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High Court grants taxpayer a 'win' in Bendel

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Since 2009 the ATO has unwaveringly maintained its view that an unpaid present entitlement (UPE) outstanding between a trust and a corporate beneficiary is in fact a loan for the purposes of Division 7A.

The High Court has confirmed in *Commissioner of Taxation v Bendel* [2026] HCA 18 (reported at 2026 WTB 24 [455]) that the ATO's position that a UPE is in fact a loan is wrong. A conclusion also reached by each judicial authority in earlier phases of the case; and indeed arguably universally by specialist advisers for at least the last 16 years.

The harsh reality for taxpayers and their advisers

While the decision undoubtably provides a moment of clarity, its true impact is likely to be at best academic given:

1. as is arguably the culture of the ATO, a Decision Impact Statement will likely issue restricting the acceptance of the decision solely to the relevant taxpayer involved and (by implication) warning other taxpayers (and their advisers) that any approach relying on the decision risks lengthy litigation against a regulatory authority with apparently unlimited funding;
2. the result of the campaign waged by the ATO in this area since 2009 has anecdotally seen many taxpayers comply with the ATO's view; meaning the ability to rely on the principles endorsed by the High Court will be unavailable;
3. based on the apparently highly receptive channels through Treasury to the Government currently enjoyed by the ATO (based on the 2026 Budget attack on trusts and corporate beneficiaries; see below) a legislative change (likely retrospective to 2009) should be expected;
4. assuming the Budget 2026 changes are implemented, trusts will pay the mandatory 32% tax (being the announced 30% plus the Medicare tax) on all income - with a further double tax impost on any trust



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distributions to companies creating a tax rate approaching 70% and effectively making the whole case irrelevant.

The key conclusions from the High Court

While 2 minority judges supported the ATO's arguments, the majority was unequivocal in deciding for the taxpayer.

The following key observations were made:

1. It is only at the stage when there remains nothing to the trustee to execute except the payment over of money to the beneficiary, or the trustee admits the debt, that an action for money had and received might lie at the suit of the beneficiary against the trustee. In other words, in relation to UPEs, the courts of law treated the trustee as the absolute owner and the beneficiary's remedy was exclusively in a court of equity (see *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516).

2. That is, it is only when there is an unconditional obligation to make payment such that the beneficiary may sue for the money in an action for money had and received that the relationship between the trustee and beneficiary becomes one of debtor and creditor, in addition to any ongoing equitable relationship between those parties.

3. This means, before any UPE can be said to be a loan, one of the following must occur:

(a) a trustee resolves to distribute income to a beneficiary and there remains nothing for the trustee to do except to carry out payment of money;

(b) an absolutely entitled beneficiary entitled to do so invokes the rule in *Saunders v Vautier* (1841) Cr & Ph 240; or

(c) the trustee expressly admits the debt to a beneficiary.



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4. The trustee resolutions here created a separate trust (that is, UPEs), not a debtor/creditor relationship and nothing in the trust deed changed this outcome.

5. The ATO misconceived the legislation by incorrectly arguing that the reference to the "provision of credit or any other form of financial accommodation" in section 109D(3)(b) was necessarily a reference to any allowance of time within which to pay an amount or to perform an obligation.

6. That is, there is no "provision ... of financial accommodation" for the purposes of section 109D(3)(b) when a private company does nothing to convert a UPE, rather the legislation requires the supply or grant of some sort of pecuniary assistance, involving some bilateral activity. Simply doing nothing, or acquiescing to the retention of funds, is not a transaction which in substance effects a loan.

7. Division 7A is directed at the transfer of value from a private company to a shareholder, or an associate of that shareholder. Implicit in its structure is that the private company does something to effect that transfer of value. To find otherwise would be to ignore the word "transaction", which by its ordinary meaning refers to some interchange or interaction between entities (see *Grimwade v Federal Commissioner of Taxation* (1949) 78 CLR 199).

8. Subdivision EA, was introduced in 2004 to capture situations where a private company has UPE from a trust, and the trustee "shifts value" from the trust to a shareholder of that private company (eg by making a loan from the trust) - which had in fact occurred in the factual matrix here.

9. Ultimately, in summary, the court confirmed:

(a) Parliament has long been aware of the issue of a private company beneficiary potentially having UPEs;

(b) where such entitlements are, in substance, lent or paid to a shareholder (or an associate of a shareholder) of the private company, Parliament intended for that shareholder to be taxed;

(c) a subsequent review suggested that the trustee (or the private company beneficiary) might instead be taxed, but such legislative change was not enacted;



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- (d) in 2004 Subdivision EA preserved Parliament's choice to tax the shareholder (or an associate of the shareholder) of the private company;
- (e) the ATO has not suggested that the taxpayer was unable to be assessed in accordance with Subdivision EA; and
- (f) the potential application of Subdivision EA was precisely the basis for the Tribunal's remittal back to the ATO, before the ATO then embarked on 2 subsequent, and unsuccessful, appeals.

The Original Decision

Subdivision EA of Division 7A applies when certain trustee payments, loans or forgiveness of debts are made in favour of a shareholder or an associate of a private company, at a time when the trust owes a UPE to a company.

Where subdivision EA applies, the corporate beneficiary is deemed to have paid an assessable dividend to the trust.

Due to a perceived additional leakage to the revenue, in 2010, ATO introduced TR 2010/3 together with PS LA 2010/4, which set out a system for dealing with an UPE, subject to grandfathering for situations arising prior to 16 December 2009.

The particular mischief that was attacked by these announcements related to situations where a trust distributed income to a corporate beneficiary and simultaneously created an UPE with the funds, other than the tax payable by the corporate beneficiary, retained within the trust structure. In other words, subdivision EA (or EB if relevant) would not apply, as the trust would not ever make a loan that would be caught by those subdivisions.



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In 2022, the ATO withdrew TR 2010/3 and PSLA 2010/4, however issued TD 2022/11 reconfirming its view that a UPE with a corporate beneficiary can be a loan, and implementing an updated regime for UPEs arising on or after 1 July 2022.

While the ATO has maintained its position in this area for some years, in *Bendel and Commissioner of Taxation (Taxation) [2023] AATA 3074* it was held that a UPE with a corporate beneficiary was in fact not a loan under subsection 109D(3) of Division 7A.

The core arguments in relation to subdivision EA and section 109D, that the tribunal accepted, were as follows:

1. The statutory context and purpose of section 109D indicates that the definition of loan does not extend to amounts of trust income which are either set aside for a beneficiary on a separate trust or to which a beneficiary is presently entitled.
2. Statutory context must be considered.
3. This is particularly because that context might show that a word or words are used with some meaning other than their ordinary meaning.
4. That is especially the case where the relevant words, here 'credit' and 'financial accommodation', do not have a fixed ordinary meaning but can have a wide range of meanings depending on context.
5. A construction of section 109D(3) that includes UPEs to companies as loans would lead to absurd and unintended results from the dual operation of section 109D and subdivision EA.
6. That is, a loan within the meaning of section 109D(3) does not reach so far as to embrace the rights in equity created when entitlements to trust income (or capital) are created but not satisfied and remain unpaid - that is an UPE. The balance of an amount outstanding or UPE of a corporate beneficiary of a trust, whether held on a separate trust or otherwise, is not a loan to the trustee of that trust.



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7. A beneficiary does not make a loan to a trust where an amount of trust income is set aside and held on a separate trust for the beneficiary. In contrast, it was also confirmed that where the trust has made a loan and an UPE to a company is outstanding (as was also the case here in relation an individual beneficiary), subdivision EA is triggered.

Importantly, the decision also commented on provisions in the relevant trust deed that provided that:

(a) '[a]ny amount set aside for any beneficiary... shall cease to form part of the Trust Fund and upon such setting aside... shall thenceforth be held by the Trustee on a separate trust for such person absolutely...' ; and

(b) determinations to pay, apply or set aside amounts for beneficiaries could be effectually made by passing a resolution or by placing such amounts to the credit of beneficiaries in the trust's books of account (which the trustee on paper appeared to have done).

Relevantly, the tribunal confirmed that it did not accept that a separate trust as conventionally understood arose merely upon creation of a right to income. That is, in conventional terms, for a trust to exist there needed to be sufficient identity of the subject matter of the trust. Here, notwithstanding the abovementioned clauses in the trust deed, it was not clear that any separate trust in could have arisen.

As confirmed in *Fischer v Nemeske* (2016) 257 CLR 615 (a case featured in other View posts), the trustee's exercise of a power to apply trust property does not necessarily involve a resettlement of trust property so as to result in the creation of a new trust. Rather, the exercise of the power by way of unconditional and irrevocable allocation of trust property results in the crystallisation of an immediate absolute beneficial entitlement in respect of property which, before and after the resolution of the trustee, remains property which the trustee holds on trust under the terms of the existing settlement, coupled with the corresponding obligation of the trustee.

Thus, despite the specific provisions of the trust deed, the tribunal confirmed that each party's contentions that were based on the concept of a separate trust having the effect that the entitlements to income were discharged or paid were not accepted.

The Court of Appeal Decision



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The essence of the above conclusions were confirmed by the federal court in the appeal decision of *Commissioner of Taxation v Bendel* [2025] FCAFC 15.

While the court made a number of clarifying statements about the interpretation approach that should have been adopted by the tribunal, none of the tribunals' missteps meant that the ATO was successful in its appeal.

Relevantly, the court confirmed:

A. Section 109D(3) cannot be construed in isolation and, in particular, not in isolation from the use of the term 'loan' - in this regard the tribunal had (erroneously) failed to identify precisely which part of the definition it was referring.

B. The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected (see *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34).

C. Furthermore, the task of statutory construction must begin with a consideration of the statutory text. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself (see *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55).

D. The purpose of legislation must be derived from what the legislation says, not from any assumption about the desired or desirable reach or operation of the provisions (see *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] HCA 56), and an anomaly should not be used as a



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reason for rejecting what otherwise is the correct construction on all other tests of construction (see *Peter Greensill Family Co Pty Ltd (trustee) v Commissioner of Taxation* [2020] FCA 55).

E. The tribunal failed to align its reasoning with the above interpretation principles - and also failed to consider case law that confirms that not all forms of financial accommodation are loans, including that although an 'advance' may include financial accommodation, the essence of a loan is an obligation of repayment. That is, while there may be a debt, this does not automatically mean there is a loan (see *Prime Wheat Association Ltd v Chief Commissioner of Stamp Duties* (1997) 42 NSWLR 505).

F. For the purposes of Division 7A, the phrase 'a provision of credit or any other form of financial accommodation' in section 109D(3) encapsulates a concept of repayment and therefore is only engaged if there is an express or implied obligation to repay.

G. In this regard, section 109G makes it clear that under Division 7A, the concept of a 'debt' is not to be inevitably equated with a loan. That is, the concept of a loan is narrower than that of a debt, which in turn means not all forms of debtor-creditor relationships are automatically loans.

H. Ultimately, section 109D(3)(b) requires some form of financial accommodation which involves an obligation to repay an identifiable principal sum; rather than simply an obligation to pay (ie UPEs) - an interpretation which:

(i) is derived from the language of the statute construed in its context and results in each of the provisions in Division 7A being given operative effect;

(ii) does not give rise to absurd or irrational outcomes or leave unaddressed an obvious drafting error (see *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* [1981] HCA 26);

(iii) reflects the fact that Subdivision EA expressly excludes from its operation a private company's UPEs that make their way to another company (see s 109XA(1)(a) in respect of payments and s 109XA(2)(a) in respect of loans) - that is, the legislature did not perceive a mischief in respect of UPEs in the way that the ATO is on record as perceiving.

