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Mr Simon Haines
Assistant Commissioner
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Australian Taxation Office

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24 July 2026

Dear Simon,

Decision Impact Statement - Commissioner of Taxation v Bendel [2026] HCA 18

CPA Australia is Australia's leading professional accounting body and one of the largest in the world. We represent the diverse interests of more than 176,000 members in over 100 countries and regions. We make this submission in response to the ATO's **Decision Impact Statement - Commissioner of Taxation v Bendel [2026] HCA 18** (DIS) on behalf of our members and in the broader public interest.

Executive summary

CPA Australia welcomes the ATO's confirmation that an unpaid present entitlement (UPE) will not, without more, be treated as a Division 7A loan following the High Court's decision in *Bendel*. However, the DIS does not provide equity and practical certainty for taxpayers, advisers and private groups that relied on the Commissioner's former incorrect administrative position for over 15 years. Without clearer administrative pathways, historically compliant taxpayers remain unfairly exposed to unnecessary compliance costs, uncertainty and adverse tax outcomes.

Furthermore, guidance is required on the operation of Subdivision EA, section 100A, section 109RB, statutory amendment time limits, and the extent to which trust deed wording, trustee resolutions and accounting records may affect the characterisation of historical UPE arrangements.

Furthermore, guidance is required on the operation of Subdivision EA, section 100A, section 109RB, statutory amendment time limits, and the extent to which trust deed wording, trustee resolutions and accounting records may affect the characterisation of historical UPE arrangements.

CPA Australia therefore recommends that the final DIS be amended to provide practical, streamlined and equitable guidance, including a clear safe harbour or administrative pathway for unwinding legacy complying loan arrangements where taxpayers acted in good faith in accordance with prior ATO guidance.

Key comments and recommendations

We make the following key comments and recommendations:

- The final DIS should clarify the interaction between passive UPEs, Subdivision EA and section 100A following the High Court's decision in *Bendel*, particularly where trust funds are retained for ordinary working capital purposes.
- The ATO should provide clearer guidance on whether trust deed wording, trustee resolutions, sub-trust arrangements or accounting classifications may affect the characterisation of a UPE for Division 7A purposes.
- Confirm that ordinary passive UPE arrangements used to fund working capital within a family trust should not, without more, be treated as giving rise to Division 7A, Subdivision EA or section 100A consequences
- The DIS should recognise that many taxpayers entered into section 109D complying loan arrangements in good faith in reliance on prior ATO guidance, and should provide practical relief for these legacy arrangements on equity grounds.

- Set out a streamlined administrative pathway, safe harbour or class-based approach under section 109RB for taxpayers who entered into section 109D complying loan arrangements in good faith in reliance on prior ATO guidance on UPEs.
- Provide practical relief for legacy UPE arrangements, including guidance on unwinding or cancelling historical section 109D complying loan agreements without unintended adverse tax consequences under section 109RB.
- The ATO should address the practical impact of statutory amendment time limits and consider administrative concessions for taxpayers who are otherwise unable to amend historical assessments.

Please refer to the Appendix for our detailed discussions. If you have any queries, contact me at jenny.wong@cpaaustralia.com.au or Bill Leung, Tax Technical Advisor on bill.leung@cpaaustralia.com.au.

Yours sincerely,

Jenny Wong
Tax Policy Lead

Appendix

Detailed discussion

Introduction

This Appendix sets out CPA Australia's detailed comments on the DIS. It focuses on the practical consequences for taxpayers, advisers and private groups that acted in good faith in reliance on the ATO's former administrative position on UPEs and Division 7A. In particular, it identifies areas where the final DIS should provide greater clarity, certainty and administrative relief, including in relation to Subdivision EA, section 100A, section 109RB, legacy complying loan arrangements, trust deed and resolution wording, accounting classifications and statutory amendment time limits.

ATO administrative response and unresolved practical issues

The ATO's approach to addressing the consequences of *Bendel*, from its Interim Decision Impact Statement following the Full Federal Court decision to its final post-High Court DIS position, raises important administrative, commercial and legal concerns for tax practitioners and private groups. They are explained as follows:

1. Clarity regarding status of UPEs and Subdivision EA

Paragraph 40 states that a variation to an investment agreement will not result in the arrangement being treated as an unpaid present entitlement (UPE) for Subdivision EA purposes. In PS LA 2010/4, the ATO stated (at paragraphs 106-107) that where amounts are placed on sub-trust, Subdivision EA can still apply where the trust makes a loan to a shareholder of the private company. The ATO should clarify whether this view is correct. In *Commissioner of Taxation v Bendel [2026]* HCA 18 (*Bendel*), it seemed the ATO is of the view that the language suggested that Subdivision EA ought to have applied, this was despite the present entitlement amounts were held on separate trust for the corporate beneficiary.

2. Clarify present entitlement issue

Some uncertainty has arisen regarding whether resolutions potentially not create a present entitlement where the trustee set asides amount on separate trust. The ATO should address this issue in the DIS.

3. Section 100A and income injection test

The majority in *Bendel* said at paragraph 72 that the corporate beneficiary did not "provide" the trustee with time to pay and that "mere inactivity cannot satisfy the language of "advance", "provision", "payment" or "transaction". There could be no "provision" of financial accommodation because nothing was "provided".

Section 270-10(1)(b)(iii) requires that the trust (e.g. the loss trust) directly or indirectly "provides" a benefit to an outsider to the trust. The *Corporate Initiatives Pty Ltd v Commissioner of Taxation [2005]* FCAFC 62 (which was considered in *Bendel* in the Full Federal Court) held that no positive action was needed to "provide" something (see para 30). Despite considering different part of the tax legislation, this conclusion should now remain in serious doubt given we have High Court authority establishing that not calling for payment of a UPE does not amount to a provision of anything. Therefore, for both the income injection test and general provisions requiring the "provision of benefits" or "financial accommodation," courts require a positive act. It would be a difficult position to take that "provide" takes on a vastly different meaning in these different contexts. Given the apparent absence of an existing ATO product addressing the income injection test, the ATO should address this issue in the final DIS.

Section 100A(7) requires for there to be a payment or the "provision of services or other benefits" to a person other than a beneficiary. The same comments can be said for the meaning of "provides" as above. Regarding the possibility of there being a "payment" by not calling on a UPE, s 100A(12) deems a payment where there is an agreement to "release, abandon, fail to demand payment of or postpone payment of, a debt owed". The authority in *Bendel* concluded that the amount set aside for the corporate beneficiary on separate trust was not a debt. Therefore, passive acquiescence or mere inactivity is insufficient to satisfy statutory requirements that demand an affirmative transfer or provision of value. That is, merely failing to demand payment of it should not be able to satisfy this extended meaning of payment for section 100A purposes. The ATO has flagged updating its Section 100A Ruling and we submit this is a critical aspect that needs to be addressed by the ATO.

4. Discretion under section 109RB

A significant operational deficiency in the DIS is its absence of guidance on how the Commissioner proposes to exercise the statutory discretion under section 109RB of the Income Tax Assessment Act 1936 (ITAA 1936) to address the historical issues arising from TR 2010/3. For more than 15 years, from TR 2010/3 through to TD 2022/11, the ATO maintained an administrative position that required family trusts to place UPEs on formal seven-year or ten-year complying Division 7A loan agreements. The High Court in *Bendel* has now confirmed that this

administrative position was legally incorrect. However, the DIS does not provide practical relief for the substantial compliance costs and administrative burden incurred by private groups that acted in accordance with that position.

Furthermore, for trusts that complied with those guidelines and made principal and interest payments over time in respect of those purported loans, the DIS does not provide a straightforward mechanism to unwind those transactions without giving rise to further adverse tax consequences, such as unexpected capital gains or dividend implications. Instead, the DIS adopts a rigid and formalistic approach by treating the executed documents as loans as a matter of fact, which cannot be unwound without triggering immediate Division 7A consequences. This gives rise to an inequitable distinction between:

- Taxpayers who disputed or did not follow the ATO's administrative guidance, who are now protected by the High Court's decision.
- Taxpayers who acted in good faith and complied with the ATO's explicit administrative guidance, who may remain subject to ongoing principal and interest repayments in respect of purported loans.

As the relevant mistake arose directly from taxpayers' reliance on the Commissioner's legally incorrect determination in TD 2022/11, it should properly be characterised as an honest mistake of law. Section 109RB expressly empowers the Commissioner to disregard the operation of Division 7A where a deemed dividend arises because of an honest mistake or inadvertent omission. The final DIS should therefore be amended to provide a class-based, self-executing, or otherwise highly streamlined administrative pathway under section 109RB. The ATO should also issue a streamlined Practical Compliance Guideline outlining a safe harbour process for unwinding or cancelling legacy section 109D complying loan agreements without adverse tax consequences.

5. Inconsistency on substance over form

The ATO appears to contend in the DIS that where taxpayers executed documents describing an arrangement as a section 109D complying loan agreement, that characterisation is determinative and cannot subsequently be revisited. This position is difficult to reconcile with the ATO's long-standing reliance on substance over (paper) form in this area. We express our concerns that the ATO is adopting a more formalistic approach in the DIS to preserve revenue outcomes, notwithstanding its previous administrative position.

6. Application of Subdivision EA

The DIS highlights that if trust funds representing a UPE are used to benefit a shareholder, Subdivision EA will be triggered. Our concern is that in a family group, cash is highly fungible. If a trust uses its working capital to pay a business expense that indirectly benefits a corporate group owner, the ATO may use the DIS as a mandate to 'justify' auditing ordinary commercial dealings within the trust. The ATO should clarify its position in the DIS.

7. Application of Section 100A

The potential application of section 100A to ordinary, passive corporate distributions remain a concern. We consider that retaining a UPE within a family trust to fund working capital is generally an ordinary family or commercial dealing, and that applying section 100A in this context would constitute regulatory overreach. The ATO should address this issue in the DIS.

8. Limitations on trust deed and resolution wording

The High Court majority placed significant weight on the Bendel trust deed and resolution, under which amounts set aside ceased to form part of the trust fund and were held on separate sub-trusts. The concern is that the ATO may rely on this aspect of the decision to contend that Bendel applies only to trust deeds and resolutions with identical "set aside" or sub-trust mechanisms. Where a deed or resolution uses broader language, such as "paid" or "applied", the ATO may seek to argue that a debtor-creditor relationship nevertheless arises per paragraph 39 of the DIS. Therefore, the DIS qualifies ATO's acceptance of the High Court's decision by stating that *Bendel* does not apply to all UPE circumstances.

On this basis, the ATO appears to maintain that the particular wording of a trust deed, trustee resolution or sub-trust arrangement may, in some cases, create financial accommodation or a separate trust relationship that remains within the scope of Division 7A. We are concerned that this approach would unduly confine the High Court's reasoning by placing excessive emphasis on deed and resolution drafting rather than the substantive nature of passive UPE arrangements, which is not supported by High Court judgment. Rather than providing a clear and generally applicable rule for UPEs, the ATO's position in the DIS would require tax practitioners to

undertake detailed reviews of the precise wording of historical trust deeds and annual trustee resolutions for each client to determine whether they are protected by the Bendel precedent.

9. Set aside/separate trust arrangements misconception

In the DIS, the ATO is seeking to confine Bendel to deeds with identical "set aside" or sub-trust mechanisms, and that holding funds on separate trust assists the taxpayer despite the ATO indicates that, regardless of whether the amount is held on separate trust, the ATO will no longer treat an UPE as a Division 7A loan where the corporate beneficiary takes no active steps to enforce payment. The High Court's consideration of the separate trust wording in *Bendel* was relevant to determining that no debtor-creditor relationship arose. Therefore, we respectfully submit that the concern ATO has in continuing to contest passive UPEs based on deed mechanics should not be sustained; that position has effectively been rejected by the High Court.

10. Loan account classification

A significant practical issue arising from the DIS concerns the way small-to-medium enterprise accountants have historically recorded these arrangements. Historically, corporate UPEs have often been recorded in trust ledgers under generic descriptions such as "beneficiary loan account" for accounting purposes. The concern is that the DIS appears to suggest that the ATO may rely on a trust's financial statements as evidence that the parties intended to create a loan. This may result in ordinary accounting descriptions or journal entries adopted for bookkeeping purposes, being given undue legal significance notwithstanding the High Court's reasoning in *Bendel*. More broadly, there is concern that the DIS does not sufficiently acknowledge that the expanded concept of "financial accommodation" under section 109D was applied incorrectly for an extended period by the ATO. Instead, the DIS appears to rely on trust deed mechanics, section 109D complying loan documentation, integrity provisions and statutory time limits to preserve or maintain historical ATO interpretations.

11. Statutory amendment limitations

The DIS states that taxpayers may seek amendments or lodging objections where they are self-assessed on the basis that standard UPEs are automatically treated as loans. However, the DIS has either omitted or does not address the practical effect of statutory time limits. Most small to medium enterprise groups are subject to two- or four-year amendment periods. Consequently, many UPE arrangements are effectively excluded from the ordinary amendment process. Taxpayers would therefore need to seek leave to lodge objections outside the standard time limits, increasing administrative and filing costs without any assurance that the ATO will accept or determine those objections favourably. The DIS should instead provide administrative concessions for out-of-time amendments, on equitable grounds, to correct an ATO-originated error, including by permitting the unwinding or cancellation of legacy section 109D complying loan agreements.