

Commissioner of Taxation v Bendel - [2025] FCAFC 15

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FEDERAL COURT OF AUSTRALIA

Commissioner of Taxation v Bendel [2025] FCAFC 15

Appeal from: [Bendel & Anor v Commissioner of Taxation](#) [2023] AATA 3074

File number(s): VID 903 of 2023

Judgment of: LOGAN, HESPE AND NESKOVICIN JJ

Date of judgment: 19 February 2025

Catchwords: TAXATION – appeal by Commissioner from a decision of the Administrative Appeals Tribunal – where corporate beneficiary had a present entitlement which was unpaid – whether present entitlement remaining unpaid was a loan for the purposes of s 109D of the [Income Tax Assessment Act 1936 \(Cth\)](#) – whether Tribunal failed to carry out its task

Legislation: [Administrative Appeals Tribunal Act 1975 \(Cth\)](#) s 44, [Income Tax Assessment Act 1936 \(Cth\)](#) Divs 6, 7A, Subdiv EA, ss 44, 109B, 109C, 109D, 109E, 109F, 109G, 109RB, 109XA, 109XB, 109Z

Cases cited:

Bendel & Anor v Commissioner of Taxation [2023]
AATA 3074

Certain Lloyd's Underwriters Subscribing to Contract No IHooAAQS v Cross [2012] HCA 56; 248 CLR 378

Chianti Pty Ltd v Leume Pty Ltd [2007] WASCA 270; 35
WAR 488

Commissioner of Taxation v Radilo Enterprises Pty Ltd (1
997) 72 FCR 300

*Cooper Brookes (Wollongong) Pty Ltd v Commissioner of
Taxation* [1981] HCA 26; 147 CLR 297

Corporate Initiatives Pty Ltd v Commissioner of Taxation
[2005] FCAC 62; 142 FCR 279

*Di Lorenzo Ceramics Pty Ltd v Federal Commissioner of
Taxation* [2017] FCA 1006; 161 FCR 198

Federal Commissioner of Taxation v Carter [2022] HCA
10; 274 CLR 304

*Federal Commissioner of Taxation v Consolidated Media
Holdings Ltd* [2012] HCA 55; 250 CLR 503

Fischer v Nemeske Pty Ltd [2016] HCA 11; 257 CLR 615

*International Litigation Partners Pte Ltd v Chameleon
Mining NL (Receivers and Managers Appointed)* [2012]
HCA 45; 246 CLR 455

*Peter Greensill Family Co Pty Ltd (trustee) v
Commissioner of Taxation* [2020] FCA 559

*Prime Wheat Association Ltd v Chief Commissioner of
Stamp Duties* (1997) 42 NSWLR 505

*Re Montgomery Wools Pty Ltd (As Trustee for
Montgomery Wools Pty Ltd Super Fund) v Federal
Commissioner of Taxation* [2012] AATA 61; 87 ATR 282

SZTAL v Minister for Immigration and Border Protection
[2017] HCA 34; 262 CLR 362

Division: General Division

Registry: Victoria

National Practice Area: Taxation

Number of paragraphs: 97

Date of hearing: 22–23 August 2024

Counsel for the Applicant: Mr G Davies KC and Mr J Phillips

Solicitor for the Applicant: Australian Taxation Office (in-house)

Counsel for the Respondents: Mr A De Wijn SC and Mr P Jeffreys

Solicitor for the Respondents: Arnold Bloch Leibler

ORDERS

VID 903 of 2023

BETWEEN: COMMISSIONER OF TAXATION
Applicant

AND: STEVEN BENDEL
First Respondent

GLEEWIN INVESTMENTS PTY LTD (ACN 131 785 576)
Second Respondent

LOGAN, HESPE AND NESKOVCIN JJ

ORDER MADE BY:

19 FEBRUARY 2025

DATE OF ORDER:

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. There be no order as to costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

BACKGROUND

1. The **Commissioner** of Taxation appeals from a decision of the Administrative Appeals **Tribunal** under s 44 of the *Administrative Appeals Tribunal Act 1975 (Cth) : Bendel & Anor v Commissioner of Taxation* [2023] AATA 3074 (28 September 2023) (**TR**). The “appeal” is in the original jurisdiction of the Court and is limited to a question of a law concerning the proper construction of Div 7A of the *Income Tax Assessment Act 1936 (Cth) (1936 Act)*.
2. The issue on appeal concerns the construction of s 109D(3), which contains a definition of “loan” for the purpose of Div 7A. The Tribunal (at TR [49]–[51] and [77]–[78]) found that a trustee had passed resolutions resulting in a corporate beneficiary becoming presently entitled to part of the income of the trust, but the trustee had not paid that entitlement to that beneficiary. Although the Tribunal did not complete its statutory task because it did not engage with the text of s 109D(3) of the 1936 Act, we do not accept the Commissioner’s construction. A “loan” for the purpose of s 109D(3) requires a transaction which creates an obligation to repay an amount or which in substance effects an obligation to repay. The creation of an obligation to pay an amount is not sufficient.

3. The appeal should be dismissed for the reasons set out below..

FACTUAL CONTEXT

4. **Gleewin Pty Ltd** is the trustee of the Steven Bendel 2005 Discretionary Trusts (**2005 Trust**). **Gleewin Investments Pty Ltd** and Mr Bendel are discretionary beneficiaries of the 2005 Trust. Mr Bendel, at all relevant times, was the sole director, secretary and beneficial owner of shares in both Gleewin and Gleewin Investments. As such, Mr Bendel was the controller of both Gleewin and Gleewin Investments (TR [26]).
5. The relevant terms of the trust deed for the 2005 Trust are set out at TR [48]. Relevantly:
- (a) At any time prior to the expiration of an Accounting Period, Gleewin could determine “to pay apply or set aside” all or any part of the net income of the trust for any one or more “General Beneficiaries” (clause 3(1)(a)).
 - (b) A determination to apply or set aside an amount for the benefit of a beneficiary was irrevocable and could be “effectually made and satisfied” by a resolution of the trustee that a sum or portion of the net income of the trust be “allocated to that beneficiary or otherwise dealt with for the benefit of that beneficiary or by placing such amount to the credit of such beneficiary in the books of account of the Trust” (clause 3(2)(c)).
 - (c) An amount set aside for a beneficiary ceased to form part of the trust fund of the 2005 Trust and was to be “held by the Trustee on a separate trust” for that beneficiary absolutely with the trustee having power to invest or apply or deal with that fund “pending payment over” to the beneficiary (clause 3(5)).
6. In each of the years ended 30 June 2013 to 30 June 2017, the director of Gleewin as trustee of the 2005 Trust passed a resolution resulting in beneficiaries of the 2005 Trust becoming presently entitled to the income of the 2005 Trust. In the years of income ended 30 June 2014 to 30 June 2017, the resolution was in the following form (**trustee resolutions**):

Distribution of Income: RESOLVED THAT, in exercise of the power of the Trust Deed and every other power enabling in that behalf, the following classes or categories of income of the Trust for the year ending 30 June 201X are hereby set aside for the benefit of the following beneficiaries, and in the following amounts and/or proportions, as set out in the table below:

(The form of resolution for the year ended 30 June 2013 does not appear to have been before the Tribunal.)

7. A summary of the income distributions by Gleewin to Gleewin Investments in the years ended 30 June 2013 to 30 June 2016 appears in table form at TR [28]. (Gleewin Investments’ entitlements to the 2005 Trust income for the years ended 30 June 2013 to 30 June 2016 were the source of the disputed deemed Div 7A dividends in the present case, as explained further below at [12].)
8. **The financial statements for the 2005 Trust disclosed the following in the balance sheet:**

- (1) “Beneficiaries [sic] Current Account Steven Bendel” as an asset of the 2005 Trust. This was the balance of amounts owed by Mr Bendel to the 2005 Trust as at the end of each income year. The balance at the end of the year reflected amounts paid on behalf of Mr Bendel (which increased the asset amount) less amounts of income of the 2005 Trust distributed to Mr Bendel (TR [37]–[38], [39(d)], [42], [43]).
 - (2) “Beneficiaries [sic] Current Account Gleewin Investments Pty Ltd”, which appeared as a standalone account and the balance of which was included in the Total Liabilities disclosed in the 2005 Trust balance sheet (TR [40]).
9. Gleewin Investments’ financial statements disclosed, as a current asset in the balance sheet, the cumulative total amount of its unpaid entitlements from the 2005 Trust.
 10. It was not disputed that in the income years ended 30 June 2013 to 30 June 2017, Gleewin Investments was made presently entitled to a share of the net income of the 2005 Trust. In the income years ended 30 June 2014 to 30 June 2017, Mr Bendel was also made presently entitled to a share of the net income of the 2005 Trust. Mr Bendel’s entitlements to 2005 Trust income appear in table form at TR [37].
 11. The Tribunal found, and it was accepted on appeal, that Gleewin did not recognise any separation of assets in its accounts, or anywhere else, reflecting or commensurate with the amounts of net income which Gleewin had resolved to set aside for the beneficiaries (TR [41]).
 12. Mr Bendel (for the years of income ended 30 June 2015 and 30 June 2017) and Gleewin Investments (for the years of income ended 30 June 2014 to 30 June 2017) have been issued with amended assessments on the basis that:
 - (a) Gleewin Investments had unpaid present entitlements to prior year trust income and these prior year unpaid present entitlements comprised loans within the meaning of s 109D(3) made by Gleewin Investments in the current year to Gleewin;
 - (b) those loans were taken to be dividends paid by Gleewin Investments to Gleewin by virtue of s 109D(1) of the 1936 Act in the year of income following the year for which the present entitlement was created (see table at TR [28]);
 - (c) those dividends were taken to be paid out of Gleewin Investments’ profits by operation of s 109Z of the 1936 Act to the extent to which Gleewin Investments had a distributable surplus;
 - (d) the dividends taken to be paid by Gleewin Investments out of profits were assessable income by operation of s 44(1) of the 1936 Act and included in Gleewin’s net income, as that term is defined in s 95 of the 1936 Act, in the year of income in which the dividend was taken to be paid; and
 - (e) the beneficiaries who were entitled to Gleewin’s income for the current income year were liable to be assessed under s 97 of the 1936 Act on a proportion of each such dividend, determined by reference to their proportionate shares of Gleewin’s income for the year in which the dividend was taken to be paid.

13. The Tribunal found that included in the calculation of the deemed dividend for each of the 2015 and 2016 years was an amount that did not have its origin in an unpaid present entitlement (being the amount of \$41,252 in the 2015 year and the amount of \$9,431 in the 2016 year). Those amounts were sourced in tax refunds due to Gleewin Investments which were directed to be paid into the bank account of Gleewin.

STATUTORY FRAMEWORK

Division 6 of the 1936 Act

14. The net income of a trust is taxed in accordance with Div 6 of the 1936 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 sub-section, 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”.

15. If there is an amount of net income of the trust to which no beneficiary is presently entitled, that amount of net income is taxed in the hands of the trustee at the highest marginal tax rate.
16. It not being disputed that in the income years ended 30 June 2013 to 30 June 2017, Gleewin Investments was presently entitled to a share of the net income of the 2005 Trust, it necessarily followed that it was common ground that Gleewin Investments had a vested interest in and present legal right to demand and receive payment of that share. It was also common ground that Gleewin Investments had not called for payment of that share and that the trustee had not performed its duty to set aside an amount equal to that share and hold it on a separate trust absolutely for Gleewin Investments. It was in this sense that Gleewin Investments was said to have “an unpaid present entitlement” (UPE).

Division 7A of the 1936 Act

17. 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.
18. Division 7A “expands the operation of s 44(1) of the Act” (*Di Lorenzo Ceramics Pty Ltd v Federal Commissioner of Taxation* [2017] FCA 1006; 161 FCR 198 at [3] (Lindgren J)) by treating certain transactions between a private company and its shareholder or associate of its shareholder as a payment of a dividend by the company to the shareholder or associate, to the extent to which the company has a distributable surplus. The kinds of transactions treated as the payment of dividends are identified in s 109B of the 1936 Act as:
 - (a) the payment of amounts (which is defined in s 109C(3) to include a transfer of property) by the company to a shareholder or shareholder’s associate (s 109C);
 - (b) the loan of amounts by the company to a shareholder or shareholder’s associate (ss 109D and 109E); and
 - (c) the forgiveness by the company of an amount of a debt owed by a shareholder or shareholder’s associate to the company (s 109F).

19. In so far as loans are concerned, s 109D relevantly provides:

109D Loans treated as dividends

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 lodgment 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.

Note 1: Some repayments cannot be counted for the purpose of this subsection. See section 109R.

Note 2: A private company is treated as making a loan to a shareholder or shareholder's associate if an interposed entity makes a loan to the shareholder or associate. See Subdivision E.

Amount of dividend

(1AA) The amount of the dividend taken under subsection (1) to have been paid is the amount of the loan that has not been repaid before the lodgment day for the current year, subject to section 109Y.

Note: Section 109Y limits the total amount of dividends taken to have been paid by a private company under this Division to the company's distributable surplus.

...

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.

...

When is the lodgment day?

- (6) In this Division, the **lodgment day** for a private company's year of income is the earlier of:
- (a) the due date for lodgment of the private company's return of income for the year of income; and
 - (b) the date of lodgment of the private company's return of income for the year of income.

Note: For the lodgment day for a private company that is a nonresident, see section 109BC.

20. 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).
21. 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.)

22. 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 lodgment and the date of lodgment 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 lodgment and the date of lodgment 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.

23. The operative provision in Subdiv EA is s 109XB . It is in the following terms:

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.

DECISION OF THE TRIBUNAL

24. The Tribunal's reasons are to be understood in the context of a factual finding. The Tribunal found that Gleewin had not in fact set aside the amounts of net income in a separate trust as it had resolved to do. The trustee was found to have had an undischarged obligation to pay to Gleewin Investments its share of trust income: TR [77]–[80].
25. The Tribunal observed (at TR [82]) that the definition of loan in s 109D(3) “uses very wide language” and that similar language used in other statutory settings had been given “a generous and wide construction”, referring to *Re Montgomery Wools Pty Ltd (As Trustee for Montgomery Wools Pty Ltd Super Fund) v Federal Commissioner of Taxation* [2012] AATA 61; 87 ATR 282; *Commissioner of Taxation v Radilo Enterprises Pty Ltd* (1997) 72 FCR 300; *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* [2012] HCA 45; 246 CLR 455. The Tribunal concluded that “[w]ithout more, a similar approach and construction could be expected in relation to s 109(3) [sic]”.
26. The Tribunal observed that the statutory settings where a similar definition had been given a “wide or ambulatory construction do not have an equivalent to former s 109UB and the current Subdivision EA”. The Tribunal considered that “those settings do not have a focus to tax the recipient of in-substance distributions of company profits in the hands of the recipient of those in-substance distributions” (TR [83]).
27. The Tribunal considered that Subdiv EA was concerned to tax the shareholder recipient of funds loaned by a trustee in circumstances where the company has a UPE 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” (TR [84(b)]).
28. In relation to the purposes of Div 7A, the Tribunal considered (at TR [86]) that:
- 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.
29. This conclusion as to purpose was considered by the Tribunal to be supported by the legislative history of Div 7A and Subdiv EA as well as extrinsic material which the Tribunal summarised at TR [87]–[94] and set out in full in Annexure A to the Tribunal's reasons.
30. The Tribunal considered (at TR [96]) that (emphasis added):

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.

31. The Tribunal considered at TR [98] the Commissioner's proposition that there is 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". 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 UPE". 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".
32. Subdivision EA was considered by the Tribunal (at TR [100]) to be the "lead provision" where the terms of that subdivision are satisfied because it was the more specific provision.
33. The Tribunal concluded at TR [101] 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.
34. The Tribunal concluded (at TR [108]) that if it were wrong on the application of s 109D(3), s 6-25 of the *Income Tax Assessment Act 1997* (Cth) (**1997 Act**) did not apply because:

The amount taken to be a dividend paid by Gleewin Investments to Gleewin was not the same as the amount determined to be assessable income by operation of ss 95 and 97 for Gleewin Investments. The threshold condition for s 6-25 to apply does not arise in the present circumstances.
35. The Tribunal concluded that in respect of the amounts of \$42,252 and \$9,431 there were loans from Gleewin Investments to Gleewin. These amounts were outside of the UPE context. The Tribunal considered there was no basis for the exercise of the discretion in s 109RB in respect of these amounts and no basis for remitting the penalty in respect of the non-inclusion of these amounts in the net income of the trust and therefore in the income of Gleewin Investments and Mr Bendel in proportion to their respective present entitlement share. There is no appeal in respect of these conclusions in relation to these two amounts.
36. The objection decisions were remitted back to the Commissioner.

APPLICANT'S SUBMISSIONS

37. The Commissioner submits that the Tribunal made three fundamental errors in its construction of Div 7A:
- (a) the Tribunal failed to address the correct statutory question;
 - (b) the Tribunal failed to give effect to the ordinary and plain meaning of s 109D(3); and
 - (c) the Tribunal failed to give effect to the legislative purpose of Div 7A.
38. In relation to the first error, the Tribunal commenced by asking the following question (TR [1]):
- The critical question for determination is whether an unpaid present entitlement to income (or capital) of a trust estate is a loan.
39. The Commissioner submits that that question was not one posed by the terms of s 109D(3); the question posed by the statute is whether on the facts as found, there is a loan as defined in s 109D(3). The Commissioner contended that as the term “unpaid present entitlement” does not appear in s 109D(3), by posing the question in the manner that it did, the Tribunal constructed a false dichotomy and misdirected itself as to its task.
40. The Commissioner submits that in undertaking the task of construing s 109D(3), one commences with the text of the provision. By s 109D(3)(b), a loan is taken to include a “provision of credit or any other form of financial accommodation”. That phrase is of wide import and is capable of encompassing the allowance by a corporate beneficiary of time for a trustee to pay an amount due to the beneficiary or the refraining by a beneficiary from demanding immediate payment of an amount due to that beneficiary.
41. The Commissioner submits that the term “financial accommodation” has been held by judicial authority to be capable of encompassing arrangements such as a bill of exchange; the provision of a guarantee of the obligations to the creditor by the principal debtor; the extension of an overdraft facility; an instalment sale; a loan (within the ordinary meaning of that term); and the provision, under a bill acceptance facility, of an indemnity against a liability, on maturity bills: *International Litigation Partners* at [28] (French CJ, Gummow, Crennan and Bell JJ) and [44] (Heydon J); *Prime Wheat Association Ltd v Chief Commissioner of Stamp Duties* (1997) 42 NSWLR 505 at 511E, 512B (Gleeson CJ), 515D (Handley JA) and 518B (Sheppard AJA); *Radilo* at 312E –F (Sackville and Lehane JJ).
42. The Commissioner contends that applying the plain and ordinary meaning of the statutory language, in relation to each of the sums of \$236,251, \$149,513, \$840,529 and \$433,188 that the trustee resolved to set aside for the benefit of Gleewin Investments (**Entitlement Sums**), there was “a provision of credit or any other form of financial accommodation” by the corporate beneficiary, Gleewin Investments, to the trustee, Gleewin and / or “a transaction (whatever its terms or form) which in substance effects a loan of money” by Gleewin Investments to Gleewin and accordingly a “loan” within the meaning of s 109D(3). The Commissioner contends this conclusion followed from the following facts:

- (a) The trustee resolutions provided for amounts of net income to be set aside for Gleewin Investments. This resulted in Gleewin Investments having a vested and indefeasible interest in that amount of net income and a right held by Gleewin Investments to call for payment of those amounts.
- (b) Gleewin retained the Entitlement Sums for continued use as part of the trust funds of the 2005 Trust and did not pay the amounts to, or hold them on a separate trust for, Gleewin Investments, with the knowledge and approval of Gleewin Investments (through Mr Bendel as the controlling mind).
- (c) Each of Gleewin Investments and Gleewin recognised and accepted that the Entitlement Sums were owed by Gleewin to Gleewin Investments by the manner in which each prepared its respective financial statements.
43. The Commissioner submits that in combination, these facts resulted in the creation of a debtor-creditor relationship between the trustee and Gleewin Investments, which involved the provision of financial accommodation by Gleewin Investments to Gleewin as trustee.
44. The Commissioner also relies upon s 109D(3)(d) which includes as a loan “a transaction (whatever its terms or form) which in substance effects a loan of money”. Gleewin retained each of the Entitlement Sums with the agreement and / or acquiescence of Gleewin Investments for use for the purposes of the 2005 Trust in circumstances where Gleewin had resolved to set aside those amounts for the benefit of Gleewin Investments and where each of Gleewin and Gleewin Investments accepted that the Entitlement Sums were owed by Gleewin to Gleewin Investments. This was said to result in Gleewin Investments providing Gleewin with the temporary use of amounts of money belonging to Gleewin Investments and therefore in substance effecting a loan of money by Gleewin Investments to Gleewin. The retention of the Entitlement Sums in these circumstances is said by the Commissioner to have had the same practical effect as a loan.
45. In relation to the second error, the Commissioner contends that the Tribunal 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. The Commissioner contends that the Tribunal had not understood that Subdiv EA has a different sphere of operation from s 109D. The two sets of statutory provisions are concerned with transactions between different entities. Subdivision EA is concerned with payments, loans and debt forgiveness made by a trustee. It has no application to loans made by a private company. In contrast, s 109D concerns loans made by a private company. It has no operation in relation to loans made by a trustee. The Tribunal was said to have failed to give effect to the statutory text of s 109D(3) in concluding that only “loans that did not have their origins in entitlements to trust income” could enliven s 109D (TR [31], [33] and [113]).
46. In relation to the third error, the Commissioner contends that the legislative purpose of Div 7A, of which s 109D forms a part, is to ensure that private companies would not be able to make tax-free distributions of profits to shareholders (and their associates) in the form of payments and loans. By enabling the trustee (as an associate of the shareholder, Mr Bendel) to retain the benefit of amounts forming part of the profits of Gleewin Investments, the trustee was able to

access the profits of Gleewin Investments. The Commissioner contends that in those circumstances, the decision of the Tribunal that s 109D(3) did not apply was contrary to the legislative purpose of s 109D.

RESPONDENTS' SUBMISSIONS

47. The respondents submit that the Tribunal's construction of s 109D was correct.
48. The respondents contend that the words of s 109D require some positive act by the private company (here, Gleewin Investments) for the provision to operate. The respondents submit that s 109D(1)(a) is only satisfied if "the private company *makes* a loan". The inclusive definition of "loan" in s 109D(3) requires "*an advance*", "*a provision*", "*a payment*" or "*a transaction*" (emphasis in original). Each of those five italicised words is said to require a positive act. They submit that that requirement is confirmed by subsection (4), which provides that the time of the loan is when "the amount of the loan is paid" or "*anything* in subsection (3) is *done*" (emphasis in original). That shows that to fall within s 109D(3) the private company must *do a thing*, and the operation of s 109D depends on being able to identify the time that thing was done. Simply not calling for payment and leaving the UPEs outstanding, even with full knowledge of the entitlement and even if that amounted to acquiescence, is said to not amount to a positive act as required by s 109D(3)(a)–(c).
49. The respondents further contend that s 109D(3)(d) did not apply. There was no transaction which in substance effected a loan of money because there was an entitlement to be paid but not repaid: *Prime Wheat* at 512G (Gleeson CJ).
50. The respondents contend that the "clear intention and operation of Subdivision EA is to only deem a dividend where there is both a UPE to a company *and* a loan made by the trustee to a shareholder of the company (or associate)" (emphasis in original). To construe s 109D as having the consequence of deeming a dividend to be paid to the trust would undermine the clear intention of s 109XB and would have the potential consequence of taxing two people in respect of the same underlying circumstance, namely the same UPE. These contentions were said to be supported by the history of Subdiv EA.
51. By their notice of contention, the respondents submitted that if the Commissioner's construction of s 109D was correct, s 6-25 of the 1997 Act should apply because on the Commissioner's construction of s 109D(3) of the 1936 Act, Gleewin Investments would be taken to pay a dividend to Gleewin in each of the 2014 to 2017 income years and those dividends would be included in Gleewin's assessable income by operation of s 44(1) of the 1936 Act. The amount of each such deemed dividend was part of Gleewin's net income for the previous year (to which Gleewin Investments has been made presently entitled). In this way, it is contended, the amount that the Commissioner seeks to include in Gleewin's assessable income for each of the 2014 to 2017 income years via s 109D is part of Gleewin's net income for the previous year. The Tribunal had misunderstood the respondents' contentions concerning s 6-25.
52. At the commencement of the hearing the respondents withdrew their notice of objection to competency.

CONSIDERATION

Construction of s 109D(3) of the 1936 Act

53. The essential issue on appeal concerns the construction of s 109D(3). As explained below, s 109D(3) cannot be construed in isolation and, in particular, not in isolation from the use of the term loan, as defined in s 109D(3) in s 109D(1)(a) or from s 109D(1)(b).
54. The principles of statutory construction are well established. They are encapsulated in summary form in *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362 at [14] (Kiefel CJ, Nettle and Gordon JJ) as follows (footnotes omitted):

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.

55. The task of statutory construction is to ascertain the meaning of a statutory provision by reference to its text, context and purpose. In the present case, it is the meaning of “a provision of credit or any other form of financial accommodation” (s 109D(3)(b)) and “a transaction (whatever its terms or form) which in substance effects a loan of money” (s 109D(3)(d)) that is required to be ascertained.
56. The Tribunal considered the text of the statute only in general terms. The Tribunal regarded (at TR [82]) the “language” used in s 109D(3) as “very wide” and considered that “similar language has been used in other statutory settings” and that “those settings give a generous and wide construction to that term” but did not identify precisely to which part of the definition in s 109D(3) it was referring.
57. The Tribunal cited three authorities which it considered concerned other statutory settings that gave such a generous and wide construction: *Montgomery Wools*; *Radilo*; and *International Litigation Partners*.
58. The first is not a judicial authority but a decision of the Tribunal concerning s 10 of the *Superannuation Industry (Supervision) Act 1993 (Cth)* which provided that a “loan includes the provision of credit or any other form of financial accommodation, whether or not enforceable, or intended to be enforceable, by legal proceedings”.
59. *Radilo* is a decision of the Full Court of this Court that concerned the former s 46D of the 1936 Act and in particular whether a dividend paid on certain performance shares was equivalent to the payment of interest on a loan. “Loan” was defined to include the provision of credit or any other form of financial accommodation. The extended definition of “loan” in this context was construed in light of the concept of interest. Cardinal to the concept of interest is that interest is referable to a principal in money or an obligation to pay money. Section 46D(2)(c) was found to direct attention to the relationship between the company and the shareholder pursuant to which the dividend is paid to determine whether there was a consensual arrangement between them. In respect of the term “provision of credit or any other form of

financial accommodation” in this context, the Court at 312E (Sackville and Lehane JJ) concluded that:

Under a consensual arrangement for the provision of credit or financial accommodation a principal sum, or its substantial equivalent (by way of indemnity against a liability on maturing bills for example, in the case of accommodation provided in the form of a bill acceptance facility), will ultimately be payable.

60. The meaning of the term “provision of credit or any other form of financial accommodation” in *Radilo* was discerned from the statutory context which involved the concept of interest on a loan. Notwithstanding that the term “loan” was given an extended meaning, the Court nonetheless concluded that a dividend would not be equivalent to the payment of interest on a loan absent an obligation by the company to repay. A loan involves an obligation to repay the sum borrowed: *Radilo* at 313 (Sackville and Lehane JJ). The essence of a loan is thus a payment of money to or for someone on the condition that it will be repaid: C L Pannam, *The Law of Money Lenders in Australia and New Zealand* (Law Book Company, 1965) p 6, cited with approval in *Radilo* at 313 (Sackville and Lehane JJ).
61. The decision in *International Litigation Partners* concerned the construction of provisions in Ch 7 in the *Corporations Act 2001 (Cth)* and regulations made thereunder. Section 911A(1) imposed a licensing requirement upon “a person who carries on a financial services business in this jurisdiction”. The expression “financial services business” was defined to mean “a business of providing financial services” (s 761A). The term “financial service” included dealing in a “financial product” (s 766A(1)(b)). “Financial product” excluded a credit facility within the meaning of the regulations (other than a margin lending facility). A credit facility included the provision of credit. The term “credit” was defined in reg 7.1.06(3)(a) of the *Corporations Regulations 2001 (Cth)* as meaning a contract, arrangement or understanding under which payment of a debt to the credit provider “is deferred”, and as including “any form of financial accommodation” (reg 7.1.06(3)(b)(i)).
62. In that regulatory context, the High Court held at [28] (French CJ, Gummow, Crennan and Bell JJ):

The expression “a contract, arrangement or understanding ... [for] any form of financial accommodation” (emphasis added) is of considerable width of denotation. For example, an agreement by a bank to lend its name to a bill of exchange for the accommodation of its customer provides a form of financial accommodation, as is reflected in the expression “accommodation bill”. The same may be said for the provision of a guarantee of the obligations to the creditor of the principal debtor. The extension by a bank to a customer of an overdraft facility provides a form of financial accommodation in respect of the presently undrawn portion of the overdraft. Further, the inclusion of the words “arrangement or understanding” indicates that regard may be had to matters of substance as well as of form.

63. Each of the authorities cited by the Tribunal concerned the phrases “provision of credit” and “any other form of financial accommodation”. Each adopted a construction that reflected the particular statutory context within which the terms appeared.

64. To the above authorities, reference should also be made to the decision of the New South Wales Court of Appeal in *Prime Wheat*, which considered a definition of “loan” in the *Stamp Duties Act 1920* (NSW). That definition included:
- (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.
65. The issue arose in the context of a share sale agreement which required the vendor “to provide financial accommodation” to the purchasers by allowing the purchasers to pay the purchase price in instalments even though title to the shares was to pass on completion. The payment obligation of the purchasers was secured by a mortgage of the shares. The issue was whether the agreement was a “debenture” evidencing or acknowledging a debt in respect of money that had been lent. There was no doubt that the transaction was one under which the vendor provided “financial accommodation”. However, it was held that the financial accommodation was not by way of loan.
66. The Court of Appeal recognised that not all forms of financial accommodation are loans. In that case, although “advance” included financial accommodation, there was no financial accommodation that involved “an advance of money”. That was because:
- ...what was involved was a granting of time to pay. Ultimately, there was a debt, but no loan.
67. The Court of Appeal observed in *Prime Wheat* that the inclusion of “any transaction which in substance effects a loan” is not to be construed as rendering everything else in the definition superfluous. Read in context, the phrase does not entitle a court to disregard the legal nature and effect of the transaction. The essence of a loan is an obligation of repayment. In *Prime Wheat*, what was involved on the part of the purchasers was an obligation to pay, not an obligation to repay.
68. Thus, notwithstanding that the phrase “financial accommodation” is capable of bearing a broad meaning, as a matter of statutory construction, its scope will depend on the statutory context. In *Prime Wheat*, the statutory context included a series of definitions involving the concepts of “advances of money”, “loan” and “provision of funds” and unlike the present case, also included a forbearance to require payment of money owing. In *Radilo*, the context included the concept of “interest on a loan”. The phrase “in substance effects a loan” is not to

be construed as rendering all other parts of the definition otiose and similarly takes its meaning from the context in which it appears: *Prime Wheat* at 512 (Gleeson CJ); 517 (Handley JA).

69. Here, the phrase “a provision of credit or any other form of financial accommodation” appears in s 109D(3) as part of a definition which includes “an advance of money” and “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” (emphasis added).
70. Each of s 109D(3)(a), (c) and (d) encapsulate a concept of repayment. As the Court of Appeal observed in *Prime Wheat* at 512 (Gleeson CJ), an advance of money involves the making of a loan, where the concept of a loan involves the provision of a principal sum attendant with an obligation to repay. Thus, embedded in s 109D(3)(a) is an obligation to repay. By its terms, s 109D(3)(c) is engaged only if there is an express or implied obligation to repay. Section 109D(3)(d) refers to a transaction which in substance *effects a loan of money*. It should not be accorded a meaning that renders all other subparagraphs otiose: *Prime Wheat* at 512. A transaction effects a loan of money where it in substance effects an obligation to repay an identifiable sum: *Radilo* at 313 (Sackville and Lehane JJ); *Prime Wheat* at 512. It would be consistent with the context of s 109D(3) for s 109D(3)(b) to also be read as encapsulating a concept of repayment.
71. Before us the Commissioner referred to the decision of the Full Court in *Corporate Initiatives Pty Ltd v Commissioner of Taxation* [2005] FCAC 62; 142 FCR 279 which concerned Div 270 of Sch 2F to the 1936 Act. The issue was relevantly whether a trustee of one trust had “provided” a “benefit” to a trustee of another trust or one of its associates. The Court concluded that by not calling for payment of a present entitlement, a benefit had been conferred. In the course of its reasoning, the Full Court observed at [25] (Spender, Heerey and Lander JJ) that:
- it is difficult to see the practical difference between a formally recorded loan and what happened here. In effect Eldersmede was the recipient of a loan repayable on demand and, as stated above, could use the amount of the loan for trust purposes.
72. We draw no assistance from *Corporate Initiatives*. It was concerned with a statutory definition of “benefit” that was couched in entirely different terms from the language we need to construe.
73. Section 109D(3) is a definitional provision. The operative provision is s 109D(1). It deems a private company to have paid a dividend if, relevantly (emphasis added):
- (a) the private company makes a loan to the entity during the current year;
 - and
 - (b) the loan is *not fully repaid* before the lodgment date for the current year...
74. Whilst s 109D(3) provides an inclusive definition of the word “loan”, there is no section which expands the meaning of the word “repaid”. This further suggests that the reference to the making of a “loan” in s 109D(1)(a) involves the creation by the private company of an obligation to repay, where s 109D(1)(b) is satisfied if that obligation to repay remains

unfulfilled before the lodgment date. By reading “loan” as defined in each of s 109D(3)(a)–(d) as containing an obligation to repay, s 109D(1)(a) can be read harmoniously with the reference to “not fully repaid” in s 109D(1)(b).

75. Section 109D is part of Div 7A, which treats certain kinds of amounts as dividends paid by a private company. Section 109B, in giving a simplified outline of Div 7A, identifies three kinds of amounts as being treated as dividends paid by a private company:

- (a) amounts paid by the company to a shareholder or shareholder’s associate;
- (b) amounts lent by the company to a shareholder or shareholder’s associate;
- (c) amounts of debts owed by a shareholder or shareholder’s associate.

76. This context is not consistent with ascribing to the term “provision of credit or any other form of financial accommodation” in s 109D(3)(b) a meaning as broad as that attributed to that phrase in the *Corporations Act*. In a context in which the purpose of the definition is to identify transactions to be treated as the payment of a dividend, a provision of financial accommodation is not to be construed as extending to the provision of a guarantee that may in fact never be called upon and never result in a payment by the company under the guarantee to any person as a loan. (There is a specific provision in Div 7A dealing with payments made under guarantees: s 109UA.) The same might also be said of the establishment of a credit facility that is undrawn. As the High Court held in *International Litigation Partners*, each of those may constitute the provision of financial accommodation in a context where what is sought to be achieved is the regulation of activities in a corporate law context. The same meaning does not translate to the context of Div 7A.

77. Division 7A itself draws a distinction between a “debt” and a “loan”. Section 109F(1) deems a private company to have paid a dividend to an entity if all or part of a debt owed by the entity to the private company is forgiven in that year. The term used is “debt” not “loan”. Section 109G provides for circumstances in which a company is taken not to pay a dividend because a debt owed to the company is forgiven. One such circumstance is where there is a:

forgiveness of an amount of a debt resulting from a loan if, because of the loan, the private company is taken:

- (a) under section 109D to pay a dividend at the end of that year or an earlier one ...

78. It is apparent from the terms of s 109G that the concept of a “debt” is not to be equated with a loan and that the concept of a loan is narrower than that of a debt. It is only a type of debt – being a debt resulting from a loan – that may be eligible for exclusion. That Div 7A does not equate all forms of debtor-creditor relationships with “loans” further suggests that the term “provision of credit or any other form of financial accommodation” in s 109D(3)(b) is not to be construed as extending to any form of debtor-creditor relationship.

79. Having regard to its context, s 109D(3)(b) is to be construed as referring to a provision of credit or any other form of financial accommodation which involves an obligation to repay an identifiable principal sum, rather than simply an obligation to pay. 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). This 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.

80. This construction of s 109D(3)(b) is derived from the terms of the section, as read in context.
81. We do not consider that such a construction fails to give effect to the purpose of Div 7A. That division treats specified kinds of amounts as dividends. The amounts so treated are those which fall within the terms of the division. As the High Court stated in *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; 250 CLR 503 at [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ):

“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.

82. In ascertaining the meaning of the statutory text, it is necessary to accord a harmonious operation to the language of the division in its entirety. Part of Div 7A includes Subdiv EA. In the simplified outline of Div 7A, s 109B relevantly states:

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 Subdivision EA and EB.)

83. A consequence of the Commissioner’s construction of s 109D(3) is that where a private company has a present entitlement to a share of the income of a trust and it is to be inferred that the private company beneficiary consented to that present entitlement remaining unpaid after the date for lodgment of the income tax return of the trust, the private company may be taken to have paid a dividend to the trustee with the result that the amount of that UPE is included in the net income of the trust. If the trustee loans the amount of the UPE to a shareholder or associate of a shareholder, that same amount is taken to be a dividend paid by the private company to the shareholder or associate of the shareholder. Such consequences were regarded by the Tribunal as “problematic or inappropriate outcomes”. Absent some sort of tie breaker provision or express rule allowing “multiple deemed dividends arising out of the same UPE circumstance”, the Tribunal considered that the Commissioner’s submission could not be accepted. On the Tribunal’s reasoning, it followed that Subdiv EA is to be regarded as a code for the circumstances in which Div 7A should be taken to apply where a company is or becomes presently entitled to an amount from a trust estate that is not paid to the company.

84. The Commissioner contends that there is no anomaly once it is recognised that Subdiv EA is concerned with a transaction between the trustee and a shareholder or shareholder's associate whilst s 109D is concerned with a transaction between the private company and the trustee.
85. This Court has cautioned against using an anomaly as a reason for rejecting what otherwise is the correct construction on all other tests of construction: *Peter Greensill Family Co Pty Ltd (trustee) v Commissioner of Taxation* [2020] FCA 559 at [70] (Thawley J). The High Court too has cautioned in *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] HCA 56; 248 CLR 378 at [26] and [41] (French CJ and Hayne J) that in construing legislation, 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.
86. The construction of s 109D(3) we have adopted is derived from the language of the statute construed in its context and results in each of the provisions in Div 7A being given operative effect.
87. We note that the construction we have adopted does not give rise to absurd or irrational outcomes or leave unaddressed an obvious drafting error: cf *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* [1981] HCA 26; 147 CLR 297 at 305 (Gibbs CJ), 311 (Stephen J) and 320–321 (Mason and Wilson JJ). The primary division governing the taxation of the income of a trust is Div 6 of the 1936 Act. Under that division, a beneficiary is taxed on its share of the net income of the trust estate based on their present entitlement to a share of the income. As explained above, if there is a share of the income of the trust estate to which no beneficiary is presently entitled, that share of the net income of the trust is taxed in the hands of the trustee at the highest marginal rate.
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.
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 a UPE 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 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). The legislature did not perceive a mischief in respect of UPEs in the way that the Commissioner now perceives.

90. In conclusion, whilst we are satisfied that the Tribunal did not complete its statutory task because it did not engage with the text of s 109D(3), we do not accept the Commissioner's construction.

Application to the facts

91. Ordinarily the relationship between beneficiary and trustee is distinguishable from the legal relationship between debtor and creditor. However, the equitable relationship of trustee and beneficiary can be overlaid with the legal relationship of debtor and creditor. As Gageler J (as his Honour then was) said in *Fischer v Nemeske Pty Ltd* [2016] HCA 11; 257 CLR 615 at [105]:

a trustee who admits to having an unconditional obligation to pay a specified amount of money to a beneficiary can thereby become liable to an action at law for the recovery of that amount as money had and received to the benefit of the beneficiary, so as to overlay the equitable relationship of trustee and beneficiary with the legal relationship of debtor and creditor. That has been settled since at least the middle of the nineteenth century

[footnotes omitted].

92. The taxpayer respondents accepted here that there existed a debtor-creditor relationship between the trustee and Gleewin Investments, based on the decision in *Chianti Pty Ltd v Leume Pty Ltd* [2007] WASCA 270; 35 WAR 488 at [63]–[77] (Buss JA) and of the High Court in *Fischer* at [26], [32] (French CJ and Bell J), [108] and [110]–[111] (Gordon J). The respondents conceded that the trustee had admitted the existence of a debt owing to Gleewin Investments on account of the amounts of net income distributed. The admission was accepted to arise from the terms of the trustee resolution and the manner in which the amounts so distributed appeared in the financial statements of the trust as part of the total liabilities owed by the trust disclosed in the balance sheet. It was also conceded that because Gleewin Investments was presently entitled to those distributed amounts, its interest in those amounts was not subject to any contingency or condition which might defeat its entitlement. Its interest was vested in interest and vested in possession and there remained nothing for the trustee to execute except payment to Gleewin Investments.

93. However, s 109D(3) requires more than the existence of a debtor-creditor relationship. It requires an obligation to repay and not merely an obligation to pay. The Commissioner contended before the Tribunal that the non-exercise by Gleewin Investments of its right to call for payment of its present entitlement amounted to the provision of financial accommodation. The Commissioner contended that Gleewin Investments had consented or acquiesced to Gleewin not paying the present entitlement by making a decision to refrain from calling for payment. However, the consensual arrangement relied upon by the Commissioner did not involve the payment of a sum by or at the direction of Gleewin Investments that was required to be repaid.

94. In those circumstances, applying the correct construction of s 109D results in only one conclusion being open. Section 109D is not satisfied. Although – based on the concessions

made by the taxpayer – a debtorcreditor relationship was created by the trustee resolution and the entry in the trust accounts, there was no loan or creation of an obligation to repay an amount as opposed to an obligation to pay.

95. The issues concerning the application of s 6-25 of the 1997 Act do not arise.

DISPOSITION

96. The appeal should be dismissed.

97. The parties agree that there should be no order as to costs.

I certify that the preceding ninety-seven (97) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Logan, Hespe and Neskovicin.

Associate:

Dated: 19 February 2025