HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA**
Appellant

and

STEVEN BENDEL
First Respondent

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

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. There are two issues. The first arises from the Commissioner's notice of appeal, while the second arises from the respondents' notice of contention.

3. **Section 109D(3):** *First*, did **Gleewin Investments** Pty Ltd make "loans" (as defined in s 109D(3) of the *Income Tax Assessment Act 1936* (Cth)) (**ITAA 1936**) to **Gleewin** Pty Ltd as trustee for the Steven Bendel 2005 Discretionary Trust (**2005 Trust**) in the years ended 30 June 2014[1] to 2017 when it agreed or acquiesced to Gleewin retaining and using, for the purposes of the 2005 Trust, amounts to which Gleewin Investments was presently entitled?

4. **Section 6-25:** *Second*, if Gleewin Investments did make such loans (so that Gleewin Investments was taken by s 109D(1) of the ITAA 1936 to pay dividends to Gleewin in Gleewin's capacity as trustee of the 2005 Trust), does

[1] The notice of appeal erroneously refers to 30 June 2013.

s 6-25 of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**) prevent those amounts from being included in the assessable income of the 2005 Trust?

PART III: SECTION 78B NOTICE

5. No notices under s 78B of the *Judiciary Act 1903* (Cth) are required.

PART IV: CITATION OF DECISIONS BELOW

6. The decision of the Administrative Appeals **Tribunal** is *Bendel & Anor v Commissioner of Taxation* (2023) 117 ATR 464; [2023] AATA 3074 (Deputy President F D O'Loughlin KC and Senior Member Keith James) (**TR**) (CAB, pp 5-79).

7. The decision of the Full Court of the Federal Court of Australia is *Commissioner of Taxation v Bendel* (2025) 307 FCR 544; [2025] FCAFC 15 (Logan, Hespe and Neskovcin JJ) (**FC**) (CAB, pp 87-113).

PART V: BACKGROUND

8. **Facts:** At all relevant times, Gleewin was trustee of the 2005 Trust, and Mr Steven Bendel and Gleewin Investments were discretionary beneficiaries of the 2005 Trust (FC [4]; TR [5]). Mr Bendel was the sole director and secretary of, and the beneficial owner of the shares in, both Gleewin and Gleewin Investments (FC [4]; TR [5]). He controlled both Gleewin and Gleewin Investments (FC [4]; TR [26]). Through Mr Bendel, each of Gleewin and Gleewin Investments had knowledge of the affairs of the other and of Mr Bendel's own affairs and circumstances (TR [26]).

9. In each of the years ended 30 June 2013 to 30 June 2016, Gleewin, through Mr Bendel as its sole director, resolved to set aside categories of the net income of the 2005 Trust in respect of the then-current year for the benefit of Mr Bendel and/or Gleewin Investments in stated proportions (FC [6], [7]; TR [28], [49]).

10. Contrary to the terms of the trust deed for the 2005 Trust, the amounts resolved to be set aside for Gleewin Investments were not held by Gleewin on a separate trust (FC [5(c)], [16]; TR [80]).

11. The books of account of Gleewin Investments recorded the amounts resolved to be set aside for it and thereafter reported the cumulative total of its unpaid

entitlements from the 2005 Trust. Corresponding entries were made in the accounts of the 2005 Trust. (FC [8], [9]; TR [40(d)], [44(d)].)

12. Before the Full Court, the respondents accepted that there existed a debtor-creditor relationship between Gleewin and Gleewin Investments in respect of the amounts resolved to be set aside (FC [92], [94]).

13. Mr Bendel caused Gleewin to satisfy Gleewin Investments' entitlement only to the extent necessary to meet Gleewin Investments' tax liabilities and other expenses from time to time (TR [44(a)]). Gleewin Investments did not, at any relevant time, call for payment of the remaining amounts to which it was entitled (FC [16]).

14. **Procedural history:** The Commissioner issued Mr Bendel and Gleewin Investments with notices of assessment on the basis that Gleewin Investments had made "loans" (within the meaning of s 109D(3)) to Gleewin that gave rise to deemed dividends under s 109D(1), resulting in assessable income for Mr Bendel and Gleewin Investments under s 97 of the ITAA 1936 as the persons presently entitled to the income of the 2005 Trust for the relevant years of income (FC [12(e)]). Following adverse objection decisions, Mr Bendel and Gleewin Investments each commenced proceedings pursuant to Part IVC of the *Taxation Administration Act 1953* (Cth).

15. **Administrative Appeals Tribunal:** Before the Tribunal, the respondents relevantly contended that:

(a) Gleewin Investments had not made any "loan" (within the meaning of s 109D(3)) to Gleewin (TR [8]);

(b) if it had done, then s 6-25 prevented the resulting deemed dividend arising under s 109D(1) from being included in Gleewin's assessable income (TR [12]). (The respondents did not contest that, if loans had been made, then deemed dividends had arisen: TR [11]);

(c) if s 6-25 was not engaged, then the discretion in s 109RB of the ITAA 1936 – to disregard the operation of Division 7A in respect of the amounts in question – was enlivened and ought to have been exercised.

16. The Tribunal resolved the first issue in the respondents' favour. (TR [101]-[102]). That made it unnecessary for the Tribunal to decide the remaining issues (TR [103], [109], [110]). However, the Tribunal thought it appropriate to address the s 6-25 issue, observing that the issue had been "fully argued" and did "not involv[e] any discretion" (TR [103]). It found that "[t]he threshold condition for s 6-25 to apply does not arise in the present circumstances" (TR [108]).

17. **Full Court:** On appeal, the Full Court held that the Tribunal "did not engage with the text of s 109D(3)" (FC [2]). In addition, unlike the Tribunal, it proceeded on the basis that a debtor-creditor relationship had arisen between Gleewin and Gleewin Investments in light of a concession to that effect which the respondents made during the appeal (FC [92], [94]). However, the Full Court reasoned that:

(a) "[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" (FC [2]; also [94]);

(b) concordantly, s 109D(3)(b) encompasses "a provision of credit or any other form of financial accommodation" only where it "involves an obligation to repay an identifiable principal sum, rather than simply an obligation to pay" (FC [79]), and s 109D(3)(d) encompasses "a transaction (whatever its terms or form) which in substance effects a loan of money" only where it "in substance effects an obligation to repay an identifiable sum" (FC [70]); and

(c) it is only where one can identify an anterior "transfer of an amount from or at the direction of the private company" that there can be a "loan" by that private company for the purpose of s 109D(3) (FC [79]; see also FC [93]).

18. The Full Court observed that the consensual arrangement relied on by the Commissioner – namely, that Gleewin Investments had consented or acquiesced to Gleewin not paying the amounts it was entitled to by making a decision to refrain from calling for payment – "did not involve the payment of a sum by or at the direction of Gleewin Investments that was required to be *repaid*"

(FC [93], emphasis added), such that it did not give rise to a "loan" within the meaning of s 109D(3) on the Full Court's construction.

19. Given that conclusion, the Full Court noted that "[t]he issues concerning the application of s 6-25 of the 1997 Act do not arise" (FC [95]). It did not comment further on them. The issue concerning s 109RB was not before the Full Court. As in this Court, the Commissioner sought orders providing for the matter to be remitted to the Tribunal for determination according to law should the appeal be allowed.

PART VI: ARGUMENT

10 **Issue 1: Section 109D(3)**

The error of the Full Court

20. The Full Court confined the meaning of "loan" in s 109D(3) to "a transaction which creates an obligation to repay an amount or which in substance effects an obligation to repay" (FC [2]; see also FC [79], [93], [94]). To that end, the inclusive limbs of the definition were read down, with the Full Court construing the expression "*provision of credit or any other form of financial accommodation*" in s 109D(3)(b) as applying only to credit or financial accommodation that involves an "obligation to repay an identifiable principal sum" resulting from "a transfer of an amount from or at the direction of the
20 private company" (FC [79]). It confined "*a transaction (whatever its terms or form) which in substance effects a loan of money*" in s 109D(3)(d) in the same way (FC [70]).

Section 109D(3) generally

21. As a matter of ordinary language, it may be accepted that an obligation to repay is the essence of a loan.[2] A transaction creating such an obligation falls within the ordinary meaning of the word "loan", and therefore within s 109D(1) and (3), whether or not it falls within any of paragraphs (a) to (d) in s 109D(3).

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[2] *Commissioner of Taxation v* ***Radilo*** *Enterprises Pty Ltd* (1997) 72 FCR 300 at 313C (Sackville and Lehane JJ); ***Prime Wheat*** *Association Ltd v Chief Commissioner of Stamp Duties* (1997) 42 NSWLR 505 at 512G (Gleeson CJ; Handley JA and Sheppard A-JA relevantly agreeing at 515D and 518B).

22. The definition of "loan" in s 109D(3) is inclusive. Inclusive definitions are commonly used "both to extend the ordinary meaning of the particular word or phrase to include matters which otherwise would not be encompassed by it and to avoid possible uncertainty by expressly providing for the inclusion of particular borderline cases."[3] That is the evident purpose of s 109D(3). Extrinsic materials concerning other tax provisions that defined "loan" in similar or near-identical terms[4] indicate: that the definition was intended to have an "extended meaning";[5] that it is not "confined to amounts of borrowings actually advanced to the borrower";[6] and that it covers "arrangements not strictly loans at law" such as "forbearing to collect payment of a debt which has fallen due",[7] the intention being that "[e]ssentially anything which has the commercial effect of

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3 *Corporate Affairs Commission (SA) v Australian Central Credit Union* (1985) 157 CLR 201 at 206-207 (Mason ACJ and Wilson, Deane and Dawson JJ). See also *Coverdale v West Coast Council* (2016) 259 CLR 164 at [37] (French CJ, Kiefel, Keane, Nettle and Gordon JJ); *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145 at [32] (the Court); *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 329-330 (Toohey, McHugh and Gummow JJ).

4 So as to include "a provision of credit or any other form of financial accommodation" and/or "a transaction (whatever its terms or form) which in substance effects a loan of money" (or near-identical expressions).

5 See the explanatory memorandum which accompanied the Fringe Benefits Tax Assessment Bill 1986 (Cth) p 135. When enacted, that Bill became the *Fringe Benefits Tax Assessment Act 1986* (Cth), s 136(1) of which contained a definition of "loan" that is nearly identical to s 109D(3). The s 136(1) definition of "loan" was applied in *Westpac Banking Corporation v Commissioner of Taxation* (1996) 70 FCR 52 (Lockhart, Lindgren and Sackville JJ). In that case, while the Court held that liability to fringe benefits tax by operation of Div 4 of Part III arose only when there was a loan in respect of which there was "an obligation to repay", the Court did not locate the "repayment" element in the definition of "loan" (s 136, which contained equivalents to s 109D(3)(b) and (d)), but rather in the express terms of s 16(1) of the *Fringe Benefits Tax Act 1986* (Cth): see 61A.

6 See the explanatory memorandum which accompanied the Taxation Laws Amendment Bill (No. 5) 1986 (Cth) p 15. When enacted that Bill became the *Taxation Laws Amendment Act 1987* (Cth), s 7 of which inserted s 46C into the ITAA 1936. Section 46C(1) provided that, "[i]n this section, unless the contrary intention appears… 'loan' includes the provision of credit or any other form of financial accommodation". See also Part B of the explanatory memorandum which accompanied the Taxation Laws Amendment (Company Distributions) Bill 1987 (Cth) p 5. When enacted, that Bill became the *Taxation Laws Amendment (Company Distributions) Act 1987* (Cth), s 7 of which inserted s 46D into the ITAA 1936. Section 46D(1) contained the same definition of "loan" as s 46C(1). Section 46D was applied in *Radilo* (1997) 72 FCR 300 (Lee, Sackville and Lehane JJ).

7 See the explanatory memorandum which accompanied the Taxation Laws Amendment Bill (No. 2) 1999 (Cth) (formerly the Taxation Laws Amendment Bill (No. 4) 1998 (Cth)) at p 191 [7.11]. When enacted, that Bill became the *Taxation Laws Amendment Act (No. 2) 1999* (Cth), cl 2 of Sch 7 of which inserted s 45ZA into the ITAA 1936. Section 45ZA(4) provided that "[i]n this section… ***loan*** includes the provision of credit or any other form of financial accommodation".

providing the borrower or accommodated party with the use of capital for a term may be equivalent to a 'loan'".[8]

23. This Court has emphasised that the purpose of definitional provisions is to fix or clarify the meaning of the defined term.[9] Fidelity to that purpose makes it of "fundamental importance" that limitations and qualifications are not read into a definition unless "clearly required" by its terms or context.[10]

24. The Full Court's construction pays insufficient regard to these settled principles. No limitations or qualifications on the ordinary language of the inclusive limbs in s 109D(3) are "clearly required". Indeed, by limiting the meaning of "loan" to transactions that involve "an obligation to repay an amount as opposed to an obligation to pay" (FC [94]), the Full Court's construction has the consequence that the four inclusive limbs of s 109D(3) have little or no work to do. That points strongly against the correctness of that construction, as "a court construing a statutory provision must strive to give meaning to every word of the provision",[11] it being "improbable that the framers of legislation could have intended to insert a provision which has virtually no practical effect".[12]

25. The Full Court's construction also conflicts with the express language of s 109D(3). It does so because to construe s 109D(3) as limited to situations where there is an anterior transfer of money creating an obligation to "repay" is to impose a limitation of *form*. But the terms of s 109D(3) make clear that it is concerned with the *substance* of transactions and not with their form. Thus, s 109D(3)(b) expressly covers the provision of financial accommodation in

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8 See the explanatory memorandum which accompanied the Taxation Laws Amendment Bill (No. 2) 1999 (Cth) at p 192 [7.13].

9 *SkyCity Adelaide Pty Ltd v Treasurer of South Australia* (2024) 98 ALJR 1273 at [32] (Gageler CJ, Gordon, Edelman, Gleeson and Beech-Jones JJ).

10 *SkyCity* (2024) 98 ALJR 1273 at [32] (Gageler CJ, Gordon, Edelman, Gleeson and Beech-Jones JJ).

11 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [71] (McHugh, Gummow, Kirby and Hayne JJ). See also *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [39] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

12 *Minister of State for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565 at 574 (Gummow J, Hill and Cooper JJ agreeing). That statement is very frequently cited: see the cases collected in Herzfeld and Price, *Interpretation* (Thomson Reuters, 2024) p 127 [5.170].

"any … form". That is language of "considerable width of denotation".[13] Similarly, s 109D(3)(d) expressly covers a transaction "whatever its terms or form" which "in substance effects a loan of money". There is no justification for implying limitations or qualifications of form in the face of those words.

Section 109D(3)(b)

26. Further, the Full Court's construction of s 109D(3)(b) is irreconcilable with the ordinary meaning of the term "credit", as found in the expression "*provision of credit*". The expression "*provision of credit*" encompasses allowing time for payment.[14] Yet, on the Full Court's construction, s 109D is incapable of applying to sales on deferred payment terms that involve the "provision of credit" in that way, because such arrangements do not require *repayment*.

27. Similarly, s 109D(3)(b) would be incapable of applying to transactions that are commonly understood as involving a provision of "financial accommodation". It would, for example, be incapable of applying to a sale of shares by a private company on terms whereby the purchase price is not payable for a number of years, or is satisfied by the issue of a promissory note containing an obligation to "pay" (not "repay") an amount.

28. Nor was there any warrant for the Full Court to confine s 109D(3)(b) by reference to the terms of s 109D(3)(a), (c) and (d) (cf FC [70]). Each of the limbs of the inclusive definition does different work in defining, clarifying or expanding the meaning of the word "loan" in Division 7A. There is therefore no basis to read down one limb by reference to the others. That is, contrary to the Full Court's approach (FC [70]), the circumstance that one or more limbs of the inclusive definition capture an attribute of the ordinary meaning of the defined term (a concept of repayment) does not imply that *every* limb of the definition requires that attribute to be present. In any event, as is discussed below, the Commissioner disputes that s 109D(3)(d) encapsulates a concept of

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[13] *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* (2012) 246 CLR 455 at [28] (French CJ and Gummow, Crennan and Bell JJ); see also [44] (Heydon J).

[14] Macquarie Dictionary, "credit" n9; Oxford English Dictionary, "credit, n." II.9 and 10; *Herbert v The King* (1941) 64 CLR 461 at 465 (Rich ACJ), 467 (McTiernan J); ***Tilley** v Official Receiver* (1960) 103 CLR 529 at 534 (Kitto J), 537 (Menzies J).

repayment, and therefore disputes the conclusion that each of s 109D(3)(a), (c) and (d) "encapsulate a concept of repayment" (FC [70]).

29. The Full Court sought to justify confining the wide language of s 109D(3)(b) in part by pointing out that "Division 7A itself draws a distinction between a 'debt' and a 'loan'" (FC [77]). After quoting from ss 109F and 109G, it observed: "[t]hat 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" (FC [78]).

10 30. The Full Court erred in treating the existence of ss 109F and 109G as a basis for reading down s 109D(3)(b). The Commissioner's construction of s 109D(3) gives s 109D and s 109F complementary spheres of operation. It results in s 109D applying where the time for payment of a debt is deferred (so that a private company's profits are accessed *temporarily*), and s 109F applying where a debt is forgiven or taken to be forgiven (so that a private company's profits are accessed *permanently*). The potential overlap is addressed by s 109G(3), which applies where deferral is followed by forgiveness. By contrast, the Full Court's construction gives rise to the arbitrary prospect of debt forgiveness arrangements enlivening Division 7A, while debt deferral arrangements escape
20 it.

31. The Commissioner agrees that there is not a "provision of credit or any other form of financial accommodation" merely because a debtor-creditor relationship can be identified. Section 109D(3)(b) is not engaged whenever one can identify an extant obligation owed to a private company (whether in the form of a debt or otherwise). For there to be a provision of credit or financial accommodation, there must be a consensual arrangement under which payment is deferred.[15] As is addressed in paragraph 47 below, both of those elements were satisfied in this case.

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[15] *Radilo* (1997) 72 FCR 300 at 312E-F (Sackville and Lehane JJ). See also *Tilley* (1960) 103 CLR 529 at 531 (Dixon CJ), 534 (Kitto J), 537 (Menzies J).

Section 109D(3)(d)

32. The Full Court appears (FC [64]-[70]) to have ascribed to s 109D(3)(d) the same meaning which was ascribed to the same language in former s 83(1) of the *Stamp Duties Act 1920* (NSW) in ***Prime Wheat***.[16] However, words used in the context of State stamp duty legislation (or money lending legislation[17]) do not necessarily have the same meaning in the context of Federal income tax legislation.[18] That is particularly true when there are relevant differences in the definitions that use those words. In the present context, in addition to differences in the way the definitions use the relevant words,[19] the extrinsic material cited in paragraph 22 above strongly supports the conclusion that the word "loan" was not intended to have the same meaning it had been given in the quite different context of stamp duty or money lending legislation.

The word "repaid" in s 109D(1)(b)

33. The Full Court erred in relying on the reference in the operative provision (s 109D(1)(b)) to a loan not being fully "repaid" as supporting its conclusion that each limb of s 109D(3) can be satisfied only if there is an obligation to "repay" (FC [74]). That reasoning is erroneous because it fails to read s 109D(1)(b) in the context of both ss 109D(1)(a) and 109D(4).

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16 (1997) 42 NSWLR 505 (Gleeson CJ, Handley JA and Sheppard A-JA agreeing in relevant part).

17 Money lending legislation being the subject of several of the authorities and texts relied upon in *Prime Wheat* (1997) 42 NSWLR 505 at 512 (Gleeson CJ): see *Metropolitan Discounts & Investments Co. Ltd v Bowra Radio Electrical Co. Ltd (in Liq.)* (1944) ALJ 88 at 90 (Rich J) and 92 (Williams J); CL Pannam, *The Law of Money Lenders in Australia and New Zealand* (1965) at 30-31, citing *Benison v Custom Credit Corporation Ltd* [1962] WAR 44 (D'Arcy J) and *Talcott Factors Ltd v G Seifert Pty Ltd* [1964] NSWR 1205 (Nagle J); D G Hill, *Stamp Duties* (1996) at 1844-1855 [sic – the correct page range appears to be 1844-1845].

18 See *Baystone Investments Pty Ltd v Commissioner of Stamp Duties* [1978] 1 NSWLR 441 at 443D-G (Reynolds, Hutley and Samuels JJA), stating that the "correct way to construe [the Act] … is, in the first instance, to give the words their plain ordinary meaning, without regard to the construction given to the same words in the *Moneylending Act*". See also *London Corporation v Cusack-Smith* [1955] AC 337 at 361 (Lord Reid).

19 For example, in *Prime Wheat* the definition of "loan" in *Stamp Duties Act 1920* (NSW) s 83(1) had no equivalent to s 109D(3)(b), although there was a reference to "financial accommodation" in the definition of "advance". In the context of those quite different definitions, Gleeson CJ held (at 511E) that while there was "no doubt" that the transaction in question was one in which the vendor provided "financial accommodation", it did not follow that there was a "loan" (as defined). Further, Gleeson CJ referred (at 511F) to the "risk of resolving the issue by reference to considerations of economic equivalence rather than by reference to an accurate characterisation of the instrument under consideration".

34. Section 109D(1)(a) specifies that the first operative condition that must be satisfied to enliven s 109D(1) is that a private company "makes a loan" to an entity during the current year. Section 109D(4) then provides that "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". Thus, a "loan" will have been "made" for the purposes of s 109D(1)(a) at the time when "anything described in [s 109D(3)] is done in relation to an entity". If, for example, a form of financial accommodation is provided (s 109D(3)(b)), then a loan will have been "made" for the purposes of s 109D(1)(a) at that time, even if no amount was "paid to the entity by way of loan" (with the logical consequence that no amount could be *repaid*: cf FC [74], [79]). To conclude otherwise would be to read the words of s 109D(4) that are italicised above out of that provision. That being so, a harmonious construction of s 109D(1) requires the word "repaid" in s 109D(1)(b) to be construed so as to accommodate the situation where no amount was "paid to the entity by way of loan" (s 109D(4)) by the private company (cf FC [79], [93]).

35. Such a meaning of "repaid" accords with the purpose of s 109D(1)(b). The work done by s 109D(1)(b) is to recognise that, if a "loan" has been "repaid" before the lodgment day for the current year, then there is no justification for deeming the company to have paid a dividend (a purpose complemented by s 109D(1AA) in cases of partial "repayment"). In that context, the word "repaid" refers to a payment of the amount the subject of the "loan" that was "made" within the meaning of s 109D(1)(a), being a meaning extended by s 109D(3) and (4).

36. For the above reasons, it was not open to the Full Court to read the word "repaid" in s 109D(1)(b) as supporting its construction of the definition of "loan". It should have given the definition in s 109D(3) effect in accordance with its terms.

The purpose of Division 7A

37. Finally, a construction of s 109D(3) that does not limit a "loan" to a transaction that involves an anterior transfer of money should be adopted because that

construction furthers the purpose of Division 7A, whereas the Full Court's construction undermines that purpose.[20]

38. The purpose of Division 7A is to expand the operation of s 44(1) of the ITAA 1936 to "ensure that private companies will no longer be able to make tax-free distributions of profits to shareholders (and their associates) in the form of payments or loans".[21] It pursues that purpose by combating the dealing out of a private company's profits whether the profits are accessed *permanently* (as by the payment of an amount (e.g., s 109C) or the forgiveness of a debt (e.g., s 109F)) or only *temporarily* (as by the making of a "loan" as defined).

10 39. The Full Court correctly recognised the above purpose, describing Division 7A as "an anti-avoidance provision directed at in substance distributions of private company profits" (FC [89]). However, the Full Court failed to appreciate that, within that statutory scheme, the term "loan" serves to identify the various means by which a shareholder or a shareholder's associate (which may be a trustee)[22] might *temporarily* access the benefit of a private company's profits. One way in which profits can be temporarily accessed is by the private company lending amounts to a shareholder or a shareholder's associate. But another way is by the private company simply allowing a shareholder or a shareholder's associate which owes amounts to the private company to retain those amounts
20 and use them for its own purposes. There will often be no practical difference between the two alternatives.[23]

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[20] Section 15AA of the *Acts Interpretation Act 1901* (Cth); *Disorganized Developments Pty Ltd v South Australia* (2023) 97 ALJR 575 at [15] (Kiefel CJ and Gageler, Gleeson and Jagot JJ, Steward J agreeing at [47]); *Taylor v Owners – Strata Plan 11564* (2014) 253 CLR 531 at [39] (French CJ, Crennan and Bell JJ).

[21] See the explanatory memorandum which accompanied the Taxation Laws Amendment Bill (No. 3) 1998 (Cth) at [9.1], [9.2], [9.119]; *Federal Commissioner of Taxation v H* (2010) 188 FCR 440 at [35] (Downes, Edmonds and Greenwood JJ); ***Di Lorenzo Ceramics*** *Pty Ltd v Federal Commissioner of Taxation* (2007) 161 FCR 198 at [3] (Lindgren J).

[22] The language and context of s 109D make clear that the section is intended to have operation in respect of "loans" (as defined) made by a private company to a trustee that is a shareholder. By virtue of ss 109ZD and 109ZE (and s 960-100(1)(f) of the ITAA 1997), the types of "entity" to which a loan may be made for the purposes of s 109D(1) include a trust. Further, the express language of s 109K is such that the exclusion from the application of s 109D(1) of loans made by a private company to another company (provided for by the combined operation of s 109D(1)(c) and s 109K) does not extend to loans made to another company in its capacity as a trustee. And see *Di Lorenzo Ceramics* (2007) 161 FCR 198 at [93] and [97] (Lindgren J).

[23] ***Corporate Initiatives*** *Pty Ltd v Federal Commissioner of Taxation* (2005) 142 FCR 279 at [25] (Spender, Heerey and Lander JJ).

40. On the Commissioner's construction, the arrangements specified in s 109D(3)(a) to (d) share a common element of describing particular ways in which the benefit of a private company's profits (which could otherwise be paid out by way of dividend) might be accessed temporarily by a shareholder or a shareholder's associate. That advances the purpose of Division 7A. By contrast, the Full Court's construction denies that the provision of a form of financial accommodation or a transaction that is otherwise in substance a loan constitutes a "loan" *unless* it is possible to identify an anterior "transfer of an amount from or at the direction of the private company" and an associated obligation to "repay" (FC [79]). That construction, by giving preference to form over substance, tends to defeat the purpose of the anti-avoidance regime.

Application of the law to the facts

41. Once the Full Court's error in construing s 109D(3) is corrected, it follows that:

(a) it is irrelevant whether the arrangement relied on by the Commissioner involves the payment of a sum by or at the direction of Gleewin Investments that was required to be "repaid": cf FC [93]; and

(b) on the facts found, there were "loans" made by Gleewin Investments to Gleewin that enlivened the operation of s 109D(1). This is further explained below.

The facts and their import

42. The facts set out at paragraphs 8-13 above establish that Gleewin Investments' controller (Mr Bendel) brought about a state of affairs whereby Gleewin retained the amounts to which Gleewin Investments was presently entitled for use for the purposes of the 2005 Trust with the agreement or acquiescence of Gleewin Investments.

43. Specifically, the facts found establish that:

(a) In each of the years ended 30 June 2014 to 30 June 2017, Gleewin Investments was a private company that was presently entitled, as a beneficiary of the 2005 Trust, to payment of an amount of money out of the trust, that entitlement arising out of resolutions which Mr Bendel signed (FC [6], [10]; TR [35], [40(d)], [49] and [50], and Annexure B);

(b) Gleewin Investments' present entitlements to a share of the net income of the 2005 Trust were recorded in all relevant financial statements and accounting records (FC [8]-[9]);

(c) Mr Bendel:

(i) had both formal and de facto control of Gleewin Investments, the 2005 Trust and Gleewin (FC [4]; TR [5] and [26]);

(ii) was aware that income of the 2005 Trust had been resolved to be set aside for the benefit of Gleewin Investments, having signed the resolutions concerned (FC [6], [7]; TR [28], [49], Annexure B);

(iii) did not arrange for the amounts that had been resolved to be set aside for the benefit of Gleewin Investments to be dealt with in accordance with clause 3(5) of the 2005 Trust Deed (FC [24]; TR [41], [51]); and

(iv) instead, arranged how Gleewin should direct its resources, by causing it to meet (only) Gleewin Investments' tax liabilities and other expenses from time to time, while advancing money from its resources to him in amounts that exceeded his own entitlements (TR [42] and [44]).

44. Mr Bendel (individually and in each of his relevant capacities, including as the controller of Gleewin Investments) must be inferred to have intended the consequences of his voluntary actions.

45. Accordingly, it must be inferred that Gleewin Investments agreed or acquiesced to Gleewin not paying the full amount of its present entitlements to it, but retaining the amount as part of and for the general purposes of the trust fund.

46. For the following reasons, on the above facts, Gleewin Investments made a "loan" to Gleewin in each of the relevant years.

There was a "provision of… [a] form of financial accommodation"

47. On the facts as found, Gleewin Investments had the power or right to call for payment to it of the amounts of the 2005 Trust's income specified in the

resolutions in each of the relevant years. If it had done so, Gleewin would have been denied the ongoing use of those amounts. Gleewin Investments provided financial accommodation by allowing Gleewin to retain the ongoing use of amounts for the general purposes of the 2005 Trust, being amounts which Gleewin Investments had the right to withdraw.[24] The arrangement was consensual and comfortably falls within the ordinary meaning of the provision of "financial accommodation" (which includes "a granting of time to pay"[25]). On that basis, it was a "loan" within s 109D(3)(b).

There was "a transaction (whatever its terms or form) which in substance effects a loan of money"

48. There was also a transaction which in substance effected a loan of money from Gleewin Investments to Gleewin. On the facts, Gleewin Investments provided Gleewin with the temporary use of amounts of money belonging to Gleewin Investments. It agreed and acquiesced to Gleewin retaining for use for the purposes of the 2005 Trust amounts that had been resolved to be set aside for its benefit. The retention by Gleewin of those amounts with the agreement and/or acquiescence of Gleewin Investments in those circumstances comprised a transaction that in substance effected a loan of money to Gleewin by Gleewin Investments.[26] On that basis, it was a "loan" within s 109D(3)(d).

Issue 2: The notice of contention and s 6-25

49. Section 6-25(1) is enlivened where the "same amount" would otherwise be included in assessable income twice. It is apt to apply where, for example, a dividend is assessable to a taxpayer as both ordinary and statutory income.

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[24] The term "provides" conveying the central concept of causing another to have something and covering the situation where A allows B to retain something (here, the ongoing use of amounts) which A has the right to withdraw: *Corporate Initiatives* (2005) 142 FCR 279 at [29]-[30] (Spender, Heerey and Lander JJ).

[25] *Prime Wheat* (1997) 42 NSWLR 505 at 512D (Gleeson CJ; Handley JA and Sheppard A-JA relevantly agreeing). While, under the legislation in issue in that case, it was possible for an arrangement to involve financial accommodation but nonetheless not be a loan, that is not possible having regard to the inclusive language of s 109D(3), pursuant to which a provision of financial accommodation is taken to be a loan.

[26] Compare *Corporate Initiatives* (2005) 142 FCR 279 at [25] (Spender, Heerey and Lander JJ).

50. The Tribunal correctly concluded that "[t]he compound term 'same amount' does not embrace amounts of a different identity that may have a historical connection" (TR [106]). Here, there is a mere historical connection between any deemed dividend arising under s 109D(1) and any amounts previously included in the 2005 Trust's assessable income. The Commissioner will address the respondents' submissions concerning their notice of contention in his reply.

PART VII: ORDERS SOUGHT

51. The appeal be allowed.

52. The orders made by the Full Court of the Federal Court of Australia on 19 February 2025 in proceeding VID 903 of 2023 be set aside and in their place order that:

(a) the appeal be allowed;

(b) the decision of the Administrative Appeals Tribunal on 28 September 2023 in proceedings 2021/3330-3331 and 2021/3324-3327 be set aside; and

(c) the matter be remitted to the Administrative Review Tribunal for determination according to law.

PART VIII: TIME REQUIRED FOR PRESENTATION OF ARGUMENT

53. The appellant estimates that he will need up to 2 hours for oral submissions in chief and 15 minutes in reply.

Dated: 30 July 2025

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ANNEXURE TO APPELLANT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1	*Income Tax Assessment Act 1936* (Cth)	As at 1 July 2017 (Compilation C2017C00242 (No. 150)))	Part III, Division 7A (ss 109B – 109ZD)	With minor (and irrelevant) exceptions, this version of the extracted provisions as at 1 July 2017 is the same as the versions of those provisions in force during the income years ending 30 June 2014 to 2017 (inclusive). The exceptions are: (i) an amendment to s 109Y on 24 June 2014: No. 31/2014, Sch 4, Pt 4, item 98; (ii) the repeal of a note to s 44 on 17 October 2014: No. 110/2014, Sch 2, Pt 3, item 7; and (iii) an amendment to s 109NB on 1 July 2015: No. 105, 2015, Sch 1, Pt 1, item 1.	Not applicable
2	*Income Tax Assessment Act 1997* (Cth)	As at 1 July 2017 (Compilation C2017C00228 (No. 170))	s 960-100	Act in force during the income years ending 30 June 2014 to 2017 (inclusive).	Not applicable
3	*Taxation Laws Amendment Act (No 3) 1998* (Cth)	As enacted	ss 1 – 4 and Schedule 8	Act that inserted Division 7A into the ITAA 1936.	Not applicable