

BETWEEN:

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

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and

COMMISSIONER OF TAXATION  
Respondent

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APPELLANT'S REPLY

These submissions are in a form suitable for publication on the internet.

*Issues between the Parties*

1. The Respondent's submissions support the conclusion but not the reasoning of the Full Court. From those submissions, it appears that the contest between the parties in this appeal resolves into two essential disputes: first, as to the meaning of the expression "unit trust" as used in Division 6C (Part VI (ii) of the Respondent's submissions); and second, whether the EISS trust falls within the scope of the meaning identified (Parts VI (i) and (iii)).

*The meaning of "unit trust" in Division 6C*

2. The course taken by the Respondent is (as was that of the Full Court, albeit by a different pathway) to derive an "ordinary" meaning of the term "unit trust" from text books, legal literature and dictionary denotations and then to limit the construction of the Division to accord with that meaning. That is the error identified by this Court in *Certain Lloyd's Underwriters v Cross*, of making an a priori assumption and construing the Act to accord with it: "The purpose of legislation must be derived from what the legislation says, and not from any assumption about the desired or desirable reach or operation of the relevant provisions."<sup>1</sup> The same can be said of its meaning: "the task of

<sup>1</sup> (2012) 248 CLR 378, 390 [26], in relation to the discernment of legislative purpose; cf *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1 at 14 [28]: "In construing a statute it is not for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose."

Filed on behalf of the Appellant

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statutory construction *must begin with a consideration of the text itself*. ... The language which has actually been employed in the text of legislation is the surest guide to legislative intention.”<sup>2</sup>

3. The passages quoted by the Respondent identify cases which are clearly within the descriptive expression “unit trust” as it is “commonly” encountered in commercial and academic discourse. They do not assist in identifying the boundaries of the term. The issue in the present appeal is not concerned with a simple instance of “common” usage: it is concerned with the full reach of the term, and with whether a trust which is not the simple case is within the scope of the term for the purpose of a provision which imposes a tax liability, and which must therefore have a clearly delimited scope.
4. The Appellant submits that for Division 6C purposes a trust estate is properly characterised as a unit trust if beneficiaries under its terms have an interest which satisfies the requirements for a “unit” implicit in the language of the Division: that it is “a beneficial interest, however described, in any of the income or property of the trust estate,”<sup>3</sup> that under the terms of the trust instrument there can be more than one “unit,”<sup>4</sup> that it is capable both of creation by the payment of money or the transfer of property to the trustee and of “cancellation, extinguishment or redemption,”<sup>5</sup> and that the extent of the interest is capable of measurement in integers of entitlement.<sup>6</sup>
5. It is not necessary for the purposes of this appeal to state exhaustively the class of trust estates which can be said to be “unit trusts”; the s 102M definition of “unit” which gives content to the statutory conception of “unit trust” in the Division is inclusive, not exhaustive.
6. The superannuation cases cited by the Respondent do not assist the Court. Neither in *Scott* nor in *Mahoney* was the specific statutory requirement that there be a fund established and applied for the benefit of employees satisfied; in *Scott* because the fund was a sham, and in *Mahoney* because the fund could be and was applied to benefit the

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<sup>2</sup> *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47], where the Court added: “The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.” (emphasis added)

<sup>3</sup> Definition of “unit” in s 102M

<sup>4</sup> A unitholder may hold a “unit or units,” definition of “unitholder” in s 102M

<sup>5</sup> Definition of “unit trust dividend” in s 102M

<sup>6</sup> Capacity for measurement of entitlement is implied by the reference to “redemption” in the definition of “unit trust dividend.”

employer. Neither decision turned on ascertaining the limits of the term “provident, benefit or retirement fund” in s 23(j)(i); the observations cited by the Respondent went only to what was indisputably such a fund. Such observations do not assist in resolving the present appeal. When a regime for the taxation of the trustees of superannuation funds was enacted, so that it was necessary to identify the limits of the meaning of the substitute term “superannuation fund,” the “ordinary usage” of the term was eschewed as a criterion of liability and an extensive statutory definition was introduced.<sup>7</sup>

7. The problem with taking “common usage” or “common understanding”<sup>8</sup> as a criterion of liability is that common usage and understanding are diffuse, and vary over time;<sup>9</sup> merely descriptive terms do not serve as a specification of the boundaries of liability. The passages from dictionaries, texts and articles set out in the Respondent’s submissions reveal the difficulty: no two of them specify the same criteria save in general and unbounded terms. Nor do the authorities cited in the Appellant’s principal submissions.<sup>10</sup> While the instruments examined in those authorities specify the persons to whom distributions may be made in terms of the “holding” of “units,” entitlements are not “divided” into “units”<sup>11</sup> and such “holdings” are no more than a means of identification of the beneficiaries, whose interests may be present or future, vested, defeasible or contingent, or no more than the status of objects of a power of appointment. Nevertheless it is within “common usage” that the measure of entitlement is designated as a “unit” and the funds are called “unit trusts.” It cannot be a criterion of liability to tax that the instrument adopts the label “unit.” Were it so, the EISS trust would be a unit trust if the measure of a Worker’s entitlement was redesignated from the balance of his or her Worker’s Account to the holding of a number of \$1 “units.” But whether a relationship between trustee and beneficiary falls within the scope of a statute “is determined by the law and not by the label which they choose to put on it.”<sup>12</sup>

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<sup>7</sup> Taxation of superannuation funds was provided for by Part IX of the Income Tax Assessment Act 1936, inserted by Act 97 of 1989; the term “superannuation fund” was defined in and by reference to sections 3 and 12 of the Occupational Superannuation Standards Act 1987.

<sup>8</sup> Respondent’s submissions at [36].

<sup>9</sup> The “common understandings” instanced by the Respondent at [27]-[34] are drawn from writings spanning 1954 to 1997 and vary significantly in content.

<sup>10</sup> Appellant’s submissions at [20]-[22]

<sup>11</sup> The Respondent’s submission at [35] is shown as inaccurate on an examination of the decisions cited.

<sup>12</sup> *Radaich v Smith* (1959) 101 CLR 209, 214, 219, speaking of the relationship of landlord and tenant and citing *Facchini v. Bryson* [1952] 1 TLR 1386, 1389-90

### *The terms of the EISS trust*

8. The account of the terms of the EISS Trust deed in the Respondent's submissions is given from a perspective which takes the issue in the appeal as being whether "the trust fund is divided into units," that is, whether the trust property is held on trust for unitholders in aliquot shares proportional to the number of units held by each unitholder.<sup>13</sup> That perspective distorts the account.<sup>14</sup> The issue is not so narrow. The Appellant does not contend that the fund is held on such terms.
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9. Under the EISS trust deed, what are "units" for Div 6C terms are denominated in dollar terms: as many as the dollars credited to the account of each Worker (a unitholder for Div 6C purposes), giving a beneficial interest in the property held by the trustee at least to the extent of an entitlement to be paid, out of the "property of the trust estate," in the several circumstances prescribed in the deed, the amount standing to the credit of the account. Nothing in the statute, nor in the sources from which the Respondent derives the postulated "ordinary usage" meaning of the term, requires that the interest of a unit holder be fixed: it may be vested or contingent, present or future, or defeasible on future events, without the trust estate losing its character as a "unit trust" for Div 6C purposes.
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10. Nor does the statute require that interests in corpus and income be held by the same beneficiaries: the interest by way of unit may be in the income *or* in the property of the trust estate. Trust estates with entitlements designated as "income units" and "corpus units" are recognised as unit trusts and fall within the scope of the term as used in Div 6C. That the trustee may apply income to the several purposes specified in cl 14, or allocate accumulated surplus proportionately to Workers' Accounts on a termination of the fund,<sup>15</sup> does not preclude the interests of workers from being units or the trust from being a unit trust for the purposes of the Division. Nor do the powers and discretions given to the trustee for the purpose of administering the fund<sup>16</sup> prevent the EISS from
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<sup>13</sup> The trust in issue in *CPT Custodian Pty Ltd v C of SR* (2005) 224 CLR 98 was such a trust, see at 111 [20]

<sup>14</sup> The assumption that the fund must be "divided into units" the holders of which have vested and indefeasible interests provokes an unwarranted focus on the existence of "discretions" which are supposed to be "absolute" (cl 17), without regard either to the circumstance that the discretions are vested in a trustee or the context in which the scheme operates: see, for example, [13] below.

<sup>15</sup> Clause 23.4(c)(i)(B), AB34.45; the allocation is among amounts transferred to a Reciprocating Scheme (defined at AB10.38) by the means provided for in cl 23.5 (AB35.20).

<sup>16</sup> The powers and discretions are not personal nor untrammelled: they are conferred on the Appellant as trustee, to be exercised for the purpose of duly discharging that office, see the Appellant's principal submissions at [49]-[50].

being a unit trust; such powers, varying in extent and terms according to the purpose for which a fund is established, are normally to be found in trust, and unit trust, deeds.

***Some other matters arising from the Respondent's submissions***

11. The "anomaly" postulated in [37] of the Respondent's submissions does not arise.  
5 Payment to a worker in redemption of the \$1 units comprising the balance of the worker's account (contributed by payment to the trustee by an employer member) is excluded from any "unit trust dividend" by para (d) of the s 102M definition.

12. The Respondent's focus on the definition of "Active Worker" as conferring a "discretionary" power is misdirected. While the EISS trust deed does not in terms specify  
10 criteria for a determination of the meaning of "Active Worker" (AB 5.48) the context both obliges the trustee to make a determination and constrains the determination which could be made. Contributions are made to the Scheme by employers under industrial awards and agreements for the benefit of named employees (and credited to those employees' "Worker's Accounts") to provide portability of and to protect  
15 employees against loss of entitlements. The trustee could not properly, by failure to make or by arbitrarily making a determination, deprive the workers of the entitlement which it had been appointed to protect and preserve.<sup>17</sup> A proper determination must be made and once made determines the rights of the holders of "Worker's Accounts," which are rights comprising "units" for Division 6C purposes.

20 ***The Respondent's Notice of Contention***

13. Persons who have a beneficial interest in property held by a trustee include those whose interest is in future but not present enjoyment, or is contingent, or is defeasible, or who are objects of a trust power,<sup>18</sup> or are objects of a mere power but take in default of exercise.<sup>19</sup> Payment is made to the EISS trustee to hold for the benefit of the Workers  
25 named at the time of payment<sup>20</sup> to be paid to them, albeit at times and in amounts contingent on the occurrence of Severance Events; they have a beneficial interest in "any of the income or property" held by the EISS trustee.

Dated 4 October 2016

  
A H Slater QC  
B L Jones

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<sup>17</sup> The observations of the Court in *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, 270 [30] are, contrary to RS [77-78], in point.

<sup>18</sup> *McPhail v Doulton, in re Baden's Trusts* [1971] AC 424, 456-7

<sup>19</sup> *Kain v Hutton* [2008] 3 NZLR 589 at [25], approved in *Kennon v Spry* (2008) 238 CLR 366

<sup>20</sup> Clauses 4.1, 5.2, AB14.20 - .45