

# Unpaid present entitlement – a Division 7A analysis

THE CHARACTERISATION OF A UPE AS A LOAN IS AGAIN SUBJECT TO ATO SCRUTINY.



Let me tell you how it will be,  
There's one for you, nineteen for me<sup>1</sup>

## INTRODUCTION

On 10 February 2009 Deputy Commissioner Mark Konza made comments regarding the potential application of s 109D (private company constructive distributions) *Income Tax Assessment Act 1936* (ITAA36) to an unpaid present entitlement (UPE) from a trust to a corporate beneficiary<sup>2</sup> which was reported by the *Weekly Tax Bulletin* (WTB) as follows:<sup>3</sup>

...

Mr Konza confirmed his view that an unpaid present entitlement of a private company beneficiary to trust income could factually become a loan, and thus a deemed dividend from the company back to the trustee of the trust under s 109D of Div 7A.

...

Mr Konza advised that an unpaid present entitlement may result in a s 109D loan where either:

- the trustee and the private company beneficiary have entered into a written loan agreement; or
- where the parties have entered into a consensual agreement for the provision of credit or other form of financial accommodation.

The Deputy Commissioner confirmed that a consensual agreement may arise if a private company's unpaid present entitlements to trust income are credited to a loan account on the trust's balance sheet, and the company acquiesces to or adopts the same accounting treatment.

...

Mr Konza's comments raise the issue of whether a distribution by a closely held trust to a corporate beneficiary is a UPE or a loan. Mr Konza has not published a technical paper supporting the statements. This has led to advisers adopting various interpretations regarding the scope and application of his comments on 10 February 2009 and as reported in the WTB. The text of Mr Konza's subsequent speech on 31 March 2009 has since been published.

This article critiques the potential application of s 109D ITAA36 to such UPEs. Particularly, this article asserts that:

- a written loan deed or the imposition of further obligations (such as interest) or obtaining a concession (such as payment other than on demand) is required to convert a UPE to a loan;
- acquiescence by a corporate beneficiary cannot create a loan or convert a UPE to a loan;
- bilateral adoption of a loan accounting treatment cannot of itself convert a UPE to a loan but may be evidence of an intent to create a loan where the other contractual elements necessary to create a loan are established.

Mr Konza also made comments concerning the application of s 100A (trust reimbursement agreements) ITAA36 which may be the subject of a subsequent article.

## DIVISION 7A

### Introduction

Division 7A ITAA97 (Div 7A) draws a clear distinction between the mutually exclusive concepts of a loan and a UPE in respect

of a corporate beneficiary. Division 7A distinguishes between:

- a loan from a private company to a shareholder (or an associate) (s 109D ITAA36); and
- a payment, loan or debt forgiveness by a trustee to a shareholder (or an associate) of a private company where there is a UPE from the trust to the private company (ss 109XA and 109XB ITAA36).

The distributing trust of which a shareholder is a beneficiary would invariably be an associate of the shareholder for Div 7A purposes.<sup>4</sup>

Where a trustee appoints income to a corporate beneficiary, to determine if ss 109D or 109XB ITAA36 potentially applies, it is necessary to determine if the appointment constitutes:

- a UPE from the trust to the corporate beneficiary; or
- a loan from the corporate beneficiary to the trustee.

The operation of the provisions can be summarised by the diagram opposite.

## SUBDIVISION EA ITAA36

### Operative provision

Paraphrased, s 109XB ITAA36 applies if:

- a trustee makes a payment or loan to or forgives a debt from a shareholder (or an associate) of a private company (that is not a company) (actual transaction) (amongst other things); and
- the company is presently entitled to an amount from the net income of the trust estate at the time the actual

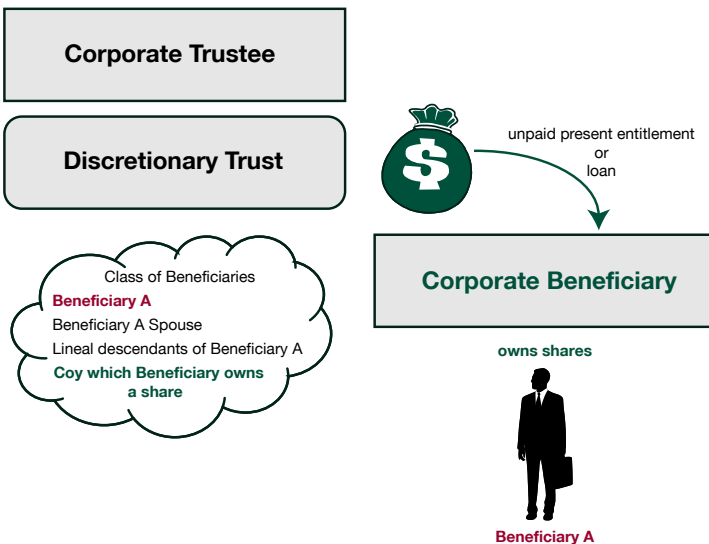
transaction takes place and the whole of that amount has not been paid to the company before the earlier of the due date for lodgment and the date of lodgment of the trustee's return of income for the trust for the year of income of the trust in which the actual transaction takes place; or<sup>5</sup>

- 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 in which the actual transaction takes place, and the whole of that amount has not been paid to the company before the earlier of those dates.<sup>6</sup>

Section 109XB ITAA36 applies where the trust makes a payment, loan or forgives a debt to a shareholder (or an associate) of a private company – the present entitlement to the corporate beneficiary being effectively extracted from the trust.

Accordingly, subdiv EA ITAA36 is unlikely to apply where a trust has a UPE to a corporate beneficiary and the money is retained by the trust on the terms of the trust and reinvested in assets owned by the trust.

In this circumstance, to apply Div 7A, it would be necessary to apply s 109D ITAA36 (discussed below).



### Determination of income uncertainty

Section 109XB ITAA36 requires the company to be presently entitled to an amount from the "net income of the trust estate". Under Div 6, Part III ITAA36 (**Div 6**) present entitlement is to the "income of the trust estate (s 97 ITAA36) and not the defined term "net income" (s 95 ITAA36).

Accordingly, the operation of s 109XB ITAA36 may be defective, unless the reference to net income is:

- intended to clarify that the net rather than the gross "income of the trust estate" is to be used in the calculation;<sup>7</sup> or
- the balance of income of the trust estate that has not been actually paid.

The amount of the UPE at issue is the amount of the present entitlement that remained unpaid at the earlier of those dates. Murphy identifies this tautology as a present entitlement must be unpaid.<sup>8</sup> However, present entitlement is used in this article to denote the creation of a present entitlement and a UPE is used to denote an outstanding present entitlement that may be subject to Div 7A.

Murphy identifies that either interpretation provides anomalous results.<sup>9</sup>

However, as the definition of unpaid present entitlement<sup>10</sup> determines the balance that has not been paid, arguably the better construction is that the concept of net income is to clarify that net rather than gross income is to be used.

There are numerous complexities in determining what constitutes "income of the trust estate".<sup>11</sup> The anomalous results from the net rather than gross income interpretation are largely avoided if income of the trust estate' means trust law income and not ordinary income.<sup>12</sup>

### Present entitlement

A beneficiary is presently entitled to a share of the income of a trust estate if the beneficiary has an interest in the income which is both vested in interest and vested in possession and the beneficiary has a present legal right to demand and receive payment of the income.<sup>13</sup>

For an interest to be vested there must be an immediate fixed right of present or future enjoyment. A right of present enjoyment arises where the interest is vested in possession. A right of future enjoyment arises where the interest is ascertainable and the interest must be ready to take effect immediately upon the determination of all preceding interests. A vested interest is contrasted with a contingent interest.

A defeasible interest is an interest that is subject to be defeated by the operation of a subsequent or mixed condition. An indefeasible interest, or an absolute interest as opposed to a defeasible interest, is one that is neither subject to any condition nor liable to be defeated by the exercise of a power.<sup>14</sup>

IT 329 states that present entitlement is created as follows:<sup>15</sup>

9. ... A declaration, resolution or other act of a trustee in an effective exercise of his discretion will amount to an application of income of a trust estate for the benefit of a beneficiary where :-
  - (a) a specific ascertainable portion of the income of the year in question is thereby immediately and absolutely vested in the beneficiary so that even though it might not be immediately paid to the beneficiary it becomes his absolute property and would form part of his estate in the event (sic) of his death;
  - (b) the declaration, resolution, etc, is final and irrevocable.
10. To the extent that a resolution conforms to these requirements it will be accepted that it evidences an application of trust income for the benefit of a beneficiary within the meaning of section 101.
11. Consistently with the directions given in paragraphs 31 and 32 of IT 328 it is accepted that a declaration, resolution, etc. which fulfils

the above requirements made within two months after the close of the year of income will be effective for the purposes of section 101, ie it will be accepted as an application of the trust income in the year preceding the two months period.

The resolution must make the appointment prior to the expiration of the relevant accounting period or vesting date.<sup>16</sup> Failure may result in no income appointment or a default appointment depending on the terms of the trust instrument.<sup>17</sup>

Accordingly, upon satisfaction of these requirements an appointment creates the relevant present entitlement. The income becomes the absolute property of the beneficiary and becomes part of the beneficiary's estate upon death.<sup>18</sup>

Where income has been credited to a beneficiary in the accounts of the trust, the trustee holds those funds on behalf of the beneficiary and not as part of the assets of the principal trust.<sup>19</sup> Distributions should be invested in a separate fund, used to purchase a separate asset or make a loan at interest.<sup>20</sup> However, this is only a general rule and most modern trusts empower the trustee to retain and mix the money in the trust's general account or in composite assets (discussed below).

This appointment process, therefore, results in creation of a present entitlement rather than a loan. Subsequent analysis of the issue must consider the circumstances in which a present entitlement is converted to a loan. The difficulty in analysis arises where the trustee reinvests the money into the trust's assets. The basis for retaining the amount and the entitlement of the beneficiary is unclear.

## LOAN TREATED AS DIVIDENDS

Paraphrased, s 109D ITAA36 provides that a private company is taken to pay a dividend to an entity at the end of the private company's year of income (current year) if:

- the private company makes a loan to the entity during the current year; and
- the loan is not fully repaid before the lodgment day for the current year; and
- the entity is a shareholder or an associate of the shareholder in the private company when the loan is made; or

- a reasonable person would conclude that the loan is made because the entity was a shareholder or associate at some time; and
- an exclusion does not apply.

Importantly, the private company must "make" a loan. The ordinary meaning of the transitive verb "make" includes (1) construct; create; (3) cause to exist; create; bring about; (6) undertake or agree to,<sup>21</sup> each indicating a positive action rather than an omission or acquiescence.

## Statutory definition of loan

A loan includes:<sup>22</sup>

- (a) an advance of money;
- (b) a provision of credit or any other form of financial accommodation;
- (c) a payment of an amount for, on account of, on behalf of or at the request of, an entity, if there is an expressed or implied obligation to repay the amount; and
- (d) a transaction (whatever its terms or form) which in substance effects a loan of money.

This statutory definition of loan arguably reflects the common law concept of debt (which is wider than a simple loan).

## Common law concept of debt

A loan is a contract by which the lender pays or advances money to the borrower in consideration of which the borrower agrees to repay the amount together with other money, such as interest (**loan credit**).<sup>23</sup> Alternatively, a debt may arise without a loan such as where goods and services are supplied in conjunction with credit (**sale credit**)<sup>24</sup> or by court judgment (**judgment debt**).

Bills of exchange and promissory notes are drawn with payment to the purchaser to be made in the future and can be traded and constitute a form of finance so represent a form of credit or financial accommodation or a transaction which in substance effects a loan of money.

The s 109D ITAA36 definition of "loan" is broadly drafted to cover these various credit and financing arrangements. However, all these forms of accommodation are arguably based on the contractual concept of debt so appear to exclude the concept of a judgment debt.<sup>25</sup>

The common law concept of debt is traditionally based upon the notion of *quid pro quo* (the giving of money or the

carrying out of work or service) or unjust enrichment.<sup>26</sup> The concepts of intention to create legal relations, offer, acceptance and consideration require a promise by one party and an exchange between them, either promise-for-promise (bilateral contract) or promise-for-act (unilateral contract) – the parties must intend to make an exchange.<sup>27</sup>

Other modes have been adopted in establishing contracts such as global analysis or mutual assent.<sup>28</sup> *Vroon BV v Foster's Brewing Group Ltd*<sup>29</sup> considered that a manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined.

Under any of the contractual approaches, the retention of the money by the trust is consistent with the UPE making it difficult to discern an exchange or mutual assent resulting in a conversion of a UPE into a debt because nothing in the *status quo* has changed.

Traditionally, the performance of an existing duty is not consideration. Under the traditional concept of consideration, the trustee is already under a duty to pay the corporate beneficiary the amount of the present entitlement so without assuming further obligations (such as interest) or obtaining a concession (such as payment other than on demand) there is no consideration to perfect a debt contract.<sup>30</sup>

However, a promise to perform an existing duty, or the performance of it, can arguably constitute good consideration because it is a benefit to the person to whom it is given.<sup>31</sup> Application of this principle appears to require the promisor to receive some additional benefit and for there to be no duress in extracting the promise. Where the *status quo* is maintained without assuming further obligations, it is difficult to envisage conversion of a UPE into a debt.

A deed constitutes good consideration.<sup>32</sup> However, a simple agreement or entries in the accounts would be insufficient to provide the necessary consideration.

With respect, it is submitted that for a UPE to be converted into a loan at common law (and under Div 7A) the loan must be executed by a deed or there must be an assumption of a further obligation (such as interest) or obtaining a further concession

(such a payment other than on demand). A simple loan agreement or book entries in the accounts of the trustee or the corporate beneficiary (or both) is insufficient to convert a UPE into a loan because there is an absence of the necessary contractual elements, particularly consideration.

Further, acquiescence does not constitute acceptance of a contract without showing that a contractual relationship has arisen by the conduct of the parties.<sup>33</sup> Where either the trustee or the corporate beneficiary does not treat the amount as a loan in the books, there would be no basis under the contractual approach to assert a conversion or a present entitlement into a loan.

no difficulty because there had been no distribution to the unitholders.

74. It appears that neither Mr Di Lorenzo nor Mrs Fresta nor any other director or member of Ceramics or Tile gave close attention to the legal character that the payments made by Ceramics on account of Tile's liabilities was to bear... The proper characterisation of the payments was, however, left to Mr Incollingo.
75. In my view there was a loan, because within the scope of his authority Mr Incollingo characterised the payments as loans, that is to say, as an indebtedness of Tile to Ceramics repayable on demand. It was within the scope of Mr Incollingo's authority to establish a running loan account in the name of Tile, to treat the payments made by Ceramics as debits to it, and to treat the ANZ, rental and BAS receipts as repayments by Tile, as he in fact did.

Similar statements about the evidentiary consequences of the parties' accounts have been made in cases such as *Lonsdale Sand and Metal P/L v FCT*<sup>35</sup> regarding s 108 ITAA36 (the predecessor to Div 7A and now repealed).

In *Lonsdale Sand and Metal P/L v FCT* loan accounts were written off by book entries in the debtor and creditor accounts without a release deed and in contravention of the "in writing" requirements under the *Law of Property Act 1936* (SA). Although the taxpayers asserted there was no consideration for the release to be contractually binding, the Federal Court found that there was consideration provided by other members of the group in selling shares in the taxpayer. The Federal Court also held that where the discharge was known to all parties and acted upon, the failure to comply with the "in writing" requirements were not detrimental.

Importantly, the Federal Court has adopted a contractual analysis with the accounts evidencing but not overriding the contractual preconditions of intention to create legal relations, offer, acceptance and consideration.

Accordingly, while the accounts can evidence the necessary contractual intent to create a loan, it is submitted that the accounts cannot create a loan where the antecedent contractual elements of offer, acceptance and consideration are not and cannot be legally established.

#### Trust law analysis

Whether the relationship of a person holding money is that of trustee or debtor is determined by the parties' common intentions. A trust relationship rather than a debtor relationship will generally exist where there is a requirement that the holder:<sup>36</sup>

- must kept the money separate from and not mix the money with other money; and
- must not use the money for the holder's own benefit.

Where the parties expressly agree that the relationship is a trust, a trust is created without expressly stating the above matters.

Although there had been some uncertainty whether money on deposit with a bank was held on trust or was a loan, money on deposit is a loan by the

“Where the *status quo* is maintained without assuming further obligations, it is difficult to envisage conversion of a UPE into a debt.”

#### Case law

In *Di Lorenzo Ceramics P/L v FCT*,<sup>34</sup> a unit trust was owned  $\frac{3}{4}$  by Di Lorenzo Ceramics P/L and  $\frac{1}{4}$  by Fresta Investments P/L. The unit trust undertook a property development, but due to cash flow problems Di Lorenzo Ceramics P/L paid certain development costs and the accountant booked the payments as loans in the accounts of the unit trust and Di Lorenzo Ceramics P/L. The Commissioner applied s 109D ITAA36 to the payment and Di Lorenzo Ceramics P/L sought to argue (amongst other things) that the accounts were mis-described and constituted an investment (despite no units having been issued in the unit trust). The Federal Court held:

45. Mr Incollingo [the group's accountant] said..."there are no loan agreements in respect of both loans and no interest has been charged on either. The loans will be paid back.
48. It is significant that Mr Incollingo's response was not to say that the reference to "loan" had been a mistake, but that a loan presented

*Di Lorenzo Ceramics P/L v FCT* provides some authority that the recording of an amount as a loan account in the trust's and corporate beneficiary balance sheet has resulted in the parties agreeing an amount is a loan. Importantly, the Federal Court has adopted a contractual concept of the statutory definition of loan.

*Di Lorenzo Ceramics P/L v FCT* is distinguishable from the UPE circumstances because:

- there was evidence that the amounts were loans and no assertion that the accounting entries were erroneous and such accounting entries were consistent with the general treatment of the matter as a running balance loan account;
- unlike the UPE circumstances, the transaction satisfied the contractual debt criteria as a loan credit or a sale credit; and
- the taxpayers did not discharge their onus that the loans were intended to be and should be characterised as a subscription for units.

customer because the bank is entitled to use the money for its own purposes with an obligation to repay the principal or an amount equal to the principal upon demand.<sup>37</sup> This is contrasted with the concept of trust where the holder of the money has rights which he is bound to exercise on behalf of another or for the accomplishment of some particular purpose<sup>38</sup> such as a solicitor's trust account which is impressed with a charge in favour of the respective clients notwithstanding that it might be impossible to identify the money of a particular client.<sup>39</sup>

Most modern trust instruments permit the trustee to mix funds and to invest mixed funds in fungible or composite assets. In these circumstances, it is submitted the prohibition on using the money for the holder's own benefit is significant.

Where the holder retains and administers the money in accordance with the trust instrument it is clear that the holder is not using it for the holder's own benefit. However, the money is not being administered for the sole benefit of the presently entitled beneficiary but is being administered for the wider class of beneficiaries. This does not appear to create a debt relationship, because the holder is bound to exercise the rights on behalf of another or for the accomplishment of some particular purpose.

Whether a trust relationship exists will be determined by whether the presently entitled beneficiary has tracing rights in respect of the mixed money or acquired fungible or composite assets. It is submitted that where the holder continues to administer the present entitlement in accordance with the trust instrument, the trust relationship continues and the presently entitled beneficiary has a tracing right against the money.

Under the common law<sup>40</sup> and equitable law<sup>41</sup> rights of tracing, an owner of property may follow and claim ownership of the property whether in its original form or in a converted form or into a composite asset provided the owner has not surrendered title to the property.

Tracing permits the presently entitled beneficiary to claim the property not merely the money value of the money traced (being a major difference to the action of debt).<sup>42</sup>

Common law tracing applies to fungible chattels and choses in action and does not apply to money or composite assets.<sup>43</sup>

Under tracing, the presently entitled beneficiary would become a partial beneficiary of the mixed fund or composite asset (which would entitle the beneficiary to a proportionate increase in the value of the mixed fund or composite asset).<sup>44</sup> Alternatively, the presently entitled beneficiary can elect to take a charge on the fund for the amount in it which represents his money.<sup>45</sup>

The election to take a charge is important because it permits the trust fund to be retained intact and for income on the fund and increases in capital value to be retained in the general trust fund to be appointed to the wider class of beneficiaries. There is some incongruity in the presently entitled beneficiary having a charge and this charge blurs the distinction between tracing and a debt action. However, unless *In re Hallett's Estate*<sup>46</sup> is overruled, the legal distinction between a trust and a debt remains valid.

The Div 7A concept of UPE concerns and appears limited to the original amount of the present entitlement and not to the income or capital growth of that amount of money. Accordingly, it is difficult to view the distribution of income or capital growth of the UPE under the trust to the wider class of beneficiaries upon the presently entitled beneficiary electing to take a charge as a loan, payment or forgiveness to which Div 7A applies.<sup>47</sup>

Accordingly, it is submitted that the retention by the trustee of a present entitlement to a corporate beneficiary and acquiring fungible or composite assets for the benefit of the trust is consistent with the continuing existence of the present entitlement and does not represent a conversion of the UPE into a loan.

## ACCOUNTING ANALYSIS

The courts have demonstrated a willingness to interpret tax statutes by reference to and consistently with generally acceptable accounting standards.<sup>48</sup> However, this is a guide only and does not override the legislation.

Closely held trusts are generally not disclosing or reporting entities for the Accounting Standards (AASB 1030).

AASB 132 and AASB 139<sup>49</sup> provide the Accounting Standard for financial instruments disclosure and presentation and recognition and measurement. The Accounting Standards do not define the term "loan", but require certain financial instruments, financial assets and financial liabilities to be recorded in accounts.

The Accounting Standards are reliant on the legal, trust or ordinary meaning of loan so the veracity of an entry in the accounts is dependent on the independent determination from a factual and legal perspective that the amount is a loan at law.

Accordingly, while the accounting treatment may raise evidentiary issues under the taxpayer's onus of proof to prove the correct classification of the transaction, the accounting treatment is not definitive.

## CONCLUSION

With respect, Mr Konza's statements were only general and, it is submitted, require qualification. Because of the importance of these issues to advisers, it is preferable for a representative of the Commissioner to publish a technical paper supporting their presentations to avoid confusion by advisers when interpreting (or misinterpreting) the statements made during oral presentations.

For the above reasons, the writer considers that:

- a written loan deed or the imposition of further obligations or concessions are required to convert a UPE to a loan;
- acquiescence by a corporate beneficiary cannot create a loan or convert a UPE to a loan; and
- bilateral adoption of a loan accounting treatment cannot of itself convert a UPE to a loan but may be evidence of an intent to create a loan where the other contractual elements necessary to create a loan are established.

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### Reference notes

- 1 *The Beatles, Tax Man, Revolver (1966 EMI).*
- 2 *M Konza, "Is the Tax Office widening its crackdown on lawyers and accountants presentation?", Taxation Institute of Australia, 10 February 2009, Sydney (repeated 31 March 2009, Canberra).*

- 3 *Weekly Tax Bulletin*, 7/2009, 20 February 2009, Thomson Reuters at [257].
- 4 Section 318(1)(d) ITAA36.
- 5 *This condition applies on and after 12 December 2002.*
- 6 *This condition applies on and after 19 February 2004.*
- 7 *FCT v Totledge P/L* (1982) 12 ATR 830 at 838.
- 8 *T Murphy, SC, Taxation of Trusts the new "s 109UB"*, Taxation Institute of Australia (Victoria), 4 March 2004.
- 9 *T Murphy, SC, ibid* at 7.
- 10 Section 109XA(4) IYAA 1936.
- 11 *R Jorgensen, Administration of SME Trusts'*, Taxation Institute of Australia (National) 12 March 2009.
- 12 Refer to *R Jorgensen, ibid*, for a discussion of this issue.
- 13 *Harmer v FCT* (1991) 22 ATR 726; *Richardson v FCT* (2001) 46 ATR 285 at [8].
- 14 *Dwight v FCT* (1992) 23 ATR 236.
- 15 IT 329.
- 16 *Pearson v FCT* (2006) 64 ATR 109.
- 17 *BRK (Bris) P/L v FCT* (2001) 46 ATR 436; cf *Ramsden v FCT* (2004) 56 ATR 42.
- 18 *Ward v IRC (NZ)* 69 ATC 6050; *IRC (NZ) v Ward* (1969) 1 ATR 287 (NZ Court of Appeal).
- 19 *Whether this is a sub-trust or a separate trust depends on the nature of the relevant property* (*D Ong Trust Law in Australia* (2nd ed 2003) The Federation Press, at 4).
- 20 *Y Grbich, G Munn and H Reicher, Modern Trusts and Taxation, Commercial Law in Context Series*, 1978 at 232.
- 21 *The Australian Concise Oxford Dictionary*. (4th ed), Oxford University Press 2004.
- 22 Section 109D(3) ITAA36.
- 23 *Foley v Hill* (1848) 2 HLC 28; 9 ER 1002.
- 24 *S Blay and E Clark, Australian Law of Financial Institutions, Harcourt Brace & Co*, 1993 at 528.
- 25 Accordingly, a judgment debt to a shareholder (or associate) of a corporate beneficiary ought not constitute a loan for the purposes of s 109D ITAA36.
- 26 *D Greg & R Davis, The Law of Contract, The Law Book Company Ltd*, 1987 at 5, 6
- 27 *N Seddon & M Ellinghaus, Law of Contract*, (8th ed 2002), LexisNexis Butterworths at [1.16].
- 28 *N Seddon & M Ellinghaus, ibid*, at [3.5].
- 29 *Vroon BV v Foster's Brewing Group Ltd* [1994] 2 VR 32 at 79-83.
- 30 *N Seddon & M Ellinghaus, ibid*, at [4.32] and [4.33].
- 31 *N Seddon & M Ellinghaus, ibid*, at [4.35].
- 32 *N Seddon & M Ellinghaus, ibid*, at [4.1] fn 5.
- 33 *Empirnall Holdings P/L v Machon Paull Partners P/L* (1988) 14 NSWLR 523 at 527-8 and 534.
- 34 *Di Lorenzo Ceramics P/L v FCT* (2007) 67 ATR 42.
- 35 *Lonsdale Sand and Metal P/L v FCT* (1998) 38 ATR 384.
- 36 *Associated Alloys P/L v ACN 001 452 106 P/L (in liq)* (2002 CLR 588 at 605; *Stephens Travel Services International P/L v Qantas Airways Ltd* (1988) 13 NSWLR 331 at 341.
- 37 *Joachimson v Swiss Bank Corp* [1921] 3 KB 110 at 127.
- 38 *FW Maitland, Equity*, Cambridge University Press (2nd ed, 1936) at 44.
- 39 *Re Jones; Ex parte Mayne* (1953) 16 ABC 169.
- 40 *Taylor v Plumer* (1815) 3 M & s 562; 105 ER 721 at 726-727; *Brady Stapleton* (1952) 88 CLR 322 at 337.
- 41 *In re Diplock* [1948] Ch 465 at 520-521.
- 42 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 572.
- 43 *Sinclair v Brougham* [1914] AC 398 at 418-419.
- 44 *Pennell v Deffell* (1953) 4 DM & G 372; 43 ER 551 at 559.
- 45 *In re Hallett's Estate* (1880) 13 Ch D 696 at 709.
- 46 *In re Hallett's Estate* (1880) 13 Ch D 696.
- 47 *Mr Konza did not appear to raise this line of analysis.*
- 48 *FCT v Australian Guarantee Corporation Ltd* (1984) 15 ATR 982; *Coles Myer Finance Ltd v FCT* (1993) 25 ATR 95 at 106.
- 49 *IAS 32 Financial Instruments: presentation, IAS 39 Financial Instruments: recognition and measurements and IFRS 7 Financial Instruments: disclosure.*