

Article Information

Authors: Megan Bishop,

Service: Corporate & Commercial, Estate & Succession Planning, Taxation

Sector: Private Clients

Implications from Bendel - What does it mean for taxation of unpaid present entitlements?

A recent Full Federal Court decision has overturned 15 years of Australian Taxation Office (ATO) administration with respect to UPEs with potential to impact the beneficiaries of the more than 800,000 discretionary trusts that exist in Australia. But whilst it provides law clarification in one area, it is not a green light for UPEs moving forward.

In February 2025, the Full Federal Court unanimously held that an unpaid present entitlement (**UPE**) from a trust to a corporate beneficiary was not a loan for the purpose of section 109D(3) of Division 7A of the *Income Tax Assessment Act 1936*.

The beauty of the judgment is in the simplicity of the ultimate conclusion. That section 109D(3) requires a transaction which creates an obligation to repay. That an obligation to pay is not sufficient. Therefore, that it is not triggered by a UPE to a corporate beneficiary without more as a UPE is an obligation to pay only, not to repay.

As a judgment that goes against the way that the ATO has administered that provision since 16 December 2009 and one that has potential to impact the beneficiaries of the more than 800,000 discretionary trusts that exist in Australia, it is no doubt causing more than a small headache for the Commissioner of Taxation. For that reason alone, it is unlikely that the Full Federal Court's judgment will be the final word. Either a High Court special leave application, legislative amendment or both are likely to ensue. At the very least there will certainly be a decision impact statement by which the Commissioner states how historic issues will now be addressed (whether that comes through now or following a further High Court appeal).

Many are lamenting that it took so long to get law clarification on the issue and the very real financial consequence that has ensued for taxpayers in putting in place arrangements the Court has now found to have ultimately been unnecessary in the meantime – as they should.

But for everything that Bendel is, there are also many things that it is not.

For more complex UPE arrangements, Bendel is not a green light that Division 7A cannot be triggered. Far from it, part of the Court's reasoning for reading down section 109D(3) was the existence of sub-division EA of Division 7A which is specifically directed at UPEs. By operation of sub-division EA, where company profits referable to a UPE do make their way to a taxpayer subject to individual tax there will continue to be a deemed dividend under subdivision EA. That includes where such amounts make it to that taxpayer indirectly through a trust. But review of more complex arrangements in light of Bendel is still warranted as it could have repercussions for how other trace through Division 7A provisions such as section 109T are triggered, how accounts have been prepared, and potentially be a basis for either objection or section 109RB disclosure for Division 7A to be overlooked based on an honest and inadvertent mistake. The ATO's recent hard line stance on 109RB disclosures may need to be revisited in this context also – especially where the mistake or omission is a direct consequence of reliance on ATO guidance products.

Bendel is also not confirmation that UPEs do not trigger other anti-avoidance measures. There continue to be other integrity measures with different definitional elements than section 109D(3) that can be triggered by UPEs. Those include section 100A and 99B of the ITAA 1936. Consideration of the same continues to be necessary.

The judgment is also not a green light (at least not yet) to unwind arrangements entered into in reliance upon TR 2010/3 and PSLA 2010/4. These arrangements will in most instances have created the obligation to repay and therefore be at risk of being within the operation as declared by the Full Federal Court. Those other potential Division 7A consequences need to be considered before action is taken. Also, some patience is warranted given the prevalence and that they do exist because of ATO guidance rendering it likely that the ATO will offer an administrative solution when the dust settles.

Finally, the judgment is also not a solution to pre-16 December 2009 UPES that have been grandfathered. Forgiveness of such UPES on the back of Bendel is not recommended. Whether such forgiveness would trigger Division 7A turns on other provisions and therefore remains an ongoing issue of uncertainty in respect of which Bendel was silent.

As we wait to see what the next step will be there are recommended steps that should be taken now. Those include:

- **Review of prior year arrangements:** To determine whether Division 7A would be triggered on the law as now declared by the Full Federal Court, and for other flow on implications such as operation of look-through provisions such as section 109T of the *Income Tax Assessment Act 1936*.
- **Objections:** Taxpayers that have not yet objected to prior year assessments based on UPES to corporate beneficiaries should consider doing so. They should do so as a protective measure rather than with a view to getting any immediate outcome – the ATO has been clear that objection decisions will be delayed whilst the Court process takes its course. But there is a limited time window within which to lodge outside of which one is dependent on exercise of discretion and it is always best to be on the safe side in that regard.
- **Section 109RB discretion applications:** The Commissioner has discretion under section 109RB to overlook Division 7A consequences that arise from inadvertent omissions or honest mistakes. This could be an option to address some flow on consequences arising from how section 109D(3) has been administered for UPES.
- **Arrangements entered in reliance on TR 2010/3 and PSLA 2010/4 and grandfathered UPES:** Other than lodging protective objections, the recommendation is to sit on these for now and continue to remain in compliance with repayment obligations if ongoing. The prevalence of these arrangements mean that the ATO providing an administrative approach for correction is likely once the dust settles, whilst corrective action in absence of that has some risk of triggering other tax obligations.
- **Continue to consider application of other integrity measures to UPES**