

# Tax Events

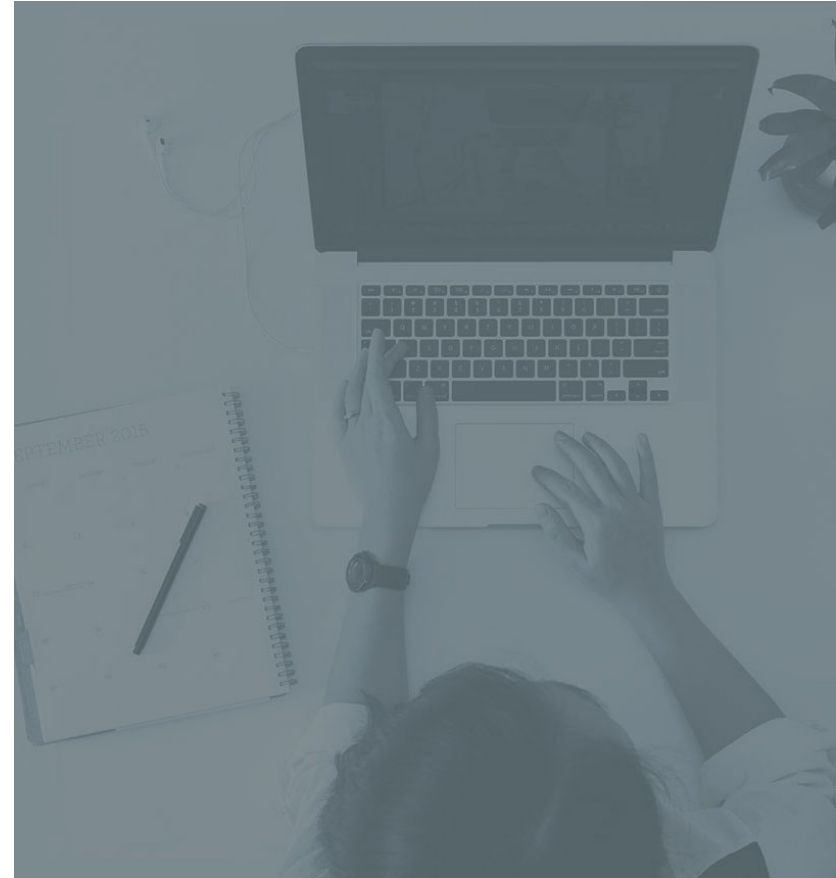
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## Trusts – Division 7A & UPEs

Tax Determination TD 2022/D1

May 2022



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## Speaker



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# Where Are We At With Division 7A ITAA 1936

Treasury Consultation paper was issued in October 2018 with significant recommendations under consideration, inter alia:

- Single 10-year loan model
  - P & I loan terms
  - Interest based on the Small business; Variable; Other; Overdraft - Indicator Lending rate
- Pre 1997 loans to be brought within Division 7A , albeit with a 2-year transition
- No distributable surplus limit
- Clarify that UPE's will come within the scope of Division 7A:
  - Similar section 109N requirements
  - All post December 2009 UPEs would need to be put on a section 109N loan agreement
- Queried whether pre–December 2009 UPEs should be brought within Division 7A

# TR 2010/3 Treatment of UPEs



## TR 2010/3

- Introduced a UPE to a company as a section 109D loan – provision of financial accommodation
- Mitigated the financial impact by PS LA 2010/4 options:
  - Pay the UPE before the relevant date;
  - Complying section 109N loan agreement; or
  - Put the UPE on a 10year interest only sub-trust arrangement

# Taxation Determination TD 2022/D1

- Pre-empts any Governments legislative change
- Proposes to treat the UPE “owing” to a company as a section 109D loan, and requiring:
  - Payment of the UPE by the relevant date;
  - Put on a section 109N agreement (P & I loan); or
  - Treat as a deemed dividend.
- Previous PS LA 2010/4 treatment not to apply from 1 July 2022
- No indication that the pre-December 2009 UPEs are to be impacted

# Practical Features of TD 2022/D1

- Concludes that there is the provision of financial accommodation (section 109D(3)(b)) when the beneficiary does not call for the payment of their equitable entitlement:
  - 7. *A private company beneficiary with a UPE, by arrangement, understanding or acquiescence, consents to the trustee retaining that amount to continue using it for trust purposes if the company:*
    - *has knowledge of an amount that it can demand immediate payment of from the trustee, and*
    - *does not demand payment.*
- To the extent that there is a common mind – company and trustee, company beneficiary is taken to have knowledge of the amount when the trustee does (importance for the timing of the loan)
- TD differentiates the application of Division 7A if distribution is:
  - UPE
  - Sub-trust arrangement
- Note ASIC Deed provides distribution is set aside and held on a sub-trust arrangement

# UPE v Sub-Trust

- The TD draws a distinction between a UPE and a sub-trust:
  - If the amount is set aside on a sub-trust for the exclusive benefit of the company:
    - UPE comes to an end;
    - Amount ceases to be part of the main trust;
    - The sub-trust is not making any financial accommodation to the company; ...

## **However:**

- By reason of “arrangement, understanding or acquiescence, the sub-trustee allows the funds to be used by the main trust, there is a section 109D(3) loan

# Division 7A Timing Issues

The TD distinguishes the timing issues between an UPE and a sub-trust situation:

- **UPE**
  - Loan is made when the beneficiary fails to call for the payment of their entitlement:
    - Fixed amount –when trustee stipulates the amount
    - % share – when \$ amount known

## **Sub-trust**

- When the beneficiary has knowledge of the use to be made of the sub-trust fund



# Examples of Application of TD

- **Example 6 is a common situation:**

## **Facts:**

- Trustee's distribution based on % share of trust income;
- At the time of the resolution (30<sup>th</sup> June 2023) corporate beneficiary does not know the \$ amount;
- Amount is determined on 1<sup>st</sup> August 2023.

## **Outcome:**

- Knowledge of amount 1<sup>st</sup> August 2023;
- Lodgment date company's return 15<sup>th</sup> May 2025;
- Rectification strategy – 15<sup>th</sup> May 2025 to avoid Division consequences
- First s.109E payment – by 30<sup>th</sup> June 2025

# Subdivision EA (Section 109XA)

- Subdivision EA applies where a trustee makes, inter alia a loan to an entity that is an associate of a private company's shareholder and there is an UPE owing to the company
- TD 2022/D1:
  - If UPE is subject to a complying loan agreement – Subdivision EA will not apply;
  - If the amount set aside for the company is put on a sub-trust – there is no UPE and no subdivision EA issues.

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# Thank you!

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