




Updated: DC Louise Clarke discusses Bendel decision

Private companies should read this article for insights about the ATO's current position regarding the Bendel decision.

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On 12 June 2025, the High Court of Australia granted us special leave to appeal the decision in [Commissioner of Taxation v Bendel \[2025\] FCAFC 15](#)  (Bendel).

Private Wealth Client Experience Deputy Commissioner, Louise Clarke, shares her thoughts on some common questions we're hearing from private companies and their advisers, regarding the case decision and court process. Louise strongly encourages taxpayers to review our published [Interim Decision Impact Statement](#), and to seek advice about their individual circumstances.

Can you explain the current situation regarding the Bendel decision?

For more than 15 years, the ATO has had a published view about the tax consequences of unpaid present entitlements (UPEs) owing to corporate beneficiaries.

The Bendel case is the first time that the ATO's longstanding view has been considered by the Courts. In February, the Full Federal Court reached a decision that's contrary to the ATO's published position.

We're now appealing this decision in the High Court because the decision is of wide interest and will affect many private company taxpayers.

Our published **Interim Decision Impact Statement** explains that we don't intend to revise our current views relating to private company entitlements to trust income, as detailed in Taxation Determination TD 2022/11 *Income tax: Division 7A: when will an unpaid present entitlement or amount held on sub-trust become the provision of 'financial accommodation'?*, until the appeal process is exhausted.

How long will the process take?

I won't second guess the workings of the High Court. However, we can anticipate that the whole process could take a little while, allowing for a hearing to be scheduled and the High Court time to consider its decision. If our appeal is unsuccessful, we will, as a priority, publish our decision impact statement. Of course, over a period of weeks and months, we'll also review and update relevant ATO guidance products.

Will the Commissioner grant a deferral to the lodgment of tax returns of affected private companies until the special leave application outcome is known?

It's not usual practice to grant lodgment deferrals as a matter progresses through the Courts.

Similarly, in this case, we're not going to grant a blanket extension of time for affected companies to lodge their tax returns pending the High Court's decision in our appeal.

We appreciate that some private company taxpayers will need to decide how to treat unpaid present entitlements (UPEs) when preparing their 2024 tax return. To assist with the decision-making process, our published **Interim Decision Impact Statement** explains that taxpayers need to be mindful that pending the outcome of our appeal to the High Court, we're maintaining our view in TD 2022/11. We also observe that the basis on which private company beneficiaries deal with UPEs may have consequences under other integrity provisions in the tax law, including section 100A and subdivision EA.

The application of section 100A and Subdivision EA does not depend on the outcome of the High Court appeal process in Bendel. So, in this regard, we consider that there's a clear pathway for taxpayers who

don't wish to risk potential exposure to other integrity provisions, regardless of the outcome of the current High Court proceedings.

Where a deemed dividend has arisen due to a group arranging their affairs in reliance on the views expressed by the Full Federal Court, will the Commissioner exercise the discretion in section 109RB to disregard any deemed dividends if they are ultimately successful in the High Court?

We won't be granting a blanket exercise of the discretion.

Section 109RB allows the Commissioner to consider exercising discretion to disregard the operation of Division 7A or to allow a deemed dividend to be franked where a deemed dividend arose if there's been an honest mistake or inadvertent omission. In this regard, each case turns on its own individual facts and circumstances, must be considered on a case-by-case basis, and the Commissioner can only exercise the discretion in an individual case when a deemed dividend has actually arisen.

Should taxpayers convert UPEs to loans and place them on complying loan terms, pending the ultimate outcome of the Bendel case?

Taxpayers will need to consider their circumstances and make their own decision pending the finalisation of the appeal process.

The Commissioner's updated **Interim Decision Impact Statement** highlights the consequences that might arise if UPEs aren't on Division 7A complying loan terms. This is regardless of the outcome of the Commissioner's appeal.

Where a UPE isn't converted into a complying Division 7A loan, taxpayers face the prospect that other integrity provisions may apply

to their arrangement (depending on the particular facts), for example Subdivision EA and section 100A.

Placing a UPE on Division 7A complying loan terms requires all the elements of section 109N be satisfied, including that there's a written loan agreement between the parties. That is, relevant UPEs must be converted to loans to comply with section 109N.

What's your advice to a taxpayer who has previously followed ATO guidance and is now considering their Division 7A loan or PS LA 2010/4 arrangement?

If a taxpayer has been following the ATO guidance and if they continue to do so, then they will have certainty regardless of the outcome of the High Court proceedings. That is, they will not be facing the prospects of a deemed dividend or potential application of other integrity provisions.


Of course, it's up to individual taxpayers to decide their approach post the Full Court's decision, and pending the outcome of the High Court appeal. However, any decision needs to be made with knowledge of the relevant risks and their individual circumstances. I strongly encourage affected taxpayers to seek advice appropriate to their particular circumstances.

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