

Bendel – The High Court has spoken, but is this the final word on taxation on unpaid present entitlements?

Authors: Megan Bishop, Partner (mbishop@piperalderman.com.au)
Belinda Spence, Special Counsel (bspence@piperalderman.com.au)
Luke Higgins, Associate (lhiggins@piperalderman.com.au)
Gideon Stein, Lawyer (gstein@piperalderman.com.au)

Practice Group: Companies, Trusts, and Taxation

Date: 11/06/2026

The High Court of Australia has upheld the Full Federal Court's decision that unpaid present entitlements (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 of the Income Tax Assessment Act 1936 (Cth) (1936 Act).

The High Court's decision

On 10 June 2026, the High Court of Australia handed down its highly anticipated judgment (**Bendel Decision**) in the case of *Commissioner of Taxation v Bendel* [2026] HCA 18 (**Bendel Case**). In positive news for taxpayers, the majority of the High Court (Gageler CJ, Gordon, Edelman, Steward and Gleeson JJ) found in favour of the taxpayer, upholding the Full Federal Court's decision and dismissing the Commissioner of Taxation's (**Commissioner**) appeal.

The majority held that where Gleewin Pty Ltd (**Gleewin**), as trustee of the Steven Bendel 2005 Discretionary Trust (**2005 Trust**), resolved to set aside net income of the trust for its corporate beneficiary, Gleewin Investments Pty Ltd (**Gleewin Investments**), that UPE did not, without more, constitute a loan for the purpose of section 109D(3) of Division 7A of the 1936 Act. The dissenting justices (Jagot and Beech-Jones JJ) were open to adopting a broader view of section 109D(3) and were prepared to treat the retention and use of funds by the trust which were referable to those UPEs, in conjunction with the beneficiaries failure to insist on payment, as capable of constituting financial accommodation or a form of loan, for Division 7A purposes.

A question of fact disputed before the High Court involved the creation of the debtor/creditor relationship (a fact which was accepted by the parties at the Full Federal Court level). The majority found that the trust resolutions of the 2005 Trust did not relevantly effect a distribution of the UPE amounts and did not create a debtor/creditor relationship between Gleewin ATF 2005 Trust and Gleewin Investments. Rather, under the terms of the trust deed, the amounts were set aside and held on separate trusts for Gleewin Investments. Therefore, the mere inaction of Gleewin Investments in not demanding payment did not amount to the provision of "financial accommodation" or a transaction that otherwise "in substance" effected a loan of money under section 109D(3)(b).

Key takeaways and practical implications

For everything that the Bendel Decision provides today, some patience is still warranted as our view is we haven't seen the last word on taxation of UPEs just yet, particularly following the

recent [Federal Budget announcements relating to the taxation of trusts](#). Whilst the appeal process has reached its conclusion, there is likely to be further action taken by the Commissioner and Federal Parliament following the Bendel Decision. We wait with anticipation to see the Commissioner's decision impact statement on the Bendel Decision and whether legislative amendments to section 109D will be introduced before Parliament to reflect the Commissioner's view of the interpretation of the term "loan" in section 109D(3).

Whilst we wait for the Commissioner's response, there are steps that taxpayers can take now to manage their position, including:

- **Review trust deeds:** The result in the Bendel Case turned materially on the language of the specific trust deed which required amounts set aside for a beneficiary to be held on separate trust which did not create an unconditional obligation to pay. An initial proactive step can be taken by taxpayers to review the wording of their discretionary trusts deeds to determine whether a similar sub-trust arrangement arises. Caution should still be exercised before implementing any amendments to trust deeds to ensure there are no unintended consequences, such as trust resettlements.
- **Review prior year arrangements:** Consideration should be given to the application of Division 7A to historical arrangements in light of the Bendel Decision. Specifically, consideration of any flow on implications such as the operation of section 109T which operates as a "look-through" provision.
- **Review accounting versus legal classification of a UPE:** UPEs are often recorded in the balance sheet against a beneficiary loan account (as a liability) as a matter of accounting convenience. Following the Bendel Decision, taxpayers and advisors may benefit from reviewing whether that position is consistent with the legal characterisation that may exist under the trust deed and trustee resolutions. If the intended position is that the amount is held on a separate trust (as opposed to some form of loan), this should be recorded as such in the accounts of the trust. Although the majority found against the Commissioner's contention that the accounts constituted an admission of indebtedness, alignment between the legal structure of the arrangements and the accounting presentation may avoid the creation of unnecessary evidentiary risk if the Commissioner later argues that a UPE was in substance a debt.
- **Applications for Commissioner's discretion under section 109RB:** In circumstances where there are unintended consequences flowing from the Bendel Decision due to the interpretation of section 109D(3), discretion may be sought from the Commissioner. It is noted that such applications are generally limited to circumstances where there is inadvertent omission or honest mistake.
- Consider the application of other integrity measures such as section 100A or section 99B.

There are also some caveats to the Bendel Decision that should be kept in mind before taking any action in relation to outstanding UPEs:

- **Grandfathered pre-December 2009 UPEs:** Forgiveness of pre-16 December 2009 UPEs that have been grandfathered is not a recommended course of action as this may trigger the application of Division 7A on other grounds (such as forgiveness of a debt);
- **Adopting a view that UPEs can not be subject to Division 7A:** The Bendel Decision should not be seen as authority for the position that UPEs more broadly are not capable

of being subject to Division 7A. Rather, UPEs are expressly included in the scope of Subdivision EA of Division 7A (specifically section 109B) with the operation of this subdivision triggered in certain circumstances.

Our previous Insight article published on 26 February 2025 (available [here](#)) also touches on the potential implications of the Bendel Decision following on from the Full Federal Court's judgment handed down in February 2025.

Summary of the facts

The Bendel Group comprised several entities which conducted an accounting and tax agent practice and invested in commercial property syndicates. It relevantly included Gleewin as trustee of the 2005 Trust and Gleewin Investments. Mr Bendel owned all of the issued shares in each of Gleewin and Gleewin Investments and was the sole director and secretary of each company. Mr Bendel and Gleewin Investments were discretionary objects of the 2005 Trust.

In each income year from 30 June 2014 to 30 June 2017 (**Relevant Period**), Gleewin as trustee for the 2005 Trust resolved to "set aside" all of the net income of the 2005 Trust for the benefit of its discretionary objects, Mr Bendel and Gleewin Investments in defined percentages.

The resolutions prepared for the Relevant Period divided the net income into three classes: capital gains; franked dividends; and other income; and allocated specific amounts to each beneficiary.

Under the terms of the 2005 Trust, the amounts set aside in the Relevant Period were required to be held on separate trusts for the benefit of the discretionary object (i.e., Gleewin Investments and Mr Bendel) (**Sub-trusts**). Gleewin did not pay to Gleewin Investments those amounts set aside by the resolutions, and Gleewin Investments did not, at any relevant time, call for payment to be made. On this basis, neither Gleewin or Gleewin Investments considered the provisions of Division 7A of the 1936 Act as being applicable to the Sub-trusts attributable to Gleewin Investments.

The Commissioner issued amended assessments to Gleewin Investments for each of the income years in the Relevant Period (**Amended Assessments**), relying on section 109D of the 1936 Act to deem the amounts set aside under the Sub-trust to constitute a loan for the purpose of section 109D(3). The Commissioner contended that the amounts set aside for Gleewin Investments (referrable to UPEs) constituted "a provision of credit or any other form of financial accommodation" by Gleewin Investments to Gleewin as trustee, or were "in substance" loans of money, and thus each a "loan" as defined in section 109D(3) in Division 7A.

There was no dispute that the effect of each resolution during the Relevant Period was to make Gleewin Investments and Mr Bendel presently entitled to a "share of the net income" for the purposes of Division 6 of Part III of the 1936 Act. Each acquired a legal right to demand and receive payment and was required to include their share in their assessable income. However, Gleewin Investments and Mr Bendel objected to the Commissioner's conclusion as to the application of section 109D.

Case history

The Bendel Decision comes following a lengthy litigious process through the lower courts and tribunal, culminating in the final decision from the High Court.

Administrative Appeals Tribunal

The Commissioner issued the Amended Assessment to Gleewin Investments for the Relevant Period. Gleewin Investments and Mr Bendel lodged objections to the Amended Assessments which were disallowed by the Commissioner, and they sought review in the Administrative Appeals Tribunal (**Tribunal**), as it was known then.

The Tribunal found in favour of the Commissioner determining that the amounts set aside under the Sub-trusts for Gleewin Investments as UPEs were in substance lent to Mr Bendel and therefore should be captured under the provisions of subdivision EA of Division 7A.

Notwithstanding the decision, the Tribunal rejected the Commissioner's contention that by giving Gleewin time to pay the net income, Gleewin Investments had made a "provision of credit or any other form of financial accommodation" or were "in substance" loans of money for the purpose of section 109D(3). The Tribunal also rejected Gleewin Investments' contention that separate trusts had been created over the net income of the 2005 Trust set aside during the Relevant Period. Instead, the Tribunal decided that it was "not possible to identify any asset or property held on any separate trust" and that each resolution must be interpreted as creating a right or entitlement for each beneficiary and a corresponding obligation on Gleewin as trustee.

Full Court of the Federal Court

The Commissioner appealed to the Full Court of the Federal Court which was unanimously dismissed on 19 February 2025 (**the FCA Appeal**).

The FCA Appeal was conducted on the basis that both parties accepted a debtor/creditor relationship existed between Gleewin and Gleewin Investments in accordance with the Sub-trusts created (a concession which later became contested on appeal to the High Court of Australia).

The Full Court held that the definition of "loan" in section 109D(3) requires "an obligation to repay and not merely an obligation to pay". Notwithstanding the debtor/creditor relationship, the non-exercise by Gleewin Investments of its right to call for payment of its UPE "did not involve the payment of a sum by or at the direction of Gleewin Investments that was required to be repaid." Accordingly, Gleewin Investments had not made a loan to Gleewin within the meaning of section 109D(1)(a).

The Commissioner sought special leave to appeal the Full Federal Court's decision. On 12 June 2025, special leave to appeal was granted by the High Court.