



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 OUTLINE OF ORAL SUBMISSIONS

PART I CERTIFICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Section 109D(3) of the *Income Tax Assessment Act 1936* (Cth)

(a) *Construction*

2. Division 7A's purpose includes preventing private companies from making tax-free distributions of profit to shareholders through payments, loans or debt forgiveness.
 - Explanatory memorandum at [9.2], [9.15], [9.119] (**JBA 5, Tab 37**)
3. Three core provisions implement that purpose by deeming a dividend. Each addresses the accessing of corporate profit by a shareholder (including a trustee).
4. Two of the provisions, ss 109C and 109F, are concerned with the permanent accessing of profit. They rely on expanded meanings of payment and forgiveness.
5. The third provision, s 109D, is concerned with the temporary accessing of profit. It supplies an inclusive definition of "loan", in s 109D(3). The function of such a definition includes extending the meaning of the defined word: **AS [22]**; *Corporate Affairs Commission* (1985) 157 CLR 201 at 206 (**JBA 3, Tab 11**).
6. The Full Court's construction of s 109D(3) (which the respondents embrace: **RS [25], [42], [49]**) confines it to situations where there is an anterior payment by the private company and an obligation to repay: **FC [79] (CAB 109)**. That construction is erroneous for the following reasons.
7. First, it results in the limbs of s 109D(3) not extending the meaning of "loan", despite extrinsic materials indicating that they were intended to do so: **AS [22], [24]**; Commissioner's Aide-mémoire concerning extrinsic material (attached).
8. Second, the Full Court's construction imposes a limitation of form: **AS [25]**; *Corporate Initiatives* (2005) 142 FCR 279 at [25] (**JBA 4, Tab 23**).
9. Third, the Full Court's construction fails to give effect to this Court's guidance that limitations and qualifications should not be read into a statutory definition unless "clearly required" by text or context: **AS [23]-[24]**; *Skycity* (2024) 98 ALJR 1273 at [32] (**JBA 4, Tab 29**). In particular, there is no basis for reading down s 109D(3)(b) by reference to the other limbs of s 109D(3): cf **FC [70] (CAB 107)**; **AS [28]**.

10. Fourth, the Full Court’s construction is inconsistent with the text of s 109D(3)(b), because the provision of credit or financial accommodation commonly will not involve a payment, followed by an obligation to repay. For example, the Full Court’s construction excludes a sale on deferred payment terms, which is an established form of financial accommodation. The respondents’ attempt to avoid that result co-opts s 109C(3), without any statutory basis for doing so, and relies on a highly artificial characterization of such a sale as involving a “payment of an amount for, on account of or at the request of” the purchaser” and an “obligation to repay the amount”: **AS [26]-[27]; AR [6], [11]-[12]**.
- *Prime Wheat* (1997) 42 NSWLR 505 at 512D (**JBA 4, Tab 27**)
 - *Tilley* (1960) 103 CLR 529 at 534, 537 (**JBA 3, Tab 19**)
 - D G Hill, *Stamp Duties* (1996) at 1845 (**Vol 5, Tab 33**)
11. Fifth, the use of the word “repaid” in s 109D(1)(b) does not support the Full Court’s construction of s 109D(3): cf **FC [74] (CAB 108)**. The word’s meaning must accommodate the situation where no amount was “paid ... by way of loan” (s 109D(4)) and there is no obligation to repay anything: **AS [33]-[36]; AR [4]**.
12. Sixth, *Prime Wheat Association Ltd v Chief Commissioner of Stamp Duties (NSW)* (1997) 42 NSWLR 505 at 508-512 (**JBA 4, Tab 27**) does not support the Full Court’s construction: cf **FC [64]-[70] (CAB 106-107); RS [48]-[49]**. In fact, it supports the Commissioner’s submission that the provision of time to pay is “financial accommodation”.
13. Seventh, Subdivision EA is not an exclusive code for dealing with unpaid present entitlements: **AS [37]-[40]; AR [9]-[10]**. First, the sphere of operation of Subdiv EA is much more limited than that of s 109D, with the consequence that to use it to confine the meaning of “loan” would confine the operation of Div 7A in contexts that have no possible overlap with Subdiv EA. Second, the asserted double taxation consequences of the overlap between s 109D and Subdiv EA are overstated, having regard to s 109Y. Third, if Parliament had wished to prevent overlap between Subdivision EA and s 109D, there are multiple ways it could have done so. The choice between those alternatives is a legislative choice, as is evidenced in ss 109T(3) and 109G(3).

14. The Commissioner's construction gives ss 109D and 109F complementary spheres of operation. It does not render s 109F(6) otiose, which is relevant for debts that do not result from loans, or that result from loans that did not give rise to a deemed dividend under s 109D: **AS [30]; AR [7]**.

(b) Application

15. In the premises, it is irrelevant whether there was a payment of an amount by Gleewin Investments and an obligation of repayment on the part of Gleewin.
16. On the facts found, Gleewin Investments provided a form of financial accommodation (s 109D(3)(b)). It allowed Gleewin to retain the ongoing use of amounts which it had the right to withdraw: **AS [8]-[13], [42]-[47]; AR [15]**.
- TR [5] (CAB 11-12), TR [26] and [28] (CAB 20), TR [40] (CAB 26), TR [41] (CAB 27), TR [44] (CAB 28), TR [49] and [51] (CAB 31), TR [77] (CAB 45), TR Annexure B (CAB 70), FC [4] (CAB 90), FC [6] and [8] (CAB 91), FC [9] (CAB 92)
17. On the facts found, there was also a transaction which in substance effects a loan of money (s 109D(3)(d)): **AS [48]**.

Section 6-25 of the *Income Tax Assessment Act 1997* (Cth)

18. Section 6-25 applies where the "same amount" would otherwise be included in assessable income twice (or more): **AS [49]-[50]; AR [16]**.
19. The deemed dividends arising under s 109D (on the one hand) and the other amounts included in Gleewin's assessable income such as interest (on the other) lack the quality of sameness needed to engage s 6-25. They have a different nature and share only a mere (and insufficient) historical connection: **AR [17]**.

Dated: 14 October 2025


Stephen Donaghue

Eugene Wheelahan

Joel Phillips

Bendel – Appellant’s aide-mémoire concerning extrinsic material relevant to the meaning of “loan” in s 109D(3) of the *Income Tax Assessment Act 1936* (Cth) (ITAA 1936)

Relevant Act	Text of definition	Extrinsic material
<i>Fringe Benefits Tax Assessment Act 1986</i> (Cth) s 136 [Vol 2, Tab 6, pp 110-111]	“136 (1) In this Act, unless the contrary intention appears— ... ‘loan’ includes – (a) an advance of money; (b) the provision of credit or any other form of financial accommodation; (c) the payment of an amount for, on account of, on behalf of or at the request of a person where there is an obligation (whether expressed or implied) to repay the amount; and (d) a transaction (whatever its terms or form) which in substance effects a loan of money.”	Explanatory memorandum to the Fringe Benefits Tax Assessment Bill 1986 (Cth) [Vol 5, Tab 34, p 649] “‘loan’, in relation to loan fringe benefits, has an extended meaning which includes an advance of money, the provision of credit or other forms of financial accommodation, the payment of an amount on behalf of a person that creates an obligation to repay, or any other form of transaction which is in substance a loan.”
ITAA 1936 s 46C Inserted by the <i>Taxation Laws Amendment Act 1987</i> (Cth) s 7 [Vol 2, Tab 8, pp 116-117]	“46C (1) In this section, unless the contrary intention appears— ... ‘loan’ includes the provision of credit or any other form of financial accommodation;”	Explanatory memorandum to the Taxation Laws Amendment Bill (No. 5) 1986 (Cth)* [Vol 5, Tab 38, p 685] “‘loan’ is defined in a manner that makes it clear that the term is not confined to amounts of borrowings actually advanced to the borrower, but is to include the provision of credit or any other form of financial accommodation.” * That bill later became the Taxation Laws Amendment Bill 1987 (Cth) which, when enacted, became the <i>Taxation Laws Amendment Act 1987</i> (Cth). See Commonwealth, <i>Business of the Senate and its Committees: 1 January-5 June 1987</i>, Parl Paper No 209 (1987) 19.
ITAA 1936 s 46D Inserted by the <i>Taxation Laws Amendment (Company Distributions) Act 1987</i> (Cth) s 7 [Vol 2, Tab 7, pp 113-114]	“46D (1) In this section, unless the contrary intention appears: ... ‘loan’ includes the provision of credit or any other form of financial accommodation;”	Part B of the Explanatory memorandum to the Taxation Laws Amendment (Company Distributions) Bill 1987 (Cth) [Vol 5, Tab 35, p 651] “‘loan’ is defined in a manner that makes it clear that the term is not confined to amounts of borrowings actually advanced to the borrower, but includes the provision of credit or any other form of financial accommodation.”

Bendel – Appellant’s aide-mémoire concerning extrinsic material relevant to the meaning of “loan” in s 109D(3) of the *Income Tax Assessment Act 1936* (Cth) (ITAA 1936)

Relevant Act	Text of definition	Extrinsic material
ITAA 1936 s 45ZA Inserted by the <i>Taxation Laws Amendment Act (No. 2) 1999</i> (Cth) sch 7 cl 2 [Vol 2, Tab 10, pp 156-158]	“45ZA (4) In this section: ... <i>loan</i> includes the provision of credit or any other form of financial accommodation.”	Explanatory memorandum to the Taxation Laws Amendment Bill (No. 2) 1999 (Cth) (formerly the Taxation Laws Amendment Bill (No. 4) 1998 (Cth)) [Vol 5, Tab 36, pp 653-654 [7.11], [7.13]] “<i>Loan</i> is defined broadly to include the provision of credit or any other form of financial accommodation, and thus includes financing arrangements not strictly loans at law, such as ... forbearing to collect payment of a debt which has fallen due;” ... “The relationship in the nature of a <i>loan</i> need not be an actual relationship of debtor and creditor as long as it is substantially equivalent to one. <i>New section 45ZA</i> is designed to deal with cases where the commercial and economic substance of a debt relationship has been replicated by obligations which do not amount in law to debt. For example, the right to receive a distribution in money or property at a later point in time equivalent in value to money or property supplied at an earlier point of time, or to call or put property at an agreed price equivalent to an amount paid previously for the property, may be equivalent in substance to a loan. Essentially anything which has the commercial effect of providing the borrower or accommodated party with the use of capital for a term may be equivalent to a ‘loan’; that is, anything equivalent to the hiring of money.”