



5 October 2022

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**Re: ATO document – Practical compliance guideline for section 100A
Additional draft green zone examples**

Dear Christopher,

The NTAA and its members thank you for the opportunity to comment on the changes the ATO intend to make to Practical Compliance Guidelines ('PCG') 2022/D1, as set out in the above-noted document.

Our observations with respect to the changes to PCG 2022/D1 are as follows (note: all references below are to the above-noted document unless otherwise stated):

1. Any expansion of the green zone is fully supported by the NTAA, as this will assist more taxpayers to assess whether trust distributions fall into the green zone under PCG 2022/D1.
2. Regarding the removal of the blue zone, paragraph 5 states:

Each example assumes that there are no additional features that either causes the example to be in the red zone or stops the example being within the green zone (i.e., the features outlined in paragraph 26 of the draft PCG).

On one reading, this suggests that there are arrangements that can be outside the green zone but not in the red zone (so they fall under neither but are not specifically labelled blue).

Or is it the ATO's intention that, if an arrangement is not in the red zone but is stopped from being in the (expanded) green zone (as it has a feature listed in paragraph 26 of PCG 2022/D1), the arrangement will also, by default, fall into the red zone?

It would be useful to clarify the ATO's compliance approach in this regard.

Retaining the blue zone may be useful as this reduces confusion as to the classification of arrangements. Our main concern is that confusion will exist with respect to more 'conventional' trust distribution arrangements that do not fall specifically within the green zone. It is therefore possible for tax practitioners and their clients to be uncertain about the 'status' of those trust distribution arrangements if they do not fall within the ATO's somewhat limited list of green zone arrangements (as outlined in the amended PCG guidelines).

Some taxpayers in this situation (and their advisers) may form the view that their arrangement carries a low risk of being invalidated under S.100A purely on the basis that the arrangement does not appear to strictly fall into the ATO's red zone. On the other hand, others may interpret the ATO's guidance differently and assume their arrangement falls into the red zone on the basis that it does not appear to strictly fall into the ATO's green zone.

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Neither approach is desirable as this uncertainty may negatively interfere with a trustee's decision-making process regarding the distribution of trust income.

Retaining the blue zone would remind taxpayers in this situation to carefully consider the elements that comprise S.100A of the ITAA 1936 ('S.100A') so they could assess the potential exposure to S.100A. The ATO may consider encouraging taxpayers with arrangements that may fall into the blue zone to engage with the ATO to discuss their proposed arrangement prior to distributing trust income.

For these reasons, the NTAA strongly encourages the ATO to retain the concept of the blue zone in their updated PCG compliance guidance.

In the alternative, the NTAA would encourage the ATO to further expand the green zone to reduce uncertainty with respect to conventional arrangements that will not otherwise fall into any specific risk zone. For instance, would the ATO consider further expanding its new [example for the additional green zone scenario](#) 'time lag between a beneficiary becoming entitled and that entitlement being satisfied' (refer to paragraph 26), to also include scenarios in which a trustee is unable to fully pay out or discharge a beneficiary's present entitlement within the two-year acceptable period (refer to paragraph 4)? For example, the green zone could be further expanded to cover scenarios in which the following requirements are met:

- there is a genuine desire for the presently entitled beneficiary to receive and enjoy the economic benefit of their entitlement;
- the trustee has shown a commitment to paying out the entitlement by ensuring that at least a portion of the entitlement is paid out or discharged within a two-year period; and
- there are extenuating circumstances that have resulted in the trustee being unable to pay out or discharge the entitlement in a timely fashion. For example, the 'ordinary family dealings' exclusion may continue to apply where a trust entitlement remains partially unpaid (outside of the two-year period), where a trustee has cashflow or liquidity concerns due to a business (such as a property development) or investment undertakings that affect the ability of the trustee to discharge unpaid trust distributions.

New green zone scenario 3A

3. Paragraph 7 – consider clarifying that Old McDonald is an individual from the outset of this example (e.g., by saying "...controlled by an individual, Old McDonald").
4. Paragraph 10 says "...*Young McDonald will take control of the McDonald Family Trust...*" – should this be control of the trust or control of the farming business? As drafted, this wording is broad enough to pick up a scenario whereby there is an intention for Old McDonald to sell the business with Young McDonald later taking over control of the trust (e.g., take control of future trust investments, which could include agistment).
5. Paragraphs 7 to 26 (New green zone scenario 3A) – it is not clear why this example does not fall within the existing 'green zone scenario 3' (refer to paragraph 20 of PCG 2022/D1). Perhaps Young McDonald is not strictly employed by the trustee?
6. Does new green zone scenario 3A extend to multi-generational businesses that are not farming businesses? Paragraph 4 suggests that it may, it would be useful to clarify this.
7. It would be useful for the ATO to clarify what additional features or benefits new green zone scenario 3A encompasses (i.e., over and above existing 'green zone scenario 3'). Will the parameters of the new green zones be set out in more detail (i.e., in addition to providing the new examples of these zones)?

New green zone scenario 3B – distributions to a loss company

8. Paragraphs 19 to 25 (new green zone scenario 3B) – this is a useful addition to the green zone scenarios. It may be worth setting out the parameters of this new green zone scenario in more detail (i.e., in addition to providing the new example for this zone) – what the ATO has provided in this document appears to be more of an example of a green zone scenario rather than the scenario itself.
9. Paragraph 25 – this paragraph says...the arrangement does not have any features that exclude it from the green zone under paragraph 26 (of PCG 2022/D1). However, paragraph 26 excludes a red zone arrangement from the green zone and paragraph 42 would include the example provided for the purposes of the new green zone scenario 3B in the red zone. No doubt this is not the intention. It is important that taxpayers are able to clearly distinguish between arrangements that fall into new green zone scenario 3B and those that fall into red zone scenario 5.
10. Paragraph 29 – could the ATO clarify whether the business in the loss trust must be continuing to access the new green zone scenario 3B and, if so, must this be for any particular duration?

New example for additional green zone scenario – time lag between a beneficiary becoming entitled and that entitlement being satisfied

11. It is not clear which 'additional green zone scenario' this example relates to. It seems this is a new example for an additional green zone scenario (that we do not have details of). This example appears to provide a green zone scenario where the requirements of green zone scenario 3 (paragraph 20 of PCG 2022/D1) are not satisfied (e.g., where the beneficiary is not involved in the management of the business and is also not a controller of the trust) but the unpaid present entitlement is paid out or discharged within a two-year time frame. Refer also to paragraph 4.

If this is the case (i.e., this example reflects a new green zone scenario), this is a useful, practical addition to the ATO's S.100A compliance guidelines.

However, it would be useful to clarify the following issues:

- Does the principle in this example apply if the trustee distributes a certain quantum of trust income as opposed to a percentage distribution or where the beneficiary is a 'balance beneficiary' (i.e., where the distribution amount is known at year-end)?
 - Is the lodgment of the tax return a reference to the earlier of the due date of the return and lodgment of the return?
 - Paragraph 33 provides "...the \$120,000 income receipts had been retained by the trustee of the Tortoise Trust as part of the investment portfolio maintained by the trustee." Does this preclude the trustee from loaning the \$120,000 to an associate of the trustee (other than the presently entitled beneficiary)?
 - The 'additional green zone scenario' appears to be akin to a safe-harbour rule of sorts. It may be more practical to introduce a two-year safe harbour period with appropriate guidance on when the rule can apply and what restrictions are imposed on the use of funds in the intervening period (and then insert the 'Tortoise Trust' example at this point). This is particularly important if the information contained in paragraph 4 is not included in the finalised version of PCG 2022/D1.
12. If, however, it is the intention of the ATO to implement a time limit over which a 'retention of funds by a trust falls into the green zone under 'green zone scenario 3' in paragraph 20 of PCG 2022/D1, the NTAA does not support this example. We are firmly of the view that the 'ordinary family or commercial dealings exclusion' in S.100A is not restricted by an arbitrary time frame (whether nominated by the ATO or otherwise).

New example for additional green zone scenario 4 concerning time lag between a loss trustee beneficiary becoming entitled and that entitlement being satisfied

13. Paragraph 35 – the heading for this example refers to ‘additional green zone scenario 4’ but it is not clear what scenario 4 refers to. Is scenario 4 in addition to new green zone scenario 3B? In any case, it would be useful to set out the parameters of this new green zone scenario (i.e., in addition to providing the new example for this scenario).
14. Paragraphs 35 to 44 – this example involves a present entitlement that is made on 30 June 2023, which is paid out on 1 December 2023, a period of five months. Is five months a lag? It seems like a reasonable time frame in this context.

This example involves a trust distribution to a loss trust which, in turn, distributes tax-free capital to trust beneficiaries (who, it is noted, could have been made presently entitled from the profit trust). The profit and loss trust are part of the same family group, which restricts distributions to the family group (i.e., assuming family trust distributions tax is to be avoided).

Given this, the NTAA agrees that the arrangement would likely fall into the ordinary family dealing exception for S.100 purposes.

Our concern is that the insinuation within the example is that a ‘lag’ between present entitlement and payment of the entitlement that exceeds five months may no longer place the arrangement within the green zone.

Can you please confirm within the example that the arrangement would continue to remain within the green zone even where the ‘lag’ exceeded five months?

15. Paragraph 38 – would the same outcome arise if the profit trust distributed capital gains to a loss trust with capital losses (assuming all other requirements were met)?
16. Presumably, a distribution to a loss trust is excluded from the example beginning at paragraph 26 (is this restricted to individuals?). If not, the lag for the example at paragraph 35 could potentially be two years, not five months. Could the ATO please clarify this?

New example for green zone concerning a testamentary trust

17. Paragraphs 45 to 50 – this example is a useful addition to the green zone as it expands the ‘retention of funds concept’ and expands the types of arrangements that can fall into the green zone. However, it may not be realistic to use an example where the only income and capital beneficiary of the trust is Gwen as this is often avoided in order to reduce the risk of the rule in *Saunders v Vautier* (1841) 41 ER 482 being invoked.

Thank you again for the opportunity to comment on the ATO’s proposed changes to PCG 2022/D1.