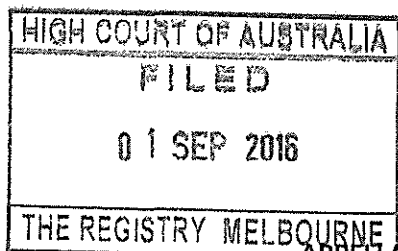


BETWEEN:

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



and

COMMISSIONER OF TAXATION  
Respondent

APPELLANT'S SUBMISSIONS

**Part I: Publication**

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

**Part II: Issues**

- 15
2. The only issue in the appeal is whether the trust estate of which the Appellant is trustee ("the EISS trust") is "a unit trust" for the purposes of Division 6C of Part III of the *Income Tax Assessment Act 1936* ("the 1936 Act").

**Part III: Judiciary Act 1903**

- 20
3. The Appellant certifies that it considers that notice is not required pursuant to s 78B of the *Judiciary Act 1903*.

**Part IV: Reports of reasons**

4. The judgment of the Full Court of the Federal Court of Australia ([2015] FCAFC 178) is reported as *Federal Commissioner of Taxation v ElecNet (Aust) Pty Ltd* (2015) 239 FCR 359, (2015) 329 ALR 310, and 2015 ATC ¶20-550.
- 25 5. The decision of Davies J at first instance ([2015] FCA 456) is reported as *ElecNet (Aust) Pty Ltd v Commissioner of Taxation* 2015 ATC ¶20-507.

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Filed on behalf of the Appellant

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**Part V: Relevant facts**

(a) *The EISS trust*

6. The Fair Work Act 2009 entitles an employee to redundancy pay in the event that his or her employment is terminated because of redundancy or because of insolvency of the employer.<sup>1</sup> In the latter case it is a common event that the entitlement is frustrated by the insolvency and consequent lack of funds. The scheme embodied in the EISS trust was established in 1988 to protect the entitlements of employees in the electrical trades industry by requiring employers to make payments on account of entitlements into a separate fund from which payments to employees would be made upon termination of employment. Payment into the scheme is now required by decisions of Fair Work Australia.<sup>2</sup>

7. The EISS trust was settled by deed made between the National Electrical Contractors Association (“NECA”), the trade union<sup>3</sup> (“ETU”) and the Appellant in 1997 and as amended to 24 May 2010 is in the terms set out at AB xx.

8. By clause 9 the trustee declares that it will hold the trust fund “on the trusts, and with and subject to, the powers and provisions contained in this Deed.” Clause 11 declares the purposes for which the trust is established:

1 Subject to the provisions of this Deed, the Trust Fund shall be maintained *exclusively* for making Severance Payments to Workers under Clause 6;

2 The Trustee shall establish a Worker's Account in respect of each Worker in its books of account ...

3 Where a Worker becomes entitled to a Severance Payment then the Trustee shall deal with such an entitlement in accordance with Clause 8.<sup>4</sup>

9. Amounts are paid to the trustee pursuant to clauses 4 and 5, to hold on the trusts of the trust deed. Each amount is paid in respect of a nominated employee (“Worker”) identified at the time of payment.<sup>5</sup> Each receipt is credited to the Worker’s Account of

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<sup>1</sup> Fair Work Act 2009, s 119(1). The accruing liability for redundancy pay may be transferred from one employer to another on a transfer of employment following, eg, a sale of a business, s 122. The EISS trust allows the successive employers to make contributions appropriate to their period of employment and makes the entitlements “portable” for employees who change jobs.

<sup>2</sup> For example, *ADJ Contracting Pty Ltd* [2011] FWAA 1447.

<sup>3</sup> Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia

<sup>4</sup> Clause 11.1 (emphasis added), 11.2, 11.3, AB xx

<sup>5</sup> Cl 5.1, 5.2, AB xx. If an employer Member considers that no amount is payable in respect of a particular worker, it must give the trustee an explanation, cl 5.3. Excessive contributions are refunded, cl 5.4.

the relevant Worker, cl 6.1, and payments out (such as Severance Payments, relevant taxes and costs) are debited to that account, cl 7.1.

10. ☐The trustee is directed by cl 8 to make Severance Payments. Such payments are made upon retirement, death, or the termination of the Worker's employment. On a termination of employment, payments are in an amount being the lesser of \$4,000 or the balance of the Worker's Account,<sup>6</sup> with any balance payable if after 4 weeks the Worker remains unemployed, or if after 39 weeks the Worker remains employed outside the industry or in an above-award position.<sup>7</sup> On death or retirement the whole balance of the account is paid out.<sup>8</sup>
- 5
- 10 11. Where no contribution has been made in respect of a Worker for 2 years and the trustee is unable to locate the Worker or his or her legal representatives, the trustee may designate the Worker as an "Inactive Worker" and the balance of the Worker's account is "forfeited to the scheme" and applied to discharge of administrative expenses.<sup>9</sup>
- 15 12. The income accruing on investment of the trust assets must be applied in a manner which does not impair the status of the EISS trust as an approved worker entitlement fund under s 58PA of the *Fringe Benefits Tax Assessment Act 1986*, and is otherwise directed to be capitalised.<sup>10</sup> The trustee may, but need not, make distributions from capitalised income to or for the benefit of Workers, their dependants, the ETU and the NECA.<sup>11</sup>

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Provision is made in respect of payments in relation to which the relevant Worker cannot be identified, cl 5.7.

<sup>6</sup> Clause 8.3(a), AB xx

<sup>7</sup> Clause 8.3(b), AB xx. Workers may elect under cl 8A to be "BFR workers" to whom termination payments not exceeding a "genuine redundancy payment" (as defined in the Income Tax Assessment Act 1997) may be made on a "genuine" (viz, bona fide) redundancy, cl 8.2(a)(i). A worker who does not elect to be a BFR worker (a "TER worker"), and whose worker's account retains a credit balance, remains entitled on the next Severance Event to have the balance of the account, with any net accretions, dealt with in accordance with clause 8.

<sup>8</sup> On death the amount is payable to the worker's estate or "dependants," an elaborately defined term.

<sup>9</sup> Clause 12, AB xx. Clause 8 applies only to "active workers," cl 8.1.

<sup>10</sup> Clauses 14.1 and 14.2, AB xx

<sup>11</sup> Any distribution of capitalised income is to be made as to 25% to the NECA and as to 75% to other beneficiaries as the trustee with the consent of the ETU thinks fit, cl 14.2, AB xx

(b) *The ruling and decisions below*

13. The Appellant sought from the Respondent a private ruling, in respect of the 2012-3 and subsequent financial years,<sup>12</sup> that it was a “unit trust” for the purposes of Div 6C of the *Income Tax Assessment Act 1936*. The Respondent ruled that it was not. On appeal from disallowance of the Respondent’s disallowance of the Appellant’s objection, Davies J held that the EISS trust was a “unit trust” within the meaning of that Division.<sup>13</sup> The Full Court allowed the Respondent’s appeal, the plurality holding 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 Division 6C, that the trust cannot be described as a ‘unit trust’ within Division 6C.”<sup>14</sup>

**Part VI: Appellant’s argument**

(a) *Appellant’s submissions in summary*

14. The error in the joint judgment below was that identified by this Court in *CPT Custodian Pty Ltd v C of SR (Vic)*:<sup>15</sup> to make

... a priori assumptions as to the nature of unit trusts under the general law and principles of equity [which do] not assist and [are] apt to mislead. All depends ... upon the terms of the particular trust. The term ‘unit trust’ is the subject of much exegesis by commentators. However, ‘unit trust’, like ‘discretionary trust’, 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 [legislative provision].

The course which the court should have taken was first to identify the relevant terms of the instrument and their effect, and second to construe the provisions of that Division, having regard to their text, context and purpose, to ascertain whether the trust estate fell within its operation.<sup>16</sup> To the latter task the use of the expression “unit trust” affords

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<sup>12</sup> The application for ruling is at AB xx. The period to which it relates is stated at AB xx

<sup>13</sup> [2015] FCA 456, AB xx; her Honour had previously directed that the question whether the EISS trust was a unit trust for Div 6C purposes be decided separately, AB xx, and that was the only matter in issue.

<sup>14</sup> [2015] FCAFC 178 at [115], AB xx, per Pagone and Edelman JJ. Jessup J at [6], AB xx, held that Div 6C “uses the term ‘unit trust’ in ... 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 ‘unitised’. There needs to be an irreducible, discrete, ‘unit’.”

<sup>15</sup> (2005) 224 CLR 98, 109 [15]

<sup>16</sup> *CPT Custodian Pty Ltd v C of SR (Vic)* (2005) 224 CLR 98, 109 [14]

little assistance, save perhaps to suggest exclusion from the operation of the Division of trust estates which can be classed under the Act as entirely “discretionary.”<sup>17</sup>

15. References to “unit trusts” and “units” are scattered widely across the Income Tax Assessment Acts. Broadly they fall into two categories: those under which the liability of the trustee to tax, or other tax consequences for the trustee or for beneficiaries, turn on the status of the trust estate as a “unit trust,”<sup>18</sup> and those which attach capital gains tax consequences to whether transactions between trustee and beneficiary are dealings in relation to “units” as interests in the trust estate. A trust which is a “unit trust” for the purposes of a provision in the former category is not necessarily one under the terms of which there are “units” dealt with for the purposes of a provision in the latter category.
16. Divisions 6B and 6C are concerned with the type of activity carried on by the trustees of trust estates the beneficial interests in which are widely held:<sup>19</sup> in the case of Div 6B, the activity is owning property that had been owned by a company whose shareholders had an opportunity to acquire interests in the trust estate (so that the income arising from the property passed to the investors without being subject to company tax), and in the case of Div 6C the activity is carrying on a trading business (not being an investment business) and distributing the income arising from that business to investors without its being subjected to company tax. In the context of these Divisions and to fulfil their purpose, the reference to “unit trust” and “unit” serves as no more than a proxy for the requirement that the trust be one under which, in broad terms, the interest of each of the beneficiaries is one with an identifiable numerator and a common denominator, though both may vary over time.
17. The EISS trust, under which the interests of Workers are fixed by reference to their Worker’s Accounts, satisfies that requirement and is a “unit trust” for the purposes of Div 6C. The definitions of “unit” and “unitholder” in s 102M support that conclusion.
18. The plurality in the Full Court, by concentrating on “the functional concept of a unit trust” and on whether the beneficiaries’ interests were “functionally unitized,” mistook the legislative purpose and in consequence the proper construction of the Division. Jessup J fell into the error identified at [44] below.

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<sup>17</sup> See further para [38(c)] below.

<sup>18</sup> This category may be further divided, see [31] below.

<sup>19</sup> Such trusts are referred to in the Divisions as “public unit trusts” and are those interests in which are listed for quotation on a stock exchange, offered to the public, or held by 50 or more people: s 102G and s 102P.

(b) *Unit trusts outside the Assessment Acts*

19. Although Dr Sin traces the use of settled trust funds as commercial vehicles as far back as a response to the Bubble Act of 1720,<sup>20</sup> the expression “unit trust” is not readily found in commercial literature or judicial decision before 1930. In Australia the earliest  
5 apparent reference in case law is to a deed made in 1939 between Unit Trusts Ltd and Queensland Trustees Ltd, the subject of the decision in *Charles v FC of T*<sup>21</sup> in 1954. But in 1960 Prof Ford, in an article on variation of shareholder rights, thought it necessary to devote a half page footnote to explaining what was meant by “unit trust.”<sup>22</sup> In the United Kingdom, a challenge to the validity of a deed to establish a “unit trust” was  
10 pressed in the Chancery Division in 1957.<sup>23</sup>
20. Two decades later the burden of double taxation of investment income derived through companies led Westfield Ltd to take the novel and risky step of splitting itself into a company and a trust estate,<sup>24</sup> the trustee of the latter acquiring the realty of the former and leasing it back to the company, so that the rental income passed to investors free  
15 from company tax. The legislative response<sup>25</sup> was the enactment of Div 6B, by which the income of the trust and like trusts was taxed at company rates. The fiscal advantages of the “unit trust” for joint investments were recognised by private investors<sup>26</sup> and a wide variety of trust instruments referring to beneficiaries’ interests as “units” came into circulation. However, the trusts which in Australia were called “unit trust” did not follow  
20 the simple proportional model in *Charles v FC of T* or in the UK trusts; drawing inspiration from the wide variety of share rights in Australian fiscal planning,<sup>27</sup> the draftsmen of “unit trust” deeds created instruments providing categories of beneficiaries with a striking range of entitlements: to income only, but no capital

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<sup>20</sup> Sin, *The Legal Nature of the Unit Trust* (Clarendon Press, Oxford, 1997), at 13 ffg, in relation to 6 Geo I c 18  
<sup>21</sup> (1954) 90 CLR 598

<sup>22</sup> Ford, HAJ, “Australian Fixed Trusts Proprietary Ltd and Others v Clyde Industries Ltd and Others (Company Law)” (1960) 2 *Melbourne University Law Review* 399

<sup>23</sup> *Re A.E.G. Unit Trust (Managers) Ltd.’s Deed* [1957] Ch. 415

<sup>24</sup> *Westfield Ltd and the Westfield Property Trust*, 1979

<sup>25</sup> That this was the legislative purpose is explained in the Minister’s second reading speech, see footnote 58 below.

<sup>26</sup> In 1980, company tax on investment income of private companies was at the rate of 46%; of the balance 90% was required to be distributed to avoid a 50% undistributed profits tax, and bore tax in the hands of shareholders at rates of up to 67% - a combined tax impost of over 80%. Investment income passing through trusts to presently entitled beneficiaries bore tax at the beneficiaries’ rate.

<sup>27</sup> See, for example, the converting shares in *Robertson v FC of T* (1952) 86 CLR 463, the preference shares in *Gorton v FC of T* (1965) 113 CLR 604, the redeemable preference shares in *WP Keighery v FC of T* (1957) 100 CLR 95 and the “dividend access” shares, exemplified in *Spassked Pty Ltd v FC of T (No 5)* (2003) 197 ALR 553 and *FC of T v Devuba Pty Ltd* [2015] FCAFC 168, which were in widespread use before 1970.

accretion (or no corpus at all);<sup>28</sup> to income from specified activities only;<sup>29</sup> to income, but only if the trustee so determined;<sup>30</sup> to appoint or remove trustees; to capital growth but no income;<sup>31</sup> to a return of capital contributed to the fund but no more;<sup>32</sup> and other variations.<sup>33</sup> In all cases the rights are said to be attached to “units” and the criterion of entitlement is being entered on some record or holding some certificate, but the entitlement is rarely proportional to the investment by way of contribution to trust funds and in many cases the fund is wholly established by donation and supported by loan.

21. In none of the decided cases is there laid down any rule which distinguishes a “unit trust” from any other trust estate; like “discretionary trust,” the term is only, and only broadly, descriptive:<sup>34</sup>

“the meaning of the term is disclosed by a consideration of usage rather than doctrine, and the usage is descriptive rather than normative ... not a component of the doctrinal divisions by which there is determined the formal and essential validity of trusts, [for which] purpose divisions are made between express trusts, implied or resulting trusts, and constructive trusts, between purpose trusts and non-purpose trusts, between trust powers and bare powers, and between testamentary trusts and settlements inter vivos. ... [It is a term of] no fixed meaning and is used to describe particular features of certain express trusts.”

22. The only general observation concerning the nature of a unit trust is that in *Charles v FC of T*:<sup>35</sup>

... a unit held under this trust deed is fundamentally different from a share in a company. A share confers upon the holder no legal or equitable interest in the assets of the company; it is a separate piece of property; and if a portion of the company's assets is distributed among the shareholders the question whether it comes to them as income or as capital depends upon whether

<sup>28</sup> *Cridland v FC of T* (1977) 140 CLR 330; *Metcalf v R&I Bank of WA* (FCA, unreported (9 Dec 93), WAG49/92, French J); *Natural Extracts Pty Ltd v Stotter* (1997) 24 ACSR 110; *Yunghanns v Elfic Pty Ltd* (2000) 1 VR 92; *Otvosi v Ferella* (2005) 225 ALR 292; *Anison v Anison* [2015] FAMCA 973

<sup>29</sup> *Vagrand Pty Ltd (in liq) v Fielding* (1993) 113 ALR 128 (“explorer units”); *Nemkal Investments v C C of SR* (2003) 52 ATR 43 (special attributable income units)

<sup>30</sup> *MSP Nominees Pty Ltd v Commissioner of Stamps (SA)* (1999) 198 CLR 494 at [7]; *Corporate Systems Publishing Pty Ltd v Lingard [No 4]* [2008] WASC 21; *Tech 1 Pty Ltd (as trustees for Rovi Investments Unit Trust) v CC of SR* [2015] NSWCATAD 123; *Huang v Wang* [2016] NSWCA 164

<sup>31</sup> *FC of T v Pearson* (1997) 36 ATR 35

<sup>32</sup> *Tyne (as trustee of the Argot Trust) and Another v UBS AG* (2014) 102 ACSR 403

<sup>33</sup> *Macarthur Cook Real Estate Funds Ltd v APN Funds Management Ltd* [2013] VSCA 240 (Underwriter Units, Vendor Units, Retail Units, Wholesale Units, Convertible Units and Income Units)

<sup>34</sup> *C of SD v Buckle* (1998) 192 CLR 226, 234 [8], adopted in *CPT Custodian Pty Ltd v C of SR (Vic)* (2005) 224 CLR 98, 109 [15] in relation to the term “unit trust.”

<sup>35</sup> (1954) 90 CLR 598, 609 (references omitted) (Dixon CJ, Kitto and Taylor J)

the corpus of their property (their shares) remains intact despite the distribution. But a unit under the trust deed before us<sup>36</sup> confers a proprietary interest in all the property which for the time being is subject to the trust of the deed ...

- 5 23. In particular, and contrary to the approach adopted by the plurality below, the term has no settled meaning which is or could be adopted in the text of Div 6C.

(c) *Taxonomy of "trusts" in the Income Tax Assessment Acts*

24. Although the word "trust" appears more than 6,000 times in the Income Tax Assessment Acts,<sup>37</sup> the Acts contain no definition of the term "trust."<sup>38</sup>
- 10 25. In the context of Division 6 of Part III of the 1936 Act (taxation of "trust income"), it was decided in this Court that while "the degree to which a revenue statute adopts or qualifies or supplants the general understanding of terms with a particular application in property law will be a matter of statutory construction," the undefined expression "income of the trust estate" has "a content found in the general law of trusts, upon  
15 which [the Act] then operates."<sup>39</sup> The meaning of "trust" in the Acts is similarly to be found in the general law,<sup>40</sup> where the term has a normative meaning.
26. In contrast, the expressions "fixed trust," "unit trust" and "discretionary trust" do not have a normative meaning. The Acts, however, use those expressions as criteria of liability to tax in numerous provisions.<sup>41</sup> In giving content to these expressions as used  
20 in the statute, regard must be had to the language of the statute viewed as a whole,<sup>42</sup> to elicit from it a coherent relationship among the terms used. Such an evaluation reveals a spectrum of "types" of trust estate, to which the Acts attach different consequences.

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<sup>36</sup> The Court in *CPT Custodian* at (2005) 224 CLR 98, 115 [34]-[36] noted that the deed in *Charles* was cast in different terms from that in *CPT Custodian*.

<sup>37</sup> Sometimes on its own and sometimes as part of a composite expression, such as "trust estate," "family trust" or "unit trust."

<sup>38</sup> There is a definition of "trustee" in s 6 of the 1936 Act which does no more than extend the reach of the defined term to persons (such as liquidators and executors) who are not trustees, although by implication it extends the reach of "trust" to relationships which are not trust relationships at general law, *FC of T v Bamford* (2010) 240 CLR 481, 503 [28]-[29].

<sup>39</sup> *FC of T v Bamford* (2010) 240 CLR 481, 501 [17], 505 [36]

<sup>40</sup> *A-G (NSW) v Brewery Employees Union of NSW* (1908) 6 CLR 469, 531

<sup>41</sup> This is the product of relatively recent amendments. As enacted, the 1936 Act used the expressions "trust" or "trustee" in only 10 provisions outside Division 6. By 1981, immediately before the enactment of Division 6B (on which Division 6C is modeled), the word "trust" appeared more than 500 times, but none of the expressions "discretionary trust," "fixed trust" or "unit trust" were adopted by the statutory language.

<sup>42</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [69]-[71]



27. At one end of this spectrum, a “fixed trust” is defined<sup>43</sup> as one in which “persons have fixed entitlements to all of the income and capital of the trust.” If “a beneficiary has a *vested and indefeasible* interest in a share of income of the trust that the trust derives from time to time, *or* of the capital of the trust, the beneficiary has a fixed entitlement to that share of the income *or* capital.”<sup>44</sup>
28. At the other, a “discretionary trust” is in some provisions undefined,<sup>45</sup> and in others defined as a trust in respect of which the trustee has a power of appointment which determines the entitlements of beneficiaries to capital or income.<sup>46</sup>
29. Between these categories of trusts (those under which there are “vested and indefeasible” interests, and those under which entitlements rest in the discretion of the trustee) is a range of trusts under which beneficiaries have entitlements which are capable of delineation in numerical or proportional terms or “units,” and which are either contingent on the happening of a stipulated event or are accrued but liable to be defeased by event, circumstance or authorised act of the trustee. Such trusts fall within the scope of the undefined rubric “unit trust” for the purposes of the Acts.
30. In limited circumstances the Acts provide for some demarcation among these categories. Where the defeasance meets tightly limited conditions, but not otherwise, a “unit trust” may be classified as a “fixed trust.”<sup>47</sup> A trust which may make a non-assessable payment to a beneficiary which is not in respect of a “unit or interest” of the beneficiary in the trust is described as discretionary trust.<sup>48</sup> These statutory specifications mark out some boundaries of what may be a “unit trust” for the purposes of the Acts.

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<sup>43</sup> Section 272-65 in Schedule 2F to the 1936 Act, adopted in s 995-1 of the 1997 Act. The terms “fixed trust” and “fixed entitlement” are used as criteria of liability in sections 115-50, 115-110, 124-781, 124-810, 165-215, 165-220, 165-245, 170-265, 295-550, 392-20, 415-20, 703-40, 707-325, 713-50, 719-35, 725-65, 727-110, 727-360, 727-400, 855-40 of the Income Tax Assessment Act 1997 and in Sch 2F (past losses of trusts) of the Income Tax Assessment Act 1936.

<sup>44</sup> Section 272-5, emphasis added. The statutory test is applied separately to income and to capital, so that it is not necessary that the same persons have fixed entitlements to income as have fixed entitlements to capital: for example, a life tenant and remainderman may together be “persons who have fixed entitlements to all of the income and capital of the trust.”

<sup>45</sup> Sections 152-40, 152-78 and 328-15 of the 1997 Act and s 177EA of the 1936 Act

<sup>46</sup> Sections 101, 102AAB and 317 of the 1936 Act.

<sup>47</sup> Section 272-5(2) in Sch 2F to the 1936 Act, inserted to allow listed and public unit trusts to have the benefit of “fixed trust” status for loss carry-forward purposes and so to retain an entitlement to deductions for past losses. Trusts which do not meet satisfy s 272-5 are not “fixed trusts” but are capable of being “unit trusts.”

<sup>48</sup> Such trusts cannot be the subject of certain rollovers or demergers, ss 124-855, 125-65 and 126-230, read with s 104-70, of the 1997 Act.

31. Within these parameters, provisions referring to “unit trusts” fall into three categories:
- (a) provisions which affect the liability of the trustee to tax if the trust is a “unit trust,”<sup>49</sup>
  - (b) other provisions which attach tax consequences, for either or both of the trustee and the beneficiary, to the status of a trust as a “unit trust,”<sup>50</sup> and
  - (c) in the part of the legislation dealing with capital gains tax, provisions which attach tax consequences to whether transactions between the trustee and the beneficiary are dealings in relation to “units” or interests in the trust estate.<sup>51</sup>
32. The nature of the beneficiary’s interest, and whether (in the Full Court’s language) it is “unitized,” is significant to the operation of the provisions in the third of these categories, but less so if at all to the operation of those in the first and second categories.
33. In Division 6C, it is the status of *the trust* as a “unit trust” which is critical: each of the provisions<sup>52</sup> on which the operation of the Division is conditioned applies only to a trust that is a “unit trust.” Any “unit” character of the beneficiaries’ interests is excluded as a criterion of the trustee’s liability by the expansive definition of “unit” in s 102M: “unit’ ... includes a beneficial interest, *howsoever described*, in *any* of the income or property of the trust estate.”
34. In contrast, in other parts of the Acts the status of the trust estate as a unit trust is of no fiscal consequence to the trustee; what is at stake is the liability of the beneficiary, and what matters is the nature of the rights of the beneficiary and of the dealings between beneficiary and trustee. Thus in the capital gains tax provisions of the 1997 Act for example s 104-35, 109-10 and 112-20 deal with “acquiring” units from the trustee of the trust, s 104-25 deals with their “redemption,” and numerous other provisions of Division

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<sup>49</sup> Income Tax Assessment Act 1997, sections 149-50, 165-165, 166-272, 207-75, 207-128, 208-155, 703-25, 713-130, 960-220, 960-225, 960-235, 960-240, 960-245, 995-1; Income Tax Assessment Act 1936 sections 102F, 102G, 102H, 102J, 102K, 102L, 102N, 102NA, 102P, 102Q, 102R, 102S, 102T, 102UC, 121C, 121D, 121DA, 121EA, 121ELB, Sch 2F sections 269-10, 269-47, 269-49, 282-5, 272-65, 272-105.

<sup>50</sup> Income Tax Assessment Act 1997 sections 51-52, 59-40, 104-55, 104-65, 104-75, 104-80, 104-90, 104-95, 104-155, 104-230, 115-290, 116-35, 118-350, 118-405, 118-407, 118-410, 118-425, 118-427, 118-428, 118-430, 118-435, 247-30, 275-105, 328-125, 392-20, 725-150, 995-1; Income Tax Assessment Act 1936 sections 25A, 26BC, 47A, 102AAB, 128FA, 317, 318, 329, 414; Taxation Administration Act 1953 Sch 1 sections 45-285, 45-288 and 396-55

<sup>51</sup> Income Tax Assessment Act 1997, sections 100-25, 104-30, 104-35, 104-40, 104-70, 104-155, 109-10, 112-20, 114-15, 116-30, 124-245, 124-300, 124-1045, 125-230, 126-230, 130-20, 130-40, 130-60, 615-5, 615-10 and 995-1

<sup>52</sup> Sections 102N, 102NA, 102P, 102Q, 102R and 102S

104 except dealings in units from their scope.<sup>53</sup> The author of the drafting instructions for the capital gains tax provisions appears to have overlooked the law explained in *Charles v FC of T*,<sup>54</sup> and to have supposed that units, like shares, were distinct choses in action separate from an interest in the trust assets: so for example s 130-20 provides for a consequence of an “issue” of “bonus units” in a unit trust,<sup>55</sup> s 166-272 addresses “splitting” of units and s 124-245 speaks of “exchanging” units in a unit trust for other units of “equal market value.”<sup>56</sup>

35. What is meant by “unit trust” in these provisions is not necessarily congruent with the meaning of the term in the different context of Division 6C.<sup>57</sup>

10 (d) *Division 6C: context and purpose*

36. Division 6C takes its structure, and much of its language, from Division 6B, introduced 4 years earlier. In the second reading speech to the 1981 Bill by which Div 6B was introduced the Minister<sup>58</sup> said that its purpose was “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.” Introducing Division 6C, the Minister<sup>59</sup> said that it addressed “the marked erosion of the company tax base over recent years, caused partly by the use of both public and private trusts in substitution for companies as a mechanism for conducting business activities [and the] ... considerable advantages in using the trust form ... for tax-exempt bodies investing in large business undertakings,” adding that the amendment “follow[ed] the basic rules already in the income tax law for taxing corporate unit trusts as companies.”

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<sup>53</sup> Provisions dealing with transactions concerning units are listed in footnote 51.

<sup>54</sup> See [22] above.

<sup>55</sup> The owner of 100 of 1000 units in a trust who receives a one-for-one “bonus issue” of units is thereby in no different position, having before and after the “bonus issue” a 10% beneficial interest in the fund (subject of course to the caveats noted in *CPT Custodian*).

<sup>56</sup> A unit is a beneficial interest in the trust estate (more precisely in the assets of the estate); if there is no change in value of that interest there is no “exchange” of one unit for another, as the beneficial interest is unchanged.

<sup>57</sup> The same word or term does not necessarily have the same meaning in different parts of an Act, or even in different parts of a section: “it all depends on context,” *Clyne v DFC of T* (1981) 150 CLR 1, 10 (Gibbs CJ)

<sup>58</sup> Minister for Business and Consumer Affairs, Hansard (H of R) 23 September 1981, p 1684, introducing the Income Tax Laws Amendment Bill (No 3) 1981

<sup>59</sup> Minister assisting the Treasurer, Hansard (H of R) 15 November 1985, p 2956, introducing the Taxation Laws Amendment Bill (No 4) 1985

37. The explanatory memorandum to the 1981 Bill provided no explanation of what was intended to be meant by the term “unit trust” other than to say that a “public unit trust” (s 102G, cf s 102P) was to be “a unit trust whose units are listed on a stock exchange, whose units are held by 50 or more persons, or whose units are available for investment by the public” and that a “unit” is “the term used to describe a beneficial interest in a prescribed trust estate,<sup>60</sup> however that interest might be described formally,” while “a beneficiary in a prescribed trust estate” is a unitholder. Apart from noting that its “provisions are modelled on those of Division 6B” the Explanatory Memorandum to the 1985 Bill to insert Div 6C does no more than paraphrase the words of the Bill.
- 10 38. Although the provisions of Div 6C (like those of Div 6B) provide no definition of “unit trust,” they do set some limits on its meaning: it must be a trust estate which is capable of satisfying the additional conditions in the various sections of the Division. Thus a unit trust, or its trustee, must be able to
- 15 (a) confer a “beneficial interest ... in any of the income or property of the trust estate,” and that interest must be able to be “held” by a beneficiary (definitions of “unit” and “unitholder” in s 102M);
  - (b) confer beneficial interests which are capable of being held by more than 50 unrelated people, or of being offered to the public, or of being listed on a stock exchange (s 102P(1));
  - 20 (c) confer beneficial interests in income, or in property, of the trust estate which are capable of measurement<sup>61</sup> such that it can be seen whether an exempt beneficiary is entitled to 20% of either (s 102P(2));
  - (d) be able to make distributions to a beneficiary (“unitholder”) (definition of “unit trust dividend” in s 102M), and be able to make such distributions in such a  
25 fashion that it can be determined whether 20% of them accrue to an exempt beneficiary (s 102P(2));

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<sup>60</sup> A “prescribed trust estate” is defined in s 102B to be a trust estate that is or has been a “corporate unit trust,” a term defined in s 102J to be a “unit trust” which is inter alia both an “eligible unit trust” and a “public unit trust.” As to the use of the term in Division 6C, see [44] below.

<sup>61</sup> A beneficiary who is no more than an object of a power of appointment, such that any entitlement to income or capital is wholly dependent upon the exercise of the power and the rights of the beneficiary are limited to proper consideration of the power and due administration of the trust (cf *Gartside v IRC* [1968] AC 553 at 617) would not meet this implicit requirement.

- (e) be able to invest in the assets listed in the definition of “eligible investment business” in s 102M;
- (f) be able to carry on a trading business, or control the conduct by another of a trading business (s 102N); and
- (g) be so conducted as to be a “resident” trust estate (s 102Q).

39. The content of the expression “unit trust” as used in Div 6C is to be found in these matters: the mischief to which it is directed, as disclosed by the extrinsic materials and the structure of the Division and its place in the Acts, and the text and context of the Division itself. What they disclose is that the essential characteristics of a unit trust for the purposes of the Division is that it can (and does) carry on a trading business, and that the beneficial interests in it are widely spread (listed on a stock exchange, offered to the public or held by more than 50 people) or are to a material extent (more than 20% of beneficial interests to income or capital) held by an exempt body. It is the nature of the trustee’s conduct, not the nature of dealings by beneficiaries with their interests under the terms of the trust, that is material to the application of Division 6C.

40. 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.” Nor is any more required of a “unitholder” than that it be “the holder of a unit in the ... trust estate.”<sup>62</sup>

41. The Full Court fell into error both in concentrating on the characteristics of the interests of individual beneficiaries under the terms of the trust – on whether the interests were “unitized” (a term of no determinate content) or “irreducible and discrete,”<sup>63</sup> or on the “functional notion of a unit”<sup>64</sup> or “the metaphor which is involved in the concept of a unit trust”<sup>65</sup> – and in resorting not to the language and context of the provisions but to a priori notions generated or fortified by incidental observations in a White Paper<sup>66</sup> and in academic debate, and by the legislative approach in other jurisdictions.

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<sup>62</sup> The definition of unitholder is stated in terms, relevant to the operation of the Division, of whether the unitholder is such in relation to a “prescribed trust estate.” That term is the shorthand definition (s 102M, by reference to s 102R, a trust which is or has been a “public trading trust”, see para [44] below) used in the modification of the operation of the other provisions of the Acts (s 102T) and for that purpose in the definitions of unit trust dividend, unitholder and unit.

<sup>63</sup> Jessup J at [6], AB xx

<sup>64</sup> Pagone and Edelman JJ at [9], [12] (AB xx and xx) (and 25 other places)

<sup>65</sup> Pagone and Edelman JJ at [72], AB xx

<sup>66</sup> Pagone and Edelman JJ at [17-18], AB xx

(e) *The EISS trust is a unit trust for Div 6C purposes*

42. The EISS trust meets the criteria implicit in the language, structure, context and purpose of Div 6C to be a “unit trust” for the purposes of that Division. It is a resident trust estate (s 102Q), able to carry on both a trading business<sup>67</sup> and eligible investment business (ss 102N and 102M). “Workers,” and on their death their dependants, each have a beneficial interest in the trust fund,<sup>68</sup> which is capable of measurement and delineation, and qualifies as a “unit” for Div 6C purposes (“a beneficial interest, however described, in any of the income or property of the trust estate”). Workers, as beneficiaries, form a class exceeding 50 unrelated people and satisfy the “public unit trust” requirement in s 102P.

43. The EISS trust is neither a “discretionary trust” (one under which any entitlement rests entirely on the discretion of the trustee or some other donee of a power of appointment) nor a “fixed trust” (one in which interests are vested and indefeasible). It falls within the broad reach of the undefined category “unit trust,” and is a “unit trust” for Division 6C purposes.

(f) *The errors in the reasons of the Full Court*

44. Jessup J rests his principal reasoning on the proposition that the definition of “unit” is “limited” to the case of a “prescribed trust estate.”<sup>69</sup> That reasoning mistakes the role of “prescribed trust estate” in the structure of the Division. By s 102M, a prescribed trust estate is one which is or has been a public trading trust (and so, taking in turn the definitions in subparagraphs (i)-(v) of the s 102R(1)(a) and (b) definition of public trading trust, also a public unit trust, a trading trust, a resident trust and a trust which is not a corporate unit trust for Div 6B purposes). Each element of the nested definitions turns on whether the trust is a “unit trust” and to each element the definition of “unit” is – as something which indicates the nature of a “unit” trust – relevant.<sup>70</sup> The expression “prescribed unit trust” is no more than a shorthand or “placemaker” definition.<sup>71</sup>

<sup>67</sup> Whether in fact the Appellant so acts as to fall within s 102N is not in issue in this appeal; the sole issue is whether it is a “unit trust,” see footnote [13] above.

<sup>68</sup> As to the Respondent’s notice of contention, see para [53] below

<sup>69</sup> Jessup J at [3]-[4], AB xx

<sup>70</sup> See [36]-[40] above.

<sup>71</sup> One whose function is to “read the words of the definition into the substantive enactment,” *Kelly v R* (2004) 218 CLR 216 at [103] (McHugh J); “... a mechanical device to save repetition,” *Mutual Acceptance Co Ltd v FCT* (1944) 69 CLR 389, 398 (Rich J)

45. The alternative basis of his Honour's decision<sup>72</sup> rests on that "interests in the trust, whatever other characteristics they might have, [must] be divided into units – or 'unitized'. There needs to be an irreducible, discrete, 'unit'." For the reasons above, this gives priority to a "central" or "ordinary" meaning over the text, context and purpose of the legislation, and does so in the absence of any determinate "ordinary" meaning which can be used as a criterion of liability. The Tribunal in the decision<sup>73</sup> endorsed by his Honour fell into the same error, as the primary Judge rightly pointed out.<sup>74</sup>
46. Pagone and Edelman JJ erroneously rested their decision not on the text, context and purpose of the legislation but on an a priori "functional" and "metaphorical" concept of "unit" and "unit trust." That approach led them into error, as is submitted above.<sup>75</sup>
47. Their Honours also relied specifically on three other "factors" or "discretions"<sup>76</sup> as supporting the notion that the interests of Workers was not "capable of being described functionally as a unitised interest." The conclusion is, for the reasons advanced above, not directed to the issue arising in the appeal, but in addition the reasoning on the "discretions" is with respect erroneous.
48. Three "discretions" are identified: the power to define the meaning of "Active Worker" for the purpose of clause 8.1;<sup>77</sup> the power to vary the amount standing to the credit of a Worker's Account under clause 7.1(e) "which the trustee determines is appropriate or equitable";<sup>78</sup> and the power to determine the amount of the Severance payment under clause 8.3.<sup>79</sup> Two things may be said of these "factors," one general and one in each case particular.
49. The general observation begins with the purpose for which the EISS trust is established (cl 11.1, "exclusively for making severance payments to Workers") and the circumstance that the donee of the powers to which attention is directed by the plurality is the trustee in its capacity as such: that is, the powers are those of the office, not personal and

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<sup>72</sup> Jessup J at [6], AB xx

<sup>73</sup> *BERT Pty Ltd as trustee for the BERT Fund No. 2 v Commissioner of Taxation* [2013] AATA 584

<sup>74</sup> Davies J at [51], AB xx

<sup>75</sup> See paras [14], [18], [41] and generally [19] to [43] above.

<sup>76</sup> Pagone and Edelman JJ at [104-114], AB xx

<sup>77</sup> Pagone and Edelman JJ at [106], AB xx

<sup>78</sup> Pagone and Edelman JJ at [110], AB xx

<sup>79</sup> Pagone and Edelman JJ at [112], AB xx

proprietary to any occupant for the time being. A power cannot be exercised for a purpose or with an intention beyond the scope of, or not justified by, the instrument creating the power;<sup>80</sup> a power conferred on a trustee as such is fiduciary and must be exercised in the interests of the beneficiaries for whose benefit it is conferred.<sup>81</sup>

5 Discretions conferred on a trustee, even those described as “absolute and unfettered,” are fiduciary and cannot be exercised capriciously to defeat a Worker’s interest in the fund, measured by the amount which has been paid into the fund for his or her benefit (not as a benefaction or bounty, but as a term of employment<sup>82</sup>) and has been credited to his or her account. Speaking of an opinion to be formed by the trustee of a  
10 superannuation fund as to a member’s capacity to return to work, this Court said in *Finch v Telstra Super Pty Ltd*<sup>83</sup> that

The Trustee was trustee of a trust. It had a duty to distribute to those who fell within the definition of “Total and Permanent Invalidity” and a duty not to distribute to those who did not. That affected its role in relation to the  
15 forming of its opinion under limb (b). Forming that opinion was not a matter of discretionary power to think one thing or the other; it was an ingredient in the performance of a trust duty. That duty was owed to the Members, including the applicant. The applicant was not the object of a discretionary power of appointment. He was the beneficiary of a trust, and although the  
20 precise form and quantum of his beneficial interest was contingent on particular events, he did have a beneficial interest.

50. So it is in the case of the discretions relied on in the joint judgment. They do not make the interests of the Workers “discretionary” and do not, nor may they be used to, defeat those interests. That the proper management of the EISS trust may require the exercise  
25 of powers such as those identified by the plurality does not deprive the beneficiaries of an interest which can, having regard to the text and purpose of the provisions, characterise the EISS trust as a “unit trust.” Any active management of a fund of any complexity will involve steps which vary the interests of beneficiaries in the assets held by the trustee and in the “corpus” and income of the fund, but the fund need not  
30 thereby cease to be one which meets a normative nor a statutory standard.

51. As to the particular discretions or duties identified:

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<sup>80</sup> *Duke of Portland v Topham* (1864) 11 HL Cas 32, 54; *Vatcher v Paull* [1915] AC 372, 378; *Redman v Permanent Trustee Co of NSW* (1916) 22 CLR 84

<sup>81</sup> *Re Burton; Wily v Burton* (1994) 126 ALR 557 at 559-560 (Davies J)

<sup>82</sup> *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, 271 [33]

<sup>83</sup> (2010) 242 CLR 254, 270 [30] (French CJ, Gummow, Heydon, Crennan and Bell JJ)



5 (a) the status of "Active Worker" is referred to only twice in the trust deed, once in the definition of Worker,<sup>84</sup> and once in cl 8.1. In respect of any employee for whom contributions had been paid to the fund and an account created under cl 11.2, there is no basis on which the trustee could properly decline to classify the employee as an Active Worker entitled to benefits pursuant to cl 8 other than that in cl 12, namely, that the Worker had become unidentifiable so that benefits cannot be paid in respect of any relevant Worker's Account.

10 (b) Clause 7.1(e) is not a power but a direction, to allocate the burden of expenses among Worker's Accounts in a manner that is "appropriate or equitable." It is not a power to adventitiously vary the entitlements of a Worker. The suggestion in [110] of the joint judgment that it "provides a broad discretion to adjust the credit standing to the account of any Worker" is wrong.

15 (c) While clause 8.3 uses the words "up to and including," in the context of the instrument and having regard to the purpose of the fund, these words are to be read not as conferring a discretion on the trustee but as meaning "not less than." A construction which allowed any part of the amount to the credit of the Worker's Account to accrue to anyone other than the Worker or the Worker's dependants would be inconsistent with the purpose of the scheme and the deed, and is not to be adopted.<sup>85</sup> If (to the contrary) the expression were to be read as granting a discretion to the trustee to pay less than the full relevant amount, the discretion would necessarily be one to be exercised for the proper purposes of the trust, not arbitrarily.

20 52. More carefully considered, none of the "discretions" relied on in the joint judgment make the interest of a Worker and his or her dependants uncertain, or diminish the appropriateness of referring to that interest as a "unit" for Div 6C purposes.

(g) *Notice of Contention*

25 53. The Respondent has filed a Notice of Contention asserting that the Full Court should have held that the terms of the EISS trust did not confer on Workers "a beneficial

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<sup>84</sup> A Worker is either an Active Worker, an Inactive Worker, or an employee of a Member who has agreed to the employee being treated as a worker. Contrary to [108] of the joint judgment, the definition of "Inactive Worker" has no work to do (the term appears only in its own definition and in the definition of "worker," AB xx and xx) save implicitly to be a potential part of the mechanism in cl 12.

<sup>85</sup> *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2005) 256 CLR 104, 116-7 [46]-[51] (French CJ, Nettle and Gordon JJ)

interest, howsoever described, in any of the income or property of the trust estate.”  
The contention is inconsistent with authority, particularly with the decision of this Court  
in *Finch v Telstra Super Pty Ltd*<sup>86</sup> quoted at [49] above, and should be rejected.

**Part VII – Legislation**

- 5 54. The relevant statutory provisions as in force in the years to which the ruling relates (as  
presently in force, materially unchanged) are the sections of the Income Tax Assessment  
Act 1936 which are attached as Appendix A.

**Part VIII – Orders sought**

55. The Appellant seeks the following orders:
- 10 (a) Appeal allowed.
- (b) Set aside the orders of the Full Court of the Federal Court of Australia made 14  
December 2015 in proceeding VID 292 of 2015, and in place thereof order that  
the appeal to that Court be dismissed.
- (c) The Respondent pay the Appellant’s costs.

15 **Part IX – Estimate**

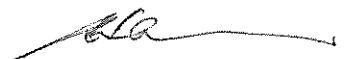
56. The estimate of hours required for the presentation of the appellant’s oral argument  
(including reply) is 2.5 hours.

Dated: 1 September 2016

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<sup>86</sup> (2010) 242 CLR 254, 270 [30] (French CJ, Gummow, Heydon, Crennan and Bell JJ)



# Income Tax Assessment Act 1936

No. 27, 1936

## Compilation No. 123

Compilation date:	12 December 2014
Includes amendments up to:	Act No. 133, 2014
Registered:	5 January 2015

## Part III—Liability to taxation

### Division 6C—Income of certain public trading trusts

#### 102M Interpretation

In this Division, unless the contrary intention appears:

*arrangement* has the same meaning as in the *Income Tax Assessment Act 1997*.

*eligible investment business* means one or more of:

- (a) investing in land for the purpose, or primarily for the purpose, of deriving rent; or
- (b) investing or trading in any or all of the following:
  - (i) secured or unsecured loans (including deposits with a bank or other financial institution);
  - (ii) bonds, debentures, stock or other securities;
  - (iii) shares in a company, including shares in a foreign hybrid company (as defined in the *Income Tax Assessment Act 1997*);
  - (iv) units in a unit trust;
  - (v) futures contracts;
  - (vi) forward contracts;
  - (vii) interest rate swap contracts;
  - (viii) currency swap contracts;
  - (ix) forward exchange rate contracts;
  - (x) forward interest rate contracts;

- (xi) life assurance policies;
- (xii) a right or option in respect of such a loan, security, share, unit, contract or policy;
- (xiii) any similar financial instruments; or
- (c) investing or trading in financial instruments (not covered by paragraph (b)) that arise under financial arrangements, other than arrangements excepted by section 102MA.

**excluded rent** means rent worked out by reference to the profits or receipts of an entity that uses any of the relevant land under an arrangement that is designed to result in the transfer of all, or substantially all, of what would otherwise be the profits of the entity to another party to the arrangement.

**financial arrangement** has the same meaning as in the *Income Tax Assessment Act 1997*.

**land** includes an interest in land and fixtures on land.

**net income**, in relation to a public trading trust, means the total assessable income of the trust calculated under this Act as if the trustee were a taxpayer in respect of that income and were a resident, less all allowable deductions.

A public trading trust may be required to work out its net income in a special way by Division 266 or 267 in Schedule 2F.

**prescribed trust estate** means a trust estate that is, or has been, a public trading trust in relation to any year of income.

**property** includes a chose in action and also includes any estate, interest, right or power, whether at law or in equity, in or over property.

**relevant year of income** means the year of income that commenced on 1 July 1985 or a subsequent year of income.

**trading business** means a business that does not consist wholly of eligible investment business.

**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.

**unitholder**, in relation to a prescribed trust estate, means the holder of a unit or units in the prescribed trust estate.

**unit trust dividend** means:

- (a) any distribution made by the trustee of a prescribed trust estate, whether in money or in other property, to a unitholder; and
- (b) any amount credited by the trustee of a prescribed trust estate to a unitholder as a unitholder;

but does not include:

- (c) money paid or credited, or property distributed, by the trustee of a prescribed trust estate to the extent to which the money or property is attributable to profits arising during a year of income in relation to which the prescribed trust estate was not a public trading trust; or
- (d) money paid or credited, or property distributed, 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 or credited or the property distributed represents money paid to, or property transferred to, the trustee for the purpose of the creation or issue of that unit; and
- (ii) the amount of the money paid or credited or the value of the property distributed, as the case may be, does not exceed the amount of the money paid to the trustee, or the value, at the time of transfer, of the property transferred to the trustee, for the purpose of the creation or issue of that unit.

## 102MA Arrangements not covered

- (1) For the purposes of paragraph (c) of the definition of *eligible investment business* in section 102M, the excepted arrangements are those specified in this section.

Note: This section does not affect an arrangement that satisfies paragraph (a) or (b) of that definition.

### *Leasing or property arrangement*

- (2) A right or obligation arising under:
- (b) an arrangement to which Division 240 of the *Income Tax Assessment Act 1997* (about arrangements treated as a sale and loan) applies; or
  - (ba) an arrangement to which Division 242 (about leases of luxury cars) of the *Income Tax Assessment Act 1997* applies; or
  - (c) a financial arrangement in the form of a loan that is taken to exist by subsection 250-155(1) of the *Income Tax Assessment Act 1997*; or
  - (d) an arrangement that, in substance or effect, depends on the use of a specific asset that is:
    - (i) real property; or
    - (ii) goods or a personal chattel (other than money or a money equivalent); or
    - (iii) intellectual property;
 and gives a right to control the use of the asset; or
  - (e) an arrangement that is a licence to use:
    - (i) real property; or
    - (ii) goods or a personal chattel (other than money or a money equivalent); or
    - (iii) intellectual property.

### *Interest in partnership or trust estate*

- (3) A right carried by an interest in a partnership or a trust estate, or an obligation that corresponds to such a right, if:
- (a) there is only one class of interest in the partnership or trust estate; or
  - (b) the interest is an equity interest in the partnership or trust estate; or
  - (c) for a right or obligation relating to a trust estate—the trust estate is managed by a funds manager or custodian, or a responsible entity (as defined in the *Corporations Act 2001*) of a registered scheme (as so defined).

### *General insurance policies*

- (4) A right or obligation under a general insurance policy.

### *Guarantees and indemnities*

- (5) A right or obligation under a guarantee or indemnity unless:
- (a) the financial arrangement is one where:
    - (i) its value changes in response to changes in a specified variable or variables (such as an interest rate, foreign exchange rate, credit rating, index or commodity or financial instrument price); and
    - (ii) there is no requirement for a net investment, or there is such a requirement but the net investment is smaller than would be required for other types of financial arrangement that would be expected to have a similar response to changes in market factors; or
  - (b) the guarantee or indemnity is given or entered into in relation to a financial arrangement.

### *Superannuation and pension income*

- (6) A right to receive, or an obligation to provide, a financial benefit (as defined in the *Income Tax Assessment Act 1997*) if the right or obligation arises from a person's membership of a superannuation or pension scheme.

### *Retirement village arrangements*

- (7) A right or obligation arising under:
- (a) a contract that gives rise to a right to occupy residential premises in a retirement village (as defined in the *A New Tax System (Goods and Services Tax) Act 1999*); or
  - (b) a contract under which a resident of such a retirement village is provided with general or personal services in the retirement village.

## **102MB Investing in land**

### *Moveable property*

- (1) For the purposes of this Division, investments in moveable property, being property that is:
- (a) incidental to and relevant to the renting of land; and
  - (b) customarily supplied or provided in connection with the renting of land; and
  - (c) ancillary to the ownership and use of land;
- are taken to be investments in land.

### *Safe harbour rule*

- (2) For the purposes of this Division, an entity's investments in land are taken to be for the purpose, or primarily for the purpose, of deriving rent during a year of income if:
- (a) each of those investments is for purposes (other than the purpose of trading) that include a purpose of deriving rent; and
  - (b) at least 75% of the gross revenue from those investments for the year of income consists of rent (except excluded rent); and
  - (c) none of the remaining gross revenue from those investments for the year of income is:
    - (i) excluded rent; or

- (ii) from the carrying on of a business that is not incidental and relevant to the renting of the land.
- (3) In working out the gross revenue referred to in paragraph (2)(b), payments for the provision of services that:
  - (a) are incidental to and relevant to the renting of land; and
  - (b) are ancillary to the ownership and use of the land;are taken to be rent derived from the land.

Example: Payments as reimbursement for expenses incurred by the lessor in providing security services for a shopping centre would be covered by this subsection.

- (4) In working out the gross revenue referred to in subsection (2), disregard any capital gains and capital losses from a CGT event arising from a disposal or other realisation of ownership of land.

#### *Meaning of entity*

- (5) In this section:

*entity* has the same meaning as in the *Income Tax Assessment Act 1997*.

### **102MC When trading business not carried on**

A trustee of a unit trust that would, apart from this section, carry on a trading business at a time during a year of income is taken for the purposes of this Division not to carry on a trading business at a time during that year if, for that year, not more than 2% of the gross revenue of the trustee (as trustee of the unit trust) was income from things other than eligible investment business (except from the carrying on of a business that is not incidental and relevant to the eligible investment business).

### **102MD Application of Division to trustees etc. of exempt life assurance funds and superannuation funds**

This Division applies to the person in whom the assets of a fund are vested (whether or not as trustee) in the same way as this Division applies to an exempt entity, if the fund is:

- (a) a fund maintained by a life assurance company solely in respect of a class of life assurance business that consists of business of, or in relation to, the issuing of, or the undertaking of liability under:
  - (i) exempt life insurance policies (within the meaning of the *Income Tax Assessment Act 1997*); or
  - (ii) complying superannuation/FHSA life insurance policies (within the meaning of that Act); or
- (b) a complying superannuation fund, a complying approved deposit fund or a pooled superannuation trust.

### **102N Trading trusts**

- (1) For the purposes of this Division, a unit trust is a trading trust in relation to a year of income if, at any time during the year of income, the trustee:
  - (a) carried on a trading business; or
  - (b) controlled, or was able to control, directly or indirectly, the affairs or operations of another person in respect of the carrying on by that other person of a trading business.

- (2) Despite paragraph (1)(b), a unit trust is not a trading trust only because it has acquired ownership interests (including a controlling interest) in, or controls:
- (a) a foreign entity whose business, when considered together with the businesses of entities that the foreign entity controls or is able to control, directly or indirectly, consists primarily of investing in land outside Australia for the purpose, or primarily for the purpose, of deriving rent; or
  - (b) a foreign entity controlled, or able to be controlled, directly or indirectly, by an entity covered by paragraph (a).
- (3) In this section:

*entity* has the same meaning as in the *Income Tax Assessment Act 1997*.

### **102NA Certain interposed trusts not trading trusts**

- (1) A unit trust is not a trading trust for the purposes of this Division in relation to a year of income if:
- (a) the trust is an interposed trust in relation to a scheme for reorganising the affairs of stapled entities referred to in Subdivision 124-Q of the *Income Tax Assessment Act 1997* in relation to the year of income or an earlier year of income; and
  - (b) a roll-over was obtained by any entity under that Subdivision of that Act in relation to the scheme for the year of income or that earlier year of income; and
  - (c) the condition in subsection (2) is satisfied.
- (2) The trustee of the trust must not, at any time during the year of income:
- (a) carry on a trading business; or
  - (b) control, or be able to control, directly or indirectly, the affairs or operations of another entity that carries on a trading business, other than:
    - (i) a company that was, before the scheme was completed, one of the stapled entities referred to in Subdivision 124-Q of the *Income Tax Assessment Act 1997*; or
    - (ii) a subsidiary of one of those stapled entities that is a company, or an entity that is controlled or able to be controlled, directly or indirectly, by that company; or
    - (iii) a trust whose trustee was, before the scheme was completed, assessed and liable to pay tax under Division 6B or this Division and that was, before the scheme was completed, one of those stapled entities; or
    - (iv) an entity that is controlled or able to be controlled, directly or indirectly, by the trust referred to in subparagraph (iii);in relation to the year of income or an earlier year of income.

- (3) In this section:

*entity* has the same meaning as in the *Income Tax Assessment Act 1997*.

### **102P Public unit trusts**

- (1) For the purposes of this Division, but subject to the succeeding provisions of this section, 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.
- (2) For the purposes of this Division, but subject to the succeeding provisions of this section, a unit trust is also a public unit trust in relation to a year of income if:
- (a) at any time during the year of income, an exempt entity or exempt entities held, or had the right to acquire or become the holder or holders of, a unit or units in the unit trust that entitled the holder or holders to not less than 20% of:
    - (i) the beneficial interests in the income of the unit trust; or
    - (ii) the beneficial interests in the property of the unit trust;
  - (b) not less than 20% of the total of money paid or credited by the trustee of the unit trust during the year of income to unitholders as unitholders was paid or credited to an exempt entity or exempt entities; or
  - (c) by reason of:
    - (i) any provision in the instrument by which the trust was created, or any contract agreement or instrument authorising the variation or abrogation of the rights attaching to any of the units in the unit trust or relating to the conversion, cancellation, extinguishment or redemption of any such units;
    - (ii) any contract, agreement, option or instrument under which a person has power to acquire a unit or units in the unit trust; or
    - (iii) any power, authority or discretion in a person in relation to the rights attaching to any of the units in the unit trust;  
the rights attaching to any of the units in the unit trust were, at any time during the year of income, capable of being varied or abrogated in such a manner (notwithstanding that they were not in fact varied or abrogated in that manner) that:
    - (iv) units in the unit trust that entitled the holder or holders to not less than 20% of:
      - (A) the beneficial interests in the income of the unit trust; or
      - (B) the beneficial interests in the property of the unit trust;would have been held by an exempt entity or exempt entities;
    - (v) not less than 20% of the total of money paid or credited by the trustee of the unit trust during the year of income to unitholders as unitholders would have been paid or credited to an exempt entity or exempt entities; or
    - (vi) in the case where no money was paid or credited by the trustee of the unit trust during the year of income to unitholders as unitholders—if money had been so paid or credited by the trustee of the unit trust during the year of income, not less than 20% of the amount of that money would have been paid or credited to an exempt entity or exempt entities.
- (3) A unit trust shall not be taken to be a public unit trust in relation to a year of income by reason that units in the unit trust were offered to the public at any time during the year of income if the Commissioner is of the opinion that any of those units were offered to the public for the purpose, or for purposes that included the purpose, of enabling the unit trust to be treated as a public unit trust for the purposes of this Division in relation to the year of income.
- (4) Subject to subsection (5), a unit trust that, but for this subsection and subsection (7), would be a public unit trust in relation to a year of income by

virtue only of subsection (1) shall be deemed not to be a public unit trust in relation to the year of income if, at any time during the year of income, one person or persons not more than 20 in number held, or had the right to acquire or become the holder or holders of, a unit or units in the unit trust that entitled the holder or holders thereof to not less than 75% of:

- (a) the beneficial interests in the income of the unit trust; or
- (b) the beneficial interests in the property of the unit trust.

(5) Subject to subsection (7), where by virtue of subsection (4), a unit trust would, but for this subsection, be deemed not to be a public unit trust in relation to a year of income by reason that, at any time during the year of income, one person or persons not more than 20 in number held, or had the right to acquire or become the holder or holders of, the unit or units referred to in subsection (4) and the Commissioner is of the opinion that, having regard to:

- (a) the length of the period or the aggregate of the lengths of the periods in the year of income during which one person or persons not more than 20 in number held, or had the right to acquire or become the holder or holders of, the unit or units referred to in subsection (4); and
- (b) any other matters that the Commissioner considers relevant;

it is reasonable that the unit trust should be treated as a public unit trust in relation to the year of income, the unit trust shall be deemed to be a public unit trust in relation to the year of income.

(6) For the purposes of subsections (4) and (5), a person (in this subsection referred to as the *transferee*) to whom a right to acquire or become the holder of a unit in a unit trust is granted or transferred shall be deemed not to have such a right if the Commissioner is of the opinion, having regard to the financial circumstances of the transferee and to any other matters that the Commissioner considers relevant, that it was not intended by the person who granted or transferred the right to the transferee that the right would be exercised by the transferee.

(7) Subject to subsection (8), a unit trust that, but for this subsection, would be a public unit trust in relation to a year of income by virtue only of subsection (1), shall be deemed not to be a public unit trust in relation to that year of income if:

- (a) not less than 75% of the total of money paid or credited by the trustee of the unit trust during the year of income to unitholders as unitholders was paid or credited to one person or persons not more than 20 in number; or
- (b) by reason of:

- (i) any provision in the instrument by which the trust was created, or any contract, agreement or instrument authorising the variation or abrogation of the rights attaching to any of the units in the unit trust or relating to the conversion, cancellation, extinguishment or redemption of any such units;
- (ii) any contract, agreement, option or instrument under which a person has power to acquire a unit or units in the unit trust; or
- (iii) any power, authority or discretion in a person in relation to the rights attaching to any of the units in the unit trust;

the rights attaching to any of the units in the unit trust were, at any time during the year of income, capable of being varied or abrogated in such a manner (notwithstanding that they were not in fact varied or abrogated in that manner) that:

- (iv) units in the unit trust that entitled the holder or holders thereof to not less than 75% of:

- (A) the beneficial interests in the income of the unit trust; or
  - (B) the beneficial interests in the property of the unit trust;
- would have been held by one person or persons not more than 20 in number;
- (v) not less than 75% of the total of money paid or credited by the trustee of the unit trust during the year of income to unitholders as unitholders would have been paid or credited to one person or persons not more than 20 in number; or
  - (vi) in the case where no money was paid or credited by the trustee of the unit trust during the year of income to unitholders as unitholders—if money had been so paid or credited by the trustee of the unit trust during the year of income, not less than 75% of the amount of that money would have been paid or credited to one person or persons not more than 20 in number.
- (8) A unit trust shall not be deemed by subsection (7) not to be a public unit trust in relation to a year of income by reason that rights attaching to any of the units in the unit trust were, at any time during the year of income, capable of being varied in the manner mentioned in paragraph (7)(b) if the Commissioner is of the opinion that the person or persons who were able to vary the rights in that manner intended not to vary the rights in that manner during the year of income.
- (9) For the purposes of subsections (1) and (3), units in a unit trust shall be taken to be offered to the public if and only if:
- (a) an offer is made to the public or to a section of the public to subscribe for or purchase the units; or
  - (b) an invitation is issued to the public or to a section of the public to make offers to subscribe for or purchase the units.
- (10) For the purposes of this section, where any units in a unit trust (except a foreign entity to which subsection 102N(2) applies) are held by the trustee of another trust estate, a person who has a beneficial interest in property of that other trust estate that consists of those units (whether or not that beneficial interest is deemed to be held by virtue of the application of this subsection) shall be deemed to hold those units.
- (11) For the purposes of this section, a distribution of property of a unit trust to a unitholder shall be taken to be a payment of money to the unitholder of an amount equal to the value of the property.
- (12) For the purposes of this section:
- (a) a person, whether or not he or she holds units in the unit trust concerned;
  - (b) his or her relatives; and
  - (c) in relation to any units in respect of which they are such nominees, his or her nominees and the nominees of any of his or her relatives;
- shall be deemed to be one person.

### **102Q Resident unit trusts**

For the purposes of this Division, a unit trust is a resident unit trust in relation to a year of income if, at any time during the year of income:

- (a) either of the following conditions was satisfied:
  - (i) any property of the unit trust was situated in Australia;
  - (ii) the trustee of the unit trust carried on business in Australia; and

- (b) either of the following conditions was satisfied:
  - (i) the central management and control of the unit trust was in Australia;
  - (ii) a person who was a resident or persons who were residents held more than 50% of:
    - (A) the beneficial interests in the income of the unit trust; or
    - (B) the beneficial interests in the property of the unit trust.

## 102R Public trading trusts

- (1) A unit trust is a public trading trust in relation to a relevant year of income if:
  - (a) where the relevant year of income is the year of income that commenced on 1 July 1985, the year of income commencing on 1 July 1986 or the year of income commencing on 1 July 1987:
    - (i) the unit trust was established after 19 September 1985;
    - (ii) the unit trust is a public unit trust in relation to the relevant year of income;
    - (iii) the unit trust is a trading trust in relation to the relevant year of income;
    - (iv) 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 public trading trust in relation to a year of income preceding the relevant year of income; and
    - (v) the unit trust is not a corporate unit trust within the meaning of Division 6B in relation to the relevant year of income; or
  - (b) where the relevant year of income is the year of income commencing on 1 July 1988 or a subsequent year of income:
    - (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:
      - (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.
- (2) Where:
  - (a) a unit trust would, but for this subsection, be a unit trust established on or before 19 September 1985;
  - (b) the unit trust was not a trading trust on 19 September 1985; and
  - (c) the unit trust became a trading trust on a day after 19 September 1985;the unit trust shall be taken, for the purposes of this section, to have been established after 19 September 1985.
- (3) For the purposes of subsection (2), a unit trust is a trading trust on a particular day if, on that day, the trustee:
  - (a) carries on a trading business; or

(b) controls or is able to control, directly or indirectly, the affairs or operations of another person in respect of the carrying on by that other person of a trading business.

(4) Where:

- (a) a unit trust would, but for this subsection, be a unit trust established on or before 19 September 1985;
- (b) if the year of income in which 19 September 1985 occurred had ended on that date, the unit trust would not have been a public unit trust in relation to that year of income; and
- (c) the Commissioner is satisfied that, at no time on or before that date, was it the intention of the trustee of the unit trust that the unit trust would become a public unit trust in relation to a year of income;

the unit trust shall be taken, for the purposes of this section, to have been established after 19 September 1985.

### **102S Taxation of net income of public trading trust**

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.

### **102T Modified application of Act in relation to certain unit trusts**

- (1) For the purpose of the application of this Act in relation to the imposition, assessment and collection of tax in respect of:
- (a) the net income of a public trading trust; and
  - (b) the income or assessable income of a unitholder in a prescribed trust estate;
- the following provisions of this section have effect.

Note: Under Subdivision 713-C of the *Income Tax Assessment Act 1997*, this Act applies differently in relation to a public trading trust that chooses to form a consolidated group.

- (3) For the purposes of the application of sections 46A and 46B in accordance with subsection (2), the Commissioner may be satisfied, in relation to a unit trust dividend, that a transaction, operation, undertaking, scheme or arrangement was by way of dividend stripping or similar to a transaction, operation, undertaking, scheme or arrangement by way of dividend stripping if the Commissioner would have been satisfied, had the unit trust dividend been a dividend paid by a company, that the transaction, operation, undertaking, scheme or arrangement would have been a transaction, operation, undertaking, scheme or arrangement by way of dividend stripping or, as the case requires, would have been similar to a transaction, operation, undertaking, scheme or arrangement by way of dividend stripping.
- (4) For the purposes of subsections (2) and (3):
- (a) the reference in paragraph (2)(a) to a prescribed trust estate includes a reference to a trust estate that is a prescribed trust estate for the purposes of Division 6B;
  - (b) the reference in paragraph (2)(b) to a public trading trust includes a reference to a unit trust that is a corporate unit trust for the purposes of Division 6B; and

- (c) references in those subsections to a unit trust dividend include references to a unit trust dividend within the meaning of Division 6B.
- (6) For the purposes of the application of the definition of *year of income* in subsection 6(1), the reference in that definition to a company (except a company in the capacity of a trustee) shall be read as including a reference to a public trading trust or, as the context requires, to the trustee of a public trading trust.
- (7) A reference in the definition of *person* in subsection 6(1) to a company shall be read as including a reference to a public trading trust or, as the context requires, to the trustee of a public trading trust.
- (8) The reference in section 158 to the taxable income of a company except income in respect of which it is assessable as trustee shall be read as including a reference to the net income of a public trading trust.
- (9) A reference in section 355-35 of the *Income Tax Assessment Act 1997* to a body corporate is to be read as including a reference to a body corporate acting in its capacity as trustee of a public trading trust.
- (11) A reference in subsection 44(1) or section 128B of this Act, in subsection 840-805(3) of the *Income Tax Assessment Act 1997*, in Subdivision 12-F in Schedule 1 to the *Taxation Administration Act 1953* (except section 12-225) or in subsection 12-390(10) in that Schedule, to a company or to a company that is a resident shall be read as including a reference to a prescribed trust estate or, as the context requires, to the trustee of a prescribed trust estate.
- (12) A reference in the definition of *paid* in subsection 6(1) or 44(1), or in section 128A or 128B, of this Act, or in Subdivision 12-F in Schedule 1 to the *Taxation Administration Act 1953* (except section 12-225), to a dividend shall be read as including a reference to a unit trust dividend.
- (13A) Subdivision 12-F in Schedule 1 to the *Taxation Administration Act 1953* applies in respect of units in a prescribed trust estate in the same way as it applies in respect of shares.
- (14) A reference in subsection 44(1) to a shareholder in relation to a company shall be read as including a reference to a unitholder in a prescribed trust estate.
- (16) A reference in section 6B, Division 6 or subsection 128A(3) or 157(3) of this Act, Subdivision 840-M of the *Income Tax Assessment Act 1997* or Subdivision 12-H in Schedule 1 to the *Taxation Administration Act 1953* to a trust estate or to a trustee shall be read as not including a reference to a trust estate that is a public trading trust or to the trustee of a public trading trust, as the case may be.
- (19) For the purposes of subsection 44(1), a unit trust dividend paid by the trustee of a prescribed trust estate out of 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.
- (20) For the purposes of section 128B, a unit trust dividend paid to a unitholder in a prescribed trust estate shall be deemed to be income derived by the unitholder at the time at which the unit trust dividend is paid.

*Non-unit dividend*

- (21) Subsections (2), (3), (4) and (20) apply as if references in those subsections to a unit trust dividend included a reference to a non-unit dividend.
- (22) For the purposes of subsection 44(1), a non-unit dividend paid by the trustee of a prescribed trust estate out of corpus of the trust estate is taken, to the extent to which the non-unit dividend is attributable to a source in Australia, to be derived from a source in Australia.
- (22A) For the purposes of subsection 44(1), a non-unit dividend paid by the trustee of a prescribed trust estate out of corpus of the trust estate is taken, to the extent to which the non-unit dividend is attributable to a source outside Australia, to be derived from a source outside Australia.
- (23) If a provision of this Act that applies to a dividend:
- (a) is taken under this section to apply to a unit trust dividend; and
  - (b) applies to a non-share dividend in the same way as it applies to a dividend;
- that provision also applies to a non-unit dividend in the same way as it applies to a dividend.

*Non-unit equity interest*

- (24) If a provision of this Act that applies to a share:
- (a) is taken under this section to apply to a unit in a prescribed trust estate; and
  - (b) applies to a non-share equity interest in a company in the same way as it applies to a share;
- that provision also applies to a non-unit equity interest in a prescribed trust estate in the same way as it applies to a share.

*Equity holder*

- (25) Subsections (1), (2), (18) and (20) apply as if references in those subsections to a unitholder included a reference to an equity holder who is not a unitholder.
- (26) If a provision of this Act that applies to a shareholder:
- (a) is taken because of this section to apply to a unitholder in a prescribed trust estate; and
  - (b) applies to an equity holder in a company who is not a shareholder in the same way as it applies to a shareholder;
- that provision also applies to an equity holder in a prescribed trust estate who is not a unitholder in the same way as it applies to a shareholder.

*Definitions*

- (27) In this section:

*equity holder* in a prescribed trust estate means the holder of an equity interest in the prescribed trust estate.

*equity interest* in a prescribed trust estate means:

- (a) a unit in the prescribed trust estate; or
- (b) any other interest that would be an equity interest in the prescribed trust estate if references in Division 974 of the *Income Tax Assessment Act 1997* to a company included references to a prescribed trust estate or, as the context requires, to the trustee of a prescribed trust estate.

*non-unit dividend* means a unit trust distribution that is not a unit trust dividend.

*non-unit equity interest* in a prescribed trust estate means an equity interest in the prescribed trust estate that is not a unit in the prescribed trust estate.

*unit trust distribution* means a distribution, or an amount credited, that would be a unit trust dividend if references in the definition of *unit trust dividend* in section 102M to a unitholder were references to an equity holder.