24 July 2026

Australian Taxation Office
GPO Box 9977
CANBERRA ACT 2601

Email: Simon.Haines@ato.gov.au

Dear Sir/Madam,

SMSF ASSOCIATION SUBMISSION – BENDEL CASE DECISION IMPACT STATEMENT

The SMSF Association welcomes the opportunity to provide this submission in response to the Australian Taxation Office's Decision Impact Statement in response to *Commissioner of Taxation v Bendel [2026] HCA 18* (*Bendel*).

Our submission is confined to two matters: the need to review the ATO's existing SMSF guidance concerning unpaid trust distributions, and the appropriate treatment of arrangements entered into in reliance on the ATO's former view.

Recommendations

The ATO should:

1. Include SMSFR 2009/3[1], SMSFR 2009/4[2] and associated SMSF audit and compliance guidance in its review following *Bendel*; and
2. Retain certainty for existing legally effective loans, while providing an elective and time-limited remediation pathway for taxpayers and SMSFs that entered into those arrangements principally to comply with the ATO's former view in TD 2022/11[3].

Review of SMSFR 2009/3

The Decision Impact Statement confirms that TD 2022/11 will be withdrawn and that a number of related taxation guidance products will be reviewed. However, SMSFR 2009/3, is not identified as a product to be reviewed.

SMSFR 2009/3 is directly relevant to unpaid present entitlements (UPE) involving SMSFs. It expresses the view that an unpaid trust distribution may constitute a loan where, among other matters, the circumstances indicate a consensual arrangement for the provision of credit or another form of financial accommodation. Where the trust is a related party, that characterisation may have

[1] Australian Taxation Office, *Self Managed Superannuation Funds: application of the Superannuation Industry (Supervision) Act 1993 to unpaid trust distributions payable to a Self Managed Superannuation Fund* (SMSFR 2009/3, 24 June 2009): (SMSFR 2009/3).
[2] Australian Taxation Office, *Self Managed Superannuation Funds: the meaning of 'asset', 'loan', 'investment in', 'lease' and 'lease arrangement' in the definition of an 'in-house asset' in the Superannuation Industry (Supervision) Act 1993* (SMSFR 2009/4, 24 June 2009): (SMSFR 2009/4).
[3] Australian Taxation Office, *Income Tax: Division 7A: when will an unpaid present entitlement or amount held on sub-trust become the provision of 'financial accommodation'?* (TD 2022/11, 13 July 2022): (TD 2022/11).

significant consequences under the in-house asset rules.[4] It may also affect the application of the arm's-length requirements[5] and associated SMSF audit and reporting obligations.

Although *Bendel* concerned Division 7A rather than the *Superannuation Industry (Supervision) Act 1993* (SIS Act), the definition of "loan" in subsection 10(1) of the SIS Act uses materially similar language, including "the provision of credit or any other form of financial accommodation". SMSFR 2009/4 confirms that this extended definition is central to the operation of the in-house asset provisions.

The High Court majority held that there was no provision of financial accommodation for the purposes of subsection 109D(3)(b)[6] where the private company did nothing. Their Honours considered that the provision of financial accommodation required an initial transfer, supply or grant of value involving bilateral activity. Mere inactivity or acquiescence in the retention of funds was insufficient. The Court similarly rejected the proposition that simply doing nothing constituted a transaction that, in substance, effected a loan of money.[7]

We acknowledge that the construction of the SIS Act must be determined by reference to its own text, context and purpose. The decision does not necessarily determine the application of subsection 10(1) of the SIS Act. Nevertheless, the substantial textual overlap and the reasoning concerning inactivity and financial accommodation require a considered review of SMSFR 2009/3.

The ATO should therefore:

- Add SMSFR 2009/3 and SMSFR 2009/4 to the guidance products under review;
- Review all SMSF auditor instructions and website guidance that rely on the relevant interpretation;
- Identify the paragraphs and examples affected by *Bendel*; and
- Publish an interim compliance position confirming how SMSF trustees and auditors should treat outstanding trust distributions while that review is undertaken.

In particular, the interim position should distinguish between:

- The mere non-payment of an entitlement;
- An express or objectively established agreement to provide time to pay;
- An entitlement formally converted into a loan; and
- A separate investment or reinvestment of the entitlement in the trust.

Without this clarification, SMSF trustees and auditors face uncertainty over the classification and valuation of fund assets, trustee compliance[8], audit report qualifications and whether an auditor contravention report is required.

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[4] *Superannuation Industry (Supervision) Act 1993* (Cth), pt 8.
[5] Ibid, s 109.
[6] *Income Tax Assessment Act 1936* (Cth): (*ITAA1936*).
[7] *Commissioner of Taxation v Bendel* [2026] HCA 18, [72]–[74]: (*'Bendel'*).
[8] *Superannuation Industry (Supervision) Act 1993* (Cth).

Existing arrangements entered into under the ATO's former view

The Decision Impact Statement states that UPEs simply left outstanding, and amounts held on separate sub-trusts under the former administrative guidance, will not without more be loans. However, UPEs that were made subject to complying loan terms are, as a matter of fact, loans and will continue to be treated as loans.

We accept that a legally effective loan agreement cannot simply be disregarded. Continuing to recognise an actual loan also provides certainty and avoids the ATO retrospectively recharacterizing arrangements that taxpayers may wish to preserve.

However, the ATO's position should not be the end of the matter. Many taxpayers entered into complying loan agreements only because the ATO's published view stated that this was necessary to avoid Division 7A consequences. Those taxpayers may now remain subject to interest, minimum yearly repayment and administrative obligations that would not have arisen had the law been correctly understood.

The difference in treatment between taxpayers who left UPEs outstanding and those who took positive steps to comply with the ATO's former view produces an inequitable result. The latter group should not be placed in a permanently less favourable position because they followed published ATO guidance.

Where an SMSF's unpaid trust distribution was formalised as a loan to a related trust in response to the ATO's former view, trustees may now be left managing in-house asset, valuation, audit and reporting consequences that arose only because they followed ATO guidance that is now being withdrawn or reconsidered. Any remediation pathway should therefore address both taxation consequences and practical SIS Act consequences for SMSFs.

We recommend that the ATO establish an elective, time-limited remediation process, available for at least 12 months after final guidance is issued. The process should:

1. Permit taxpayers to pay out, terminate, replace or otherwise unwind an existing complying loan where this can be done legally and without reducing the creditor's entitlement;
2. Explain the application of *ITAA1936* sections 109D, 109F and 109RB, Subdivision EA, section 100A and Part IVA to genuine remediation transactions;
3. Provide a streamlined approach to the exercise of the Commissioner's discretion under section 109RB[9] where an unintended Division 7A[10] consequence arises from reasonable reliance on the former ATO view; and
4. Confirm that the ATO will not apply compliance resources merely because an arrangement has been remediated, in the absence of tax avoidance, value shifting or a benefit being provided to a shareholder or associate.

To avoid doubt, the Association is not seeking blanket relief for arrangements involving tax avoidance, value shifting, or benefits provided to shareholders or associates. We acknowledge that

[9] Ibid.
[10] Ibid.

Subdivision EA, section 100A and Part IVA may continue to apply according to their terms. Our concern is confined to genuine arrangements entered into in good faith in reasonable reliance on the ATO's former published view.

Summary

The High Court's decision has implications extending beyond the income tax products presently identified in the Decision Impact Statement. SMSFR 2009/3 relies on concepts and statutory language closely connected with the reasoning considered in *Bendel*. It should therefore be expressly included in the ATO's review.

For existing arrangements, the ATO should preserve legal certainty by continuing to recognise genuine loans, but supplement that position with a practical and elective remediation pathway. This would appropriately protect the integrity of the tax and superannuation systems while ensuring that taxpayers and SMSF trustees are not disadvantaged for having acted in good faith in accordance with the ATO's former published view.

The remediation guidance should not be limited to taxation matters. Consideration should also be given to any practical relief that may be needed for SMSFs. Trustees should not be required to choose between continuing an unnecessary arrangement and undertaking remediation without clear guidance about the SIS Act consequences.

If you have any questions about our submission, please do not hesitate to contact us, and we thank you again for the opportunity to provide this submission.

Yours sincerely,

Tracey Scotchbrook
Head of Policy and Advocacy

ABOUT THE SMSF ASSOCIATION

The SMSF Association is the peak body representing the self-managed superannuation fund (SMSF) sector which is comprised of over 1.2 million SMSF members and a diverse range of financial professionals. The SMSF Association continues to build integrity through professional and education standards for practitioners who service the SMSF sector. The SMSF Association consists of professional members, principally accountants, auditors, lawyers, financial advisers, tax professionals and actuaries. Additionally, the SMSF Association represents SMSF trustee members and provides them with access to independent education materials to assist them in the running of their SMSF.