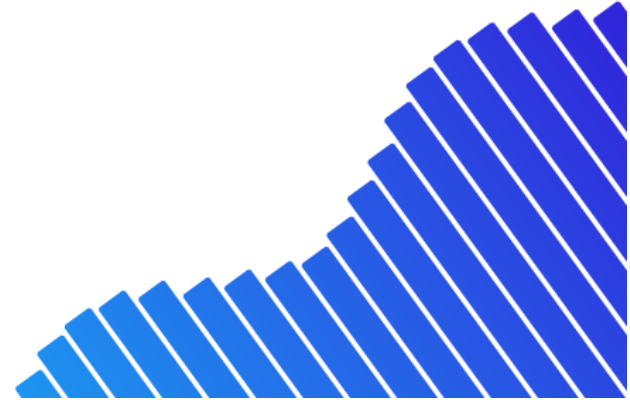


Is this the final word on Division 7A and UPEs?

Written by The Tax Institute's Tax Policy and Advocacy Team

Correct as of 14 July 2022



Purpose of this article

This article sets out the ATO's position on when an unpaid present entitlement (UPE) or amount held on sub-trust becomes the provision of 'financial accommodation' for the purposes of Division 7A of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936). The article is based on the statements made in the final Taxation Determination [TD 2022/11](#) (Determination) issued on 13 July 2022.

This article is not a critique of the legislative provisions in Division 7A, nor the ATO's interpretation of these provisions. Rather, it aims to explain the impact of the Determination on taxpayers' arrangements to assist practitioners in understanding the ATO's revised position.

Background

Since the introduction of Division on 4 December 1997, 23 separate enacted bills have amended the provisions or made insertions in over 24 years – that's nearly one a year, every year.

Additionally, in that period, the ATO has issued 24 taxation rulings and determinations, including practice statements and practical compliance guidelines, on Division 7A – again, roughly one a year, separate from web guidance.

ATO guidance on Division 7A and UPEs

The primary guidance materials issued by the ATO on the application of Division 7A to unpaid present entitlements (UPEs) include:

- Taxation Ruling [TR 2010/3](#) *Income tax: Division 7A loans: trust entitlements* (withdrawn on 30 June 2022)
- Law Administration Practice Statement [PS LA 2010/4](#) *Division 7A: trust entitlements (PS LA)* (withdrawn on 1 July 2022)
- Practical Compliance Guideline [PCG 2017/13](#) *Division 7A – PS LA 2010/4 sub-trust arrangements maturing in or after the 2016–17 income year (PCG)* (updated on 7 June 2022)
- [TD 2022/11](#) *Income tax: Division 7A: when will an unpaid present entitlement or amount held on sub-trust become the provision of 'financial accommodation'?*

New final Taxation Determination: TD 2022/11

The ATO has settled on its final position on UPEs with the issue of the Determination on 13 July 2022.

The Determination describes when a private company (**company**) provides financial accommodation within the meaning of section 109D(3) of the ITAA 1936 where that company is made presently entitled to a share of the income of a trust (**trust income**) and either:

- that entitlement remains unpaid (a UPE); or
- the trustee sets aside an amount from the main trust and holds it on a new separate trust (sub-trust) for the company.

The Determination finalises draft Taxation Determination [TD 2022/D1](#), which was issued on 23 February 2022, and applies to trust entitlements arising on or after 1 July 2022. The Determination clarifies the ATO's compliance approach, with practical examples, on how to meet the timing requirements to ensure that a UPE or amount held on sub-trust does not cause a deemed dividend to arise under Division 7A where the arrangement is managed using complying loan agreements.

Withdrawal of 2010 products

As a consequence of the finalisation of the Determination, Taxation Ruling [TR 2010/3](#) *Income tax: Division 7A loans: trust entitlements* and Law Administration Practice Statement [PS LA 2010/4](#) *Division 7A: trust entitlements (2010 products)* were withdrawn on 30 June 2022 and 1 July 2022 respectively, both with effect from 1 July 2022.

In respect of the withdrawn ruling, the ATO advises:

An entity may continue to rely on this Taxation Ruling in respect of trust entitlements conferred on or before 30 June 2022. That is, the Commissioner will not devote compliance resources to arrangements conducted in accordance with TR 2010/3 in respect of trust entitlements arising on or before 30 June 2022.

In respect of the withdrawn practice statement, the ATO advises:

An entity may continue to rely on this Practice Statement in respect of trust entitlements conferred on or before 30 June 2022. This includes circumstances where Option 1 and Option 2 have been put in place after 30 June 2022 for such entitlements.

That is, the Commissioner will not devote compliance resources to sub-trust arrangements conducted in accordance with this Practice Statement in respect of trust entitlements arising on or before 30 June 2022, even though those sub-trust arrangements may commence after 30 June 2022.

Date of effect of TD 2022/11

The Determination applies to trust entitlements arising on or after 1 July 2022. Taxpayers can continue to rely on the 2010 products in relation to trust entitlements that arose on or before 30 June 2022.

Consistent with the withdrawal notice for the practice statement above, the Commissioner has advised that:¹

The Commissioner will take a compliance approach of not devoting compliance resources to sub-trust arrangements conducted in accordance with PS LA 2010/4 in respect of trust entitlements arising before 1 July 2022 ... , even though those sub-trust arrangements may commence after 30 June 2022.

The Determination does not apply to UPEs that arose before 16 December 2009.

What does the Determination say?

As mentioned above, the Determination explains the Division 7A implications when a company is made presently entitled to a share of the income of a trust² and either:

- there is a UPE; or
- the present entitlement has been satisfied by a sub-trust.

The ATO's position on these circumstances can be summarised as follows:

When does a UPE or an amount held on sub-trust become the provision of financial accommodation for Division 7A purposes?

- 1 A company with a UPE will provide financial accommodation to the trustee where the company:
 - has knowledge of an amount that it can demand immediate payment of from the trustee;
 - consents to the trustee retaining the amount and continuing to use the funds for trust purposes; and
 - does not demand payment of the amount.

This will need to be managed as a complying Division 7A loan otherwise a deemed dividend will arise for the trustee.

¹ Paragraph 48 of TD 2022/11.

² For guidance on the meaning of the term 'income of the trust', see draft Taxation Ruling [TR 2012/D1](#).

When does a UPE or an amount held on sub-trust become the provision of financial accommodation for Division 7A purposes?

- 2** A company will **not** provide financial accommodation where:
- the company is made presently entitled to an amount of trust income;
 - that amount is set aside by the trustee and held on sub-trust for the company's sole benefit; and
 - the funds are not used by the company's shareholder or their associate (**shareholder/associate**).

- 3** A company will provide financial accommodation to the shareholder/associate where:
- the company is made presently entitled to an amount of trust income;
 - that amount is set aside by the trustee and held on sub-trust; and
 - the company consents to those funds being used by the shareholder/associate.

This will need to be managed as a complying Division 7A loan otherwise a deemed dividend will arise for the shareholder/associate.

The above circumstances are referred to as **Case 1**, **Case 2** and **Case 3** respectively in the discussion below.

Key points on the Division 7A implications

Treatment of pre-16 December 2009 UPEs

The draft Determination was silent on the Division 7A treatment of UPEs arising before 16 December 2009. Again based on feedback provided during consultation, and consistent with the 2010 products, the final Determination makes it clear that it does not apply to UPEs arising before 16 December 2009.

This means that UPEs arising before 16 December 2009 continue to be grandfathered and the company is not taken to provide financial accommodation to the trustee where it does not demand payment of these UPEs. This position is very pleasing and provides certainty to taxpayers.

Does the UPE continue to exist?

In **Case 1** above, the Commissioner's view is that a UPE that results in the provision of financial accommodation should be treated as a loan, rather than a UPE. This is limited to its characterisation for Division 7A purposes and does not change the character of the amount for trust law purposes.

In **Case 2** and **Case 3** above, the setting aside of the amount on sub-trust by the trustee results in the amount ceasing to be an asset of the main trust and forming the corpus of the sub-trust. The trustee's obligation in respect of the entitlement to distributed income comes to an end and a new obligation arises for the sub-trustee under a separate trust. The setting aside of the amount on sub-trust for the company discharges the trustee's obligation to pay the entitlement to trust income. This means that the UPE is satisfied by the holding of the amount on sub-trust.

Timing rule

Sensibly, the ATO has shifted from its preliminary position in the draft Determination on the point in time when the company is taken to have knowledge of its entitlement, and consequently, when the financial accommodation is taken to be provided.

The position in the draft Determination was that the time when the company's entitlement is known will depend on how that entitlement is expressed. Responding to feedback provided during consultation, including by The Tax Institute, the ATO's final position is that the company makes a loan when the financial accommodation is provided.

The provision of financial accommodation will occur when the company has knowledge of an amount that it can demand immediate payment of from the trustee and does not demand payment of the amount.

If the company and the trustee have the same directing mind and will (controlled by the same person or persons), the company is taken to have knowledge of the amount that it can demand immediate payment of from the trustee when the trustee does.

The point in time when the amount of the company's entitlement is known will typically arise after the end of the income year; that is, in the income year following that in which the entitlement arises.

To remove any doubt, although the ATO's position is that the financial accommodation will typically be provided in the income year following the one in which the entitlement arises, this position applies only to trust entitlements arising on or after 1 July 2022, not to those arising on or before 30 June 2022.

Accordingly, the earliest that financial accommodation could be provided under the ATO's new guidance is, generally, during the 2023–24 income year in respect of entitlements arising during the 2022–23 income year.

This will be the case whether the entitlement is expressed as:

- a fixed amount from the trust income;
- a percentage of trust income, or some other part of trust income identified in a calculable manner; or
- a combination of fixed and calculable amounts.

It will be a rare circumstance that a beneficiary would have knowledge of the amount of the entitlement in the year in which the entitlement arises (see, for example, the circumstance described in [TD 2018/9](#) about early entitlements).

Evidencing a sub-trust

It may seem there is a vacuum of guidance on how to evidence a sub-trust, following the withdrawal of the 2010 products which were quite prescriptive in the type of documentation that was required and the manner in which the arrangement should be managed.³

However, it is expected that the existence of a sub-trust could be readily evidenced by holding of funds on behalf of the corporate beneficiary in a separate bank account. That said, practically, holding funds in a separate bank account is not common.

The ATO's view on evidencing the existence of a sub-trust is set out at Issue No. 7.1 of the [Public advice and guidance compendium \(Compendium\)](#) accompanying the Determination. The ATO explains that the existence of a sub-trust depends on the trust deed and the trustee's exercise of power in each particular case.

Is the sub-trustee required to lodge a sub-trust tax return?

Sub-trustees as described in Practice Statement [PS LA 2010/4 \(PS LA\)](#) as implementing an Option 1 or Option 2 arrangement were extended an administrative concession that relieved them from the requirement of lodging an income tax return. This arrangement no longer applies to sub-trusts that hold trust entitlements that arise on or after 1 July 2022.

However, the ATO's view⁴ is that most sub-trusts will be:

- a 'Transparent Trust' as described in Law Administration Practice Statement [PS LA 2000/2](#) *An exemption for the trustees of some trust estates from the requirement to furnish a tax return on behalf of the trust estate*
- able to access the concessional treatment set out in this practice statement that relieves certain trustees from the requirement to furnish a tax return.

According to this practice statement, a 'Transparent Trust' is one in which the beneficiary of the trust estate has an absolute, indefeasible entitlement to the capital and the income of the trust.⁵ As the beneficiary has an absolute entitlement to the income of the trust, the beneficiary, and not the trustee, will be taxed in respect of that income.⁶

If the sub-trust is not a Transparent Trust, whether the sub-trustee must lodge returns will depend upon the respective legislative instrument for each year. Ordinarily, a trust that is not a Transparent Trust will be required to lodge tax returns (unless another exemption applies).

If the sub-trust is a Transparent Trust, income derived by the sub-trustee in that capacity will be included by the company in its assessable income.

³ See Option 1 and Option 2 set out in Practice Statement [PS LA 2010/4](#).

⁴ Item 7.1 of the Compendium.

⁵ Paragraph 3 of PS LA 2000/2.

⁶ Paragraph 11 of PS LA 2000/2.

Meaning of ‘used’ and non-cash assets

In **Case 3** above, the company that is made presently entitled to an amount of trust income will provide financial accommodation where:

- that amount is set aside by the trustee and held on sub-trust; and
- the company consents to those funds being used by the shareholder/associate.

The ATO has confirmed that the word ‘use’ takes its ordinary meaning, and includes allowing the funds to be used as security in respect of financial arrangements of the shareholder/associate.⁷

The following issues were raised during consultation, including by The Tax Institute:

1. Where the asset being ‘used’ is property and not cash, is this the provision of financial accommodation or does it attract the application of section 109CA of the ITAA 1936?
2. The final Determination should address whether the ATO considers the use of tangible assets, such as real property, as being the provision of financial accommodation directly by the company to the user of the asset and, if so, how to quantify the amount of the Division 7A loan.

The ATO’s response to these issues is as follows:

A present entitlement to trust income will always contemplate an entitlement to a pecuniary amount. The Commissioner’s views in the Determination concern the failure to exercise an immediate demand for discharge of that pecuniary amount. This is to be contrasted with a present entitlement to trust property which necessarily concerns exercise of a trustee power over corpus and is outside of scope of this Determination.

The Commissioner has rarely seen examples of sub-trusts holding non-cash assets. The outcomes of non-cash assets being held in a sub-trust can be worked through on a case-by-case basis. Private company groups that intend to put non-cash assets into sub-trusts to satisfy UPEs are encouraged to seek advice before doing so.

No dual layer of financial accommodation

During consultation, The Tax Institute raised a concern with the ATO that Division 7A could potentially apply twice to a single arrangement. This may occur in instances where an amount is held on sub-trust and the funds are used by a shareholder/associate. In this case, the company is taken to have provided financial accommodation to the shareholder/associate.

However, as the funds are not held for the sole benefit of the company, the exclusion in paragraph 14 of the final Determination from the arrangement being the provision of financial accommodation would no longer apply. Accordingly, there were concerns that the arrangement, by extension, must therefore constitute the provision of financial accommodation by the company in favour of the sub-trustee. This would be in addition to the financial accommodation already provided by the company to the shareholder/associate, resulting in two Division 7A loans arising under the same arrangement.

⁷ Footnote 8 of TD 2022/11.

It is therefore pleasing to see the final Determination makes the ATO's position clear that the company does not financially accommodate the sub-trustee (in that capacity) in this circumstance.⁸ This ensures that there can be no dual layer of financial accommodation for Division 7A purposes in respect of a single arrangement.

Sub-trust arrangements

Maturing in or after the 2016–17 income year – PCG 2017/13

Practical Compliance Guideline [PCG 2017/13](#) was originally released on 19 July 2017 to cover UPEs managed under a 7-year interest-only sub-trust arrangement in accordance with Option 1 (**Option 1 arrangement**) of Practice Statement [PS LA 2010/4](#) (**PS LA**), maturing in the 2016–17 or 2017–18 income years.

The original PCG provided that:

- On the maturity of an Option 1 arrangement in the 2016–17 or 2017–18 income years, any unpaid principal amount will be treated by the Commissioner as the provision of financial accommodation and therefore a Division 7A loan.
- If all, or part, of the principal of the Option 1 arrangement is not repaid on or before the maturity date, the Commissioner will accept that a new loan on complying Division 7A terms (in accordance with section 109N of the ITAA 1936) may be put in place between the sub-trust and the company prior to the company's lodgment day for the income year in which the date of maturity fell. This allowed the amount to be repaid over a further 7-year period with annual payments of both principal and interest.

The original PCG was then updated on:

- 15 August 2018 to extend the position in the PCG to include the 2018–19 income year;
- 27 June 2019 to extend the position in the PCG to include the 2019–20 income year; and
- 30 June 2021 to extend the position in the PCG to include the 2020–21 income year and 10-year interest-only sub-trust arrangements in accordance with Option 2 of the PS LA (**Option 2 arrangements**) that were maturing for the first time in 2020–21.

A pattern of annual updates from the ATO created uncertainty for taxpayers, while seemingly the ATO (and the rest of us) waited for the elusive legislative reforms to Division 7A announced as part of the Federal Budget 2016–17 on 3 May 2016. Throughout 2021–22, there was further uncertainty as to whether the ATO would extend the PCG yet again to include those arrangements maturing in the current income year. The Tax Institute had suggested for some time that a permanent position should be arrived at so that annual updates would no longer be necessary.

⁸ Paragraph 17 of TD 2022/11.

So, it is pleasing that, on 7 June 2022, the ATO not only updated the PCG to include Option 1 and Option 2 arrangements maturing in 2021–22, but has taken the sensible approach of altering the PCG so it applies to:

- sub-trust arrangements maturing in or after the 2016–17 income year that have been dealt with in accordance with either Option 1 or Option 2; and
- UPEs arising on or before 30 June 2022.

Legacy sub-trust arrangements

This means that the position taken in the PCG applies to any legacy sub-trust arrangements created in respect of UPEs arising from the 2009–10 to 2021–22 income years (inclusive). These arrangements may continue until maturity and remain eligible for managing any unpaid principal on maturity as a complying Division 7A loan. This allows a further period for the amount to be repaid with periodic payments of both principal and interest.

It is clear from the revised PCG that the interest-only 7- and 10-year sub-trust arrangements set out in Option 1 and Option 2 in the withdrawn PS LA apply only where the UPE arose on or before 30 June 2022.

Further, notwithstanding the final Determination issued by the ATO on 13 July 2022 that sets out a revised position by the ATO on UPEs and amounts held on sub-trust from 1 July 2022, the updated PCG makes it clear that existing sub-trust arrangements – including those resulting from UPEs arising on or before 30 June 2022 – may continue until their maturity.

Tables 1 and 2 in the updated PCG conveniently outline the key dates that the relevant parties must note where the principal amount held on sub-trust is not repaid in full by the maturity date in the relevant income year. The updated PCG now has a legacy impact for UPEs arising during 2021–22 until the maturity of the sub-trust arrangement, generally:

- 14 May 2030 for Option 1 arrangements
- 14 May 2033 for Option 2 arrangements.

Further, if on maturity the principal amount is not repaid in full, the outstanding amount can be placed on Division 7A complying loan terms, with the liability for the first minimum yearly repayment under the new 7-year complying loan arising on:

- 30 June 2031 (Option 1 arrangements)
- 30 June 2034 (Option 2 arrangements),

with the entire arrangement concluding by 30 June 2037 and 30 June 2040 respectively.

What is a company's lodgment day?

Division 7A complying loan agreements are required to be in place before the company's lodgment day. The 'lodgment day' is defined to mean the earlier of the due date for lodgment of the company's tax return for the income year and the date of lodgment of the company's tax return for the income year.⁹

This means that if the actual lodgment date is earlier than 15 May, the date by which the agreement is required to be put in place will be accordingly brought forward. If the company is granted further time to lodge, say 5 June, then the lodgment day is extended to that later date.

In the tables below, it is assumed the company's lodgment day is 15 May.

Accordingly, a complying Division 7A loan agreement would need to be place by:

- 14 May – assuming a lodgment date of 15 May
- 11 February – assuming an earlier lodgment date of 12 February
- 4 June – assuming a deferred lodgment date of 5 June.

Ready Reckoner tables

The relevant due dates for legacy sub-trust arrangements under the 2010 products may be summarised as follows:

Table 1: Option 1 (7-year) sub-trust arrangement

UPE arises	30 June 2010	30 June 2011	30 June 2012	30 June 2013	30 June 2014	30 June 2015	30 June 2016	30 June 2017	30 June 2018	30 June 2019	30 June 2020	30 June 2021	30 June 2022
UPE held on sub-trust	15 May 2011	15 May 2012	15 May 2013	15 May 2014	15 May 2015	15 May 2016	15 May 2017	15 May 2018	15 May 2019	15 May 2020	15 May 2021	15 May 2022	15 May 2023
Liability to pay interest	30 June 2012	30 June 2012	30 June 2013	30 June 2014	30 June 2015	30 June 2016	30 June 2017	30 June 2018	30 June 2019	30 June 2020	30 June 2021	30 June 2022	30 June 2023
Repayment of principal and final interest	14 May 2018	14 May 2019	14 May 2020	14 May 2021	14 May 2022	14 May 2023	14 May 2024	14 May 2025	14 May 2026	14 May 2027	14 May 2028	14 May 2029	14 May 2030
Income year that Div 7A loan arises if not repaid by maturity	2017 -18	2018 -19	2019 -20	2020 -21	2021 -22	2022 -23	2023 -24	2024 -25	2025 -26	2026 -27	2027 -28	2028 -29	2029 -30

⁹ Section 109D(6) of the ITAA 1936.

UPE arises	30 June 2010	30 June 2011	30 June 2012	30 June 2013	30 June 2014	30 June 2015	30 June 2016	30 June 2017	30 June 2018	30 June 2019	30 June 2020	30 June 2021	30 June 2022
Div 7A loan agreement must be in place	15 May 2019	15 May 2020	15 May 2021	15 May 2022	15 May 2023	15 May 2024	15 May 2025	15 May 2026	15 May 2027	15 May 2028	15 May 2029	15 May 2030	15 May 2031
Liability to make first MYR	30 June 2019	30 June 2020	30 June 2021	30 June 2022	30 June 2023	30 June 2024	30 June 2025	30 June 2026	30 June 2027	30 June 2028	30 June 2029	30 June 2030	30 June 2031
Liability to make last MYR	30 June 2025	30 June 2026	30 June 2027	30 June 2028	30 June 2029	30 June 2030	30 June 2031	30 June 2032	30 June 2033	30 June 2034	30 June 2035	30 June 2036	30 June 2037

Table 2: Option 2 (10-year) sub-trust arrangement

UPE arises	30 June 2010	30 June 2011	30 June 2012	30 June 2013	30 June 2014	30 June 2015	30 June 2016	30 June 2017	30 June 2018	30 June 2019	30 June 2020	30 June 2021	30 June 2022
UPE held on sub-trust	15 May 2011	15 May 2012	15 May 2013	15 May 2014	15 May 2015	15 May 2016	15 May 2017	15 May 2018	15 May 2019	15 May 2020	15 May 2021	15 May 2022	15 May 2023
Liability to pay interest	30 June 2012	30 June 2012	30 June 2013	30 June 2014	30 June 2015	30 June 2016	30 June 2017	30 June 2018	30 June 2019	30 June 2020	30 June 2021	30 June 2022	30 June 2023
Repayment of principal and final interest	14 May 2021	14 May 2022	14 May 2023	14 May 2024	14 May 2025	14 May 2026	14 May 2027	14 May 2028	14 May 2029	14 May 2030	14 May 2031	14 May 2032	14 May 2033
Income year that Div 7A loan arises if not repaid by maturity	2020 -21	2021 -22	2022 -23	2023 -24	2024 -25	2025 -26	2026 -27	2027 -28	2028 -29	2029 -30	2030 -31	2031 -32	2032 -33
Div 7A loan agreement must be in place	15 May 2022	15 May 2023	15 May 2024	15 May 2025	15 May 2026	15 May 2027	15 May 2028	15 May 2029	15 May 2030	15 May 2031	15 May 2032	15 May 2033	15 May 2034
Liability to make first MYR	30 June 2022	30 June 2023	30 June 2024	30 June 2025	30 June 2026	30 June 2027	30 June 2028	30 June 2029	30 June 2030	30 June 2031	30 June 2032	30 June 2033	30 June 2034
Liability to make last MYR	30 June 2028	30 June 2029	30 June 2030	30 June 2031	30 June 2032	30 June 2033	30 June 2034	30 June 2035	30 June 2036	30 June 2037	30 June 2038	30 June 2039	30 June 2040

Merit of sub-trust arrangements from 1 July 2022

Commercially, the interest-only aspect was the most attractive feature of sub-trust arrangements. From a tax perspective, it may be that little benefit can be gained from implementing a sub-trust arrangement for UPEs arising on or after 1 July 2022. This is because, except for **Case 2** (where the funds are held on sub-trust for the company's sole benefit), they will generally be treated as loans for Division 7A purposes.

While **Case 2** will not result in any Division 7A (or Subdivision EA or EB) implications, the company will generally be assessed on any income made by the sub-trustee. Further if a non-cash asset was held on sub-trust, the eventual gain on the disposal of the asset would be assessable to the company, resulting in the taxation of the gain without the availability of the CGT discount.

Taxpayers and their advisers should carefully consider the merit of establishing a sub-trust for trust entitlements arising on or after 1 July 2022.

What is the legacy of Subdivisions EA and EB?

So with the clear position that UPEs and amounts held on sub-trust will generally constitute the provision of financial accommodation, where does that leave Subdivisions EA and EB? Crucially, these provisions have no application where there is no UPE.

In **Case 1**, the Commissioner's view is that a UPE that results in the provision of financial accommodation should be treated as a loan, rather than a UPE.

The Commissioner explains at paragraph 146 of the Determination that Subdivision EA (and EB) will not apply to a UPE that has been treated as a loan:

Consistent with the legislative context of Division 7A, an amount that has been treated as a loan and dealt with under section 109D ... should be regarded as a loan for all purposes of Division 7A, including Subdivision EA. Accordingly, the Commissioner will not treat a UPE in those circumstances as a present entitlement that remains unpaid for Subdivision EA purposes. This is consistent with the position taken in TR 2010/3.

In **Case 2** and **Case 3**, the Commissioner's view is that the setting aside of the amount on sub-trust for the company discharges the trustee's obligation to pay the entitlement to trust income. Accordingly, the UPE is satisfied by the holding of the amount on sub-trust.

The Commissioner explains at paragraph 148 of the Determination that Subdivision EA (and EB) will not apply to an amount that is set aside and held on sub-trust (whether for the sole benefit of the company):

... where a ... company ... is made presently entitled to trust income and the trustee satisfies that UPE by setting aside an amount from the main trust and holding it on sub-trust for the exclusive benefit of the ... company ..., the present entitlement to income is paid and there is no UPE. In those circumstances, the conditions for Subdivision EA to operate are not satisfied.

So when can Subdivision EA and EB apply? The Commissioner explains at paragraph 147 of the Determination that:

Subdivision EA has scope to operate in circumstances where the UPE of a ... company does not result in financial accommodation dealt with under section 109D (for example, because the ... company does not have knowledge of the amount that it can demand immediate payment of from the trustee at the relevant time).

Subdivision EA and EB also remain capable of applying to UPEs arising before 16 December 2009 and may continue to apply where the UPE is not taken to be the provision of financial accommodation under the 2010 products.

The circumstances in which Subdivisions EA and EB may apply are summarised below.

Subdivisions EA and EB may apply where:

- 1 The UPE arose before 16 December 2009.
- 2 The UPE:
 - arose on or after 16 December 2009 but on or before 30 June 2022; and
 - is held on sub-trust in accordance with Option 1 or Option 2 of the withdrawn PS LA.
- 3 The UPE arises on or after 1 July 2022 but does not constitute the provision of financial accommodation – for example, where the company does not have knowledge of the amount that it can demand immediate payment of from the trustee at the relevant time, in which case the amount continues to be a UPE and is not taken to be a Division 7A loan.

Importantly, for UPEs arising on or after 1 July 2022, if the UPE results in the provision of financial accommodation pursuant to the Determination by the time the amount would otherwise need to be addressed under Subdivision EA, then the treatment of the UPE as a loan means that Subdivision EA does not apply (as described above).

Status of proposed reforms to Division 7A

It is now nearly 10 years since the then Labor Assistant Treasurer, David Bradbury, commissioned a review by the Board of Taxation on 18 May 2012. The Board's [report](#) which recommended changes be made to improve the integrity and operation of Div 7A was delivered to the Government in November 2014. As part of the [Federal Budget 2016-17](#) in May 2016, the Government committed to making targeted amendments to Div 7A, with a proposed start date for the reforms of 1 July 2018. The start date was deferred to 1 July 2019, then to 1 July 2020, then to [income years commencing on or after the date of Royal Assent of the enabling legislation](#).

The only consultation materials on the reforms that the Government has issued to date is a [consultation paper](#) released on 22 October 2018 by Treasury outlining the proposed changes.

While many in the profession are keen to see more detail on the reforms, the deferral of the proposed measures is sensible. It will allow a reasonable period for design and implementation of the new rules, whatever form they take.

The Tax Institute will continue to be actively engaged in advocating for workable amendments to the provisions of Div 7A.

Further guidance and information

The Tax Institute's submission on draft Taxation Determination TD 2022/D1 can be found [here](#).

The ATO's Public advice and guidance compendium accompanying the Determination can be found [here](#).

Further guidance and information is available from the [ATO website](#).

If you have any specific concerns that have not been outlined above, please email taxpolicy@taxinstitute.com.au.

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