

# Why? Guide

**Acis.**

Recent cases and guidance from the Australian Taxation Office (ATO) impact trust deeds and the way Trustees exercise their discretions, especially in relation to trust distributions. The below table outlines the issues identified by these cases and guidance and informs the considerations, strategies and solutions that should be

Source	Problem
TR 2022/4 PCG 2022/2	<p><b>Taxation Ruling 2022/4 and Practical Compliance Guideline 2022/2</b> are two pieces of guidance published by the ATO in December 2022. They outline the ATO's approach to the application of section 100A of the Income Tax Assessment Act 1936 (Cth) (ITAA) to trust distributions.</p> <p>In brief, section 100A is an integrity measure dealing with trust distributions that arise out of or in connection with an arrangement where:</p> <ul style="list-style-type: none"><li>• a person other than the entitled beneficiary is provided a benefit;</li><li>• it is intended to have the result of reducing someone's tax liability; and</li><li>• the arrangement is entered into outside the course of ordinary family or commercial dealing.</li></ul> <p>Where it applies, the likely result is that the intended beneficiary may be considered not to actually be entitled to the distribution and the trustee may instead be taxed on the amount at the highest marginal rate.</p> <p>It is necessary to consider s. 100A as well as the matters raised in TR 2022/4 and PCG 2022/2 when making trust distributions. Previous year's distributions may also need to be revisited.</p>
Owies #1	<p><i>Re Owies Family Trust [2020] VSC 716</i></p> <p>The Court in this case was called upon to determine if a power in a trust deed that was relied upon to make a change to the Guardian and Appointor was sufficient and therefore, whether the change of Guardian and Appointor was valid or invalid. The Court held that the power relied upon was not sufficient and thus, that the appointment of a new Guardian and Appointor was invalid.</p> <p>It is necessary to ensure that:</p> <ul style="list-style-type: none"><li>• Trust deeds contain sufficient powers to change positions in the trust. Where they don't, amending them to include these provisions should be considered.</li><li>• Previously prepared amendments to change positions are reviewed to ensure they don't have validity issues.</li></ul>

Source	Problem
Owies #2	<p><i>Owies v JJE Nominees Pty Ltd [2022] VSCA 142</i></p> <p>Potential beneficiaries of a discretionary trust challenged the distributions that a Trustee had made in this case. The Court held that a Trustee needs to give "real and genuine" consideration to the personal circumstances of potential beneficiaries of a trust when making distributions. The Court held, because this hadn't happened (as well as other things like a "policy" of distribution making being followed each year), that the distributions that had been made were voidable.</p> <p>When making trust distributions it is necessary to consider:</p> <ul style="list-style-type: none"> <li>• Whether a pattern or policy of distribution making has or will be followed.</li> <li>• Whether "real and genuine" consideration has been given to a potential beneficiaries personal circumstances.</li> </ul>
Guardian AIT	<p><i>Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust [2023] FCAFC 3</i></p> <p>In considering whether s. 100A ITAA applied, the Court in this case held that the ordinary exception applied and that, as a result, s. 100A was not applicable. Despite that, the Court held that Part IVA (a broader integrity measure in ITAA) applied, largely due to the repetition of behaviour from the previous years.</p> <p>When making trust distributions it is necessary to consider whether:</p> <ul style="list-style-type: none"> <li>• There are ordinary family or commercial dealing reasons for something happening.</li> <li>• Whether a pattern or policy of distribution making has or will be followed.</li> </ul>
Demian	<p><i>Advanced Holdings Pty Limited as Trustee for The Demian Trust v FCT [2021] FCAFC 135</i></p> <p>The Court in this case was called upon to determine if a power in a trust deed that was relied upon to appoint an additional Trustee was sufficient and therefore, whether the appointment was valid or invalid. The Court held that the power relied upon was not sufficient for the purpose that it was used and thus, that the appointment was invalid.</p> <p>It is necessary to ensure that:</p> <ul style="list-style-type: none"> <li>• Trust deeds contain sufficient powers to change positions in the trust. Where they don't, amending them to include these provisions should be considered.</li> <li>• Previously prepared amendments to change positions are reviewed to ensure they don't have validity issues.</li> </ul>
Minerva	<p><i>Minerva Financial Group Pty Ltd v Commissioner of Taxation [2022] FCA 1092</i></p> <p>The Court in this case held that Part IVA (a broader integrity measure in the ITAA) applied on the basis that a restructure involving the trust in question was unnecessarily complex and had the sole purpose of paying less tax.</p> <p>When making trust distributions it is necessary to consider whether the trust in question has been involved in a bigger picture restructure, and if so, whether that restructure had purposes (for example asset protection) other than tax minimisation.</p>