




Deputy Commissioner 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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Private Wealth Client Experience Deputy Commissioner, Louise Clarke, shares her thoughts on some common questions we are hearing from private companies and their advisers, regarding the [Commissioner of Taxation v Bendel \[2025\] FCAFC 15](#)  (Bendel) 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 is contrary to the ATO's published position.

We've sought special leave to appeal this decision to the High Court because the decision is of wide interest and will impact 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 they'll decide whether to grant the Commissioner special leave to appeal in the next few months. If the High Court decides to hear our appeal, 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 the High Court chooses not to hear our appeal, we will, as a priority and almost immediately, publish practical guidance for taxpayers by updating our Decision Impact Statement. Of course, over a period of weeks and months, we will 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 is not usual practice to grant lodgment deferrals as a matter progresses through the Courts.

Similarly, in this case, we are not going to grant a blanket extension of time for affected companies to lodge their tax returns pending the High Court's decision about the ATO's special leave application, or any subsequent 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 special leave application to the High Court, we are 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 Bendel High court process. 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 he is 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 his discretion to disregard the operation of Division 7A or to allow a deemed dividend to be franked where a deemed dividend arose if there has been an honest mistake or inadvertent omission. In this regard, each case turns on its own individual facts and circumstances and 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 special leave application and any possible 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 to 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 is up to individual taxpayers to decide their approach post the Full Court's decision. However, any decision needs to be made with knowledge of the relevant risks and their individual circumstances. I strongly encourage impacted taxpayers to seek advice appropriate to their particular circumstances.

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