

## Article Information

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## ATO releases Decision Impact Statement on Bendel - the wait is over, but was it worth the wait

***On 26 June, the Australian Taxation Office (ATO) issued the highly anticipated Decision Impact Statement (DIS) following the High Court's landmark judgment in Commissioner of Taxation v Bendel [2026] HCA 18 (Bendel). The DIS sets out the ATO's response to the Bendel decision handed down on 10 June 2026. There are positives for some taxpayers. Ironically largely those that ignored the interim advice issued by the ATO. And a lot of questions that remain for others.***

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### Summary

As set out in our earlier Insight, [Bendel - The High Court has spoken, but is this the final word on taxation on unpaid present entitlements?](#) dated 11 June, Bendel concerned whether unpaid present entitlements (**UPEs**) are loans for the purposes of Division 7A of the *Income Tax Assessment Act 1936* (Cth). The High Court (Gageler CJ, Gordon, Edelman, Steward and Gleeson JJ) found in favour of the taxpayer, that UPEs from a trust to a corporate beneficiary do not, without more, constitute a loan for the purpose of section 109D(3) of Division 7A, upholding the Full Federal Court's decision and dismissing the Commissioner of Taxation's (**Commissioner**) appeal.

### ATO's view of the decision: What changes?

In the DIS, the ATO considers that the High Court's reasoning clarifies 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. This position applies regardless of whether the amount is held on a separate trust.

However, the ATO qualifies its view by noting inaction by a beneficiary may be insufficient to spare potential implications under other provisions of the tax law, such as Subdivision EA and section 100A. In particular, the ATO focused on an observation of the majority that "the facts here broadly correspond with the circumstances to which Subdivision EA is addressed". Although their Honours were not determining this issue, the ATO is of the view that the majority judgment suggests that Subdivision EA may apply where the funds to which a private company has been made presently entitled have been set aside on a separate trust and other relevant requirements are met.

These outcomes contradict the position the Commissioner has taken in Taxation Determination TD 2022/11 and as a consequence, the ruling will be withdrawn. The ATO will also review and amend as appropriate a suite of related rulings and PCGs, including:

- Taxation Ruling TR 2022/4 (section 100A)
- Taxation Ruling TR 2015/4 (CGT small business concessions and UPEs)
- Taxation Determination TD 2015/20, Taxation Ruling TD 2011/15 (Division 7A UPE guidance)
- Practical Compliance Guideline PCG 2022/2 and Practical Compliance Guideline PCG 2017/13

It is noted that the withdrawn rulings will continue to apply to pre-withdrawal schemes where favourable to taxpayers.

### Implications for existing and historic arrangements

The ATO has confirmed that where arrangements involving UPEs have been implemented in accordance with TD 2022/11

or prior ATO administrative guidance, including PS LA 2010/4 (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). 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.

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).

Interestingly, the ATO does not include reference to or discussion in the DIS on the application of section 109RB (Commissioner's discretion to disregard application of Division 7A) where there are unintended consequences flowing from the Bendel decision due to the interpretation of section 109D(3). During the Bendel appeal process, the ATO publicly commented that the Commissioner would not be issuing a blanket exercise of discretion under section 109RB. Given the public interest in the application of the discretion, it is surprising that there was no direct consideration of the discretion in the DIS. In our opinion it remains an option worth considering on a case by case basis for those that entered into loan arrangements based on the ATO guidance now withdrawn, especially where there is evidence that the entry into those arrangements was influenced by the existence of that guidance.

### **Practical takeaways**

For some taxpayers, the DIS may bring a sigh of relief that the ATO has aligned its view that passive UPEs will not give rise to deemed dividends. For those taxpayers who were hoping for more relief such as guidance on how the Commissioner will exercise its discretion under section 109RB, the DIS provides little relief. The DIS is open for comment until 24 July.

As we wait for any revision to the DIS following public comment, there are other considerations to keep in mind as we look ahead. Those include:

- **Trust deed terms and resolutions matter:** Although the ATO is of the view that the High Court correctly expressed the application of section 109D(3) with respect to the treatment of UPEs, this is not a 'one size fits all' approach. The particular facts and circumstances of the UPE should be considered carefully. There may be instances where subsequent dealings between the trustee and beneficiary result in the creation of a separate trust relationship or other form of financial accommodation which may attract the application of Division 7A. To evaluate any risk, there is a need to examine:
  - trust deed powers,
  - trustee resolutions,
  - accounting treatment, and
  - subsequent dealings with entitlements
- **Subdivision EA and section 100A remain critical:** These provisions continue to be imperative when considering the classification of UPEs. The ATO's focus on the observation made by their Honours in Bendel may see the ATO double down on its approach to applying these provisions to UPEs. Careful consideration should be taken to assess whether a passive UPE may be captured by these anti-avoidance rules.
- **Post-1 July 2028 UPEs:** The overlay of the Bendel decision to UPEs to corporate beneficiaries will need to be considered in the context of the budget announcements. The impending changes to the taxation of trusts from 1 July 2028 may well see the end of the corporate beneficiary in the context of discretionary trusts. This may result in the application of Division 7A to UPEs to corporate beneficiaries being redundant for many taxpayers.

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