



Public advice and guidance compendium – TD 2025/5

❗ Relying on this Compendium

This Compendium of comments provides responses to comments received on draft Taxation Determination TD 2025/D2 *Income tax: disregarding certain payments under section 109R of the Income Tax Assessment Act 1936 in determining how much of a loan has been repaid in situations where notional loans are involved*. 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

All legislative references in this Compendium are to the *Income Tax Assessment Act 1936*.

Issue number	Issue raised	ATO response
1	<i>The legal personality or character of interposed entities</i> The draft Determination only provides examples where the interposed entity is a private company, which leaves significant uncertainty about the Commissioner's view on other entity types. The final Determination should include an additional example that explicitly addresses the application of section 109R in a scenario where the interposed entity is a trust, partnership or individual.	We do not think it is necessary to include an additional example in the final Determination as the operation of the provisions does not depend on whether the interposed entity is a company. We do not consider that the views expressed in the Determination create uncertainty in this regard.
2	<i>Consistency of view</i> The position in the draft Determination is inconsistent with Taxation Determination TD 2011/16 <i>Income tax: Division 7A - payments and loans through interposed entities - factors the Commissioner will take into account in determining the amount of any deemed payment or notional loan arising under section 109T of the Income Tax Assessment Act 1936</i> which implies that section 109R does not apply to disregard	The Determination explains when a repayment is disregarded by section 109R for the purpose of working out how much has been repaid under section 109D. TD 2011/16 is instead concerned with factors the Commissioner will consider in determining the amount of a notional loan under section 109W. Paragraph 49 of TD 2011/16 uses a repayment which would attract section 109R as an example of something which would not be taken into account by the Commissioner for that purpose.

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	payments in arrangements involving notional loans but instead is a factor that the Commissioner would consider in determining the amount of the notional loan.	In the context of Example 2 in the Determination, TD 2011/16 explains that, because the repayment is one to which section 109R would apply, the repayment should not be taken into account as a factor that would reduce the amount of that notional loan, which is why the Commissioner would determine the full amount of \$205,000 to be a notional loan. The Determination then sets out the view that the notional repayment by Apple Trust is disregarded under section 109R, with the consequence that the notional loan from Banana Co remains outstanding and will give rise to a deemed dividend under section 109D. There is no inconsistency between the positions.
3	<i>Source of funds</i> It has been suggested that (for clarity) the Determination could state that if a borrower can establish that it has funded its repayment from other sources and has not obtained the indirect loan to circumvent section 109R, the repayment of the notional loan should not be disregarded by the application of section 109R.	The question of whether the repayment is funded from sources other than indirect loans to circumvent section 109R is a question of fact, and we will consider the circumstances of each individual case when applying section 109R.
4	<i>Double taxation</i> We have received feedback regarding several aspects of how double taxation could occur.	Our view regarding double taxation is addressed in paragraphs 51 and 52 of the Determination.
5	<i>Statutory interpretation</i> The Commissioner's application of section 109R to notional loans is an overreach, going beyond the scope of the deeming rules intended by parliament. Deeming provisions should be given a strict interpretation: <i>Commissioner of Taxation v Comber, A.H.</i> [1986] FCA 92; 10 FCR 88 at [96] (<i>Comber</i>).	We acknowledge these alternative views on statutory construction, as stated in paragraphs 47 to 50 of the Determination. The proposition in <i>Comber</i> is that deeming provisions are to be construed only for the purpose for which they are resorted to. Sections 109T and 109W provide that the notional loan applies for the purposes of Division 7A, which includes section 109R.
6	<i>Unpaid present entitlements (UPEs) deemed to be loans</i> Clarity is sought regarding the interaction with the Commissioner's position on UPEs being deemed loans (that is, the position taken in <i>Commissioner of Taxation v Bendel</i> [2025] FCAFC 15.	Our position on UPEs is not relevant to or within scope of the Determination. Section 109R applies only once it has been determined that there is a loan.

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7	<i>No sufficient distributable surplus</i> Concerns raised around Banana Co or Orange Co (in the examples) not having sufficient distributable surplus.	In the final Determination, we have updated the examples to demonstrate how the distributable surplus of Banana Co limits the amount of the deemed dividends.
8	<i>Attributing a reason to a notional transaction</i> It is not possible to apply a reasonable person test to determine why an entity obtained a notional loan.	We have addressed this contention under paragraphs 49 and 50 of the Determination.
9	<i>Application of anti-avoidance provisions</i> Rather than applying section 109R to interposed entity loans, Part IVA should be considered instead in the appropriate circumstances.	Section 109R is a specific integrity provision within Division 7A and will apply in the first instance. In applicable cases we will also consider the application of the general anti-avoidance provisions (as mentioned in paragraph 3 of the Determination).
10	<i>Law reform should be considered</i> Legislative reform should be sought to clarify how section 109R applies to notional loans	This submission raises policy issues which are outside the scope of the Determination.
11	<i>Typographical error</i> The date referred to in paragraph 11 of the draft Determination should be 11 May 2024.	In the final Determination, this date has been updated to 11 May 2024.