TD 2022/11EC - Compendium

Australian Government
Australian Taxation Office

Public advice and guidance compendium – TD 2022/11

Relying on this Compendium

This Compendium of comments provides responses to comments received on draft Taxation Determination TD 2022/D1 *Income tax: Division 7A: when will an unpaid present entitlement or amount held on sub-trust become the provision of financial accommodation?*. 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

Issue number	Issue raised	ATO response
All legislative references in this Compendium are to the *Income Tax Assessment Act 1936*.		
Commissioner's view not supported by law		
1.1	A legislative amendment is required to provide clarity on how section 109D applies to unpaid present entitlements (UPEs). Finalising the Determination should be deferred as there is no direct case precedent to support the Commissioner's interpretation of 'financial accommodation' as it relates to UPEs. Since 2009, the ATO has adopted an approach to Division 7A without any sound legal basis.	No amendments are proposed to the final Determination. The views in the Determination represents the Commissioner's considered view of subsection 109D(3) in light of judicial consideration of the meaning of financial accommodation. Any legislative amendment is a matter for Parliament.
1.2	The usage of the word 'other' requires that the words 'a provision of credit' that precede 'or any other financial accommodation' need to be taken into account in determining the meaning of financial accommodation such that 'financial accommodation' must be read to be another type or kind of 'a provision of credit'.	See amendments to paragraph 59 of the final Determination. The Commissioner's view is that the operation of the word 'other' results in 'a provision of credit' being a subset of the wider legal meaning of 'financial accommodation' and does not constrain the wider legal meaning of that term.
1.3	If it had been intended that a UPE could be treated as a 'loan' under section 109D, this would have been listed as a specific paragraph in section 109D. The fact that UPEs are specifically mentioned in Subdivision EA and not in section 109D supports the view that the latter was not intended to be extended to UPEs.	No amendments are proposed to the final Determination. Not all forms of financial accommodation are listed specifically within section 109D. As described in further detail in Appendix 3 of the final Determination and previously in Taxation Ruling TR 2010/3 *Income tax: Division 7A loans: trust entitlements* (now withdrawn), when section 109D, former section 109UB and

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		Subdivision EA were introduced, the prevailing view was that a UPE was held on trust for the (implicitly sole) benefit of the private company beneficiary. This is illustrated by the statement in the Explanatory Memorandum to the Taxation Laws Amendment Bill (No. 3) 1998 (which introduced former section 109UB) at paragraph 9.82, which sets out that '… the amount to which the company is presently entitled [that is, the UPE] is held on a secondary trust for the benefit of the company'. Correspondingly, Subdivision EA (like its predecessor, section 109UB) reflects an understanding by the draftsperson that it was only through a further transaction (that is in addition to the present entitlement becoming the property of a separate trust), such as a loan, that a shareholder of the private company (or an associate of such a shareholder) could benefit from the company's profits.Where a private company's UPE: • has not been satisfied, and • is not treated as a loan for section 109D purposes certain transactions (such as a loan to a shareholder of the company) by the trust may engage Subdivision EA. See also our response to Issue 6.4 of this Compendium.
Unpaid present entitlements is an equitable obligation and not financial accommodation		
2.1	A UPE cannot constitute a 'loan' or 'financial accommodation' as a UPE gives rise to an equitable interest in the trust and not a debt of the trustee at law. It is not a transaction of a financing nature.	No amendments are proposed to the final Determination. Paragraphs 63 to 65 of the final Determination explain why we consider financial accommodation arises in instances described in the Determination. Financial accommodation does not require a debt.
2.2	*Corporate Initiatives Pty Ltd v Commissioner Of Taxation* [2005] FCAFC 62 (*Corporate Initiatives*) provides no basis for the Commissioner's contention that a beneficiary's failure to call on a UPE is a loan for the purposes of paragraph 109D(3)(b). That case considered whether the failure to call on the UPE was a 'benefit' for the purposes of section 270-20 of Schedule 2F.	No amendments are proposed to the final Determination. Paragraphs 69 to 73 of the final Determination explain how *Corporate Initiatives* supports our view that a failure to call for a UPE confers a benefit on the trustee and the Full Federal Court likened that benefit to a formally recorded loan.
2.3	*Montgomery Wools Pty Ltd as Trustee for Montgomery Wools Pty Ltd Super Fund and Commissioner of Taxation*	No amendments are proposed to the final Determination.

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	[2012] AATA 61 *(Montgomery Wools)* is not authority for the argument a UPE that has not been reflected as a 'loan' in the entity's financial statements is 'financial accommodation' for the purposes of paragraph 109D(3)(b). *Montgomery Wools* may have application where a UPE owing from a trust to a private company beneficiary was recorded in the relevant entity's financial statements as a 'loan' as opposed to an UPE. However, as stated in *Montgomery Wools*, the existence of the loan is a rebuttable presumption.	As explained in paragraphs 66 to 68 of the final Determination, the Commissioner considers *Montgomery Wools* is authority for the view that acquiescence or a failure to enforce or demand a right constitutes a positive act in certain circumstances.
Timing of financial accomodation		
3	The current approach proposed by the Commissioner as to when financial accommodation is provided creates complexity, uncertainty, disputes and administrative difficulties. A uniform approach should be taken to when financial accommodation is taken to be provided which should be in the income year following the year in which the present entitlement arises. Both fixed and proportionate resolutions should be treated the same way – when the accounts are determined. In any event, the requirement to notify beneficiaries is clearly after the period in which the entitlement arises.	Paragraph 12 of the final Determination has been updated to state that the Commissioner considers that a private company will typically not provide financial accommodation in respect of a UPE until the income year that follows the income year in which the UPE arises. This will be the case, whether the private company's entitlement to income is expressed as a specified amount, a calculable amount or a combination of those methods (for example, a tiered resolution).
Knowledge of unpaid present entitlements		
4	The Commissioner should provide detailed guidance with practical examples about what constitutes 'knowledge' and when knowledge can be imputed between related parties. We consider it unreasonable for the ATO to impute knowledge apart from instances where the same individual(s) signed both sets of financial accounts (that is, for the trust and the corporate beneficiary). This is a question of fact.	No amendments are proposed to the final Determination. Paragraphs 78 to 83 of the final Determination set out principles, drawn from relevant case law, for determining when a private company has (or is taken to have) knowledge of a UPE (in particular, where the trust and private company are subject to common control). However, whether a private company has knowledge of a UPE remains a question of fact, determined according to its circumstances. Paragraph 83 of the final Determination explains that where the same natural person is the controlling mind of the trustee and beneficiary, it follows that the

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		beneficiary will have knowledge of the present entitlement at the same time that the trustee does. However, as stated in that paragraph, that presumption is capable of being displaced.
Treatment of and interaction with TR 2010/3 and PS LA 2010/4 and the application of PCG 2017/13		
5.1	Several concepts from TR 2010/3 and Law Administration Practice Statement PS LA 2010/4 *Division 7A: trust entitlements* (now withdrawn) which are still relevant and are not contained in the draft Determination need to be included in separate guidance products or alternatively the final Determination should include a comparison of differences between the new and withdrawn guidance with the reasons for the changes.	The Commissioner is considering whether to issue further public advice and guidance on this issue. This will include a consideration of overall priority, sector need and likely impact.
5.2	The Commissioner should clarify whether the position set out in the draft Determination applies to pre-16 December 2009 UPEs and whether there is any change with respect to the Commissioner's position in PS LA 2010/4.	See the changes to paragraphs 46 to 48 of the final Determination, which confirm: • taxpayers can continue to treat trust entitlements conferred on or before 30 June 2022 in accordance with TR 2010/3 and PS LA 2010/4 • the Commissioner will not devote compliance resources to sub-trust arrangements conducted in accordance with PS LA 2010/4 in respect of trust entitlements arising before 1 July 2022, even though those sub-trust arrangements may commence after 30 June 2022, and • the Determination does not apply to unpaid present entitlements arising before 16 December 2009.
5.3	The final Determination should clearly state that the approach to loans made before 4 December 1997 will continue.	No amendments are proposed to the final Determination. The approach to loans made before 4 December 1997 is legislative. See also subsection 109D(5) and the effects of varying a pre-4 December 1997 loan.
5.4	Guidance in relation to the form of investment Options 1, 2 and 3 in PS LA 2010/4 is not outlined in the draft Determination for existing sub-trust arrangements. The Commissioner should clarify how Practical Compliance Guideline PCG 2017/13 *Division 7A – PS LA 2010/4*	Our administrative approach in PCG 2017/13 has been extended to trust entitlements created on or before 30 June 2022. In addition, the amended paragraphs 97 to 99 of the final Determination explain that we will not devote compliance resources to sub-trust arrangements that correspond to the guidance in TR 2010/3 and

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	sub-trust arrangements maturing in or after the 2016-17 income year will apply going forward. In addition, it is unclear whether taxpayers can continue managing existing UPEs held on sub-trust under one of Options 1, 2 or 3 sub-trust investment options in PS LA 2010/4 until their maturity date without an adverse Division 7A consequence. The final Determination should continue to provide these investment options.	PS LA 2010/4 where the trust entitlement has been created on or before 30 June 2022. However, where a trust entitlement arising on or after 1 July 2022 is put on sub-trust arrangements that are consistent with PS LA 2010/4, this will amount to financial accommodation.
Interaction with Subdivisions EA and EB		
6.1	The approach taken in the draft Determination leaves no scope for the operation of Subdivision EA as UPEs to private company beneficiaries will almost always attract the operation of section 109D.	No amendments are proposed to the final Determination. As stated in paragraph 147 of the Determination, Subdivision EA: has scope to operate in circumstances where the UPE of a private company does not result in financial accommodation dealt with under section 109D (for example, because the private company does not have knowledge of the amount that it can demand immediate payment of from the trustee at the relevant time). Subdivision EA also has scope to operate in relation to: • UPEs conferred before 1 July 2022 that remain unsatisfied, including UPEs in existence before 16 December 2009 (see paragraph 104 of PS LA 2010/4), and • UPEs where one of the elements of financial accommodation is not present (e.g. where the private company has not acquiesced to non-payment of the UPE). The High Court observed in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28 at [71] that '… a court construing a statutory provision must strive to give meaning to every word of the provision'. In the same way that principle suggests an interpretation of paragraph 109D(3)(b) that does not make Subdivision EA redundant, it equally supports giving effect to the phrase 'any other form of financial accommodation' in paragraph 109D(3)(b). Also refer to our response to Issue 1.3 of this Compendium.

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6.2	The final Determination should clearly state that the Commissioner will not apply Subdivisions EA or EB unless it is in respect of arrangements that occur between 30 June and when the present entitlement amount is quantified at which point financial accommodation occurs. Paragraph 146 of the draft Determination is unclear regarding when amounts will not be treated as UPEs for the purposes of Subdivisions EA and EB.	No amendments are proposed to the final Determination. Refer to our responses to Issues 6.1 and 6.4 of this Compendium. Paragraphs 143 to 148 of the final Determination describe the Commissioner's position in relation to Subdivisions EA and EB. If there are circumstances that fall outside of those, the application of Subdivisions EA and EB will be considered on a case-by-case basis.
6.3	The final Determination should make absolutely clear whether the ATO views pre-2009 UPEs as loans (and not UPEs) or whether it views these as both loans and UPEs, but reserves the right to continue to treat these as UPEs for the purposes of Subdivision EA. Confirmation is required that UPEs held in sub-trust between 15 December 2009 and before 1 July 2022 may attract the operation of Subdivisions EA or EB, where a loan is made by the trustee to the shareholder/associate of the private company beneficiary.	See our amendments at paragraphs 46 to 48 of the final Determination. These amendments clarify that it does not deal with pre-16 December 2009 UPEs. Taxpayers can continue to rely on the treatment of pre-16 December 2009 UPEs as set out in TR 2010/3 and PS LA 2010/4. Paragraph 104 of PS LA 2010/4 states that '[f]or the avoidance of doubt, the ATO may, in appropriate cases, apply Subdivision EA in respect of UPEs in existence before 16 December 2009.' Paragraph 147 of the final Determination also makes clear that Subdivision EA 'has scope to operate in circumstances where the UPE of a private company does not result in financial accommodation dealt with under section 109D'. UPEs in existence since before 16 December 2009, and some UPEs in existence since before 1 July 2022, will not have been dealt with under section 109D. See also our response to Issue 6.4 of this Compendium.
6.4	Clarification is needed where amounts are held on sub-trust for the exclusive benefit of the private company beneficiary, Subdivision EA has no potential application because there is no UPE.	The Commissioner accepts (see at paragraph 13 of the final Determination) that a UPE may be satisfied by an amount being set aside on sub-trust. Whether a UPE is satisfied in this way will depend upon factors which may include the terms of the trust deed, the resolution and how the funds are then treated or set aside. In order for Subdivision EA to operate, there must be a UPE. Where that UPE is satisfied by way of putting funds on a sub-trust, a pre-requisite for Subdivision EA to operate (that is a UPE) does not exist. For post-15 December 2009 UPEs put on a complying sub-trust arrangement (that is, as described in paragraph 58 of PS LA 2010/4), the Commissioner's

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		view as reflected in paragraph 13 of the final Determination is that the UPE may be satisfied. To the extent that the sub-trust funds are used by a third party and relate to a present entitlement that arose on or before 30 June 2022, taxpayers can continue to rely on TR 2010/3 and PS LA 2010/4 for sub-trust terms (Options 1, 2 or 3). Paragraphs 46 to 48 of the final Determination explain that the Commissioner will not devote compliance resources to sub-trust arrangements that correspond to the guidance in those products. For pre-16 December 2009, the Commissioner accepts that where these UPEs have been satisfied by way of sub-trust, Subdivision EA is not capable of being enlivened by reference to that particular trust entitlement. For trust entitlements that arise on or after 1 July 2022 and are satisfied by being put on sub-trust and used by shareholders or associates of shareholders of the private company beneficiary, Appendix 2 of the final Determination provides a compliance approach that allows for the financial accommodation to be made subject to complying loan terms, in order to avoid the operation of Division 7A.
Sub-trusts		
7.1	The draft Determination does not provide guidance regarding evidence required to demonstrate the existence and terms of a sub-trust. Is the trustee of the sub-trust required to obtain a tax file number, prepare separate financial statements and lodge tax returns?	The existence of a sub-trust depends on the trust deed and the trustee's exercise of power in each particular case. Formerly, sub-trustees as described in PS LA 2010/4 as implementing 'Option 1' or 'Option 2' investment arrangements were extended an administrative concession not requiring lodgment of returns. This arrangement no longer applies to sub-trusts that hold trust entitlements that arise on or after 1 July 2022. However, in most instances, a sub-trust will be a 'Transparent Trust' as described in Law Administration Practice Statement PS LA 2000/2 *An exemption for the trustees of some trust estates from the requirement to furnish a tax return on behalf of the trust estate.* The sub-trustee may therefore be exempted from furnishing a tax return. If the sub-trust is not a Transparent Trust, whether the sub-trustee must lodge returns will depend upon the respective legislative instrument for each

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		year. Ordinarily, a trust that is not a Transparent Trust will be required to lodge tax returns (unless another exemption applies). If the sub-trust is a Transparent Trust, income derived by the sub-trustee in that capacity will be included by the beneficiary in their assessable income.
7.2	Our main concern with the ATO view in the draft Determination relating to 'circumstance two' is that it undermines the entity concept in sections 109ZE and 960-100 by ignoring the sub-trust and concluding that the corporate beneficiary provides the financial accommodation to the main trust (or user of the funds) directly, rather than indirectly through interposed entities. We are concerned that this view could have broader implications, such as where there is a corporate unitholder in a unit trust. If the unit trust makes a loan to a related party, one would normally have to rely on the application of 109T for a deemed dividend to arise (that is section 109C payment from company to unit trust for subscription of units (to which section 109J could apply) followed by a section 109D loan made by the unit trust to target entity).	We have made changes to the final Determination at paragraphs 17, 34 and 74. A sub-trust is ordinarily going to meet the definition of a Transparent Trust as defined in PS LA 2000/2. As such, a sub-trustee who allows a third party to use the sub-trust funds in circumstances where the private company beneficiary consents or acquiesces to that use is not being financially accommodated, and the actions of that trust are effectively taken to be actions of the absolute beneficiary. It is the third-party entity who uses the funds who is being financially accommodated. When the beneficiary allows a third party to use its funds, this is a benefit being provided to that third party by the beneficiary. Where that third party is a shareholder (or shareholder's associate) of the private company beneficiary, Division 7A may apply. The broader implications of such a view are consistent with the overall policy intent of Division 7A. Where a private company allows a shareholder (or shareholder's associate) access to and use of its funds in a tax-free way, Division 7A should have cause to apply. We do not consider the rights of a beneficiary under a sub-trust as we have described it is analogous to a corporate unitholder in a unit trust. Where a sub-trust does not meet the definition of a Transparent Trust, whether financial accommodation is provided to the sub-trustee needs to be considered on a case-by-case basis.
Division 7A potentially applying twice		
8	Division 7A may potentially apply twice to a single arrangement in instances where, if the funds are no longer held by the sub-trustee for the sole benefit of the private company beneficiary (as suggested in paragraph 13 of the draft Determination) and again if the funds are used by the shareholder (or shareholder's associate) of the private	We have made changes to the final Determination at paragraphs 17, 34 and 74. As explained in paragraph 17 of the final Determination, the private company beneficiary does not financially accommodate the trustee of a sub-trust.

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	company beneficiary (as stated in paragraph 14 of the draft Determination).	If the sub-trustee applies the assets of the sub-trust with consent (including by acquiescence) of the private company beneficiary, the sub-trustee is not being accommodated. In this situation, it is the entity that has use of the funds that is being accommodated. See also our response to Issue 7.2 of this Compendium.
Sub-trust and financial accommodation – source of funds		
9	If the funds of the sub-trust are able to be used by the shareholder (shareholder's associate) of the private company beneficiary, the final Determination should clarify where those funds are effectively sourced from (that is, the sub-trust or the main trust) and whether this distinction is relevant when financial accommodation is provided.	No amendments are proposed to the final Determination. Paragraph 13 of the final Determination explains that when the trustee sets aside an amount from the main trust and holds it on sub-trust, that amount ceases to be an asset of the main trust. The beneficial ownership of funds in a sub-trust is held by the private company beneficiary of that sub-trust. Financial accommodation will typically arise where a shareholder or their associate uses or benefits from those funds. If those funds are not placed on sub-trust, the present entitlement remains unpaid and the funds remain intermingled with the assets of the main trust which results in financial accommodation. If the funds are used or otherwise accessed by another shareholder or their associate, financial accommodation also arises.
Provision of financial accommodation to third parties		
10	We consider that Example 2 of the final Determination should make it clear whether the bank has received financial accommodation from the private company.	No amendments are proposed to the final Determination. Given its wide meaning, the bank has received financial accommodation in Example 2 of the Determination. However, because the bank is not a shareholder or an associate of a shareholder, it is not a loan to which Division 7A applies.
Provide additional examples		
11	The final Determination should include additional examples to illustrate a delayed payment of the trust distribution provided for in the trustee resolution such that the beneficiary cannot call for the payment until that later date, similar to declaration of dividends.	No amendments are proposed to the final Determination. 'Present Entitlement' involves an indefeasible and absolutely vested interest in possession to trust income. This necessitates there must be an immediate right to demand payment and there can be no contingency to entitlement.

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Meaning of the term 'used' and non-cash assets being used in the sub-trust		
12	There is no guidance on the term 'used' as stated in the draft Determination. Where the asset being 'used' is property and not cash, is it the provision of financial accommodation or does it attract the application of section 109CA? The final Determination should address whether the ATO considers the use of tangible assets, such as real property, as being the provision of financial accommodation directly by the corporate beneficiary to the user of the asset and, if so, how to quantify the amount of the Division 7A loan.	See the footnote added at paragraph 15 of the final Determination. 'Used' will take its ordinary meaning. A present entitlement to trust income will always contemplate an entitlement to a pecuniary amount. The Commissioner's views in the Determination concern the failure to exercise an immediate demand for discharge of that pecuniary amount. This is to be contrasted with a present entitlement to trust property which necessarily concerns exercise of a trustee power over corpus and is outside of scope of this Determination. The Commissioner has rarely seen examples of sub-trusts holding non-cash assets. The outcomes of non-cash assets being held in a sub-trust can be worked through on a case-by-case basis. Private company groups that intend to put non-cash assets into sub-trusts to satisfy UPEs are encouraged to seek advice before doing so.
Impact of the guidance		
13.1	The Determination may drive a tax-planning behavioural shift – where taxpayers may express trust entitlements as a fixed percentage in order to obtain a 12-month deferral from making annual repayments.	Noted. Paragraph 12 of the final Determination has been updated to state that the Commissioner considers that a private company will typically not provide financial accommodation in respect of a UPE until the income year that follows the income year in which the UPE arises. Refer also to our response to Issue 3.1 of this Compendium.
13.2	There are negligible benefits of this position in terms of higher fees and costs to taxpayers and minimal tax revenue gains.	No amendments are proposed to the final Determination. The Determination represents the Commissioner's considered view on how subsection 109D(3) operates in accordance with law.
13.3	The Commissioner's interpretation of UPEs in previous guidance, and now the draft Determination, has prevented a wide range of commercial practices that were allowable, by using the funds represented by pre-16 December 2009 UPEs that enabled succession planning and business expansion (acquisition of assets for the business).	No amendments are proposed to the Determination. The guidance in the final Determination is limited to when UPEs and amounts held in sub-trust (in respect of present entitlements conferred after 30 June 2022) will become the provision of financial accommodation. It does not otherwise limit the actions of trustees.

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Typographical error		
14	Paragraph 58 of the draft Determination transposes 2 words in 'any other of form financial accommodation'.	Noted. This has been corrected in the final Determination.
Other issues		
15.1	We consider that the draft Determination should be withdrawn and that proper consultation should arise between the ATO and the professional bodies and other specialist tax advisers regarding UPEs and corporate beneficiaries.	The Commissioner conducted consultation on the draft Determination prior to release and post-release, both broadly and through targeted consultation.
15.2	Will the analysis in ATO Interpretative Decision ATO ID 2012/74 *Income Tax: Division 7A: unpaid present entitlements between a unit trust and unit holders* continue to apply once the draft Determination is finalised?	ATO ID 2012/74 will be withdrawn and the Commissioner will consider whether a replacement product is required.
15.3	The final Determination should amend the wording in the text and diagrams to refer to repaying a loan or executing a loan agreement being done 'before' lodgment day instead of 'by' or 'on' lodgment day to be consistent with the law under paragraph 109(1)(b) and subsection 109N(1) respectively.	Agreed. The timelines at paragraphs 104, 107, 123 and 137 of the final Determination have been updated.
15.4	The details in the timelines in paragraphs 110 and 123 of the draft Determination should be re-examined. Taxpayers who enter into loan agreements with maturity dates of 30 June 2030 and 30 June 2031 in accordance with those paragraphs may enter into non-complying loans.	Agreed. Paragraphs 123 and 137 of the final Determination have been updated.
15.5	In paragraphs 110 and 123 the draft Determination, there is a suggestion that the loan is made at a later time, on the 31 March 2024 and 15 May 2025. If that were the case, the first minimum yearly repayment would be due on 30 June 2025 and 30 June 2026 respectively, rather than 30 June 2024 and 30 June 2025 as stated in the timelines. This needs to be clarified.	No amendments are proposed to the final Determination. At paragraph 122 of the final Determination, we state that the transaction replacing the UPE with a formal loan is not treated as a new loan made in the 2024–25 income year. Therefore, the year in which the loan will be taken to have been made is the 2023–24 income year.

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15.6	Paragraphs 6 and 12 of the draft Determination only refer to a private company beneficiary. However, the title of the draft Determination refers to the concept of the provision of financial accommodation more broadly. The Determination should be neutral as to what kind of entity the beneficiary is.	No amendments are proposed to the final Determination. The title of the final Determination indicates that it is about Division 7A. Ordinarily, Division 7A will only be relevant where financial accommodation is provided by a private company.