

HIGH COURT OF AUSTRALIA

KIEFEL, GAGELER, KEANE, NETTLE AND GORDON JJ

ELECNET (AUST) PTY LTD (AS TRUSTEE FOR
THE ELECTRICAL INDUSTRY SEVERANCE
SCHEME)

APPELLANT

AND

COMMISSIONER OF TAXATION

RESPONDENT

ElecNet (Aust) Pty Ltd v Commissioner of Taxation
[2016] HCA 51
21 December 2016
M104/2016

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

A H Slater QC with B L Jones for the appellant (instructed by Mills Oakley)

G J Davies QC with S J Sharpley QC and A T Broadfoot for the respondent (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

ElecNet (Aust) Pty Ltd v Commissioner of Taxation

Taxation – Unit trusts – Public trading trust – Where trust settled by deed – Where employers become members of industry severance scheme created by trust – Where members of scheme obliged to make payments to trustee – Where trustee credits payments to accounts in name of individual employees – Where trustee makes payment to employee upon termination of employment – Whether unit trust within meaning of Div 6C of Pt III of the *Income Tax Assessment Act* 1936 (Cth).

Words and phrases – "beneficial interest", "ordinary acceptance", "prescribed trust estate", "public trading trust", "unit", "unit trust".

Income Tax Assessment Act 1936 (Cth), ss 102M, 102P, 102R, 102S, 102T.

1 KIEFEL, GAGELER, KEANE AND GORDON JJ. The appellant ("ElecNet") is the trustee of a trust known as the Electrical Industry Severance Scheme ("the EISS"). The trust was settled by deed in 1997 ("the Deed"). The parties to the Deed are the National Electrical Contractors Association and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia ("the Sponsors"), and ElecNet.

2 Under the EISS, employers within the electrical contracting industry may become members of the scheme and, upon doing so, become obliged to make payments to ElecNet. These payments are credited by ElecNet to accounts in the name of each of the employees in respect of whom a payment is made. The Deed contemplates that, at such time as an employee's employment is terminated, ElecNet is to make a severance or redundancy payment to that employee. In this way, the EISS serves to protect, and allow the portability of, benefits payable to employees upon termination of employment.

3 On 10 December 2012, ElecNet requested a private ruling from the respondent ("the Commissioner") as to whether the EISS is a public trading trust for the purposes of Div 6C of Pt III of the *Income Tax Assessment Act* 1936 (Cth) ("the ITAA"). A ruling that ElecNet is a public trading trust within Div 6C would afford ElecNet a fiscal advantage, in that, where Div 6C applies, s 102S provides that ElecNet is to pay tax on its net income, not at the rate otherwise applicable under the general provisions in Div 6 of Pt III of the ITAA relating to trusts (and in particular s 99A)¹, but at a lower rate declared by Parliament², being the same as the rate of tax payable by a company³.

1 *Income Tax Rates Act* 1986 (Cth), s 12(9), which provides:

"The rate of tax payable by a trustee in respect of the net income of a trust estate in respect of which the trustee is liable, under section 99A of [the ITAA], to be assessed and to pay tax is 45%."

2 *Income Tax Rates Act* 1986 (Cth), s 25, which at the time of the ruling provided:

"The rate of tax payable by a trustee of a public trading trust in respect of the net income of the public trading trust in respect of which the trustee is liable, under section 102S of [the ITAA], to be assessed and to pay tax is 30%."

3 *Income Tax Rates Act* 1986 (Cth), s 23.

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On 20 December 2013, the Commissioner ruled that the EISS is not a public trading trust for the purposes of Div 6C, on the ground, among others, that the EISS is not a unit trust within the meaning of Div 6C. ElecNet objected to the ruling; the objection was disallowed by the Commissioner on 10 September 2014.

ElecNet appealed to the Federal Court of Australia. The primary judge (Davies J) allowed the appeal, holding that the EISS was a unit trust for the purposes of Div 6C⁴.

The Commissioner appealed to the Full Court of the Federal Court of Australia. The Full Court (Jessup, Pagone and Edelman JJ) allowed the Commissioner's appeal, holding that the EISS was not a unit trust for the purposes of Div 6C⁵.

The only issue before this Court is whether the EISS is a unit trust for the purposes of Div 6C. ElecNet undertook no modest endeavour in seeking to argue that the rights created by the Deed in favour of employees are such as to give the EISS the character of a unit trust for the purposes of Div 6C. For the reasons which follow, ElecNet failed in its endeavour. The Full Court was right to conclude that the EISS is not a unit trust for the purposes of Div 6C.

Division 6C

Within Div 6C, the operative provision is s 102S. It provides:

"The trustee of a unit trust that is a public trading trust in relation to a relevant year of income shall be assessed and is liable to pay tax on the net income of the public trading trust of the relevant year of income at the rate declared by the Parliament for the purposes of this section."

Section 102M defines terms used in Div 6C. The expression "unit trust" is not defined, but the section provides:

"**unit**, in relation to a prescribed trust estate, includes a beneficial interest, however described, in any of the income or property of the trust estate."

⁴ *ElecNet (Aust) Pty Ltd (as Trustee for the Electrical Industry Severance Scheme) v Federal Commissioner of Taxation* 2015 ATC ¶20-507 at 17,124 [55].

⁵ *Federal Commissioner of Taxation v Elecnet (Aust) Pty Ltd* (2015) 239 FCR 359 at 379 [115].

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The term "unitholder" is defined "in relation to a prescribed trust estate" to mean "the holder of a unit or units in the prescribed trust estate." The expression "prescribed trust estate" is defined to mean a "trust estate that is, or has been, a public trading trust in relation to any year of income." From these interrelated definitions, it is apparent that the trust estate of a unit trust is a prescribed trust estate if it is or has been a public trading trust in relation to a year of income.

10 Section 102R states the requirements for a unit trust to be a public trading trust in relation to a year of income for the purposes of s 102S. These requirements are not in controversy in this appeal, but it is convenient to note here the requirement of s 102R that "the unit trust is a public unit trust in relation to the relevant year of income"⁶. This requirement directs attention to statutory context that bears significantly upon the meaning of the expression "unit trust" within Div 6C. In this regard, s 102P(1) provides that, for the purposes of Div 6C, a unit trust is a public unit trust in relation to a year of income if, at any time during the year of income:

- "(a) any of the units in the unit trust were listed for quotation in the official list of a stock exchange in Australia or elsewhere;
- (b) any of the units in the unit trust were offered to the public; or
- (c) the units in the unit trust were held by not fewer than 50 persons."

11 In addition, s 102P(2) expands the scope of the concept of a public unit trust to include cases where the holder (or holders) of units holds a certain proportion of the beneficial rights in respect of the trust estate⁷.

12 The provisions of s 102P are significant because they refer to units in a unit trust within Div 6C as items of commerce capable of being offered to, and acquired by, unitholders, whether by subscription or purchase. Further, these units are such as to entitle the holder to a beneficial interest in the income or property of a prescribed trust estate which is capable of being measured as a percentage of the beneficial entitlement to the income or property of the prescribed trust estate relative to the extent of the interests of other unitholders. These provisions support the view of the Administrative Appeals Tribunal in *Re BERT Pty Ltd (As Trustee for the BERT Fund No 2)* and *Federal Commissioner*

6 *Income Tax Assessment Act 1936* (Cth), s 102R(1)(a)(ii).

7 *Income Tax Assessment Act 1936* (Cth), s 102P(2)(a), (c).

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of *Taxation*⁸ that the expression "unit" in this context is speaking of the beneficial interest divided into "discrete parcels of rights."

13 The argument advanced by ElecNet, both in this Court and below, fixes upon the inclusive definition of "unit" in s 102M. ElecNet's argument was, ultimately, that the credit for each dollar received from an employer by ElecNet and held by it in respect of an employee is a "unit", being that employee's beneficial interest in the trust estate of which ElecNet is trustee. A consideration of the material terms of the Deed provides no support for this argument.

The terms of the Deed

14 Recital A provides:

"The Sponsors have agreed to establish a scheme to be known as the Electrical Industry Severance Scheme (the *Scheme*) to provide benefits to Workers who leave or change their employment in circumstances set out in this Deed."

15 The relevant definitions are set out in cl 1 of the Deed. "Worker" is defined to mean:

- "(a) an Active Worker;
- (b) an Inactive Worker; and
- (c) an employee whose employer, being a Member, has agreed that the employee be treated as a worker for the purposes of this Deed by notifying [ElecNet] in such manner and form as may be prescribed by [ElecNet] from time to time, but does not include an Apprentice."

16 "Active Worker" and "Inactive Worker" are defined in turn as having "the meaning determined by [ElecNet] for the purposes of this Deed." It is not apparent from the material in the record whether ElecNet has exercised its discretion to make determinations about the meanings of the terms "Active Worker" and "Inactive Worker" and, if determinations have been made, what meanings have been determined.

8 (2013) 95 ATR 457 at 466 [23].

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17 The term "Member ... in relation to a Worker" is defined to mean "the
person employing him or her and in relation to a former Worker means the
person or persons by which the former Worker was last employed."

18 Clause 3 provides for employers to become Members of the Scheme, and
cl 4 obliges Members to make contributions to the Scheme:

"4.1 Each Member shall make Contributions to the Scheme in respect of
each of the Member's Workers of such amount, or at such rate and
on such basis:

(a) applicable from time to time under, or for the purpose of, the
Agreement; or

(b) as may be agreed from time to time between the Member,
[ElecNet] and the Sponsors (whether in relation to the
Member's Worker generally or in relation to any particular
category or class of the Member's Workers).

4.2 All Contributions made by a Member to the Scheme become part
of the Trust Fund."

19 The term "Trust Fund" is defined to mean "all moneys and other assets
held by, or on account of, [ElecNet] under this Deed."

20 Clause 6.1(a) of the Deed provides:

"[ElecNet] shall credit to the Worker's Account of each Worker ... each
Contribution made in respect of him or her pursuant to this Deed".

21 The term "Worker's Account" is defined to mean, in respect of a Worker,
the account established and maintained by ElecNet in its books of account under
cl 11.2.

22 Clause 7.1 authorises ElecNet to debit from the Worker's Account of each
Worker – in addition to any "Severance Payment" or other benefit – taxes, costs
and expenses associated with the Scheme. Clause 7.1(e) provides that ElecNet
may debit "such other amounts (if any) which [ElecNet] determines is
appropriate or equitable to debit to the Worker's Account of the Worker."

23 Clause 11 of the Deed provides for the application of the Trust Fund.
Under cl 11.1, the Trust Fund shall, subject to the provisions of the Deed, be
maintained exclusively for making Severance Payments to Workers under cl 8.
Clause 11.2 requires ElecNet to establish a Worker's Account in its books of

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account in respect of each Worker and provides that each Worker's Account is to be debited and credited in accordance with cl 6, 7 and 8. Under cl 11.3, where a Worker "becomes entitled to a Severance Payment" ElecNet is obliged to deal with that entitlement in accordance with cl 8.

24 Clause 8 provides for the payment of benefits to Workers. Clause 8.1 provides: "This Clause 8 only applies to a Worker who is an Active Worker." Clause 8.2 provides that ElecNet "shall pay" to a Worker a Severance Payment calculated in accordance with cl 8.3 upon the occurrence of one of the "Severance Events" set out in cl 8.2, namely termination of the Worker's employment, or the Worker's retirement or death. Clause 8.3 provides for "the Severance Payment payable to a Worker, or a person claiming through or under a Worker", of the amount standing to the credit of the Worker's Account. The timing of the payment depends upon the amount of the credit in the account and whether the Worker remains unemployed. Upon the making of the payment, a corresponding debit is to be made in the Worker's Account.

25 Clause 12 provides that, where no contribution has been made in respect of a Worker for two years and ElecNet is unable to locate the Worker or his or her legal representative or dependants, the balance of the Worker's Account is "forfeited to the Scheme" and applied to the discharge of the reasonable administrative expenses of the Scheme.

26 Clause 14 provides for the application of the income of the Trust Fund. Clause 14.1 sets out an exhaustive list of purposes for which ElecNet may make payments from the income of the Trust Fund. These purposes include the making of investments and payment of the reasonable expenses of administering the Trust Fund. Clause 14.1A sets out a list of payments that can be made by ElecNet to "other persons". Clause 14.2 provides for the capitalisation of income earned by investment. Amounts so capitalised may be distributed to Workers.

27 Clause 23 provides for the winding up of the Scheme. Clause 23.4 contemplates the making of a distribution to Workers of an amount by reference to each Worker's Account, after payment of the expenses of winding up and "debts owing ... to the Sponsors, Members or Apprentices".

28 Clause 9 contains the declaration of trust:

"[ElecNet] declares that it will hold the Trust Fund on the trusts, and with and subject to, the powers and provisions contained in this Deed."

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29 Clause 17 provides in relation to the discretion vested in ElecNet:

"Subject to any express provision to the contrary, every discretion vested in [ElecNet] shall be absolute and uncontrolled and may be exercised without [ElecNet] assigning any reason for its exercise and every power vested in it shall be exercisable in its absolute discretion and [ElecNet] shall have the like discretion in deciding whether or not to exercise any such power."

The primary judge

30 The primary judge held that Div 6C of Pt III of the ITAA⁹:

"applies to trusts in which the beneficial interest in property or income of the trust is widely held, whether those beneficial interests be described as units or the trust described as a unit trust."

31 Her Honour's conclusion was driven by her Honour's view of the significance of the inclusive definition of "unit" in s 102M. In this regard, her Honour said¹⁰:

"Having regard to the definition of 'unit' in s 102M, it is not a complete answer for Division 6C purposes that the trust deed does not formally divide the beneficial interest in the trust fund into units. Nor, in light of the definition of 'unit', must 'unitholders' have a proportionate interest in the whole of the income or property of the trust estate."

32 The primary judge held that the interest of each Worker under the EISS may be described as a beneficial interest in any property of the EISS. Her Honour said¹¹:

"It is unnecessary to give any definitive meaning to the expression 'beneficial interest' in Division 6C for present purposes because, in the

9 *ElecNet (Aust) Pty Ltd (as Trustee for the Electrical Industry Severance Scheme) v Federal Commissioner of Taxation* 2015 ATC ¶20-507 at 17,122 [49].

10 *ElecNet (Aust) Pty Ltd (as Trustee for the Electrical Industry Severance Scheme) v Federal Commissioner of Taxation* 2015 ATC ¶20-507 at 17,122 [49].

11 *ElecNet (Aust) Pty Ltd (as Trustee for the Electrical Industry Severance Scheme) v Federal Commissioner of Taxation* 2015 ATC ¶20-507 at 17,124 [54].

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present case, as the analysis of the Deed shows, the trust fund (ie the 'property of the trust') is held for the benefit of the persons in respect of whom the contributions are made by the employers and each worker has a discrete proprietary interest in the contributions paid in respect of them into the trust fund and standing to their worker's account, although not a present right to immediate payment. The proprietary nature of their interests is sufficient to give rise to 'beneficial interests in any property of the trust estate' within the meaning of 'unit' in s 102M."

The Full Court

33 In the Full Court, Jessup J held that the primary judge erred in treating the definition of "unit" in s 102M of the ITAA as expanding the scope of the expression "unit trust" in Div 6C¹². Jessup J noted that the definition of "unit" in s 102M is confined to the case of "a prescribed trust estate"¹³, which is, in turn, associated exclusively with a "unit trust". In his Honour's view, the inclusive definition of "unit" does not expand the scope of a "unit trust", because the context in which the defined term "unit" is used in Div 6C confines the scope of the defined term. His Honour said that it was not "[a]s a matter of grammatical construction ... defensible" to accept that a trust which may not otherwise be a unit trust for the purposes of Div 6C could become one because of the definition, whether or not it related to a prescribed trust estate¹⁴.

34 In an incisive observation, Jessup J said¹⁵:

"There is no indication in [the ITAA] that Div 6C, or that s 102S in particular, uses the term 'unit trust' in anything other than its ordinary meaning. Central to that meaning is the requirement that the interests in the trust, whatever other characteristics they might have, be divided into units – or 'unitized'. There needs to be an irreducible, discrete, 'unit' or, as

12 *Federal Commissioner of Taxation v Elecnet (Aust) Pty Ltd* (2015) 239 FCR 359 at 360 [2].

13 *Federal Commissioner of Taxation v Elecnet (Aust) Pty Ltd* (2015) 239 FCR 359 at 360 [3].

14 *Federal Commissioner of Taxation v Elecnet (Aust) Pty Ltd* (2015) 239 FCR 359 at 361 [4].

15 *Federal Commissioner of Taxation v Elecnet (Aust) Pty Ltd* (2015) 239 FCR 359 at 361 [6].

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the Administrative Appeals Tribunal said in *BERT*, parcel of rights, by reference to which those interests are held, such that every person or entity with an interest in the trust will have one or more such units."

35 In a joint judgment, Pagone and Edelman JJ held that, while a "unit" includes "a core concept of persons entitled to a beneficial interest in any of the income or property of the trust estate"¹⁶, this "significant indicator" must be "considered together with an assessment of whether the trust fits the functional description of a 'unit trust'."¹⁷

36 In this regard, Pagone and Edelman JJ focused upon the discretionary powers conferred on ElecNet under the Deed. Their Honours referred first to cl 8.1 of the Deed, which provides for payment upon a Severance Event only to a Worker who is an Active Worker. Their Honours said of this qualification¹⁸:

"even if [ElecNet's] power in clause 8.1 were a fiduciary power, to be exercised honestly and in accordance with the purposes of the Trust Deed, it remains a power of appointment. [ElecNet], as Trustee, has the power to determine a criterion which would entitle a Worker to a contingent distribution. As Senior Counsel for [ElecNet] quite properly conceded, there must be content to the concept of an 'Inactive Worker'".

37 Their Honours also noted that, under the Deed, "there is the discretion of [ElecNet] to vary the amount standing to the credit of a Worker's account." This is because cl 7.1(e) provides ElecNet with a power to debit "such other amount(s) (if any) which [ElecNet] determines is appropriate or equitable to debit to the

16 *Federal Commissioner of Taxation v Elecnet (Aust) Pty Ltd* (2015) 239 FCR 359 at 371 [61].

17 *Federal Commissioner of Taxation v Elecnet (Aust) Pty Ltd* (2015) 239 FCR 359 at 371 [61].

18 *Federal Commissioner of Taxation v Elecnet (Aust) Pty Ltd* (2015) 239 FCR 359 at 378 [109].

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Worker's Account"¹⁹. Finally, their Honours observed that cl 8.3 vests a discretion in ElecNet to determine the relevant amount of the payment²⁰.

38 Of these three discretions, their Honours said²¹:

"[W]hen considered together, [they] have the effect that any interest that a Worker has under the EISS Deed is not capable of being described functionally as a unitised interest under a unit trust. The terms of the EISS Deed therefore depart so far from the functional concept of a unit trust, as reflected in the context and background to Div 6C, that the trust cannot be described as a 'unit trust' within Div 6C. The trust would not be a unit trust whether or not it is correct to describe the Worker's interest as a beneficial interest in the property of the trust estate."

39 Their Honours' conclusion was framed in terms of a "functional understanding" of the nature of a unit trust. Their Honours said²²:

"Ultimately, it is neither necessary nor appropriate to attempt a conclusive definition of a 'unit trust' in this appeal for the purposes of Div 6C. It is sufficient to say that whether a trust is a 'unit trust' within the undefined meaning of that term in Div 6C requires the text of that Division (including its definitions) to be construed in light of a functional and descriptive understanding of the nature of a unit trust. It also requires a close examination of the particular trust deed in order to determine whether the functional nature of the trust operates as a unit trust. The text, context, and purpose of Div 6C illustrates that this examination will be assisted by consideration of the core concept of whether persons have (i) a beneficial interest in the income or property of the trust estate, which is (ii) capable of being functionally described as involving units. But even the absence of (i) will not necessarily be determinative."

19 *Federal Commissioner of Taxation v Elecnet (Aust) Pty Ltd* (2015) 239 FCR 359 at 378 [110].

20 *Federal Commissioner of Taxation v Elecnet (Aust) Pty Ltd* (2015) 239 FCR 359 at 379 [114].

21 *Federal Commissioner of Taxation v Elecnet (Aust) Pty Ltd* (2015) 239 FCR 359 at 379 [115].

22 *Federal Commissioner of Taxation v Elecnet (Aust) Pty Ltd* (2015) 239 FCR 359 at 376-377 [95].

ElecNet's submissions

40 ElecNet submitted that Pagone and Edelman JJ erred in proceeding upon a "functional" conception of a unit trust, rather than an understanding determined by the terms of Div 6C. The definition of "unit" in Div 6C is, it was said, inclusive and should not be constrained by "a priori" assumptions about the nature of a unit trust. ElecNet argued that Jessup J made the same error, and also that his Honour misunderstood the relevance of the concept of "prescribed trust estate" in Div 6C.

41 ElecNet argued that the Full Court should have, first, identified the relevant terms of the Deed and their effect, and then construed the provisions of Div 6C, having regard to their text, context and purpose, to ascertain whether the trust estate falls within their operation. In this regard, ElecNet invoked the support of observations made by this Court in *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)*²³.

42 ElecNet argued that, under the ITAA, between the categories of a "fixed trust" and a "discretionary trust" is a range of trusts under which beneficiaries have entitlements which are capable of delineation in numerical or proportional terms, or "units", and which either are contingent on the happening of a stipulated event or are accrued but liable to be defeated by event, circumstance or authorised act of a trustee. ElecNet argued that the EISS is neither a "discretionary trust" nor a "fixed trust", but falls within this undefined category of "unit trust".

The Commissioner's submissions

43 The Commissioner submitted that, as a matter of common usage, and having regard to the text and purpose of Div 6C, the expression "unit trust" refers to a recognised category of trust relationships developed as an alternative to a company as a structure for investors to pool their resources for investment or trading purposes²⁴. It was said that the purpose of Div 6C is to treat unit trusts engaged in trading activities as if they were companies for the purposes of

23 (2005) 224 CLR 98 at 109-110 [15]; [2005] HCA 53.

24 *Elders Trustee and Executor Co Ltd v E G Reeves Pty Ltd* (1987) 78 ALR 193 at 230.

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income tax. This treatment was said to accord with the common understanding of a unit trust as resembling "companies in function"²⁵.

44 The Commissioner submitted that the EISS is not a unit trust within the meaning of Div 6C for several reasons. First, the beneficial interest in the Trust Fund is not divided into units (however described). Secondly, the various rights and entitlements created in Workers by the Deed are disparate in nature and quantity: for the most part they are dependent upon the exercise of a discretion by ElecNet in favour of a particular identified individual Worker. Thus, the rights of Active Workers under cl 8 of the Deed are not the same as, or even analogous to, the rights of the holder of units in a unit trust, because the designation of a person as an Active Worker for the purposes of cl 8 depends on ElecNet's determination of the meaning of Active Worker in respect of each individual who is a candidate for a Severance Payment; and further, the quantum of a Worker's payment under cl 8 depends upon matters peculiar to that person (for example, the amount of contributions paid on the person's behalf). Finally, the rights dealt with by cl 8 do not relate to the whole of the Trust Fund; ElecNet's power to make distributions out of the Trust Fund is dealt with by various clauses (including cll 13.4, 14.1, 14.1A, 14.2 and 23.4) which authorise the disbursement of the trust estate otherwise than by way of a Severance Payment to a Worker. There is force in these submissions.

45 The Commissioner also submitted that, by reason of the broad discretions conferred upon ElecNet by the Deed, any given Worker does not have a beneficial interest in any of the income or property of the trust estate within the meaning of the definition of "unit" in s 102M. The Commissioner argued that the primary judge erred in holding that the Workers have a "discrete proprietary interest in the contributions paid in respect of them"²⁶, because unless and until the matters required for an entitlement under cl 8 of the Deed have occurred, including the exercise of discretions by ElecNet, the Worker does not have a beneficial interest "in" any item of income or property of the EISS. It was said that any entitlement to a Severance Payment that may arise under cl 8 is not an entitlement to the contributions paid in respect of the Worker or any part of them, but to an amount payable out of the capital of the Trust Fund calculated by

25 Austin and Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law*, 16th ed (2015) at 21 [1.360].

26 *ElecNet (Aust) Pty Ltd (as Trustee for the Electrical Industry Severance Scheme) v Federal Commissioner of Taxation* 2015 ATC ¶20-507 at 17,124 [54].

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reference to, among other things, an amount standing to the credit of the Worker's Account and the exercise of ElecNet's discretion to make that payment.

46 ElecNet countered this latter submission, arguing that the discretion conferred on it as trustee of the EISS is fiduciary and cannot be exercised capriciously so as to defeat a Worker's interest in the Trust Fund²⁷. Any discretion conferred on ElecNet by the Deed would have to be exercised for the proper purposes of the trust, and not arbitrarily. Accordingly, with respect to cl 8.1 of the Deed, there is no basis on which ElecNet could properly decline to classify the employee as an Active Worker entitled to benefits unless the Worker is unidentifiable, as contemplated by cl 12. Further, ElecNet argued that cl 7.1(e) of the Deed is a direction to allocate the burden of expenses, and not a power to vary the entitlements of a Worker adventitiously.

47 The appeal may be determined in the Commissioner's favour without coming to a concluded view upon this argument. On any view of the interest created by the Deed in favour of a Worker, the effect of the Deed is such that the interest so created is not cognisable as a unit in a unit trust for the purposes of Div 6C.

The effect of the Deed

48 In *CPT Custodian*²⁸, upon which ElecNet relied, it was said that:

"a priori assumptions as to the nature of unit trusts under the general law and principles of equity would not assist and would be apt to mislead. All depends, as Tamberlin and Hely JJ put it in *Kent v SS Maria Luisa [No 2]*²⁹, upon the terms of the particular trust. The term 'unit trust' is the subject of much exegesis by commentators³⁰. However, 'unit trust', like

27 *Portland v Topham* (1864) 11 HL Cas 32 at 54 [11 ER 1242 at 1251]; *Vatcher v Paull* [1915] AC 372 at 378; *Redman v Permanent Trustee Co of New South Wales Ltd* (1916) 22 CLR 84; [1916] HCA 47; *Re Burton*; *Wily v Burton* (1994) 126 ALR 557 at 559-560; *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254 at 270 [30], 271 [33]; [2010] HCA 36.

28 (2005) 224 CLR 98 at 109-110 [15].

29 (2003) 130 FCR 12 at 33 [60].

30 See Ford, "Unit Trusts", (1960) 23 *Modern Law Review* 129; Ford, "Public Unit Trusts", in Austin and Vann (eds), *The Law of Public Company Finance*, (1986) (Footnote continues on next page)

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'discretionary trust'³¹, in the absence of an applicable statutory definition, does not have a constant, fixed normative meaning which can dictate the application to particular facts of the definition in s 3(a) of the [*Land Tax Act* 1958 (Vic)]".

49 It may readily be accepted that the question as to whether the EISS is a unit trust within Div 6C cannot be resolved by reference to "a priori assumptions as to the nature of unit trusts". The answer to the question depends upon the effect of the terms of the Deed and the construction of the terms of the provisions of Div 6C by reference to their text, context and purpose.

50 It must be understood, however, that, in *CPT Custodian*, this Court was concerned with a question as to the ownership of the assets of a trust estate of a unit trust. That question could not be answered by reference to the characteristics of a "unit trust" considered in the abstract. Rather, in order to determine the nature of the interests of unitholders, "it was necessary to begin with the terms of the relevant trust deeds and the rights, powers, and restrictions for which they provided."³² It was held that the nature of a beneficiary's rights under what was described as a "unit trust" was not determined by that general designation, but by the operative terms of the instrument. The question in this case is whether or not the EISS is a unit trust for the purposes of Div 6C, having regard to the rights created by the Deed and the meaning of the language of the statute.

51 The broad discretions conferred upon ElecNet to determine which Workers should benefit under the Scheme, and the extent of any such benefit, afford some support for the Commissioner's contention that no Worker has a beneficial interest in any of the income or property of the trust estate. However, it may be assumed for the sake of argument that, although the quantum of any Worker's beneficial interest is contingent upon the exercise of ElecNet's discretions in light of events, each Worker does enjoy a beneficial interest in the trust estate³³. Even if that assumption is made, it cannot be said that the

397; Sin, *The Legal Nature of the Unit Trust*, (1997); Thomas and Hudson, *The Law of Trusts*, (2003), Ch 51.

31 *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 234 [8]; [1998] HCA 4.

32 *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98 at 108 [10] (footnote omitted).

33 *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254 at 269-270 [28]-[30].

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beneficial interests of Workers have been divided into units which are created under the Deed, and then issued to and held by the Workers.

52 Under the terms of the Deed, the making of a Severance Payment or other payment to a Worker, and the determination of the quantum of that payment, do not operate by reference to the Worker's ownership of units, but by reference to the contributions which happen to have been paid over time into that Worker's Account with ElecNet, and the determination by ElecNet to regard the Worker as an Active Worker. The extent of the entitlement of any Worker is not measurable as a percentage of the prescribed trust estate by reference to the terms of the Deed; rather, it depends upon the course of contributions paid on behalf of that Worker over time and the Worker's circumstances. In addition, it is to strain language too far to say that the Worker "holds" the entry in his or her account as a unit. Each Worker can no more be said to be a unitholder in respect of the amounts credited to him or her in ElecNet's books of account than a beneficiary of the estate of a deceased person could be described as a unitholder in respect of the moneys held on that person's behalf in the trust account of the estate's solicitor.

53 On behalf of ElecNet, it was argued that the beneficial interest of each Worker, while not divided into equal units, was measurable by reference to the number of dollars credited to each Worker's Account so that the units are the number of dollars so credited. On this view, the units were said to be \$1 units, so that each unit entitles the holder to receive a return of \$1 and no present income but a future contingent and defeasible right to share in any surplus under cl 23. But one can say that the units are \$1 units only because of the absence from the Deed of any provision on the topic. One might as well speak of one cent units because the Worker is entitled to be paid every cent that is due. The problem for ElecNet's argument is not that the beneficial interest of each Worker is not described as a "unit" but that it is not "described" by the Deed at all. That is simply a reflection of the circumstance that the Deed does not concern itself with the creation of discrete parcels of rights which might be dealt with as items of commerce analogously with shares in a company.

Division 6C: textual considerations

54 The inclusive definition of "unit" in s 102M is expressed to relate only to beneficial interests in income or property of a prescribed trust estate. By definition, a prescribed trust estate must be (or have been) a trust estate that is a public trading trust the interests in which are held by unitholders. Jessup J was right to hold that the inclusive definition of "unit" does not expand the meaning of "unit trust" for the purposes of Div 6C.

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55 The term "unit" is defined specifically "in relation to a prescribed trust estate", which, as has been seen, is linked with the defined term "unitholder". As has been noted above, Div 6C, and s 102P in particular, is cast in terms that are apposite to a species of trust in which the beneficial interest in the trust fund is divided into units as discrete parcels of rights themselves capable of being dealt with, like shares in a company, as items of commerce. The inclusive definition of "unit" does not encompass an interest that would not otherwise be identifiable as a unit in relation to a prescribed trust estate merely because it is a beneficial interest in any of the income or property of the trust estate. Rather, the inclusive definition of "unit" ensures that a beneficial interest is a "unit" for the purposes of Div 6C, however it might be so described, and even if it is limited to only part of the property or income of the trust estate.

56 There is no reason in the text or context of Div 6C to attribute to the undefined expression "unit trust" any meaning other than the meaning evident from the language of Div 6C. That meaning accords with the common usage of the expression "unit trust". As the Commissioner rightly observed, there is no reported case, in Australia or elsewhere, in which the expression "unit trust" has been applied 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 estate.

57 In addition, contrary to the argument advanced by ElecNet, Div 6C does not speak of a unit trust in contradistinction to a "fixed trust" or a "discretionary trust"; there is no textual basis for a suggestion that the term "unit trust" was adopted as a description of a trust relationship falling somewhere between the ends of a spectrum not mentioned by the statute.

The purpose of Div 6C

58 With all respect to Pagone and Edelman JJ, it may be doubted whether anything useful is added to the analysis of Div 6C by the pursuit of a "functional description" of a unit trust beyond the understanding which may be gleaned from a consideration of the text and purpose of Div 6C. In this regard, a consideration of the purpose of Div 6C is not at odds with, but confirmatory of, the conclusion suggested by the text of the statute.

59 In the 1970s, public unit trusts became an attractive structure for investment because income tax legislation treated income distributions from trusts more favourably than income distributed by companies by way of dividends to shareholders. The net income of a trading company attracted income tax at the prescribed rate for companies and, in addition, shareholders

were taxed on their dividends. Under the income tax law then applicable to trusts, only the beneficiaries were liable to pay tax on trust income to which they were presently entitled.

60 Division 6B was introduced into Pt III of the ITAA in 1981³⁴ to provide for the taxation of certain corporate unit trusts as if they were companies. In the Second Reading Speech of the legislation that introduced Div 6B, the Minister for Business and Consumer Affairs, Mr Moore, said that the legislation was being introduced³⁵:

"to deal with the threat to company tax revenues posed by the growing practice of public company groups reorganising their affairs so as to eliminate company tax on some of their income. The practice involves the transfer of profitable assets, particularly investment in property, to unit trusts. ...

The main concern of the Government in this respect is to prevent ad hoc erosion of the so-called classical system of company taxation through the use of unit trusts by public companies. Accordingly, the broad thrust of the amendments is to remove the taxation advantage sought by companies from placing income producing property in the hands of unit trusts. This is to be achieved basically by treating unit trusts evolving from the practice as if they were companies for tax purposes."

61 In 1985, Div 6C was introduced into the ITAA³⁶. In the Explanatory Memorandum, it was said that Div 6C "will tax as a company the trustee of a public unit trust carrying on a trade or business (to be known as a 'public trading

34 *Income Tax Laws Amendment Act (No 3) 1981* (Cth).

35 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 23 September 1981 at 1682.

36 *Taxation Laws Amendment Act (No 4) 1985* (Cth).

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trust')."³⁷ In the Second Reading Speech, the Minister Assisting the Treasurer, Mr Hurford, said³⁸:

"The Government ... decided ... that company tax arrangements should be extended to public unit trusts that operate a trade or business. In announcing that decision, it was also indicated that private trusts and public unit trusts of the more traditional kind that do no more than invest in property, equities or securities would not be affected."

62 The purpose of Div 6C is to treat unit trusts for tax purposes as analogous to the relationship between companies and shareholders. The relationship established by the Deed between ElecNet and a Worker is not analogous to that between a company and a shareholder. To observe, as Jessup J did, that the entitlement of any Worker under the EISS is not "unitised" is to note an important respect in which an entitlement under the EISS cannot be regarded as analogous to a share in a company. The making of a contribution by a Member to ElecNet is not analogous to a subscription to the capital of an enterprise which is to generate income from which profits may be distributed to the subscribers. Further, a payment to a Worker by ElecNet under cl 8 of the Deed is not even tenuously analogous to a dividend paid to a shareholder in a company, because both the making of a payment to a Worker, and the quantum of any such payment, depend on the exercise of a discretion by the trustee having regard to circumstances personal to the potential recipient.

63 In this latter regard, it is also a matter of some concern that to characterise the EISS as a unit trust for the purposes of Div 6C may have the unintended and, from the perspective of the recipients, unattractive consequence that Severance Payments made to Workers under the Scheme may be taxable in the hands of the recipients as unit trust dividends. Section 102T(19) of the ITAA provides that s 44(1), which deals with taxation of dividends paid to a shareholder in a company, applies to unit trust dividends paid by a trustee of a "prescribed trust estate" to a unitholder. Section 44(1) of the ITAA includes in the assessable income of a shareholder in a company dividends paid to the shareholder by the company out of profits derived by it. By virtue of s 102T(14), a reference in

37 Australia, House of Representatives, Taxation Laws Amendment Bill (No 4) 1985 and Income Tax (Companies, Corporate Unit Trusts and Superannuation Funds) Amendment Bill 1985, Explanatory Memorandum at 75.

38 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 15 November 1985 at 2958.

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s 44(1) to a shareholder in relation to a company is to be read as a reference to a unitholder in a prescribed trust estate; and by virtue of s 102T(19), for the purposes of s 44(1), a unit trust dividend paid by a trustee of a prescribed trust estate out of the corpus of the trust estate shall, to the extent to which the unit trust dividend is attributable to profits derived by the trustee, be taken to be paid out of those profits. In this way, the provisions of cl 14 of the Deed give rise to the possibility that a payment to a Worker may include an amount attributable to the profits generated from the investments made by ElecNet.

64 Counsel for ElecNet sought to allay the doubts which contemplation of these possible disadvantages for Workers was apt to cast upon their argument by contending that distributions to Workers by ElecNet cannot be unit trust dividends within the meaning of that expression in Div 6C.

65 Section 102M defines the expression "unit trust dividend" relevantly to mean:

"(a) any distribution made by the trustee of a prescribed trust estate, whether in money or in other property, to a unitholder; ...

but does not include:

...

(d) money paid ... by the trustee of a prescribed trust estate in respect of the cancellation, extinguishment or redemption of a unit to the extent to which:

(i) the money paid ... represents money paid to ... the trustee for the purpose of the creation or issue of that unit; and

(ii) the amount of the money paid ... does not exceed the amount of the money paid to the trustee ... for the purpose of the creation or issue of that unit."

66 In particular, counsel for ElecNet argued that a distribution to a Worker by ElecNet would properly be characterised as "money paid ... by the trustee of a prescribed trust estate in respect of the cancellation, extinguishment or redemption of a unit" because the money would represent money paid to ElecNet for the purpose of the creation or issue of the unit, and the amount of the money distributed would not exceed the money paid to ElecNet for the purpose of the creation or issue of the unit.

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67 This aspect of ElecNet's argument cannot be accepted. The natural description of what occurs when a payment is made to a Worker is that ElecNet's obligation under cl 8 of the Deed is satisfied. Once again, it is to strain the language to describe what has occurred upon payment under cl 8 as the cancellation, extinguishment or redemption of an interest in a prescribed trust estate. No right is "held" by a Worker to be cancelled, extinguished or redeemed: the Worker who receives payment engages in no act or process that might be described as cancellation, extinguishment or redemption. The concept of redemption, for example, is derived from the Latin "redimere" – to buy back: when used of a share or other form of commercial security, it involves reacquisition by the issuer. Nothing of the sort occurs when a payment is made under cl 8 of the Deed.

68 In addition, payments to Active Workers under cl 8 are, if Div 6C does not apply, taxable as employment termination payments under Div 82 of the *Income Tax Assessment Act 1997* (Cth) or redundancy payments or similar under Div 83 of that Act, which are apt to be less burdensome to the recipients. It would be of grave concern to Workers if, by reason of the application of Div 6C, payments to them were treated as unit trust dividends rather than being subject to tax under the specific provisions of Div 82 or Div 83.

Conclusion and orders

69 The rights conferred on Workers by the Deed were not such as to support the conclusion that the EISS is a unit trust for the purposes of Div 6C of Pt III of the ITAA.

70 The appeal should be dismissed. ElecNet should pay the costs of the appeal.

71 NETTLE J. This is an appeal from orders of the Full Court of the Federal Court of Australia (Jessup, Pagone and Edelman JJ)³⁹ which, in effect, upheld a ruling by the respondent ("the Commissioner") that the trust of which the appellant ("ElecNet") is trustee is not a unit trust for the purposes of Div 6C of Pt III of the *Income Tax Assessment Act 1936* (Cth) ("the 1936 Act"). The relevant facts and the parties' contentions are set out in the plurality's reasons. For the reasons which follow, the Electrical Industry Severance Scheme ("the EISS") is not a unit trust in the sense required by Div 6C and the appeal to this Court should be dismissed.

Relevant statutory provisions

72 Division 6C was modelled on provisions of Div 6B of Pt III of the 1936 Act⁴⁰, which, in turn, needs to be understood in light of Div 6 in the same Part. Thus, to place Div 6C in context, it is first necessary to refer briefly to Divs 6 and 6B.

Division 6

73 Division 6 provides generally for the taxation of trust income. The basic principle of the Division, which emerges from ss 96 and 97, is that a trustee is not liable to pay income tax on the income of the trust estate, but a beneficiary who is presently entitled to a share of the income of the trust estate will have that share included in his or her assessable income. That is the position unless one of the other provisions applies. For example, s 98 makes a trustee liable to pay tax in respect of the share of the income of the trust estate to which a beneficiary who is under a legal disability is presently entitled. Special provision is made for discretionary trusts in s 101 and for revocable trusts in s 102.

Division 6B

74 Division 6B was introduced in 1981⁴¹ to provide for the taxation of "corporate unit trusts". "Unit trust" was not specifically defined⁴². Its meaning

39 *Federal Commissioner of Taxation v Elecnet (Aust) Pty Ltd* (2015) 239 FCR 359.

40 Australia, House of Representatives, Taxation Laws Amendment Bill (No 4) 1985 and Income Tax (Companies, Corporate Unit Trusts and Superannuation Funds) Amendment Bill 1985, Explanatory Memorandum at 10.

41 *Income Tax Laws Amendment Act (No 3) 1981* (Cth), s 10. Division 6B has since been repealed by the *Tax Laws Amendment (New Tax System for Managed Investment Trusts) Act 2016* (Cth), Sched 5, Pt 2.

42 Section 102D provided definitions of "unit", "unitholder" and "unit trust dividend".

was apparent, however, from the operative provisions of the Division and, in particular, from the concern to tax corporate unit trusts as close substitutes for public companies. Section 102K provided in substance that a trustee of a "corporate unit trust" was to be assessed and was liable to pay tax on the net income of the trust at the rate declared by Parliament. Section 102J(1)(b) provided that a unit trust was a "corporate unit trust" in relation to a year of income commencing on or after 1 July 1983 if:

- "(i) the unit trust is an *eligible unit trust* in relation to the relevant year of income;
- (ii) the unit trust is a *public unit trust* in relation to the relevant year of income; and
- (iii) either of the following conditions is satisfied:
 - (A) the unit trust is a *resident unit trust* in relation to the relevant year of income;
 - (B) the unit trust was a *corporate unit trust* in relation to a year of income preceding the relevant year of income." (emphasis added)

75 Section 102F provided in substance that, for the purposes of Div 6B, an "eligible unit trust" in relation to a year of income was a unit trust which acquired property during the year of income or a preceding year pursuant to a "prescribed arrangement" in relation to a company whose property it was formerly, or pursuant to a "prescribed arrangement" in relation to a company that had carried on a business that the trustee of the unit trust carried on at any time during the year of income or a preceding year of income. A "prescribed arrangement"⁴³ in relation to a company was one under which a shareholder in the company was, by reason of being a shareholder, granted a right or an option to acquire units in the unit trust and the units in the unit trust were to be held or dealt with, or the income or property of the unit trust was to be applied, in such a way that in the opinion of the Commissioner the unit trust would be a public unit trust in relation to the relevant year of income if s 102G were applied.

76 Section 102G provided in substance that, for the purposes of Div 6B, a unit trust was a "public unit trust" in relation to a year of income if, at any time during that year, any of the units in the unit trust were offered to the public or listed for quotation in the official list of a stock exchange in Australia or elsewhere, or the units were held by not fewer than 50 persons.

43 *Income Tax Assessment Act 1936* (Cth), s 102E.

77 Section 102H provided that, for the purposes of Div 6B, a unit trust was a "resident unit trust" in relation to a year of income if any property of the unit trust were situated in Australia or the trustee of the unit trust carried on business in Australia, and either the central management and control of the unit trust was situated in Australia or residents of Australia held more than 50 per cent of the beneficial interest in the income or property of the unit trust. As appears from those provisions, "unit" and "unit trust" were used in Div 6B in a manner that accords to the generally accepted conception of a unit trust as one in which the beneficial interest in the property and income is divided into units analogous to shares in a company⁴⁴.

Division 6C: Scope of "public trading trust"

78 Division 6C was introduced in 1985⁴⁵ to counter a practice of public companies transferring income earning assets to publicly listed or widely held unit trusts – "public trading trusts" – in order to avoid company tax on income derived from those assets⁴⁶. As was the case in Div 6B, "unit trust" is not defined in Div 6C. "Unit" is defined in s 102M in relation to a "prescribed trust estate", meaning a public trading trust in relation to any year of income, to include "a beneficial interest, however described, in any of the income or property of the trust estate".

79 Section 102R(1)(b)⁴⁷ provides in substance that a unit trust is a "public trading trust" in relation to a year of income commencing on or after 1 July 1988 if:

- "(i) the unit trust is a *public unit trust* in relation to the relevant year of income;
- (ii) the unit trust is a *trading trust* in relation to the relevant year of income;
- (iii) either of the following conditions is satisfied:

44 Meagher and Gummow, *Jacobs' Law of Trusts in Australia*, 5th ed (1986) at 59-60 [312]-[314]. See and compare Heydon and Leeming, *Jacobs' Law of Trusts in Australia*, 8th ed (2016) at 40 [3-10].

45 *Taxation Laws Amendment Act (No 4) 1985* (Cth), s 16.

46 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 15 November 1985 at 2958.

47 Section 102R(1)(b)(iv) was repealed consequent to the repeal of Div 6B: *Tax Laws Amendment (New Tax System for Managed Investment Trusts) Act*, Sched 5, Pt 3.

- (A) the unit trust is a *resident unit trust* in relation to the relevant year of income;
- (B) the unit trust was a *public trading trust* in relation to a year of income preceding the relevant year of income; and
- (iv) the unit trust is not a corporate unit trust within the meaning of Division 6B in relation to the relevant year of income." (emphasis added)

80 For the purposes of Div 6C, s 102P(1) provides, in substance and subject to some qualifications of no present relevance, that a unit trust is a "public unit trust" if, during the relevant year of income, any of the units in the unit trust were offered to the public or listed for quotation in the official list of a stock exchange in Australia or elsewhere, or the units were held by not fewer than 50 persons. Section 102N(1) provides, in substance and again subject to some qualifications of no present relevance, that a unit trust is a "trading trust" in relation to a year of income if at any time during that year the trustee carried on a trading business or controlled, or was able to control, the affairs of another person in respect of the carrying on by that person of a trading business. Section 102Q provides the same definition of "resident unit trust" as was found in s 102H for the purposes of Div 6B⁴⁸.

81 In addition to the definitions of "prescribed trust estate" and "unit", s 102M defines unit holder "in relation to a prescribed trust estate" to mean the "holder of a unit or units in the prescribed trust estate", and defines "unit trust dividend" to mean any distribution by the trustee of a prescribed trust estate to a unit holder, whether in money or other property, or any amount credited by the trustee to a unit holder as such.

Division 6C: Tax consequences for "public trading trusts"

82 The operative provisions of Div 6C are found in ss 102S and 102T. Section 102S provides that the trustee of a public trading trust in a relevant year of income shall be assessed and is liable to pay tax on the net income of the public trading trust at the rate declared by Parliament for the purposes of the section⁴⁹.

83 Section 102T provides for a modified application of the 1936 Act in relation to the imposition, assessment and collection of tax in respect of the net

48 See [77] above.

49 Section 25 of the *Income Tax Rates Act* 1986 (Cth) imposes the same rate of taxation for public trading trusts as for companies under s 23(2).

income of a public trading trust and the assessable income of a unit holder in a prescribed trust estate. Sub-sections (6) and (7) provide that, for the purposes of the 1936 Act, references to "company" in relation to a "year of income" and in the definition of "person" shall be taken to include references to a "public trading trust" or, if the context requires, the trustee of a public trading trust. Sub-section (16) provides, *inter alia*, that a reference in Div 6 to a trust estate or trustee shall be read as *not* including a reference to a public trading trust or to the trustee of a public trading trust. Sub-section (2), which was repealed with effect from 2008⁵⁰, made tax rebates available in respect of unit trust dividends. Sub-section (3) provides for the application of dividend stripping provisions⁵¹ to such unit trust dividends if, in effect, the Commissioner is satisfied that, had the unit trust dividend been a dividend paid by a company, it would have been similar to a dividend stripping operation. Those provisions make clear that the tax treatment of a public trading trust under Div 6C was and is akin to that of a company, rather than to that of a trust caught in the general terms of Div 6.

84 Section 102T(14) provides that a reference to a "shareholder" in s 44(1) of the 1936 Act, which provides for the assessment of dividends paid by companies as part of the income of shareholders, "shall be read as including a reference to a unitholder in a prescribed trust estate". Sub-sections (19) and (20) respectively provide that, where a unit trust dividend is paid by a trustee to a unit holder in a prescribed trust estate, that dividend is taken to be paid out of the profits derived by the trustee as such (to the extent the dividend is attributable to those profits) for the purpose of s 44(1) and deemed to be income derived by the unit holder at the time the unit trust dividend is paid for the purpose of withholding tax. Collectively, those provisions serve to include unit trust dividends in the assessable income of a unit holder, just as company dividends are assessed to shareholders.

The meaning of "unit trust"

85 The Full Court were correct to construe the term "unit trust" in Div 6C by reference to its ordinary acceptance. As Windeyer J observed in *Scott v Federal Commissioner of Taxation*, where an expression in an Act is undefined, the connotation of the phrase must be determined by one's general knowledge of the extent of the denotation of the phrase in common parlance⁵². In common

50 *Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006* (Cth), Sched 3, item 8.

51 *Income Tax Assessment Act*, s 177E.

52 (1966) 117 CLR 514 at 524; [1966] HCA 48. See also *Attorney-General for NSW v Brewery Employees Union of NSW* (1908) 6 CLR 469 at 531 per O'Connor J; [1908] HCA 94; *Mahony v Commissioner of Taxation (Cth)* (1967) 41 ALJR 232 at (Footnote continues on next page)

parlance, a unit trust is a trust in which the beneficial interest in the trust estate is divided into fractions, ordinarily called units. It is an express trust of which all the beneficiaries (the unit holders) are ascertainable at any given time. The division of the trust estate into units is the defining feature of a unit trust ordinarily so called⁵³.

86 Contrary to ElecNet's submissions, nothing said in *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)*⁵⁴ implies that "unit trust" where it appears in Div 6C is or may be used in any different sense. *CPT Custodian* did not gainsay that the notion of a unit trust necessitates the division of the beneficial interest in the trust estate into units. The observations in *CPT Custodian* on which ElecNet relied were directed to the nature of the beneficial interests of unit holders. Semasiologically, they assumed a meaning of "unit trust" predicated on a division of the trust estate into units. The point made in *CPT Custodian*⁵⁵ was not that *a priori* conceptions of unit trusts are irrelevant to the recognition of what may constitute a unit trust, but rather that, although the trust estate of a unit trust is divided into units, the rights conferred by a unit may, and usually will, fall short of a proprietary interest in the assets of the trust that would be sufficient to constitute the holder of a unit an "owner" of trust property within the meaning of s 3(1) of the *Land Tax Act* 1958 (Vic).

87 Following the remarks of this Court in *CPT Custodian*, it may be accepted that the notion of a unit trust is sufficiently broad to encompass a range of so-called unit trusts, and thus that a unit in one unit trust may comprise a beneficial interest in the trust estate of that trust that is different in kind from the beneficial interest comprised of a unit in another. But to observe the broad nature of beneficial interests that may be comprised of the units in different unit trusts does not detract from the understanding that a unit trust is one in which the beneficial interest in the trust estate is divided into units.

232 per Kitto J, 237 per Windeyer J; *Federal Commissioner of Taxation v Bamford* (2010) 240 CLR 481 at 501 [17], 505 [36]; [2010] HCA 10.

53 Ford, "Unit Trusts", (1960) 23 *Modern Law Review* 129 at 129-130; Gower et al, *Gower's Principles of Modern Company Law*, 4th ed (1979) at 266-267 (see and compare Gower, *The Principles of Modern Company Law*, (1954) at 229-233); Austin and Vann (eds), *The Law of Public Company Finance*, (1986) at 399-400; *Butterworths Australian Legal Dictionary*, (1997) at 1215-1216; Thomas and Hudson, *The Law of Trusts*, 2nd ed (2010) at 1403-1405 [53.04]-[53.10]; *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98 at 109-110 [15]; [2005] HCA 53.

54 (2005) 224 CLR 98.

55 (2005) 224 CLR 98 at 109-110 [15].

88 It is true that, in *CPT Custodian*⁵⁶ and also in *Chief Commissioner of Stamp Duties (NSW) v Buckle*⁵⁷, it was observed that the expressions "fixed trust", "unit trust" and "discretionary trust" are not normative and so are not in themselves determinative of the interests created by trusts of those kinds. But the expressions "fixed trust", "unit trust" and "discretionary trust" are descriptive of the particular features of those kinds of trusts.

89 It is also true that in *CPT Custodian* it was accepted that, of itself, the fact that rights conferred under a trust deed are conditional does not dictate that they may not aptly be described as conferring a beneficial interest in property⁵⁸. Consequently, it was not in dispute before this Court that a contingent interest may suffice to constitute a beneficial interest. Whether it is sufficient depends on whether the trustee's powers are powers in the nature of a trust⁵⁹. Hence, it is conceivable that there may be a unit trust in which each unit holder's beneficial interest in the trust estate is contingent rather than vested. But so to observe in no way implies that a discretionary trust which is not unitised in the plain and ordinary sense of that term is properly to be regarded as a unit trust for the purposes of Div 6C.

"Unit trust" in Div 6C

90 Counsel for ElecNet submitted that, even if "unit trust" in Div 6C connotes the common understanding of a unit trust, the plain effect of the definition of "unit" in relation to a prescribed trust estate in s 102M is to extend the meaning of "unit trust" for the purposes of Div 6C beyond the sense of a trust in which the beneficial interest in the trust estate is divided into fractions or units. In counsel's submission, "unit trust" in Div 6C thus refers to any trust that confers beneficial interests that are:

- (i) capable of being "held" by a beneficiary in accordance with the definition of "unitholder" in s 102M;
- (ii) capable of being held by not fewer than 50 unrelated people, or of being listed on a stock exchange or offered to the public, thus satisfying the requirements of s 102P(1); and

56 (2005) 224 CLR 98 at 109-110 [15].

57 (1998) 192 CLR 226 at 234 [8]; [1998] HCA 4.

58 *CPT Custodian* (2005) 224 CLR 98 at 110 [17]. Cf *Caboche v Ramsay* (1993) 119 ALR 215 at 230-231 per Gummow J.

59 See *In re Baden's Deed Trusts* [1971] AC 424 at 449 per Lord Wilberforce.

- (iii) capable of measurement such that it can be seen whether an exempt beneficiary is entitled to 20 per cent or more of the beneficial interests in the income or property of the unit trust, thus satisfying the test in s 102P(2),

in circumstances where the terms of the deed establishing the unit trust are such that the trustee is able to:

- (i) make distributions to each beneficiary in a fashion that enables it to be determined, for the purpose of s 102P(2), whether 20 per cent of the distributions accrue to an exempt beneficiary;
- (ii) invest in the assets listed in the definition of "eligible investment business" in s 102M;
- (iii) carry on a trading business, or control the conduct by another of a trading business, within the meaning of s 102N; and
- (iv) conduct the trust in such a way that the trust constitutes a resident unit trust within the meaning of s 102Q.

91 In counsel's submission, the evident purpose of so extending the meaning of "unit trust" in Div 6C is to impose the taxation regime ordained by that Division on any trust which has the essential characteristics of carrying on a trading business and being constituted of beneficial interests that are widely held or held by an exempt body to a material extent. On the terms of s 102M, no more is required of a "unit" than that it be a "beneficial interest, however described, in any of the income or property of the trust estate", and no more is required of a "unitholder" than that it be "the holder of a unit or units in the ... trust estate".

92 Those arguments should be rejected. Putting aside for the moment what ElecNet submitted is the plain effect of the definition of "unit" in s 102M, the text, context and purpose of Div 6C all point to a meaning of "unit trust" throughout the Division which accords to ordinary acceptance, and, therefore, requires the division of the trust estate, or perhaps the relevant part of the trust estate, into units. The language of Div 6C is replete with references to units and with terms apposite to a trust in which the beneficial interest is divided into units.

93 Both par (d) of the definition of "unit trust dividend" in s 102M and s 102P(2)(c)(i) refer to the "cancellation, extinguishment or redemption" of a unit. That implies a conception of units sufficiently analogous to shares in a company that a unit may be cancelled, extinguished or redeemed by mechanisms

akin to the cancellation, extinguishment or redemption of a share in a company⁶⁰. Contrary to ElecNet's submissions, the fact that a unit in a unit trust comprises a beneficial interest in the trust estate, whereas a share does not confer a beneficial interest in the assets of the company⁶¹, is beside the point. Units in unit trusts as ordinarily understood are, in reality, regularly cancelled, extinguished and redeemed by processes akin to the cancellation, extinguishment or redemption of shares in a company. By contrast, a beneficial interest in a trust estate which is not divided into units is not and cannot be so cancelled, extinguished or redeemed.

94 Paragraphs (a) and (b) of s 102P(1) refer to the listing of units for quotation in the official list of a stock exchange and the offer of units to the public. Both the listing of units for quotation and the offering of units to the public require that each unit, or at least each unit in a particular class of units, be the same as each other unit, or each other unit in that class. Contrary to ElecNet's submissions, the fact that s 102P(1)(c) provides, in the alternative, that units in a qualifying unit trust may be held by not fewer than 50 persons does not imply that the same assumption is absent from s 102P(1)(c). The alternative exists to provide for the division of the beneficial interest in a unit trust into units that are not listed or offered to the public but are widely held. Section 102P(2)(c)(ii) refers to the acquisition of units in a manner which necessarily assumes the assignability of units, and s 102P(9) refers to subscription for and purchase of units; again implying for the reasons already given that each unit, or each unit of a particular class, is both the same and assignable.

95 The context of Div 6C leads to the same conclusion. It followed directly from Div 6B, both within the structure of the 1936 Act and in terms of the date on which it was introduced into the Act. As has been observed, the context and evident purpose of Div 6B demonstrate that the Division was directed towards the treatment of corporate unit trusts as analogous to companies distributing share dividends. Correspondingly, the context and purpose of Div 6C, broadly stated, demonstrate that the Division is directed towards subjecting public trading trusts comprised of units analogous to shares, and their unit holders, to a taxation regime in Div 6C that is similar to the taxation regime that was applicable to corporate unit trusts and their unit holders under Div 6B, and that is applicable to companies and their shareholders.

60 See *MSP Nominees Pty Ltd v Commissioner of Stamps (SA)* (1999) 198 CLR 494 at 507 [26]; [1999] HCA 51. See generally Heydon and Leeming, *Jacobs' Law of Trusts in Australia*, 8th ed (2016) at 40 [3-10].

61 *Charles v Federal Commissioner of Taxation* (1954) 90 CLR 598 at 608-609; [1954] HCA 16; *Macaura v Northern Assurance Co Ltd* [1925] AC 619 at 626-627 per Lord Buckmaster.

96 The extrinsic materials confirm that view. As was observed in the second reading speech in support of the introduction of Div 6C⁶²:

"Measures contained in this Bill ... in many respects mirror the present corporate unit trust provisions. ...

Provisions in the Bill, like those in the present income tax law relating to corporate unit trusts, will ensure that distributions made by public trading trusts are treated for all practical purposes in the same way as dividends paid by a company. ... Distributions made by a public trading trust to a resident individual will be included in assessable income in the same way as company dividends."

97 The improbability of the term "unit trust" having the meaning contended for by ElecNet is further illustrated by the fact that such an understanding would allow payment to an "Active Worker" under cl 8 of the deed of the EISS, which otherwise would be taxable as an employment termination payment under the *Income Tax Assessment Act 1997* (Cth) ("the 1997 Act"), to be treated as a unit trust dividend by reason of Div 6C of Pt III of the 1936 Act and therefore as not subject to taxation under the more specific provisions of Div 82 or Div 83 of the 1997 Act. To accept that as the effect of Div 6C would be inconsistent with the purpose of that Division in seeking to subject publicly listed and widely held trading trusts to taxation as if they were companies, and contrary to the ostensible purpose of Divs 82 and 83 of the 1997 Act in seeking to provide a specific taxation regime in respect of payments to employees upon termination.

The relevance of the definition of "unit" in s 102M

98 It remains to deal with the definition of "unit" in s 102M. Once s 102M is seen in the context of the other provisions of Div 6C which have been referred to, it is apparent that the purpose and effect of the definition is not to expand the conception of "unit" to include beneficial interests which do not accord with the ordinary acceptance of a unit in a unit trust. Rather, it is to ensure that, where a trust is divided into units, as units are ordinarily understood, each unit will be a unit for the purposes of Div 6C regardless of the nature of the beneficial interest in the trust estate comprised of that unit, and regardless of whether it be an interest in the income or property of the trust estate. Possibly, in view of this Court's decision in *CPT Custodian*, that would have been so in any event. But, presumably, when the provision was enacted, there was some concern that a unit in a unit trust might not otherwise be taken to constitute a unit for the purposes of

62 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 15 November 1985 at 2958.

Div 6C unless it conferred a proprietary interest in the assets of the trust fund⁶³. Defining "unit" to include "a beneficial interest, however described, in any of the income or property of the trust estate" foreclosed that possibility. But it did not and does not suggest a purpose of discarding the ordinary understanding of "unit" for the purposes of Div 6C.

The EISS is not a unit trust

99 As the above analysis of Div 6C and the ordinary acceptance of the expression "unit trust" reveals, a "unit trust" is a trust in which the beneficial interest is divided into units analogous to shares in a company such that each unit, or each unit in a class of units, is the same as each other unit, or unit in the same class, and each such unit is capable of cancellation, extinguishment or redemption by processes akin to the cancellation, extinguishment or redemption of shares in a company. The beneficial interest of each worker in the EISS, as reflected by the amount standing to the credit of the worker's account, is in no way comparable to units of that kind. Each worker's account is likely to be of a different amount. The rights of each worker vary according to his or her circumstances, including whether the worker is recognised by ElecNet as an "Active Worker" and whether the worker is entitled to receive payment on account of retrenchment or retirement. It is also difficult to conceive of the satisfaction of a worker's entitlement, or anything else that might lawfully be done by ElecNet as trustee in relation to a worker's entitlement, as analogous to the cancellation, extinguishment or redemption of shares in a company.

100 It appears that it was uncontroversial before the Full Court of the Federal Court that the EISS was not a unit trust according to ordinary acceptance and that the beneficial interests of workers in the EISS were thus not divided into units as ordinarily understood⁶⁴. Before this Court, however, it was contended that there is no one kind of unit trust but rather a range of different unit trusts and that, although the EISS is hardly within the range of typical unit trusts, it is nonetheless within the "penumbral area between the simple case and the boundary" of what may properly be conceived of as unit trusts. In the submission of ElecNet's counsel, the EISS is a unit trust because the beneficial interest of each worker in the trust estate is capable of measurement in terms of the amount standing to the credit of each worker's account, and capable of expression as a fraction of the totality of the trust estate.

⁶³ *Charles* (1954) 90 CLR 598 at 609; *Costa & Duppe Properties Pty Ltd v Duppe* [1986] VR 90 at 92-93, 95-96. Cf *CPT Custodian* (2005) 224 CLR 98 at 110 [16]-[17], 113-114 [29]-[32].

⁶⁴ *Elecnet* (2015) 239 FCR 359 at 361 [6] per Jessup J.

101 That contention should be rejected. Its consequences bespeak its speciousness. If accepted, it would mean that any form of trust, whether a fixed, unit or discretionary trust as ordinarily understood, would qualify as a unit trust within the meaning of Div 6C provided it were possible to measure the value of each beneficiary's beneficial interest in the trust estate and express that value as a fraction or percentage of the total value of the trust estate. Any fixed trust of which the trustee carries on a trading business and in which there are at least 50 beneficiaries would be a public trading trust for the purposes of Div 6C, and subject to the particular taxation regime of that Division, regardless of any and all of the differences between the nature and value of each beneficiary's beneficial interest in the trust estate. The improbability of that being the purpose and effect of Div 6C renders it untenable.

102 Faced with those difficulties, counsel for ElecNet submitted in oral argument that the EISS trust estate could be conceived of as comprised of the number of units of one dollar equal to the number of whole dollars comprising the total trust estate, and that each worker held a number of units in the trust estate equal to the number of whole dollars standing to the credit of that worker's account. Asked why it should be supposed that each unit was comprised of a dollar rather than, say, 50 cents or even one cent, counsel submitted that it did not matter which unit of currency was adopted, the principle would be the same.

103 That submission should also be rejected. The trust estate is not divided into units; the terms of the deed of the EISS provide, in effect, for the opposite. And even if it were sensible to speak of each worker as having a number of units in the trust estate equal to the number of whole dollars, or increments of 50 cents or one cent, standing to the credit of that worker's account, the rights and entitlements of one worker would still be different from those of each other worker according to the circumstances already explained, and the workers would remain incapable of dealing with or satisfying the entitlements conferred by such units in a manner analogous to the cancellation, extinguishment or redemption of shares in a company.

Conclusion

104 As Jessup J concluded, what is determinative in this case is that the beneficial interest in the EISS is not divided into units. For that reason, the EISS lacks the defining feature of unitisation which characterises a trust as a unit trust. The EISS provides instead for different amounts of the trust estate to be credited to each individual worker's account, which are then held on trust to make payments to that worker upon the occurrence of a severance event, in an amount to be determined by ElecNet up to the amount standing to the credit of that worker's account. In effect, it creates a series of individual trusts – one for each worker – with capacity in the trustee to treat each of the individual funds as comprising one fund for the purposes of administration and investment. In essential respects, it is more akin to a defined benefits superannuation scheme

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fund which is held on trust for the payment of retirement, death or total disability benefits to members or their dependants. But, be that as it may, it is not a unit trust within the meaning of Div 6C.