contains our view of the law, which does not have scope for proxies. However, as a matter of practical compliance with these views, we have set out in Practical Compliance Guideline PCG 2022/2 *Section 100A reimbursement agreements – ATO compliance approach* that we will not dedicate compliance resources to consider the application of section 100A to arrangements that are within the green-zone scenarios described in the Guideline. The green-zone scenarios deal with: • beneficiaries' entitlements being applied to benefit the beneficiaries' spouse or dependants • beneficiaries' entitlements being paid to make a donation to a deductible gift recipient or a personal contribution to a superannuation fund • beneficiaries' entitlements being satisfied within 2 years of those entitlements arising • beneficiaries' entitlements being used by the trustee as working capital or in undertaking investment activities.
17	The draft Ruling interpretation of the phrase 'entered into the course of ordinary family or commercial dealing' is incorrect where it states that something which is 'common' or 'commonplace' can fail to be ordinary. The exception is intended to be interpreted broadly to encompass a large range of circumstances including 'common' arrangements in line with the Oxford Dictionary definition of the word 'ordinary'.	We do not agree. In response to the feedback that the explanation of when a dealing is ordinary family or commercial dealing was difficult to understand, we have restructured the explanation and removed some terminology that had been used in the draft Ruling (see paragraphs 25 to 32 and 97 to 113 of the final Ruling). The core test for the exception is whether the dealing can be explained by the family or commercial objectives that it achieves. While most commonplace arrangements would in fact meet this test, that is not a substitute for the test. That an arrangement is widespread or seen as commonplace does not of itself demonstrate that the arrangement achieves any particular family or commercial objective or objectives.

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		A case where a commonplace arrangement might not satisfy the ordinary dealing test is one like the arrangement considered in *Commissioner of Taxation (Cth) v Gulland* [1985] HCA 83, the section 260 case we have referred to in the Ruling – a marketed tax avoidance arrangement that has become popular in the community.
18	The draft Ruling interpretation of the phrase in subsection 100A(13) 'entered into the course of ordinary family or commercial dealing' is incorrect where it states that a dealing can fail to be ordinary if not artificial.	We do not agree. The core test for the exception is whether the dealing can be explained by the family or commercial objectives that it achieves. In the application of this core test, we consider that the category of cases that would fail to meet this standard is not limited to those which demonstrate artifice or contrivance. We also take the position (consistently with the meaning of the core test) that a dealing can fail to be ordinary where it is overly complex and contains steps that are not necessary to achieve the claimed objectives, or where the totality of the steps taken do not achieve any objective. The position that an arrangement is not ordinary where it contains additional, unnecessary elements is supported by the decision of the Full Federal Court in *Prestige Motors*, where the Court noted that it is not sufficient to demonstrate that some steps in an arrangement have a commercial objective, as it is the whole of the dealing that must be examined. The position is also supported, in our view, by the observations of Thawley J in *BBlood* at [96]. We note that there has been public commentary that Logan J adopted a different approach in *Guardian* at [144], where he states that 'the adjective 'ordinary' in 'ordinary family or commercial dealing' has particular work to do. It is used in contradistinction to 'extraordinary'. It refers to a dealing which contains no element of artificiality'. His Honour continued on to make the observation that the '… explanatory memorandum confirms what a reading of s 100A would suggest, which is that the section is directed to addressing, according to its terms, "trust stripping"'. We do not necessarily agree that His Honour was taking a different approach to that later taken by the Court in *BBlood.* His Honour's judgment can be read as stating that a lack of artificiality is a condition for ordinary family or commercial dealing, not the whole test.
19	The draft Ruling interpretation of the phrase in subsection 100A(13) 'entered into the course of ordinary	We do not agree that dealings between family members are necessarily ordinary dealing. The core test for the exception is whether the dealing can

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	family or commercial dealing' is incorrect where it fails to acknowledge that a dealing between family members that involves no specially introduced beneficiaries is necessarily entered into in the course of ordinary family or commercial dealing. The draft Ruling also fails to give weight to the feature that family dealings 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.	be explained by the family or commercial objectives that it achieves. It is not correct to substitute a test of whether the dealing has been conducted between family members. We recognise that, in the application of the core test, family objectives can be characterised by an absence of self-interest by the participants and that long-term family objectives, such as those concerning succession planning or asset protection where a business is being operated, can achieve the pursuit of family or commercial objectives with a co-existent object of achieving tax efficiency (see paragraph 108 of the final Ruling). However, we do not agree that the exception is satisfied where the evidence shows that the dealing does not in fact achieve a family or commercial objective or is more properly explained by some objective other than a family or commercial objective.
20	The draft Ruling interpretation of the phrase in subsection 100A(13) 'entered into in the course of ordinary family or commercial dealing' is incorrect where it asserts that the existence of a tax purpose (labelled in paragraph 95 of the draft Ruling as 'tax-driven factors') can be relevant. The interpretation, where it asserts that the decision of the Judicial Committee of the Privy Council in *Newton* can be a relevant source of interpretation of section 100A, fails to correctly apply principles recognised by the High Court that the meaning of a statute is to be derived from the common or ordinary meaning of the text. On a proper construction of the text of the section, it is only the objective circumstances of the transaction that can be considered, and the question of whether there is a tax purpose is not relevant.	We agree that it is possible that the objective circumstances of a transaction can be sufficient to demonstrate the core test of ordinary dealing is satisfied as the dealing achieves a family or commercial objective. It does not follow, in our view, that questions of the existence of a tax avoidance purpose, which the arrangement can be seen to give effect to, are irrelevant to the enquiry. What we consider is relevant is detailed in paragraphs 105 to 108 of the final Ruling. We have also addressed the issue in more detail in paragraphs 191 to 198 of Appendix 3 to the final Ruling.

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21	In the draft Ruling, with respect to the interpretation of the phrase in subsection 100A(13) 'entered into in the course of ordinary family or commercial dealing', there is a lack of precision as to how the Commissioner has adopted the test in *Newton*. Specifically, the ATO should express a view (which is not stated in paragraph 27 of the draft Ruling) whether the ordinary dealing exception will apply if a tax minimisation purpose is subsidiary to the stated ordinary family or commercial objects.	Our view, as stated in the draft Ruling, is that the test in *Newton* is relevant. It is a part of the context in which Parliament enacted the words in subsection 100A(13) 'entered into in the course of ordinary family or commercial dealing'. We consider that the nature of the test, an objective enquiry applied to the transactions that form the dealing, is of the same kind as the test considered in *Newton*. However, we also recognise that, as noted by the Courts in *Prestige Motors* and *Guardian*, there are differences in the context of the respective provisions. In subsection 260(1), demonstrating that an arrangement can be explained as 'ordinary family or business dealing' would exclude the satisfaction of the statutory test that an 'agreement… has or purports to have the purpose or effect …of [among other things] altering the incidence of any income tax'. In subsection 100A(13), as explained in the Ruling and confirmed in recent cases including *BBlood*, the statutory enquiry is whether 'an agreement is entered into in the course of ordinary family or commercial dealing'. Unlike the terms of section 260 for which the test in *Newton* was formulated to address, the function of the core test is not to exclude a purpose or effect of reducing the incidence of tax. However, in the operation of the test we consider that evidence of an objective of tax minimisation can be relevant to the statutory question of whether a dealing can be explained by the family or commercial objectives it achieves. For the specific question raised in this issue, a tax minimisation purpose that is subsidiary to the family or commercial objectives that the evidence shows are achieved by the dealing will not cause the core test for ordinary dealing to be failed.

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22	The draft Ruling's interpretation of the phrase in subsection 100A(13) 'entered into in the course of ordinary family or commercial dealing' does not accommodate breadth in family situations such as cultural and social factors and how families interact within their family unit. The interpretive view in the draft Ruling is too wide and would lead to inappropriate outcomes that would not advance the administration of the provision. In particular, it could lead to decision making that depends on value judgments made by tax officers. Each family's circumstances are unique and the ATO should consider whether the arrangement is ordinary in the setting of that family, as opposed to adopting an objective standard of what is an ordinary family dealing.	We have included content in paragraphs 109 to 113 of the final Ruling to indicate that these factors can be taken into account in answering the composite question of whether a dealing has been entered into in the course of ordinary family or commercial dealing. We do, however, note that the question of whether social or cultural factors or the circumstances of a particular family are relevant is (like other factual matters) a subject of objective enquiry for which examination of evidence can be relevant. Examination of the evidence is a feature of the test and conducting this examination does not show that we are making value judgments or departing from the operation of the law.
23	The ATO should seek declaratory relief from the Federal Court as to the correct interpretation of the 'ordinary family or commercial dealing' exclusion in subsection 100A(13). This would be the most efficient way (in cost and time for both the ATO and taxpayers) to provide certainty on this important matter. Alternatively, the ATO should fund a suitable test case to allow the courts the opportunity to interpret the ordinary family or commercial dealing exception.	We recognise the importance of litigation as an instrument to provide greater certainty on how the law applies, though factual enquiries and decisions on the facts will rarely be a complete answer. Following the issue of the draft Ruling, the interpretation of the phrase 'entered into in the course of ordinary family or commercial dealing' has been considered by the Federal Court in *BBlood.* The question is also a subject of an appeal to that Court in *Guardian.* We will look to the outcomes of these cases to provide greater certainty about the application of the section if possible.
24	To interpret what ought to be ordinary, some of the tax-driven features referred to in paragraph 95 of the draft Ruling require clarification: • Why or how the trustee's reasons for not remitting income to the beneficiary are false. • Why the proportion of income actually remitted compared to other beneficiaries can be relevant. • How the relationship between beneficiaries, trustee and settlor will impact the analysis and what factors will need to be considered.	We acknowledge the feedback and have acted on it. We maintain that the presence of tax-driven features can be relevant to the statutory question of whether an agreement has been 'entered into in the course of ordinary family or commercial dealing'. In the final Ruling, the list of examples of tax-driven factors that could be relevant to the question has been shortened and more directly linked to the test of ordinary family or commercial dealing.

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	• Greater clarity is needed for scenarios where distributions are made to family members other than adult children.	
Deeming created by section 100A and its effect		
25	The ATO's view in paragraph 37 of the draft Ruling that the effect of section 100A is to create a fictional state of affairs where the receipt of, or entitlement to, financial benefits does not arise is incorrect. The view impermissibly extends the deeming in subsections 100A(1) and (2) beyond its intended purpose, in a manner contrary to the approach to interpreting deeming provisions as described in *Commissioner of Taxation v Comber, A.H.* [1986] FCA 92. For section 100A purposes, the deeming of no present entitlement does not go beyond switching off the mechanism by which sections 97 and 98 operate to assess beneficiaries and trustees on an appropriate share of the net income of a trust estate.	We do not agree that the deeming is confined as suggested. The deeming in subsections 100A(1) and (2) is expressed to apply 'for the purposes of the Act'. We agree, noting the views of the Courts in the cases referred to in footnotes 111 to 113 in paragraph 116 of the final Ruling, that the statutory fiction created by the deeming is not without limitation and its limits must be construed from the context of the provision. Having regard to the statutory context, the Commissioner considers the deeming takes effect for those purposes of the ITAA 1936 that operate to provide taxation consequences in relation to the entitlement which is the subject of section 100A. Thawley J, in *BBlood* at [155], referred to the effect of the fiction as 'switching off' and 'undo[ing]' the entitlement. There are provisions in the ITAA 1936, apart from sections 97 and 98, which bear upon the taxation of trust net income related to the entitlement which is switched off by the statutory deeming. The fictional circumstances achieved by the deeming are taken to exist for the purpose of these provisions. We consider that the deeming can similarly extend to alter the operation of the streaming rules in Subdivisions 115-C and 207-B of the *Income Tax Assessment Act 1997* (ITAA 1997), if the relevant gains or distributions form part of the trust income and form part of the entitlement of the beneficiary which is 'undone' by the deeming. The fictitious sets of facts achieved by the deeming in section 100A may have the result that the beneficiary is not specifically entitled. Further, the streaming provisions may operate without regard to a specific entitlement by instead allocating a gain or distribution in accordance with adjusted Division 6 percentages of trust income. The operation of the adjusted Division 6 percentages can also be impacted by section 100A.

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		We note that the decision of the Federal Court at first instance in *BBlood* is consistent with the position that the operation of Subdivision 207-B of the ITAA 1997 is altered by the operation of section 100A. We have addressed this in paragraphs 115 to 134 of Appendix 1 to the final Ruling.
26	If the ATO maintains the view in paragraph 37 of the draft Ruling that the effect of section 100A is to create a fictional state of affairs where the receipt of, or entitlement to, financial benefits did not arise, the ATO should confirm that the view extends to other purposes of the ITAA 1936 with the effect that Division 7A does not apply to arrangements which involve entitlements that are also subject to section 100A. This would avoid double taxation.	As we note in our response to Issue 25 of this Compendium, there are provisions in the ITAA 1936 apart from sections 97 and 98 which bear upon the taxation of trust net income related to the entitlement which is switched off by the statutory deeming. The fictional circumstances created by the deeming are taken to exist for the purpose of these provisions. We consider this extends to Division 7A. Where section 100A has applied to a relevant entitlement of a corporate beneficiary, there will be taken to be no present entitlement of that corporate entity which could be the subject of a loan to the trustee under section 109D. This is addressed in paragraphs 124 to 125 of the final Ruling.
27	The Ruling should provide guidance on how the operation of section 100A interacts with other provisions, including the trust loss provisions in Schedule 2F, section 45B, Division 7A and Part IVA.	In an already relatively lengthy Ruling, we have confined our consideration to how section 100A applies. In addition, however, we have addressed a number of the practical interaction issues in the final guidance, including: • where the operation of Division 7A is limited for dealings with an entitlement that has arisen under a reimbursement agreement (paragraph 124 of the final Ruling) • how compliance with the conditions in Division 7A or Schedule 2F can, in particular scenarios and examples, indicate a lower risk of section 100A applying (paragraphs 28 and 29, and 126 to 152 of PCG 2022/2). As a practical matter, the operation of section 100A to the facts of an arrangement could be relevant to the operation of Part IVA in the same manner as other substantive provisions of the ITAA 1936. For example, it might be relevant for the paragraph 177D(2)(d) consideration of 'the result in relation to the operation of the Act that, but for this Part, would be achieved by the scheme'.

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		We will monitor the operation of the system in practice. We will continue to consider the need for separate public advice on other interaction issues and whether that advice can be provided within existing products.
Example on the effect on streamed capital gains and franked distributions		
28	The draft Ruling and explanation provide that where section 100A applies in relation to the amount of a capital gain or franked distribution, the consequences involve making an adjustment to the parties' adjusted Division 6 percentages, as that term is defined in subsection 95(1). The ATO should include a worked example in the Ruling to demonstrate how this will happen in practice.	We have acted on this issue by including a worked example in paragraphs 130 to 133 of the final Ruling.
Date of effect – retrospectivity		
29	The views in the draft Ruling should be expressed to apply on a prospective basis only, for one or more of the following reasons: • there has been a lack of community awareness of the potential operation of section 100A before the release of the draft Ruling • the views detailed in the draft Ruling arguably reflect a change in approach by the ATO, and • the rule of law requires certainty of the operation of the law and taxpayers should not be caught unaware by the proposed interpretation of the law by government agencies. Due to interpretative uncertainty in the interpretation of the ordinary family or commercial dealing exemption and other aspects of section 100A, the final Ruling should only apply prospectively in the interest of fairness to taxpayers.	The final Ruling is expressed to apply to income years before and after the date of release. The law applies from the date of effect of the legislation, whether or not we have published a view about that law and irrespective of the level of community understanding about the enacted law. We disagree that the views detailed in the draft and final Rulings reflect a change in approach in how we have been administering the law. The views detailed therein are consistent with our longstanding approach to the administration of section 100A, as reflected in public statements of our senior officers and as can be seen in the positions we have consistently put to taxpayers (and later to the judiciary) in matters such as *Nelson v Commissioner of Taxation* [2017] FCA 819, *Guardian* and *BBlood*. Notwithstanding the standard application of the final Ruling to years both before and after the date it is published for the reasons given above, as a matter of administration, PCG 2022/2 explains our compliance approach to arrangements to which section 100A may apply. PCG 2022/2 states that for trust entitlements arising before 1 July 2022, we will stand by the administrative position in *Trust taxation – reimbursement agreement* to the extent it is more favourable to the taxpayer's circumstances than PCG 2022/2. Additionally, we will only seek to apply compliance resources to years earlier than the 2014–15 income year in specified circumstances.

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30	The Ruling should state that the Commissioner does not have an unlimited period of review to amend an assessment to give effect to the operation of section 100A (despite the wording of table item 17 of subsection 170(10)), having regard to the views of the Full Federal Court (in relation to an item in subsection 170(10AA)) in *Metlife Insurance Ltd v Commissioner of Taxation* [2008] FCAFC 167 (*Metlife*).	We do not agree. The provision considered by the Court in *Metlife* related to the operation of capital gains tax (CGT) provisions which could be impacted by later-occurring events. The Court found that once those later events had occurred, the relevant CGT provision had been engaged and so subsection 170(10AA) could not operate to further extend the period of review 'for the purposes of giving effect to' that CGT provision. We consider subsection 170(10), in allowing amendments to assessments to be made at any time 'for the purpose of giving effect to' section 100A, operates more broadly. Section 100A is an anti-avoidance provision. It does not rely for its operation on later-occurring facts in order to create a statutory backdating in the same way as the provision considered in *Metlife*. We note that while not needing to decide the point, in *BBlood* at [61–69], Thawley J noted that *Metlife* did not necessarily limit the operation of subsection 170(10) as it applied to amendments giving effect to section 100A.
Administration		
31	The ATO should adopt internal supervisory processes, such as review by the General Anti-Avoidance Rules (GAAR) Panel where section 100A was applied. Under the current arrangements, there is a concern that the ATO will seek to subvert the operation of the GAAR Panel and apply section 100A to arrangements for prior years. Referral to the GAAR panel should be mandatory and Law Administration Practice Statement PS LA 2005/24 *Application of General Anti-Avoidance Rules* updated to this effect.	The ATO recognises that the application of section 100A is a significant matter. The GAAR Panel has previously considered matters where we have raised the issue of whether section 100A applies to a certain type of arrangement. This will continue to feature as a part of our administrative process.
32	The draft Ruling should not have issued. The making of a public ruling on section 100A at a time when there is limited case law and when there is controversy about the meaning of the phrase 'entered into the course of ordinary family or commercial dealing' in subsection 100A(13) is in excess of the Commissioner's General Power of Administration.	We acknowledge that there is current controversy about aspects of the operation of section 100A and some of these are the subject of current Full Federal Court appeals. The object of the public advice and guidance program is to provide certainty to the community on our view of how the tax laws apply. Providing certainty in this way supports stakeholders making decisions as they engage with the tax system. The object is not limited to instances where the position under the

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		law is settled or straightforward. This final Ruling and other guidance have been released in response to requests from the public and representative bodies. The making of a public ruling is not beyond power. It is an exercise of the specific power conferred on the Commissioner by section 358-5 of Schedule 1 to the *Taxation Administration Act 1953*. By the terms of that section, we may make a written ruling on the way in which we consider a relevant provision or relevant provisions would apply to entities generally. The final Ruling may cover any matter involved in the application of the provision.
Record keeping		
33	The effect of the reasoning in the draft Ruling is to impose significant additional and impracticable record-keeping burdens for persons who administer trusts. This would extend to the requirement to prove that an agreement did not exist before a present entitlement was created and to explain intra-family dealings that would, apart from the operation of section 100A, be conducted with informality and without the need to maintain written records. This is compounded by the unlimited period of review for the operation of the section, for historical and ongoing arrangements. The draft Ruling interpretation of the phrase in subsection 100A(13) 'entered into in the course of ordinary family or commercial dealing' imposes an obligation on trustees that is inconsistent with the operation of the general law. It is established trust law that the trustee has no obligation or duty to substantiate the use of trust distributions or for beneficiaries to be aware of their distribution entitlement. It follows that no such requirement should be imposed to demonstrate that an agreement is entered into in the course of ordinary family or commercial dealing.	We do not require trustees to act contrary to law and acknowledge that dealings between family members have a level of informality. However, the application of section 100A depends on the facts of each case, which evidence can be helpful in establishing. Not all evidence need necessarily be sourced from the trust (for instance, evidence of the beneficiary's purpose in, for example, sharing an amount they were entitled to receive would likely come from that beneficiary), though most trustees would be required as a matter of trust law to account to their beneficiaries and/or discretionary objects by keeping some record of the affairs of the trust. We encourage taxpayers to maintain adequate and relevant records to support their contentions. For further information on record keeping, refer to PCG 2022/2 and web guidance.

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	The final Ruling ought to adopt an interpretive position that is consistent with the operation of the general law.	
Examples		
34	The examples in Appendix 2 of the draft Ruling provide limited guidance and should be revised to address the following: • avoid the use of caveats such as 'absent any additional factors' and 'a different outcome might arise' because they increase uncertainty when understanding the ATO's views as applying to fact patterns • overlaps between the final Ruling and PCG 2022/2 should be better managed, to ensure common scenarios or content are properly cross-referenced • should modify factual contexts to cover commonplace familial arrangements; that is, long-term wealth transfer or succession planning • should modify factual contexts to acknowledge cultural and other diversity • repetition should not be a hallmark feature of a tax reduction purpose • should give further guidance on what is a reasonable time for a present entitlement to remain unpaid • additional examples should be adopted to include arrangements that have been established by case law, involve distributions to loss making entities or to arm's length suppliers to make an expense deductible or concern circular arrangements.	We have acted on this feedback. Examples in the final Ruling have been revised, as per the following: • Broadly, the factual contexts have been modified to illustrate a variety of different familial or commercial settings including diversity in family compositions. • The language has been revised to provide better clarity on when a factor would weigh against an ordinary family or commercial dealing. • Repetition is illustrated as a feature that can appear as explicable by an ordinary familial objective, as well as a sign of a tax-driven feature in other cases. Further examples have been included within the text of the final Ruling to illustrate the points made. PCG 2022/2 also contains additional examples, which include the retention of unpaid entitlements and loss beneficiaries.
35	Example 1 in Appendix 2 of the draft Ruling should be expanded to deal with the creation of a testamentary trust where the majority of assets are willed to that trust for the benefit of an entire family.	We have acted on this feedback. We have retained the example, which now appears as Example 6 of the final Ruling as involving a single beneficiary to simplify the illustration of the idea. We agree that the reasoning could apply equally where the arrangement

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		involved several beneficiaries for whom payment will be suspended until they reach a certain age. We also note that paragraph 137 of the final Ruling clarifies the language used in Example 6 to provide better certainty to taxpayers and practitioners. Example 10 in paragraphs 120 to 125 of PCG 2022/2 also contains practical guidance in respect of a testamentary trust.
36	Example 2 in the draft Ruling should not employ vague language which allows the ATO to 'hedge its bets' with what should be a straightforward green-zone arrangement. It does not address that other family members, other than spouses, may also have shared financial responsibilities and, on the other hand, not all spousal relationships will equally share finances either. It is not clear what is meant by 'familial objects' in this context.	We have acted on this feedback. The factual content, terminology and factors in this example, which now appears as Example 7 of the final Ruling, have been revised in the final Ruling to provide better certainty to taxpayers and practitioners. Specifically, some changes to the facts have been made to accommodate that not all spouses will share an exact 50/50 split of their joint finances. The new facts still demonstrate an understanding that spouses (de facto or married) will share resources in furtherance of their personal and financial objectives and this can properly be explained as ordinary dealing to achieve family or commercial ends. Where other family members in fact share financial resources under an arrangement, we agree that it is possible that this could be an arrangement in the course of ordinary family or commercial dealing. However, such circumstances need to be considered on their own merits and specific facts and therefore in our view were not suitable as content in the final Ruling.
37	Example 3 in the draft Ruling should not be limited by the caveats contained in paragraph 115 of the draft Ruling as these are not tax-driven features, but rather can be examples of an ordinary family or commercial dealing. The example should clarify the approach to evaluate transactions between parents or grandparents assisting an adult beneficiary. The example unduly places an emphasis on retiring parents or the aging process as a negative factor. The example should accept that gifting between family members is a common transaction regardless of age. Repetition can be commonly explicable and is not necessarily a hallmark feature of tax avoidance. For example, it was	We have acted on the feedback to revise the factual content, terminology and factors in this example, which now appears as Example 8 of the final Ruling, to illustrate that while the dealings can be wholly between family members, where the acts that comprise the arrangement achieve a particular favourable tax result that cannot otherwise be seen to result in any family or commercial objectives, these features are likely to weigh against an ordinary family or commercial dealing and, further, raise a question as to whether the tax reduction purpose requirement is satisfied. We do not intend to convey that retired parents will be scrutinised. The factual scenario was simply intended as a practical, easy to understand instance where parents tax rates may be lesser. New facts have been added to Example 8 in the final Ruling to further demonstrate this.

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	queried whether helping an adult child or adult grandchild cope with increasing regular payments, such as rental obligations or mortgage repayments, was considered objectionable. It was suggested there should not be an emphasis on the mismatch of tax rates because, for example, family members often make sacrifices without first calculating their marginal tax rate.	We agree that the entitlements of lower marginal rate beneficiaries can be a part of an arrangement to achieve family or commercial objectives, and that a mismatch of tax rates does not solely inform the question of whether there is ordinary dealing. We do maintain, however, that the presence of a lower tax rate for the presently entitled beneficiary can, taken together with the other facts of an arrangement, be relevant to determining what are the objectives that a dealing will achieve.
38	Example 4 of the draft Ruling is vague and requires explanation, as its application to ascertaining the source of funds or types of arrangements is unclear. The arrangement where the entitlement is gifted to the trustee in Example 4 could be done for numerous legitimate reasons. For example, this will feature very commonly for small businesses or rural businesses that are run through trust structures. The retention of entitlements is seen as beneficial as it is applied towards the working capital, alleviates liquidity issues or furthers the family's business. Family members are expected to pool resources and pitch in with their labour or resources. Consequently, the example does not address that families often see themselves as a single economic unit and not taxpayers. The drafting and language in Example 4 should be clarified as it could be misconstrued or produce unwanted behavioural responses, such as reliance on unilateral arrangements entered into by trustees or requiring adult children to contribute greater amounts to offset costs borne by their parents such as board, vehicle running costs or travel expenses.	We note the feedback. We have removed Example 4 from the final Ruling. Arrangements involving retentions by trustees, particularly business trusts, are covered in paragraphs 25 to 29 of PCG 2022/2.
39	Example 5 of the draft Ruling is vague and provides limited guidance. It contains caveats which operate to overly restrict the operation of the ordinary family or commercial dealing	We have retained the example, which now appears as Example 9 of the final Ruling. The example has been expanded to explain how the other requirements, such as the benefit to another condition, may be met in a case where a

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	exception because such factors could themselves be characterised as an ordinary family dealing. For instance, a trustee holding on separate trust a beneficiary's entitlement would be ordinarily and legally acceptable. It is not clear whether the facts imply there was a breach of the trustee's duty to the beneficiary or where the beneficiary could not for some reason take action against the trustee for moneys had or received. Similarly, it is unclear why a factor would weigh against an ordinary dealing, such as where the separate or sub-trust empowers the trustee to make an interest-free loan to another, whether or not it is on an interest-free or undefined period basis. Most modern trusts will enable a trustee to hold a beneficiary's entitlement on a separate trust for their sole benefit until such time it is paid or dealt with. The draft Ruling does not recognise relevant avenues for redress that are available to trustees and beneficiaries under trust law. The example should be revised to appropriately address common family settings, such as a breakdown in relationship between those who control the trust and the beneficiaries or the death of the controller and where their deceased estate includes trust assets. The example should clarify the legal meaning of a 'separate trust' and the practical implications that flow out.	beneficiary does not receive their entitlement and it remains held on the terms of a trust. We agree that the use of separate trusts is common and is legally acceptable. The use of a separate trust is not a turning point or a necessary pointer for or against the meeting of any of the requirements for the application of section 100A. While conduct in breach of trust would be an indicator that would point against a conclusion that an agreement is entered into in the course of ordinary dealing, this example does not involve a breach of trust. On reflection, as it was not a critical fact of difference, we have decided to take out the fact that the funds were set aside on a separate trust. No negative inference should be drawn from this. We maintain that the trustee's use of funds and evidence that the amount of the entitlement might not be ultimately received or otherwise enjoyed by a beneficiary are relevant facts to consider for whether the requirements in section 100A are met. We have noted the comments on other common family settings involving breakdowns in relationships and will continue to consider how they can be used in guidance that the ATO can provide.
40	Example 6 in the draft Ruling should be revised as it provides limited guidance. The example is vague; for instance, it does not clarify what is the nature of the help provided by the parent. The example should not use repetitive financial support as a hallmark feature of tax avoidance, because it can be commonly explicable by several family objectives. For example, parents often provide financing arrangements to adult children particularly where there is an unexpected need	We have retained this example, which now appears as Example 10 in the final Ruling. We have acted on the feedback to revise the factual content, terminology and factors in this example to illustrate different surrounding facts in family arrangements. Repetition is illustrated as a feature that might be explained by family objectives or alternatively might be explained by another objective, which could be the reduction of tax payable.

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	such as loss of job, illness, breakdown of a marriage or de facto relationship, increased interest repayments or substantial repairs. All these contexts lend to ordinary family dealings. Without accounting for such surrounding factors, the example is unhelpful and places incorrect emphasis on the mismatch between tax rates.	
41	Example 7 in the draft Ruling should be deleted as it is peripheral to the substance of the issues that form the subject of the draft Ruling. If it is retained, the example should be expanded to include the 'retiring of a trust debt' scenario contained in ATO Interpretative Decision ATO ID 2012/74 *Income Tax: Division 7A: unpaid present entitlements between a unit trust and unit holders* (now withdrawn). It should clarify the type of documentation or evidence the ATO would like to see in relation to the arrangements. Section 100A should not apply even if the loans made by the 20 unrelated unitholders to the fixed unit trust were not made at a market rate of interest or some of the factors outlined in paragraph 132 of the draft Ruling were present.	We have noted the balance of the feedback and Example 7 has been removed from the final Ruling.
42	Example 8 in the draft Ruling should be revised because it contains elements that are not likely to be encountered in practice. For instance, it refers to a company buying back 100% of its shares in the absence of a liquidation, which does not happen in practice. The example scenario is unlikely to invoke the operation of section 100A as the amounts deal with capital receipts rather than trust income. Some submissions called for the example to be deleted as it deals with issues unrelated to the operation of section 100A.	We note the feedback. The example has been revised, which now appears as Example 11 in the final Ruling, to correct that a buy back cannot be made of all the shares in a company. The example has been retained as it demonstrates an arrangement like that considered in the Federal Court in *BBlood*.
43	Example 9 of the draft Ruling should reference the *Guardian* decision as it contains some factual similarities.	We note the feedback. The example has been retained as Example 12 in the final Ruling.

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	The example should be amended to include factual details that may produce a different conclusion. Some submissions viewed the arrangement in the example as not one that purports to circumvent any tax laws and likely falls within legitimate tax planning.	We maintain that the arrangement does demonstrate a risk that section 100A would apply. Footnote 132 has been added in the final Ruling to reflect interactions with the *Guardian* decision.