



Decision impact statement

Commissioner of Taxation v Bendel [2026] HCA 18

📌 Relying on this Decision impact statement

This publication provides our view on the implications of the court or tribunal decision discussed, including on related public advice or guidance.

Taxpayers can rely on this Decision impact statement to provide them with protection from interest and penalties in the following way. If a statement turns out to be incorrect and taxpayers underpay their tax as a result, they will not have to pay a penalty, nor will they have to pay interest on the underpayment provided they reasonably relied on this Decision impact statement in good faith. However, even if they do not have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it.

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Venue:	High Court
Venue reference No:	M47/2025
Judgment date:	10 June 2026

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Summary of decision

1. This Decision impact statement outlines the ATO's response to this case which concerns whether a private company's failure to call for payment of entitlements to income of an associated trust was the provision of 'financial accommodation' or a transaction 'which in substance effects a loan' and, therefore, a loan for the purposes of section 109D of the *Income Tax Assessment Act 1936*.
2. All legislative references in this Decision impact statement are to the *Income Tax Assessment Act 1936* unless otherwise indicated.
3. All judgment references in this Decision impact statement are to the judgment of *Commissioner of Taxation v Bendel* [2026] HCA 18 unless otherwise indicated.

Overview of facts

4. This case was an appeal by the Commissioner from the Full Federal Court's decision of 19 February 2025¹, which held that a private company's unpaid present entitlements (UPEs) to trust income were not loans for the purpose of section 109D.
5. The Steven Bendel 2005 Discretionary Trust (the Trust) was a discretionary trust. Its trustee was Gleewin Pty Ltd (the Trustee).
6. The beneficiaries of the Trust included Mr Bendel and Gleewin Investments Pty Ltd (Gleewin) (together, the Respondents).
7. Mr Bendel was the sole shareholder and director of the Trustee and Gleewin.
8. Mr Bendel and Gleewin were made presently entitled to income of the Trust for each of the 2013 to 2016 income years by way of resolutions by the Trustee to 'set aside' identified amounts for them (the Resolutions).
9. The Trust deed provided that any amount set aside ceased to form part of the Trust Fund, was instead held by the Trustee on separate trust for the beneficiary absolutely, and the Trustee was empowered to invest, apply or deal with the funds of that separate trust under other relevant provisions in the deed.
10. However, the accounting records prepared by the Trustee did not separately record the amounts set aside for Gleewin. Those amounts were instead booked to a 'Beneficiaries Current Account' balance in the liabilities section of the Trust's balance sheet.
11. In each of the 2013 to 2017 income years, the Trust made some payments for, or on behalf of, Gleewin that had the effect of reducing Gleewin's current account balance. However, that balance remained substantially unpaid by Gleewin's lodgment day² for each of its 2013 to 2016 income year income tax returns.
12. The accounting records of the Trust also showed that in the 2014 to 2017 income years, it made significant payments to Mr Bendel, shown as owing to the Trust.
13. Gleewin had never called for payment of any of the Trust income set aside for its benefit in any of the years in question. It remained relevantly passive.

¹ *Commissioner of Taxation v Bendel* [2025] FCAFC 15.

² As defined in subsection 109D(6), being the earlier of the due date for lodgment of the private company's income tax return or the date on which that return is lodged.

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14. The Commissioner issued amended assessments to the Respondents for each of the 2014 to 2017 income years. Those assessments reflected additional amounts included in their assessable income under section 97, on the basis that:

- the outstanding amounts represented loans from Gleewin to the Trust within the meaning of subsection 109D(3) that were taken to be dividends paid to the Trust under subsection 109D(1), and
- the beneficiaries entitled to the Trust's income had a corresponding proportion of each deemed dividend included in their assessable income by section 97.

15. The Commissioner made no argument that there had been a breach of trust or of the fiduciary duties of the Trustee.

Issues decided

Issue 1: What was the character of the amounts set aside for Gleewin by the Resolutions?

16. It was not in dispute that the Resolutions made Gleewin and Mr Bendel presently entitled to a share of the income of the Trust for the relevant income years.

17. The majority (Gageler CJ, Gordon, Edelman, Steward and Gleeson JJ) considered that the exercise of the power in the Trust deed to 'set aside' (as distinct from the power to pay or apply) a share of income, in conjunction with the directions in the Trust deed about the Trustee was to deal with amounts so set aside, meant that each of those amounts were held by the Trustee on separate trusts.

18. In reaching that view, their Honours rejected the Commissioner's contentions that:

- there was insufficient certainty as to the property which would be the subject of any separate trusts over the amounts set aside, and
- the Trust's accounts expressed an admission by the Trustee that there existed an unconditional relationship of debtor and creditor between Gleewin and the Trustee.

19. In her dissenting judgement, Jagot J found that:

- the Resolutions did not give rise to separate trusts, and
- a debtor-creditor relationship had arisen between the Trustee and Gleewin.

20. Beech-Jones J considered that there was no basis for the High Court to depart from the position accepted in the Full Court of the Federal Court that there existed a debtor-creditor relationship between Gleewin and the Trustee, nor should it entertain revisiting the Full Court's concurrent findings that Gleewin's entitlements were not held on separate trust.

Issue 2: Did Gleewin make a loan within the meaning of subsection 109D(3) to the Trust during each of the 2014 to 2017 years in respect of the Trust income set aside for it?

21. The majority decided that Gleewin did not make a loan to the Trustee within the meaning of subsection 109D(3). There was, therefore, no dividend deemed to have been paid by Gleewin to the Trust under subsection 109D(1).

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22. In reaching its decision, the majority considered that, for the purposes of subsection 109D(3):

- the 'provision of financial accommodation' requires the company to do something which transfers, supplies or grants value or pecuniary assistance, involving some bilateral activity
- there is no 'provision of financial accommodation' when a private company does nothing
- mere inactivity cannot satisfy the language of 'advance', 'provision', 'payment' or 'transaction', and
- simply doing nothing, or acquiescing to the retention of funds, is not a transaction which in substance effects a loan.

23. The majority also relied on the statutory context and legislative history of Division 7A in support of its conclusion. In particular:

- the structure of Division 7A distinguishes between loans (and their forgiveness, including under section 109F) and UPEs addressed separately under Subdivision EA, and
- the replacement of former section 109UB with Subdivision EA, indicated that Parliament considered it necessary to enact specific provisions dealing with UPEs, rather than relying on the definition of 'loan'.

24. Both Jagot and Beech-Jones JJ considered that Gleewin had provided financial accommodation within the meaning of paragraph 109D(3)(b) to the Trustee.

Issue 3: Did section 6-25 of the Income Tax Assessment Act 1997 prevent a deemed dividend from being included in the Trust's net income or, alternatively, the Applicant's assessable income?

25. Consistent with its conclusion for Issue 2 (that is, section 109D was not engaged by the circumstances of Gleewin and the Trust), the majority found it unnecessary to decide this issue.

26. Jagot and Beech-Jones JJ considered that section 6-25 of the *Income Tax Assessment Act 1997* did not apply.

ATO view of this decision

27. The High Court's reasoning makes it clear that section 109D does not apply in relation to a private company's entitlement to a share of trust income that remains unpaid where the company does not take action in respect of that entitlement.

28. However, a private company beneficiary's inaction in respect of an unpaid entitlement to trust income may be insufficient to spare potential implications under other taxation laws, including Subdivision EA and section 100A.

29. Relevantly, the majority observed that 'the facts here broadly correspond with the circumstances to which Subdivision EA is addressed'.³ That is consistent with their characterisation of the amounts set aside by the Trustee – albeit on separate trust for Gleewin – as an 'unpaid present entitlement'. While their Honours were not determining the issue, their language suggests that Subdivision EA may apply where the funds to

³ *Commissioner of Taxation v Bendel* [2026] HCA 18 at [64].

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which a private company has been made presently entitled have been set aside on a separate trust and other relevant requirements are met.

30. These outcomes contradict the position the Commissioner has taken 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'?* (which we will withdraw) and other advice as detailed in paragraphs 44 to 46 of this Decision impact statement, which we will review and amend as appropriate.

31. This decision also highlights the need to carefully examine the particular facts and circumstances in determining the character of an amount to which a beneficiary is presently entitled, including:

- terms of the trust deed
- terms of any resolutions by the trustee or trustees
- accounting records of the parties, and
- any other dealings in respect of that amount (for example, making it subject to a loan agreement).

32. Depending on those matters, the beneficiary's entitlement and the trustee's subsequent dealings with that amount may support the conclusion that the parties have entered into a separate trust relationship or another form of financial arrangement. In some circumstances, a beneficiary's present entitlement to a share of trust income may be dealt with in a way which gives rise to a presently enforceable debt owed by the trustee to the beneficiary.

Administrative treatment

Application of section 109D

33. The Commissioner will apply section 109D to arrangements involving UPEs on the basis of the ATO view of the decision described in paragraphs 27 to 32 of this Decision impact statement.

34. Accordingly, where a private company beneficiary has not taken any relevant action in respect of its UPE, the Commissioner will not treat the UPE as a loan for the purposes of section 109D. This will be the case whether or not the amount in question is held on a separate trust.

35. In contrast, where parties have taken steps that result in a UPE being satisfied, replaced or otherwise dealt with in a manner that gives rise to a loan within subsection 109D(3), the arrangement will be characterised accordingly. The entitlement will not be treated as remaining unpaid merely because those steps were taken based on a mistaken understanding of the law. Where the entitlement has already been satisfied or converted into a loan, it has ceased to be a UPE. This decision does not reinstate it as a mere UPE. The tax consequences of any additional dealings with funds associated with a former UPE will depend on the particular circumstances of those dealings.

Other provisions

36. In situations where a private company beneficiary has a UPE and the trust (including any relevant separate trust) pays, makes a loan to, forgives a debt of a shareholder or associate of a shareholder of that company, we may have cause to consider the application of Subdivision EA.

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37. Further, in situations where the UPE arises out of, or in connection with, an arrangement intended to reduce someone's tax liability, where someone else benefits, and that is entered into outside the course of ordinary family or commercial dealing, section 100A may apply, making the trustee liable to tax at the top marginal rate.⁴

Implications for previous arrangements

38. Where arrangements involving UPEs have been implemented in accordance with TD 2022/11 or prior ATO administrative guidance, including Law Administration Practice Statement PS LA 2010/4 *Division 7A: trust entitlements* (now withdrawn), those UPEs will not be treated as loans unless the parties have taken steps that result in an arrangement falling within subsection 109D(3).

39. For example, for the purposes of Division 7A:

- UPEs that have simply been left outstanding will not, without more, be loans
- UPEs set aside and held on separate sub-trusts in accordance with PS LA 2010/4 will not be loans, but
- UPEs that have been made subject to complying loan terms are, as a matter of fact, loans, and will continue to be treated consistently as loans.

40. A variation to the terms of an investment agreement between a separate or sub-trust and the main trust (for example, changes to interest rate or term) will not, of itself, result in the arrangement constituting a loan or in the amount being treated as an UPE for the purposes of Subdivision EA. However, this will depend on the nature and effect of the variation having regard to all the circumstances.

Objections

41. Taxpayers who have been assessed on the basis that UPEs without more were loans for the purposes of section 109D may seek an amendment (where they remain within amendment periods) or lodge an objection (where they are outside of amendment periods).

42. Decisions in respect of amendment requests or objections will involve a consideration of relevant facts and circumstances, including the terms of the trust deed, resolutions of the trustee, accounting records, and any subsequent dealings with the entitlement, to confirm whether the circumstances are within the scope of the High Court's reasoning.

43. For objections that are outside the standard time limits, requests for an extension of time will be considered having regard to the taxpayer's circumstances, including whether the objection arises as a result of this decision.

Implications for affected advice or guidance

44. As a consequence of this decision, we will withdraw TD 2022/11.

45. We will also review other guidance, including the following, to determine whether any amendments or withdrawals are required.

- Taxation Ruling TR 2022/4 *Income tax: section 100A reimbursement agreements*

⁴ See Taxation Ruling TR 2022/4 *Income tax: section 100A reimbursement agreements*

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- Taxation Ruling TR 2015/4 *Income tax: CGT small business concessions: unpaid present entitlements and the maximum net asset value test*
- Taxation Determination TD 2015/20 *Income tax: Division 7A: is a release by a private company of its unpaid present entitlement a 'payment' within the meaning of Division 7A of Part III of the Income Tax Assessment Act 1936?*
- Taxation Determination TD 2011/15 *Income tax: Division 7A - unpaid present entitlements - factors the Commissioner will take into account in determining the amount of any deemed entitlement arising under section 109XI of the Income Tax Assessment Act 1936*
- Practical Compliance Guideline PCG 2022/2 *Section 100A reimbursement agreements – ATO compliance approach*
- Practical Compliance Guideline PCG 2017/13 *Division 7A - PS LA 2010/4 sub-trust arrangements maturing in or after the 2016-17 income year.*

46. To the extent that we withdraw a public ruling, it will continue to apply to schemes that had begun to be carried out before the withdrawal, where favourable to the taxpayer.⁵

47. We may also issue further guidance, as appropriate, to assist taxpayers and their advisers to understand the implications of the decision and to support the consistent administration of Division 6 and Division 7A.

Comments

48. We invite you to advise us if you feel this decision has consequences we have not identified. Please forward your comments to the contact officer.

Due date: 24 July 2026
Contact officer: Simon Haines
Email: Simon.Haines@ato.gov.au
Phone: 08 7422 2955

Commissioner of Taxation
26 June 2026

⁵ Subsection 358-20(3) of Schedule 1 to the *Taxation Administration Act 1953*.

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References

Related rulings and determinations:

TR 2022/4; TR 2015/4; TD 2022/11; TD 2015/20; TD 2011/15

- ITAA 1936 109F
- ITAA 1936 109UB
- ITAA 1997 6-25

Legislative references:

- ITAA 1936 Div 6
- ITAA 1936 97
- ITAA 1936 100A
- ITAA 1936 Div 7A
- ITAA 1936 Subdiv EA
- ITAA 1936 109D
- ITAA 1936 109D(1)
- ITAA 1936 109D(3)
- ITAA 1936 109D(6)

Cases relied on:

Commissioner of Taxation v Bendel
[2025] FCAFC 15; 307 FCR 544; 122
ATR 197; 2025 ATC 20-946

Other references:

PCG 2022/2; PCG 2017/3; PS LA
2010/4W

ATO references

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