HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA APPELLANT

AND

STEVEN BENDEL & ANOR RESPONDENTS

Commissioner of Taxation v Bendel
[2026] HCA 18
Dates of Hearing: 14 October & 3 December 2025
Date of Judgment: 10 June 2026
M47/2025

ORDER

Appeal dismissed.

On appeal from the Federal Court of Australia

Representation

S P Donaghue KC, Solicitor-General of the Commonwealth, and E F Wheelahan KC with J D Phillips for the appellant (instructed by Australian Government Solicitor)

A J de Wijn SC with P L Jeffreys and T J Graham for the respondents (instructed by Arnold Bloch Leibler)

CATCHWORDS

Commissioner of Taxation v Bendel

Income tax (Cth) – Assessable income – Distributions to entities connected with private company – Loans treated as dividends under s 109D of *Income Tax Assessment Act 1936* (Cth) ("ITAA 1936") – Where deed of settlement of discretionary trust required amounts set aside for any beneficiary to be held on separate trust – Where trustee made resolutions to set aside amounts of net income for corporate beneficiary – Where corporate beneficiary had unpaid present entitlements – Whether resolutions to set aside amounts effected distributions – Whether amounts set aside sufficiently certain for creation of separate trusts – Whether relationship of debtor and creditor arose between trustee and corporate beneficiary – Whether unpaid present entitlements were loans for purposes of s 109D(3) of ITAA 1936.

Words and phrases – "admission of indebtedness", "advance of money", "corporate beneficiary", "debtor/creditor relationship", "deemed dividend", "discretionary object", "discretionary trust", "distribution", "financial accommodation", "in substance effects a loan of money", "loan", "loan of money", "making a loan", "net income", "obligation of repayment", "obligation to repay", "pending payment", "private company beneficiary", "repay", "same amount", "separate trust", "set aside", "time to pay", "unconditional duty to pay", "unpaid present entitlement".

Income Tax Assessment Act 1936 (Cth), ss 44(1), 95, 97, 109C, 109D, 109E, 109F, 109XA, 109XB, 109ZD.
Income Tax Assessment Act 1997 (Cth), ss 6-25, 104-55, 960-100(1).

1 GAGELER CJ, GORDON, EDELMAN, STEWARD AND GLEESON JJ. The assessable income of a resident shareholder includes dividends paid by a company to that shareholder.[1] Division 7A of Pt III of the *Income Tax Assessment Act 1936* (Cth) ("the 1936 Act"), headed "Distributions to entities connected with a private company", deems certain other amounts to be dividends. It was enacted "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".[2]

2 To that end, within Div 7A, s 109D deems certain amounts falling within the definition of "loan" in s 109D(3) to be dividends. "[L]oan" is defined in s 109D(3) relevantly to include "a provision of credit or any other form of financial accommodation" and "a transaction (whatever its terms or form) which in substance effects a loan of money".[3]

3 In each of the years of income ended 30 June 2014 to 30 June 2017, Gleewin Pty Ltd ("Gleewin") as trustee of the Steven Bendel 2005 Discretionary Trust ("the 2005 Trust") resolved to "set aside" for the benefit of one or each of its discretionary objects – the taxpayers, Gleewin Investments Pty Ltd ("Gleewin Investments") and Mr Bendel – defined percentages of the net income of the 2005 Trust ("the Resolutions"). Under the terms of the 2005 Trust, the amounts set aside were required to be held on separate trusts. Gleewin did not pay to Gleewin Investments those amounts set aside by the Resolutions and held on separate trust, and Gleewin Investments did not, at any relevant time, call for payment to be made.

4 The Commissioner issued notices of amended assessment to Gleewin Investments for those years of income, relying upon s 109D of the 1936 Act. The Commissioner contended that the amounts set aside for Gleewin Investments by the Resolutions (called "unpaid present entitlements") constituted the "provision of credit or any other form of financial accommodation" by Gleewin Investments to Gleewin as trustee, or were "in substance" loans of money from Gleewin Investments to Gleewin as trustee, and thus were each a "loan" as defined in s 109D(3) in Div 7A.

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1 *Income Tax Assessment Act 1936* (Cth), s 44(1)(a).

2 Australia, Senate, *Taxation Laws Amendment Bill (No 3) 1998*, Explanatory Memorandum at 129.

3 See below at [61].

5 This appeal raised directly the application of Div 7A and, in particular, the construction of the expanded definition of "loan" in s 109D(3). However, during the initial hearing of the appeal in this Court, preliminary questions arose about the proper construction and legal effect of the Resolutions, in particular: (1) whether the Resolutions effected a setting aside and then a distribution of the unpaid present entitlements; (2) if the Resolutions effected a setting aside of the unpaid present entitlements, and no more, whether separate trusts were created in respect of those amounts; and (3) whether the Resolutions gave rise to a debtor/creditor relationship between Gleewin and Gleewin Investments. The Solicitor-General of the Commonwealth, appearing for the Commissioner, accepted that these questions were appropriate to be resolved in order to determine the appeal. The initial hearing was adjourned and the parties filed supplementary written submissions which addressed them. On the adjourned hearing of the appeal, these questions were the subject of oral argument.

6 For the reasons which follow, and contrary to the Commissioner's submissions in respect of the preliminary questions, the Resolutions effected a setting aside of the unpaid present entitlements, but not a distribution of those amounts. The unpaid present entitlements were thereafter held on separate trusts created by the Resolutions for Gleewin Investments, and no debtor/creditor relationship arose between Gleewin and Gleewin Investments. The Commissioner's argument that the expanded definition of "loan" in s 109D(3) encompasses the circumstances wherein a beneficiary does not insist on being paid an unpaid present entitlement by the trustee must be rejected. The Commissioner's appeal must be dismissed.

The relevant facts

The Bendel group

7 The Bendel group comprised several entities which conducted an accounting and tax agent practice and invested in commercial property syndicates. It included Gleewin, Gleewin Investments and the 2005 Trust. Mr Bendel owned all of the issued shares in each of Gleewin and Gleewin Investments and was the sole director and secretary of each company. He and Gleewin Investments were discretionary objects of the 2005 Trust. Since Mr Bendel controlled each of Gleewin and Gleewin Investments, it was not disputed that each company had knowledge of the affairs of the other, and of Mr Bendel's own affairs and circumstances.

8 Gleewin Investments held assets comprising cash on hand, outstanding entitlements to income from Gleewin as trustee, and prepayments of income tax.

It derived income from trust distributions it received. And from time to time, Mr Bendel procured Gleewin as trustee to pay some of Gleewin Investments' expenses. Importantly, pursuant to s 97(1)(a) of the 1936 Act, Gleewin Investments included in its assessable income all of the net income set aside in its favour by Gleewin as trustee of the 2005 Trust. Payments of income tax were sourced from Gleewin's bank account.

Deed of settlement of the 2005 Trust

9 The 2005 Trust was established by a deed of settlement made on 24 June 2005 ("the 2005 Trust Deed"). It is described as a "discretionary trust". That usage is "descriptive rather than normative"[4] and is an expression that has sometimes been used loosely to describe cases where there is a power rather than a duty to distribute[5] and "the power involved is a trust power rather than a bare power".[6] The terms of the 2005 Trust Deed are important. Although the 2005 Trust describes itself as a "discretionary trust" there is no duty to distribute any of the income of the capital until a "Vesting Day" which, according to the Schedule to the deed, defaults to a date in the year 2085. By cl 3(1)(a) of the 2005 Trust Deed, the trustee has a discretion to "determine ... to pay apply or set aside [all or any part or parts of the net income of the Trust Fund] to or for any one or more" of the discretionary objects.

10 The terms used in cl 3(1)(a) are defined in the 2005 Trust Deed, to an extent. The term "pay" is defined in cl 1(18) to include "transfer convey and assign". The term "set aside" is also defined, in cl 1(19), to include, "in relation to a beneficiary ... placing sums to the credit of such beneficiary in the books of account of the Trust Fund"; the term "apply", however, is not defined. By cl 3(2)(c), the term "net income" is defined, by reference to s 95 of the 1936 Act, essentially as the total assessable income of the trust estate calculated under the 1936 Act as if the trustee were a taxpayer, less all allowable deductions.[7]

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4 See *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 234 [8].

5 Hudson, McFarlane and Mitchell, *Hayton, McFarlane and Mitchell on Equity and Trusts*, 15th ed (2022) at 302 [7-124].

6 *Federal Commissioner of Taxation v Vegners* (1989) 90 ALR 547 at 552.

7 See below at [48].

11 Relevantly, cl 3(2)(c) addresses how a determination made pursuant to cl 3(1)(a) "may be effectually made and satisfied" by resolution by the trustee with reference to "a sum out of or portion of the net income". A series of powers are then conferred, exercisable by individual resolution. The trustee may allocate that sum to a beneficiary; or it may otherwise deal with the sum for the benefit of a beneficiary; or it may place such amount to the credit of a beneficiary in the books of account of the 2005 Trust; or it may draw a cheque made payable to or for the credit or benefit of a beneficiary; or it may pay the sum over to or for the benefit of a beneficiary in such manner and to such person on behalf of the beneficiary as the trustee thinks fit.

12 Clause 3(5) is important, as it addresses specifically what is to occur if there is a determination to set aside a portion of net income. It stipulates that such net income is to be held in a "separate trust ... pending payment" and invested in the meantime in the manner set out in cl 6(5). Clause 3(5) relevantly provides:

> "Any amount set aside for any beneficiary and any amount held by the [t]rustee in trust for any person ... shall cease to form part of the Trust Fund and upon such setting aside or becoming subject to such trust (as the case may be) shall thenceforth be held by the [t]rustee on a separate trust for such person absolutely with power to the [t]rustee pending payment over thereof to such person to invest or apply or deal with such Fund or any resulting income therefrom or any part thereof in the manner provided for in Clause 6(5) hereof."

13 Clause 6(5) applies "where the [t]rustee holds any amount upon separate trust for any person" pursuant to cl 3(5). It confers on the trustee a power to invest on behalf of the beneficiary the amount set aside in any of the investments "authorised" (by cl 7 of the 2005 Trust Deed) "in such manner as the [t]rustee in its absolute discretion thinks fit".[8]

Assets of the 2005 Trust

14 The assets of the 2005 Trust comprised interests in other entities in the Bendel group which, amongst other things, invested in commercial property syndicates. The assets comprised the ownership of assets including shares in certain companies in the Bendel group, as well as Gleewin as trustee of the 2005 Trust itself being a beneficiary of certain trusts. The 2005 Trust received income

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8 It was accepted that the loans made by Gleewin as trustee to Mr Bendel were authorised investments of the kind referred to in cl 6(5).

from these assets. It also lent money directly to Mr Bendel and to Gleewin Investments, and indirectly by payment of Gleewin Investments' expenses.

15 During the years of income ended 30 June 2013 to 30 June 2016, Gleewin as trustee derived interest of $6,396, trust distributions of $2,192,177, and fully franked dividends of $814,932. However, as some trust distributions were unpaid, and some dividends were not paid and recorded as still owing, or were lent back, Gleewin as trustee in fact only received trust distributions of $1,631,132 and dividends of $616,864. During these years, Gleewin as trustee did not use this income received to make any new or additional material investments. Instead, in each year it set aside all of its income in favour of Gleewin Investments and Mr Bendel, less deductible expenses totalling $451,815. The accounts for the year of income ended 30 June 2017 record that the 2005 Trust received trust distributions of $731,561 and dividends of $24,955, and incurred expenses of $188,054.

16 At no stage did Gleewin as trustee report any asset or income held separately, nor did it purport to alienate or create any interest in any identified asset, and it did not, by reason of the operation of cl 3(5) of the 2005 Trust Deed, separately account for the net income it set aside. The Commissioner relied upon this fact to deny the existence of separate trusts over the net income set aside in each year in favour of Gleewin Investments. He argued that any such trust must also fail because its property could not be identified with certainty. No asset, or interest in an asset, of the 2005 Trust, it was said, could be identified as being the subject of this separate trust. And moreover, he said, "income" is not property. These contentions are addressed below.

17 Two further matters should be observed. First, Gleewin Investments had never called for payment of any of the net income set aside for its benefit in any of the years in question. It remained relevantly passive. Secondly, that Gleewin Investments did not call for payment is hardly surprising given that, as described above, much of the net income set aside in favour of Gleewin Investments was, in fact, lent to Mr Bendel, who controlled Gleewin and Gleewin Investments.

The Resolutions

18 In each of the years of income ended 30 June 2013 to 30 June 2017, Gleewin as trustee resolved to set aside all of the net income of the 2005 Trust, by setting it aside in favour of Gleewin Investments and/or Mr Bendel. At least in the years of income ended 30 June 2014 to 30 June 2017, the Resolution was in the following form:

> "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 ... 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:
>
> ..."

19 Thereafter followed, within each of the Resolutions, a table dividing up as between Gleewin Investments and Mr Bendel all of the net income of the trust, which was comprised of three classes, namely, capital gains, franked dividends and other income. The amounts set aside in favour of Gleewin Investments in the years of income ended 30 June 2013 to 30 June 2016 were as follows:

Year of income ended 30 June	**Net income set aside in favour of Gleewin Investments**
2013	$236,251
2014	$149,513
2015	$840,529
2016	$433,188

20 At least in the years of income ended 30 June 2014 to 30 June 2017, the Resolution went on to resolve as follows:

> "Also RESOLVED THAT for the avoidance of doubt, regardless of any adjustment to the income of the Trust, the income of the Trust shall be distributed as specified above."

21 It was not in dispute that the effect of the Resolution was to make Gleewin Investments and Mr Bendel presently entitled to a "share of the net income" for the purposes of Div 6 of Pt III of the 1936 Act. Each object acquired an interest in

that income and a legal right to demand and then receive payment.[9] As such, each object was required to include their "share" in their assessable income and pay tax accordingly.[10]

The decisions below

Administrative Appeals Tribunal

22 As described above, the Commissioner issued amended assessments to Gleewin Investments for the years of income ended 30 June 2014 to 30 June 2017 relying upon s 109D of the 1936 Act. Gleewin Investments (and Mr Bendel) lodged objections to the amended assessments issued by the Commissioner. The Commissioner disallowed these objections, and Gleewin Investments (and Mr Bendel) sought review of those objection decisions in the Administrative Appeals Tribunal.

23 In the Tribunal, Gleewin Investments contended that separate trusts had been created over the net income set aside in favour of Gleewin Investments in each year of income. The Tribunal rejected that submission and decided that it was "not possible to identify any asset or property held on any separate trust"[11] so that each Resolution must be interpreted as creating a right or entitlement for each beneficiary to that distribution and a corresponding obligation on Gleewin as trustee. However, the Tribunal also rejected the Commissioner's contention that, by giving Gleewin time to pay the net income, Gleewin Investments had made a "provision of credit or any other form of financial accommodation", or had made, "in substance", loans of money for the purposes of s 109D(3). The Tribunal decided that the unpaid present entitlements of Gleewin Investments were, in substance, lent to Mr Bendel, and as such should have been taxed in the hands of Mr Bendel in accordance with the provisions of Subdiv EA of Div 7A, as

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9 *Harmer v Federal Commissioner of Taxation* (1991) 173 CLR 264 at 271. See also *Federal Commissioner of Taxation v Carter* (2022) 274 CLR 304 at 309-310 [1]-[3].

10 1936 Act, s 97(1)(a); *Federal Commissioner of Taxation v Bamford* (2010) 240 CLR 481.

11 *Re Bendel and Federal Commissioner of Taxation* (2023) 117 ATR 464 at 490 [79].

described below.[12] The Commissioner, the Tribunal concluded, had taxed the wrong taxpayer – he should have assessed Mr Bendel.

24 The Tribunal was also concerned that the outcome sought by the Commissioner would result in the taxation of the same amount twice: that the net income would be taxed first in the hands of Gleewin Investments in accordance with Div 6 of Pt III of the 1936 Act, and then taxed again in the following year of income as a deemed dividend – either in the hands of Gleewin as trustee or in the hands of a beneficiary of the 2005 Trust (depending on how the net income of the trust was distributed) – pursuant to Div 7A of Pt III of the 1936 Act. The Tribunal explained that in circumstances where a corporate beneficiary has an unpaid present entitlement, and the trustee has lent an amount to a shareholder of the corporate beneficiary, if that shareholder, or an associate of that shareholder, was a beneficiary of the trust and was properly taxed under Div 6, that shareholder, or associate of that shareholder, would have the same amount included in their assessable income in two consecutive years of income. The Tribunal considered that the shareholder in such a case (here, Mr Bendel) would not be saved by s 6-25 of the *Income Tax Assessment Act 1997* (Cth) ("the 1997 Act"). Such an outcome was considered to be "problematic or inappropriate".[13] In such circumstances, the objection decisions were set aside and Gleewin Investments' (and Mr Bendel's) objections were remitted to the Commissioner for reconsideration.

Full Court of the Federal Court of Australia

25 The Commissioner appealed to the Full Court of the Federal Court of Australia. That appeal was unanimously dismissed. The Full Court began its reasoning with an analysis of what ordinarily constitutes a "loan". Following the judgment of Sackville and Lehane JJ in *Commissioner of Taxation v Radilo Enterprises Pty Ltd* ("*Radilo*"),[14] the Full Court decided that "[t]he essence of a

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12 See below at [79]-[84].

13 (2023) 117 ATR 464 at 495 [98].

14 (1997) 72 FCR 300 at 313.

loan" was the "payment of money to or for someone on the condition that it will be repaid".[15]

26 The Full Court accepted the joint position of the parties that the Resolutions created a debtor/creditor relationship as between Gleewin and Gleewin Investments. It also accepted that the definition in s 109D(3) expanded upon the ordinary meaning of the word "loan", but nonetheless decided that a "loan" had to conform to the essence of a loan, as described in *Radilo*. That definition did not embrace every debtor/creditor relationship.[16] In that respect, the Full Court observed that the definitions of "loan" in s 109D(3)(a), (c) and (d) each encapsulated in some way the concept of repayment. In that context, a construction of s 109D(3)(b) which did not also include that feature was to be rejected.[17] Their Honours thus reasoned:[18]

> "Each of s 109D(3)(a), (c) and (d) encapsulate a concept of repayment. ... 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 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."

The Full Court concluded that s 109D(3)(b) should "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".[19]

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15 *Federal Commissioner of Taxation v Bendel* (2025) 307 FCR 544 at 557 [60], citing Pannam, *The Law of Money Lenders in Australia and New Zealand* (1965) at 6. See below at [67].

16 (2025) 307 FCR 544 at 563-564 [93].

17 (2025) 307 FCR 544 at 559 [70].

18 (2025) 307 FCR 544 at 559 [70] (emphasis in original).

19 (2025) 307 FCR 544 at 561 [79].

27 The Full Court, like the Tribunal, was also concerned about the double taxation consequences of accepting the Commissioner's case. Their Honours reasoned:[20]

> "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."

The legal effect of the Resolutions

28 Departing from the common position of the parties before the Full Court and addressing the questions which he accepted were appropriate to be resolved in order to determine the appeal to this Court, the Commissioner argued that the Resolutions not only effected a setting aside of the unpaid present entitlements but, in fact, also effected a distribution of those amounts. He contended that the effect of the Resolutions in each year of income was to create an unconditional duty to pay Gleewin Investments the unpaid present entitlements, and that, as such, a debtor/creditor relationship arose between Gleewin and Gleewin Investments. Furthermore, the accounts of the 2005 Trust were said to evidence an admission of the existence of such an obligation. In the alternative, the Commissioner argued that if the Resolutions effected only a setting aside, the unpaid present entitlements were not held on separate trust for Gleewin Investments because those trusts lacked certainty. For the reasons that follow, each of those contentions must be rejected, with the effect that Gleewin Investments did not "loan" the unpaid present entitlements to Gleewin for the purposes of s 109D.

When does a trustee become a debtor of a beneficiary?

29 One starts with the basal proposition that when there is an unconditional obligation to make payment – whether because a trustee resolves to distribute income to a beneficiary and there remains nothing for the trustee to do except to

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20 (2025) 307 FCR 544 at 562-563 [88].

carry out payment of money, or because a beneficiary entitled to do so invokes the rule in *Saunders v Vautier*,[21] or because the trustee admits a debt to a beneficiary – the beneficiary may sue for the money in an action for money had and received. At that point, either the relationship between the trustee and beneficiary has become one of debtor and creditor, or such a relationship then exists in addition to any ongoing equitable relationship between those parties. As Gummow J observed in *Roxborough v Rothmans of Pall Mall Australia Ltd*:[22]

> "With respect to express trusts it was settled by 1852, when *Edwards v Lowndes* was decided, that it was only at the stage when there remains nothing to the trustee to execute except the payment over of money to the beneficiary, or the trustee admits the debt, that an action for money had and received might lie at the suit of the beneficiary against the trustee; in other respects, in the courts of law the trustee was treated as the absolute owner and the beneficiary's remedy was exclusively in a court of equity which might give effect to equitable set-offs and other equitable defences available to the trustee."

30 In that respect, the Commissioner placed particular reliance on the following observation of Gageler J in *Fischer v Nemeske Pty Ltd*:[23]

> "[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."

31 A resolution to distribute income in the true sense of an unconditional undertaking to pay to the beneficiary or object of a trust will create a debtor/creditor relationship. But whether or not a resolution by a trustee is such a distribution resolution turns upon the terms of the relevant trust deed, and upon the

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21 (1841) Cr & Ph 240 [41 ER 482].

22 (2001) 208 CLR 516 at 541 [67] (footnote omitted). See also *Pardoe v Price* (1847) 16 M & W 451 at 458-459 [153 ER 1266 at 1269]; *Edwards v Lowndes* (1852) 1 E & B 81 at 89 [118 ER 367 at 370]; *Turner v New South Wales Mont de Piete Deposit and Investment Co Ltd* (1910) 10 CLR 539 at 546; *Chianti Pty Ltd v Leume Pty Ltd* (2007) 35 WAR 488.

23 (2016) 257 CLR 615 at 653 [105].

particular language of the resolution in question,[24] as well as, in a given case, upon the actions of the beneficiary in question. There are several cases which illustrate this point, each of which highlights the importance of the language of the resolution in question.

32 In *Fischer*, the resolution which gave rise to a debtor/creditor relationship was in the following terms:[25]

> "RESOLVED that pusuant [sic] to the powers conferred on the Company as Trustee in the Deed of Settlement of the Nemes Family Trust: —
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> That a final distribution be and is hereby made out of the asset revaluation reserve for the period ending 30th September, 1995 [sic] and that it be paid or credited to: — the beneficiaries in the following manner and order:
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> The entire reserve if any, to be distributed to: —
>
> [the named beneficiaries]
>
> as joint tenants."

33 The language of a "final distribution be and is hereby made" in the resolution in *Fischer* may be contrasted with the words of cl 3(5) here and the substantive operation of the Resolutions to set aside net income and to subject that income to the creation of separate trusts, with a trustee power to invest. That is so notwithstanding the heading of the Resolutions in this case, namely "Distribution of Income". Moreover, the parties in *Fischer* executed a deed of charge to secure performance of the trustee's promise, with the recitals to that deed referring to the trustee's indebtedness to the beneficiaries.[26]

34 In *Chianti Pty Ltd v Leume Pty Ltd*,[27] the resolution of the trustee that was held in context to have given rise to a debtor/creditor relationship was expressed

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24 *Fischer v Nemeske Pty Ltd* (2016) 257 CLR 615 at 650-651 [98], [100]; *Aussiegolfa Pty Ltd v Federal Commissioner of Taxation* (2018) 264 FCR 587 at 644 [206(f)], 647 [219]; cf *Oswal v Federal Commissioner of Taxation* (2013) 233 FCR 110.

25 (2016) 257 CLR 615 at 621 [2] (footnote omitted).

26 (2016) 257 CLR 615 at 622 [6].

27 (2007) 35 WAR 488.

in terms that income "be applied" pursuant to the relevant clause of the trust deed to specified beneficiaries in specified amounts or proportions and that the "application [be] effected by crediting the said amounts to such beneficiaries in the books of the trust".[28]

35 In contrast, there is the decision of Edmonds J in *Oswal v Federal Commissioner of Taxation*.[29] There, a resolution by the trustee created a new trust, but no debtor/creditor relationship arose. That case concerned an exercise of a power contained in a trust deed which authorised the trustee to "appoint, apply, or distribute, the whole or any part of the capital of the [trust fund] to or for a [beneficiary] for the [beneficiary's] own use and benefit".[30] The trustee resolved to "appoint for the absolute benefit of" certain named beneficiaries a part of the corpus of the trust comprising shares in a company.[31] The resolution went on to state that "[h]enceforth the corpus so appointed and income or accretion of capital [therefrom] shall be held on separate trust and for the absolute benefit of the named beneficiaries".[32]

36 At issue was whether the resolution had created a new trust over the shares, or, more particularly, whether it constituted the creation of a trust by declaration for the purposes of CGT event E1.[33] Relying on the speech of Lord Wilberforce in *Roome v Edwards*,[34] the taxpayer contended that only a sub-fund within a continuing trust had been created.[35] Edmonds J rejected that submission. Given the language of the resolution, his Honour concluded that a new trust had been created,

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28 (2007) 35 WAR 488 at 509 [64], 514-515 [77]. See also *Leume Pty Ltd v Chianti Pty Ltd* [2006] WADC 95 at [19].

29 (2013) 233 FCR 110.

30 (2013) 233 FCR 110 at 116 [23].

31 (2013) 233 FCR 110 at 114 [14].

32 (2013) 233 FCR 110 at 114 [14].

33 1997 Act, s 104-55.

34 [1982] AC 279.

35 (2013) 233 FCR 110 at 119 [33], quoting [1982] AC 279 at 292-293.

even though the shares had previously been held on a different trust.[36] The creation of a new trust in such circumstances is not, without more, the creation of a debtor/creditor relationship.[37]

The effect of the Resolutions

37 In light of the foregoing cases, did the Resolutions here create an unconditional duty to pay Gleewin Investments the unpaid present entitlements? Correctly construed, they did not. Prior to the Resolutions, Gleewin Investments was the object of a (discretionary) fiduciary power. The 2005 Trust had not "vested". As an object of a fiduciary power, like the object of a discretionary trust, Gleewin Investments' "sole interest, if it be an 'interest'" was to require Gleewin "to exercise, in bona fide, [its] discretion as to how [the income] shall be distributed".[38]

38 The Resolutions provided that the amounts were "hereby set aside". The Resolutions were made pursuant to the power in cl 3(1)(a), read with cl 3(2)(c), not to "pay" or "apply" net income but to "set aside" such income. The term "set aside", as already mentioned, is defined in the 2005 Trust Deed to include the crediting of sums to a beneficiary in the books of account, rather than actually distributing such sums.[39] Each of the Resolutions triggered an application of cl 3(5). That had three consequences. First, the amounts set aside "cease[d] to form part of the Trust Fund". Secondly, "upon such setting aside" the amounts "thenceforth" came to be held by the same trustee "on a separate trust". And thirdly, "pending payment over thereof", the trustee had power "to invest or apply or deal with" the amounts set aside. The legal effect was therefore that the amounts set aside were no longer impressed only with a fiduciary power in favour of objects including Gleewin Investments but became the subject of a fixed trust (the separate trusts) with Gleewin Investments as a beneficiary and with a power for Gleewin to invest, apply or deal with the funds subject to that trust for the benefit of Gleewin Investments.

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36 (2013) 233 FCR 110 at 127 [61]; cf *Commissioner of State Revenue v Lam & Kym Pty Ltd* (2004) 10 VR 420.

37 *Commissioner of Inland Revenue v Ward* [1970] NZLR 1 at 30.

38 *Gartside v Inland Revenue Commissioners* [1968] AC 553 at 606.

39 See above at [10].

39 It follows that the setting aside of net income under the deed did not create an unconditional duty to pay that income. That was not what was intended. In that respect, the phrase "pending payment" in cl 3(5) is significant. It signifies that following the creation of the separate trust, there is a state of affairs which is anterior to payment, namely the holding of income by the trustee on that separate trust, and its investment in the meantime, and the holding of accretions to that trust, whether they be capital or income, subject to the same separate trust. Moreover, whilst invested, the trustee of this separate trust has a continuing right of indemnity.[40]

40 The phrase "pending payment" is significant for another reason. It makes clear that something more must occur before payment must be effected, and before there arises an unconditional duty to pay. If the trustee does not choose to pay, and unless it otherwise admits an indebtedness to the beneficiary, what must occur is a call for payment by the beneficiary of the new trust in circumstances where the beneficiary is entitled to call.[41] Until then, the continued holding of the net income on a separate trust, and the investment of that income, is mandated by the deed.

41 The Commissioner also suggested that the effect of each of the Resolutions was to constitute a determination to pay, and not just set aside, the net income to Gleewin Investments (and to Mr Bendel), relying upon the phrase "shall be distributed" and the fact that the Resolutions were labelled "Distribution of Income". The 2005 Trust Deed does not use the word "distribute" in describing the powers of the trustee under cl 3. In such circumstances, the use of that word in the Resolutions should be seen as a generic way of describing one of the three ways of dealing with the money comprising the trust's net income in fact authorised by cl 3(1)(a) – namely, to "pay apply or set aside" the net income. Here, the method chosen was to set aside the net income, and no more. Put in different terms, it is apparent by the use of future tense ("shall be distributed"), and the words "for the avoidance of doubt", that the reference in the Resolutions to distribution is recording an obvious future consequence of setting aside the amounts. It does not change the fact that, until the call for payment, Gleewin retained the amounts and had no unconditional duty to pay that income. The fact that the Resolutions are labelled "Distribution of Income" cannot change the fact that the text provided for setting aside, not distribution. The label "Distribution of Income" can be read as

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40 *Trustee Act 1958* (Vic), s 36(2); cf *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98.

41 *Saunders v Vautier* (1841) Cr & Ph 240 [41 ER 482]; cf *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98.

referring to distribution in a general sense – namely, the obvious future consequence of the setting aside – but it cannot alter the express operation of the Resolutions.

42 For these reasons, each of the Resolutions did not create an unconditional duty to pay Gleewin Investments.

Separate trusts

43 Given that Gleewin did not have an unconditional duty to pay Gleewin Investments, by the terms of cl 3(5) of the 2005 Trust Deed the amounts set aside for Gleewin Investments thereafter ceased to form part of the general fund and were held by Gleewin on separate trusts.

44 The Commissioner nonetheless contended that any separate trust failed because the subject matter of each such trust was uncertain. That was because, it was said, Gleewin as trustee had not identified, for each year of income, the specific property of that putative trust and had not otherwise segregated particular assets of the 2005 Trust as being subject to this new arrangement. The Commissioner relied upon the dissenting judgment of Turner J in *Commissioner of Inland Revenue v Ward*,[42] a 1969 decision of the Court of Appeal of New Zealand. That case concerned a resolution for income of a trust in the sum of £3,540 "[t]o be held for the credit of my four children in equal shares". This resolution was carried into effect in the books of account of the trust, but no actual payment was made until some years later.[43]

45 Turner J held that this gift had failed, and no separate trust had been created in respect of the sum. His Honour reasoned as follows:[44]

> "One of the classic 'three certainties' which must necessarily characterise, without exception, the creation of every valid trust is certainty in the property made the subject of the trust. ... It is essential, if there is to be a trust, that the beneficiaries – and indeed the Court – should at any time be able to say of any particular property, that it is part of the trust property or that it is not."

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42 [1970] NZLR 1.

43 [1970] NZLR 1 at 7.

44 [1970] NZLR 1 at 21.

Turner J then posed the question: which of the assets were the subject of the alleged separate trust? His Honour answered that question by observing that it was "quite meaningless to say '£3540 out of the assets was made subject to the trust'" when the assets of the trust variously constituted land, sundry debts and money in bank and solicitors' trust accounts. That was especially so given that the amount of the distribution exceeded the amount of cash held by the trustee. The amount of £3,540 was just "not available".[45]

46 Turner J's dissenting reasons were inconsistent with the reasons of the majority in *Ward*.[46] But, more fundamentally, the reasons of Turner J were based on the shortfall of cash held by the trustee; if there had been more than £3,540 held by the trustee then, his Honour accepted, "it might have been possible to say" that a trust was created.[47]

47 In *Hunter v Moss*,[48] Mr Moss had declared himself to hold on trust for Mr Hunter 50 of his 950 shares in Moss Electrical Co Ltd. The Court of Appeal of England and Wales held, in an *ex tempore* decision, that a valid trust had been created over 50 of those shares. In *White v Shortall*,[49] the Supreme Court of New South Wales disagreed with that outcome. Campbell J observed that the Court of Appeal's reasoning simply assumed, or asserted, "that it is possible for a person to declare himself trustee of a particular number of the shares he holds in a particular company".[50] The Full Court in *Federal Commissioner of Taxation v Elecnet (Aust) Pty Ltd*[51] was also critical of the reasoning in *Hunter v Moss*. Pagone and Edelman JJ described it as "very controversial".[52] It can be accepted, however, that the declaration of trust in that case was certain if characterised as "Moss declaring

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45 [1970] NZLR 1 at 21-22.

46 See, especially, [1970] NZLR 1 at 30.

47 [1970] NZLR 1 at 22.

48 [1994] 1 WLR 452; [1994] 3 All ER 215.

49 (2006) 68 NSWLR 650.

50 (2006) 68 NSWLR 650 at 683 [190].

51 (2015) 239 FCR 359.

52 (2015) 239 FCR 359 at 374 [82].

himself the trustee of one nineteenth (ie 50/950) of *all* his shares in favour of Hunter".[53]

48 Here, the Resolutions identified with sufficient certainty the property which would be the subject of the separate trusts created by setting aside all of the net income of the 2005 Trust in defined percentages as between Gleewin Investments and Mr Bendel in each of the years of income in question. This is because such property was ascertainable from the term "net income".[54] That term was defined by reference to s 95 of the 1936 Act. Section 95(1) relevantly provides:

> "***net income***, in relation to a trust estate, means the total assessable income of the trust estate calculated under this Act as if the trustee were a taxpayer in respect of that income and were a resident, less all allowable deductions ..."

There is nothing ambiguous or uncertain about the identification of the property the subject of the trust using this language.

49 An illustration of certainty of the subject matter of a trust where that subject matter is ascertained by reference to a clear concept is the decision of this Court in *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In liq)*.[55] That case concerned what is sometimes called a "*Romalpa* clause",[56] whereby ownership of goods sold is retained by the seller until their account is fully paid. In that case, it was a term of sale that if the buyer used steel sold to it in the manufacture or construction of goods, or supplied it to a third party for such use, the buyer was required to hold on trust for the seller such "proceeds" of manufacture or construction as related to the steel supplied which equalled, in dollar terms, the

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53 (2015) 239 FCR 359 at 374 [82] (emphasis in original), citing Hayton, "Uncertainty of Subject-Matter of Trusts" (1994) 110 *Law Quarterly Review* 335 at 336.

54 cf *Herdegen v Federal Commissioner of Taxation* (1988) 84 ALR 271, as explained by Campbell J in *White v Shortall* (2006) 68 NSWLR 650 at 695 [234].

55 (2000) 202 CLR 588.

56 *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676; [1976] 2 All ER 552.

amount owing to the seller. This trust did not fail for want of certainty. A majority of this Court (Gaudron, McHugh, Gummow and Hayne JJ) said:[57]

> "In the present case, it is no objection to the effective creation of a trust that the property to be subjected to it is identified to be a proportion of the proceeds received by the buyer; a proportion referable to moneys from time to time due and owing but unpaid by the buyer to the seller.
>
> In respect of those proceeds from time to time bound by the trust, there is nothing in the terms of the trust to negative the ordinary consequence that the trustee (the buyer) is bound to apply that sum by accounting to or at the direction of a beneficiary (the seller)."

50 In the same way, the net income of the 2005 Trust is a concept which enables clear identification of a sum of money which would be held by Gleewin in each year. The rights which were the subject matter of that declaration, and from which the net income would be calculated, were in the form of: (1) the money comprising receipts from the 2005 Trust's own investments as interest, trust distributions or dividends, less Gleewin's expenses; and/or (2) debts, being choses in action, representing unpaid income or dividends, both of which were included in the calculation of the net income of the trust. The Commissioner contended that it could not be said which of these, or which parts of these, comprised the fund of the putative separate trust. But the answer to that contention is that those receipts could be calculated at the year end as net income, and that that calculation identified the proportion of Gleewin's trust account which was the subject matter of the trust. Although the expenses would vary from year to year and the balance of Gleewin's trust account would fluctuate from year to year, the "net income" was ascertainable as a proportion of Gleewin's trust account at the end of each year of income. There was no suggestion on this appeal that Gleewin was in breach of trust by any failure to segregate the ascertained amounts of the separate trusts at each year end.

51 Much of the money that was the subject of the separate trusts was lent to Mr Bendel. Some of it was also used to pay expenses of Gleewin Investments. All of it was impressed, in each year of income in question, by a new separate trust, carved out of the general fund of the 2005 Trust. Depending on the terms of the

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57 (2000) 202 CLR 588 at 604 [30]-[31]. See also *Kauter v Hilton* (1953) 90 CLR 86 at 97; *Commissioner of Inland Revenue v Ward* [1970] NZLR 1 at 30; *In re Baron Vestey's Settlement* [1951] Ch 209 at 219-221; *Ellison v Sandini Pty Ltd* (2018) 263 FCR 460 at 496-497 [148].

Resolution in the year of income in question, a defined percentage of that trust property was held on separate trust in favour of Gleewin Investments, and a defined percentage was held on separate trust in favour of Mr Bendel. Whether the setting off of Mr Bendel's entitlement to that net income against his indebtedness to the 2005 Trust involved some form of a constructive calling by him to be paid that money need not be decided.

Did Gleewin's accounts constitute an admission of indebtedness?

52 The Commissioner also placed much reliance on the accounts prepared by Gleewin for the 2005 Trust in order to argue that a debtor/creditor relationship existed between Gleewin and Gleewin Investments. In particular, he relied upon the recording in each year of income of an entry in the liabilities of the balance sheet called "Beneficiaries Current Account". Under this label appeared the name Gleewin Investments and posted to it in each year of income were the amounts set aside in favour of that entity. This was said to be the expression of an admission by Gleewin as trustee that there existed as between it and Gleewin Investments an unconditional relationship of debtor and creditor.

53 Whether or not the accounts can be read as expressing such an admission is, of course, a question of fact. The fundamental difficulty for the Commissioner is that the Tribunal did not find as a fact that the accounts expressed such an admission, and the evidence before the Tribunal did not make an inference that the accounts expressed such an admission inevitable.

54 Some observations should be made about the accounts of the 2005 Trust and the Commissioner's contention. First, the "Beneficiaries Current Account" stood alone in the balance sheets. It was specifically not listed as a current liability or as a non-current liability but was otherwise apparently counted as a liability. Secondly, no expert evidence was led as to what the amounts included in the "Beneficiaries Current Account" represented. It may be accepted that the entries represented a diminishment in some way of the assets of the general fund of the 2005 Trust, but the legal form of that reduction is not revealed. Thirdly, no evidence was led as to whether this form of accounts complied with an applicable accounting standard and, if so, what that standard might have been. Fourthly, what is called the "Beneficiaries Current Account" might be no more than a recognition of the setting aside of an amount in a given year of income, subject to a separate trust, which could be called for at any time by Gleewin Investments. Given the equivocal nature of this evidence, the Commissioner cannot get from the accounts of the 2005 Trust the admission he seeks.

55 Another standalone account, also called "Beneficiaries Current Account", appeared under the assets of the balance sheets of the 2005 Trust. Under this label appeared the name Steven Bendel. Given that it was acknowledged that the 2005 Trust lent much of the income set aside for the benefit of Gleewin Investments to Mr Bendel, on this occasion it may be accepted that this account evidenced the balance at the end of each year of income of the amounts lent to him.

56 Finally, it is to be noted that the accounts of Gleewin Investments disclosed a current asset described as "Steven Bendel 2005 Discretionary Trust". Again, no expert evidence was led about this entry, and, absent such evidence or findings based on such evidence, one cannot be confident about what this entry, assuming it to have been correctly made, represents.

Conclusion

57 For the foregoing reasons, the effect of the Resolutions was not to make Gleewin as trustee a debtor of Gleewin Investments. Rather, as described above, the Resolutions set aside the net income of the 2005 Trust in favour of Gleewin Investments and created, in each year of income, a separate trust. The Resolutions gave rise to no action in money had and received unless and until Gleewin Investments called for its payment, or Gleewin admitted that it was indebted to Gleewin Investments. However, no call by Gleewin Investments nor any admission by Gleewin as trustee ever took place.

The construction of s 109D(3)

58 The Commissioner nevertheless contended that s 109D(3) expanded the meaning of a "loan" such that a beneficiary provides "financial accommodation" to a trustee (s 109D(3)(b)), or effects "in substance" a loan of money (s 109D(3)(d)), whenever the beneficiary does not insist on being paid an amount of an unpaid present entitlement. Such an arrangement, it was said, was capable of satisfying either or both of s 109D(3)(b) or s 109D(3)(d). For the reasons that follow, this contention must also be rejected.

The legislative framework

59 As explained above, the assessable income of a resident shareholder includes dividends paid by a company to that shareholder[58] and Div 7A of Pt III of the 1936 Act deems certain other transactions to be dividends. Three different

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58 1936 Act, s 44(1).

kinds of transfer of value are deemed by Div 7A to be dividends paid by a private company to a shareholder, as follows: the payment of an amount by a company to a shareholder, or shareholder's associate (s 109C); the loan of an amount by a company to a shareholder, or shareholder's associate (ss 109D, 109E); or the forgiveness by the company of an amount of debt owed by a shareholder, or shareholder's associate (s 109F).

60 Section 109D(1), which is the relevant operative provision, provides:

"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."

61 Section 109D(3) sets out an inclusive definition of what is a "loan" for the purposes of s 109D(1). It provides:

"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."

62 Section 109D(4) provides that a loan is made at the time the amount of the loan is paid to an entity by way of loan, or anything described in s 109D(3) "is done in relation to" the entity.

63 It is not in dispute that, for the purposes of s 109D: Gleewin Investments is a private company; Mr Bendel is a shareholder of that company; Gleewin as trustee is an associate of Mr Bendel; and the reference to an "entity" in s 109D includes a trust such as the 2005 Trust.[59] As explained above, the Commissioner relies in particular upon the definitions in ss 109D(3)(b) and 109D(3)(d).

64 Contextually, Subdiv EA of Div 7A of Pt III of the 1936 Act (headed "Unpaid present entitlements") is important. The Commissioner does not rely upon it even though it expressly addresses cases of unpaid present entitlements of a private company beneficiary. Under Subdiv EA, an amount is included in the assessable income of a shareholder of a private company, or in the assessable income of an associate of a shareholder of a private company, as if it were a dividend where that private company has an "unpaid present entitlement" to the income of a trust, and the trustee makes a payment or loan to, or forgives a debt of, the shareholder or associate of the shareholder of that private company. Subdivision EA was introduced by the *Tax Laws Amendment (2004 Measures No 1) Act 2004* (Cth). The Explanatory Memorandum to the Bill which became that Act describes Subdiv EA as applying when a private company is presently entitled to the income of a trust which has not been paid, and the trustee "shifts value" from the trust to a shareholder of that private company.[60] In the years of income in question much of the money to which Gleewin Investments was presently entitled was lent by the 2005 Trust to Mr Bendel. Thus, the facts here broadly correspond with the circumstances to which Subdiv EA is addressed.

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59 1936 Act, s 109ZD; 1997 Act, s 960-100(1).

60 Australia, House of Representatives, *Tax Laws Amendment (2004 Measures No 1) Bill 2004*, Explanatory Memorandum at 64 [8.6].

65 Section 109XA(2) in Subdiv EA deals with the shifting of value which takes place by way of a loan. It generally applies when: a trustee makes a loan to a shareholder of a private company (or an associate); that company is presently entitled to an amount of the net income of that trust; and all or part of that present entitlement remains unpaid. In such circumstances, under s 109XB the trust is treated as being a private company, and the shareholder (or associate) is deemed to have been paid a dividend. Section 109XA(2) relevantly provides:

> "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; ..."

66 By their notice of contention, the taxpayers also rely upon s 6-25 of the 1997 Act to contend that the Commissioner is here seeking wrongfully to tax the same amounts twice. Section 6-25(1) provides:

> "Sometimes more than one rule includes an amount in your assessable income:
>
> • the same amount may be ordinary income and may also be included in your assessable income by one or more provisions about assessable income; or
>
> • the same amount may be included in your assessable income by more than one provision about assessable income.
>
> However, the amount is included only once in your assessable income for an income year, and is then not included in your assessable income for any other income year."

Section 109D(3)(b)

67 The breadth of the phrase "financial accommodation" in s 109D(3)(b), according to the Commissioner's second case, is noteworthy. Any arrangement whereby a person does not insist upon the performance of an obligation owed to them would appear to be caught by his conception of a loan as financial accommodation. In that respect, the Commissioner emphasised that the inclusive definition of "loan" in s 109D(3) was intended to expand the traditional legal concept of a loan. As the Full Court observed, that traditional understanding was set out in the reasons of Sackville and Lehane JJ in *Radilo*, which quoted the following extract from Dr Pannam's book *The Law of Money Lenders in Australia and New Zealand*:[61]

> "A loan of money may be defined, in general terms, as a simple contract whereby one person ('the lender') pays or agrees to pay a sum of money in consideration of a promise by another person ('the borrower') to repay the money upon demand or at a fixed date. The promise of repayment may or may not be coupled with a promise to pay interest on the money so paid. The essence of the transaction is the promise of repayment."

68 Plainly, Gleewin Investments' forbearance here did not fall within this traditional understanding of a loan; indeed, it did not even meet the substance of such a concept, as no promise of repayment was ever given. The Commissioner nonetheless relied heavily upon the reasons of the Court of Appeal of the Supreme Court of New South Wales in *Prime Wheat Association Ltd v Chief Commissioner of Stamp Duties* ("*Prime Wheat*").[62] That case concerned certain agreements for the sale of shares whereby title to the shares passed upon the payment of a deposit, and thereafter the vendor was "to provide financial accommodation" to the purchasers by allowing them to pay the remainder of the purchase price in instalments over 20 years. The issue for determination was whether the agreements providing for deferred payment were a loan security attracting liability for stamp duty under the *Stamp Duties Act 1920* (NSW). That turned upon whether each one involved a "loan" as defined in that Act. That word was defined to include "an

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61 (1997) 72 FCR 300 at 313, quoting Pannam, *The Law of Money Lenders in Australia and New Zealand* (1965) at 6.

62 (1997) 42 NSWLR 505.

advance of money", and "advance" was defined to include "the provision or obtaining of funds by way of financial accommodation".[63]

69 Gleeson CJ (with whom Handley JA and Sheppard A-JA agreed on this point[64]) found that the agreements did not involve loans because there had been no advance of money. In a passage relied upon by the taxpayers, his Honour said:[65]

> "A sale on terms giving the purchaser time to pay is not a disguised loan. The essence of a loan is an obligation of repayment."

70 The Commissioner argued that the case was not concerned with the meaning of "financial accommodation" *simpliciter*, but with the meaning of that term when used with the phrase "the provision or obtaining of funds" in the definition of "advance"; that additional language does not appear in s 109D(3)(b). It followed, it was said, that the phrase "financial accommodation", without more, was a term that did not necessarily require any advancement of money but rather that its essential meaning was to give time to pay a financial obligation. In that respect, the Commissioner relied upon Gleeson CJ's observation that "[n]ot all forms of financial accommodation are loans".[66] His Honour said of the agreements in issue in *Prime Wheat*:[67]

> "There is no doubt, in the present case, that the transaction in question was one under which the vendor of the shares provided financial accommodation to the purchasers, or that the instrument in question made provision for such financial accommodation."

71 The Commissioner thus submitted that the reference to the "provision of credit or any other form of financial accommodation" in s 109D(3)(b) was necessarily a reference to any allowance of time within which to pay an amount or to perform an obligation. By its forbearance, it was said, Gleewin Investments

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63 *Stamp Duties Act 1920* (NSW), s 83(1).

64 (1997) 42 NSWLR 505 at 515, 518.

65 (1997) 42 NSWLR 505 at 512. See also *Tilley v Official Receiver in Bankruptcy* (1960) 103 CLR 529 at 534-535, 537.

66 (1997) 42 NSWLR 505 at 512.

67 (1997) 42 NSWLR 505 at 511.

provided financial accommodation to an associate of one of its shareholders, namely Gleewin. With respect, that submission is misconceived.

72 Contrary to the Commissioner's contentions, there is no "provision ... of financial accommodation" for the purposes of s 109D(3)(b) when a private company does nothing. The provision of financial accommodation requires some initial or anterior transfer of value or, put in different terms, the supply or grant of some sort of pecuniary assistance, involving some bilateral activity. As already mentioned, Div 7A is directed at the transfer of value from a private company to a shareholder, or an associate of that shareholder. Implicit in its structure is that the private company does something to effect that transfer of value. The text of s 109D supports that conclusion. Section 109D(1) applies when a private company "makes" a loan. That will take place, by the application of s 109D(3), when there is an "advance" of money, or a "provision" of financial accommodation, or a "payment" of an amount in defined circumstances, or a "transaction" which in substance effects a loan of money. Moreover, s 109D(4) states that a loan is made when the amount of the loan is "paid" or anything described in s 109D(3) is "done". In each case, the legislation requires that the private company is actively doing something to move value from it to someone, which is analogous with the payment of a dividend. But here, Gleewin Investments did nothing. It did not "provide" Gleewin with time to pay; there was nothing like the promise to transfer shares and to give time to pay by way of instalment as seen in *Prime Wheat*. Its mere inactivity cannot satisfy the language of "advance", "provision", "payment" or "transaction".

73 It follows that the Commissioner's case in reliance upon s 109D(3)(b) must fail.

Section 109D(3)(d)

74 The Commissioner's arguments as to whether Gleewin Investments' forbearance "in substance" effected a "loan of money" within the meaning of s 109D(3)(d) were no different from his arguments as to the breadth of "financial accommodation" within the meaning of s 109D(3)(b). It thus follows that his reliance on s 109D(3)(d) was also misplaced. Simply doing nothing, or acquiescing to the retention of funds, is not a transaction which in substance effects a loan. To find otherwise would be to ignore the word "transaction", which by its ordinary meaning refers to some interchange or interaction between entities.[68] That

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68 *Grimwade v Federal Commissioner of Taxation* (1949) 78 CLR 199 at 220; *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015) 254 CLR 489 at 503 [18].

conclusion is buttressed by the fact that the relationship between Gleewin as trustee and Gleewin Investments remained one of trustee and beneficiary and not one of debtor and creditor. Moreover, if the Commissioner were correct, it would mean that a private company beneficiary in the position of being able to invoke the rule in *Saunders v Vautier*[69] would be taken to have made a loan to a trustee for the purposes of s 109D(3) for the period during which the beneficiary could have called for the trust to be terminated, but did not. That is a highly improbable outcome.

Statutory context

75 There are strong contextual factors that reinforce the foregoing conclusion that Gleewin Investments' forbearance did not constitute a loan for the purposes of s 109D. Those factors support both the construction of s 109D(3) by the Full Court, and the conclusion of the Tribunal that the Commissioner has taxed the wrong taxpayer.

76 First, the references to a loan being "fully repaid" in s 109D(1)(b), to an amount of a loan that "has not been repaid" in s 109D(1AA), and to "an express or implied obligation to repay" in s 109D(3)(c), support the conclusion of the Full Court that, at least, the expanded notion of a loan in s 109D(3) still requires some form of an obligation to repay an amount or value supplied. That is expressly so in the terms of s 109D(3)(a), (c) and (d), and implicitly so in those of s 109D(3)(b). That is because, as *Prime Wheat* and *Radilo* confirm, the essence or substance of a loan is an obligation of repayment in some form.[70] In that respect, we differ from the Full Court to the extent that it is an element of their Honours' reasoning that s 109D(3) is limited to transfers of "an identifiable principal sum"[71] or money more generally. Section 109D is not limited to transfers of money; it extends to any transfer of value from a private company, including transfers of property or supplies of services, burdened with an obligation of repayment of the value supplied.

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69 (1841) Cr & Ph 240 [41 ER 482].

70 *Prime Wheat Association Ltd v Chief Commissioner of Stamp Duties* (1997) 42 NSWLR 505 at 512; *Commissioner of Taxation v Radilo Enterprises Pty Ltd* (1997) 72 FCR 300 at 313.

71 (2025) 307 FCR 544 at 561 [79].

77 Secondly, there is the inclusion of s 109F(6). It forms part of the provisions under which forgiven debts are treated as dividends in defined circumstances. It provides:

> "An amount of debt an entity (the ***debtor***) owes a private company is also ***forgiven*** for the purposes of [Div 7A] if a reasonable person would conclude (having regard to all the circumstances) that the private company will not insist on the entity paying the amount or rely on the entity's obligation to pay the amount. (The amount is forgiven when a reasonable person would first reach that conclusion.)"

If s 109D(3) can apply to a private company not insisting upon the performance of an obligation to repay it, it makes, with respect, little sense for the legislation to include the foregoing provision, which is triggered when a reasonable person would conclude that a private company "will not insist" on payment. In such a case as that which is implied by s 109F(6) – that is, one in which a private company is owed a debt and is able to, but does not, insist on the payment of that amount – based on the Commissioner's approach, a deemed dividend for Div 7A purposes has already been paid due to the private company's forbearance, from inception of that debt, in the form of a loan under s 109D. That is not a conclusion that promotes a harmonious and coherent application of Div 7A.[72]

78 Thirdly, s 109F(6) deploys an objective test to determine whether a deemed dividend has been paid. It turns on the hypothetical conclusion of a "reasonable person", like many other provisions within Div 7A.[73] This factor strongly supports the conclusion that the various intentions or purposes of the transfers of value which are deemed to be dividends under Div 7A are to be objectively ascertained. These provisions do not turn on the subjective controlling mind of a private company, nor the subjective mind of any person. Again, that conclusion clashes with the Commissioner's reliance upon subjective forbearance by Gleewin Investments.

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72 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [70].

73 See, eg, 1936 Act, ss 109C(1)(b), 109D(1)(d)(ii), 109D(1A)(d)(ii), 109F(1)(b), 109F(5)(b), 109R(2)(a), 109R(2)(b)(ii), 109T(1)(b), 109U(1)(b), 109XA(1A)(c)(i), 109XA(1A)(c)(ii), 109XF(1)(b), 109XG(1)(b), 109XI(1)(b).

Legislative history

79 In addition to the statutory context to s 109D, the presence of Subdiv EA in Div 7A greatly undermines the Commissioner's case, as does the legislative history which led to the introduction of that subdivision in 2004.

80 When the Bill containing Div 7A was first introduced into Parliament,[74] it contained no provision dealing with the unpaid present entitlements of a private company beneficiary. This was seen to be problematic. A media release issued by the Assistant Treasurer on 27 March 1998 recommended that the Bill be amended to address this issue. The media release stated:[75]

> "It has been argued that the proposed legislation does not apply to arrangements where a corporate beneficiary has become presently entitled to net income of a trust and the amount is not paid by the trustee to the corporate beneficiary, but continues to be held by the trustee who then provides a loan to a shareholder (or their associate) of the corporate beneficiary. These sorts of arrangements should be caught by Division 7A because, in substance, a loan of money from the private company to the shareholder (or their associate) has been effected via the trust. The proposed legislation will be amended to deal with this situation."

81 The result was the introduction into the 1936 Act of former s 109UB.[76] This provision applied where a private company beneficiary was presently entitled to the net income of a trust, which amount had not been paid by the trustee. A deemed dividend arose when the trustee then lent money to a shareholder of the private company. It is immediately noteworthy that the legislative solution for what was to occur when unpaid present entitlements of a private company were effectively lent to that company's shareholder was to make the shareholder the recipient of the deemed dividend, rather than the trustee, as the Commissioner would have it in this case. In the context of the broader purpose and structure of Div 7A, that legislative choice made sense, for in such a case it is the shareholder, not the private company, that has received the economic value.

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74 *Taxation Laws Amendment Bill (No 7) 1997* (Cth).

75 Senator Rod Kemp, "Taxation of Distributions Disguised as Loans from Private Companies" (27 March 1998).

76 *Taxation Laws Amendment Act (No 3) 1998* (Cth), Sch 8, item 2.

82 It is apparent that, by 2002, s 109UB was perceived to be defective because it did not address a case of an unpaid present entitlement where the trustee simply made a payment to the shareholder, as distinct from a loan. The Board of Taxation, a government-appointed advisory body, prepared a report to the Treasurer of Australia entitled *Taxation of Discretionary Trusts* which, amongst other things, addressed this problem.[77] What is significant is one of its proposed alternative amendments to Div 7A which Parliament did *not* adopt. It was described in the following terms:[78]

> "Alternatively, section 109UB could be repealed, and replaced with a section setting out the consequences where a trustee makes a company presently entitled to the income of a trust, but does not pay the funds to the company within a reasonable period. The consequences could be either that the trustee would be assessed on the amount of the income as if there had been no distribution, or that the company would have to pay a top-up tax (which could create franking credits in the company)."

83 This solution, which taxes either the trustee or the private company beneficiary "as if there had been no distribution", was not adopted. This is also, of course, effectively the outcome sought in this case by the Commissioner. Instead, Parliament in 2004 repealed s 109UB and enacted new Subdiv EA.[79] That subdivision preserves the operation of former s 109UB in s 109XA(2).[80] It then resolved the identified defect by expressly dealing with payments, as distinct from loans, in s 109XA(1).

84 It follows from this history that:

(a) Parliament has long been aware of the issue of a private company beneficiary potentially having unpaid present entitlements;

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77 Board of Taxation, *Taxation of Discretionary Trusts* (November 2002). See also Australia, House of Representatives, *Tax Laws Amendment (2004 Measures No 1) Bill 2004*, Explanatory Memorandum at 63 [8.3]-[8.4].

78 Board of Taxation, *Taxation of Discretionary Trusts* (November 2002) at 17 [82].

79 *Tax Laws Amendment (2004 Measures No 1) Act 2004* (Cth), Sch 8.

80 See above at [65].

(b) where such entitlements are, in substance, lent or paid to a shareholder (or an associate of a shareholder) of the private company, Parliament intended for that shareholder to be taxed;

(c) a subsequent review suggested that the trustee (or the private company beneficiary) might instead be taxed, but such legislative change was not enacted;

(d) new Subdiv EA preserved Parliament's choice to tax the shareholder (or an associate of the shareholder) of the private company;

(e) the Commissioner has not suggested that he could not assess Mr Bendel in accordance with Subdiv EA; and

(f) this was precisely the basis for the Tribunal's remittal back to the Commissioner.

85 The Commissioner's case on the expanded definition of "loan" in s 109D(3) must therefore be rejected.

Section 6-25 of the 1997 Act

86 The taxpayers having succeeded in this appeal, it is unnecessary to consider their notice of contention.

Disposition

87 This appeal must be dismissed.

JAGOT J.

The appeal

88 The principal question in this appeal is whether certain undisputed facts concerning the operation of a discretionary trust mean that a beneficiary of the trust made "loans" to the trustee of the trust under s 109D(1)(a) of the *Income Tax Assessment Act 1936* (Cth) ("the 1936 Act"), "loan" being defined in s 109D(3) of that Act, by not requiring the trustee to pay a portion of the income of the trust to the beneficiary which the trustee had resolved to set aside for the beneficiary. If the answer to that question is "yes", s 109D(1) of the 1936 Act operates so that the beneficiary, being a private company, is taken to have paid a dividend in the amount of the "loan" to the trustee, being an "entity" as defined in s 109ZD of that Act, to the extent the amount is not repaid by the end of the beneficiary's year of income. At the end of the beneficiary's year of income, the amount of the deemed dividend payment forms part of the trustee's assessable income. In that event, a secondary question arises in this appeal as to whether s 6-25 of the *Income Tax Assessment Act 1997* (Cth) ("the 1997 Act") applies to the resulting additional assessable income of the trustee (to the extent that the assessable income of the trustee as taxable included the amount of the "loans"), s 6-25(1) providing that the same amount of assessable income is "included only once in your assessable income for an income year".

89 The Administrative Appeals Tribunal ("the Tribunal") set aside objection decisions made by the Commissioner of Taxation ("the Commissioner") that rejected the beneficiary's objections to the income tax assessments issued by the Commissioner, to the extent that those assessments included the amount the Commissioner characterised as "loans" to the trustee resulting in the deemed payment of dividends to the trustee under s 109D(1) of the 1936 Act.[81] The Full Court of the Federal Court of Australia (Logan, Hespe and Neskovcin JJ) dismissed the Commissioner's appeal from the Tribunal's decision.[82]

90 By a grant of special leave to this Court the Commissioner contends that the Full Court erred in not finding that the beneficiary made "loans" to the trustee within the scope of s 109D(1) of the 1936 Act when the beneficiary agreed or acquiesced to the trustee retaining and using, for the purposes of the trust, "amounts to which [the beneficiary] was presently entitled". The respondents – who are the beneficiary and the sole director and beneficial shareholder of the shares in the beneficiary – contend to the contrary and contend that, if the Commissioner is correct on the above point, s 6-25 of the 1997 Act operates to prevent inclusion of the amount of the "loans" in the assessable income of the trust

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81 *Re Bendel and Federal Commissioner of Taxation* (2023) 117 ATR 464.

82 *Federal Commissioner of Taxation v Bendel* (2025) 307 FCR 544.

because those "same" amounts have already been taxed as part of the income of the trust.

91 For the following reasons the Full Court was right to reject the respondents' argument and the Tribunal's conclusion that Subdiv EA of Div 7A of Pt III of the 1936 Act operated to the exclusion of Subdiv B of that Division (in which s 109D is located).[83] However, in respect of the construction of the meaning of "loan" as defined in s 109D(3) of the 1936 Act: (i) the Full Court erred in confining the meaning of "loan" as defined in s 109D(3) to the concept of the making of a payment subject to an obligation of repayment;[84] (ii) given the extended definition of "loan" in s 109D(3), the Full Court's approach would wrongly confine the definition of "loan" to the meaning set out in s 109D(3)(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"), when that is only one part of the definition of "loan" and the definition includes also s 109D(3)(b) ("a provision of credit or any other form of financial accommodation"); (iii) the use of the concept of "repaid" in s 109D(1)(b) ("the loan is not fully repaid before the lodgment day for the current year") and s 109D(1AA) ("[t]he amount of the dividend taken under [s 109D(1)] to have been paid is the amount of the loan that has not been repaid before the lodgment day for the current year") does not support confining the meaning of "loan" as defined in s 109D(3) to its meaning in s 109D(3)(c); (iv) rather, the text, context and purpose of the provisions indicate that the meaning of the undefined term "repaid" as used in s 109D(1)(b) and (1AA) is to be adjusted to accommodate the breadth of the meaning of the defined term "loan" in s 109D(3) as a whole; (v) the text, context and purpose of the provisions indicate that the undefined term "repaid" as used in s 109D(1)(b) and (1AA) is to be read as including both the repayment of an amount paid "if there is an express or implied obligation to repay the amount" (as per s 109D(3)(c)) and the undoing of the thing done to constitute a provision of, relevantly, any form of financial accommodation (as per s 109D(3)(b)); and (vi) this construction of "repaid" accords with, in particular, the terms of s 109D(4) ("[f]or 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 [s 109D(3)] is done in relation to the entity*"[85]), the effect of the making of a "loan" in accordance with s 109D(1) being a deemed hypothetical payment of a dividend ("[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 ..."[86]), and the function of s 109D(1)(b) and (1AA)

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83 *Federal Commissioner of Taxation v Bendel* (2025) 307 FCR 544 at 562 [85].

84 *Federal Commissioner of Taxation v Bendel* (2025) 307 FCR 544 at 561 [79].

85 Emphasis added.

86 Emphasis added.

respectively being to "undo" that consequence of deemed payment of a dividend in whole or in part to the extent the "loan" resulting in the payment of the deemed dividend has been "repaid".

92 On the proper construction of s 109D of the 1936 Act Gleewin Investments Pty Ltd ("Gleewin Investments"), the beneficiary, made a "loan" to Gleewin Pty Ltd ("Gleewin"), the trustee, in the form of "a provision of ... any ... form of financial accommodation" in each of the relevant years. As s 109D(1)(a) refers to a private company that "makes a loan", that concept, including the meaning of "makes", must be construed consistently with the several ways in which s 109D(3) and (4) provide for the making of a loan, including a "provision of ... financial accommodation" by the doing of that thing. Such "provision" did not require a payment of money by Gleewin Investments to Gleewin under an obligation of repayment or, indeed, any positive act by Gleewin Investments effecting a transfer of value by Gleewin Investments to Gleewin under an obligation of re-transfer. Rather, there was a provision of financial accommodation as referred to in s 109D(3)(b) and therefore the "mak[ing of] a loan" within s 109D(1)(a) by Gleewin Investments not requiring Gleewin to pay to Gleewin Investments its entitlements in circumstances where, on the facts of the present case, as will be explained, it must be inferred that: (i) Gleewin had admitted to Gleewin Investments that it was indebted to Gleewin Investments to the extent of the net income set aside and not paid, in respect of which Gleewin could have made immediate payment to Gleewin Investments (as it did to Mr Bendel, who was in the same position as Gleewin Investments, by crediting those entitlements against debt he owed to Gleewin) and Gleewin Investments could have demanded immediate payment (subject only to calculation of the monetary sum representing the entitlement less any rights of Gleewin to deduction or set-off); (ii) Gleewin Investments was aware of these circumstances, including its right to require Gleewin to pay to it its entitlements; and (iii) Gleewin Investments decided not to require Gleewin to pay to it its entitlements within the relevant years. As will become apparent, the facts of this case are unable to be characterised as Gleewin Investments simply doing nothing and merely passively acquiescing to the trust deed operating in accordance with its terms.

The primary facts

93 The primary facts are the facts as found by the Tribunal.[87]

94 The Steven Bendel 2005 Discretionary Trust ("the Trust") was created by a deed of settlement in 2005 ("the Trust Deed"). Gleewin was appointed as the

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87 *Re Bendel and Federal Commissioner of Taxation* (2023) 117 ATR 464.

trustee.[88] The discretionary beneficiaries of the Trust included Gleewin Investments and Mr Bendel, who was the sole director of and shareholder in Gleewin and Gleewin Investments.[89]

95 The Trust Deed contains the following provisions:

"1 ***Definitions***

...

(16) 'Accounting Period' shall mean each period of Twelve months ending on the balance date in each year ...;

...

(18) 'pay' includes transfer convey and assign;

(19) 'set aside' in relation to a beneficiary includes placing sums to the credit of such beneficiary in the books of account of the Trust Fund;

...

3 ***Payment or Application of Income – Trustee's Determination***

(1) The Trustee may at any time before the expiration of any Accounting Period with respect to all or any part or parts of the net income of the Trust Fund for such Accounting Period determine: –

(a) to pay apply or set aside the same to or for any one or more of the General Beneficiaries living or in existence at the time of the determination;

...

(2) The following provisions shall apply to any determination made pursuant to sub-clause (1) of this Clause –

...

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88 *Re Bendel and Federal Commissioner of Taxation* (2023) 117 ATR 464 at 467 [5(a)] and fn 3.

89 *Re Bendel and Federal Commissioner of Taxation* (2023) 117 ATR 464 at 467 [5].

(c) a determination to pay apply or set aside any amount to or for the benefit of any beneficiary shall be irrevocable and may be effectually made and satisfied (inter alia) by a resolution of the Trustee that a sum out of or portion of the net income of the Trust Fund for the accounting period or a sum out of or portion of the net income of the trust estate as defined in Section 95 of the [1936 Act] of the Trust Fund for the accounting period 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 Fund or by drawing any cheque in respect of such amount made payable to or for the credit or benefit of such beneficiary or by paying the same over to or for the benefit of such beneficiary in such manner and to such person on behalf of such beneficiary as the Trustee shall think fit;

...

(5) Any amount set aside for any beneficiary ... shall cease to form part of the Trust Fund and upon such setting aside ... shall thenceforth be held by the Trustee on a separate trust for such person absolutely with power to the Trustee pending payment over thereof to such person to invest or apply or deal with such Fund or any resulting income therefrom or any part thereof in the manner provided for in Clause 6(5) hereof.

...

6 ***Application of Trust Fund Prior to Vesting Day***

The Trustee may –

...

(5) where the Trustee holds any amount upon separate trust for any person pursuant to Clause[] 3(5) ... while he or she is under a legal disability or where he or she is not under a legal disability but the amount is left in the hands of the Trustee invest on behalf of such person that amount and the resulting income thereof in any of the investments hereby authorised and while any such person is under any legal disability at any time or times and from time to time in their absolute discretion resort to such amount and the income thereof and

> pay apply or deal with the same or any part thereof (but not so as to infringe the rule against perpetuities) in such manner as the Trustee in its absolute discretion thinks fit for the benefit of such person in the terms of the powers contained in sub-clauses (3) and (4) of this Clause".

96 Clause 32(a) of the Trust Deed provides that the trustee may, in connection with the exercise of various powers:

> "determine that the net income of the Trust Fund for any Accounting Period for the purposes of Clause 3 is an amount equal to the 'net income of the trust estate' within the meaning of Division 6 of Part III of the [1936 Act] or any corresponding provision, or any other amount determined by reference to the provisions of the law relating to taxation; and may in particular include in such net income any capital gain which, or to the extent to which it, is subject to income tax".

97 As Mr Bendel controlled the Trust, Gleewin and Gleewin Investments, Mr Bendel's "knowledge of the affairs of each entity can be attributed to each entity, and each entity can be accepted as having knowledge of the affairs of the others of them, including knowledge of Mr Bendel's affairs and circumstances".[90]

98 In each of 2014, 2015, 2016 and 2017, Gleewin resolved:[91] (i) a determination of the income of the Trust for the year, and (ii) a "distribution" of the income as determined. In each determination of income, Gleewin determined the Trust's income to be, in effect, "all those amounts being income for the purposes of the accounting records of the Trust ... less the expenses and outgoings of the Trust for the year" and "the amount remaining of each capital gain ... made in the year ... after the recoupment ... of any unrecouped current-year or prior-year capital losses". In each "distribution" of income, Gleewin resolved that "the following classes or categories of income of the Trust for the year ... 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". In each year the table specified Mr Bendel and Gleewin Investments as having a percentage entitlement for the capital gains, the amount of franked dividends less expenses, and any other income

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90 *Re Bendel and Federal Commissioner of Taxation* (2023) 117 ATR 464 at 473 [26].

91 *Re Bendel and Federal Commissioner of Taxation* (2023) 117 ATR 464 at 507-510, Annexure B.

of the Trust. In each year the resolution contained an additional provision resolving that:[92]

> "for the avoidance of doubt, regardless of any adjustment to the income of the Trust, the income of the Trust shall be distributed as specified above".

99 Gleewin maintained two accounts for the beneficiaries, the Gleewin Investments Current Account and the Bendel Current Account.[93] "Where the balance of a [beneficiary's] current account was in Gleewin's favour, as was the case for the Bendel Current Account, it was reported in the 'Assets' half of the balance sheet as a stand-alone account and its balance was included in Total Assets reported. Where the balance was in favour of a beneficiary, as was the case for the Gleewin Investments Current Account, it was reported in the 'Liabilities' side of the balance sheet as a stand-alone account and its balance was included in Total Liabilities reported."[94] Gleewin "did not recognise any separation of any of its assets in its accounts, or anywhere else in the evidence, reflecting or commensurate with unsatisfied entitlements to income".[95]

100 During each of the 2013 to 2017 years:[96]

> "(a) Mr Bendel caused Gleewin to advance money from its resources to him or for his benefit from time to time;
>
> (b) the advances to Mr Bendel were recorded with the description 'Drawings' by way of journals posted to the Bendel Current Account maintained by or on behalf of Gleewin;
>
> (c) distributions of (or creation of entitlements to) Gleewin's income or capital were made from time to time;

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92 *Re Bendel and Federal Commissioner of Taxation* (2023) 117 ATR 464 at 507-510, Annexure B.

93 *Re Bendel and Federal Commissioner of Taxation* (2023) 117 ATR 464 at 477 [40(d)].

94 *Re Bendel and Federal Commissioner of Taxation* (2023) 117 ATR 464 at 477 [40(d)].

95 *Re Bendel and Federal Commissioner of Taxation* (2023) 117 ATR 464 at 477 [41].

96 *Re Bendel and Federal Commissioner of Taxation* (2023) 117 ATR 464 at 477 [42].

(d) when the amounts of the distributions (entitlements) were ascertained, journals were posted to the Bendel Current Account maintained by or on behalf of Gleewin; and

(e) for each Year Mr Bendel's entitlement to Gleewin's income was less than the then balance owed by him to Gleewin so that his entitlement to Gleewin's income was always fully discharged or paid."

101 For each of the 2013 to 2017 years:[97]

"(a) Mr Bendel caused Gleewin to meet Gleewin Investments' tax liabilities and other expenses from time to time;

(b) when Gleewin Investments' expenses were met by Gleewin, entries were made to both entities' accounts – in Gleewin's accounts, expenses were recorded in the Gleewin Investments Current Account, and in Gleewin Investments' accounts, the expenses were recorded in the account named 'Steven Bendel 2005 Discretionary Trust';

(c) from time to time amounts belonging to Gleewin Investments (PAYG tax refunds) were received by Gleewin and not passed on. These amounts also were posted to the same accounts by or on behalf of each of Gleewin and Gleewin Investments and reflected an increase in Gleewin's obligations to Gleewin Investments; and

(d) for each Year Gleewin Investments' entitlement to Gleewin's income was also posted to the Gleewin Investments Current Account, and for each of the 2013 to 2017 Years that income entitlement was greater than the taxation and other expenses paid on Gleewin Investments' behalf by Gleewin from its resources so that its entitlement to Gleewin's income was always recorded as at least partly outstanding."

Key statutory provisions

102 Section 96, in Div 6 of Pt III of the 1936 Act, provides that:

"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."

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97 *Re Bendel and Federal Commissioner of Taxation* (2023) 117 ATR 464 at 478 [44] (footnote omitted).

103 Section 97(1), also in Div 6 of Pt III of the 1936 Act, provides in part that:

> "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".

104 Section 44(1), in Div 2 of Pt III of the 1936 Act, 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.

105 Section 95(1) of the 1936 Act provides relevantly that:

> "***net income***, in relation to a trust estate, means the total assessable income of the trust estate calculated under this Act as if the trustee were a taxpayer in respect of that income and were a resident, less all allowable deductions, except deductions under Division 393 of the [1997 Act] (Farm management deposits) and except also, in respect of any beneficiary who has no beneficial interest in the corpus of the trust estate, or in respect of any life tenant, the deductions allowable under Division 36 of the [1997 Act] in respect of such of the tax losses of previous years as are required to be met out of corpus.
>
> A trust may be required to work out its net income in a special way by Division 266 or 267 in Schedule 2F to this Act or Division 275 of the [1997 Act]."

106 Division 7A of Pt III of the 1936 Act, as explained in s 109B, "treats 3 kinds of amounts as dividends paid by a private company", being: "amounts paid by the company to a shareholder or shareholder's associate (see section 109C)"; "amounts lent by the company to a shareholder or shareholder's associate (see sections 109D and 109E)"; and "amounts of debts owed by a shareholder or shareholder's associate to the company that the company forgives (see section 109F)". According to s 109B "[t]his treatment makes the amounts assessable income of the shareholder or associate (under section 44)". Sections 109C-109F are the provisions comprising Subdiv B of Div 7A of Pt III of the 1936 Act.

107 Section 109B explains further that 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", as to which "[s]ee Subdivisions EA and EB".

108 Section 109D, in Subdiv B of Div 7A of Pt III of the 1936 Act, includes the following provisions:

"**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 non-resident, see section 109BC."

109 Subdivision EA of Div 7A of Pt III of the 1936 Act, which s 109B identifies as relevant to the statement that 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", includes s 109XA. Section 109XA provides in part that:

"**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."

110 Section 109XB, also in Subdiv EA of Div 7A of Pt III of the 1936 Act, provides that:

"**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."

The Tribunal's decision

111 The respondents' principal contention before the Tribunal was that the "statutory context and purpose of s 109D indicates that the definition of loan does not extend to amounts of trust income which are either set aside for a beneficiary on a separate trust or to which a beneficiary is presently entitled".[98] The first part of this proposition, the respondents submitted, followed from the fact that the beneficiary's "entitlement to [trust] income was a function of a trust relationship and not a debtor and creditor relationship".[99] This is because the Trust Deed specifies that "[a]ny amount set aside for any beneficiary ... shall cease to form part of the Trust Fund and upon such setting aside ... shall thenceforth be held by the Trustee on a separate trust for such person".[100]

112 The Commissioner accepted before the Tribunal that Gleewin's resolutions setting aside certain amounts for each beneficiary constituted separate trusts in respect of those amounts under the Trust Deed and that, in respect of those amounts set aside, Gleewin Investments held a right to terminate the separate trust in accordance with the rule in *Saunders v Vautier*.[101] According to the

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98 *Re Bendel and Federal Commissioner of Taxation* (2023) 117 ATR 464 at 482 [60].

99 *Re Bendel and Federal Commissioner of Taxation* (2023) 117 ATR 464 at 483 [63].

100 *Re Bendel and Federal Commissioner of Taxation* (2023) 117 ATR 464 at 480 [48].

101 *Re Bendel and Federal Commissioner of Taxation* (2023) 117 ATR 464 at 485 [66], referring to *Saunders v Vautier* (1841) Cr & Ph 240 [41 ER 482]. See *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98 at

Commissioner's principal contention, Gleewin Investments made a "loan" to Gleewin because it provided "financial accommodation" to Gleewin within the meaning of the definition of "loan" in s 109D(3)(b) by "deci[ding] not to exercise [the] right", being the *Saunders v Vautier* right to terminate the separate trust over those set aside amounts as a result of which Gleewin would have had to pay those set aside amounts to Gleewin Investments.[102]

113 The Tribunal did not accept the common position of the parties that Gleewin's resolutions to set aside amounts created separate trusts, as it was not possible from the resolutions to identify the subject-matter of the asserted separate trust.[103] As the Tribunal put it:[104]

> "The present circumstances are that Gleewin did not make any appropriation of any asset, nor any investment decision regarding the Trust Funds referrable to any income entitlements and has not identified any asset or property held on account of entitlements to income. At the end of each Year and thereafter there was on the facts of this case, no identifiable property that was held for Gleewin Investments absolutely."

114 The Tribunal therefore considered that:[105]

> "In the present circumstances, where it is not possible to identify any asset or property held on any separate trust as conventionally understood, notwithstanding the acceptance of the parties that a separate trust was created, what was created upon passing resolutions to distribute Gleewin's income was a right or entitlement for the beneficiary coupled with the

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119 [47], quoting *Thomas on Powers* (1998) at 176: "[u]nder the rule in *Saunders v Vautier*, an adult beneficiary (or a number of adult beneficiaries acting together) who has (or between them have) an absolute, vested and indefeasible interest in the capital and income of property may at any time require the transfer of the property to him (or them) and may terminate any accumulation" (footnote omitted).

102 *Re Bendel and Federal Commissioner of Taxation* (2023) 117 ATR 464 at 485 [66].

103 *Re Bendel and Federal Commissioner of Taxation* (2023) 117 ATR 464 at 487 [68].

104 *Re Bendel and Federal Commissioner of Taxation* (2023) 117 ATR 464 at 490 [77].

105 *Re Bendel and Federal Commissioner of Taxation* (2023) 117 ATR 464 at 490 [79]-[81].

corresponding obligation of the trustee of a nature contemplated by what Gageler J said in *Fischer v Nemeske* [*Pty Ltd*].[106]

Accordingly, the Tribunal does not accept contentions that a separate trust in fact arose in any conventional sense that had the effect of discharging or replacing the obligation to pay entitlements to income. Those entitlements to be paid shares of Gleewin's income continued to exist.

Each party's contentions that were based on the concept of a separate trust having the effect that the entitlements to income were discharged or paid are not accepted."

115 Having put those considerations to one side, the Tribunal reasoned that as between the provisions of Subdiv B of Div 7A of Pt III of the 1936 Act (containing, relevantly, s 109D) and Subdiv EA of Div 7A of Pt III of the 1936 Act (containing, relevantly, ss 109XA and 109XB), the latter "being a specific, and therefore lead, provision containing an express set of rules that can be regarded as a particular path has been chosen to deal with the taxation effect of unpaid present entitlements in favour of corporate beneficiaries in prescribed circumstances".[107] In the overall context of the relevant provisions, this led the Tribunal to the "necessary conclusion ... 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."[108]

The Commissioner's appeal to the Federal Court

116 The Commissioner appealed to the Federal Court of Australia. The appeal, which was referred to the Full Court, was confined to questions of law under s 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth). The questions of law each concerned the meaning of "loan" as defined in s 109D(3) of the 1936 Act

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106 (2016) 257 CLR 615 at 651 [99]: "An absolute beneficial entitlement to some part of a fund of property that is held on trust need not be reflected in an absolute beneficial entitlement to the whole or some part of any specific asset within that fund ... Whether or not a particular beneficial entitlement to some portion of a trust fund is reflected in a beneficial entitlement to the whole or some part of a specific asset within that fund depends on the terms of the trust settlement".

107 *Re Bendel and Federal Commissioner of Taxation* (2023) 117 ATR 464 at 496 [101(e)].

108 *Re Bendel and Federal Commissioner of Taxation* (2023) 117 ATR 464 at 496 [101].

and embodied, in various forms, the Commissioner's essential proposition that "where by agreement, arrangement or understanding a beneficiary consents or acquiesces to the trustee not paying to it an amount of money to which it is presently entitled but retaining the amount as part of and for the general purposes of the trust fund, there is 'a provision of credit or any other form of financial accommodation' by the beneficiary to the trustee within the meaning of s 109D(3)(b)".

117 The Full Court dismissed the Commissioner's appeal. The Full Court reasoned that: (i) as each of "s 109D(3)(a), (c) and (d) encapsulate a concept of repayment", 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";[109] (ii) while "s 109D(3) provides an inclusive definition of the word 'loan', there is no section which expands the meaning of the word 'repaid'"[110] appearing in s 109D(1)(b), which specifies as a condition of a private company being taken to have paid a dividend that "the loan is not fully repaid before the lodgment day for the current year"; and (iii) this indicates that "loan" as defined in s 109D(3)(b) must require an obligation of "repayment" so that the provision may operate harmoniously with the condition in s 109D(1)(b). The Full Court therefore concluded that s 109D(3)(b), in including within the defined term "loan" the "provision of credit or any other form of financial accommodation":[111]

> "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."

118 In applying this construction of s 109D(3)(b) to the facts of the present case, the Full Court recorded that the respondents "accepted ... that there existed a debtor-creditor relationship between [Gleewin] and Gleewin Investments"[112] based on the reasoning in *Chianti Pty Ltd v Leume Pty Ltd*[113] and *Fischer v*

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109 *Federal Commissioner of Taxation v Bendel* (2025) 307 FCR 544 at 559 [70].

110 *Federal Commissioner of Taxation v Bendel* (2025) 307 FCR 544 at 560 [74].

111 *Federal Commissioner of Taxation v Bendel* (2025) 307 FCR 544 at 561 [79].

112 *Federal Commissioner of Taxation v Bendel* (2025) 307 FCR 544 at 563 [92].

113 (2007) 35 WAR 488 at 509-515 [63]-[77].

Nemeske Pty Ltd.[114] The Full Court also recorded that the respondents "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."[115]

119 The Full Court reasoned that: (i) its construction of s 109D(3)(b) "requires an obligation to repay and not merely an obligation to pay"; (ii) accordingly, "more than the existence of a debtor-creditor relationship" is necessary to engage that part of the definition of "loan"; (iii) therefore "the non-exercise by Gleewin Investments of its right to call for payment of its present entitlement" under "the consensual arrangement" between Gleewin Investments and Gleewin, by "making a decision to refrain from calling for payment" of its present entitlement, "did not involve the payment of a sum by or at the direction of Gleewin Investments that was required to be repaid"; and (iv) in consequence, Gleewin Investments had not made a loan to Gleewin within the meaning of s 109D(1)(a).[116]

Principles of statutory construction

120 It is axiomatic that "the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have" and, ordinarily but not always, "that meaning (the legal meaning) will correspond with the grammatical meaning of the provision".[117] In determining if the legal meaning corresponds with the literal grammatical meaning of a provision, the court recognises that the "primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute"[118] and that a provision "must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals".[119]

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114 (2016) 257 CLR 615 at 632 [26], 635 [32], 654 [108], 654-655 [110]-[111].

115 *Federal Commissioner of Taxation v Bendel* (2025) 307 FCR 544 at 563 [92].

116 *Federal Commissioner of Taxation v Bendel* (2025) 307 FCR 544 at 563-564 [93]-[94].

117 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78].

118 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69].

119 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [70].

121 Accordingly, "[w]here conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions".[120] The required adjustment of meaning "will often require the court 'to determine which is the leading provision and which the subordinate provision, and which must give way to the other'"[121] as "[o]nly by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme".[122] It is equally axiomatic that "a court construing a statutory provision must strive to give meaning to every word of the provision ... '... [so] that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent'".[123]

122 Relevant also is the statement in *Gibb v Federal Commissioner of Taxation*[124] that:[125]

> "The function of a definition clause in a statute is merely to indicate that when particular words or expressions the subject of definition, are found in the substantive part of the statute under consideration, they are to be understood in the defined sense – or are to be taken to include certain things which, but for the definition, they would not include. Such clauses are, therefore, no more than an aid to the construction of the statute and do not operate in any other way."

123 As will be explained, it is one thing to accept that a definition is an aid to construction; it is another, when faced with a definition that obviously extends the ordinary meaning of a word (in this appeal, "loan"), to construe a substantive

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120 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [70].

121 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [70], quoting *Institute of Patent Agents v Lockwood* [1894] AC 347 at 360.

122 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [70].

123 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71], quoting *The Commonwealth v Baume* (1905) 2 CLR 405 at 414, in turn citing *R v Berchet* (1690) 1 Show KB 106 [89 ER 480].

124 (1966) 118 CLR 628.

125 (1966) 118 CLR 628 at 635.

provision which uses the defined term in a manner that renders otiose all but one element of the extended definition, thereby effectively re-confining the definition to the word's ordinary meaning wherever used.

Subdivision EA not an exclusive code

124 The definition of "loan" in s 109D(3) of the 1936 Act operates only "[i]n this Division", meaning Div 7A of Pt III. As s 109B discloses, the object of Div 7A is to treat three "kinds of amounts" as dividends. The "kinds of amounts" are those described in s 109C, ss 109D and 109E, and s 109F, each of which, as noted, is in Subdiv B of Div 7A of Pt III. Section 109B discloses that the "treatment" of these three kinds of amounts "makes the amounts assessable income of the shareholder or associate (under section 44)". Section 109B discloses further that an "amount *may also be included* in the assessable income of a shareholder or shareholder's associate if"[126] other specified conditions in, relevantly, Subdiv EA are satisfied. That s 109B, in explaining the operation of Div 7A, describes Subdiv EA as identifying amounts that may "also" be included in assessable income is a clear indicator that Subdiv B and Subdiv EA are not in conflict so that there is no hierarchy of provisions in which Subdiv EA operates to the exclusion of Subdiv B in respect of circumstances within the terms of both. Rather, that an "amount may also be included in ... assessable income" if the conditions in Subdiv EA are satisfied indicates that the Subdivisions operate cumulatively.

125 Other indications also support the cumulative operation of Subdiv B and Subdiv EA. For example, to the extent that there is the potential for overlap between s 109C ("amounts paid by the company to a shareholder or shareholder's associate") and s 109D ("amounts lent by the company to a shareholder or shareholder's associate"), the overlap is expressly excluded by s 109C(3A). Section 109C(3) defines "payment to an entity" in Div 7A. Section 109C(3A) provides that "[h]owever, a loan to an entity is not a payment to the entity". This means that if a circumstance would satisfy both s 109C and s 109D (by involving a "loan" as defined in s 109D(3)(c)), s 109D operates to the exclusion of s 109C. In contrast, there is no equivalent exclusionary provision operating as between Subdiv B – s 109D in particular – and Subdiv EA. Nor is there any hint in the text of Subdiv B and Subdiv EA that the former operates subject to the latter or the latter operates so as to prevail over the former. This may be contrasted further with s 109G(3), which excludes the operation of s 109F as specified if s 109D applies, and s 109T(3), which provides that Div 7A "does not operate" as specified (in ss 109T(1), 109V and 109W) if the "private company is taken under Subdivision B ... to pay a dividend as a result of the payment or loan to the first interposed entity". In other words, the drafting of Div 7A recognises that its provisions may overlap

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126 Emphasis added.

but, where intended, the provisions expressly provide for their own hierarchy of operation.

126 This overlapping of provisions accords with the specific policy objective of Div 7A, which is to "reduce the scope for tax avoidance by ensuring that tax is payable on distributions from private companies", which "[c]urrently ... in certain circumstances, [are] able to make distributions ... that are effectively tax free by structuring them as payments or loans to shareholders rather than as taxable distributions".[127] Within this framework, overlapping provisions are to be recognised as a form of drafting exercising abundant caution, with the provisions themselves expressly determining their own hierarchy of operation where the legislature considered it appropriate to do so.

127 Within this framework, that Subdiv EA of Div 7A replaced the predecessor provision s 109UB, s 109UB's purpose being to ensure that arrangements in which "a corporate beneficiary has become presently entitled to net income of a trust and the amount is not paid by the trustee to the corporate beneficiary, but continues to be held by the trustee who then provides a loan to a shareholder (or their associate) of the corporate beneficiary" would be treated as assessable income,[128] provides no support to the respondents' proposition that the application of Subdiv EA should be construed as implicitly excluding the application of Subdiv B.

128 Rather, it is apparent that the circumstances that engage Subdiv B are differently expressed from the circumstances that engage Subdiv EA. Subdivision B (relevantly s 109D) is engaged if a private company "makes a loan" to an entity which is not fully repaid before the lodgment day for the current year. In this circumstance, the private company is Gleewin Investments, the entity is Gleewin, and the putative "loan" is Gleewin Investments refraining from exercising a right to require payment of income to it so that such income remains in and available to Gleewin, enabling, for example, Gleewin to loan money to the other beneficiary, Mr Bendel. Subdivision EA (relevantly s 109XA(2)) is engaged if a trustee makes a "loan" to a shareholder or an associate of a shareholder of a private company and if, relevantly, the private company is presently entitled to an amount from the net income of the trust estate at the time the actual transaction takes place. In this circumstance, the "loan" is from Gleewin to Mr Bendel as a shareholder of Gleewin Investments, which was relevantly "presently entitled to

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127 Australia, Senate, *Taxation Laws Amendment Bill (No 3) 1998*, Explanatory Memorandum at [9.119].

128 The Hon Rod Kemp MP, *Taxation of Distributions Disguised as Loans from Private Companies* (Media Release, 27 March 1998); Australia, Senate, *Tax Laws Amendment (2004 Measures No 7) Bill 2005*, Revised Explanatory Memorandum at [9.4]. See also Australia, Senate, *Taxation Laws Amendment Bill (No 3) 1998*, Explanatory Memorandum at [9.1]-[9.2], [9.15].

an amount from the net income of the trust estate at the time the actual transaction [ie, the loan] takes place". That the two provisions on their face relate to differently expressed circumstances is not reconcilable with an interpretation in which one provision (s 109XA(2)) functions as a code to the exclusion of the other provision (s 109D) in the event of both provisions applying.

129 Accordingly, the Full Court was correct not to adopt the reasoning of the Tribunal that Subdiv EA (s 109XA(2)) is to be construed as excluding Subdiv B (s 109D) if both provisions can apply to the same facts. As the Commissioner submitted to the Full Court, the apparent "anomaly" which the Tribunal perceived, and which drove the Tribunal's construction, is no anomaly at all 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".[129] The Full Court was also correct to recognise that a perception of anomaly is not a reliable guide to the meaning of legislation where the apparent anomaly results from an "assumption about the desired or desirable reach or operation of the provisions" rather than from the legislative text.[130]

The textual ambiguity in s 109D

130 While there is no potential conflict between Subdiv B (s 109D) and Subdiv EA (s 109XA(2)) calling for resolution by determining the hierarchy of the conflicting provisions, there is a potential conflict within s 109D itself. The potential conflict is that the first condition for the engagement of s 109D(1) in s 109D(1)(a) requires that a private company "makes a loan" to an entity, and the second condition for the engagement of s 109D(1) in s 109D(1)(b) requires that the "loan is not fully repaid before the lodgment day". These provisions are to be construed in their context, which includes that: (i) "loan" is defined in s 109D(3) to include in s 109D(3)(b) "a provision of credit or any other form of financial accommodation", where the ordinary meaning of providing financial accommodation does not necessarily involve a payment subject to an obligation of repayment; (ii) s 109D(3)(c) brings within the statutory definition of "loan" its ordinary meaning[131] of 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

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129 *Federal Commissioner of Taxation v Bendel* (2025) 307 FCR 544 at 562 [84].

130 *Federal Commissioner of Taxation v Bendel* (2025) 307 FCR 544 at 562 [85], referring to *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 390 [26], 395 [41].

131 eg, *Commissioner of Taxation v Radilo Enterprises Pty Ltd* (1997) 72 FCR 300 at 313, quoting Pannam, *The Law of Money Lenders in Australia and New Zealand* (1965) at 6.

the amount", which may be contrasted with at least s 109D(3)(b), which contains neither a requirement for "payment" nor an obligation of "repayment"; (iii) s 109D(4) provides that "[f]or 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"; and (iv) s 109D(1AA) provides that the "amount of the dividend taken under [s 109D(1)] to have been paid is the amount of the loan that has not been repaid before the lodgment day".

131 These provisions expose ambiguity. Section 109D(3) defines "loan" inclusively in terms which extend its ordinary meaning beyond a payment by one person to another subject to an obligation of repayment. If "loan" was intended to be confined to the making of a payment by one person to another subject to an obligation of repayment, s 109D(3) could have contained s 109D(3)(c) alone or, at most, s 109D(3)(c) and s 109D(3)(d), the latter to catch transactions the substance of which is the making of a payment by one person to another subject to an obligation of repayment irrespective of the form of the transaction. Yet s 109D(3)(b) appears as part of the inclusive definition of "loan" in s 109D(3) and its terms do not include a requirement for "payment" of an amount subject to "an express or implied obligation to repay the amount".

132 Further, s 109D(4) reinforces that s 109D(3) gives an extended meaning to "loan" by expressly identifying that, within the meaning of s 109D(3), there are two ways in which a "loan" can be made – firstly, if "the amount of the loan is paid to the entity by way of loan" (where "by way of loan" must mean by the making of a payment subject to an obligation of repayment, or else the reference to "loan" in the phrase "by way of loan" would make no sense given the extended definition of "loan") or, secondly, if "anything described in subsection (3) is done in relation to the entity". The second option is plainly an alternative to the first option, as the use of the disjunctive "or" exposes. That is, s 109D(3) and (4) expressly contemplate that there may be a "loan" made within the statutory definition in either circumstance – if "the amount of the loan is paid to the entity by way of loan" (which is contemplated by s 109D(3)(c)) or if "anything described in subsection (3) is done in relation to the entity" (which must include s 109D(3)(b)). It necessarily follows that the first option, "the amount of the loan is paid to the entity by way of loan", does not exhaust the intended scope of "loan" as represented by the second option, "anything described in subsection (3) is done in relation to the entity". Further again, the first condition in s 109D(1)(a), "the private company makes a loan to the entity during the current year", is able to be satisfied by either option in s 109D(4). In other words, s 109D(3) and (4) expose that the extended meanings they expressly contemplate qualify the concept of "makes a loan" in s 109D(1)(a) and, as will become apparent, therefore must also qualify the meaning of the loan not being "repaid" in s 109D(1)(b) and (1AA).

133 It may be accepted that the ordinary meaning of the concept of "repaid" (which is not defined in Div 7A of Pt III of the 1936 Act) is readily relatable to the

first option in s 109D(4), "the amount of the loan is paid to the entity by way of loan" (engaging s 109D(3)(c)), but is not readily relatable to the second option in s 109D(4), "anything described in subsection (3) is done in relation to the entity" (engaging at least s 109D(3)(b)). This tension within the provisions is not answered by the fact that the function of s 109D(4) is to enable ascertainment of the time when a "loan" is "made". Section 109D(4) is as much a part of the statutory scheme as s 109D(1), (1AA) and (3). Section 109D(4), moreover, functions only if, relevantly, s 109D(1) is engaged. That is, s 109D(1) and (1AA) must be construed on the basis that s 109D(3) and (4) both expressly contemplate that a "loan" may be "made" and may be "repaid" in either circumstance in s 109D(4) – if "the amount of the loan is paid to the entity by way of loan" (as referred to in s 109D(3)(c)) or if "anything described in subsection (3) is done in relation to the entity" (as referred to in at least s 109D(3)(b)).

134 Within this textual context it is possible to apprehend both the problems in the approach of the Full Court to the construction of the provisions and the proper reconciliation of the provisions of s 109D which is required.

Reconciling the provisions of s 109D

135 The first aspect of the reasoning of the Full Court, that it would be "consistent with" s 109D(3)(a), (c) and (d) of the 1936 Act if s 109D(3)(b) of that Act contained a requirement for the making of a payment subject to an obligation of repayment,[132] does not go far but is problematic in any event. One problem is that, as noted, s 109D(3)(c) contains an express requirement that there be a payment to an entity "if there is an express or implied obligation to repay the amount". If it had been intended that s 109D(3)(b) require a payment subject to an "express or implied obligation to repay the amount" of the "provision of credit or any other form of financial accommodation" it would have been expected that the provision would say so in the same terms as s 109D(3)(c). Instead, it refers merely to the provision of credit or any other form of financial accommodation.

136 Section 109D(3)(b) is structured to refer first to "a provision of credit" and second and disjunctively to "any other form of financial accommodation". The words "or any other form of" are of broad import within an inclusive definition. The use of the disjunctive "or" and the words "any other form of" discloses that s 109D(3)(b) assumes that the provision of credit is a form of "financial accommodation" (which it undoubtedly is) and that "any other form of financial accommodation" is broader than the "provision of credit". In other words, the provision of credit is a mere example of the broader class of a provision of financial accommodation, rather than the reverse. As Heydon J has observed, "[i]n ordinary

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132 *Federal Commissioner of Taxation v Bendel* (2025) 307 FCR 544 at 559 [70].

usage, 'accommodation' means anything which supplies a want".[133] Accordingly, "a provision of ... financial accommodation" is to supply (meaning, satisfy) a financial want. Whether a financial want is being satisfied, wholly or partly, is a question of objective fact. That is, both the fact of a financial want and the fact of satisfaction of it, in whole or in part, are to be determined objectively.

137 Consistently with this, one core or central ordinary meaning of "a provision of ... financial accommodation" in s 109D(3)(b) is the provision of time to pay so that, for example, a seller is said to financially accommodate a buyer if the terms of the sale include the buyer paying for the good or service some period of time after the good or service is provided.[134] In such a transaction, the obligation on the buyer is for payment of the amount due when due, not "repayment" of any amount paid by the seller to the buyer. In other words, by providing that a "loan" includes "a provision of credit or any other form of financial accommodation" (rather than, for example, "a provision of financial accommodation or any other form of credit"), s 109D(3)(b) is making obvious that there is no requirement for the transfer of money or value between the parties for a provision of financial accommodation to have occurred.

138 Moreover, s 109D(4) accords with this understanding of s 109D(3)(b). Section 109D(4) describes two ways in which a loan within the meaning of s 109D(3) may be made – by paying an amount "to the entity by way of loan" or by "anything described in subsection (3) [being] done in relation to the entity". By necessary implication, this second option of "anything described in subsection (3) [being] done in relation to the entity" does not involve either making a payment or an obligation to repay. That the qualification "by way of loan" does not appear in the second option in s 109D(4) reinforces that s 109D(3)(b) does not require the making of a payment subject to an obligation of repayment and that a "loan" within the meaning of s 109D(3) can be achieved by no more than the doing of the thing described in s 109D(3)(b) (relevantly, in this case, the provision of financial accommodation).

139 In the face of these structural and textual indicators nothing is gained by the Full Court's observation that it would be "consistent with" s 109D(3)(a), (c) and (d) if s 109D(3)(b) also incorporated a requirement for repayment. It cannot be assumed on any proper foundation that s 109D(3)(b) was intended to be read as confined to a provision of any form of financial accommodation provided that the provision involves a payment of money to an entity subject to an obligation of repayment. Such a construction would be manifestly inconsistent with

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133 *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* (2012) 246 CLR 455 at 467 [43].

134 cf *Tilley v Official Receiver in Bankruptcy* (1960) 103 CLR 529, concerning the obtaining of credit.

s 109D(3)(c) (which requires a payment subject to an obligation of repayment) being only one form of "loan" under the statutory definition and with the express terms of s 109D(4) providing a second way in which a loan is made, by "anything described in subsection (3) [being] done in relation to the entity".

140 The second aspect of the Full Court's reasoning, that as "repaid" appears in s 109D(1)(b) (and, for that matter, s 109D(1AA)) "loan" must be construed so as to require a payment subject to an obligation of repayment,[135] effectively avoids the conceptual and textual complexity of the provisions and the necessary task of reconciling the concept of "repaid" in s 109D(1)(b) (and s 109D(1AA)) with the other provisions with which they interact, s 109D(3) and (4). As will be explained, the possibility for which the Full Court's reasoning does not allow is that it is the meaning of the undefined term "repaid" in s 109D(1)(b) (and s 109D(1AA)) which introduces ambiguity and which must be adjusted to give a harmonious effect to all of s 109D. Several considerations support the view that the provisions of s 109D are best reconciled by adjusting the meaning of "repaid" to encompass both a repayment of an amount paid in discharge of an obligation and the undoing of the thing done which constituted the provision of a form of financial accommodation (being the making of the "loan") within the meaning of, relevantly, s 109D(3)(b).

141 First, in alleviating the conflict between the provisions, it is necessary to recognise their conceptual and resulting textual complexity because it is that complexity which creates the circumstances for potential confusion in drafting. Section 109D(1) is a provision that deems an occurrence to have occurred, being the deemed hypothetical "payment" of a dividend by a private company to an entity. The deeming consequence only occurs, however, if certain conditions are satisfied. The first condition in s 109D(1)(a) is that a private company "makes a loan" to an entity, which, by use of the word "loan", picks up the extended meaning of that term in s 109D(3). It is within this context that the second condition in s 109D(1)(b), "the loan is not fully repaid before the lodgment day", must be construed.

142 The conceptual complexity includes that within this framework the function of s 109D(1)(b) is to enable the effect of a "loan" that has been made within the meaning of s 109D(1)(a) at any time "during the current year" (the deemed hypothetical payment of the dividend) to be negated if the "loan" has been "fully repaid" at any time "before the lodgment day for the current year". The function of the concept of "fully repaid", therefore, is to describe the effect of the "loan" being fully undone before the lodgment day (so that there is no deemed hypothetical payment of the dividend). Equally, the function of an amount of the "loan" being "repaid" in s 109D(1AA) is to describe the effect of the "loan" being partly undone before the lodgment day (so that, to that extent, there is a lesser deemed

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135 *Federal Commissioner of Taxation v Bendel* (2025) 307 FCR 544 at 560 [74].

hypothetical payment of the dividend). This structure creates the potential for drafting confusion between the concepts of "makes a loan" in s 109D(1)(a) (with the meaning of that expression controlled by s 109D(3) and (4) as explained) and "the loan is not ... repaid" in s 109D(1)(b) (the meaning of which is also controlled by s 109D(3) and (4) as explained), particularly when the negating effect of the fact of a "loan" being "repaid" is to undo the deemed hypothetical payment of the dividend.

143 In particular, in this context, that s 109D(1)(b) and (1AA) use the shorthand concept of the "loan" being "repaid" (fully in s 109D(1)(b) or partly in s 109D(1AA)) to describe a broader circumstance of the thing that constituted the "loan" by being a thing done as described in s 109D(3) being "repaid" by being fully or partly "undone", is perhaps understandable. To put it another way, in circumstances where the paradigm case of a "loan" is covered by s 109D(3)(c) but the definition of "loan" has an extended meaning as reflected in, relevantly, s 109D(3)(b) and the second option in s 109D(4), it is reasonably clear that the concept of a "loan" being "repaid" in the statutory scheme was intended to embrace both the paradigm case of payment under an obligation to repay and the fact of repayment and the extended case of the doing of a thing in s 109D(3) and the fact of that thing being undone in whole (s 109D(1)(b)) or in part (s 109D(1AA)).

144 Accordingly, the meaning which should be given to the concept of "repaid" in s 109D(1)(b) (and s 109D(1AA)) is not to be confined to its ordinary meaning of payment back of an amount paid under an obligation of such repayment but extends to the full or partial undoing of the thing which was done to constitute the "making" of the "loan" in s 109D(3) and (4).

145 Second, that the word "repaid" in s 109D(1)(b) (and s 109D(1AA)) cannot be given only its ordinary meaning is reinforced by the fact that doing so would effectively confine the definition of "loan" in s 109D(3) to s 109D(3)(c) and (d). In so doing, a core or central ordinary meaning of the inclusive definition of "loan" in s 109D(3)(b) of "a provision of ... any other form of financial accommodation" (in which there may be neither payment nor repayment) would be written out of the definition. To write that core or central ordinary meaning of "a provision of ... any other form of financial accommodation" out of the definition of "loan" would be to re-define "loan" in a much narrower form than the legislature chose, contrary to the principle that meaning is to be given to all provisions of a statute if possible. If it had been the legislative intention to require a payment and repayment to constitute a "loan" as defined in s 109D(3), by implication from s 109D(1)(b) (and s 109D(1AA)), then it is simply inexplicable that s 109D(3) contains more than s 109D(3)(c) and (d).

146 Third, there is a strong indicator of the proper reconciliation of the concept of "repaid" in s 109D(1)(b) (and s 109D(1AA)) with s 109D(3) in the terms of s 109D(4). As noted, s 109D(4) provides that in Div 7A "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". That s 109D(4) is concerned with the time a "loan" is made does not undermine the significance of its terms, as the provision is relevant only if s 109D(1) is engaged. Section 109D(4) unequivocally identifies two different ways in which a "loan" may be made – either by paying an amount to an entity "by way of loan" or by doing "anything described in subsection (3) ... in relation to the entity".

147 These two options for the way in which a "loan" may be made (which then enable the time the "loan" is made to be identified) reflect that paying an amount "by way of loan" (as covered by s 109D(3)(c)) does not exhaust the scope of "loan" in s 109D(3). A "loan" may be made by a private company simply doing a thing described in s 109D(3) in relation to an entity, which includes "a provision of ... any other form of financial accommodation" as described in s 109D(3)(b). In referring to paying an amount to an entity "by way of loan", s 109D(4) must contemplate that the loan may be repaid and, in referring to "anything described in subsection (3) [being] done in relation to the entity", s 109D(4) must contemplate that the thing done to constitute the "loan" may be undone.

148 Fourth, if the word "repaid" in s 109D(1)(b) (and s 109D(1AA)) is given only its ordinary meaning, it would have the effect of writing the second option in s 109D(4) out of that provision altogether. It would be inexplicable that s 109D(4) expressly identifies a way to make a loan that does not involve any payment of money to an entity if "repaid" in s 109D(1)(b) (and s 109D(1AA)) was to be given its ordinary meaning. This would have the effect of rendering the second option in s 109D(4) wholly otiose. Putting it another way, there would be no point in s 109D(4) referring to a loan being made by the doing of anything described in s 109D(3) in relation to an entity (by necessary implication, not involving the payment of an amount of money to the entity by way of loan) if the doing of that thing could never satisfy s 109D(1)(b) (and s 109D(1AA)) because there would be no obligation for any amount to be "repaid".

149 Fifth, once it is recognised that s 109D(4) expressly contemplates that s 109D(3) is a definition embracing both the common or ordinary meaning of "loan" (a payment to an entity of an amount required to be repaid as set out in s 109D(3)(c)) and another, extended meaning of "loan" (a thing done in relation to an entity as described in s 109D(3) not involving a payment to an entity of an amount required to be repaid) it is obvious that the second option in s 109D(4) must include the circumstance in s 109D(3)(b). From that point, it is not a large step to recognise that the reference to a "loan" (as defined in s 109D(3) as a whole) being "repaid" must embrace both the ordinary meaning of "repaid" and an adjusted, extended meaning of "undone". That "repaid" is not so defined in Div 7A of Pt III of the 1936 Act may be accepted, but "loan" is defined to have an extended meaning and that extended meaning cannot be simply disregarded. The object of giving a harmonious operation to all provisions within s 109D is achieved by adjusting the meaning of "repaid" in s 109D(1)(b) (and s 109D(1AA)) rather than

by rewriting the definition of "loan" in s 109D(3) so it includes only s 109D(3)(c) and (d) and writing out the second option in s 109D(4) altogether.

150 Sixth, the concept of "repaid" does not appear in any provision of Div 7A that requires its meaning to be confined to its ordinary meaning of the payment back of money paid under an obligation of repayment. Apart from the use of "repaid" in s 109D(1) and (1AA) relevant to this case, the term is used in s 109D(1A) and (2) applying to a "loan" made during the winding-up of a private company; s 109E applying to an amalgamated "loan"; and s 109R relating to working out how much of a "loan" has not been repaid.

151 Seventh, and contrary to the Full Court's reasoning,[136] the provisions in Div 7A involving the concept of a "debt" do not suggest that a "loan" must involve a payment under an obligation of repayment contrary to the express terms of the definition of "loan" in at the least s 109D(3)(b). Section 109F simply provides another circumstance in which a private company will be taken to have paid a dividend to an entity. That additional circumstance is if the private company "forgives" all or part of a debt the entity owes to the private company. As s 109F(6) discloses, the act of "forgiving" a debt, in effect, means that the private company has evinced its intention never to insist on payment of an amount owed to it. That the forgiveness of a debt, once the intention is evinced, is final, does not mean that "loan" as defined in s 109D(3) should be construed as not including any circumstance by which financial accommodation is provided temporarily. A "loan", by definition, can cease. That Div 7A covers both permanent and temporary circumstances is no more than an outcome of its provisions.

152 The Full Court also considered s 109G to be relevant.[137] Section 109G(1) provides that a "private company is not taken under this Division to pay a dividend because a debt owed to it by another company is forgiven". Section 109G(3) provides that a "private company is not taken under section 109F to pay a dividend at the end of a year of income because of the forgiveness of an amount of a debt resulting from a loan if, because of the loan, the private company is taken", relevantly, "(a) under section 109D to pay a dividend at the end of that year or an earlier one". Section 109G(3) is doing no more than recognising that if a private company is taken to have paid a dividend under s 109D because it "makes a loan" to an entity, that private company is not also to be taken to have paid a dividend because by reason of that "loan" there is a debt which the private company has forgiven. Section 109G(3) is an express provision avoiding double tax to which effect must be given but it does not suggest that "loan" as defined in s 109D(3)

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136 *Federal Commissioner of Taxation v Bendel* (2025) 307 FCR 544 at 560-561 [77]-[78].

137 *Federal Commissioner of Taxation v Bendel* (2025) 307 FCR 544 at 561 [77]-[78].

must be construed as confined to the making of a payment under an obligation to repay.

153 In these circumstances the required resolution to give a harmonious effect to all of the provisions of s 109D is to adjust the meaning of "repaid" in s 109D(1)(b) to encompass a repayment if the "loan" involved a payment under an obligation to repay and to encompass an undoing of the provision of any form of financial accommodation if the doing of that thing did not involve a payment under an obligation to repay but is nevertheless a "loan" as defined in s 109D(3)(b).

154 The same approach is required for s 109D(1AA). In saying that the amount of the dividend taken to be paid "is the amount of the loan that has not been repaid before the lodgment day" the provision is to be construed to encompass a repayment if the "loan" involved a payment under an obligation to repay and to encompass an undoing of the provision of any form of financial accommodation if the doing of that thing did not involve a payment under an obligation to repay but is nevertheless a "loan" as defined in s 109D(3)(b).

155 The Full Court also observed that, on this approach to s 109D, s 109D(1) would be engaged so that the private company is taken to have paid to the entity a dividend with the result that a trust would be taxed on the amount of the dividend not "repaid" in accordance with s 109D(1AA) and, if the trustee then loans the same amount to a shareholder or associate of a shareholder, that amount is also taken to be a dividend paid by the private company to the shareholder or associate of the shareholder. The Full Court, as noted, rightly did not rely on this as a circumstance relevant to the task of statutory construction (in contrast to the reasoning of the Tribunal) because to do so would assume a legislative object to avoid taxation on both circumstances.[138]

156 As the Commissioner also submitted, however, s 109D(1AA) and s 109XB(2) both operate "subject to" s 109Y. Section 109Y, as its heading discloses, provides a formula for a proportional reduction of dividends so they do not exceed a private company's distributable surplus. By this what is meant is that the sum of all the dividends a private company is taken to have made under all provisions of Div 7A cannot be greater than "the company's distributable surplus for that year". Section 109Y represents a manifest legislative intention that, unless specified otherwise, the provisions of Div 7A may operate cumulatively with the overall tax burden, as a result of that cumulative operation, not being able to exceed the private company's distributable surplus for the relevant year.

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138 *Federal Commissioner of Taxation v Bendel* (2025) 307 FCR 544 at 562 [83]-[85].

Adjusting the meaning of "repaid" is not contrary to authority

157 The Full Court correctly observed[139] that the cases on which the parties relied[140] in respect of the concept of a "loan" or "financial accommodation" were each resolved in their particular statutory context. The same observation may be made about *Tilley v Official Receiver in Bankruptcy*,[141] which concerned the provisions of the then bankruptcy legislation and the concept therein of "obtaining credit". Similarly, the reasoning in *Prime Wheat Association Ltd v Chief Commissioner of Stamp Duties*[142] depended on provisions of stamp duty legislation in which a "loan" was defined as including an advance of money; a forbearance to require payment of money owing on any account whatever; and any transaction (whatever its terms or form) which in substance effects a loan of money, where "advance" was defined to include "the provision or obtaining of funds by way of financial accommodation" and, importantly, "financial accommodation" was defined to include "funds provided by means of a loan or funds provided or obtained by means of a bill facility" and "funds provided under any other obligation except an obligation [as specified]".[143] It followed that while the transaction involved a form of financial accommodation, that financial accommodation was not by way of "loan" as defined given the specific statutory definition of "financial accommodation". As Gleeson CJ put it in the context of those statutory provisions, "[n]ot all forms of financial accommodation are loans" and in that case there was "a debt, but no loan".[144]

158 To the extent the respondents relied on the reasoning in *McKay v National Australia Bank Ltd*,[145] the issue in that case was whether there had been consideration for the provision of a guarantee where the guarantee itself recognised that "the mere fact of forbearance is not of itself sufficient consideration for a

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139 eg, *Federal Commissioner of Taxation v Bendel* (2025) 307 FCR 544 at 557 [60], 558 [62], 558 [64], 559 [68], 560 [72].

140 eg, *Commissioner of Taxation v Radilo Enterprises Pty Ltd* (1997) 72 FCR 300; *Prime Wheat Association Ltd v Chief Commissioner of Stamp Duties* (1997) 42 NSWLR 505; *Corporate Initiatives Pty Ltd v Commissioner of Taxation* (2005) 142 FCR 279; *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* (2012) 246 CLR 455.

141 (1960) 103 CLR 529.

142 (1997) 42 NSWLR 505.

143 (1997) 42 NSWLR 505 at 509-510.

144 (1997) 42 NSWLR 505 at 512.

145 [1998] 1 VR 173.

person becoming surety for an existing debt", the requirement for consideration being "either an undertaking to forbear or an actual forbearance at the surety's request".[146] That is the context in which it was said that the words "provision of banking accommodation" "cannot in their context embrace ... a mere suffering by the bank of the continued existence of an unpaid debt in an unclosed account. The adoption of such an attitude by a bank does not ... amount to the 'provision of banking accommodation'. At the most it amounts to a postponement by a creditor of his right to call in a debt; an inaction which smacks of a forbearance to sue; but in this case a forbearance of a kind insufficient to afford valuable consideration."[147]

159 Ultimately, none of the authorities to which the parties referred speak to the questions relevant to resolution of this appeal.

What does "makes a loan" mean?

160 Another consequence of the respondents' incorrect insistence that a "loan" requires a payment to have been made under an obligation to repay is the effect of that approach on the concept of "the private company *makes* a loan"[148] in s 109D(1)(a). Because the making of a payment under an obligation to repay involves a positive act by the private company, the respondents asserted that a private company may "make a loan" only by a positive act.

161 Leaving aside the all-important context in which "makes" is used in s 109D(1)(a), the respondents' assumption is inconsistent with the ordinary meaning of the word "make", which in the Macquarie Dictionary includes "to cause to be or become", "to give rise to; occasion", "to be sufficient to constitute; be essential to", and "to achieve ...".[149] A person may cause, occasion and achieve a thing without the doing of a positive act. While there would be no such causing, occasioning or achieving unless the person had agency to act or not to act, that agency alone and the doing or not doing of an act may be sufficient to "make" the thing occur depending on the circumstances. The respondents have not identified any reason to confine the ordinary meaning of "makes" in s 109D(1)(a) to a positive act, let alone a positive act of paying money under an obligation of repayment.

162 As already explained, the respondents' approach to s 109D(1)(a) also decontextualises the concept of "makes". The verb "makes" in s 109D(1)(a) is to be construed in a context in which the definition of "loan" extends beyond the

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146 [1998] 1 VR 173 at 177-178.

147 [1998] 1 VR 173 at 178.

148 Emphasis added.

149 *Macquarie Dictionary* (online), "make" (def 3, 8, 21, 27).

circumstance of the making of a payment under an obligation of repayment as specified in s 109D(3)(c). Accordingly, "makes" is to be given a meaning capable of applying to every part of the definition of "loan" in s 109D(3), including the "making" of a "loan" by the doing of the thing, being a provision of financial accommodation, as contemplated by s 109D(4). A provision of financial accommodation under s 109D(3)(b) therefore encompasses any circumstance in which a private company, by the doing of a thing (see s 109D(4)), satisfies a financial want of an entity, in whole or in part, with the facts of both financial want and its satisfaction being objectively determined.

163 Given this, the surrounding circumstances may be such that the refraining from doing of an act is itself the doing of a thing to constitute the "making" of a "loan". No doubt a private company's state of mind will be crucial in such a case of doing a thing (a provision of financial accommodation) by not doing another thing (not requiring its entitlements to be paid to it). It may be accepted, for example, that a thing done or not done without agency will be immaterial, and in such a case the existence of agency depends on the private company being inferred to have known the relevant surrounding circumstances by which the private company is doing a thing (a provision of financial accommodation) by not doing another thing (not requiring its entitlements to be paid to it) but the relevant state of mind attributable to a private company extends to its objectively ascertained state of mind by the ordinary process of fact finding, including the drawing of inferences.

Separate trust?

164 As noted, the Tribunal rejected the respondents' contention that, by operation of cl 3(5) of the Trust Deed, a separate trust arose over the portions or amounts set aside for Gleewin Investments.[150] Moreover, neither party challenged that conclusion on appeal to the Full Court, a fact which the respondents frankly described as representing a "forensic decision" they had made. Yet the respondents now contend that, although it is not determinative of the appeal, this Court should find that such a separate trust was created. In these circumstances, revisiting the question whether a separate trust was created by operation of cl 3(5) of the Trust Deed is unappealing to say the least.

165 The respondents' acceptance that the question whether separate trusts were constituted is not determinative of the appeal accords with the fact that, if a separate trust for the sole benefit of Gleewin Investments had been constituted, then Gleewin Investments would have had the right as sole beneficiary to require Gleewin to pay the amount held in that separate trust to it at any time, thereby

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150 *Re Bendel and Federal Commissioner of Taxation* (2023) 117 ATR 464 at 490 [81].

terminating the trust, in accordance with the rule in *Saunders v Vautier*.[151] In that event, the Commissioner's case, in accordance with the Commissioner's position before the Tribunal, was that Gleewin Investments provided financial accommodation to Gleewin by not exercising that right when, at the least, Gleewin Investments must be taken to have known that it could call for the amount to be paid to it at any time.

166 No conclusion that separate trusts were constituted should be reached, however. It was common ground before the Tribunal that Gleewin did not separate any amounts of its net income as determined to be set aside in the resolutions. That cl 3(5) of the Trust Deed says that "[a]ny amount set aside for any beneficiary ... shall cease to form part of the Trust Fund and upon such setting aside ... shall thenceforth be held by the Trustee on a separate trust for such person absolutely" may be accepted. The question whether there was, at the time of putative constitution of the separate trust by operation of cl 3(5), sufficient certainty of subject-matter of the putative separate trust to enable such a trust to be constituted[152] and the question whether the reasoning in *White v Shortall*[153] applicable to a parcel of shares can be translated and applied to a portion of net income of a trust can both be put to one side. In the context of cl 3(2)(c) of the Trust Deed, it is difficult to construe cl 3(5) as meaning that such amounts, by reason of Gleewin's determinations effected by the resolutions, ceased to form part of the Trust Fund and instead were held on a separately constituted trust thereafter. The better reading of cl 3(5) is that which the Commissioner proposes. Clause 3(5) operated so that, by reason of Gleewin's determinations effected by the resolutions to set aside amounts or portions of the Trust's net income, there was effected an irrevocable alteration of the beneficial entitlements in the Trust Fund as a whole. McCarthy J described the true effect of such a resolution in *Commissioner of Inland Revenue v Ward*[154] in these terms:[155]

> "The moneys covered by the resolution were of course held on trust both before and after the resolution; held, basically, under the trusts created by the original deed. The effect of the resolution was to fix the beneficiaries to whom payment would eventually have to be made and to that extent one could perhaps speak of a new trust, but this is by no means an unusual occurrence in the administration of trust deeds."

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151 (1841) Cr & Ph 240 [41 ER 482].

152 See, eg, *Commissioner of Inland Revenue v Ward* [1970] NZLR 1.

153 (2006) 68 NSWLR 650.

154 [1970] NZLR 1.

155 [1970] NZLR 1 at 30.

167 The reasoning of Gageler J in *Fischer v Nemeske Pty Ltd*[156] reflects the same approach. His Honour said:[157]

> "An absolute beneficial entitlement to some part of a fund of property that is held on trust need not be reflected in an absolute beneficial entitlement to the whole or some part of any specific asset within that fund. That must be so whether the absolute beneficial entitlement to some part of a fund of property that is held on trust is defined by the terms of the trust settlement itself, or whether such absolute beneficial entitlement to some part of a fund of property that is held on trust is defined by an exercise of a power conferred on a trustee under the terms of a trust settlement. Whether or not a particular beneficial entitlement to some portion of a trust fund is reflected in a beneficial entitlement to the whole or some part of a specific asset within that fund depends on the terms of the trust settlement."

168 This construction of cl 3(5) of the Trust Deed, as will become apparent, reflects (in part) what in fact occurred and how Gleewin in fact treated the entitlements of Gleewin Investments and Mr Bendel.

169 Otherwise, nothing supports the respondents' contention that if the subject-matter of the putative separate trust was uncertain at the time of each resolution then there "is no reason to deny that a separate trust thereafter arose once the income set aside for Gleewin Investments was invested in an identifiable asset", that identifiable asset being, it was said, the loans that Gleewin made to Mr Bendel. The separate trust was either effectively constituted at the time of the setting aside (being the resolutions) or not. Clause 3(5) of the Trust Deed cannot be construed as having an ambulatory operation so that, if and when the subject-matter of the putative trust can be identified with sufficient certainty, the separate trust is then constituted. Nor is it to be merely assumed that Gleewin lending money to Mr Bendel constituted an investment of the portion of net income to which Gleewin Investments was entitled "for the benefit of" Gleewin Investments as contemplated by cll 3(2)(c) and 6(5) of the Trust Deed; whatever else might be said, the "absolute discretion" of Gleewin in respect of making investments pending payment was confined to the investment being for the benefit of Gleewin Investments.

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156 (2016) 257 CLR 615.

157 (2016) 257 CLR 615 at 651 [99] (footnote omitted).

The debtor-creditor issue

The respondents' changed position

170 In an appeal to this Court from an appeal to the Federal Court under s 44(1) of the *Administrative Appeals Tribunal Act*, being an appeal limited to a question of law, the answer to the debtor-creditor issue should be straightforward. The facts are the facts as found by the Tribunal.

171 So much is true for the primary facts described above. But the character of the facts, the inferences that should be drawn from them, and their consequences, regrettably, remain unsettled. One thing that remains undisputed is the Tribunal's factual finding that Mr Bendel controlled Gleewin as the trustee and thereby the Trust, and Gleewin Investments as the beneficiary. As a result, and as previously noted, his knowledge of the affairs of himself and each of the entities can be attributed to each entity.[158] Another thing that remains common ground is that, howsoever its rights might be characterised, Gleewin Investments could have required Gleewin to pay to it its entitlements at any time, just as Gleewin paid Mr Bendel his entitlements by crediting them in its books of account against the loans it made to Mr Bendel.

172 However, a dispute now exists between the parties as to whether the respondents were correct to have conceded before the Full Court that the facts gave rise to a debtor-creditor relationship between Gleewin and Gleewin Investments. This (then) common position is reflected in the Full Court's observation that "[t]he taxpayer respondents accepted ... that there existed a debtor-creditor relationship between the trustee and Gleewin Investments" as "[t]he 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" and "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."[159]

173 The respondents' point before the Full Court was that none of this mattered because: (i) Subdiv EA applied to the exclusion of Subdiv B; (ii) s 109D(1)(b) operated so that unless there had been a payment subject to an obligation to repay there could be no "loan" for the purpose of s 109D(1); (iii) that Gleewin Investments "could have sued in debt to recover the amount" does not "result in there being a loan"; and (iv) by merely refraining from calling for a payment of

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158 *Re Bendel and Federal Commissioner of Taxation* (2023) 117 ATR 464 at 473 [26].

159 *Federal Commissioner of Taxation v Bendel* (2025) 307 FCR 544 at 563 [92].

any amount set aside for it, Gleewin Investments as beneficiary did not "make" a "loan" in any event because that refraining involved nothing more than allowing the Trust Deed to operate according to its terms or, as the Full Court recorded the case the respondents put, "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 [amounts set aside] 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) to (c)."[160]

174 The respondents now assert, however, that the facts did not give rise to a debtor-creditor relationship between Gleewin and Gleewin Investments. In this new context, the respondents emphasise that Gleewin had a power under cl 3(1)(a) of the Trust Deed to determine to either pay apply or set aside part of the net income of the Trust for an Accounting Period (as defined). They contend that Gleewin determined by the resolution in each relevant year only to "set aside" part of that net income for, relevantly, Gleewin Investments, the proper construction of the resolutions being that the determination that "the income of the Trust shall be distributed as specified above" refers back to that part of the resolution in which the "distribution of income" is, in terms, to "set aside" the specified amounts. On that basis, the respondents contend that cl 3(2)(c) of the Trust Deed vested a range of powers in Gleewin and cl 3(5) provided that the amount so set aside ceased to be part of the Trust Fund and was held on separate trust absolutely for Gleewin Investments, there being no obligation on Gleewin to pay any amount to Gleewin Investments by any time, the obligation to pay arising only on Gleewin Investments calling for payment. As the respondents put it, "[s]imply continuing to hold amounts on trust for a beneficiary, effectively at call, does not amount to a loan made by the beneficiary to the trustee as defined in s 109D(3)".

175 It is not apparent why the respondents should be permitted to resile from express concessions before the Full Court that Gleewin had admitted to Gleewin Investments a debt not only by the terms of the resolutions it passed but also subsequently by its accounts, in which, as the Full Court put it, the amounts owed to Gleewin Investments "appeared in the financial statements of the trust as part of the total liabilities owed by the trust disclosed in the balance sheet".[161] By that concession Gleewin accepted that it had, as a matter of fact, admitted the debt to Gleewin Investments. The respondents should not now be permitted to resile from that admission of fact. That the Commissioner was prepared to respond to the appeal on the new factual basis, in circumstances where the Commissioner maintained that there was a debtor-creditor relationship in accordance with

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160 *Federal Commissioner of Taxation v Bendel* (2025) 307 FCR 544 at 555-556 [48] (emphasis in original).

161 *Federal Commissioner of Taxation v Bendel* (2025) 307 FCR 544 at 563 [92].

Gleewin having admitted the debt to Gleewin Investments as beneficiary, does not mean that the Commissioner consented to the withdrawal of the admission. It should not have been necessary to deal with the debtor-creditor issue in this appeal as the respondents should have acknowledged that they made an admission of fact (consistent with their concession to the Full Court), being the admission that Gleewin and Gleewin Investments were in a debtor-creditor relationship. That the respondents were invited to consider if their admission was one of law in oral argument ought not to have permitted them to change the proper characterisation of their admission as one of fact, their admission not being one of characterisation of the legal relationship between Gleewin and Gleewin Investments but being an admission by Gleewin to Gleewin Investments of the fact of a debt arising from the resolutions and owing at all times to Gleewin Investments subject only to Gleewin Investments requiring payment. As will be explained, the existence of such a debtor-creditor relationship also accords with the objective facts of the case.

Debtor-creditor relationship?

176 A debt is "a sum of money which is now payable or will become payable in the future by reason of a present obligation".[162] As the Full Court's reasons recognised, a "debt" may exist whether or not a payment has been made under an obligation of repayment.[163] The existence of a debt no more depends on a breach of trust than it does on a breach of contract. As Dixon CJ, McTiernan and Taylor JJ said in *Young v Queensland Trustees Ltd*,[164] the "common law does not and never did conceive of indebtedness in a sum certain for an executed consideration as a mere breach of contract: it is rather the detention of a sum of money and that was so whether the creditor enforced his demand by an action of debt or by *indebitatus assumpsit*".[165] That the resolutions set aside a portion of the Trust's net income rather than an amount for each beneficiary does not mean that no debt existed. A debt may exist even if the sum owed under it is to be calculated or assessed subsequently.[166]

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162 *Webb v Stenton* (1883) 11 QBD 518 at 527.

163 *Federal Commissioner of Taxation v Bendel* (2025) 307 FCR 544 at 561 [79].

164 (1956) 99 CLR 560.

165 (1956) 99 CLR 560 at 567.

166 eg, *Crisp & Gunn Co-operative Ltd v Hobart Corporation* (1963) 110 CLR 538 at 543; *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 250-251; *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 207 CLR 520 at 533-534 [30].

177 Further, the reasoning in *Fischer v Nemeske Pty Ltd*[167] confirms that: (i) "no action at common law for money had and received lies against a trustee in respect of its equitable obligations even if those obligations extend to the payment of money";[168] and (ii) if, however, a trustee admits to a beneficiary that the trustee has appropriated a sum as payable to the beneficiary, the character of the relationship is changed so that the trustee is liable in law to the beneficiary for the payment of that sum, which obligation the beneficiary could vindicate by an action for money had and received against the trustee.[169]

178 From the terms of the resolutions of Gleewin, there can be no doubt that its "determination" under cl 3(1) of the Trust Deed was to "set aside" for each specified beneficiary the specified "classes or categories of income of the Trust ... in the ... amounts and/or proportions, as set out in the table" in each resolution. In further resolving that "for the avoidance of doubt, regardless of any adjustment to the income of the Trust, the income of the Trust shall be distributed as specified above", Gleewin was confirming that the "distribution" being effected was to "set aside" those amounts or proportions of income for each beneficiary as specified.

179 It does not follow from this, however, that Gleewin could not pay a beneficiary its entitlement unless the beneficiary required payment. To the contrary, the resolutions to "set aside" the income for a beneficiary in the specified portions or amounts required Gleewin to do one of two things without a beneficiary taking any action. By the resolutions, Gleewin was bound to either immediately pay a beneficiary its entitlement (subject only to the calculation of the amount thereof to reflect the portions or amounts of entitlements as determined) or to place that portion or amount (as so calculated) "to the credit of such beneficiary in the books of account of the Trust Fund". This is because, on the setting aside of the portion or amount of the Trust's income, the portion or amount was to 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 Fund or by drawing any cheque in respect of such amount made payable to or for the credit or benefit of such beneficiary or by paying the same over to or for the benefit of such beneficiary" as specified in cl 3(2)(c) of the Trust Deed, each option being available for all forms of determination, be it to "pay apply or set aside any amount to or for the benefit of any beneficiary". Each such determination, be it to "pay apply or set aside any amount to or for the benefit of

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167 (2016) 257 CLR 615.

168 (2016) 257 CLR 615 at 626 [16], citing *Bartlett v Dimond* (1845) 14 M & W 49 at 56 [153 ER 385 at 387]; *Pardoe v Price* (1847) 16 M & W 451 at 458-459 [153 ER 1266 at 1269]; *Edwards v Lowndes* (1852) 1 El & Bl 81 at 89 [118 ER 367 at 370]. See also (2016) 257 CLR 615 at 653 [105].

169 (2016) 257 CLR 615 at 627 [16]-[17], see also at 653 [105], 654-655 [109]-[111].

any beneficiary", by cl 3(2)(c) was "irrevocable" and "effectually made and satisfied (inter alia) by a resolution" of Gleewin. It is also relevant that if Gleewin did not immediately pay the beneficiary its entitlement then it could only hold that portion or amount "pending payment" as set out in cl 3(5) of the Trust Deed. The concept of "pending payment" accords with the resolutions having created a debt due to each beneficiary immediately, subject only to calculation of the quantum of the debt.

180 Accordingly, and irrespective of the fact that Gleewin determined to "set aside" portions of Trust income rather than to "pay" such portions, Gleewin was immediately bound by the resolutions either to pay a beneficiary its entitlement (as and when calculated) or to credit the amounts payable in its books of account whether or not a beneficiary required it to do so. It was only if Gleewin took the latter option in respect of a beneficiary's entitlement that the beneficiary could either accept that Gleewin could continue to hold those amounts or require Gleewin to pay those amounts to it.

181 Gleewin acted in accordance with the resolutions by immediately, on quantification of the amounts: (i) recording sums to the credit of, relevantly, Gleewin Investments in the Gleewin Investments Current Account, showing those amounts as current liabilities of the Trust; and (ii) paying Mr Bendel his entitlements by crediting those entitlements against the Bendel Current Account, which was in debt to Gleewin as a result of Gleewin's loans to Mr Bendel. Gleewin did so in circumstances where there is no evidence of: (i) any further resolution by Gleewin to "pay" Mr Bendel's entitlements to him thereby enabling the Bendel Current Account in debit to be reduced by the amount of the entitlements paid to him; or (ii) Mr Bendel having required Gleewin to pay his entitlement to him by making a call for payment or otherwise.

182 In circumstances where Mr Bendel was the controlling mind of all involved, Gleewin thereby must be taken to have admitted to Gleewin Investments (and to Mr Bendel) that the setting aside of, relevantly, the portions of income for each as specified in Gleewin's resolutions resulted in there being a debtor-creditor relationship between Gleewin and each beneficiary in respect of the amounts as subsequently recorded in the Trust books of account (albeit subject to whatever entitlements to set-off or adjustment may be vested in Gleewin). If the entitlements were not immediately paid to each beneficiary (on quantification), cl 3(5) only enabled Gleewin "pending payment" to "invest or apply or deal with such Fund or any resulting income therefrom or any part thereof in the manner provided for in [cl] 6(5) hereof".

183 These provisions of the Trust Deed all support the conclusion that the respondents' concession before the Full Court properly reflected that, by Gleewin's actions in respect of both Mr Bendel and Gleewin Investments and the fact of Mr Bendel being the common controlling mind of all involved, Gleewin had admitted to both Gleewin Investments and Mr Bendel its indebtedness to each of

them in respect of the portions of net income set aside for them under the resolutions. Gleewin thereafter acted at all times consistently with those admissions of fact.

184 Given the terms of the Trust Deed, there was no inconsistency between the trustee and beneficiary relationship and the debtor-creditor relationship as described above. The circumstances as contemplated by the Trust Deed meant that each beneficiary held an absolute beneficial entitlement to a portion of the Trust's net income as set aside for them and an immediate legal entitlement to payment of that portion subject only to its quantification (and rights of deduction and set-off by the trustee). These equitable and legal rights involve no inconsistency and reflect the operation of the Trust Deed in accordance with its terms and Gleewin's actions reflecting those terms.

185 The Full Court, accordingly, was correct to accept the respondents' concession that Gleewin had admitted the existence of debts owing to Gleewin Investments and Mr Bendel, each being presently entitled to payment of those portions of the Trust's net income for each year (calculable as the amounts recorded in the Trust's books of account). By immediately paying to Mr Bendel his entitlements on quantification of them without any further resolution or action by Mr Bendel, Gleewin was acting in accordance with the Trust Deed. That the Trust Deed also authorised Gleewin to hold those amounts and invest them on behalf of a beneficiary, being a power exercisable pending payment of the amounts to the beneficiary, and that Gleewin exercised that power in relation to the entitlements of Gleewin Investments does not alter the fact that the amounts were payable to Gleewin Investments without more, as a debtor-creditor relationship existed in respect of each portion of net income as set aside each year – the admission of such by Gleewin to each beneficiary being effected by the terms of the resolutions in the context of the terms of the Trust Deed, thereafter confirmed as to quantum by the entries in the Trust's books of account.

Application of s 109D to the facts

186 It may be accepted that, as Mr Bendel was the controlling mind of all involved, he knowingly arranged for Gleewin to set-off his entitlements against his indebtedness, but there is no reason to infer that in doing so he "required" Gleewin to pay him his entitlements by, for example, calling for such payment. Equally, it must be inferred that Mr Bendel, as the controlling mind of all involved, also knowingly arranged for Gleewin to hold the entitlements of Gleewin Investments and for Gleewin Investments not to require the payment of its entitlements to it. In those circumstances, it is to be inferred that Gleewin Investments decided to enable Gleewin to not pay to it its entitlements. That is, from the objective surrounding circumstances, Gleewin Investments had the requisite agency to make its non-action the "doing of a thing", being the provision of financial accommodation to Gleewin. The mere fact that Mr Bendel was the controlling mind of all involved means also that it must be inferred that, objectively, Gleewin had a financial want

which was objectively satisfied in whole or in part by the provision of financial accommodation. That is, even without the additional facts that Gleewin Investments so deciding enabled Gleewin to lend money to Mr Bendel and that Gleewin did so, the idea that Gleewin Investments was a non-agent merely standing by while the Trust Deed operated in accordance with its terms and did nothing capable of being undone is more than implausible. With the additional facts that Gleewin Investments so deciding enabled Gleewin to lend money to Mr Bendel and that Gleewin did so, the Commissioner's case that Gleewin Investments made loans to Gleewin in accordance with s 109D(1)(a) because, as between Gleewin Investments and Gleewin, there was a doing of a thing by Gleewin Investments (not requiring payment of its entitlements to it) constituting a provision of financial accommodation under s 109D(3)(b), is compelling.

187 The facts of this case, in reality, are straightforward. Gleewin admitted to Gleewin Investments and Mr Bendel as beneficiaries that it owed them money and was thereby indebted to them by the resolutions Gleewin passed. By those resolutions alone it admitted its indebtedness to each beneficiary irrespective of the fact that the amount of the debt was to be quantified. At the moment the resolutions were passed, each beneficiary could require Gleewin to pay to that beneficiary their entitlements and Gleewin would have been liable as a debtor to do so (subject only to quantification and in accordance with any rights of deduction or set-off). Failing payment, each beneficiary could sue Gleewin in debt for the amount owed to that beneficiary irrespective of the trust relationship. The recording of the amounts owed under the respective entitlements of each beneficiary in the Trust's books of account simply confirmed Gleewin's admission of its indebtedness and its quantification. Mr Bendel, the controlling mind of all involved, decided that his entitlements should be paid to him and Gleewin complied by crediting the entitlements against Mr Bendel's loans in the Trust's books of account. Mr Bendel simultaneously decided as the controlling mind of Gleewin Investments that Gleewin Investments' entitlements should not be paid to it but should be left in the hands of the Trust, which would enable Gleewin to loan him money. Gleewin complied by recording its indebtedness to Gleewin Investments in the Trust's books of account. That by so doing Gleewin Investments provided financial accommodation to Gleewin cannot be seriously doubted. The thing done by Gleewin Investments was to not require Gleewin to pay its entitlement to it within the relevant year. That thing done could have been undone either fully in accordance with s 109D(1)(b) or partly in accordance with s 109D(1AA). The thing done, a provision of financial accommodation, was not undone within the relevant year. Accordingly, s 109D(1)(a) is satisfied.

188 Given that s 109D(1)(b) is to be construed as encompassing both a repayment of an amount if the "loan" involved a payment of an amount under an obligation to repay and an undoing of the thing done to constitute the provision of any form of financial accommodation, it is clear that s 109D(1)(b) is also satisfied. The "loans" Gleewin Investments made to Gleewin were not fully undone in the relevant years.

189 There was no dispute that s 109D(1)(d) would be satisfied in the circumstances.

190 Accordingly, Gleewin Investments is taken to have paid a dividend to Gleewin at the end of each of Gleewin Investments' relevant years of income. By s 109D(1AA) the amount of that dividend is "the amount of the loan that has not been repaid before the lodgment day for the current year", meaning the amount of the financial accommodation which had not been undone by Gleewin paying to Gleewin Investments its entitlements for that year.

Section 6-25 applicable?

191 Section 6-25 of the 1997 Act is engaged only if the "amount" of a taxpayer's assessable income is the "same amount" included as assessable income under two or more provisions of the taxation legislation.

192 The statutory construct which s 6-25 creates is not satisfied in the present case. That the assessable income of Gleewin would have included its receipts in an income year (by reference to which Gleewin was taxed for that income year), which included or were constituted by amounts set aside by resolution for the Trust's beneficiaries, and that Gleewin Investments made a "loan" to Gleewin of its share of net income as so set aside by reason of which Gleewin Investments is taken to have paid a dividend to Gleewin under s 109D(1) of the 1936 Act (by reference to which Gleewin would be taxable in a subsequent income year), does not mean that Gleewin will be subject to tax on the "same amount" of assessable income. The first amount on which Gleewin is taxed is the whole of its assessable income. The second amount on which Gleewin is taxed is that part of the deemed dividend taken to have been paid to it and not repaid in accordance with s 109D(1) and (1AA). These are different amounts, both in quantum and in concept. These amounts are no more than historically related in that the latter is derived from the former. That does not satisfy the requirement that each amount of assessable income be the "same amount" as required by s 6-25 of the 1997 Act.

Conclusion and orders

193 For these reasons s 109D(1) of the 1936 Act applies to the "loans" which Gleewin Investments made to Gleewin in the relevant years. The Commissioner's appeal should be allowed and the orders of the Full Court should be set aside and in their place order that the appeal be allowed, the orders of the Tribunal set aside and the matter remitted to the Tribunal for determination in accordance with law.

194 BEECH-JONES J. Division 7A of Pt III of the *Income Tax Assessment Act 1936* (Cth) ("the ITAA 1936") seeks to ensure that, amongst other things, loans made "by private companies to shareholders (and their associates) [are] to be assessable dividends to the extent that there are realised or unrealised profits in the company".[170] To that end, within Div 7A, s 109D(3) provides an expansive and inclusive definition of a "loan".

195 Based on the factual findings made by the Administrative Appeals Tribunal ("the AAT")[171] and the admissions made on behalf of the respondents before the Full Court of the Federal Court, the principal issue before this Court should be whether a private company beneficiary that gives or grants time for the payment of a debt owed to it by a trustee[172] "makes a loan" to the trustee for the purposes of s 109D(1)(a) of the ITAA 1936. Contrary to the reasoning of the Full Court, the answer to that question is "yes" because the deferral of a shareholder's obligation to pay a debt amounts to the provision of "credit or any other form of financial accommodation" within the meaning of s 109D(3)(b).

196 The posing and answering of that question was complicated by attempts in this Court to revisit those factual findings and admissions.[173] They should not be revisited. Instead, the issue of principle just noted should be answered as I have stated and the respondents' notice of contention concerning the application of s 6-25 of the *Income Tax Assessment Act 1997* (Cth) ("the ITAA 1997") should be rejected. The appeal by the Commissioner of Taxation should be allowed and the orders proposed by Jagot J should be made.

Background

197 Through various entities that constitute the "Bendel Group", the first respondent, Mr Steven Bendel, conducts an accounting and registered tax agent practice and also participates in various commercial property syndicates.

198 Gleewin Pty Ltd ("Gleewin") is the trustee of the Steven Bendel 2005 Discretionary Trust ("the 2005 Trust"). Mr Bendel and the second respondent,

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170 Australia, Senate, *Taxation Laws Amendment Bill (No 3) 1998*, Explanatory Memorandum at 131 [9.11].

171 *Re Bendel and Federal Commissioner of Taxation* (2023) 117 ATR 464.

172 Where the trustee is also a shareholder in the private company or an "associate" of such a shareholder when the loan is made, or a reasonable person would conclude that the loan is made because the trustee has been such a shareholder or associate of such a shareholder at some time: *Income Tax Assessment Act 1936* (Cth), s 109D(1)(d).

173 See below at [216]-[217].

Gleewin Investments Pty Ltd ("Gleewin Investments"), are discretionary beneficiaries of the 2005 Trust. The 2005 Trust, Gleewin and Gleewin Investments are part of the Bendel Group. At the relevant times, they were controlled by Mr Bendel. His knowledge of the affairs of each entity was and can be attributed to each entity, and each entity was and can be attributed with the knowledge of Mr Bendel's affairs and of the affairs of the other entities.

199 Clause 3(1)(a) of the Trust Deed for the 2005 Trust confers on Gleewin as trustee a power "at any time before the expiration of any Accounting Period with respect to all or any part or parts of the net income of the Trust Fund for such Accounting Period [to] determine ... to *pay apply or set aside* [all or any part or parts of the net income of the Trust Fund] to or for any one or more of the General Beneficiaries" as defined (emphasis added). The Trust Deed defines "set aside" in relation to a beneficiary as "includ[ing] placing sums to the credit of such beneficiary in the books of account of the Trust Fund".[174] Clause 3(2)(c) provides that any such determination "shall be irrevocable" and "may be effectually made and satisfied (inter alia) by a resolution of the Trustee". Clause 3(2)(c) further provides that such a resolution is to be to the effect that a "sum out of or portion of the net income" of the Trust Fund or trust estate ("as defined in Section 95 of the Income Tax Assessment Act") for the accounting period "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 Fund or by drawing any cheque in respect of such amount made payable to or for the credit or benefit of such beneficiary or by paying the same over to or for the benefit of such beneficiary in such manner and to such person on behalf of such beneficiary as the Trustee shall think fit".

200 Clause 3(5) of the Trust Deed provides that any amount "*set aside* for any beneficiary … shall cease to form part of the Trust Fund and upon such setting aside … shall thenceforth be held by the Trustee on a separate trust for such person absolutely" (emphasis added). Pending payment over of that amount to the beneficiary, the trustee has the power "to invest or apply or deal with such Fund or any resulting income therefrom or any part thereof in the manner provided for in Clause 6(5)". Relevantly, cl 6(5) confers on the trustee a power to invest "in such manner as the Trustee in its absolute discretion thinks fit for the benefit of such person" the amount held in the separate trust created by cl 3(5) and any income that results from the separate trust.

201 An annexure to the AAT's decision sets out the terms of the resolutions of the director of Gleewin, as trustee, made in June of each year from 2014 to 2017. Relevantly, those resolutions record that the director resolved that certain classes or categories of income of the 2005 Trust for the relevant financial year were "hereby set aside" for the benefit of particular beneficiaries in particular

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174 Clause 1(19) of the Trust Deed for the 2005 Trust.

proportions, as set out in a table forming part of each resolution (the "entitlements"). It was further resolved that "for the avoidance of doubt ... the income of the Trust shall be *distributed* as specified" in that table (emphasis added).

202 For the tax years ending 30 June 2014 and 30 June 2016, the applicable resolutions provided that 100 per cent of the 2005 Trust's net capital gains was "set aside" for the benefit of and "shall be distributed" to Mr Bendel and 100 per cent of the net franked dividends and all other income was "set aside" for the benefit of and "shall be distributed" to Gleewin Investments. For the tax year ending 30 June 2015, the resolutions provided that 90 per cent of the 2005 Trust's net capital gains, net franked dividends and all other income was "set aside" and "shall be distributed" to Gleewin Investments and 10 per cent was "set aside" and resolved to be "distributed" to Mr Bendel. For the tax year ending 30 June 2017, 100 per cent of the 2005 Trust's net capital gains and net franked dividends was "set aside" and resolved to be "distributed" to Mr Bendel. The balance of the 2005 Trust's income for that financial year was "set aside" and resolved to be "distributed" to Gleewin Investments and Mr Bendel in the proportions 75 per cent and 25 per cent respectively.

203 The 2005 Trust's balance sheets for each of the 2014 to 2017 financial years included a "Beneficiaries Current Account" in the name of Mr Bendel, listed as an asset. These entries reflect monies advanced to Mr Bendel from time to time, which exceeded his entitlements under the resolutions, such that Mr Bendel's entitlement to Gleewin's income was always fully discharged or paid. The 2005 Trust's "Trust Distribution Statement" for each of the 2014 to 2017 financial years confirms that Mr Bendel's entitlement under the applicable resolution to a proportion of a class or category of the 2005 Trust's income was applied in each year to reduce Mr Bendel's indebtedness to the 2005 Trust.

204 The 2005 Trust's balance sheets for the 2013 to 2017 financial years also included a "Beneficiaries Current Account" for Gleewin Investments. The account was listed between the sub-headings "Current Liabilities" and "Non-Current Liabilities" and its balance was included in the calculation of the 2005 Trust's "Total Liabilities" in each financial year. The 2005 Trust's "Trust Distribution Statement" for each financial year from 2013 to 2017 confirms that Gleewin Investments' entitlement under that year's resolution was applied in each year to increase the balance of Gleewin Investments' "Beneficiaries Current Account". In addition, Gleewin Investments' balance sheet for each financial year from 2014 to 2017 included a corresponding "current asset" comprising the (moving) balance of Gleewin Investments' unpaid entitlement out of the 2005 Trust.

205 Mr Bendel caused Gleewin to meet Gleewin Investments' tax liabilities and other expenses from time to time. When this took place entries were recorded in Gleewin's accounts in the "Gleewin Investments Current Account", and in Gleewin Investments' accounts the expenses were recorded in the account named "Steven

Bendel 2005 Discretionary Trust". Otherwise, Gleewin Investments did not, at any relevant time, call for payment of the remaining amounts to which it was entitled.

The Commissioner's assessments

206 The Commissioner issued assessments for the relevant taxation years to the two presently entitled beneficiaries of the 2005 Trust, namely Mr Bendel and Gleewin Investments.[175] Those assessments reflected a determination by the Commissioner that Gleewin Investments had unpaid present entitlements to prior year distributable income from the 2005 Trust. These prior year unpaid present entitlements were said to comprise loans within the meaning of s 109D(3) of the ITAA 1936 made by Gleewin Investments in the relevant year to Gleewin. The loans were assessed to be dividends paid by Gleewin Investments to Gleewin by virtue of s 109D(1) of the ITAA 1936 in the year ending 30 June following the year for which the present entitlement was created. These (deemed) dividends were taken to be paid out of Gleewin Investments' profits to the extent to which Gleewin Investments had a "distributable surplus", as defined by the ITAA 1936.[176] As such, the (deemed) dividends taken to be paid by Gleewin Investments out of its profits were determined to be "assessable income"[177] and the beneficiaries of the 2005 Trust (ie, Gleewin Investments and Mr Bendel), who were entitled to Gleewin's income in each relevant year of income, were assessed under s 97 of the ITAA 1936 by reference to their proportionate shares of Gleewin's income for the year in which the dividend was taken to be paid.

207 Mr Bendel and Gleewin Investments lodged objections to the Commissioner's assessments which were relevantly disallowed ("the objection decisions"). Mr Bendel and Gleewin Investments sought review of the objection decisions by the AAT.

The AAT's findings and reasons

208 Before the AAT the respondents and the Commissioner both contended that the effect of each of the resolutions described above was to create a separate trust under cl 3(5) of the Trust Deed in respect of Gleewin Investments' entitlements. The parties disagreed as to the effect of those separate trusts, debating whether Gleewin Investments' actions in not collapsing the trusts and requiring the payment to it of those entitlements amounted to a loan by it to Gleewin for the purposes of s 109D(3).

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175 *Income Tax Assessment Act 1936* (Cth), s 97(1).

176 *Income Tax Assessment Act 1936* (Cth), ss 109Y(2), 109Z.

177 *Income Tax Assessment Act 1936* (Cth), s 44(1).

209 The AAT found that Gleewin did not report that it held any asset separately, did not purport to alienate or create any interest in any identified asset to meet or correspond with Gleewin Investments' unpaid present entitlements, and did not report or account for any separate trust with respect to those entitlements. The AAT found that it was not possible to identify any asset held by Gleewin in respect of which any change in any form of ownership occurred. Gleewin Investments also reported its entitlements in each year of income "in a corresponding way". The AAT found that there was no identifiable property held by Gleewin for Gleewin Investments absolutely and for its benefit.

210 Ultimately, contrary to the parties' submissions, the AAT did not accept that "a separate trust in fact arose in any conventional sense that had the effect of discharging or replacing [Gleewin's] obligation to pay [Gleewin Investments'] entitlements to income". Instead, the AAT found that Gleewin Investments' absolute beneficial entitlement to part of the fund held by Gleewin on trust was not "reflected in an absolute beneficial entitlement to the whole or some part of any specific asset" within the fund[178] but was "an entitlement to be paid a sum of money out of the fund of property that is held on trust",[179] which was "immediately enforceable in equity".[180]

211 However, the AAT did not accept that Gleewin Investments made a loan to Gleewin for the purposes of s 109D. The AAT appeared to conclude (or assume) that the circumstances satisfied the terms of s 109XA(2) within Subdiv EA of Div 7A in that, at the relevant times, Gleewin had made a loan to an associate of a shareholder (ie, Mr Bendel) of a private company (ie, Gleewin Investments) and the private company became presently entitled to the net income of the 2005 Trust after that transaction took place but before the earlier of the due date for lodgement and the date of lodgement of the trustee's return of income for the trust in the relevant year, and the whole of that amount had not been paid to Gleewin Investments before the earlier of those dates.[181] Thus, in effect, the AAT held that Gleewin Investments' entitlements were in substance lent to Mr Bendel. The AAT construed Subdiv EA as the "specific, and therefore lead, provision" excluding any operation of s 109D. The AAT set aside the objection decisions and remitted the respondents' objections to the tax assessments to the Commissioner for reconsideration.

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178 Citing *Fischer v Nemeske Pty Ltd* (2016) 257 CLR 615 at 651 [99].

179 *Fischer* (2016) 257 CLR 615 at 651 [100].

180 *Fischer* (2016) 257 CLR 615 at 652 [104].

181 *Income Tax Assessment Act 1936* (Cth), s 109XA(2)(b). See below at [245]-[248].

The appeal to the Full Court of the Federal Court

212 Pursuant to s 44(1) of the (former) *Administrative Appeals Tribunal Act 1975* (Cth) ("the AAT Act"),[182] the Commissioner appealed to the Full Court against the AAT's decision "on a question of law" concerning the proper construction of Div 7A of Pt III of the ITAA 1936. With such an appeal, the Full Court's power to make findings of fact, like this Court on appeal from the Full Court, was only enlivened if it was established that the AAT answered a question of law incorrectly and, even then, the Full Court could only make findings of fact not inconsistent with findings of fact made by the AAT (other than those findings of fact made by the AAT as the result of an error of law).[183]

213 In the Full Court, neither party sought to reagitate the AAT's findings rejecting the existence of a separate trust (assuming it were possible to do so). To the contrary, the appeal to the Full Court was conducted on the following factual and legal basis, which was consistent with the AAT's factual findings and which involved admissions by Mr Bendel and Gleewin Investments (and, through them, Gleewin), namely:[184]

> "The taxpayer respondents accepted here that there *existed a debtor-creditor relationship between the trustee and Gleewin Investments* ... 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." (emphasis added)

214 As noted, the effect of the AAT's finding that no separate trust was created was that there existed an unconditional immediate equitable obligation on the part

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182 See also *Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Act 2024* (Cth), Sch 16, item 25.

183 *Administrative Appeals Tribunal Act 1975* (Cth), s 44(7)(a). The Full Court would also have had to have regard to the considerations enumerated in s 44(7)(b) in determining whether it was convenient to make the relevant findings of fact.

184 *Federal Commissioner of Taxation v Bendel* (2025) 307 FCR 544 at 563 [92].

of Gleewin to account to Mr Bendel and Gleewin Investments for the amount that was the subject of the resolutions (ie, the entitlements).[185] Of itself, that equitable obligation did not necessarily create a debt enforceable at law by way of an action for money had and received against Gleewin.[186] However, consistent with the above, either or both of the 2005 Trust's financial accounts[187] or the admission by the respondents (which, as between the parties to these proceedings, extends to Gleewin) in the Full Court evidenced the unconditional and irrevocable allocation of an amount out of the 2005 Trust's fund such that a debtor-creditor relationship arose and rendered, as between the parties to these proceedings, Gleewin liable at common law for an action for money had and received.[188] That is not to exclude the possibility that the resolutions, including those which resolved to "distribute" those amounts, also had that effect.

215 The Full Court found that by not addressing the text of s 109D(3) the AAT did not complete its statutory task. Implicitly, the Full Court rejected the AAT's treatment of Subdiv EA as constituting the leading provisions that excluded the operation of s 109D. Nevertheless, the Full Court dismissed the Commissioner's appeal. The Full Court found that s 109D(3) was not satisfied because that provision requires "more than the existence of a debtor-creditor relationship". Rather, the Full Court determined that s 109D(3) requires "an obligation to repay and not merely an obligation to pay" which was not satisfied by the "non-exercise by Gleewin Investments of its right to call for payment of its present entitlement", which the Commissioner contended amounted to the provision of financial accommodation. The Full Court held that "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*" (emphasis added).

The appeal to this Court

216 Pursuant to a grant of special leave to appeal, the Commissioner appealed against the Full Court's decision. The Commissioner's sole ground of appeal contends that the Full Court ought to have found that Gleewin Investments made a loan to Gleewin "when it agreed or acquiesced to Gleewin ... retaining and using, for the purposes of the [2005] Trust, amounts to which it was presently entitled". By a notice of contention, Mr Bendel and Gleewin Investments contend that, even if the Commissioner's ground of appeal is upheld, s 6-25(1) of the ITAA 1997

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185 See *Fischer* (2016) 257 CLR 615 at 652 [104].

186 *Fischer* (2016) 257 CLR 615 at 626-627 [16], citing *Edwards v Lowndes* (1852) 1 El & Bl 81 at 89 [118 ER 367 at 370].

187 See above at [203]-[204].

188 *Fischer* (2016) 257 CLR 615 at 635 [32], 650 [96].

precluded the inclusion of Gleewin Investments' entitlements in Gleewin's assessable income. In light of the Full Court's conclusion that s 109D was not satisfied, the respondents' contention regarding the application of s 6-25 did not need to be determined in that Court.

217 The Commissioner's ground of appeal was framed by reference to the AAT's finding that Gleewin Investments' entitlements were not held on separate trust but under the 2005 Trust. The Commissioner's written submissions also reflected that finding and the respondents' admitted position in the Full Court noted above.[189] Nevertheless, through the hearing of the appeal those findings were reopened for consideration. This was not done at the instigation of the Commissioner. To the contrary, the Commissioner sought to maintain the basis upon which the matter was decided by the AAT and upon which the Full Court decided the Commissioner's appeal. To the extent that the Commissioner addressed submissions concerning a different factual substratum to that upon which the appeal commenced, it was only on a contingent basis.

218 In their original written submissions, the respondents contended that the AAT's conclusion that no separate trust was created under cl 3(5) "might be doubted" but noted (correctly) that this finding was not challenged in the Full Court and affirmed that they did not seek to challenge that finding in this Court. However, at the resumed hearing of the appeal, the respondents challenged that finding and contended that a separate trust was created. They did so without purporting to file an amended notice of contention, much less explain how they could do so when no such challenge was made in the Full Court and within the constraints of s 44(7) of the AAT Act. Notwithstanding this reversal in the respondents' stated position concerning the existence of a separate trust, the respondents did not otherwise seek to resile from their concession in the Full Court that there existed a debtor-creditor relationship between Gleewin and Gleewin Investments in respect of Gleewin Investments' unpaid present entitlements. The respondents accepted that that relationship arose from the admission in the 2005 Trust's financial accounts of a liability in favour of Gleewin Investments.[190]

219 There is no basis upon which this Court can now depart from the position accepted in the Full Court that there existed a debtor-creditor relationship between Gleewin and Gleewin Investments in respect of Gleewin Investments' entitlements. Such a relationship is evidenced by an admission by the trustee.[191]

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189 See above at [213].

190 See above at [204]. See also *Fischer* (2016) 257 CLR 615 at 646 [81]-[82], citing *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 541 [67].

191 See *Fischer* (2016) 257 CLR 615 at 646 [81], citing *Roxborough v Rothmans of Pall Mall* (2001) 208 CLR 516 at 541 [67].

The 2005 Trust's balance sheets clearly accept that Gleewin Investments' entitlements are a liability. Although the balance sheets are equivocal as to whether the liability is current or non-current, Gleewin Investments' financial statements identify those entitlements as a current asset and its knowledge is attributed to Gleewin. Expert evidence is not required but even if there was some doubt regarding the effect of the financial accounts, that doubt is resolved by the respondents' concessions in the Full Court.

220 Similarly, this Court should not entertain the respondents' attempt to revisit the concurrent findings (or at least the concurrent basis upon which the proceedings were decided by the AAT and the Full Court), namely that Gleewin Investments' entitlements were not held on separate trust by Gleewin under cl 3(5) of the Trust Deed. This is especially so in the context of an appeal under s 44(1) of the AAT Act and where the party challenging the finding in this Court mounted no challenge to that finding in the Full Court and did not seek to file a notice of contention in this Court exposing their challenge. Otherwise, had the issue been properly open to review by this Court, it would have been necessary to determine whether resolutions that both "set aside" and "for the avoidance of doubt ... distributed" amounts engage cl 3(5) of the Trust Deed such that a separate trust was created, or otherwise constituted a determination to "pay" or "apply" those amounts to Gleewin Investments in a manner that does not engage cl 3(5) and instead created an unconditional and irrevocable entitlement to account to Gleewin Investments for the relevant amount.[192] As Mr Bendel wore every conceivable hat in these events simultaneously, his actions in not establishing separate trusts pursuant to cl 3(5) were capable of bearing upon a determination as to the true effect of the resolutions he procured.

221 The end result is that s 109D(3) falls to be applied to the circumstances addressed in the Full Court, namely that a debt immediately owing ("current") and payable by a trustee (Gleewin) to a private company beneficiary (Gleewin Investments) was deferred. This deferral took place by agreement between Gleewin and Gleewin Investments through Mr Bendel controlling all aspects of these transactions and his knowledge and that of the other entities being shared.

Section 109D

222 Section 109D is found within Div 7A of Pt III of the ITAA 1936, which is entitled "Distributions to entities connected with a private company". Division 7A

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192 See *In re Baron Vestey's Settlement* [1951] Ch 209, cited in *Fischer* (2016) 257 CLR 615 at 650 [96].

was inserted[193] into the ITAA 1936 with effect from 23 June 1998.[194] The overall purpose of the Division is to "ensure that all advances, loans, and other credits (unless they come within specified exclusions) by private companies to shareholders (and their associates), are treated as assessable dividends to the extent that there are realised or unrealised profits in the company" (as are debts owed by shareholders forgiven by private companies[195]) so as 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".[196]

223 In the case of loans, s 109D(1) provides:

"*Loans treated as dividends in year of making*

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."

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193 By *Taxation Laws Amendment Act (No 3) 1998* (Cth), Sch 8, item 2.

194 See *Taxation Laws Amendment Act (No 3) 1998* (Cth), s 2.

195 See *Income Tax Assessment Act 1936* (Cth), s 109F.

196 Australia, Senate, *Taxation Laws Amendment Bill (No 3) 1998*, Explanatory Memorandum at 129 [9.1]-[9.2]. See also *Income Tax Assessment Act 1936* (Cth), s 109B.

224 Section 109D(1AA) specifies that the amount of the (deemed) dividend taken 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". Section 109Y is within Subdiv F of Div 7A. That provision operates to reduce the amount taken to be (deemed) dividends under provisions such as s 109D, so that the deemed dividends do not exceed the private company's "distributable surplus".[197] Section 109Y is the means of ensuring that the provisions in Div 7A capture the use of loans as a distribution of realised or unrealised profits of the private company.[198]

225 Critical to the resolution of this appeal is the inclusive meaning of "loan" in s 109D(3). That provision, along with s 109D(4), provides:

> "*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." (underlining added for emphasis)

226 Three other aspects of Div 7A should be noted. First, s 109F(1) provides that in certain circumstances a private company is taken to pay a dividend to an entity at the end of the private company's year of income if all or part of a debt the entity owed the private company is "forgiven" in that year. Section 109F(6) provides that an amount of debt the entity owes a private company is forgiven for

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197 See the definition of "distributable surplus" in *Income Tax Assessment Act 1936* (Cth), s 109Y(2).

198 Australia, Senate, *Taxation Laws Amendment Bill (No 3) 1998*, Explanatory Memorandum at 147-149 [9.93]-[9.99].

the purposes of Div 7A "if a reasonable person would conclude (having regard to all the circumstances) that the private company *will not insist* on the entity paying the amount or rely on the entity's obligation to pay the amount", and that the "amount is forgiven when a reasonable person would first reach that conclusion".[199]

227 Second, Subdiv D of Div 7A includes various provisions that specify certain payments and loans which are not treated as dividends (notwithstanding provisions such as s 109D), including a payment or loan a private company makes to another company other than in its capacity as a trustee,[200] and loans to an entity to the extent that the loan would otherwise be included in the entity's assessable income apart from Div 7A.[201]

228 Third, at the time of Div 7A's enactment in 1998, that Division included s 109UB. The effect of that provision was that if a private company, as a beneficiary of a trust estate, had been presently entitled to an amount of net income of the trust estate which had not been paid by the trustee to the private company, and the trustee had made a loan to a shareholder or associate of the shareholder of the private company, then the private company was deemed to have made a loan to the shareholder or associate at the time the trustee made the loan.[202] In 2004, this provision was repealed and replaced by the inclusion in Div 7A of Subdiv EA, comprising ss 109XA to 109XC.[203] The new Subdiv EA has "a similar" effect to former s 109UB, although the "new provisions extend [s 109UB's] operation".[204] The AAT's conclusion about the application of s 109XA(2) to the arrangements between Gleewin, Gleewin Investments and Mr Bendel has already been described.[205]

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199 Emphasis added; see also *Income Tax Assessment Act 1936* (Cth), s 109F(3)-(5) for other circumstances in which an amount of a debt is taken to be forgiven.

200 *Income Tax Assessment Act 1936* (Cth), s 109K, read with s 109ZE and *Income Tax Assessment Act 1997* (Cth), s 960-100.

201 *Income Tax Assessment Act 1936* (Cth), s 109L(1).

202 See Australia, Senate, *Taxation Laws Amendment Bill (No 3) 1998*, Explanatory Memorandum at 145 [9.82]-[9.83].

203 *Tax Laws Amendment (2004 Measures No 1) Act 2004* (Cth), Sch 8.

204 Australia, House of Representatives, *Tax Laws Amendment (2004 Measures No 1) Bill 2004*, Explanatory Memorandum at 63 [8.2], 64 [8.5].

205 See above at [211].

Credit or any other form of financial accommodation

229 The construction of a statutory provision such as s 109D "begins and ends with the statutory text understood in context and in light of the statutory purpose – being what the provision is designed to achieve in fact – insofar as that purpose is discernible from the statutory text and context".[206] The meaning that would best achieve the statutory purpose so discerned is to be preferred to each alternative meaning.[207]

230 The purpose of Div 7A of Pt III of the ITAA 1936 has already been described.[208] That purpose supports an expansive view of the provisions of Div 7A so as to ensure that "all advances, loans, and other credits" made by private companies will no longer be treated as tax-free distributions of profits to shareholders (and their associates).[209] This broad purpose is reflected in the text of s 109D, especially the wide definition of "loan" in s 109D(3). Five matters should be noted about that definition.

231 First, fidelity to the legislature's purpose in fixing a meaning to a term such as "loan" means that "limitations and qualifications are not read into [that] statutory definition unless clearly required by its terms or its context".[210]

232 Second, the definition is inclusive and brings within the meaning of the term "loan" concepts that would or might not ordinarily fall within the meaning of that term.[211]

233 Third, the inclusive (and expansive) definition means that paras (a), (c) and (d) of s 109D(3), including those paragraphs' references to the word "repay"

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206 *Palmanova Pty Ltd v The Commonwealth* (2025) 99 ALJR 1362 at 1364-1365 [4] (footnote omitted); 424 ALR 768 at 769-770.

207 *Acts Interpretation Act 1901* (Cth), s 15AA.

208 See above at [222].

209 Australia, Senate, *Taxation Laws Amendment Bill (No 3) 1998*, Explanatory Memorandum at 129 [9.1]-[9.2].

210 *SkyCity Adelaide Pty Ltd v Treasurer (SA)* (2024) 282 CLR 479 at 489 [32].

211 *Federal Commissioner of Taxation v St Hubert's Island Pty Ltd (In liq)* (1978) 138 CLR 210 at 216; *Corporate Affairs Commission (SA) v Australian Central Credit Union* (1985) 157 CLR 201 at 206-207; see also *YZ Finance Co Pty Ltd v Cummings* (1964) 109 CLR 395 at 402-403.

(expressly in para (c), and arguably by implication in paras (a) and (d)) cannot be used to limit the scope of para (b) unless required by its terms or context.[212]

234 Fourth, like the word "anything",[213] the word "any" is of the widest import and thus so is the phrase "any other form of financial accommodation" in para (b).[214]

235 Fifth, phrases such as "advance of money", "provision of credit" and "financial accommodation" are commonly deployed in various statutory contexts dealing with similar subject matter. Judicial consideration of the meaning of those terms can assist in interpreting s 109D(3) provided appropriate consideration is given to differences in text and context.[215]

236 Generally, to give or grant time to pay an existing debt is to provide credit[216] and also to provide financial accommodation.[217] Mere inaction in seeking payment or even an uncommunicated acquiescence may not be sufficient to provide credit or financial accommodation[218] but conduct or advertence amounting to giving or granting time is sufficient to provide credit or financial accommodation.[219] Such conduct or advertence may be inferred; it need not be contractual or express.[220]

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212 *St Hubert's Island* (1978) 138 CLR 210 at 229.

213 *St Hubert's Island* (1978) 138 CLR 210 at 215.

214 See also *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* (2012) 246 CLR 455 at 463-464 [26]-[28].

215 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 371 [24]; see also *Gale v Federal Commissioner of Taxation* (1960) 102 CLR 1 at 12; *Federal Commissioner of Taxation v ICI Australia Ltd* (1972) 127 CLR 529 at 541-542, 581; *Coverdale v West Coast Council* (2016) 259 CLR 164 at 178 [43].

216 *Herbert v The King* (1941) 64 CLR 461 at 466, 467-468; *Tilley v Official Receiver in Bankruptcy* (1960) 103 CLR 529 at 534, 537.

217 *Prime Wheat Association Ltd v Chief Commissioner of Stamp Duties* (1997) 42 NSWLR 505 at 511, 512.

218 *McKay v National Australia Bank Ltd* [1998] 1 VR 173 at 186.

219 *Herbert* (1941) 64 CLR 461 at 466, 467-468; *Tilley* (1960) 103 CLR 529 at 534, 537.

220 *Tilley* (1960) 103 CLR 529 at 534, citing *R v Peters* (1886) 16 QBD 636.

237 In *Prime Wheat Association Ltd v Chief Commissioner of Stamp Duties*,[221] a question arose as to whether a share sale agreement, which provided that title in the shares passed on completion and the sale price was to be paid by instalments thereafter,[222] fell within a statutory definition of "loan" under the *Stamp Duties Act 1920* (NSW). One limb of the definition of "loan" under the *Stamp Duties Act 1920* (NSW) was identical to s 109D(3)(d) of the ITAA 1936, namely a "transaction (whatever its terms or form) which in substance effects a loan of money".[223] Gleeson CJ rejected that the share sale agreement fell within this definition, on the basis that the "essence of a loan is an obligation of repayment" and that the share sale agreement involved "payment, not repayment".[224] Another limb of the definition of "loan" in the *Stamp Duties Act 1920* (NSW) was "an advance of money",[225] where "advance" was defined to "include[] the provision or obtaining of funds by way of financial accommodation".[226] Gleeson CJ accepted that the transaction involved the vendor providing "financial accommodation", involving as it did a "granting of time to pay".[227] However, his Honour added that "[n]ot all forms of financial accommodation are loans" and held in that case there was no "advance of money".[228] Applied to the present statutory context, all (ie, "any") forms of financial accommodation are loans and that includes giving or granting time to pay a debt.

238 *Prime Wheat Association* reinforces that, subject to the statutory text or context indicating to the contrary, a provision of credit or any form of financial accommodation does not require an initial advance or something to be repaid.

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221 (1997) 42 NSWLR 505.

222 *Prime Wheat Association* (1997) 42 NSWLR 505 at 508-509.

223 See *Prime Wheat Association* (1997) 42 NSWLR 505 at 509-510, quoting *Stamp Duties Act 1920* (NSW), s 83(1) (para (d) of the definition of "loan").

224 *Prime Wheat Association* (1997) 42 NSWLR 505 at 512.

225 *Prime Wheat Association* (1997) 42 NSWLR 505 at 509, quoting *Stamp Duties Act 1920* (NSW), s 83(1) (para (a) of the definition of "loan").

226 *Prime Wheat Association* (1997) 42 NSWLR 505 at 509, quoting *Stamp Duties Act 1920* (NSW), s 83(1) (definition of "advance").

227 *Prime Wheat Association* (1997) 42 NSWLR 505 at 511, 512.

228 *Prime Wheat Association* (1997) 42 NSWLR 505 at 512, 515, 518.

239 Both the respondents and the Full Court placed reliance on *Commissioner of Taxation v Radilo Enterprises Pty Ltd*[229] as suggesting to the contrary. *Radilo* does not suggest to the contrary. In *Radilo* the issue was whether dividends payable and paid in respect of redeemable non-cumulative converting preference shares were a "debt dividend"[230] and specifically whether, having regard to certain features of the transaction, "the payment of the dividend may reasonably be regarded as equivalent to the payment of interest on a loan".[231] "Loan" was relevantly defined as "includ[ing] the provision of credit or any other form of financial accommodation".[232] The conclusion that the payments were not debt dividends turned on a conclusion that the statutory requirement of equivalence between the payment of the dividend and the payment of interest on a loan meant that the relationship between the corporation that issued the shares and the corporate shareholder that received the dividend must be equivalent "to the relationship between a lender and a borrower".[233] Although Sackville and Lehane JJ described the relationship in that case as not involving any obligation on the corporation that issued the shares to "repay" the holder of the shares,[234] an obligation of repayment was not expressed to be a necessary condition of "financial accommodation". Instead, the necessity for there to be an obligation to repay flowed from the equivalence requirement,[235] which, in turn, followed from a conclusion that the ordinary meaning of "loan" embraced an obligation of repayment.[236] That conclusion may have some bearing on the construction of the word "loan" in s 109D(3)(d) but it has no relevance to the construction of s 109D(3)(b).[237] Sackville and Lehane JJ otherwise accepted that "financial accommodation" refers to a "consensual arrangement" in which "a principal sum,

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229 (1997) 72 FCR 300.

230 *Radilo* (1997) 72 FCR 300 at 309.

231 *Radilo* (1997) 72 FCR 300 at 304, 312, quoting *Income Tax Assessment Act 1936* (Cth), s 46D(2)(c).

232 *Radilo* (1997) 72 FCR 300 at 303, quoting *Income Tax Assessment Act 1936* (Cth), s 46D(1) (definition of "loan").

233 *Radilo* (1997) 72 FCR 300 at 308.

234 *Radilo* (1997) 72 FCR 300 at 314.

235 *Radilo* (1997) 72 FCR 300 at 312.

236 *Radilo* (1997) 72 FCR 300 at 313.

237 *Radilo* (1997) 72 FCR 300 at 313.

or its substantial equivalent ... will ultimately be payable".[238] Giving or granting time to pay a debt meets this description, because the debt is still "ultimately ... payable".

Other aspects of statutory context

240 The above matters point clearly if not overwhelmingly in the direction of a broad approach to the inclusive definition of "loan", especially to a meaning of "credit or any other form of financial accommodation" that includes the giving or granting of time to pay a debt. That conclusion also follows when the definition is considered against the balance of the statutory context. When s 109D(4) is read with the definition of "loan" in s 109D(3),[239] the loan is made to an entity either at the time a loan is paid to the entity, or when the thing "described in subsection (3) is done in relation to the entity". In the present context the thing described in s 109D(3) is the provision of credit or any other form of financial accommodation; thus, the loan is made when the time to pay an existing debt is given or granted.

241 A conclusion that a loan is made in such circumstances is also consistent and operates harmoniously with s 109F(6).[240] That provision simply provides that a debt is forgiven, so that a dividend is taken to have been paid, in circumstances where a reasonable person would conclude that payment is no longer insisted upon. Unlike s 109D(3)(b), s 109F(6) is not directed to a deferral of time to pay a debt but to circumstances where payment is no longer being sought at all. Moreover, there will be no double counting of any deemed dividends as between ss 109D and 109F, in that s 109F is not engaged where the dividend arises at the end of a year of income because of the forgiveness of a debt resulting from a loan if, because of the loan, the company is taken under s 109D to pay a dividend at the end of that year or an earlier one.[241]

The Full Court's reasoning: "repay" and "repaid"

242 One part of the Full Court's reasons for concluding that a concept of repayment was embedded in all aspects of the definition of "loan" was that it was a constituent element of paras (a), (c) and (d) of s 109D(3). However, as noted, to use some of the limbs of an inclusive definition to restrict the meaning of another

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238 *Radilo* (1997) 72 FCR 300 at 312.

239 As it must be: *SkyCity Adelaide Pty Ltd v Treasurer (SA)* (2024) 282 CLR 479 at 488-489 [32].

240 Section 109F being one of the other "kinds of amounts" treated as a dividend paid by a private company: *Income Tax Assessment Act 1936* (Cth), s 109B. See above at [226].

241 *Income Tax Assessment Act 1936* (Cth), s 109G(3)(a).

limb subverts the very purpose of the inclusive and expansive definition in s 109D.[242] Drawing on *Prime Wheat Association*[243] and *Radilo*,[244] the Full Court concluded that a transaction "effects a loan of money where it in substance effects an obligation to repay an identifiable sum". As explained, that proposition may be correct to the extent that those cases are referring to what is "in substance ... a loan" in s 109D(3)(d) but those cases are not authority that repayment is essential to the extent that the definition of "loan" is extended to include "credit or any other form of financial accommodation" in s 109D(3)(b).[245]

243 As part of the statutory context, the Full Court also referred to s 109D(1)(b), which provides that a private company is taken to pay a dividend where the loan "is not fully repaid before the lodgment day", as supporting a construction that restricts the meaning of "loan" to require the repayment of an amount that was initially paid. Their Honours observed that "[w]hilst s 109D(3) provides an inclusive definition of the word 'loan', there is no section which expands the meaning of the word 'repaid'". However, it is more accurate to note that, while there is an expansive and inclusive definition of the word "loan", there is no definition of the word "repaid". Where one term is defined inclusively and expansively its meaning is not to be restricted by an undefined term. That approach subverts the intent and terms of the inclusive definition and the legislation generally.[246] The intent of the expanded and inclusive definition is given effect through the undefined word "repaid" accommodating that expanded definition, not vice versa. Thus the phrase "fully repaid" in s 109D(1)(b) takes its meaning by asking how the loan referred to in s 109D(1)(a) was made. Where the loan was made by the "provision of credit or any other form of financial accommodation" in the form of giving or granting time to pay a debt, the "loan" is fully repaid when the time given or granted to pay expires and the debt is called in.

244 In addition to relying on the Full Court's reasons, the respondents pointed to other provisions within Div 7A as supporting a supposed necessity for all the limbs of the definition of "loan" to require repayment. Thus they pointed to: s 109D(1AA), which provides that the amount of the dividend is not the amount of the loan, but only the amount that "has not been repaid before the lodgment

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242 See above at [233].

243 (1997) 42 NSWLR 505 at 512.

244 (1997) 72 FCR 300 at 313.

245 See above at [237]-[239].

246 That approach should therefore not be preferred: *Acts Interpretation Act 1901* (Cth), s 15AA. See *SkyCity Adelaide Pty Ltd v Treasurer (SA)* (2024) 282 CLR 479 at 488-489 [32].

day"; s 109E(1)(b)-(c), which, in relation to an "amalgamated loan", provide that a "private company is taken to pay a dividend" where "the amalgamated loan is not repaid at the end of the current year"[247] and "the amount (if any) paid to the private company during the current year ... falls short of the minimum yearly repayment";[248] and s 109N, which provides the opportunity for a loan to be put in writing, including as to repayment.[249] The respondents also relied on s 109R, which qualifies when amounts paid by the company constitute repayments of a loan for the purposes of ss 109D and 109E. However, these contentions only question beg as to what is meant by the terms "repayment" and "repaid". As noted, those terms must accommodate the inclusive definition of "loan".[250]

Section 109UB and s 109XA(2)

245 Neither the Full Court nor the respondents sought to rely on the AAT's reasoning that s 109XA(2) was a "leading" or "specific" provision, the operation of which excluded s 109D. In effect, that reasoning seeks to apply the principle in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia*[251] that "[w]hen the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power".[252]

246 Even if it were otherwise capable of application to provisions that do not confer powers, that principle cannot be applied in this context. What triggers the operation of s 109D(3), specifically s 109D(3)(b), in this case is the act of the private company in giving or granting the trustee time to pay a debt, and that is not a necessary element for the invocation of either former s 109UB(1) or current s 109XA(2). Moreover, to invoke former s 109UB(1) or current s 109XA(2) there must be a loan made by the trustee to a shareholder or an associate of a shareholder of a private company, in circumstances where the company is presently entitled to

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247 *Income Tax Assessment Act 1936* (Cth), s 109E(1)(b).

248 *Income Tax Assessment Act 1936* (Cth), s 109E(1)(c).

249 *Income Tax Assessment Act 1936* (Cth), s 109N(3).

250 See above at [243].

251 (1932) 47 CLR 1.

252 *Anthony Hordern* (1932) 47 CLR 1 at 7.

an amount from the net income of the trust estate,[253] whereas neither of those aspects are necessary for s 109D(3)(b) to be engaged. It follows that the ambit of neither provision is wholly within the ambit of the other.[254] It is not possible to state that these provisions confer only one power or deal with the same subject matter, necessitating the confinement of the more generally expressed power in s 109D by reference to some "restrictions" expressed in s 109XA.[255]

247 In this Court the respondents adopted a variant of the AAT's reasoning, contending that the effect of former s 109UB was that, in the circumstances of this case, the shareholder or associate, namely Mr Bendel, would have been taken to have been paid an assessable dividend by Gleewin Investments on the basis that he received, via the 2005 Trust, the benefit of Gleewin Investments' profits. The respondents submitted that it is "immediately apparent that s 109UB proceeded on the basis that an unpaid present entitlement was not a loan from the private company to the trust" and that otherwise former s 109UB would have been unnecessary. The Full Court made a similar point relying on Subdiv EA, which, as noted, replaced former s 109UB.

248 The principal difficulty with this contention is that it does not explain how, other than by an appeal to the *Anthony Hordern* principle, which is not relied on, the expansive definition of "loan" is to be construed to accommodate the apparently intended outcome that whenever a factual scenario falls within former s 109UB(1) and current s 109XA(2) it is thereby excluded from s 109D(3) (especially s 109D(3)(b)) even though, as explained, the ambit of each provision is different. Otherwise, an overall complaint that, for a particular factual scenario, provisions could operate to trigger taxation consequences for both the shareholder or their associate under former s 109UB(1) or current s 109XA(2) and the presently entitled shareholders of the entity that receives the loan under s 109D(3) does not assist in interpreting either provision. As explained, the ITAA 1936 and the ITAA 1997 make provision to address the taxation consequences of different provisions applying to the same scenario.[256] The fact that the ITAA 1936 explicitly

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253 See *Income Tax Assessment Act 1936* (Cth), s 109XA(2); see also *Income Tax Assessment Act 1936* (Cth), former s 109UB(1).

254 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 589 [59], citing *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 678 and *Refrigerated Express Lines (A/asia) Pty Ltd v Australian Meat and Live-Stock Corporation [No 2]* (1980) 44 FLR 455 at 468-469.

255 *Nystrom* (2006) 228 CLR 566 at 589-590 [59]-[61].

256 See above at [227]. For example, *Income Tax Assessment Act 1936* (Cth), ss 109L, 109T(3); *Income Tax Assessment Act 1997* (Cth), s 6-25.

does so in some circumstances tells against any general principle of construction limiting the application of one provision to a factual scenario that happens to also fall within another.

Conclusion, notice of contention and disposition of the appeal

249 It follows that the Commissioner's ground of appeal should be upheld.

250 I agree with the reasoning of Jagot J for rejecting the respondents' notice of contention.

251 The orders proposed by Jagot J should be made.