

MELBOURNE REGISTRY

BETWEEN



AND

ELECNET (AUST) PTY LTD (AS TRUSTEE
FOR THE ELECTRICAL INDUSTRY
SEVERANCE SCHEME (ACN 080 344 458)

Appellant

COMMISSIONER OF TAXATION OF THE
COMMONWEALTH OF AUSTRALIA

Respondent

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RESPONDENT'S SUBMISSIONS

Part I: Publication

1. The Respondent certifies that these submissions are in a form suitable for publication on the internet.

Part II: Issues

2. The issue is whether the Electrical Industry Severance Scheme (**the EISS**) is a "unit trust", as that term is used in the "public trading trust" provisions in Division 6C of Part III of the *Income Tax Assessment Act 1936* (**the ITAA 1936**). The Respondent contends that the EISS is not a unit trust, and as a result it cannot be a trading trust or a public trading trust for the purposes of Division 6C.

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Part III: Judiciary Act 1903

3. The Respondent certifies that he considers that notice is not required to be given under s 78B of the *Judiciary Act 1903* (Cth).

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Part IV: Facts

4. Part V of the Appellant's submissions contains misstatements or omissions of relevant matters, at the paragraphs listed below:

(a) Paragraph 10: the Appellant states that on termination of employment, payments to Workers are an amount being the lesser of \$4,000 or the balance of the Worker's Account, with any balance payable after either 4 weeks or 39 weeks, citing cl 8.3(a). This is incorrect:

(i) Clause 8 only applies to those Workers who are "Active Workers", the meaning of which is to be determined by the Trustee;¹

10 (ii) The entitlement of Active Workers to a payment is governed by cl 8.3 and is either "an amount up to and including the amount standing to the credit of the Worker's Account", or "an amount up to and including the Prescribed Amount" plus in specified circumstances "an amount up to and including the balance of the amount standing to the credit of the relevant Worker's account".²

(b) Paragraph 10: the Appellant also states that on death or retirement "the whole balance of the account is paid out". Death or retirement are, along with termination of employment, defined as Severance Events in cl 8.2, and that clause provides that the Severance Payment to be made on the happening of
20 any of the Severance Events is to be "calculated in accordance with Clause 8.3". Accordingly, the same restrictions to payments referred to in subparagraphs (c)(i) and (ii) above apply on death or retirement.

(c) Paragraph 11: the Appellant contends that in circumstances where cl 12 applies to a Worker the Trustee "may designate" the Worker as an "Inactive Worker". However the meaning of "Inactive Worker" is a matter for the Trustee to determine pursuant to cl 1 and while it may be open to the Trustee to exercise that power to designate a Worker falling within cl 12 as an "Inactive Worker" it is not known whether the Trustee has in fact made any such determination and, if it has made a determination, what meaning it has determined.

30 5. In paragraph 49, the Appellant incorrectly submits that the purpose for which the EISS trust was established is "*exclusively* for making Severance Payments to Workers". Clause 11.1 expressly provides that the trust fund is to be maintained "[s]ubject to the

¹ See, in the Full Federal Court (FFC), Pagone and Edelman J at [105], and the Appellant's concession referred to at [108].

² See FFC, Pagone and Edelman JJ at [111], cl 8.3 and cl 8.5.

provisions of this Deed”. The making of Severance Payments is governed by cl 8.³ Clauses 14.1 and 14.2⁴ make provision for the application of the income of the trust fund to Members and Workers, among others, and for the distribution of capitalised income out of the trust fund to NECA and the ETU Beneficiaries as defined.⁵

Part V: Statutes and Regulations

6. The Appellant’s Part VII is accepted.

Part VI: Argument in Answer to the Appellant

10 7. The Full Federal Court held correctly, it is respectfully submitted, that the EISS is not a unit trust within the meaning of Division 6C of Part III of the ITAA 1936. “Unit trust” is a descriptive expression of common usage. It is not defined in Division 6C and for the purposes of Division 6C, having regard to the text and context, it bears the meaning ascertained from its common usage. The EISS is a benefits and discretionary trust set up for the benefit of workers and others and under the Deed the beneficial interest in the trust fund is not divided into portions (whether described as units or otherwise) to be issued to and held by the beneficiaries. Such a trust is not a unit trust within the meaning of Division 6C.

20 8. The Appellant seeks to construe “unit trust” in Division 6C as a trust “under which, in broad terms, the interest of each of the beneficiaries is one with an identifiable numerator and a common denominator, though both may vary over time”.⁶ It contends that the EISS is a “unit trust”, so construed, because the “Workers”, and on their death their dependants, each have a beneficial interest in the trust fund, which is capable of measurement and delineation...”.⁷ The Appellant’s submissions are erroneous. There are three principal reasons:

- 30 (a) First, the terms of the EISS are not such that the interest of each of the beneficiaries is one with an identifiable numerator and a common denominator;
- (b) Secondly, “unit trust” is an expression of common usage. In Division 6C it is not defined and it has the meaning that accords with common usage. On that meaning, a central characteristic of a unit trust is that the beneficial interest in the trust fund is divided into shares or portions, usually referred to as units, which are held by the persons on whose behalf and for whom the trustee maintains and administers the trust fund. “Unit trust” does not apply to a trust

³ There is no dispute that cl 11.1 is intended to refer to cl 8 and not cl 6.

⁴ There are other clauses providing for payments out of the trust fund, e.g. cl 13.4.

⁵ See pars 14 to 17 below.

⁶ Appellant’s Submissions, par 16; also par 29.

⁷ Appellant’s Submissions, par 42; also par 16.

where the beneficial interest in the trust fund is not divided into units (howsoever described);⁸

- (c) The terms and nature of the EISS are such that the beneficial interest in the trust fund is not divided into units (howsoever described). It is not a “unit trust” within the meaning of Division 6C.

Each of the above matters is addressed below.

(i) *Terms and Nature of the EISS*

9. The trust fund consists of “all moneys and other assets held by, or on account of, the Trustee under this Deed”.⁹ The fund includes contributions¹⁰ made by Members in respect of Workers, amounts transferred in respect of Workers from Reciprocating Schemes,¹¹ income¹² and capitalised income.¹³
10. The beneficiaries¹⁴ for whom the Trustee holds and maintains the trust fund are:
- (a) Workers;¹⁵
 - (b) Lost Workers;¹⁶
 - (c) Dependents of Workers;¹⁷
 - (d) Members;¹⁸
 - (e) the ETU;¹⁹
 - (f) the NECA.²⁰
11. “Worker” is defined in cl 1 as meaning:
- (a) an Active Worker;
 - (b) an Inactive Worker;
 - (c) an employee whose employer, being a Member, has agreed that the employee be treated as a worker for the purposes of this Deed.

⁸ Cf, FFC, Jessup J at [6], Pagone and Edelman JJ at [13] and [94].

⁹ Cl 1, definition of Trust Fund.

¹⁰ Cl 4, cl 5.

¹¹ Cl 13; cl 1 defines Reciprocating Scheme.

¹² Cl 14.1.

¹³ Cl 14.2, cl 14.3.

¹⁴ There are also others who may benefit under the EISS: e.g., under cl 14.1(j), cl 8.7(c) and cl 23.5.

¹⁵ Defined in cl 1.

¹⁶ Defined in cl 1, but see also cl 13.2(a)(ii).

¹⁷ Defined in cl 1.

¹⁸ Defined in cl 1.

¹⁹ Defined in cl 1.

²⁰ Defined in cl 1.

12. “Active Worker” and “Inactive Worker” have the meaning determined by the Trustee.²¹
13. The rights and entitlements of the beneficiaries to distributions out of the trust fund are different as between each category of beneficiary and, for the most part, as between each beneficiary within each category.
14. At the discretion of the Trustee, current year income may be paid to Members and, in limited specified circumstances, to a Worker and to a person mentioned in cl 14.1A: see cl 14.1(b), (c), (d), (g), (i), and (j). Income not applied in accordance with cl 14.1 and cl 14.1A must be added as an accretion to the capital of the trust fund: cl 14.2.
- 10 15. The capital of the EISS may be distributed in accordance with cl 8, cl 13.4, cl 14.2, cl 14.3 and cl 23.4.
16. Cl 8 provides for the making of a Severance Payment. For present purposes there are a number of material features to note about cl 8:
- (a) first, it authorises a payment only to an Active Worker (or, upon an Active Worker’s death, to the persons listed in cl 8.3(b), which includes in certain circumstances, “any other person the Trustee determines”²²);
- (b) secondly, the amount and timing of the payment depends upon matters specific to the particular Active Worker, such as the amount standing to the credit of the Active Worker’s account,²³ the circumstances surrounding the termination of employment, and the person’s subsequent employment history;²⁴
- 20 (c) thirdly, the amount of the payment is also dependent upon the exercise of the Trustee’s discretion to pay a sum “up to and including” an amount specified in the Deed;²⁵
- (d) fourthly, cl 8 is not exhaustive of the Trustee’s power to distribute capital of the trust fund. In particular, capitalised income may be distributed pursuant to cl 14.2 and cl 14.3.
17. Cl 14.2 confers on the Trustee a discretion to distribute or not to distribute. The discretion to distribute is absolute: cl 17.²⁶ Where the trustee exercises the discretion under cl 14.2, 25% of the distribution must be to the NECA and 75% to one or more of the ETU Beneficiaries. A discretionary power of appointment in relation to the
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²¹ See cl 1 and cf *Pagone and Edelman JJ* at [105] and [108], referring to the Appellant’s concession about Inactive Workers.

²² Cl 8.7.

²³ See cl 6, cl 7 and cl 11.4.

²⁴ See cl 8.3 and cl 8.5.

²⁵ See cll 8.3(a), 8.3(b)(i), 8.3(b)(ii), and *Pagone and Edelman JJ* at [111].

²⁶ Cf, *Pagone and Edelman JJ* at [106].

ETU Beneficiaries, exercisable with consent of the ETU, is conferred on the trustee: see cl 14.3. The ETU Beneficiaries include the ETU, workers (whether Active or Inactive) and their dependants: see cl 14.3.

18. On a winding up of the EISS if, after payment of expenses and liabilities, there is an excess of funds over the aggregate amount credited to the Workers' Accounts and Lost Workers' Accounts, the balance of the fund is paid to a "Reciprocating Scheme": cl 23.4.²⁷ If the balance of the funds is less than the aggregate of the amounts credited to Workers' Accounts and Lost Workers' Accounts the balance is dealt with in accordance with arrangements to be made between the trustee, the NECA and the ETU: cl 23.5.
19. The terms of the EISS, referred to above, demonstrate that:
- (a) contrary to the submissions of the Appellant, the interest of each of the beneficiaries is not one with an identifiable numerator and a common denominator; and
 - (b) the EISS is not a trust where the beneficial interest in the trust fund is divided into units (howsoever described).²⁸
- (ii) *Proper construction of "unit trust" in Division 6C of Part III of the ITAA 1936*
20. "Unit trust" is an expression of common usage. It is not defined in Division 6C. It is used in Division 6C in the context of provisions that in effect treat certain unit trusts as companies for taxation purposes. Where the Division applies, a trustee of the public trading trust is taxed on the net income of the trust at the rate declared by Parliament²⁹ and distributions by prescribed trust estates are treated as dividends from companies, subject to stated exclusions.³⁰ In Division 6C, having regard to the text, purpose and effect of the Division, the expression "unit trust" bears its commonly understood meaning, and that meaning is ascertained from its common usage.
21. Like "discretionary trust", "provident fund", "benefit fund" and "superannuation fund", in the absence of applicable statutory definition "unit trust" does not have a constant, fixed normative meaning.³¹ Its commonly understood meaning is ascertained by reference to its usage.
22. In *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 234, the High Court said in relation to the term "discretionary trust":

²⁷ ABxx.

²⁸ FFC, Jessup J at [6].

²⁹ See s 102S; and s 25 of the *Income Tax Rates Act 1986* (Cth).

³⁰ Definition of "unit trust dividend", s 102M, and s 102T.

The meaning of this term is disclosed by a consideration of usage rather than doctrine, and the usage is descriptive rather than normative.³²

23. In *Scott v Commissioner of Taxation* (1966) 40 ALJR 265 at 278, Windeyer J stated in relation to the term “superannuation fund”:

10 There is no definition in the Act of a superannuation fund. The meaning of the term must therefore depend upon ordinary usage, the attributes of a thing thus denominated being those which things ordinarily so described have. To say that all that one need do to decide whether there was here a superannuation fund of the required kind is to study the deed is a mistake, because the deed must be read with a preconception of what such a fund is, otherwise reading it can provide no answer. There are many books and many articles in periodicals about employees' superannuation and pension funds. I have read some of them, or parts of them, with a view to seeing what meaning is generally given to those expressions by those who use them. Some of these works are written from a sociological point of view, emphasizing the social and industrial advantages of superannuation schemes established for employees. It was no doubt an appreciation of matters of that kind which led the Parliament to exempt income of such funds from tax. Others of the works I have seen deal primarily with economic and accountancy considerations which ought to govern the administration of superannuation or pension funds to ensure that their incomes are securely applied for the purposes for which the funds were established. Such reading as I have been able to do leaves me with the impression that the connotation of the phrase in the Act must be determined by one's general knowledge of the extent of the denotation of the phrase in common parlance.

24. In *Mahoney v Commissioner of Taxation* (1967) 41 ALJR 232, in relation to the term “provident, benefit or superannuation fund”, Kitto J said at p 232:

30 There was no definition in the Act of ‘a provident, benefit or superannuation fund’, and the meaning of the several expressions must therefore be arrived at in the light of ordinary usage and with only one piece of assistance to be gained from the immediate context.

Windeyer J at p 237 stated:

40 The terms "provident fund", "benefit fund " and "superannuation fund" are not defined in the Act. They are well-known terms, and as such have a meaning in several departments of law. For example, ... The expression "provident, benefit or superannuation fund" in the *Income Tax Assessment Act* thus takes its meaning from past usage. But it has now a wider meaning in that the words no longer denote only funds contributed by the members of a mutual society: superannuation and pension schemes for employees to-day may be “non-contributory” being set up by the employer and maintained entirely by contributions made by the employer.

³¹ *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98 at 109-110.

³² See also *FCT v Vegners* (1989) 90 ALR 547 at 552 per Gummow J.

25. Dixon J said in *Herbert Adams Pty Ltd v FCT*,³³ “[a] revenue law directed to commerce usually employs the descriptions and adopts the meanings in use among those who exercise the trade concerned.”

26. The common usage of the term “unit trust” emerged as a reference to the particular trust relationship that was developed as an alternative mechanism to a company for investors to pool their resources for investment or trading purposes.³⁴ In that context, and as commonly used, a central characteristic of a unit trust is that the trust fund is divided into units (howsoever described) which when created or issued are held by the beneficiaries of the trust.

10 27. The Oxford English Dictionary (3rd ed) defines “unit trust” as follows:

Finance (a) an open-end collective investment fund which is priced, bought, and sold in units which represent a mixture of the securities which underlie the fund...

28. The Macquarie Dictionary defines “unit trust” as:

Finance 1. A trust whose management purchases shares from a number of companies. The portfolio of such shares is divided into equal units for sale to the public...

29. Sin K, *The Legal Nature of the Unit Trust* (Clarendon Press, Oxford, 1997) states, at pp 1-2:³⁵

20 It is in the context of indirect investment that the concept of the unit trust emerged. In the contemporary market-place, a unit trust is initiated by a professional fund management company commonly called the manager. It is constituted by a trust deed executed between a manager and a trustee, which provides that assets of investors, commonly called the unitholders, will be held on trust by the trustee to be invested in such manner as may be directed by the manager in accordance with the terms of the trust deed. Rights, which are calculated in terms of the value of underlying assets, are created by this trust deed in the form of units. They are then subscribed to by investors and are dealt with and disposed of by them as intangible properties. The manager may undertake to repurchase units itself or in some cases to arrange for the units to be redeemed by the trustee out of the trust fund. Alternatively, though rarely, units may be sold or purchased in the stock exchange. This form of investment arrangement is very common in common law countries although the regulatory regimes may differ. It is regarded as an alternative to the company as an investment vehicle. And like the company, it has been used for commercial activities other than investment. [footnotes omitted]

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³³ (1932) 47 CLR 222 at 227.

³⁴ Ford, “Unit Trusts” 23 MLR 129 at 130; *Elders Trustee and Executor Co Ltd v EG Reeves Pty Ltd* (1987) 78 ALR 193 at 230 per Gummow J; Walsh, writing in Grbich, Munn and Reicher, “Modern Trusts and Taxation” (Butterworths 1978) at page 36. The term unit trust was first introduced into Commonwealth legislation without definition in the *Banking Act 1959* (Cth), s 39(8) definition of “securities”.

³⁵ And see further Day and Harris, *Unit Trusts*, Oyez Publishing, 1972 at 2; Lomnicka, *Open-Ended Investment Companies - A New Bottle For Old Wine, The Corporate Dimension*, ed Rider, Jordans, 1998 at 47; and Magney, “A Comparative Analysis of Estate Planning Vehicles” (1977) 12 *Taxation in Australia* 222 at 226.

30. Gower, *The Principles of Modern Company Law*, (Stevens & Sons, 1954) states:

(at p 229) Technically unit trusts are not associations at all, but merely an extension of the private trust into the commercial field. Nevertheless they offer to the public an investment practically indistinguishable from shares in a limited company

(at pp 250-1) Such an arrangement, then known as a management trust, was not uncommon in the early part of the second half of the nineteenth century and was in fact merely an example of the deed of settlement company from which it differed only in that the trust held shares in other businesses instead of itself engaging in trade.

Later the same legal form was employed as an alternative to the investment trust company and business or management trusts became common. In 1932 these were reintroduced into England as the modern unit trust.

This is merely a refinement of the type of organisation upheld fifty years earlier in *Smith v. Anderson* [(1880) 15 Ch.D.247]. Briefly what occurs is that the managers of the trust (generally a private company) purchase a block of various investments and vest them in trustees (in practice a trust corporation such as a bank or insurance company), to be held on the terms of an elaborate trust deed. This divides the beneficial interest in the trust fund into a large number of shares or units.

31. Ford, Austin & Ramsay's *Principles of Corporations Law*, Lexis Nexis, states at [1.360]:

One type of trust, called a "unit trust", has a superficial resemblance in function to a company because the equitable ownership or beneficial interest in the property to which the trustee holds legal title is divided into units - somewhat like share capital in a company with share capital - and each beneficiary holds a number of units. Some unit trusts are public in that the public is invited to invest in units. Such public unit trusts may be investment trusts: for example, a promoter solicits subscriptions and with the money subscribed acquires land or other property to be held on trust on behalf of investors. The trustee's duties will be governed by a trust deed. Usually the total fund will be divided into units of, say, \$1, and the interests of the contributors will consist of a number of units representing their respective proportions of the total contributions. Hence, the trust will be called a "unit trust".

Some unit trusts are private, as where a trading business is carried on for the benefit of several groups (such as a number of particular families of persons active in the business). The business is held on a unit trust and the units are held by sub-trustees, each holding in turn on a discretionary trust for a particular family.

Although unit trusts resemble companies in function, they and all other trusts are fundamentally different under basic law.

32. Ford, HAJ, "Unit Trusts" (1960) 23 *Modern Law Review* 129 states, at p 129:

Basically a unit trust is an arrangement whereby property is held on trust for a large number of investors. It is constituted by a deed regulating the rights, powers and duties of the parties to the arrangement. These parties are usually a manager, a trustee and investors, the last being commonly known as unit

holders. The manager purchases property and vests the title to it in the trustee who, at the outset, holds on trust for the manager. The beneficial interest is divided into a large number of units which are sold by the manager to investors. Share-unit trusts are of two kinds: fixed and flexible. In the fixed unit trust the portfolio of shares is fixed and not, except in special circumstances, subject to variation. The first portfolio of investments in a fixed unit trust is described as a unit and the beneficial interest is divided into sub-units which the manager sells to investors. A fixed unit trust deed will usually provide for the constitution of additional units matching the first portfolio which will be vested in the trustee and divided into the same number of sub-units. In the flexible unit trust the manager and the trustee have power under the deed to vary the nature and proportions of the shares comprising the trust fund. Unlike the fixed trust the portfolio in a flexible trust cannot be divided into rigidly constituted units but the beneficial interest in the trust fund whatever its constitution from time to time is divided into parts described as units.

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33. Walsh, MJ, “Unit Trusts” (1978) 12 *Taxation in Australia* 446 at 447 states: “I believe that the most significant feature of the unit trust is that the trust fund will be divided into portions or parts, each part of which being described as a unit. The holders of such parts or units will have a fixed defined part of the trust fund. Usually, the units will be transferrable and they can come with a variety of rights attaching to them.”
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34. Heydon and Leeming, *Jacobs’ Law of Trusts in Australia* (7th ed 2006) states at [310]: “In the case of a unit trust, the scheme property is divided into a large number of units, which may, subject to their terms, be issued, redeemed and traded publicly and privately”.
35. The Appellant does not point to any reported case from Australia or elsewhere in which the expression unit trust is used other than in circumstances where under the applicable trust deed the beneficial interest in the trust fund is divided into units which when created or issued are to be held by the persons for whom the trustee maintains and administers the trust fund.³⁶
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³⁶ See the cases in footnotes 28 to 33 of the Appellant’s submissions: *Cridland v FCT* (1977) 140 CLR 330 at 335-6; *Metcalf v R&I Bank of WA* (Unreported decision of French J, FCA 9 December 1993) at 14; *Natural Extracts Pty Ltd v Stotter* (1997) 24 ACSR 110 at 116-7, 120; *Yunghanns v Elfic Pty Ltd* (2000) 1 VR 92 at 95-6 [13]; *Otvosi v Ferella* (2005) 225 ALR 292 at 298-9 [28]; *Anison v Anison* [2015] FAMCA 973 at [6] – [10]; *Vagrand Pty Ltd (in liq) v Fielding* (1993) 113 ALR 128 at 551-2; *Nemkal Investments Pty Ltd v Chief Commissioner of State Revenue* (2003) 52 ATR 43 at 45 [5]; *MSP Nominees Pty Ltd v Commissioner of Stamps (South Australia)* (1999) 198 CLR 494 at 500 [3]; *Corporate Systems Publishing Pty Ltd v Lingard [No 4]* [2008] WASC 21[14] – [19]; *Tech 1 Pty Ltd (atf ROVI Investments Unit Trust) v Chief Commissioner of State Revenue* [2015] NSWCATAD 123 at [11]; *Huang v Wang* [2016] NSWCA 164 at [5]; *DCT v Pearson* (1997) 36 ATR 35 at 35-36; *Tyne (as trustee of the Argot Trust) v UBS AG* (2014) 102 ACSR 403 at 417 [120]; *Macarthur Cook Real Estate Funds Ltd v APN Funds Management Ltd* [2013] VSCA 240 at [4]. And see further, by way of further examples, *Charles v FCT* (1954) 90 CLR 598 at 605-6; *Read v The Commonwealth* (1988) 167 CLR 57 at 61-2 per Mason CJ, Deane and Gaudron JJ; *CPT Custodians Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98 at 110-11 [19]; *Kent v SS “Maria Luisa” (No 2)* (2003) 130 FCR 12 at 30 [49].

36. Having regard to the text and context, Division 6C uses the expression “unit trust” as it is commonly understood. There are a number of reasons for this. First, there is no statutory definition of the expression.³⁷ Secondly, the purpose and effect of the Division is to treat particular unit trusts as companies for the purposes of income taxation, which accords with the common understanding of a unit trust as resembling “companies in function”.³⁸ Thirdly, the Division utilises language that is apposite to a trust where the beneficial interest in the trust fund is divided into units and is not apposite to a trust where the beneficial interest is not divided into units. In the latter instance, the expression “cancellation, extinguishment or redemption of a unit”³⁹ is inapposite to refer simply to a capital distribution made to a beneficiary entitled to the distribution. In that instance there is no right or interest that is cancelled, extinguished or redeemed. Fourthly, the text and context of Division 6C does not reveal any basis for attributing to “unit trust” any meaning other than the meaning ascertained in accordance with its common usage. The Appellant’s contention that a trust is a unit trust because “the interest of each of the beneficiaries is one with an identifiable numerator and a common denominator”⁴⁰ has no support from the text and context of Division 6C. There is no basis for contending that “unit trust” in Division 6C does not have its commonly used meaning.
37. The Appellant’s contention that the EISS is a unit trust for the purposes of Division 6C, if accepted, may have the anomalous and clearly unintended consequence that payments to Active Workers under cl 8 that are otherwise taxable as employment termination payments under Division 82 of the *Income Tax Assessment Act 1997* or redundancy payments or the like under Division 83 of that Act would by reason of Division 6C be treated as unit trust dividends and therefore not subject to tax under Division 82 or Division 83.⁴¹
- (iii) *The EISS is not a unit trust within the meaning of Division 6C of Part III of the ITAA 1936*
38. The characterisation of a trust as a unit trust is one that must be made of the whole fund. It is incorrect to focus on parts only of the trust deed to determine whether the whole is a unit trust. The Appellant impermissibly seeks to focus on the rights of the Active Workers to the exclusion of the other rights or entitlements of the other

³⁷ See pars 23 to 25 above.

³⁸ See Ford, Austin & Ramsay’s *Principles of Corporations Law*, cited at par 31 above; also pars 29, 30 and footnote 35 above; also *Kent v SS “Maria Luisa” (No 2)* (2003) 130 FCR 12 at 29-30 [48].

³⁹ Section 102M, definition of “unit trust dividend” sub-par (d); see also s 102P(2)(c)(i) and 102P(7)(b)(i).

⁴⁰ Appellant’s submissions, par 16.

⁴¹ See s 82-130(1)(c), s 82-135(h), s 83-175(4); also footnotes 29 and 30 above and par 55 below.

beneficiaries created by the trust deed. On an examination of the whole of the trust deed the EISS is not a unit trust. There are a number of reasons.

39. First, the beneficial interest in the trust fund is not divided into units (howsoever described).⁴²

40. Secondly, the various rights and entitlements created in the various beneficiaries by the deed are disparate in nature and quantity and for the most part dependent upon the exercise of a discretion by the Trustee.

10 41. Thirdly, the Appellant's reliance on the rights of Active Workers under cl 8 is misconceived. Those rights are not synonymous with the rights of the holder of units in a unit trust. The designation of a person as an Active Worker depends first upon the Trustee's determination of the meaning of "Active Worker". Moreover, once determined to be an Active Worker the rights of a person under cl 8 depend upon matters specific to that person, including materially the contributions paid into the trust fund on his or her behalf, the debits made to the person's account made by the Trustee, the particular circumstances surrounding the termination of the person's employment, the subsequent employment history of the person, and the exercise of the Trustee's discretion to pay a sum up to and including the applicable amount.

20 42. Fourthly, the rights dealt with by cl 8 do not relate to the whole of the trust fund. The Trustee's power to make distributions out of the trust fund, other than as Severance Payments, is dealt with by various other clauses, including cl 13.4, cl 14.1, cl 14.2, cl 14.3 and cl 23.4. Cl 14 confers on the Trustee discretions as to the persons to whom, and the proportions in which, distributions under that clause may be made.

43. Accordingly, as the Full Federal Court held; the EISS is not a unit trust within the meaning of Division 6C of Part III of the ITAA 1936.

30 44. The Appellant contends that the "Workers", and on their death their dependants, each have a beneficial interest in the trust fund, which is capable of measurement and delineation and qualifies as a "unit" for Div 6C purposes ("a beneficial interest, howsoever described, in any of the income or property of the trust estate").⁴³ The Appellant's contention is erroneous and misconceived. There are a number of reasons.

45. First, unless and until the preconditions for a payment under cl 8 have occurred and the Trustee has determined the sum up to the applicable amount that is to be paid, an

⁴² As Jessup J below found at [6]; cf Pagone and Edelman JJ at [13].

⁴³ Appellant's Submissions par 42.

Active Worker's entitlement under that clause is not capable of measurement and delineation.⁴⁴

46. Secondly, Inactive Workers have no entitlement to a payment under cl 8. Inactive Workers may receive a distribution of capitalised income, but the making and quantum of any such distribution is subject to the discretion of the trustee.⁴⁵ Prior to the exercise of the Trustee's discretion, an Inactive Worker's entitlement is no more than an expectancy.
47. Likewise, any entitlement of a Dependant under cl 8 is subject to the exercise of the Trustee's discretion and is no more than an expectancy.⁴⁶
- 10 48. Thirdly, the rights and entitlements created by cl 8 relate only to a part of the capital of the trust fund. The balance of the trust capital and the current year income is held and maintained by the Trustee for the various categories of beneficiaries mentioned in the trust deed, including but not limited to the Workers. The entitlements of the various categories are of varying types and for the most part subject to the exercise of the Trustee's discretion. None of the interests of the beneficiaries in relation to the balance of the trust capital and the current year income is capable of measurement and delineation.
49. Fourthly, the Appellant's reliance upon the statutory definition of "unit" in s 102M is misconceived. It is erroneous to conclude that because a trust is one in which one or more beneficiaries has or have a beneficial interest in any of the income or property of the trust estate, the trust is therefore a unit trust for the purposes of Division 6C.
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50. The definition of "unit" does not expand or alter the meaning of "unit trust" for the purposes of Division 6C. The definition is relevant to ascertaining a "unitholder" for the purposes of applying Division 6C to a distribution by a "prescribed trust estate" to the unitholder. By the words "in relation to", the definition requires a relationship with a "prescribed trust estate" which means "a trust estate that is, or has been, a public trading trust ...".⁴⁷ The beneficial interest to which the definition refers is a beneficial interest in the income or property of the public trading trust in question. The identification of the "public trading trust" in question, involving as it does the identification of the relevant "unit trust", must be undertaken before the definition of "unit" can be applied. The work of the definition is enlivened once the relevant unit trust is identified.
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⁴⁴ See par 16 above.

⁴⁵ See par 17 above.

⁴⁶ Cl 8.7.

⁴⁷ Section 102M.

51. Moreover, the language of the definition is such that it does not purport to expand or alter the commonly understood meaning of unit trust. The definition of “unit” is inclusionary not exhaustive. It makes it clear that a beneficial interest in the relevant prescribed trust estate may be described as something other than as a unit and that the beneficial interest may be in any of the income or property of the trust fund. Neither of those features is inconsistent with or contrary to the common meaning of the term “unit trust”. The nature of a unitholder’s beneficial interest depends upon the terms of the particular trust.⁴⁸ The definition does not give an extended or altered meaning to what may otherwise be comprehended as a unit trust.⁴⁹
- 10 52. In Division 6C, the principal taxing provision is section 102S, which imposes tax on the “trustee of a unit trust that is a public trading trust”. “Public trading trust” is defined in s 102R in terms which state that “[a] unit trust is a public trading trust in relation to a relevant year of income if...”. One requirement of “if” is that “the unit trust is a public unit trust” and another is that “the unit trust is a trading trust”.
53. A further consideration is whether “the unit trust is a resident unit trust”. Those concepts are defined in s 102P, s 102N and s 102Q, all of which rely on the concept of a “unit trust”.
54. The term “unit”, like the term “unitholder”, is defined in s 102M specifically “in relation to a prescribed trust estate”. It is not defined for the purposes of or in relation to the concepts “trading trust”, “resident unit trust”, “public unit trust” or “unit trust”, which are the concepts by reference to which s 102S operates. Therefore the scheme of the legislation is such that a unit trust must first qualify as a public trading trust in relation to an income year before it can be a “prescribed trust estate” in relation to which the s 102M defined term “unit” can apply.
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55. The definition of “unit”, “in relation to a prescribed trust estate” is of particular significance to the operation of s 102T so far as it is concerned with the taxation treatment of distributions to unitholders. The provisions of s 102T that are not concerned with distributions but with the taxation of the trustee taxed in respect of the net income under s 102S, use the term “public trading trust”: see, e.g., s 102T(1)(a) and ss 102T(6), (7) and (8). But where s 102T is concerned with the taxation treatment of distributions, it uses the term “prescribed trust estate”.⁵⁰ This is the only place in Division 6C where the term “prescribed trust estate” appears at all apart from
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⁴⁸ *Kent v SS “Maria Luisa”* (No 2) (2003) 130 FCR 12 at 29 [48]; *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98 at 115 [36].

⁴⁹ *BERT Pty Ltd v FCT* [2013] AATA 584 at [22] per Logan J and Deputy President Hack SC, approved in *FFC* by Jessup J at [5]; and see footnote 47.

⁵⁰ See also, Explanatory Memorandum to the Taxation Laws Amendment Bill (No. 4) 1985, at pages 78-79 and 10-11.

in the interpretation provision in s 102M. The function of s 102T, so far as distributions are concerned, is to ensure that the treatment under the income tax legislation applicable to distributions made by companies to shareholders is applied to distributions made by trustees of prescribed trust estates. Thus, for example, the effect of sub-sections 102T(11), (12), (14) and (19) is to deem the trustee of a prescribed trust estate to be a company, deem the distribution to be a dividend paid and deem the unitholder in the prescribed trust estate to be a shareholder. By this means the unitholders who receive distributions are taxed under s 44 of the ITAA 1936 as though corporate dividends are being received.

10 56. Contrary to the contention of the Appellant at par 42 the rights and entitlements of the Workers and their Dependents in the EISS are not “units” as defined in s 102M. Critically the “beneficial interests” to which that definition applies are beneficial interests in the income or property of a prescribed trust estate, which as defined must be or have been a unit trust. The EISS is not and never has been a unit trust. Accordingly, whether or not the rights and entitlements of the Workers and their Dependents could otherwise properly be characterised as “beneficial interests (howsoever described) in any of the income or property” of the EISS,⁵¹ they could not be and are not “units” as defined in s 102M.

(iv) *Other matters relied on by the Appellant*

20 57. The Appellant relies on *CPT Custodian*⁵² and argues at pars 14 - 15 that the joint judgment in the Full Court of the Federal Court committed the error identified in *CPT Custodian* 224 CLR at 109-10 [14]-[15].

58. *CPT Custodian* does not assist the Appellant. In *CPT Custodian*, the High Court was concerned with the definition of “owner” in s 3 of the *Land Tax Act* 1958 (Vic). The reasoning of the Court of Appeal below was criticised on the basis that it erroneously sought to apply the definition of “owner” by considering whether the recipient of a land tax assessment was the holder of a unit in a unit trust. Because the High Court in *CPT Custodian* was concerned with whether beneficiaries’ rights under the trust in that case fell within the defined term “owner” it was necessary in that case to ascertain the nature of the beneficiaries’ rights. Ascertaining the nature of those rights was not assisted by considering whether the trust was a unit trust, and the error identified was to proceed by reference to an *a priori* concept of unit trusts, when the text of the legislation for consideration in that case did not require consideration of whether the

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⁵¹ See par 73 and following below.

⁵² *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98.

trust in question was a unit trust. But the present case is different: the very issue in this case is whether the EISS is a “unit trust” as that term is used in Division 6C.

59. The Appellant’s submissions under the heading “Taxonomy of ‘trusts’ in the Income Tax Assessment Acts” are misconceived. There is nothing to be gained in this case by analysis of provisions introduced subsequently to Division 6C that refer to the term “unit trust”, e.g. the trust loss provisions in Schedule 2F to the ITAA 1936 to which the Appellant refers (at par 30 and footnote 47) or the capital gains tax provisions (Appellant’s submissions at par 34). Those provisions are directed to different subject matters, shed no light on legislative intent as at the time of introduction of Division 6C and do not assist in the construction of Division 6C.⁵³ Nor is there anything to be gained by the excursus engaged in by the Appellant, in its submissions at pars 27 – 31, into the concept of “fixed trust” which is defined in the trust loss provisions enacted subsequently to Division 6C, or the definitions given in some provisions of the term “discretionary trust”. To interpret Division 6C, as the Appellant invites the Court to do, by reference to a so-called spectrum of trusts, from “fixed trusts” (defined in some provisions other than in Division 6C) to “discretionary trusts” is not consistent with authority. Division 6C does not use the term “fixed trust” or “discretionary trust” and there is no reason to suppose that the legislature had in mind the kind of spectrum to which the Appellant refers when it enacted Division 6C, adopting the term “unit trust”.
60. The Appellant’s conclusion that the expression “unit trust” means the category of trusts between fixed trusts and discretionary trusts (see Appellant’s submissions at pars 27 – 29) is incorrect. The contention is contrary to the meaning of unit trust as it is commonly understood, and it has no support from the text, context and purpose of Division 6C which uses the expression without definition.⁵⁴
61. Contrary to the submissions of the Appellant at pars 47 to 52 it was not erroneous for Pagone and Edelman JJ in the Full Court to take into account the fact that the trust deed contains provisions that enable the Trustee to pay to the workers less than the amounts contributed on their behalf. There is no dispute that these provisions, like any permissive provisions contained in a trust deed, would need to be applied for

⁵³ Cf *Attorney-General v Clarkson* [1900] 1 QB 156 at 165; *Grain Elevators Board v Shire of Dunmunkle* (1946) 73 CLR 70 at 86 per Dixon J; *Hooker v Gilling* (2007) 48 MVR 136 at 143; [2007] NSWCA 99 at [43]–[44], per McColl JA (with whom Ipp and Basten JJA agreed).

⁵⁴ As to purpose, the mischief identified in the Second Reading Speech was the use of a unit trust mechanism as a trading structure: Second Reading Speech for the Income Tax Laws Amendment Bill (No 4) 1985, House of Representatives Hansard, 15 November 1985 page 2598. Prior to Division 6C being introduced, the Second Reading Speech for the Bill introduction Division 6B identified the problem of unit trusts holding income producing property: Second Reading Speech for the Income Tax Laws Amendment Bill (No 3) 1981, House of Representatives Hansard, 23 September 1981 page 1682.

proper purposes. But regardless of whether the provisions in question are characterised as discretions or powers, the existence of them is inconsistent with the existence of any presumed intention of the settlors for the trust estate to be unitised.

62. The Respondent's answer to the specific matters raised in the Appellant's submissions at par 51 is as follows.
63. First, as to par 51(a), the use of the expression "Active Worker" in the Deed is not limited to the two instances listed by the Appellant. Importantly it appears in cl 1 as a defined term⁵⁵ which "has the meaning determined by the Trustee for the purposes of this Deed."⁵⁶
- 10 64. The Appellant contends that the only basis on which the Trustee could properly decline to classify a Worker as an Active Worker is if the Worker fell within the terms of cl 12, which deals with Forfeited Benefits. Since the Trustee's power in cl 1 with respect to the definition of "Active Worker" is to determine the meaning of that defined term, the Appellant is effectively contending that the Trustee must define Active Worker as being exclusively the class of Workers who have not fallen within Clause 12.⁵⁷
- 20 65. However neither the cl 1 definitions of "Active Worker" or "Inactive Worker" refers to cl 12 and likewise cl 12 refers to neither term.⁵⁸ Instead the Trustee is granted in cl 1 a broad power to determine the meaning of these terms. If the Appellant's argument were correct then "Active Worker" should simply have been defined in cl 1 as all Workers not falling within the scope of cl 12. The Appellant does not explain why the drafters of the Deed did not take this approach but instead chose to grant the Trustee a broad discretionary definitional power.
66. The Appellant could have, but did not, include any material in its Ruling application as to whether and if so how the Trustee has exercised its power to define the term "Active Worker". There was no evidence before the primary Judge as to what determination(s) the Trustee had made as to the meaning of Active Worker⁵⁹ so

⁵⁵ For completeness, it also appears in cl 6.1(c), 13.2 and cl 13.3 which give Active Workers additional rights with respect to transfers from the Previous Scheme to the Scheme than non-Active Workers would enjoy.

⁵⁶ There is also a definition of "Inactive Worker" in similar terms and given the definition of "Worker" it appears that the two definitions may be related, although not necessarily complementary given the existence of paragraph (c) in the definition of "Worker". See also Pagone and Edelman JJ FFC at [109].

⁵⁷ As a number of provisions of the Deed, especially cl 8, depend on the meaning given to Active Worker then the Trustee would be effectively obliged to make a determination under cl 1 of its meaning.

⁵⁸ A drafting oddity if cl 12 was really intended to define the class of non-Active Workers.

⁵⁹ Reasons of the primary Judge at [22], [35] and [55].

speculation as to the circumstances in which the Trustee might choose to designate Workers as Active (or Inactive) Workers can remain only that.⁶⁰

67. Secondly, as to par 51(b), the Appellant's contention as to the nature of cl 7.1(e) is incorrect. Cl 7.1(e) operates as a distinct power to debit in its own right, not as some sort of direction as to how other powers to debit expenses are to be utilised.
68. Cl 7.1 sets out five circumstances in which debits can be made to Worker's Accounts and cl 7.2 sets out when they can be made. Each of cl 7.1(a)-(d) deals with a specific situation in which it would be appropriate to make a debit while 7.1(e) is a far more general discretionary power. In particular cl 7.1(c) and (d) deal with debits to cover, respectively, a range of taxes, charges, imposts etc that might be levied with respect to a Worker and debits to cover Scheme administration costs. Each of cl 7.1(c) and (d) commences with the words "such amount".
69. That 7.1(e) deals with different amounts that may be debited under 7.1(c) or (d) is plain from the opening words "such other amounts". Not only does 7.1(e) deal with amounts not dealt with by the previous paragraphs, the discretion to debit is phrased in completely different and broad discretionary terms.⁶¹ Further, cl 7.1(e) permits the Trustee to debit individual Worker's Accounts such amount that the Trustee determines it would be "appropriate or equitable" to do so. The Trustee would not be limited to making identical or proportional adjustments to Workers' Accounts to reflect the sharing of the burden of expenses.
70. Thirdly, as to par 51(c), the Appellant contends that, notwithstanding their ordinary meaning of describing a range up to an upper limit, the words "up to and including" appearing several times in cl 8.3 do not confer a discretion on the Trustee to pay any amount less than the highest amount payable under each subclause.
71. However, if this were the drafter's intention then why would the Deed simply not have been drafted so as to require payment of an amount equal to that highest amount? The Appellant's suggested rewriting so as to replace "up to and including" with "no less than" creates a drafting issue of its own: the ordinary meaning of "no less than" is a range with a lower limit of the highest amount payable but the Deed does not permit payments of more than the amount standing to the credit of each Worker's Account.⁶²
72. The last sentence in par 51(c) raises a straw man: it is not the Respondent's position, nor did the joint reasons in the Full Court find, that the discretion could be exercised "arbitrarily". In the FFC at [113]-[114] Pagone and Edelman JJ discussed one

⁶⁰ One possible situation in which the Trustee might determine that a Worker is not an Active Worker is where the Worker's employing Member has become inactive: Pagone and Edelman JJ at [45].

⁶¹ See also Cl 17.

circumstance in which such a discretion could possibly be exercised but found that the power was not limited to that circumstance.

Part VII: Notice of Contention

73. The learned trial judge erred in finding that “[t]he proprietary nature of [the] interests [of the Workers] is sufficient to give rise to ‘beneficial interests in any property of the trust estate’ within the meaning of ‘unit’ in s 102M.”⁶³
74. The inclusive definition of “unit” relates only to beneficial interests in income or property of a prescribed trust estate, which by definition must be or have been a unit trust. The EISS is not and was not a unit trust. Accordingly, the rights and entitlements of the Workers under the EISS could not be and are not units as defined in s 102M.⁶⁴
75. Moreover, the inclusive definition of “unit” refers to a beneficial interest “in any of the income or property” of the trust estate. The inclusive definition thus focusses upon an interest “in” particular income or property. The nature of the interests of a beneficiary under a trust depends on the terms of the particular trust deed.⁶⁵ Under cl 8 of the EISS, a person’s entitlement to a Severance Payment depends first upon the designation of the person as an Active Worker in accordance with a meaning determined by the Trustee, then upon the happening of a precondition for the payment stipulated in cl 8, the credits and debits that have been made to the person’s account by the Trustee by the time of the happening of the relevant precondition, and the exercise of the Trustee’s discretion to pay a sum up to and including the applicable amount. Unless and until the matters required for an entitlement under cl 8 have occurred, including the exercise of discretions by the Trustee, whatever interests the Worker may otherwise have,⁶⁶ he or she does not have a beneficial interest “in” any item of income or property of the EISS.
76. The learned trial judge’s finding that the Workers have a “discrete proprietary interest in the contributions paid in respect of them”⁶⁷ is incorrect. The contributions once paid form part of the trust fund which the Trustee maintains and administers for all of the beneficiaries and may be expended or invested as the Trustee deems fit in the exercise of its duties. Any entitlement that may arise to a Severance Payment under cl

⁶² Cl 11.4.

⁶³ Davies J at [54].

⁶⁴ See pars 49 - 56 above.

⁶⁵ *Kent v SS “Maria Luisa”* (No 2) (2003) 130 FCR 12 at 29 [48]; *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98 at 115 [36].

⁶⁶ Such as a right to due administration: see e.g. *Gartside v Inland Revenue Commissioners* [1968] AC 553 at 575; *Commissioner of State Revenue v Serena Pty Ltd* (2008) 36 WAR 251 at 264-5 [47]-[53] and 267 [64] per Martin CJ, 282-286 [121]-[139] per Buss JA.

8 is not an entitlement to the contributions paid in respect of the Worker or any part of them,⁶⁸ but is an entitlement to an amount payable out of the capital of the trust fund and calculated by reference to, amongst other things, an amount standing to the credit of the Worker's Account and the exercise of the Trustee's discretion to pay a sum up to and including the applicable amount.

77. The decision in *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254 at 270 [30] to which the Appellant refers at par 53 of its submissions does not (and could not) establish any general proposition to the effect contended for. *Finch* was a case concerned with the particular context of a benefit claimable under a defined benefit superannuation fund and the special historical, legal and policy considerations that accompany such funds (referred to by the Court in that case at 270-272 [32]-[37]) and not the issue presently before this Court concerning Division 6C unit trusts⁶⁹.
78. Further, the primary issue in *Finch* was not the nature of any member's interest in the superannuation fund's income or property but rather whether the bases on which the decision of the superannuation fund trustee could be reviewed were limited to *Karger v Paul* principles. It was in this context that the statement at 242 CLR 270 [30] that the member of the fund in that case had a "beneficial interest" (but not, as s102M requires, a beneficial interest **in** the trust income or property) was made.
79. Given this Court's caution⁷⁰ as to the use of the term "beneficial interest" in the context of discretionary and unit trusts and the need to ascertain the nature of any interest in a trust by reference to the precise terms of each trust deed, the Appellant's attempt to transpose the statement from *Finch* to the present case and to read it as establishing that beneficial interests exist **in** the income or property of the EISS should be rejected.

Part VIII: Estimate

80. The respondent estimates that he will require 2 hours for his oral arguments.

Dated: 22 September 2016

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⁶⁷ Davies J at [54].

⁶⁸ See also cl 27.2 and cl 27.3 of the Deed.

⁶⁹ As to those considerations see also the recent decision of *Commonwealth Bank Officers Superannuation Corporation Ltd v Beck* [2016] NSWCA 218, per Bathurst CJ at [89]-[104], Macfarlan J agreeing at [89], [192]-[195], Gleeson J agreeing at [196] in which the fund member's attempt to rely upon *Finch* was rejected based on an analysis of the precise terms of the trust deed in question.

⁷⁰ *Commissioner of State Taxation v Cyril Henschke Pty Ltd* (2010) 242 CLR 508, at 517 [25].