



Local Tax Club-Melbourne & Geelong

Key Learnings from Bendel's Case

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1. Introduction

1. In *Commissioner of Taxation v Bendel* [2025] FCAFC 15 (**Bendel's Case**), a Full Court of the Federal Court (Logan, Hespe and Neskovcin JJ) found that a “loan” for the purposes of s 109D(3) of Div. 7A of the *Income Tax Assessment 1936* (Cth) required a transaction which created “an obligation to repay an amount or which in substance effected an obligation to repay” such an amount.¹
2. It followed that:
 - (a) entitlements of a corporate beneficiary to amounts of income of a trust estate appointed to it over several years by the trustee but which had remained unpaid were not loans within the meaning of that section;
 - (b) Div. 7A did not apply to cause the entitlements to be taken to be dividends paid to the corporate beneficiary for taxation purposes; and
 - (c) although the Administrative Appeals Tribunal below had “not completed its statutory task by not engaging with the text of s 109D(3)”, the Commissioner’s appeal against the Tribunal’s decision was nevertheless unsuccessful.
3. Subject to a successful appeal to the High Court or legislative amendment, the decision determines the construction of s 109D(3) against the Commissioner’s position which he promulgated in 2009,² as identified on the Australian Taxation Office website since 13 December 2017³ and, more recently, by taxation determination TD 2022/11.
4. Although not referred to by the Full Court in *Bendel's Case*, the correctness of the decision is supported by s 109C and, to a lesser extent, s 109CA (both of which concerns certain “payments” by private companies) and s 109N (which concerns certain agreements operating to exclude the operation of s 109D). The Full Court’s finding as to the proper meaning and construction of s 109D(3) avoids issues with those provisions that would have arisen had the Commissioner’s construction prevailed.
5. In the author’s view, the difficulties engaged by *Bendel's Case* and by the complexity of Div. 7A generally arise from a legislative approach to specific anti-avoidance provisions addressing specific conduct of taxpayers rather than operating by reference to the mischief the legislation was seeking to avoid.

¹ The Commissioner has sought special leave to appeal the decision to the High Court of Australia.

² See taxation ruling TR 2010/3 and PS LA 2010/4, both of which were withdrawn with effect from 30 June 2022 by taxation determination TD 2022/11, [97]; see also TD 2022/11, [99].

³ https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/private-company-benefits-division-7a-dividends/in-detail/division-7a-and-trusts? redirected _division7Atrusts (last updated 13 December 2017, last accessed 18 March 2025).

2. Division 6 of the Act

6. There was no dispute in *Bendel's Case* concerning the operation of Div. 6. As the Full Court stated:⁴

"The net income of a trust is taxed in accordance with Div 6 of the Act. The operation of Div 6 was succinctly summarised by the High Court in *Federal Commissioner of Taxation v Carter* [2022] HCA 10; 274 CLR 304 at [1]–[3] (Gageler, Gordon, Steward and Gleeson JJ) (footnotes omitted) as follows:

[1]The primary provision in Div 6, s 96, states: "Except as provided in this Act, a trustee shall not be liable as trustee to pay income tax upon the income of the trust estate". Section 96 reflects that, in Div 6, the basic income tax treatment of the net income of a trust estate is to assess the beneficiaries on a share of the net income of the trust estate based on their *present entitlement* to a share of the income of the trust estate. The trust is the mere conduit through which the beneficiaries under the trust receive income and are assessed.

[2] That basic income tax treatment, from the perspective of the beneficiary, is addressed in s 97(1), which relevantly states:

"Subject to Division 6D, where a beneficiary of a trust estate who is not under any legal disability *is presently entitled to a share of the income of the trust estate*:

(a) the assessable income of the beneficiary shall include:

- (i) so much of that share of the net income of the trust estate as is attributable to a period when the beneficiary was a resident; and
- (ii) so much of that share of the net income of the trust estate as is attributable to a period when the beneficiary was not a resident and is also attributable to sources in Australia ..." (Emphasis added.)

[3] A criterion on which s 97(1) operates is that a beneficiary "*is presently entitled* to a share of the income of the trust estate" (emphasis added). For the purposes of that subsection, a beneficiary is presently entitled to a share of the income of a trust estate "if, but only if: (a) the beneficiary has an interest in the income which is both vested in interest and vested in possession; and (b) the beneficiary has a present legal right to demand and receive payment of the income, whether or not the precise entitlement can be ascertained before the end of the relevant year of income and whether or not the trustee has the funds available for immediate payment".

3. The application of Div. 7A to “loans”

7. Section 44(1) relevantly provides that the assessable income of a shareholder in a company includes dividends paid by the company out of profits derived by the company from any source. Division 7A “expands the operation of s 44(1) of the Act”. It treats certain transactions identified in s 109B between private companies and their shareholders (and certain associates) as payments of dividends by the companies to the shareholders (or associates) to the extent to which the companies have distributable surpluses: see s 109Z.
8. Amongst other things, s 109B refers to loans of amounts by companies to shareholders and their associates, as provided for by s 109D. That section relevantly provides as follows.

“Loans treated as dividends in year of making

- (1) A private company is taken to pay a dividend to an entity at the end of one of the private company’s years of income (the **current year**) if:
 - (a) the private company makes a loan to the entity during the current year; and
 - (b) the loan is not fully repaid before the lodgement day for the current year; and
 - (c) Subdivision D does not prevent the private company from being taken to pay a dividend because of the loan at the end of the current year; and
 - (d) either:
 - (i) the entity is a shareholder in the private company, or an associate of such a shareholder, when the loan is made; or
 - (ii) a reasonable person would conclude (having regard to all the circumstances) that the loan is made because the entity has been such a shareholder or associate at some time.
- ...

What is a loan?

- (3) In this Division, **loan** includes:
 - (a) an advance of money; and
 - (b) a provision of credit or any other form of financial accommodation; and
 - (c) a payment of an amount for, on account of, on behalf of or at the request of, an entity, if there is an express or implied obligation to repay the amount; and
 - (d) a transaction (whatever its terms or form) which in substance effects a loan of money.

In which year of income is a loan made?

- (4) For the purposes of this Division, a loan is made to an entity at the time the amount of the loan is paid to the entity by way of loan or anything described in subsection (3) is done in relation to the entity.
- ...”.

Division 7A also deems a dividend to be paid where an amount is paid or lent by the company to the shareholder or associate through one or more interposed entities: see Subdiv. E.

9. Section 109B identifies a further circumstance in which an amount may be included in the assessable income of a shareholder or shareholder's associate, as follows:

"An amount may also be included in the assessable income of a shareholder or shareholder's associate if:

- (a) a company has an unpaid present entitlement to income of a trust; and
- (b) the trustee makes a payment or loan to, or forgives a debt of, the shareholder or associate.

(See Subdivisions EA and EB.)"

10. Subdivision EA commences with s 109XA. It is in the following relevant terms:

"109XA Payments, loans and debt forgiveness by a trustee in favour of a shareholder etc. of a private company with an unpaid present entitlement

...

Loans

- (2) Section 109XB applies if:

- (a) a trustee makes a loan (including a loan through an interposed entity as described in section 109XG) to a shareholder or an associate of a shareholder of a private company (except a shareholder or associate that is a company) (the ***actual transaction***); and
- (b) either:
 - (i) the company is presently entitled to an amount from the net income of the trust estate at the time the actual transaction takes place, and the whole of that amount has not been paid to the company before the earlier of the due date for lodgement and the date of lodgement of the trustee's return of income for the trust for the year of income of the trust in which the actual transaction takes place; or
 - (ii) the company becomes presently entitled to an amount from the net income of the trust estate after the actual transaction takes place, but before the earlier of the due date for lodgement and the date of lodgement of the trustee's return of income for the trust for the year of income of the trust in which the actual transaction takes place, and the whole of the amount has not been paid to the company before the earlier of those dates.

Note: For entitlements through interposed trusts, see section 109XI."

11. Section 109XB provides:

"109XB Amounts included in assessable income

- (1) An amount is included, as if it were a dividend paid by the company at the end of the year of income of the company in which the actual transaction took place, in the assessable income of the shareholder or associate referred to in subsection 109XA(1), (2) or (3) if:

- (a) had the actual transaction been done by a private company (the notional company); and
 - (b) had the shareholder or associate been a shareholder of the notional company at the time the actual transaction took place;
- an amount (the ***Division 7A amount***) would have been included in the shareholder's or associate's assessable income because of a provision of this Division outside this Subdivision.
- (2) Subject to section 109Y, the amount that is included under subsection (1) is the Division 7A amount.

Note: There are some modifications of this Division for the purposes of working out the Division 7A amount: see section 109XC."

4. The facts in Bendel's Case

12. A company (G) was the trustee of an *inter vivos* trust estate settled by deed. Another company (GI) and the respondent, a Mr Bendel, were discretionary objects of the trust. Mr Bendel was the sole controller of both G and GI.
13. The trust deed authorised G as trustee to determine to pay, apply or set aside all or any part of an amount of net income of the trust estate for certain accounting periods to certain beneficiaries, that a determination was irrevocable and could be effectually made and satisfied by a resolution of the trustee, by otherwise dealing with it for their benefit, or by placing the amount to their credit in the trust's books of account.
14. For the income years ended 30 June 2013 to 30 June 2017, G determined by resolution that GI was entitled to a share of the net income of the trust estate.
15. For the income years ended 30 June 2014 to 30 June 2015, G also determined by resolution that Mr Bendel was entitled to a share of that net income.
16. The Commissioner assessed GI for the years ended 30 June 2014 to 30 June 2017 and Mr Bendel for the years ended 30 June 2015 to 30 June 2017 on the following basis.
 - (a) GI had unpaid present entitlements in each year to prior year trust income which comprised loans under s 109D(3) from GI to G.
 - (b) Those loans were taken to be dividends paid by GI to G by s 109D(1) in the year of income following the year in which the present entitlement was created.
 - (c) The dividends were taken to be paid out of GI's profits by s. 109Z to the extent GI had a distributable surplus.
 - (d) Those dividends were assessable income under s 44(1) and included in G's net income in the year of income in which the dividend was taken to be paid.
 - (e) The beneficiaries entitled to G's income for the current income year were assessed under s 97 of that proportion of each such dividend by reference their proportionate entitlement to G's income for the income year in which the dividend was taken to be paid.
17. The Commissioner disallowed objections by Mr Bendel and G, who sought review by the Administrative Appeals Tribunal.

Administrative Appeal Tribunal decision at first instance

18. The Administrative Appeals Tribunal found in favour of Mr Bendel and G. The Tribunal considered that “[t]he critical question for determination is whether an unpaid present entitlement to income (or capital) of a trust estate is a loan.” It approached that question on the basis that that Subdiv. EA was concerned to tax the shareholder recipient of funds loaned by a trustee in circumstances where the company has an unpaid present entitlement owed by the trustee. In those circumstances “the in-substance loan is from the private company to the shareholder (or associate) effected via the trust” and the “loan from the trust is taxed in these circumstances on the same basis as would a loan from a corporate beneficiary directly to the shareholder”. The Tribunal stated (*Bendel's Case*, [26]):

“The evident purpose of Division 7A is to ensure that shareholders of private companies are not able

to enjoy effective distributions of company profits in a tax-free form. That purpose is set out in s 109B of the 1936 Assessment Act. That purpose is also amply demonstrated by the range of operative provisions which identify various means by which corporate resources can be passed to, or enjoyed by, shareholders and associates of shareholders, and then quantify taxable amounts by reference to the benefit enjoyed and the relevant distributable surplus, which is a surrogate a [sic] company's realised and unrealised profits. This purpose is also buttressed by the range of supplementary provisions which seek to ensure that the primary rules are not avoided, e.g., through back-to-back or tripartite arrangements etc."

The Tribunal supported that conclusion by reference to the legislative history of Div 7A and Subdiv. EA, as well extrinsic material, and concluded that (*Bendel's Case*, [30]):

"Consistent with Division 7A's policy of taxing shareholders (or associates) of companies who enjoy the benefit of company profits in informal ways, that intention is only raise [sic] a tax liability on an amount taken to be a dividend in circumstances where there is *both* an unpaid present entitlement to a corporate beneficiary and a loan made by the Trustee to a shareholder or an associate of a shareholder of the relevant company.

19. As the Full Court in *Bendel's Case* stated (at [31]):

"The Tribunal considered the Commissioner's proposition that there was a loan to the trustee meeting the terms of s 109D(3), "feeding into an assessable dividend through the combined operation of Div 7A and s 44 and Division 6 of the 1936 Assessment Act". Thus, the Tribunal considered the Commissioner's proposition to raise "the spectre of taxing two people in respect of precisely the same underlying circumstance, namely the same [unpaid present entitlement]". Two people would be taxed – one through Div 6 and one through Div 7A – in circumstances where a corporate beneficiary has an unpaid present entitlement to the income of the trust and within the prescribed time frames the trustee of that trust has lent money to a shareholder of that corporate beneficiary (or to an associate of such a shareholder). An outcome whereby two people are taxed "as a consequence of events starting in the same circumstances and allowing the Commissioner to choose which taxpayer is assessed or to assess and collect from both" was considered by the Tribunal to be a "problematic or inappropriate outcome". The Tribunal was concerned by the absence of a tie breaker provision that would "produce a single outcome among two otherwise operative provisions that might arise from precisely the same unpaid present entitlement relationship".

The Commissioner's contentions in the Full Court

20. Before the Full Court, the Commissioner contended that there were three errors in the Tribunal's decision. He first contended that as the term "unpaid present entitlement" did not appear in s 109D(3), the Tribunal's identification of the question before it as engaging whether an "unpaid present entitlement" was a "loan" created a false dichotomy. In framing the key issue before it as whether an unpaid present entitlement was a loan, the Tribunal therefore misdirected itself and failed to complete its statutory task.
21. The Commissioner submitted that because G had the benefit of the use of the funds but GI had a vested and indefeasible entitlement to the net income, there was a debtor-creditor relationship between the trustee and GI which involved the provision of "financial accommodation" by GI to G as trustee within the meaning of that term in s 109(3)(b).

22. The Commissioner further relied upon s 109(3)(d) to submit that because GI agreed or acquiesced to G using the funds to which it was entitled, there was "a transaction which in substance effects a loan of money".
23. Secondly, the Commissioner contended that the Tribunal had not understood that Subdiv. EA was concerned with payments, loans and forgiveness made by a trustee, and had no application to loans made by a private company. The Tribunal had therefore:
 - (a) erroneously circumscribed the plain and ordinary meaning of s 109D(3) by reason of the terms and operation of Subdiv. EA and its predecessor, s 109UB; and
 - (b) in concluding that "only loans that did not have their origins in entitlements in trust income" could enliven s 109D, had failed to give effect to the statutory text of s 109D(3).
24. Finally, the Commissioner contended that the legislative purpose of Div. 7A was to ensure that private companies would not be able to make tax free distributions of profits in the form of payments and loans to shareholders (and their associates). By enabling G (as an associate of Mr Bendel) to retain the benefit of amounts forming part of the profits of GI, the trustee was able to access the profits of GI. In those circumstances, the Commissioner contended that the decision of the Tribunal that s 109D(3) did not apply was contrary to the legislative purpose of s 109D.

5. The Full Court's decision

(1) The relevant principles of statutory construction

25. As to its approach to the construction of the section, the Court referred to well established principles as stated in summary form by the High Court in *SZTAL v Minister for Immigration and Border Protection* (107) 262 CLR 362, at [14] (Kiefel CJ Nettle and Gordon JJ) that:

“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.<https://advance.lexis.com/document/?pdmfid=1201008&crid=5617387b-97b3-46cd-b69a-632a5ad3d5e8&pddocfullpath=/shared/document/cases-au/urn:contentItem:5PDN-YDS1-F2MB-S2HW-00000-00&pdcontentcomponentid=267702&pdshepid=urn:contentItem:5PDN-YDS1-F2MB-S2HW-00000-00&pdteaserkey=sr0&pdicsfeatureid=1517127&pditab=allpods&ecomp=hwtpk&earg=sr0&prid=4b6e0622-61a7-41e7-bf50-63fef02ce646> 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.”

26. The Court also referred to *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, at [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ) that:

“This Court has stated on many occasions that 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.”

(2) The meaning of “loan”

27. Against that background, the Court considered applicable authority on the meaning of “loans” and “financial accommodation”. The Court first considered *Commissioner of Taxation v Radilo Enterprises Pty Ltd* (1990) 72 FCR 300. In that case, a dividend paid on certain preference shares was the equivalent of a payment of interest on a loan for the purposes of the former s 46D of the Act. The Court held that it was not, as “the essence of a loan is thus a payment of money to or for someone on condition that it will be repaid: CL Pannam, *The Law of Money Lenders in Australia and New Zealand* (Law Book Company, 1965, p. 6)”.
28. The Full Court next considered *Prime Wheat Association Ltd v Chief Commissioner of Stamp Duties* (1997) 42 NSWLR 505 (“**Prime Wheat**”). That case concerned a share sale agreement payable in instalment secured by mortgage. The issue was whether the agreement was a “loan” within the meaning of the *Stamp Duties Act 1920* (NSW). A definition of “loan” in that Act included the following (*Bendel's Case*, [64]):
- “(1) An advance of money. “Advance” was defined to include the provision or obtaining of funds by way of financial accommodation. The term “financial accommodation” was itself defined in

- inclusive terms to include funds provided by means of a loan or obtained by means of a bill facility and funds provided under any other obligation except an obligation imposed by a lease or hiring agreement.
- (2) Money paid for or on account of or on behalf of or at the request of any person.
 - (3) A forbearance to require payment of money owing on any account whatever.
 - (4) Any transaction which in substance effects a loan of money."
29. The Full Court observed that the decision in *Prime Wheat* recognised that not all forms of financial accommodation are loans. That was because, although an "advance" there included giving "financial accommodation", there was no financial accommodation that included an advance of money. Thus, the Court of Appeal in *Prime Wheat* concluded that "... what was involved was a granting of time to pay. Ultimately, there was a debt but no loan..." (*Bendel's Case*, [66]).
30. The Full Court further observed that in *Prime Wheat*, the Court of Appeal found that that definition was not to be construed as rendering everything else in the definition as superfluous (*Bendel's Case*, [67]). Read in context, the phrase did not entitle the court to disregard the legal nature and effect of the transaction. The essence of the loan being an obligation of repayment, the obligation to pay under the terms contract was not an obligation to repay.
31. Turning to the words of Div. 7A, the Full Court observed that s 109F(1) and s 109G (concerning debt forgiveness) distinguish between "debts" and "loans". The Full Court considered that, because Div. 7A did not equate all forms of debtor-creditor relationships with "loans, the term 'a provision of credit or any other form of financial accommodation' in s. 109D(3) is not to be construed as extending to any form of debtor-creditor relationship" (*Bendel's Case*, [78]).
32. The Full Court concluded that, having regard to its context, s 109D(3)(b) is to be construed as referring to a provision of credit or other form of financial accommodation which involved an obligation to repay an identifiable principal sum, rather than merely an obligation to pay (*Bendel's Case*, [79]).
33. Thus, the creation of an obligation to pay an amount to a private company that does not result from a transfer of an amount from or at the direction of the private company is not a loan within the meaning of s 109D(3). As the Full Court observed, that is consistent with the use of the phrase "makes a loan" in s 109D(1)(a) which connotes something more than the mere existence of a debt owed to a private company (*Bendel's Case*, [79]).
- (3) Purposes of Div. 7A**
34. As to the Commissioner's submissions concerning the purpose of Div. 7A, the Full Court noted that its approach to the construction of s 109D(3) was "derived from the language of the statute construed in its context and results in each of the provisions in Div. 7A being given operative affect" (*Bendel's Case*, [86]). Moreover, nothing in that approach to Div. 7A resulted in an absurd or irrational outcome or left unaddressed drafting errors (*Bendel's Case*, [87]). In particular, the construction adopted by the Full Court left Div. 6 as the primary division governing the taxation of income a trust.
35. The Full Court stated (*Bendel's Case*, [88]):

"The perceived mischief which lies at the heart of the Commissioner's submission is the creation of a present entitlement which is not paid to a corporate beneficiary and remains in the trust but which

benefits from taxation at the corporate beneficiary's corporate tax rate. Division 7A does not operate to negate that present entitlement. A consequence of the Commissioner's construction of Div 7A is that a share of net income to which a corporate beneficiary has been made presently entitled and on which the corporate beneficiary has been taxed in one year is again included net income of that same trust in the following year. This has the potential result of an overall tax impost that is higher than if the corporate beneficiary was never made presently entitled at all."

36. The Full Court rejected that position. It stated (*Bendel's Case*, [89]):

"Division 7A is an anti-avoidance provision directed at in substance distributions of private company profits. It operates according to its terms. By the terms of Subdiv. EA where company profits referable to [an unpaid present entitlement] make their way to a taxpayer who is subject to tax at personal rates, there is a deemed distribution to that taxpayer and the benefit of the corporate tax rate is lost. That was the mischief perceived by the legislature. Subdivision EA expressly excludes a private company's [unpaid present entitlements] 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). The legislature did not perceive a mischief in respect of [unpaid present entitlements] in the way that the Commissioner now perceives."

(4) Application to the facts

37. G and Mr Bendel accepted that there was a debtor-creditor relationship between G and GI based on the decisions of *Chianti Pty Ltd v Leume Pty Ltd* (2007) WAR 488. [63]-[77] and *Fisher v Nemeske Pty Ltd* (2016) 257 CLR 615, [26], [32] (French CJ, Bell J) and [108] and [110]-[111] (Gordon J). On the unchallenged facts as found by the Tribunal that G had not in fact set aside amounts of net income in a separate trust as it had resolved to do, leaving G with an undischarged obligation to pay, GI had an obligation to pay an amount to G but no obligation to repay any amount. The definition of a "loan" 109D(3) was therefore not satisfied.

6. The narrowness of the decision

38. The actual decision in *Bendel's Case* is quite narrow. The case stands for the limited proposition that an unpaid obligation arising from the exercise of a trustee's power of appointment of income is not a "loan" within the meaning of those words given by s 109D(3).
39. In considering the construction of s 109D(3), the Court did not rely upon a wider consideration of other circumstances in which deemed dividends arise under Div. 7A, including under s 109C (and also, 109CA).
40. Notwithstanding the Full Court's application of the reasoning in *Commissioner of Taxation v Radilo Pty Ltd* and in *Prime Wheat*, it therefore should not be assumed that the conclusions in *Bendel's Case* are engaged in respect of arrangements otherwise than those arising from unpaid present entitlements in consequence of the exercise of a trustee's power of appointment (for example, an instalment payment plan in the terms considered in *Prime Wheat*). Rather, amongst other things, it becomes necessary to consider s 109C(1) (and s 109CA).
41. Section 109C(1) provides:

"A private company is taken to pay a dividend to an entity at the end of the private company's year of income if the private company pays an amount to the entity during the year and either:

- (a) the payment is made when the entity is a shareholder in the private company or an associate of such a shareholder; or
- (b) a reasonable person would conclude (having regard to all the circumstances) that the payment is made because the entity has been such a shareholder or associate at some time."

42. "Payment" is defined in s 109C(3). It provides:

"In this Division, payment to an entity means:

- (a) a payment to the extent that it is to the entity, on behalf of the entity or for the benefit of the entity; and
- (b) a credit of an amount to the extent that it is:
 - (i) to the entity; or
 - (ii) on behalf of the entity; or
 - (iii) for the benefit of the entity; and
- (c) a transfer of property to the entity."

43. By s. 109C(3A), "[h]owever, a loan to an entity is not a payment to an entity." Thus, for the purposes of Div. 7A, no arrangements meeting the definition of "loan" in s 109D(3) are payments under s 109D(3). However, arrangements that are not such "loans" may be such "payments". For example, on the findings of the Full Court in *Bendel's Case*, an instalment payment plan such as that arising in *Prime Wheat* would fall outside the definition of a loan in s 109D(3). There would be an obligation on the trade creditor to pay, but not to repay anything advanced to it. That says nothing about s 109C(3)(b).
44. On those facts (and putting aside whether there would be a deemed payment, which would fall to be considered), questions arise as to the meaning of the words "a credit of an amount" in s. 109C(3)(b) in

contradistinction to the words “provision of credit” in s. 109D(3)(b). As s 109C only operates if s 109D does not, the word “credit” must have different meanings in the two sections; otherwise its inclusion in s 109(3)(b) would have no purpose.

45. That consequence supports the correctness of Full Court in *Bendel's Case*, as it suggests that if the terms of s 109D(3)(b) were as wide as that contended for by the Commissioner in *Bendel's Case*, s 109C(3)(b) would have no work to do.
46. Similar construction questions arise under s 109CA. That section extends a “payment” to include “the provision of an asset for use by the entity”. The time of the payment is the time “the entity first uses the asset ... (a) with the permission of the provider of the asset”, or “has a right to use the asset ... at a time when the provider of the asset does not have [that right] ...”. For example, query whether the instalment payment plan in *Prime Wheat* would have engaged s 109CA, as the payments there fell due in return for the acquisition of shares which passed on completion subject to a mortgage to the vendor. Although there must be doubt whether the words “for use” in s 109CA extend to choses in action, if they do, it is difficult to see how s 109CA could not apply. That would raise a further difficult question as to whether s 109C(3A), which provides that “a loan to an entity is not a payment” includes an amount taken to be a “payment” by s 109CA.
47. Section 109N of Sub-div. D also suggests that *Bendel's Case* is correctly decided. It is to be recalled that s 109D(1)(c) provides that s 109D(1) operates if, amongst other things, sub-div. D “does not prevent the private company from being taken to pay a dividend because of the land ...”.
48. Section 109N(1) provides:

“A private company that makes a loan to an entity in one of the private company's years of income is not taken under section 109D to pay a dividend at the end of the year of income because of the loan if, before the lodgment day for the year of income:

- (a) the agreement that the loan was made under is in writing; and
 - (b) the rate of interest payable on the loan for years of income after the year in which the loan is made equals or exceeds the benchmark interest rate for the year; and
 - (c) the term of the loan does not exceed the term (the maximum term) for that kind of loan worked out under subsection (3).”
49. Section 109N requires that the related parties to which s 109D(1) would otherwise have application enter into an “agreement” concerning a “loan” the subject of s 109D(1). Presumably, that agreement requires a legally binding contract and not merely an unenforceable understanding or arrangement. If the Commissioner were correct in his construction of the word “loan” in s 109D(3), it would encompass circumstances in which no monies were advanced at all; for example, a financial accommodation enabling one party the benefit of the use of funds from another relevantly related party with no obligation to repay that party. In that circumstance, it would not be possible for the related parties to enter into a binding contract in respect of a “loan” as contemplated by the terms of s 109N, as there would be no subject matter (in fact or reality) for the contract. Although it might be possible for the parties to bring that subject matter into existence (for example, by a deed of acknowledgement, novation or assignment), doing so would thereby create an actual loan within the ordinary meaning of that word, encompassing a requirement for its repayment. That would obviate any requirement for the extended definition in s 109D(3).

50. Those issues do not arise on the Full Court's construction of s 109D(3), which requires an actual obligation for repayment to engage its operation.

7. Issues in the practical application of s 109N

51. *Bendel's Case* also highlights two key practical issues in the application of s 109N. First, it is often forgotten a loan agreement cannot arise merely by an agreement to make relevant book entries between the parties: *Manzi v Smith* (1975) 132 CLR 671. For example, in the context of dividend, in *Re Associated Electronic Services Pty Ltd (in voluntary liq)*, the directors and shareholders of a company agreed upon the declaration of a dividend. They told the accountant that they "desired that their dividends be not paid to them in cash but be loaned by them to the company, and requested the accountant to make the necessary entries in the company's books of account". The dividend was then debited but never paid in cash. Gibbs J (as he was then) said :

"The mere act of making the entries in the company's books, to debit the amount of the dividend to the profit and loss appropriation account and credit that amount to the appellant's loan account, did not increase the appellant's assets or diminish his liabilities. The appellant received nothing that was equivalent to payment ..."

The true result of what occurred therefore is that the parties did not agree that the dividend be paid in some mode other than cash – they agreed that it be not paid until requested. – and the company's liability to pay the dividend was not discharged by payment, accord and satisfaction or otherwise."

52. However, those difficulties may be overcome if an agreement duly requires that an amount that is in fact owing is to be lent and then to be repaid in accordance with the terms of an agreement: *Brookton Co-operative Society Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 441.
53. Secondly, in that event, as is noted above, the agreement would then comprise be a loan in reality, which would obviate the application of the extended definition of a "loan" in s 109D(3) in the first place. That highlights difficulties for taxpayers in positions the same or similar to those in *Bendel's Case* pending the Commissioner's special leave application to the High Court. They must choose expressly to bring themselves within the operation of Div. 7A by or run the risk of losing franking credits on deemed dividends (and indeed, double tax, on the Commissioner's view), if the High Court were ultimately to overturn the Full Court.
54. In the author's view, that outcome renders it inappropriate for the Commissioner to apply the law pending any special leave outcome on any basis otherwise than that found by the Full Court. The executive government is bound by the Court's order unless or until the High Court determines otherwise, or the legislation is changed. At the very least, the Commissioner ought to apply the law subject to special arrangements for taxpayers in such a position.
55. Finally, even in the case of an ordinary loan (absent the extended definition), if related parties wish to agree to terms of interest and repayment at a time after monies were advanced (as is contemplated by s 109N which contemplates an agreement to be entered into before the due date of the lodgement of the tax return in respect of monies lent before the end of the prior year of income), care should be taken that it is enforceable, as past consideration is no consideration: *Roscorla v Thomas* (1842) 3 QB 234, 114 E 496; *Hopkinson v Logan* (1839) 5 M&W 241, 151 ER 103. If there is any doubt, the agreement should be by deed.

8. Reform – back to the future?

56. *Bendel's Case* highlights just one of the many complexities arising under Div. 7A. In the author's view, if the true mischief with which Parliament is concerned is to prevent shareholders (and their associates) from having taking benefit of monies representing profits of a private company not brought to tax in their hands, the focus of the anti-avoidance legislation should upon the simplest means to bring those profits to taxation. That will not occur, as Div. 7A demonstrates, by legislation focusing upon mechanisms that might be engaged to obtain those benefit arises, as those mechanisms arise economically as well as legally. To do so will always result in highly complex legislation seeking to deal with problems of form and substance and addressing in wide language multiple permutations of possible conduct seeking to obtain economic outcomes that otherwise fall outside the terms of the legislation. Rather, the legislation should focus upon the mischief that is being avoided, namely that the tax rate of the company is less than that of the person obtaining the benefit of it.
57. In the author's view, a better solution would therefore be to impose an undistributed profits tax upon private companies who have not distributed by way of dividend to the economic benefit of a taxpayer on marginal rates, such of the taxed income of the company within such time as is considered appropriate.
58. An even simpler solution would be to remove the arbitrage by aligning the corporate taxation rate for private companies with the top marginal rate.
59. But as both those solutions would comprise tax reform, a process which this country seems incapable of undertaking, it is more likely that taxpayers, their advisors and the revenue will continue to grapple with the complexities of Div. 7A.