

# Division 7A and Unpaid Present Entitlements back in the spotlight!

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On 28 September 2023, the Administrative Appeals Tribunal (AAT) handed down its decision in **Bendel & Anor v Commissioner of Taxation [2023] AATA 3074**, finding that unpaid present entitlements (UPEs) to income or capital of a trust estate payable to a private company did not constitute loans for Division 7A purposes. This position is contrary to the ATO's longstanding position in relation to UPEs and Division 7A.

The key issue in this case was whether a private company beneficiary had made a loan to a Trust for Division 7A purposes (within the meaning of s109D(3) of ITAA 1936) for the relevant tax year(s), by virtue of having a UPE outstanding (payable by the Trust to the private company beneficiary).

The AAT held that having regard to various factors, "the necessary conclusion is that a loan within the meaning of s 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. The balance of an outstanding or unpaid entitlement 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".



## What does this mean for the ATO's position going forward?

The Commissioner has published his view in several documents - including [TR 2010/3](#) and [PS LA 2010/4](#) (both now withdrawn) and [TD 2022/11](#) (replacing the withdrawn ATO documents with effect from 01 July 2022) - that a UPE payable to a private company will fall within the extended meaning of the term "loan" for Division 7A purposes as it constitutes the provision of financial accommodation.

Although the Bendel decision is significant in terms of its subject matter and interpretations, taxpayers should exercise caution when seeking to apply the case to their own circumstances. It is important to note:

- Given the Bendel decision is contrary to ATO published views, the ATO may look to appeal the decision and run the matter through the courts.

- Despite being written by a multi-person tribunal, the ATO may not immediately apply the AAT decision to other taxpayers.
- In our experience, the ATO tends to seek superior court judgments for precedential application rather than AAT decisions.
- The ATO's published views are therefore not expected to be revised until the appeals process has been exhausted.

With a tribunal decision now in conflict with ATO published views, and legislative reform having been deferred repeatedly, there is significant uncertainty as to how trusts and Division 7A provisions interact in some circumstances. This may be the 'new normal' until the legislature adequately deals with these issues by enacting new/updated legislation and/or clarification of the issue occurs through the courts.



## Next steps and actions

It is important in light of the Bendel decision (and pending possible appeals and later court judgments) that all private groups with trusts and corporate beneficiaries do the following:

- Review the trust deed to understand how the trustee and beneficiary interactions will impact the status of the UPE
- Determine how trustee resolutions and correspondences between trustee and beneficiary should be drafted and conducted to ensure no inadvertent Division 7A implications arise and no actions are taken contrary to the trust deed
- Review how the trust assets are being used or applied, as Subdivision EA could still apply to capture UPEs within Division 7A (even if not amounting to a “loan” at first instance).



### Find out more

For a more detailed discussion on the implications of the Bendel case, please get in touch with your PwC advisor or contact:

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