

**IN THE HIGH COURT OF AUSTRALIA  
MELBOURNE REGISTRY**

No. M82 of 2014

ON APPEAL FROM THE SUPREME COURT OF VICTORIA, COURT OF APPEAL

BETWEEN:

**MARK KORDA**  
First Appellant

and

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**BRIAN WEBSTER**  
Second Appellant

and

**S.E.A.S. SAPFOR FORESTS PTY LTD**  
(ACN 007 872 120)  
Third Appellant

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and

**S.E.A.S. SAPFOR HARVESTING PTY LTD**  
(ACN 007 511 211)  
Fourth Appellant

and

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**GUNNS LIMITED**  
(ACN 009 478 148)  
Fifth Appellant

and

**AUSTRALIAN EXECUTOR TRUSTEES (SA) LIMITED**  
(ACN 007 870 644)  
Respondent

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**APPELLANTS' SUBMISSIONS**

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Date of document: 19 September 2014  
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### Part I: Certification

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

### Part II: Issues

2. The constituent documents establishing a forestry investment scheme created an express trust of the net timber proceeds and “land value” payments when received by the trustee for the covenantholders from the Forest Company. The issues are:

- (a) Is an unstated and enlarged trust or trusts to be imputed over:

- (i) the timber proceeds before payment to the trustee?

- (ii) the proceeds of the sale of land on which the scheme was conducted?

- (b) Does commercial necessity mandate the imputation of the unstated and enlarged trust or trusts?

### Part III: Section 78B of the *Judiciary Act 1903 (Cth)*

3. Consideration has been given to the question of whether notice pursuant to s.78B of the *Judiciary Act 1903 (Cth)* should be given with the conclusion that this is not necessary.

### Part IV: Citations

4. The reasons for judgment of the primary court below are not reported in the authorised reports, but are reported as *Australian Executor Trustees (SA) Limited v Korda & Ors* (2013) 8 ASTLR 454. The medium neutral citation is *Australian Executor Trustees (SA) Limited v Korda & Ors* [2013] VSC 7. The reasons of the Court of Appeal of the Supreme Court of Victoria are not reported. The medium neutral citation is *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65.

### Part V: Facts

5. On 25 September 2012, administrators were appointed to Gunns Limited (**Gunns**) and its subsidiaries including SEAS Sapfor Forests Proprietary Limited (the **Forest Company**) and SEAS Sapfor Harvesting Proprietary Limited (the **Milling Company**). On the same day, the first and second appellants were appointed as receivers and managers of *inter alios* Gunns, the Forest Company and the Milling Company. Subsequently, Gunns, the Forest Company and the Milling Company were placed into liquidation.
6. The respondent (**AET**) is the trustee of the Southern Australia Perpetual Forests Trust (**SAPF Trust**). The SAPF Trust is governed by a Trust Deed entered into by AET<sup>1</sup> and the Forest Company on 6 March 1964.

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<sup>1</sup> At the time of entry into the Trust Deed, AET was known as Farmers’ Co-operative Executors and Trustees Limited.

7. The Milling Company is not a party to the Trust Deed. On the same day as the Trust Deed was executed, AET entered into a Tripartite Agreement with the Forest Company and the Milling Company (**Tripartite Agreement**).
8. The Forest Company raised funds from the public from time to time by issuing what were described under the relevant prospectuses as “Covenants”.<sup>2</sup> The purchase of a “Covenant” from the Forest Company conferred a right upon a “covenantholder” to the net timber proceeds attributable to their interest in the particular planting year for which they applied.<sup>3</sup> Certain covenantholders were also entitled to a payment in relation to the value of the relevant land upon clear felling of the timber or cessation of the covenant.<sup>4</sup>
9. Pursuant to the Tripartite Agreement, the Milling Company was engaged by the Forest Company to provide felling and milling services and to market and sell the timber derived from the plantations.
10. AET was the trustee for the covenantholders.
11. The Trust Deed governed the means by which net timber proceeds and “land value payments” were to be paid by the Forest Company to AET, for distribution to the covenantholders. The Milling Company had separate obligations to make payments to Forest Company of net timber proceeds, pursuant to the Tripartite Agreement.
12. The relevant process in respect of the timber proceeds may be summarised as follows<sup>5</sup>: the Forest Company maintains the tree plantation for between 20 and 25 years; the Forest Company directs the Milling Company to harvest the trees; the Milling Company harvests the trees; the Milling Company has the exclusive right to sell standing timber and pay the purchase price to the Forest Company; monies are received by the Milling Company from harvesting activities prior to 30 September in any year; the Milling Company then deducts a percentage of the proceeds plus certain costs; the Milling Company pays the balance of proceeds to the Forest Company in five tranches (April 15%, May 15%, June 15% July 15%, August 40%) in the year following the 30 September date; the Forest Company makes certain deductions from the monies received from the Milling Company and pays the balance to AET within 30 days of receipt from the Milling Company in the same five tranches and in the same proportions; and AET distributes the monies to covenantholders.

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<sup>2</sup> The Covenants for the pre 1982 planting years (i.e. where there is no land value payment entitlement) are contained within schedules at the end of the Trust Deed and within the 1980 Prospectus at p.7 and 8 and the 1984 Prospectus at p. 7 to 9. The Covenants for the 1982 and 1983 planting years (i.e. where there is a land value payment entitlement) are also contained within schedules at the end of the Trust Deed and within the 1984 Prospectus at p.10 to 12.

<sup>3</sup> Clause 1 and 4 of the Covenants. See for example, the covenant at p.7 and p.10 of the 1984 Prospectus.

<sup>4</sup> Clauses 1 and 4 of the Covenants. See for example, the covenant at p.10 of the 1984 Prospectus. See also clauses 27 and 29 of the Trust Deed.

<sup>5</sup> *Australian Executor Trustees (SA) Limited v Korda & Ors* [2013] VSC 7 at [17 (d)-(j)] per Sifris J.

13. Pursuant to the terms of the Trust Deed, a similar process was to be adopted in respect of the land value payments.<sup>6</sup> However, the provisions of the Tripartite Agreement were not engaged, and Milling Company was not involved.
14. Certain of the Gunns companies owned land (**GT Land**) and trees (**GT Trees**). On 15 March 2012, the Forest Company, Milling Company and *inter alios* AET, entered into a Tree Sale Agreement for the sale of the GT Trees (**Tree Sale Agreement**). The Tree Sale Agreement provided for the payment of a total of \$33,999,998 to the Milling Company (**Tree Sale Proceeds**). At the same time, a number of entities including the Forest Company entered into separate contracts for the sale of the GT Land (**Sale of Land Agreements**). The total consideration payable to the Forest Company was \$53,356,000 (**Land Sale Proceeds**).
15. Following the administration and receivership of Gunns and its subsidiaries, AET filed an originating motion seeking declarations as to its rights to the proceeds of the Tree Sale Agreement and the Sale of Land Agreements.
16. The trial judge found that the Tree Sale Proceeds and Land Sale Proceeds were held on trust for the covenantholders.
17. The appellants were granted leave to appeal. By majority (Maxwell P and Osborn JA) the Court of Appeal dismissed the appeal<sup>7</sup> on the grounds that, *inter alia*, it was a matter of commercial necessity that the investments made by covenantholders not be at risk by reason of extraneous activities of the Forest Company and the Milling Company; if a representative of the commercial interests of investors had been a participant in the drawing up of the Trust Deed and Tripartite Agreement, there was every likelihood that express provision would have been made to protect against the risk of the Forest Company or the Milling Company becoming insolvent; the language of the prospectus created an expectation that a covenantholder would obtain a beneficial interest in the GT Land; and the Trust Deed and Tripartite Agreement were consistent with and supported that analysis of the intention of the parties. For these reasons, the majority held that the trial judge was correct to find the existence of an “enlarged trust”.<sup>8</sup>
18. Robson AJA dissented, holding that the proceeds from the harvesting, milling and sale of timber products were not held on trust before the net timber proceeds were paid to AET.<sup>9</sup> His Honour also held that the plantation lands and therefore the Land Sale Proceeds were not at any stage held on trust for the covenantholders.<sup>10</sup> The main grounds of his Honour’s conclusions were that the Trust Deed and Tripartite Agreement did not make any reference to the timber sale proceeds being held on

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<sup>6</sup> Trust Deed clause 28(b).

<sup>7</sup> *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65.

<sup>8</sup> *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [64] per Maxwell P and Osborne JA, see also reasons of the trial judge, paras [75] and [88].

<sup>9</sup> *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [248] per Robson AJA.

<sup>10</sup> *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [248] per Robson AJA.

10 trust by the Forest Company or Milling Company, despite expressly establishing such a trust once the net timber proceeds were paid to AET;<sup>11</sup> that if it was intended that the scheme as a whole was to afford covenantholders the protection of a trust at all stages, this was an "extraordinary omission" from the "detailed and lengthy scheme documents";<sup>12</sup> the fact that the Tripartite Agreement provided for the moneys payable by the Milling Company to the Forest Company to be paid in five instalments which carried with it the implication that the Milling Company was able to use those moneys as it saw fit in the interim;<sup>13</sup> the provision of the Tripartite Agreement preventing payment of a dividend made no commercial sense if the Tree Sale Proceeds were held on trust for the covenantholders;<sup>14</sup> the parties made "express and precise provision" for AET to hold monies in separate trust accounts, without a corresponding obligation being placed on the Forest Company or Milling Company;<sup>15</sup> the scheme was promoted on the basis that net timber proceeds paid to covenantholders were not assessable for income tax consistent with the decision in *Clowes v Federal Commissioner of Taxation*<sup>16</sup>, and that if the land, timber and timber sale proceeds were held on trust before the expenses of harvesting, milling and marketing were met, there was a "potential" or "considerable" risk that the proceeds may have been assessable;<sup>17</sup> the intention to create only contractual rights was emphasised by the description given to the investment being purchased; and the covenantholders involved in the 1982 and 1983 planting years were contractually entitled to the value of the land but not to a proprietary interest in the land.<sup>18</sup>

## Part VI: Argument

19. The majority's conclusion that the provisions of the Trust Deed and Tripartite Agreement were consistent with and supported a conclusion that the parties intended, and commercial necessity mandated, an "enlarged trust"<sup>19</sup> failed to give effect to the provisions of the Trust Deed and Tripartite Agreement and the context provided by the regulatory framework governing the issue of the relevant covenants.

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<sup>11</sup> *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [248] per Robson AJA.

<sup>12</sup> *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [255] per Robson AJA.

<sup>13</sup> *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [251] per Robson AJA.

<sup>14</sup> *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [252] per Robson AJA.

<sup>15</sup> *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [249]-[250] per Robson AJA.

<sup>16</sup> (1954) 91 CLR 209

<sup>17</sup> *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [260] per Robson AJA.

<sup>18</sup> *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [276] per Robson AJA.

<sup>19</sup> *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [41], [44] and [64] per Maxwell P and Osborn JA.

A. The Regulatory Framework

20. The Prospectuses expressly referred to the applicable regulatory framework governing the issuing of covenants.<sup>20</sup> Relevantly, the regulatory framework was as follows:
- (a) as at the date of the Trust Deed and Tripartite Agreement, the *Companies Act 1962* (SA) (**Companies Act**) and the regulations made under the *Companies Act* (**Companies Regulations**);
  - 10 (b) as at the date of the 1980 Prospectus - *Companies Act 1962-1974* (SA) (as amended by the *Companies Act Amendment Act 1979* (SA) and the *Companies Act Amendment Act, 1980* (SA)) (**1980 Act**) and regulations made under that Act (**1980 Regulations**); and
  - (c) as at the date of the 1984 Prospectus - *Companies (South Australia) Code* (**Companies Code**) and regulations made under the *Companies Code* (**1984 Regulations**).
21. There was no material difference in the applicable regulatory frameworks between 1964 and 1984.<sup>21</sup>
22. The key features of the regulatory framework were as follows:
- (a) Dual structure: a management company and a trustee were appointed in respect of each scheme;<sup>22</sup>
  - 20 (b) Issuing company must be a public company: only a public company or its agent could issue "interests" such as the covenants;<sup>23</sup>
  - (c) Approved Deed required: interests could only be issued or offered to the public for subscription or purchase by a public company in circumstances where there was an "approved deed" in force;<sup>24</sup>
  - (d) Conditions on approval: a deed was an approved deed<sup>25</sup> if:
    - (i) the Registrar had approved the deed which must contain various covenants set out in the statute and regulations<sup>26</sup> unless an exemption is obtained; and

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<sup>20</sup> See for example, 1980 Prospectus at p.20 and 1984 Prospectus at p.24.

<sup>21</sup> See, ss 76 to 89 and the Seventh Schedule to the Companies Act and regulation 12 of the Companies Regulations and compare with ss 76 to 89 and the Seventh Schedule to the 1980 Act and regulation 12 of the 1980 Regulations, and ss 166 to 177 of the Companies Code and regulations 50 and 51 and schedules 5 and 6 to the 1984 Regulations.

<sup>22</sup> See ss 76(1), 77(b) of the Companies Act and 1980 Act; ss 164(1) and 165, Companies Code.

<sup>23</sup> See section 81, Companies Act; section 81, 1980 Act; section 169 of the Companies Code.

<sup>24</sup> See section 83, Companies Act; section 83, 1980 Act; section 171, Companies Code.

<sup>25</sup> See ss 77 and 78, Companies Act; ss 77 and 78, 1980 Act; ss 165 and 166, Companies Code.

<sup>26</sup> See ss 78(2)(b) and 80, Companies Act and regulation 12, Companies Regulations; ss 78(2)(b) and 80, 1980 Act and regulation 12, 1980 Regulations; ss 166(2)(b) and 168, Companies Code and regulation 50 and Schedule 5, 1984 Regulations.

- (ii) the Minister<sup>27</sup> had granted approval to the trustee or representative appointed for the purposes of the deed acting as trustee.
- (e) Statement: before any invitation, offer or issue of covenants to the public, the management company was to issue a statement in writing.<sup>28</sup> That statement was required to include the matters prescribed.<sup>29</sup>
- (f) Management company's covenants which were prescribed for inclusion in an approved deed included covenants:<sup>30</sup>
  - (i) that it would use its best endeavours to carry on and conduct its business in a proper and efficient manner;
  - 10 (ii) that it would retain a register of holders of interests and lodge certain statements and returns with the Registrar;
  - (iii) that it would make its books available to the trustee or its auditors to the same extent as if they were directors of the company;
  - (iv) that it would give the trustee or auditor such information as it requires relating to the scheme of the company or any property of the company;
  - (v) that it would within a specified period (30 days) pay to the trustee or representative money which was payable to the trustee or representative.
- 20 (g) Trustee's covenants which were prescribed for inclusion in an approved deed included covenants:<sup>31</sup>
  - (i) that it would exercise all due diligence and vigilance in carrying out its functions and in watching the rights of holders of interests; and
  - (ii) that it would keep proper books of account which are to be audited annually and sent to holders of interests;
- (h) Trustee's breach: there was specific provision made relating to the liability of trustees<sup>32</sup> but no such provision with respect to management companies; and
- 30 (i) Penalties: penalties (for example, a \$20,000 fine or 5 years imprisonment) attached to a failure to observe or comply with, *inter alia*, the requirement to have an approved deed in force (a condition of which was the approval of

<sup>27</sup> Approval is granted by the Registrar under the Companies Act and the Commission under the 1980 Act.

<sup>28</sup> See section 82, Companies Act; section 82, 1980 Act; section 170, Companies Code.

<sup>29</sup> See section 82(2) and Seventh Schedule, Companies Act; section 82(2) and Seventh Schedule, 1980 Act; section 170(4), Companies Code and Regulation 51 and Schedule 6, 1984 Regulations.

<sup>30</sup> See ss 78(2), 80(1), 84 and 85 of the Companies Act and regulation 12(1) of the Companies Regulations; ss 78(2), 80(1), 84 and 85 of the 1980 Act and regulation 12(1) of the 1980 Regulations; ss 166(2), 168, 172 and 173 of the Companies Code and regulation 50 and Schedule 5 to the 1984 Regulations.

<sup>31</sup> See section 80, Companies Act; section 80, 1980 Act; section 168, Companies Code.

<sup>32</sup> See section 89, Companies Act; section 89, 1980 Act; section 177, Companies Code.

the trustee) in respect of interests that are offered to the public or a covenant contained "or deemed to be contained" in an approved deed.<sup>33</sup>

23. The Forest Company's role was in "management of the Trust" (clause 20B(a) of the Trust Deed). That management function reflected that it was the "management company" under the statutory regulatory regime in respect of the investment scheme overall, to which the approved deed (Trust Deed) related, including management of the net timber proceeds ultimately held by the Respondent subject to the express trust established by the Trust Deed. The management company was the company "by or on behalf of which the interests have been or are proposed to be issued".<sup>34</sup>
24. The Forest Company could not issue an invitation to purchase covenants unless at the time of issue, there was an approved deed.<sup>35</sup> The regulatory framework distinguished between the functions and obligations of the "trustee for or representative of the holders of interests"<sup>36</sup> and the "management company".<sup>37</sup> Under the statutory regime the management company's obligations were in "covenant"<sup>38</sup> and not trust and the roles of the management company and trustee could not be performed by the same entity.<sup>39</sup>
25. In the present context, it is telling that the Trust Deed<sup>40</sup> and Prospectuses<sup>41</sup> demonstrate scrupulous adherence to the requirements of the regulatory framework. Yet, the Respondent's case requires the Court to accept that the Forest Company and Milling Company were also trustees of some broader trust or trusts, with the consequence that the parties were, for the reasons set out below, in breach of the threshold statutory requirement of having an "approved deed" in place and thereby subjecting themselves to the risk of penalties including fine or imprisonment.
26. The "approved deed" was required to contain an express declaration of trust.<sup>42</sup> The statutory provisions requiring approval of a trustee and the regulations setting out

<sup>33</sup> See section 86, Companies Act; section 86, 1980 Act; section 174, Companies Code.

<sup>34</sup> See section 76(1) Companies Act and 1980 Act, s 164(1), Companies Code.

<sup>35</sup> See section 83, Companies Act; section 83, 1980 Act; section 171, Companies Code

<sup>36</sup> See ss 78 and 80, Companies Act; ss 78 and 80, 1980 Act; ss 166 and 168, Companies Code.

<sup>37</sup> See ss 76 and 80, Companies Act; ss 76 and 80, 1980 Act; ss 164 and 168, Companies Code.

<sup>38</sup> See section 80, Companies Act; section 80, 1980 Act; section 168, Companies Code. The different nature of the duties of the trustee and the management company is reinforced by the fact that the statutes make special provision with respect to a trustee's liability for "*breach of trust where the trustee or representative fails to show the degree of care and diligence required of a trustee or representative*" having regard to the terms of the deed (see section 89, Companies Act; section 89, 1980 Act; section 177, Companies Code) without including any similar provision in relation to the management company.

<sup>39</sup> See, for example, s 87, Companies Act; s 87, 1980 Act; s 175, Companies Code. See also Release 126 by the National Companies and Securities Commission at [6]-[8].

<sup>40</sup> See Schedule A.

<sup>41</sup> See Schedule B.

<sup>42</sup> For example, Schedule 5 to the 1984 Regulations states that an approved deed must contain: "a provision expressly appointing a **person** (being a person approved by the Commission) as trustee for or representative of the holders of prescribed interests" (emphasis added); and, a provision "*creating a trust or containing a declaration of trust*" and "*[w]here a trust is, or is to be, created, or a declaration of trust is, or is to be made, full particulars of the trust [are required]*" (emphasis added). See also regulation 12(1)(b) and (c) of the Companies Regulations and regulation 12(1)(b) and (c) of the 1980 Regulations.

the requirements for an approved deed both refer to a single trust and trustee.<sup>43</sup> Thus, the statutory framework contemplated a single approved trustee and a single trust and not multiple trustees or multiple trusts in relation to any scheme.

27. Further, the statutory regime required the parties to set out exhaustively the nature of the trust created under an approved deed and the property which would vest in the trustee.<sup>44</sup> Self evidently, the Trust Deed and Tripartite Agreement do not contain any reference to or detail of an express trust with respect to the property held by the Forest Company or Milling Company.
28. If, despite the regulatory regime, the Forest Company and the Respondent were intended to be co-trustees of the "Trust" referred to in clause 20B(a), the Trust Deed's failure to expressly provide for such an arrangement is inexplicable.
29. Critically, there is no express statement that land and trees the subject of the scheme are held on trust. There is no express statement that the moneys in the hands of the Milling Company and the Forest Company are held on trust. If a trust existed which was broad enough to encompass the land, trees and funds in the hands of the Forest Company and the Milling Company, the Trust Deed would have said so. Despite this, the majority endorsed<sup>45</sup> the conclusions and reasoning of the trial judge<sup>46</sup> that there was an imputed trust of the trees and land, and indeed of the invested funds too. It was from this trust that the trust of the Tree Sale Proceeds and the Land Sale Proceeds followed. As the regulatory framework reveals, comprehensive imputed trusts of this nature would have transformed the covenantholders from passive investors entitled to a share of any net proceeds ultimately produced, into beneficial owners of the forestry business itself, and would have transformed the companies from operators of the forestry business in their own right into managers and agents.
30. An imputation far more likely than the one contended for by the Respondent, is that the parties adhered to the statutory requirements by setting out the full particulars of the *one* express trust in the Trust Deed and Prospectuses. That trust (set out at clause 20A of the Trust Deed and restated in the Prospectuses) does not make reference to a trust over land, trees on the land or the funds held by the Forest Company or Milling Company.

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<sup>43</sup> See ss 77 and 79 of the Companies Act, ss 77 and 79 of the 1980 Act, ss 165 and 167 of the Companies Code; regulation 12(1)(b) and (c) of the Companies Regulations; regulation 12(1)(b) and (c) of the 1980 Regulations; regulation 50 and Sch 5 (1) to (3) to the 1984 Regulations.

<sup>44</sup> The deed was required to set out:

"full particulars of the trust, including precise information as to the circumstances in which money, marketable securities, investments and other property subject to the trust are or will be vested in the trustee or representative" (see regulation 12(1)(c) in the Companies Regulations and the 1980 Regulations and Sch 5, 3(3) of the 1984 Regulations). Any prospectus was also required to set out "[w]here any real or personal property to which the [interest] relates is or will become vested in the trustee or representative, the nature and description of the property and the conditions or circumstances under which it is or will become so vested". See Sch 7 (20), Companies Act; Sch 7 (20), 1980 Act; Sch 6, (20), 1984 Regulations

<sup>45</sup> *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [8].

<sup>46</sup> *Australian Executor Trustees (SA) Limited v Korda & Ors* [2013] VSC 7 at [87], [88].

B. Paying proper regard to the text of the Trust Deed and Tripartite Agreement

31. Having regard to the regulatory framework, the following points may be made in relation to the provisions of the Trust Deed and the Tripartite Agreement.
32. *First*, on the very day (6 March 1964) that the Respondent contends that Forest Company, Milling Company and AET intended that the Forest Company and Milling Company became subject to trust obligations under the Trust Deed and/or Tripartite Agreement, the parties did in fact expressly turn their minds to the existence of a trustee and beneficiary relationship and determined that only AET should be the subject of those fiduciary obligations. The Tripartite Agreement and Trust Deed make no mention of monies being held by the Milling Company and Forest Company on trust or as trustee.<sup>47</sup> This is in clear contrast to the express statement in clause 4(a) of the Trust Deed “[t]hat the Trustee [i.e. AET] will hold all moneys paid...or received by the Trustee...subject to the trusts.”<sup>48</sup>
33. Had the parties intended to create a trust in which the Forest Company or Milling Company held the sale proceeds on trust, it would have been simple for the parties to have said so.<sup>49</sup> Instead, the Trust Deed characterised the Forest Company as the “manager” of the Trust and the relationship created between it and the “Covenantholders” as being in “covenant” as annexed to the Trust Deed. The Forest Company’s obligations under the Trust Deed were expressed in the language of covenant<sup>50</sup> and the Covenantholders’ right to the net timber proceeds was enforceable against the Forest Company in covenant – “in full satisfaction and discharge of the obligations of the [Forest] Company.”<sup>51</sup>
34. *Secondly*, the Milling Company is not a party to the Trust Deed. It is a party to the Tripartite Agreement. If it had been the relevant intention to clothe the Milling Company with the obligations of trustee, there would have been no need to execute a separate agreement which did not use the language of trustee and beneficiary. Furthermore, the Milling Company was only obliged to pay across timber proceeds to the Forest Company in the year following receipt and then by instalments<sup>52</sup> – an arrangement more characteristic of debt than trust.
35. The fact that under the Tripartite Agreement the Milling Company was entitled to use the sale proceeds as it saw fit, is inconsistent with a trust structure.<sup>53</sup>

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<sup>47</sup> See: *Jessup v Queensland Housing Commission* (2002) 2 Qd.R. 270 at 273 [8] (per McPherson JA, with whom Davies JA and Philippides JA agreed).

<sup>48</sup> See also, clause 1 of the Trust Deed.

<sup>49</sup> *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [248] to [250] and [255] per Robson AJA.

<sup>50</sup> See for example, clauses 1, 10, 11(b), 20E(c) and 22 of the Trust Deed.

<sup>51</sup> See eg, clause 14 of the Covenant. See also, clauses 10, 12(b) and 20D(c), of the Trust Deed.

<sup>52</sup> Clause 9(f), Tripartite Agreement.

<sup>53</sup> *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [250] to [251] per Robson AJA. See also *Australian Executor Trustees (SA) Limited v Korda & Ors* [2013] VSC 7 at [76] per Sifris J.

36. *Thirdly*, the omission from the constituent documents of provisions that the sale proceeds are to be held on trust at all stages is a strong indicator that the parties intended the sale proceeds to be subject to a trust only once paid to AET.<sup>54</sup>
37. The Milling Company and Forest Company did not have to place the timber proceeds received by them into an account styled “trust account”. That is to be contrasted with clause 12(e) of the Trust Deed, which expressly states that AET holds the “net proceeds...in the interest of the respective Covenantholders” and obliges AET to open separate accounts in the Trustee’s ledger for each planting.<sup>55</sup> The Forest Company and Milling Company were not obliged to keep the gross timber proceeds separate from their general funds.<sup>56</sup> That is a powerful indicium that no trust is to be imputed,<sup>57</sup> particularly where it appears to be the result of a deliberate choice.<sup>58</sup>
38. *Fourthly*, the constituent documents also did not provide the covenantholders with a beneficial interest in the sale proceeds with respect to the land. Rather, the covenantholders were granted a contractual right to be paid the value of the land, not an interest in the land itself. The fact that the constituent documents did not create an express trust of the kind asserted, or state that the Forest Company holds no beneficial interest in the trees and the land until the trees had been harvested and the proceeds paid by Forest Company to AET, were “extraordinary” and “unlikely” omission(s).<sup>59</sup>
39. Finally, a number of provisions of the Trust Deed and Tripartite Agreement are inconsistent with an inference or presumption that fiduciary obligations had been imposed on the Forest Company and/or Milling Company:
- (a) The entitlement of the Forest Company to the Maintenance Fund and the income derived from its investment.<sup>60</sup>
  - (b) Clause 13 of the Trust Deed is expressed to provide for the “Power to Trustee to Carry on **Contract** in Event of Forest Company’s Default” and confers upon the Trustee (AET) the power to “take charge and manage **the business** conducted by the Forest Company<sup>61</sup> (emphasis added).
  - (c) The Trust Deed provides that the Forest Company “is not liable to be removed from the management of the Trust” – a particularly incongruous

<sup>54</sup> *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [255] per Robson AJA.

<sup>55</sup> Clause 12 (e) of the Trust Deed. In contrast, the sub-clause dealing with the proceeds received by the Forest Company imposes no such obligation on it: see, Clause 12(d) of the Trust Deed.

<sup>56</sup> Clause 8 and 10 of the Tripartite Agreement expressly contemplated such an admixture.

<sup>57</sup> *Walker v Corboy* (1990) 19 NSWLR 382 at 397-398; *Compass Resources Ltd v Sherman* [2010] WASC 41 per Sherman J at [70]-[71] and [90] together with the cases cited at [70]-[71].

<sup>58</sup> *Walker v Corboy* (1990) 19 NSWLR 382 at 397-398.

<sup>59</sup> *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [268] , [272] to [276] and [255] to [256] per Robson AJA.

<sup>60</sup> Clauses 4(b) and 7 of the Trust Deed.

<sup>61</sup> Clause 13 of the Trust Deed. Emphasis Added.

fetter on the rights of Covenantholders if the Forest Company is in fact intended to act as a trustee.

- (d) The Covenant annexed to the Trust Deed provides that the Covenantholder “shall accept his due proportion of the benefits from the sale of timber...and of the value of the land in full satisfaction and discharge of all and singular of the obligations of the Company and the Covenantholder shall have no further claim whatever on the Company.”<sup>62</sup> Such a fetter or limitation is also not consistent with a conclusion that the Covenantholders were intended to be beneficiaries.
- 10 (e) The indemnity provided by the Forest Company in clause 3(c) of the Trust Deed is inconsistent with an intention to confer the obligations of a trustee upon the Forest Company – if it was intended that the Forest Company would act as trustee, it would properly be the recipient of the indemnity.
- (f) The restraints imposed on the Forest Company’s dealings with the land and trees by clauses 2(d)(i) and 2(d)(iv) of the Trust Deed and clause 6 of the Covenant are more consistent with the Forest Company being the beneficial owner of the land.<sup>63</sup>
- 20 (g) Interest earned on monies in the Timber Proceeds Accounts accretes to the benefit of Covenantholders, whereas there is no obligation on the Milling Company or Forest Company to pay interest on the gross timber proceeds when held by them.

C. The investment context in which the Covenants were issued

40. A further basis for rejecting a contention that the parties intended that the Forest Company and Milling Company act as trustees is provided by the context in which the convenantholders invested. The scheme was promoted to investors as one where the proceeds paid to covenantholders were not assessable for income tax, and on the basis of constituent documents put in place in 1964, after *Clowes* was decided. The prospectuses provided by the Forest Company noted that decisions of the High Court in 1954 and 1975 had determined that timber proceeds were not assessable income.<sup>64</sup> As Robson AJA recognised in his dissenting judgment, if the land, timber and timber sale proceeds were held on trust before the expenses of harvesting, milling and marketing were met, there was a “potential” or “considerable” risk that the proceeds may have been assessable.<sup>65</sup>
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<sup>62</sup> See clause 16 of the Covenant.

<sup>63</sup> See further, *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [282] per Robson AJA

<sup>64</sup> See for example, 1980 Prospectus at p.4 and 1984 Prospectus at p.4. Those decisions were *Clowes* (1954) 91 CLR 209 and *Milne v Federal Commissioner of Taxation* (1976) 133 CLR 526.

<sup>65</sup> *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [258] and [260] per Robson AJA.

41. In contrast to Robson AJA, the majority held that the “*creation of the wider trust had no income tax implications whatsoever*”.<sup>66</sup> For the reasons that follow, the conclusion of Robson AJA ought to be preferred.
42. *Clowes*<sup>67</sup> was decided by a bench of four. Dixon CJ and Kitto J held in favour of the taxpayer whilst Webb and Taylor JJ held in favour of the Commissioner. The decision of Dixon CJ was therefore decisive.
43. Dixon CJ held that:
- 10 “the operations of the company [were] conducted on its own behalf and not on behalf of the lot-holders”<sup>68</sup> His Honour noted:<sup>69</sup> “But the taxpayer did nothing but lay out his money on the faith of the contract and await the result. The company was in no sense his agent. The money which he paid in pursuance of the contracts became part of the general funds of the company. Its obligations to him were simply contractual.”
44. Similarly, Kitto J stated:<sup>70</sup> “Upon payment to the company, the lot-holders’ money was gone, and it was not repayable in any circumstances ...” and concluded that “the scheme was the company’s scheme, and the profit it produced arose to the company and not to the lot-holders”.<sup>71</sup>
- 20 45. Taylor and Webb JJ rejected the taxpayer's submission that “the only profit-making scheme disclosed by the evidence was that which the company operated and further that this scheme was not carried out by the company as agent or otherwise on behalf of the appellant.”<sup>72</sup>
46. Webb J held that:<sup>73</sup>
- “But in any event I think there is enough on the face of the agreements to indicate that the taxpayer acquired not choses in action but interests in particular timber in respect of which he was paid, on the basis of his lot-holding, his due proportion of the profits from the timber grown on his lots and other lots, and thus to establish the necessary relationship between the taxpayer and the source of the income.”
- 30 47. Webb J’s reasoning that the taxpayer acquired an *interest* in timber (and thus his conclusion) stands in stark contrast to that of Dixon CJ<sup>74</sup> and Kitto J.<sup>75</sup>

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<sup>66</sup> *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [58] per Maxwell P and Osborn JA.

<sup>67</sup> (1954) 91 CLR 209.

<sup>68</sup> (1954) 91 CLR 209 at 218.

<sup>69</sup> (1954) 91 CLR 209 at 217.

<sup>70</sup> (1954) 91 CLR 209 at 223.

<sup>71</sup> (1954) 91 CLR 209 at 224.

<sup>72</sup> (1954) 91 CLR 209 at 232 per Taylor J at 218 per Webb J.

<sup>73</sup> At 219.

<sup>74</sup> At 216-218.

<sup>75</sup> At 223.

48. It would be odd if the parties, having turned their mind to the relevant tax treatment, then intended to enter into a trust relationship which would have the effect of conferring an *interest* in the timber and therefore bolstering the analysis of Webb J and undermining the reasoning of Dixon CJ and Kitto J (and thus potentially prejudicing the tax treatment the subject of the representations to covenantholders).<sup>76</sup>

D. The Land Sale Proceeds – Conflating “Land Value” with beneficial ownership

10 49. The majority held that the Land Sale Proceeds were held on trust by the Forest Company. In doing so Maxwell P and Osborn JA relied heavily on isolated statements in the 1984 prospectus.<sup>77</sup> However, those statements could not alter the character of the covenantholders’ contractual rights expressly conferred by clause 27 of the Trust Deed and Clause 6 of the covenant.<sup>78</sup>

50. Clause 27 of the Trust Deed provided that:

20 “ In respect of the 1982 and 1983 planting years each Covenant in respect of which a Fully Paid Certificate has been issued will entitle the holder thereof **to the value** as determined pursuant to clause 29 hereof (**at the time when timber is clear felled or at such earlier time as the land ceases to be subject to the Covenant** as a result of the timber being damaged by fire or for any other reason proportionate to the total land appropriated to the planting year) of the freehold land or land held under perpetual lease (hereinafter called “the land”) planted in respect of the Covenant” (Emphasis added)

51. Clause 28 of the Trust Deed contained the obligation cast upon the Forest Company to make payment to the Trustee of the amounts payable by Forest Company pursuant to clause 29 of the Trust Deed.

52. Clause 6 of the Covenant (contained in the 1984 Prospectus) stated that:<sup>79</sup>

“In addition to payment in respect of the timber harvested, the Covenantholder will receive his due proportion of the value of the freehold land and land held under perpetual lease contained in the Covenant as listed

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<sup>76</sup> Although the correct tax treatment (as opposed to the risk of establishing a structure at odds with *Clowes*), is not to the point, on the majority’s analysis, it would seem that the relevant profit making activities were being undertaken by the Forest Company and/or the Milling Company in their capacity as trustee of the expanded trust. That section 26(a) would potentially be engaged in a trust scenario is consistent with the comments of Dixon CJ that, for the section to apply, the profit making scheme or undertaking needed to be carried out “by the taxpayer or on his behalf”. For the purposes of the trust taxation provisions, the net income of the trust estate (ie taxable income of a trust) is calculated as if the trustee is itself a separate taxpayer. It ought be noted that s.25A(1) of the *Income Tax Assessment Act 1936*, replaced section 26(a) with effect from 25 June 1984 ( By Act No. 47 of 1984). To the extent relevant, the wording of the new s 25A(1) was identical to the old s.26(a).

<sup>77</sup> Cf, *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [26] per Maxwell P and Osborn JA.

<sup>78</sup> See for example, clause 6 of the covenant in the 1984 Prospectus at p.11.

<sup>79</sup> See page 11 of the 1984 Prospectus. See also, clause 13, page 16 of the 1984 Prospectus.

hereunder when the timber is clear felled or when the land ceases to be subject to the Covenant as a result of fire or for any other reason.”

- 10 53. The nature and limits of the parties’ rights and obligations were definitively established by these provisions. The Forest Company’s obligation to pay arose independently from any sale of land. The Forest Company was liable to make a payment based on the “value of land” upon the timber being clear felled or the land ceasing to be the subject of the covenant. Those two events could occur without the land being sold. The Trust Deed and the Covenant did not provide that if the land was sold, the sale proceeds must be set aside and used to meet the Forest Company’s contractual obligation to covenantholders.<sup>80</sup>
54. The Covenants and Trust Deed clearly stipulated a contractual right to payment of an amount *referable* to the value of the land rather than the creation of an interest in the land itself.<sup>81</sup> Even the prospectus recorded that the value of the land would be calculated pursuant to clause 29 of the Trust Deed.<sup>82</sup>
55. Robson AJA correctly held that the:<sup>83</sup>
- “invitation [to investors] made it clear that the interest was in the value of the land, and not the land itself”<sup>84</sup> and “the imprecise language used in the headings [of the prospectus] does not alter the meaning of the detailed and carefully drafted Covenants.”<sup>85</sup>

20 E. Commercial Necessity and Extraneous Risks

56. Whilst commercial necessity was recognised in *Byrnes v Kendle*<sup>86</sup> as a relevant “background circumstance” for the purpose of inferring or imputing an express trust, such necessity should be taken to exist only where a trust is indispensable in resolving an otherwise unworkable relationship.
57. The majority gave primacy to assumptions as to the attitude of hypothetical investors and their supposed risk intolerance.<sup>87</sup> These were not matters of mutually known facts,<sup>88</sup> and were not matters of evidence.
58. The majority further assumed that “if a representative of the commercial investors had been a participant in drawing up the scheme documents in 1964”<sup>89</sup> and “had it

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<sup>80</sup> See clauses 16 and 17 of the 1982 and 1983 Covenant at p.12 of the 1984 Prospectus.

<sup>81</sup> *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [268] per Robson AJA.

<sup>82</sup> See page 16 of the 1984 Prospectus.

<sup>83</sup> *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [272] and [276] per Robson AJA. See also page 3 and 4 of the 1984 Prospectus.

<sup>84</sup> *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [268] per Robson AJA.

<sup>85</sup> *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [276] per Robson AJA.

<sup>86</sup> (2011) 243 CLR 253 at 287 [108].

<sup>87</sup> *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [35]-[36] (Maxwell P and Osborn JA).

<sup>88</sup> *Byrnes* (2011) 243 CLR 253 at 286-7 [108]. Cf *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [30]-[43].

<sup>89</sup> *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [37] per Maxwell P and Osborn JA.

been suggested”<sup>90</sup> that there was a risk of insolvency, a “putative investor representative would undoubtedly have insisted on [trust protection]”<sup>91</sup>. The majority did not address the issue as to whether the companies would have acceded to an investor request for such a trust (which would transform the companies from arms-length commercial contractors into fiduciaries). In any event, this further assumption was erroneous in fact and in principle.

10 59. The assumption was erroneous in fact because AET *was* a party to the Trust Deed and Tripartite Deed as trustee for and on behalf of persons who thereafter purchased covenants – so, a representative of the commercial interests of investors *was* a participant in the drawing up of the scheme documents in 1964.<sup>92</sup>

60. The assumption was also erroneous in principle, because the majority failed to apply the “objective theory”<sup>93</sup>. The majority made assumptions about, and treated as decisive, the supposed expectations and intentions of the investors<sup>94</sup>, rather than identifying, so far as the evidence permitted, the intention of the parties by reference to mutually known facts.

20 61. Further, in establishing the regulatory framework applicable to the issue of covenants, the South Australian Parliament appeared to expressly recognise that interest holders may not be adequately protected from risks arising from the conduct of managers. The relevant statutory regime was introduced initially by the *Companies Act Amendment Bill 1960 (SA)* (“**SA Amending Bill**”). The second reading speech for the SA Amending Bill states that:

“The relationship between the trustees and the unit holders therefore does not provide the unit holders with adequate protection, and it is by no means clear that the manager would in fact owe the duties of a trustee to unit holders. The manager's role of principal who stands to gain or lose from the operation of the trust is difficult to reconcile with any fiduciary duties towards the investors.”

30 62. Accordingly, protective measures *alternative* to a trust arrangement were introduced. The measures introduced did not seek to eliminate those risks by imposing trustee or fiduciary duties on the management company.<sup>95</sup> Rather, the

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<sup>90</sup> *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [37] per Maxwell P and Osborn JA.

<sup>91</sup> *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [37] per Maxwell P and Osborn JA.

<sup>92</sup> Cf, *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [37] per Maxwell P and Osborn JA.

<sup>93</sup> See, *Byrnes* at 275 [59] per Gummow and Hayne JJ at 286 and 290 per Heydon and Crennan JJ [105] and [114]; *Trident* (1988) 165 CLR 107 at 121 (per Mason CJ and Wilson J); *Snowy Hydro* [2012] VSCA 145 at [83]. Cf Cf, *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [7ff] per Maxwell P and Osborn JA .

<sup>94</sup> *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [37].

<sup>95</sup> The absence of trust or fiduciary protection was recognised by Professor Ford in H.A.J Ford et al, *Prescribed Interests* (Discussion Paper No 6, Companies and Securities Law Review Committee, May 1987) in which it was stated at p.104 in respect of Companies Act Part IV Division 6 ( which was relevantly

10 statutory requirements focused on mitigating that risk by ensuring adequate disclosure by the management company.<sup>96</sup> Such provisions included: provisions prohibiting companies other than public companies from issuing “interests”; the management company’s covenant that it would make its books available to the trustee or its auditors;<sup>97</sup> the management company’s covenant that it would give the trustee or its auditor such information as it required relating to the scheme of the company or any property of the company;<sup>98</sup> the requirement for the prospectuses to contain particulars disclosing the “*true nature of the undertaking, scheme, enterprise or investment contract*” in respect of which the interest was issued and the property to which it related;<sup>99</sup> the requirement for the deed and prospectuses to set out precise details about any property that was to vest in a trustee or another party; the requirement for the prospectuses to contain details of previous schemes involving the issue of interests conducted by the management company over the previous five years;<sup>100</sup> and the requirement for a prospectus to contain an auditor’s report detailing, *inter alia*, the profit and loss of the management company of the previous five years.<sup>101</sup>

#### Part VII: Legislation

63. See Schedule C.

#### Part VIII: Orders Sought

20 64. The Appellants seek orders that:

- (a) the appeal be allowed;
- (b) paragraphs 1 and 2 of the Court of Appeal orders dated 10 April 2014 and paragraphs 1, 2 and 3 of the orders made by the Honourable Justice Sifris

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identical to the Code): “At present, the Companies Act Part IV Division 6 shows no explicit intention to treat the management company as a fiduciary. Section 168(1)(a) requires as a condition of a deed being approved under s 165 that it contain: ‘a covenant binding the management company that it will use its best endeavours to carry on and conduct its business in a proper and efficient manner and to ensure that the undertaking, scheme or enterprise to which the deed relates is carried on and conducted in a proper and efficient manner’. That provision, though suitable to a non-trust investment opportunity, seems to fall short of a provision appropriate to a management company involved in an administration of a trust.”

<sup>96</sup> It should also be noted that the statutory regime contemplated the insolvency of the management company (see section 87, Companies Act; section 87 1980 Act; section 174 of the Companies Code and provided that in those circumstances, the scheme could be wound up.

<sup>97</sup> See section 80(1)(e) of the Companies Act; section 80(1)(e) of the 1980 Act; section 168(1)(e) of the Companies Code.

<sup>98</sup> See ss 80(1)(e) and (f) of the Companies Act; ss 80(1)(e) and (f) of the 1980 Act; ss 168(1)(e) and (f) of the Companies Code.

<sup>99</sup> See Sch 7 (clause 13), Companies Act; Sch 7 (clause 13), 1980 Act; Schedule 6 (clause 13), 1984 Regulations.

<sup>100</sup> See Sch 7 (clause 33), Companies Act; Sch 7 (clause 33), 1980 Act; Schedule 6 (clause 37), 1984 Regulations.

<sup>101</sup> See Sch 7 (clause 36), Companies Act; Sch 7 (clause 36), 1980 Act; Schedule 6 (clause 41), 1984 Regulations.

dated 1 March 2013 be set aside, with the following orders made in lieu thereof;

- (c) the Respondent is not entitled to any of the \$33,999,998 paid to the Milling Company pursuant to the Tree Sale Agreement (as defined in paragraph 23 of the affidavit of Bryan Webster affirmed on 11 November 2012);
- (d) the Respondent is not and at all material times was not entitled to any portion of the proceeds of the Land Sale Contracts (as defined in paragraph 23 of the affidavit of Bryan Webster affirmed on 11 November 2012);
- (e) the Respondent pay the Appellants' costs of the proceeding before Sifris J and in the Court of Appeal; and
- (f) the Respondent pay the Appellants' costs in this Court.

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**Part IX: Time Estimate**

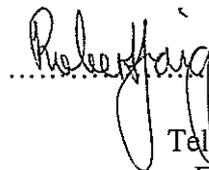
65. The Appellants estimate that 3.5 hours will be required for presentation of their oral argument, including any reply.

Dated:

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**SCHEDULE A**

<b>Trust Deed clause</b>	<b>Companies Act / Companies Regulation</b>	<b>1980 Act / 1980 Regulation</b>	<b>Companies Code / 1984 Regulations</b>
1	Reg 12(1)(b)	Reg 12(1)(b)	CI 2, Sch 5 to regulations
CI 3(e) and CI 20E	s 84; Reg 12(1)(l)	s 84; Reg 12(1)(i)	s 172; CI 9, Sch 5 regulations
12(d)	s 80(1)(b)(l)	s 80(1)(b)(l)	s 168(1)(b)(i)
12(d) – (f)	Reg 12(1)(g)(v)	Reg 12(1)(g)(v)	CI 7(e), Sch 5 to regulations
12(h), 20D, 20D(f)	Reg 12(1)(g)(vi)	Reg 12(1)(g)(vi)	CI 7(f), Sch 5 to regulations
18, 19, 20D(f)	Reg 12(1)(d)(l)	Reg 12(1)(d)(l)	CI 4(a), Sch 5 to regulations
20A	Reg 12(c)	Reg 12(c)	CI 3, Sch 5 to regulations
20B(a)	Reg 12(1)(d)(ii)	Reg 12(d)(ii)	CI 4(b), Sch 5 to regulations
20B(b)	Reg 12(1)(d)(iii)	Reg 12(d)(iii)	CI 4(c), Sch 5 to regulations
20C	Reg 12(1)(f)	Reg 12(1)(f)	CI 6, Sch 5 to regulations
20B(c)	Reg 12(1)(d)(iv)	Reg 12(1)(d)(iv)	CI 4(d), Sch 5 to regulations
20D(b)	s 80(1)(b)(iii); Reg 12(1)(g)(ii)	s 80(1)(b)(iii); Reg 12(1)(g)(ii)	s 168(1)(b)(iii); CI 7(b), Sch 5 to regulations
20D(c)	Reg 12(1)(g)(iii)	Reg 12(1)(g)(iii)	CI 7(c), Sch 5 to regulations
20D(d)	Reg 12(1)(g)(iv)	Reg 12(1)(g)(iv)	CI 7(d), Sch 5 to regulations
20D(c)	Reg 12(1)(j)	Reg 12(1)(j)	CI 10, Sch 5 to regulations
20D(h)	Reg 12(1)(k)(ii)	Reg 12(1)(k)(ii)	CI 11(b), Sch 5 to regulations
20D(g)	Reg 12(1)(k)(i)	Reg 12(1)(k)(i)	CI 11(a), Sch 5 to regulations
20E(c)	Reg 12(1)(l)	12(1)(k)	CI 12, Sch 5 to regulations
20F(a), 21D and 22H	s 80(1)(d)	s 80(1)(d)	s 168(1)(d)
20F	Reg 12(1)(e)	Reg 12(1)(e)	CI 5, Sch 5 to regulations
21A(a)	s 80(1)(c)(i)	s 80(1)(c)(i)	s 168(1)(c)(i)
21A(b)	s 80(1)(c)(ii)	s 80(1)(c)(ii)	s 168(1)(c)(ii)
21A(c)	s 80(1)(c)(iii)	s 80(1)(c)(iii)	s 168(1)(c)(iii)
21A(d)	s 80(1)(c)(iv)	s 80(1)(c)(iv)	s 168(1)(c)(iv)
21B, 22D	s 80(1)(g)	s 80(1)(g)	s 168(1)(g)
22A	s 80(1)(a)	s 80(1)(a)	s 168(1)(a)
22B	s 80(1)(e)	s 80(1)(e)	s 168(1)(e)
22B(c)	s 80(1)(b)(iv)	s 80(1)(b)(iv)	s 168(1)(b)(iv)
22C	s 80(1)(f)	s 80(1)(f)	s 168(1)(f)
22E	s 80(1)(h)	s 80(1)(h)	s 168(1)(h)
22G and 20D	s 80(1)(b)(ii)	s 80(1)(b)(ii)	s 168(1)(b)(ii)
23	Reg 12(1)(h)	Reg 12(1)(h)	CI 8, Sch 6 to regulations

## SCHEDULE B

Prospectus reference	Companies Act / Companies Regulation	1980 Act / 1980 Regulation	Companies Code / 1984 Regulations
Cl 1, Statutory information ("SI"); p 12 (1980), p 15 (1984)	Sch 7, cl 1	Sch 7, cl 1	cl 1, Sch 6 to regulations
Cl 2, SI; p 12 (1980), p 15 (1984)	Sch 7, cl 2 & 3	Sch 7, cl 2 & 3	cl 2 & 3, Sch 6 to regulations
Title page & cl 4 - 9, SI; p2 & 212 (1980), p2 & p15 (1984)	Sch 7, cl 4 -10	Sch 7, cl 4 - 10	cl 4 - 10, Sch 6 to regulations
Cl 12, SI; p12 (1980), p15 (1984)	Sch 7, cl 11	Sch 7, cl 11	cl 11, Sch 6 to regulations
General information & covenant; pp 3-6 (1980), pp 3 - 5 (1984)	Sch 7, cl 13	Sch 7, cl 13	cl 13, Sch 6 to regulations
Cl 1 and 4 of covenant; p 7 (1980) pp 7 - 11 (1984)	Sch 7, cl 14	Sch 7, cl 14	cl 14, Sch 6 to regulations
cl 14 SI; p 7 (1980), P 7& 8 (1984)	Sch 7, cl 15	Sch 7, cl 15	Cl 15, Sch 6 to regulations
Cl 15 SI; p 13 (1980), p16 (1984)	Sch 7, cl 16	Sch 7, cl 16	Cl 16, Sch 6 to regulations
Cl 16, SI; p 13 (1980), p 16 (1984)	Sch 7, cl 17	Sch 7, cl 17	Cl 17, Sch 6 to regulations
Cl 17 SI; p13 (1980), p17 (1984)	Sch 7, cl 18	Sch 7, cl 18	Cl 18, Sch 6 to regulations
Cl 18 SI; p13 (1980), p17 (1984)	Sch 7, cl 20	Sch 7, cl 20	Cl 20, Sch 6 to regulations
Cl 19 SI; p 14 (1980), P 17 (1984)	Sch 7, cl 21	Sch 7, cl 21	Cl 21, Sch 6 to regulations
Cl 20 & 21 SI; p 14 (1980), p 17 (1984)	Sch 7, cl 22 and 23	Sch 7, cl 22 and 23	Cl 22, Sch 6 to regulations
Cl 23 SI; p 17 (1984 only)	NA	NA	Cl 23, Sch 6 to regulations
Cl 24 SI; p 17 (1984 only)	NA	NA	Cl 24, Sch 6 to regulations
Cl 25 SI; p 17 (1984 only)	NA	NA	Cl 25, Sch 6 to regulations
cl 22 SI (p 14 , 1980) and cl 26 SI (p 17, 1984)	Sch 7, cl 24	Sch 7, cl 24	Cl 26, Sch 6 to regulations
Cl 27 SI; p 18 (1984 only)	NA	NA	Cl 27, Sch 6 to regulations
cl 23 SI (p 14, 1980) and cl 22 & 28 SI (p 18, 1984)	Sch 7, cl 25	Sch 7, cl 25	Cl 28, Sch 6 to regulations
cl 24 SI (p. 14, 1980) and cl 29 SI (p 18, 1984)	Sch 7, cl 26	Sch 7, cl 26	Cl 29, Sch 6 to regulations
cl 4 & 24 SI (p 13-14 1980) and cl 13 & 30 SI (p 16 - 18 1984)	Sch 7, cl 27	Sch 7, cl 27	Cl 30, Sch 6 to regulations
cl 26 SI (p 14, 1980) and cl 31 SI (p 18 1984)	Sch 7, cl 28	Sch 7, cl 28	Cl 31, Sch 6 to regulations
cl 13 SI (p 14, 1980) and cl 13 & 32 SI (p 18, 1984)	Sch 7, cl 29	Sch 7, cl 29	Cl 33, Sch 6 to regulations
cl 28 SI (p 14 1980) and cl 33 SI (p 18 1984)	Sch 7, cl 30 & 31	Sch 7, cl 30 & 31	Cl 34 & 35, Sch 6 to regulations
cl 29 SI (p 14, 1980) and cl 34 SI (p 18 1984)	Sch 7, cl 32	Sch 7, cl 32	Cl 36, Sch 6 to regulations
cl 30 SI (p 14 1980) and cl 35 SI (p 18 1984)	Sch 7, cl 33	Sch 7, cl 33	Cl 37, Sch 6 to regulations
cl 31 & 32 SI (p 14 1980) and cl 36 & 37 SI (p 18 1984)	Sch 7, cl 34	Sch 7, cl 34	Cl 38, Sch 6 to regulations
Auditors report; p 15 (1980), p 19 (1984)	Sch 7, cl 36	Sch 7, cl 36	Sch 6 to regulations

**SCHEDULE C TO APPELLANT'S SUBMISSIONS**

**Companies Act 1962 (SA)**

as at 6 March 1964

**Sections 76 – 89**

**DIVISION V. – INTERESTS OTHER THAN SHARES, DEBENTURES, ETC**

**DIVISION V.**

Interpretation.  
N.S.W. s. 178A  
Vic. s. 63  
Qsld. s. 83S3  
S.A. s. 114a.  
W.A. s. 98A  
Tas. s. 62.

76. (1) In this Division and in the Seventh Schedule, unless inconsistent with the context or subject matter–

"company" means a public company, and includes a corporation that is a public company under the law of a proclaimed State and is registered as a foreign company in this State:

"financial year", in relation to a deed, means the period of twelve months ending on the thirtieth day of June or on such other date as is specified in lieu thereof in the deed:

"interest" means any right to participate or interest, whether enforceable or not, and whether actual, prospective or contingent–

- (a) in any profits, assets or realization of any financial or business undertaking or scheme, whether in the State or elsewhere;
- (b) in any common enterprise whether in the State or elsewhere, in which the holder of the right or interest is led to expect profits, rent or interest from the efforts of the promoter of the enterprise or a third party; or
- (c) in any investment contract–

whether or not in the right or interest is evidenced by a formal document and whether or not the right or interest relates to a physical asset, but does not include–

- (i) any share in or debenture of a corporation;
- (ii) any interest in or arising out of a policy of life insurance; or
- (iii) any interest in a partnership agreement:

"investment contract" means any contract, scheme or arrangement which, in substance and irrespective of the form thereof, involves the investment of money in or under such circumstances that the investor acquires or may acquire an interest in or right in respect of property which under or in accordance with the terms of investment will, or may at the option of the investor, be used or employed in common with any other interest in or right in respect of property acquired in or under like circumstances;

"management company", in relation to any interests issued or proposed to be issued or any deed that relates to any interests issued or proposed to be issued means a company by or on behalf of which the interests have been or are proposed to be issued and includes an person for the time being exercising the functions of the management company:

"proclaimed State" means a State or Territory of the Commonwealth

declared by proclamation to be a proclaimed State or Territory for the purposes of this Division.

(2) A reference in this Division to a deed shall be read as including a reference to any instrument amending or affecting the deed.

(3) Every deed approved under the repealed Act shall be deemed to contain covenants to the effect of the covenants required to be contained in a deed under subsection (1) of section 80 except the covenants required under subparagraphs (i), (ii) and (iii) of paragraph (b) of that subsection, and subsections (2), (3), (4) and (5) of that section shall apply in relation to the deed accordingly.

**PART IV.  
DIVISION v.**

Approved deeds.  
S.A. s. 114b.  
Qsld. s. 83B.  
W.A. s. 98B.

77. For the purposes of this Division, a deed shall be an approved deed if—

- (a) The Registrar has granted his approval to the deed under this Division or under any corresponding previous enactment; and
- (b) The Minister has granted his approval under this Division or under any corresponding previous enactment to the trustee or representative appointed for the purposes of the deed acting as trustee or representative and that approval has not been revoked and the trustee or representative has not ceased to hold office.

**PART IV.  
DIVISION v.**

Approval of deeds.  
S.A. s. 114c.  
Qsld. s. 83c.  
W.A. s. 98c.

78. (1) Where a deed makes provision for the appointment of an approved trustee for or representative of the holders of interests issued or proposed to be issued by a company the Registrar may, subject to this section, grant his approval to the deed.

(2) The Registrar shall not grant his approval to a deed unless the deed—

- (a) complies with the requirements of this Division; and
- (b) makes provision for such other matters and things as are required by or under the regulations to be included in the deed.

(3) Within seven days after a deed has been approved under this section, the management company shall lodge in the office of the Registrar the deed, or a copy of the deed verified as prescribed by statutory declaration, and the copy shall for all purposes, in the absence of proof that it is not a true copy, be regarded as an original.

**PART IV.  
DIVISION v.**

Approval of trustees.  
N.S.W. s. 173B.  
S.A. s. 114d.  
W.A. s. 98D.

79. (1) The Minister may, subject to such terms and conditions as he thinks fit, grant his approval to a company acting as trustee or representative for the purposes of a deed.

(2) Where the Minister, having regard to the nature of the undertaking, scheme, enterprise, contract or arrangement to which a deed relates, is satisfied that in the special circumstances of the case it is impracticable to secure a company to act as trustee or representative for the purposes of the deed, the Minister may, subject to such terms and conditions as he thinks fit, grant his approval to such person or persons as he thinks fit acting as trustee or representative for the purposes of the deed.

(3) The Minister may, at any time, by reason of a breach of a term or condition subject to which the approval was granted or for any other reason, revoke an approval granted by him under this section or under any corresponding previous enactment.

**PART IV.  
DIVISION v.**

Covenants to be included in deeds.  
N.S.W s. 173F.  
S.A. s. 114e.  
Qsld. s. 83N.  
W.A. s. 98N.

80. (1) A deed shall, for the purposes of paragraph (a) of subsection (2) of section 78, contain covenants to the following effect, namely—

- (a) a covenant binding the management company that it will use its best endeavours to carry on and conduct its business in a proper and efficient manner and to ensure that any undertaking, scheme or enterprise to which the deed relates is carried on and conducted in a proper and efficient manner;
- (b) covenants binding the management company—
  - (i) that the management company will pay to the trustee or representative, within thirty days after their receipt by the company, and moneys that, under the deed, are payable by the company to the trustee or representative;
  - (ii) that the management company will not sell any interest to which the deed relates otherwise than at a price calculated in accordance with the provisions of the deed;
  - (iii) that the management company will, at the request of the holder of an interest, purchase that interest from the holder and that the purchase price will be a price calculated in accordance with the provisions of the deed; and
  - (iv) that the management company will not, without the approval of the trustee or representative, publish or cause to be published any advertisement, circular or other document containing any statement with respect to the sale price of interests to which the deed relates or the yield therefrom or containing any invitation to buy interests;
- (c) covenants binding the trustee or representative that the trustee or representative will—
  - (i) exercise all due diligence and vigilance in carrying out the functions and duties of the trustee or representative and in watching the rights and interests of the holders of the interests to which the deed relates;
  - (ii) keep or cause to be kept proper books of account in relation to those interests;
  - (iii) cause those accounts to be audited at the end of each financial year by a registered company auditor; and
  - (iv) send or cause to be sent by post a statement of the accounts with the report of the auditor thereon within two months of the end of the financial year, to each of the holders of those interests;
- (d) a covenant binding the management company and the trustee or representative, respectively, that no moneys available for investment under the deed will be invested in or lent to the management company, or to the trustee or representative, or to any company (other than a banking corporation or a corporation declared pursuant to paragraph (b) of subsection (5) of section 38 to be an authorized dealer in the short term money market) which is by virtue of subsection (5) of section 6 deemed to be related to the management company or to the trustee or representative;

- (e) a covenant binding the management company that to the same extent as if the trustee or representative were a director of the company, the company will–
  - (i) make available to the trustee or representative, or to any registered company auditor appointed by the trustee or representative, for inspection the whole of the books of the company whether kept at the registered office or elsewhere; and
  - (ii) give to the trustee or representative or to any such auditor such oral or written information as it or he requires with respect to all matters relating to the undertaking, scheme or enterprise of the company or any property (whether acquired before or after the date of the deed) of the company or otherwise relating to the affairs thereof;
- (f) a covenant binding the management company that the management company will make available, or ensure that there is made available, to the trustee or representative such details as the trustee or representative requires with respect to all matters relating to the undertaking, scheme or enterprise to which the deed relates;
- (g) covenants binding the management company and the trustee or representative, respectively, that the management company or the trustee or representative, as the case may be, will not exercise the right to vote in respect of any shares relating to the interests to which the deed relates held by the management company, trustee or representative at any election for directors of a corporation whose shares are so held, without the consent of the majority of the holders of the interests to which the deed relates present in person and voting given at a meeting of those holders summoned in the manner provided for in sub-paragraphs (i) and (ii) of paragraph (h) of this subsection for the purpose of authorizing the exercise of the right at the next election; and
- (h) a covenant binding the management company that the management company will within twenty-one days after an application is delivered to the company at its registered office, being an application by not less than fifty, or one-tenth in number, whichever is the less, of the holders of the interests to which the deed relates–
  - (i) by sending notice by post of the proposed meeting at least seven days before the proposed meeting to each of those holders at his last known address or in the case of joint holders to the joint holder whose name stands first in the company's records; and
  - (ii) by publishing at least fourteen days before the proposed meeting an advertisement giving notice of the meeting in a daily newspaper circulating generally throughout the State,

summon a meeting of the holders for the purpose of laying before the meeting the accounts and balance-sheet which were laid before the last preceding annual general meeting of the management company of the last audited statement of accounts of the trustee or representative, and for the purpose of giving to the trustee or representative such directions as the meeting

thinks proper.

(2) A meeting summoned for the purposes of a covenant contained in a deed in pursuance of paragraph (g) or (h) if subsection (1) of this section shall be held at the time and place specified in the notice and advertisement, being a time not later than two months after the giving of the notice, under the chairmanship of—

- (a) such person as is appointed in that behalf by the holders of the interests to which the deed relates present at the meeting; or
- (b) where no such appointment is made, a nominee of the trustee or representative approved by the Registrar,

and shall be conducted in accordance with the provisions of the deed or, insofar as the deed makes no provision, as directed by the chairman of the meeting.

(3) Notwithstanding anything to the contrary contained in an approved deed, the undertaking, scheme, enterprise, contract or arrangement to which the deed relates may be continued in operation or existence if it appears to be in the interests of the holders of the interests to which the deed relates during such period as is or such periods as are agreed upon by the trustee or representative and the management company.

(4) Where a direction is given to the trustee or representative at a meeting summoned pursuant to a covenant complying with paragraph (h) of subsection (1) of this section, the trustee or representative—

- (a) shall comply with the direction unless it is inconsistent with the deed of this Act; and
- (b) shall not be liable for anything done or omitted to be done by it by reason only of its following that direction.

(5) where the trustee or representative is of the opinion that any direction so given is inconsistent with the deed or this Act or is otherwise objectionable, the trustee or representative may apply to the Court for an order confirming, setting aside or varying the direction and the Court may make such order as it thinks fit.

**PART IV.**  
**DIVISION v.**

Interests to be issued  
by companies only.  
N.S.W s. 173B.  
S.A. s. 114f.  
Qsld. s. 83F.  
W.A. s. 98F.

81. No person, except a company or an agent of a company authorized in that behalf under the seal of the company, shall issue, or offer to the public for subscription or purchase or shall invite the public to subscribe for or purchase, any interest.

**PART IV.**  
**DIVISION v.**

Statement to be  
issued.  
N.S.W s. 173C.  
S.A. s. 114g.  
Qsld. s. 83G.  
W.A. s. 98G.

82. (1) Before a company or an agent of a company issues, or offers to the public for subscription or purchase or invites the public to subscribe for or purchase, any interest, the company shall issue or cause to be issued a statement in writing in connection therewith which statement shall for all purposes be deemed to be a prospectus issued by a company, and subject to subsection (2) of this section, all provisions of this Act and rules of law relating to prospectuses or to the offering or to an intended offering of shares for subscription or purchase to the public shall with such adaptations as are necessary apply and have effect accordingly as if the interest were shares offered or intended to be offered to the public for subscription or purchase and as if persons accepting any offer or invitation in respect of or subscribing for or purchasing any such interest were subscribers for shares.

(2) Subject to subsection (3) of this section, the statement shall set out—

- (a) the matters and reports specified in the Seventh Schedule; and
- (b) such other matters as are required by or under the regulations to be set out in the statement,

with such adaptations as the circumstances of each case require and the Registrar approves.

(3) A matter or report referred to in subsection (2) of this section may be omitted from a statement if, having regard to the nature of the interest, the Registrar is of the opinion that the matter or report is not appropriate for inclusion in the statement and has by writing under this hand approved the omission.

**PART IV.  
DIVISION v.**

No issue without approved deed.  
N.S.W s. 173D.  
S.A. s. 114h.  
Qsid. s. 83H.  
W.A. s. 98H.

83. (1) A person shall not issue, or offer to the public for subscription or purchase or invite the public to subscribe for or purchase, any interest until, at the time of the issue, offer or invitation, there is in force, in relation to the interest, a deed that is an approved deed.

(2) A person shall not in any deed, prospectus, statement, advertisement or other document relating to any interest make any reference to an approval of a deed or of a trustee or representative granted under this Division.

**PART IV.  
DIVISION v.**

Register of interest holders.

84. (1) The management company shall in respect of each deed with which the company is concerned keep a register of the holders of interests under the deed and enter therein-

- (a) the names and addresses of the holders;
- (b) the extent of the holding of each holder and, if his interest consists of a specific interest in any property, a description of the property and its location sufficient to identify it;
- (c) the date at which the name of each person was entered in the register as a holder; and
- (d) the date at which any person ceased to be a holder.

(2) The provisions of Division IV of Part V shall so far as are applicable and with such adaptations as are necessary apply to and in relation to the register.

(3) A management company which-

- (a) keeps a register of holders of interests at a place within three miles of the office of the Registrar; and;
- (b) provides reasonable accommodation and facilities for persons to inspect and take copies of its list of interest holders,

need not comply with the provision of paragraph (a) of subsection (1) of section 85 in relation to the deed under which the interests are held unless the Governor by order published in the *Government Gazette* otherwise directs.

**PART IV.**  
**DIVISION v.**

Returns, information,  
etc., relating to  
interests.

N.S.W s. 173G.

S.A. s. 114j.

Qsld. s. 83J.

W.A. s. 98J.

85. (1) Where a deed is or has at any time been an approved deed, the management company shall, so long as the deed or any deed in substitution in whole or in part for the deed, remains in force, lodge with the Registrar, within two months after the end of each financial year applicable to the deed—

- (a) a return in the prescribed form containing a list of all persons who, at the end of the financial year, were holders of the interests to which the deed relates, showing the name and address of each holder and the extent of this holding and, if his interest consists of a specific interest in any property, a description of the property and its location sufficient to identify it;
- (b) a summary of—
  - (i) all purchases and sales of land and marketable securities affecting the interests of the holders during the financial year; and
  - (ii) all other investments affecting the interests of the holders made during the financial year, showing the descriptions and quantifies of those investments;
- (c) a statement of the total amount of brokerage affecting the interests of the holders paid or charged by the management company during the financial year and the proportion thereof paid to any stock or share broker, or any partner, employee or nominee of any stock or share broker, who is an officer of the company and the proportion retained by the company;
- (d) a list of all parcels of land and marketable securities, and other investments, held by the trustee or representative in relation to the deed, as at the end of the financial year, showing the value of the land, securities or other investments and the basis of valuations; and
- (e) such other statements and particulars (if any) as may be prescribed.

(2) Any document required to be lodged with the Registrar by the management company under subsection (1) of this section shall be signed by at least one director of the management company.

(3) A company to which subsection (1) of this section applies shall, if so requested by any holder of an interest to which the deed relates within a period of one month after the end of the financial year, send by post or cause to be sent by post to the holder, within two months after the end of the financial year, a copy of the documents which the company is required to lodge with the Registrar by virtue of paragraphs (b) to (e) (inclusive) of subsection (1) of this section.

**PART IV.  
DIVISION v.**

Penalty for  
contravention of  
Division, etc.  
N.S.W s. 173L.  
S.A. ss. 114k, 114l.  
Qsld. ss. 83K, 83L  
W.A. ss. 98K, 98L.

86. (1) A person shall not-

- (a) contravene or fail to comply with a provision of this Division; or
- (b) fail to comply with a covenant contained or deemed to be contained in any deed that is or at any time has been an approved deed.

Penalty: Imprisonment for twelve months or five hundred pounds.

(2) A person shall not be relieved from any liability to any holder of an interest by reasons of any contravention of, or failure to comply with, a provision of this Division.

**PART IV.  
DIVISION v.**

Winding up of  
schemes, etc.

87. (1) Where the management company under a deed is in liquidation or where, in the opinion of the trustee or representative, the management company has ceased to carry on business or has, to the prejudice of holders of interests to which the deed relates, failed to comply with any provision of the deed, the trustee or representative shall summon a meeting of the holders.

(2) A meeting under subsection (1) of this section shall be summoned-

- (a) by sending by post notice of the proposed meeting at least twenty-one days before the proposed meeting, to each holder at this last known address, or, in the case of joint holders, to the joint holder whose name stands first in the company's records; and
- (b) by publishing, at least twenty-one days before the proposed meeting, an advertisement giving notice of the meeting in a daily newspaper circulating generally throughout the State.

(3) The provisions of subsection (2) of section 80 shall apply to such a meeting as if the meeting were a meeting referred to in that subsection.

(4) If at any such meeting a resolution is passed by a majority of not less than three-fourths in value of the holders of the interests present in person and voting at the meeting that the undertaking, scheme, enterprise, contract or arrangement to which the deed relates be wound up, the trustee or representative shall apply to the Court for an order confirming the resolution.

(5) On an application by the trustee or representative the Court may, if it is satisfied that it is in the interest of the holders of the interests, confirm the resolution and may make such orders as it thinks necessary or expedient for the effective winding up of the undertaking, scheme, enterprise, contract or arrangement.

**PART IV.  
DIVISION v.**

Power to exempt from  
compliance with  
Division and non-  
application of Division  
in certain  
circumstances  
Qsld. s. 83m.  
S.A. ss. 114M.  
W.A. ss. 98M.

88. (1) The Minister may, by notice published in the *Government Gazette*, exempt any company, subject to such terms and conditions as are specified in the notice, from complying with all or any of the provisions of this Division in relation to any interest, or class of interests, specified in the notice, and may, by notice published in the *Government Gazette*, revoke such a notice or vary it in such a manner as he thinks fit.

Non-application of  
Division to personal  
representatives, etc.

(2) this Division shall not apply in the case of the sale of any interest by a personal representative, liquidator, receiver or trustee in bankruptcy in the normal course of realization of assets.

**PART IV.  
DIVISION v.**

Liability of trustees.  
U.K. s. 88.  
S.A. s. 114n.  
Qsld. s. 83N.  
W.A. s. 98N.

89. (1) Subject to this section, any provision contained in a deed that is or at any time has been an approved deed, or in any contract with the holders of interests to which such a deed relates, shall be void in so far as it would have the effect of exempting a trustee or representative under the deed from, or indemnifying such trustee or representative against, liability for breach of trust where the trustee or representative fails to show the degree of care and diligence required of a trustee or representative having regard to the provisions of the deed conferring on the trustee or representative any powers, authorises or discretions.

(2) Subsection (1) of this section shall not invalidate—

- (a) any release otherwise validly given in respect of anything done or omitted to be done by a trustee or representative before the giving of the release; or
- (b) any provision enabling such a release to be given—
  - (i) on the agreement thereto of a majority of not less than three-fourths in nominal value of holders of interests present in person and voting at a meeting summoned for the purpose; and
  - (ii) either with respect to specific acts or omissions or on the trustee or representative ceasing to act.

**Seventh Schedule – Statement Required Pursuant to Division V of Part IV**

N.S.W. 14th  
Schedule  
Vic. 7th Schedule.  
Qsld. 13th Schedule.  
Tas. 7th Schedule.  
S.A. s. 114g (2),  
S.A. Coy. Regs.

**PART I.**

**MATTERS REQUIRED TO BE STATED IN STATEMENT.**

1. The date of the statement.
2. The date of the parties to the deed referred to in section 83.
3. The date of and parties to any deed or instrument by which any of the provisions of the approved deed relating to the interest has been amended or abrogated.
4. The name of the trustee or representative under any such deed and the address of the trustee's or representative's registered office.
5. A summary of the provisions of the deed regulating the retirement, removal and replacement of the trustee or representative.
6. The name of the management company and the address of its registered office.
7. The names, descriptions, and addresses of all the directors of the management company.
8. A summary of the provisions of the deed regulating the retirement, removal and replacement of the management company.
9. The name and address of the auditor of the accounts relating to interests under the deed.
10. A summary of the provisions of the deed regulating the appointment, retirement, removal and replacement of such auditor.
11. The duration, if ascertainable, of the undertaking, scheme, enterprise, or investment contract to which the deed relates or if the duration is not ascertainable, that fact.
12. Full particulars with respect to the termination or winding up of the

undertaking, scheme, enterprise or investment contract.

13. Such particulars as are sufficient to disclose the true nature of the undertaking, scheme, enterprise or investment contract in respect of which the interest is to be issued or offered to the public for subscription or purchase and the property to which the interest relates.

14. The nature of the interest to be so issued or offered and of any units or sub-units into which the interest is divided and the rights in relation thereto of the persons who become the holders thereof.

15. The address where the register of interest holders is or will be kept and the days on and the hours during which it is or will be accessible to the public.

16. The method of calculation provided by the deed of the price at which the management company may sell the interest or any right in respect thereof or any unit or sub-unit of the interest.

17. Such particulars as are sufficient to describe the duties and obligations imposed on the trustee or representative appointed by the deed relating to the interest.

18. The name and address of each person or corporation with whom or with which a holder of the interest is required, obliged or entitled, in connection with the undertaking, scheme, enterprise or investment contract, to enter into any contract whether by way of lease or otherwise.

19. The full names, descriptions and residential addresses of the directors of each corporation referred to in clause 18 of this Schedule.

20. Whether any real or personal property to which the interest relates is or will become vested in the trustee or representative, the nature and description of such property and the conditions or circumstances under which it is or will become so vested.

21. Where the interest consists of rights or interests in or arising out of an investment relating to property that ordinarily depreciates in value through use or effluxion of time, such particulars as are sufficient to disclose the true particulars of the provision made for the replacement of such property and the source of sources from which such replacement is to be made or from which the cost of such replacement is to be met.

22. The full names and residential addresses of the vendors of any property to which the interest relates, whether such property was purchased or acquired by the management company or by any person or corporation referred to in clause 18 of this Schedule or is proposed to be so purchased or acquired, a full and true description of such property and the amount paid or to be paid therefor to each vendor.

23. Such particulars as are sufficient to disclose the true nature and extent of the interest, if any of each director of the management company, whether as a director, shareholder, partner or otherwise, in the business of each such vendor and in such property.

24. the obligations imposed upon the management company or any other person to purchase from any holder thereof the interest or any rights in respect thereof or the units or sub-units of the interest for which he has subscribed or which he has purchased, and a statement of the method provided by the deed for the calculation of the purchase price thereof.

25. A summary of the rights and obligations of the management company and of the trustee or representative governing the valuation of any investment made or property held in relation to the interest.

26. A summary of the provisions of the deed whereby investments or other property comprising or forming part of the interest to which the deed relates may be varied.

27. Full information regarding the remuneration of the trustee or representative and the management company respectively, the manner in which under the provisions of the deed such remuneration is provided for, and the charges (if any) that will be made by way of such remuneration upon the sale of or subscription for any such interest and upon the distribution of income and capital or otherwise in connection with the relevant undertaking, scheme, enterprise or investment contract.

28. Whether the interest or any rights in respect thereof or any units or sub-units of the interest are transferable by the holders thereof and, if so, a summary of the provisions of the deed regulating such transfer.

29. A summary of the provisions of the deed relating to the distribution of the holders of the interest or of units or sub-units of the interest of the income derived from the undertaking, scheme, enterprise or investment contract.

30. Full information as to whether and to what extent any factor other than cash receipts by way of dividend, interest or bonus has been or will be taken into account in calculating the amount of income that will be payable to an interest holder.

31. If any reference is made to the yield of income obtained or likely to be obtained by the holders of the interest or of units or sub-units of the interest, a statement as to whether and to what extent anything other than cash receipts by way of dividends, interest or bonuses has been taken into account in calculating the yield.

32. A summary of the provisions of the Act and of the deed regulating the convening of meetings of holders of the interest or of units or sub-units of the interest.

33. The name and description and the date of commencement of operation of every other undertaking, scheme, enterprise or investment contract involving the issue of interests to the public conducted by the management company within the five years immediately preceding the date of the statement.

34. A declaration—

- (a) that no units or sub-units of interests purchased or subscribed for pursuant to the statement shall be allotted later than six months after the date appearing in the statement pursuant to paragraph 1 hereof; and
- (b) unless the conditions of issue of the units or sub-units expressly provide that certificates be not issued, that certificates shall be issued by the trustee or representative to purchasers of or subscribers for units or sub-units of interests purchased or subscribed for pursuant to the statement not more than two months after the allotment of the units or sub-units.

35. A summary of the provisions of the deed with respect to the undertakings—

- (a) by or on behalf of the management company relating to the allotment of interests and of units or sub-units of interests to which the deed relates; and
- (b) by or on behalf of the trustee or representative relating to the issue to holders of interests and of units or sub-units of interests

of certificates of title thereto.

**PART II.**

**REPORTS TO BE SET OUT IN STATEMENT.**

36. A report or reports by a person who at the time of making the report or reports was a registered company auditor, and whose name must appear as such in the statement, setting out—

- (a) such information as sufficiently discloses the number of distributions (if any) of income to holders of interests or of units or sub-units of interests to which the deed relates in each of the five years immediately preceding the date of the statement during which those interests had been in existence, the amount of each distribution and the extent to which each distribution consisted of any component other than dividends, interest and bonuses, and where it consisted of any component other than dividends, interest and bonuses, the nature and value of each of those components;
- (b) such information, as sufficiently discloses the selling price and the purchase price, respectively, of those interests, units or sub-units on the date upon which each distribution was made;
- (c) such information as sufficiently discloses the selling price and purchase price, respectively, of those interests, units or sub-units on such date, being a date within a period of fourteen days immediately preceding the date of the statement as is specified in the relevant report;
- (d) in respect of every issue of interests relating to any other undertaking, scheme, enterprise or investment contract conducted or entered into by the management company within the period of five years immediately preceding the date of the statement, similar information to that required under paragraphs (a), (b) and (c) of this clause; and
- (e) the profits or losses of the management company (and of every corporation with which a holder of the interest is required, obliged or entitled, pursuant to the undertaking, scheme, enterprise or investment contract, to enter into any contract) in respect of each of the five years during which the company and corporation, respectively, were carrying on business immediately preceding the date of the statement, and the rates of dividend (if any) paid by that company and that corporation in respect of each of those years, and the assets and liabilities of that company and of that corporation as at the last date to which its accounts were made up.

37. If in the case of a company which has been carrying on business, or of a business which has been carried on, for less than five years, the accounts of the company or business have only been made up in respect of four years, three years, two years, or one year, this Schedule shall have effect as if references to four years, three years, two years, or one year, as the case may be, were substituted for references to five years.

am. Companies Act Amendment Act 1971-1972 (SA) (assented to 27 April 1972)

Amendment of principal Act, s. 76 - Interpretation.

**Section 14.** Section 76 of the principal Act is amended by striking out paragraphs (i), (ii) and (iii) of the definition of "interest" and inserting in lieu thereof the following paragraphs: -

- (d) any shares in or debenture of a corporation;
- (e) any interest in or arising out of a policy of life assurance; or
- (f) an interest in a partnership agreement other than any interest in a partnership agreement that is a prescribed interest or is an interest included in a class of prescribed interests.

Amendment of principal Act, s. 80 - Covenants to be included in deeds.

**Section 15.** Section 80 of the principal Act is amended by striking out from paragraph (d) of subsection (1) the passage "subsection (5) of section 38" and inserting in lieu thereof the passage "subsection (7) of section 38".

Amendment of principal Act, s. 81 - Interests to be issued by companies only.

**Section 16.** Section 81 of the principal Act is amended by inserting after the present provisions thereof (which are hereby designated subsection (1) thereof), the following subsection: -

- (2) Subsection (1) does not apply to or in relation to an offer to the public for a purchase of an interest -
  - (a) that is an interest in a partnership agreement; and
  - (b) that was subscribed for or purchased before the commencement of the Companies Act Amendment Act, 1971-1972.

Amendment of principal Act, s 83 - No issue without approved deed.

**Section 17.** Section 83 of the principal Act is amended by inserting after the word "interest" (where first occurring) in subsection (1) the passage "(not being an interest referred to in subsection (2) of section 81 of this Act)".

**Companies Regulations 1963 (SA)**

as at 6 March 1964

**Section 12**

Matters and things to be included in deeds.

12. (1) For the purposes of paragraph (b) of subsection (2) of section 78 of the Act, the following are the matters and things required to be included in a deed:-

- (a) such particulars as are sufficient to disclose the nature of the undertaking, scheme, enterprise or investment contract, and the nature of the interests, to which the deed relates;
- (b) a provision expressly appointing a company or other person (being a company or person that has been approved by the Attorney-General) as trustee for or representative of the holders of the interests to which the deed relates;
- (c) except where no property is to be vested in the trustee or representative, a provision creating a trust, or containing a declaration of trust, and setting out full particulars of the trust, including precise information as to the circumstances in which the money, marketable securities, investments and other

property subject to the trust are or will be vested in the trustee or representative towards the holders of those interests in regard to that property;

- (d) a provision for, and full particulars with respect to-
- (i) the retirement, removal and replacement of the trustee or representative;
  - (ii) the retirement, removal and replacement of the management company or, if the management company is not liable to be removed by the trustee or representative or by the interest holders, a statement of that fact;
  - (iii) the appointment, retirement, removal and replacement of the auditor of the accounts relating to interests under the deed;
  - (iv) the duration, if ascertainable, of the undertaking, scheme, enterprise or investment contract or, if the duration is not ascertainable, a statement of that fact; and
  - (v) the termination or winding up of the undertaking, scheme, enterprise or investment contract;

- (e) provisions-
- (i) binding the management company and the trustee or representative that neither the management company nor the trustee or representative appointed by or under the deed will invest any money that is available for investment under the deed in any interest; and
  - (ii) binding the management company that the management company will not, for any purpose connected with any interest to which the deed relates, vest in the trustee or representative any property that is an interest,

unless there is in existence in respect of that interest a deed that is an approved deed under Division V of Part IV of the Act or under a corresponding law of a proclaimed State;

- (f) where the interests to which the deed relates consist of rights or interests in or arising out of an investment relating to property that tends to depreciate in value through use or effluxion of time, particulars of the provision made or to be made for the replacement of that property and the source or sources from which the replacement is to be made or from which cost of the replacement is to be met or, if no provision is made, a statement of that fact;

- (g) full particulars of-
- (i) the method of calculation of the highest price at which an interest to which the deed relates may be sold by the management company;
  - (ii) the circumstances in which the management company or any other person may be required to purchase from the holder of an interest any interest for which the holder has subscribed or which he has acquired, and the method of

- calculation of the purchase price of the interest;
  - (iii) the circumstances in which, and methods by which, all or any of the investments or other property comprising or forming part of an interest to which the deed relates may be varied;
  - (iv) the conditions governing the transfer of the interests to which the deed relates;
  - (v) the conditions governing the distribution of income to the holders of those interests; and
  - (vi) the remuneration of the trustee or representative and of the management company, respectively, and the manner in which that remuneration is provided for, including the charges (if any) that will be made by way of that remuneration upon the subscription for or sale of an interest to which the deed relates and upon the distribution of income and capital or otherwise in connection with the relevant undertaking, scheme, enterprise or investment contract;
- (h) specific provisions relating to the convening of meetings of interest holders;
  - (i) specific provisions whereby the management company undertakes to keep and maintain an up-to-date register of interests holders and to make that register available for inspection, free of charge, to any interest holder at any time when the company's office is required by the Act to be accessible to the public;
  - (j) where the deed is capable of modification, provisions governing the modification of the deed;
  - (k) a declaration–
    - (i) that no units or sub-units of interests purchased or subscribed for pursuant to the statement issued by the management company under section 82 of the Act shall be allotted later than six months after the date of the statement; and
    - (ii) unless the conditions of issue of the units or sub-units expressly provide that certificates be not issued – that certificates shall be issued by the trustee or representative to purchasers of or subscribers for units or sub-units of interests purchased or subscribed for pursuant to the statement not more than two months after the allotment of the units or sub-units; and
  - (l) where the deed requires, or confers a right on, interest holders to enter into an agreement in connection with the undertaking, scheme, enterprise or investment contract, a provisions incorporating, whether by way of annexure or otherwise, the terms and form of that agreement.

(2) In this regulation expressions defined in section 76 of the Act for the purposes of Division V of Part IV of the Act have the same respective meanings as they have in that Division.

**Companies Act 1962-1974 (SA)**

as at 11 April 1974

**Sections 76 – 89**

**DIVISION V. – INTERESTS OTHER THAN SHARES, DEBENTURES, ETC.**

**DIVISION V.**

Interpretation.  
N.S.W. s. 173A  
Vic. s. 63  
Qsld. s. 83A  
S.A. s. 114a.  
W.A. s. 98A  
Tas. s. 62.

Def. amended by 52,  
1972, s. 14.

76. (1) In this Division and in the Seventh Schedule, unless inconsistent with the context or subject matter–

"company" means a public company, and includes a corporation that is a public company under the law of a proclaimed State and is registered as a foreign company in this State:

"financial year", in relation to a deed, means the period of twelve months ending on the thirtieth day of June or on such other date as is specified in lieu thereof in the deed:

"interest" means any right to participate or interest, whether enforceable or not, and whether actual, prospective or contingent–

- (a) in any profits, assets or realization of any financial or business undertaking or scheme, whether in the State or elsewhere;
- (b) in any common enterprise whether in the State or elsewhere, in which the holder of the right or interest is led to expect profits, rent or interest from the efforts of the promoter of the enterprise or a third party; or
- (c) in any investment contract–

whether or not the right of interest is evidence by a formal document and whether or not the right or interest relates to a physical asset, but does not include–

- (d) any share in or debenture of a corporation;
- (e) any interest in or arising out of a policy of life insurance; or
- (f) any interest in a partnership agreement other than any interest in a partnership agreement that is a prescribed interest or is an interest included in a class of prescribed interests:

"investment contract" means any contract, scheme or arrangement which, in substance and irrespective of the form thereof, involves the investment of money in or under such circumstances that the investor acquires or may acquire in an interest in or right in respect of property which under or in accordance with the terms of investment will, or may at the option of the investor, be used or employed in common with any other interest in or right in respect of property acquired in or under like circumstances;

"management company", in relation to any interests issued or proposed to be issued or any deed that relates to any interests issued or proposed to be issued means a company by or on behalf of which the interests have been or are proposed to be issued and includes an person for the time being exercising the functions of the

management company:

"proclaimed State" means a State or Territory of the Commonwealth declared by proclamation to be a proclaimed State or Territory for the purposes of this Division.

(2) A reference in this Division to a deed shall be read as including a reference to any instrument amending or affecting the deed.

(3) Every deed approved under the repealed Act shall be deemed to contain covenants to the effect of the covenants required to be contained in a deed under subsection (1) of section 80 except the covenants required under subparagraphs (i), (ii) and (iii) of paragraph (b) of that subsection, and subsections (2), (3), (4) and (5) of that section shall apply in relation to the deed accordingly.

**PART IV.  
DIVISION V.**

Approved deeds.

S.A. s. 114b.  
Qsld. s. 83B.  
W.A. s. 98B.

77. For the purposes of this Division, a deed shall be an approved deed if-

- (a) the Registrar has granted his approval to the deed under this Division or under any corresponding previous enactment; and
- (b) the Minister has granted his approval under this Division or under any corresponding previous enactment to the trustee or representative appointed for the purposes of the deed acting as trustee or representative and that approval has not been revoked and the trustee or representative has not ceased to hold office.

**PART IV.  
DIVISION V.**

Approval of deeds.

S.A. s. 114c.  
Qsld. s. 83c.  
W.A. s. 98c.

78. (1) Where a deed makes provision for the appointment of an approved trustee for or representative of the holders of interests issued or proposed to be issued by a company the Registrar may, subject to this section, grant his approval to the deed.

(2) The Registrar shall not grant his approval to a deed unless the deed-

- (a) complies with the requirements of this Division; and
- (b) makes provision for such other matters and things as are required by or under the regulations to be included in the deed.

(3) Within seven days after a deed has been approved under this section, the management company shall lodge in the office of the Registrar the deed, or a copy of the deed verified as prescribed by a statutory declaration, and the copy shall for all purposes, in the absence of proof that it is not a true copy, be regarded as an original.

**PART IV.  
DIVISION V.**

Approval of trustees.

N.S.W. s. 173E.  
S.A. s. 114d.  
W.A. s. 98D.

79. (1) The Minister may, subject to such terms and conditions as he thinks fit, grant his approval to a company acting as trustee or representative for the purposes of a deed.

(2) Where the Minister, having regard to the nature of the undertaking, scheme, enterprise, contract or arrangement to which a deed relates, is satisfied that in the special circumstances of the case it is impracticable to secure a company to act as trustee or representative for the purposes of the deed, the Minister may, subject to such terms and conditions as he thinks fit, grant his approval to such person or persons as he thinks fit acting as trustee or representative for the purposes of the deed.

(3) The Minister may, at any time, by reason of a breach of a term or condition subject to which the approval was granted or for any other reason, revoke an approval granted by him under this section or under any corresponding previous enactment.

**PART IV.  
DIVISION V.**

80. (1) A deed shall, for the purposes of paragraph (a) of subsection (2) of

Covenants to be included in deeds.  
N.S.W s. 173F.  
S.A. s. 114e.  
Qsld. s. 83E.  
W.A. s. 98E.

section 78, contain covenants to the following effect, namely-

- (a) a covenant binding the management company that it will use its best endeavours to carry on and conduct its business in a proper and efficient manner and to ensure that any undertaking, scheme or enterprise to which the deed relates is carried on and conducted in a proper and efficient manner;
- (b) covenants binding the management company-
  - (i) that the management company will pay to the trustee or representative, within thirty days after their receipt by the company, and moneys that, under the deed, are payable by the company to the trustee or representative;
  - (ii) that the management company will not sell any interest to which the deed relates otherwise than at a price calculated in accordance with the provisions of the deed;
  - (iii) that the management company will, at the request of the holder of an interest, purchase that interest from the holder and that the purchase price will be a price calculated in accordance with the provisions of the deed; and
  - (iv) that the management company will not, without the approval of the trustee or representative, publish or cause to be published any advertisement, circular or other document containing any statement with respect to the sale price of interests to which the deed relates or the yield therefrom or containing any invitation to buy interests;
- (c) covenants binding the trustee or representative that the trustee or representative will-
  - (i) exercise all due diligence and vigilance in carrying out the functions and duties of the trustee or representative and in watching the rights and interests of the holders of the interests to which the deed relates;
  - (ii) keep or cause to be kept proper books of account in relation to those interests;
  - (iii) cause those accounts to be audited at the end of each financial year by a registered company auditor; and
  - (iv) send or cause to be sent by post a statement of the accounts with the report of the auditor thereon within two months of the end of the financial year, to each of the holders of those interests;
- (d) a covenant binding the management company and the trustee or representative, respectively, that no moneys available for investment under the deed will be invested in or lent to the management company, or to the trustee or representative, or to any company (other than a banking corporation or a corporation declared pursuant to paragraph (b) of subsection (7) of section 38 to be an authorized dealer in the short term money market) which is by virtue of subsection (7) of section 6 deemed to be related to the management company or to the trustee or representative;
- (e) a covenant binding the management company that to the same

Para. (d) amended by  
52, 1972, s. 15.

extent as if the trustee or representative were a director of the company, the company will—

- (i) make available to the trustee or representative, or to any registered company auditor appointed by the trustee or representative, for inspection the whole of the books of the company whether kept at the registered office or elsewhere; and
  - (ii) give to the trustee or representative or to any such auditor such oral or written information as it or he requires with respect to all matters relating to the undertaking, scheme or enterprise of the company or any property (whether acquired before or after the date of the deed) of the company or otherwise relating to the affairs thereof;
- (f) a covenant binding the management company that the management company will make available, or ensure that there is made available, to the trustee or representative such details as the trustee or representative requires with respect to all matters relating to the undertaking, scheme or enterprise to which the deed relates;
- (g) covenants binding the management company and the trustee or representative, respectively, that the management company or the trustee or representative, as the case may be, will not exercise the right to vote in respect of any shares relating to the interests to which the deed relates held by the management company, trustee or representative at any election for directors of a corporation whose shares are so held, without the consent of the majority of the holders of the interests to which the deed relates present in person and voting given at a meeting of those holdings summoned in the manner provided for in subparagraphs (i) and (ii) of paragraph (h) of this subsection for the purpose of authorizing the exercise of the right at the next election; and
- (h) a covenant binding the management company that the management company will within twenty-one days after an application is delivered to the company at its registered office, being an application by not less than fifty or one-tenth in number, whichever is the less, of the holders of the interests to which the deed relates—
- (i) by sending notice by post of the proposed meeting at least seven days before the proposed meeting to each of those holders at his last known address or in the case of joint holders to the joint holder whose name stands first in the company's records; and
  - (ii) by publishing at least fourteen days before the proposed meeting an advertisement giving notice of the meeting in a daily newspaper circulating generally throughout the State,

summon a meeting of the holders for the purpose of laying before the meeting the accounts and balance-sheet which were laid before the last preceding annual general meeting of the management company of the last audited statement of accounts of the trustee or representative and for the purpose of giving to the trustee or representative such directions as the meeting

thinks proper.

(2) A meeting summoned for the purposes of a covenant contained in a deed in pursuance of paragraph (g) or (h) of subsection (1) of this section shall be held at the time and place specified in the notice and advertisement, being a time not later than two months after the giving of the notice, under the chairmanship of—

- (a) such person as is appointed in that behalf by the holders of the interests to which the deed relates present at the meeting; or
- (b) where no such appointment is made, a nominee of the trustee or representative approved by the Registrar,

and shall be conducted in accordance with the provisions of the deed or, insofar as the deed makes no provision, as directed by the chairman of the meeting.

(3) Notwithstanding anything to the contrary contained in an approved deed, the undertaking, scheme, enterprise, contract or arrangement to which the deed relates may be continued in operation or existence if it appears to be in the interests of the holders of the interests to which the deed relates during such period as is or such periods as are agreed upon by the trustee or representative and the management company.

(4) Where a direction is given to the trustee or representative at a meeting summoned pursuant to a covenant complying with paragraph (h) of subsection (1) of this section, the trustee or representative—

- (a) shall comply with the direction unless it is inconsistent with the deed of this Act; and
- (b) shall not be liable for anything done or omitted to be done by it by reason only of its following that direction.

(5) Where the trustee or representative is of the opinion that any direction so given is inconsistent with the deed or this Act or is otherwise objectionable, the trustee or representative may apply to the Court for an order confirming, setting aside or varying the direction and the Court may make such order as it thinks fit.

**PART IV.**  
**DIVISION V.**

Interests to be issued  
by companies only.  
N.S.W s. 173B.  
S.A. s. 114f.  
Qsld. s. 83F.  
W.A. s. 98F.

Subsec. (2) inserted  
by 52, 1972, s. 16.

81. (1) No person, except a company or an agent of a company authorized in that behalf under the seal of the company, shall issue, or offer to the public for subscription or purchase or shall invite the public to subscribe for or purchase, any interest.

(2) Subsection (1) does not apply to or in relation to an offer to the public for purchase of an interest—

- (a) that is an interest in a partnership agreement; and
- (b) that was subscribed for or purchased before the commencement of the Companies Act Amendment Act, 1971-1972.

**PART IV.  
DIVISION V.**

Statement to be issued.

N.S.W s. 173C.  
S.A. s. 114g.  
Qsld. s. 83G.  
W.A. s. 98G.

82 (1) Before a company or an agent of a company issues, or offers to the public for subscription or purchase or invites the public to subscribe for or purchase, any interest, the company shall issue or cause to be issued a statement in writing in connection therewith which statement shall for all purposes be deemed to be a prospectus issued by a company, and subject to subsection (2) of this section, all provisions of this Act and rules of law relating to prospectuses or to the offering or to an intended offering of shares for subscription or purchase to the public shall with such adaptations as are necessary apply and have effect accordingly as if the interest were shares offered or intended to be offered to the public for subscription or purchase and as if persons accepting any offer or invitation in respect of or subscribing for or purchasing any such interest were subscribers for shares.

(2) Subject to subsection (3) of this section, the statement shall set out-

- (a) the matters and reports specified in the Seventh Schedule; and
- (b) such other matters as are required by or under the regulations to be set out in the statement,

with such adaptations as the circumstances of each case require and the Registrar approves.

(3) A matter or report referred to in subsection (2) of this section may be omitted from a statement if, having regard to the nature of the interest, the Registrar is of the opinion that the matter or report is not appropriate for inclusion in the statement and has by writing under this hand approved the omission.

**PART IV.  
DIVISION V.**

No issue without approved deed.  
N.S.W s. 173D.  
S.A. s. 114h.  
Qsld. s. 83H.  
W.A. s. 98H.

83. (1) A person shall not issue, or offer to the public for subscription or purchase or invite the public to subscribe for or purchase, any interest (not being an interest referred to in subsection(2) of section 81 of this Act) unless, at the time of the issue, offer or invitation, there is in force, in relation to the interest, a deed that is an approved deed.

(2) A person shall not in any deed, prospectus, statement, advertisement or other document relating to any interest make any reference to an approval of a deed or of a trustee or representative granted under this Division.

**Subsec. (1)  
amended by 52,  
1972, s. 17.**

**PART IV.  
DIVISION V.**

Register of interest holders.

84. (1) The management company shall in respect of each deed with which the company is concerned keep a register of the holders of interests under the deed and enter therein-

- (a) the names and addresses of the holders;
- (b) the extent of the holding of each holder and, if his interest consists of a specific interest in any property, a description of the property and its location sufficient to identify it;
- (c) the date at which the name of each person was entered in the register as a holder; and
- (d) the date at which any person ceased to be a holder.

(2) The provisions of Division IV of Part V shall so far as are applicable and with such adaptations as are necessary apply to and in relation to the register.

(3) A management company which-

- (a) keeps a register of holders of interests at a place within three miles of the office of the Registrar; and

- (b) provides reasonable accommodation and facilities for persons to inspect and take copies of its list of interest holders,

need not comply with the provision of paragraph (a) of subsection (1) of section 85 in relation to the deed under which the interests are held unless the Governor by order published in the *Government Gazette* otherwise directs.

**PART IV.**  
**DIVISION V.**

Returns, information,  
etc., relating to  
interests.

N.S.W s. 173G.

S.A. s. 114j.

Qsld. s. 83J.

W.A. s. 98J.

85. (1) Where a deed is or has at any time been an approved deed, the management company shall, so long as the deed or any deed in substitution in whole or in part for the deed, remains in force, lodge with the Registrar, within two months after the end of each financial year applicable to the deed—

- (a) a return in the prescribed form containing a list of all persons who, at the end of the financial year, were holders of the interests to which the deed relates, showing the name and address of each holder and the extent of this holding and, if his interest consists of a specific interest in any property, a description of the property and its location sufficient to identify it;
- (b) a summary of—
  - (i) all purchases and sales of land and marketable securities affecting the interests of the holders during the financial year; and
  - (ii) all other investments affecting the interests of the holders made during the financial year, showing the descriptions and quantities of those investments;
- (c) a statement of the total amount of brokerage affecting the interests of the holders paid or charged by the management company during the financial year and the proportion thereof paid to any stock or share broker, or any partner, employee or nominee of any stock or share broker, who is an officer of the company and the proportion retained by the company;
- (d) a list of all parcels of land and marketable securities, and other investments, held by the trustee or representative in relation to the deed, as at the end of the financial year, showing the value of the land, securities or other investments and the basis of valuations; and
- (e) such other statements and particulars (if any) as may be prescribed.

(2) Any document required to be lodged with the Registrar by the management company under subsection (1) of this section shall be signed by at least one director of the management company.

(3) A company to which subsection (1) of this section applies shall, if so requested by any holder of an interest to which the deed relates within a period of one month after the end of the financial year, send by post or cause to be sent by post to the holder, within two months after the end of the financial year, a copy of the documents which the company is required to lodge with the Registrar by virtue of paragraphs (b) to (e) (inclusive) of subsection (1) of this section.

**PART IV.  
DIVISION V.**

Penalty for  
contravention of  
Division, etc.  
N.S.W s. 173L.  
S.A. ss. 114k, 114l.  
Qsld. ss. 83K, 83L  
W.A. ss. 98K, 98L.

86. (1) A person shall not—

- (a) contravene or fail to comply with a provision of this Division; or
- (b) fail to comply with a covenant contained or deemed to be contained in any deed that is or at any time has been an approved deed.

Penalty: Imprisonment for twelve months or one thousand dollars<sup>1</sup>.

(2) A person shall not be relieved from any liability to any holder of an interest by reason of any contravention of, or failure to comply with, a provision of this Division.

**PART IV.  
DIVISION V.**

Winding up of  
schemes, etc.

87. (1) Where the management company under a deed is in liquidation or where, in the opinion of the trustee or representative, the management company has ceased to carry on business or has, to the prejudice of holders of interests to which the deed relates, failed to comply with any provision of the deed, the trustee or representative shall summon a meeting of the holders.

(2) A meeting under subsection (1) of this section shall be summoned—

- (a) by sending by post notice of the proposed meeting at least twenty-one days before the proposed meeting, to each holder at this last known address, or, in the case of joint holders, to the joint holder whose name stands first in the company's records; and
- (b) by publishing, at least twenty-one days before the proposed meeting, an advertisement giving notice of the meeting in a daily newspaper circulating generally throughout the State.

(3) The provisions of subsection (2) of section 80 shall apply to such a meeting as if the meeting were a meeting referred to in that subsection.

(4) If at any such meeting a resolution is passed by a majority of not less than three-fourths in value of the holders of the interests present in person and voting at the meeting that the undertaking, scheme, enterprise, contract or arrangement to which the deed relates be wound up, the trustee or representative shall apply to the Court for an order confirming the resolution.

(5) On an application by the trustee or representative the Court may, if it is satisfied that it is in the interest of the holders of the interests, confirm the resolution and may make such orders as it thinks necessary or expedient for the effective winding up of the undertaking, scheme, enterprise, contract or arrangement.

**PART IV.  
DIVISION V.**

Power to exempt from  
compliance with  
Division and non-  
application of Division  
in certain  
circumstances  
Qsld. s. 83M.  
S.A. ss. 114m.  
W.A. ss. 98M.

88. (1) The Minister may, by notice published in the *Government Gazette*, exempt any company, subject to such terms and conditions as are specified in the notice, from complying with all or any of the provisions of this Division in relation to any interest, or class of interests, specified in the notice, and may, by notice published in the *Government Gazette*, revoke such a notice or vary it in such a manner as he thinks fit.

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<sup>1</sup> Pursuant to s. 8 of the Acts Republiation Act, 1967, as amended, references to amounts of money expressed in decimal currency have been substituted for references to amounts of money expressed in the old currency.

Non-application of Division to personal representatives, etc.

(2) This Division shall not apply in the case of the sale of any interest by a personal representative, liquidator, receiver or trustee in bankruptcy in the normal course of realization of assets.

**PART IV.  
DIVISION V.**

Liability of trustees.  
U.K. s. 88.  
S.A. s. 114n.  
Qsld. s. 83N.  
W.A. s. 98N.

89. (1) Subject to this section, any provision contained in a deed that is or at any time has been an approved deed, or in any contract with the holders of interests to which such a deed relates, shall be void in so far as it would have the effect of exempting a trustee or representative under the deed from, or indemnifying such trustee or representative against, liability for breach of trust where the trustee or representative fails to show the degree of care and diligence required of a trustee or representative having regard to the provisions of the deed conferring on the trustee or representative any powers, authorities or discretions.

(2) Subsection (1) of this section shall not invalidate—

- (a) any release otherwise validly given in respect of anything done or omitted to be done by a trustee or representative before the giving of the release; or
- (b) any provision enabling such a release to be given—
  - (i) on the agreement thereto of a majority of not less than three-fourths in nominal value of holders of interests present in person and voting at a meeting summoned for the purpose; and
  - (ii) either with respect to specific acts or omissions or on the trustee or representative ceasing to act.

**Seventh Schedule – Statement Required Pursuant to Division V of Part IV**

**PART I**

**MATTERS REQUIRED TO BE STATED IN STATEMENT**

N.S.W. 14th  
Schedule  
Vic. 7th Schedule.  
Qsld. 13th Schedule.  
Tas. 7th Schedule.  
S.A. s. 114g (2),  
S.A. Coy. Regs.

1. The date of the statement.
2. The date of and parties to the deed referred to in section 83.
3. The date of and parties to any deed or instrument by which any of the provisions of the approved deed relating to the interest has been amended or abrogated.
4. The name of the trustee or representative under any such deed and the address of the trustee's or representative's registered office.
5. A summary of the provisions of the deed regulating the retirement, removal and replacement of the trustee or representative.
6. The name of the management company and the address of its registered office.
7. The names, descriptions, and addresses of all the directors of the management company.
8. A summary of the provisions of the deed regulating the retirement, removal and replacement of the management company.
9. The name and address of the auditor of the accounts relating to interests under the deed.
10. A summary of the provisions of the deed regulating the appointment, retirement, removal and replacement of such auditor.

11. The duration, if ascertainable, of the undertaking, scheme, enterprise, or investment contract to which the deed relates or if the duration is not ascertainable, that fact.
12. Full particulars with respect to the termination or winding up of the undertaking, scheme, enterprise or investment contract.
13. Such particulars as are sufficient to disclose the true nature of the undertaking, scheme, enterprise or investment contract in respect of which the interest is to be issued or offered to the public for subscription or purchase and the property to which the interest relates.
14. The nature of the interest to be so issued or offered and of any units or sub-units into which the interest is divided and the rights in relation thereto of the persons who become the holders thereof.
15. The address where the register of interest holders is or will be kept and the days on and the hours during which it is or will be accessible to the public.
16. The method of calculation provided by the deed of the price at which the management company may sell the interest or any right in respect thereof or any unit or sub-unit of the interest.
17. Such particulars as are sufficient to describe the duties and obligations imposed on the trustee or representative appointed by the deed relating to the interest.
18. The name and address of each person or corporation with whom or with which a holder of the interest is required, obliged or entitled, in connection with the undertaking, scheme, enterprise or investment contract, to enter into any contract whether by way of lease or otherwise.
19. The full names, descriptions and residential addresses of the directors of each corporation referred to in clause 18 of this schedule.
20. Whether any real or personal property to which the interest relates is or will become vested in the trustee or representative, the nature and description of such property and the conditions or circumstances under which it is or will become so vested.
21. Where the interest consists of rights or interests in or arising out of an investment relating to property that ordinarily depreciates in value through use or effluxion of time, such particulars as are sufficient to disclose the true particulars of the provision made for the replacement of such property and the source or sources from which such replacement is to be made or from which the cost of such replacement is to be met.
22. The full names and residential addresses of the vendors of any property to which the interest relates, whether such property was purchased or acquired by the management company or by any person or corporation referred to in clause 18 of this schedule or is proposed to be so purchased or acquired, a full and true description of such property and the amount paid or to be paid therefor to each vendor.
23. Such particulars as are sufficient to disclose the true nature and extent of the interest, if any, of each director of the management company, whether as a director, shareholder, partner or otherwise, in the business of each such vendor and in such property.
24. The obligations imposed upon the management company or any other person to purchase from any holder thereof the interest or any rights in respect thereof or the units or sub-units of the interest for which he has subscribed or which he has purchased, and a statement of the method

- provided by the deed for the calculation of the purchase price thereof.
25. A summary of the rights and obligations of the management company and of the trustee or representative governing the valuation of any investment made or property held in relation to the interest.
26. A summary of the provisions of the deed whereby investments or other property comprising or forming part of the interest to which the deed relates may be varied.
27. Full information regarding the remuneration of the trustee or representative and the management company respectively, the manner in which under the provisions of the deed such remuneration is provided for, and the charges (if any) that will be made by way of such remuneration upon the sale of or subscription for any such interest and upon the distribution of income and capital or otherwise in connection with the relevant undertaking, scheme, enterprise or investment contract.
28. Whether the interest or any rights in respect thereof or any units or sub-units of the interest are transferable by the holders thereof and, if so, a summary of the provisions of the deed regulating such transfer.
29. A summary of the provisions of the deed relating to the distribution of the holders of the interest or of units or sub-units of the interest of the income derived from the undertaking, scheme, enterprise or investment contract.
30. Full information as to whether and to what extent any factor other than cash receipts by way of dividend, interest or bonus has been or will be taken into account in calculating the amount of income that will be payable to an interest holder.
31. If any reference is made to the yield of income obtained or likely to be obtained by the holders of the interest or of units or sub-units of the interest, a statement as to whether and to what extent anything other than cash receipts by way of dividends, interest or bonuses has been taken into account in calculating the yield.
32. A summary of the provisions of the Act and of the deed regulating the convening of meetings of holders of the interest or of units or sub-units of the interest.
33. The name and description and the date of commencement of operation of every other undertaking, scheme, enterprise or investment contract involving the issue of interests to the public conducted by the management company within the five years immediately preceding the date of the statement.
34. A declaration—
- (a) that no units or sub-units of interests purchased or subscribed for pursuant to the statement shall be allotted later than six months after the date appearing in the statement pursuant to paragraph 1 hereof; and
  - (b) unless the conditions of issue of the units or sub-units expressly provide that certificates be not issued, that certificates shall be issued by the trustee or representative to purchasers of or subscribers for units or sub-units of interests purchased or subscribed for pursuant to the statement not more than two months after the allotment of the units or sub-units.
35. A summary of the provisions of the deed with respect to the undertakings—
- (a) by or on behalf of the management company relating to the

allotment of interests and of units or sub-units of interests to which the deed relates; and

- (b) by or on behalf of the trustee or representative relating to the issue to holders of interests and of units or sub-units of interests of certificates of title thereto.

## **PART II**

### **REPORTS TO BE SET OUT IN STATEMENT**

36. A report or reports by a person who at the time of making the report or reports was a registered company auditor, and whose name must appear as such in the statement, setting out—

- (a) such information as sufficiently discloses the number of distributions (if any) of income to holders of interests or of units or sub-units of interests to which the deed relates in each of the five years immediately preceding the date of the statement during which those interests had been in existence, the amount of each distribution and the extent to which each distribution consisted of any component other than dividends, interest and bonuses, and where it consisted of any component other than dividends, interest and bonuses, the nature and value of each of those components;
- (b) such information, as sufficiently discloses the selling price and the purchase price, respectively, of those interests, units or sub-units on the date upon which each distribution was made;
- (c) such information as sufficiently discloses the selling price and purchase price, respectively, of those interests, units or sub-units on such date, being a date within a period of fourteen days immediately preceding the date of the statement as is specified in the relevant report;
- (d) in respect of every issue of interests relating to any other undertaking, scheme, enterprise or investment contract conducted or entered into by the management company within the period of five years immediately preceding the date of the statement, similar information to that required under paragraphs (a), (b) and (c) of this clause; and
- (e) the profits or losses of the management company (and of every corporation with which a holder of the interest is required, obliged or entitled, pursuant to the undertaking, scheme, enterprise or investment contract, to enter into any contract) in respect of each of the five years during which the company and corporation, respectively, were carrying on business immediately preceding the date of the statement, and the rates of dividend (if any) paid by that company and that corporation in respect of each of those years, and the assets and liabilities of that company and of that corporation as at the last date to which its accounts were made up.

37. If in the case of a company which has been carrying on business, or of a business which has been carried on, for less than five years, the accounts of the company or business have only been made up in respect of four years, three years, two years, or one year, this schedule shall have effect as if references to four years, three years, two years, or one year, as the case may be, were substituted for references to five years.

**Sections 68 – 74**

Amendment of  
principal Act, s. 76–  
Interpretation.

68. Section 76 of the principal Act is amended–

- (a) by striking out from subsection (1) the definitions of "interest" and "investment contract" and inserting in lieu thereof the following definitions: –

"interest" means any right to participate or interest, whether enforceable or not, and whether actual prospective or contingent–

- (a) in any profits, assets or realization of any financial or business undertaking or scheme whether in the State or elsewhere;
- (b) in any common enterprise whether in the State or elsewhere in which the holder of the right or interest is led to expect profits, rent or interest from the efforts of the promoter of the enterprise or a third party; or
- (c) in any investment contract

whether or not in the right or interest is evidence by a formal document and whether or not the right or interest relates to a physical asset, but does not include–

- (d) any share in or debenture of a corporation;
- (e) any interest in or arising out of a policy of life insurance; or
- (f) any interest in a partnership agreement, unless the agreement or proposed agreement–
- (i) relates to an undertaking, scheme, enterprise or investment contract promoted by or on behalf of a person whose ordinary business is or includes the promotion of similar undertakings, schemes, enterprises or investment contracts, whether or not that person is, or is to become, a party to the agreement or proposed agreement; or
- (ii) is or would be an agreement, or is or would be within a class of agreements, prescribed by the regulations for the purposes of this paragraph; or

- (g) a prescribed right or interest or a right or interest of a prescribed class or kind declared by the regulations to be an exempt right or interest for the purposes of this Division:

"investment contract" means any contract scheme or arrangement which, in substance and irrespective of the form thereof involves the investment of money in or under such circumstances that the investor acquires or may acquire an interest in or right in respect of property whether in the State or elsewhere which under or in accordance with the terms of investment will, or may at the option of the investor, be used

or employed in common with any other interest in or right in respect of property whether in the State or elsewhere acquired in or under like circumstances; and

(b) by inserting after subsection (1) the following subsection:-

(1a) A regulation made for the purposes of subparagraph (ii) of paragraph (f) of the definition of "interest" in subsection (1) of this section does not apply to an agreement or a class of agreements relating to a partnership-

(a) being a partnership for the carrying on of a profession or trade where a person carrying on that profession or trade is required by any Act to be registered, licensed or otherwise authorized in order to do so; and

(b) the business of which does not include any business other than the business of a partnership referred to in paragraph (a) of this subsection.

Amendment of principal Act, s. 77-  
Approved deeds.

69. Section 77 of the principal Act is amended by striking out from paragraph (a) the word "Registrar" and inserting in lieu thereof the word "Commission".

Amendment of principal Act, s. 78-  
Approval of deeds.

70. Section 78 of the principal Act is amended-

(a) by striking out from subsection (1) the passage "the Registrar may, subject to this section, grant his approval" and inserting in lieu thereof the passage "the Commission may, subject to this section, grant its approval";

(b) by striking out from subsection (2) the passage "The Registrar shall not grant his approval" and inserting in lieu thereof the passage "The Commission shall not grant its approval"; and

(c) by striking out from section (3) the word "Registrar" and inserting in lieu thereof the word "Commission".

Amendment of principal Act, s. 80-  
Covenants to be included in deeds.

71. Section 80 of the principal Act is amended-

(a) by striking out from subsection (1) the passage "A deed shall" and inserting in lieu thereof the passage "Subject to subsection (1a) of this section, a deed shall";

(b) by inserting after subsection (1) the following subsections:-

(1a) The Minister may by notice published in the *Gazette* declare that, subject to such terms and conditions as are specified in the notice, a specified deed that makes provision for the appointment of a specified company as trustee for or representative of the holders of the interests to which the deed relates is not required to contain covenants to the effect of such of the matters referred to in subsection (1) of this section as are specified in the notice and the Minister may, by notice so published, revoke such a notice or vary it in such manner as he thinks fit.

(1b) Where before the commencement of the Companies Act Amendment Act, 1979, a notice was published under section 88 of this Act purporting to exempt a company, subject to such terms and conditions as were specified in the notice, from complying with the provisions of subsection (1) of this section in respect of a deed specified in the notice, the notice-

- (a) shall, notwithstanding any provision of this Act, have effect and be deemed always to have had effect according to its tenor; and
- (b) may, notwithstanding any provision of this Act, be varied or revoked by the Minister by notice published in the *Gazette*; and
- (c) by striking out from paragraph (b) of subsection (2) the word "Registrar" and inserting in lieu thereof the word "Commission".

Amendment of principal Act, s. 82-  
Statement to be issued.

72. Section 82 of the principal Act is amended-

- (a) by striking out subsection (1) and inserting in lieu thereof the following subsection:-
  - (1) Before a company or an agent of a company issues, or offers to the public for subscription or purchase or invites the public to subscribe for or purchase, any interest the company shall issue or cause to be issued a statement in writing in connection therewith which statement shall for all purposes be deemed to be a prospectus issued by a company, and subject to subsection (2) of this section, all provisions of this Act and rules of law relating to prospectuses or to the offering or to an intended offering of shares for subscription or purchase to the public shall with such adaptations as are necessary apply and have effect accordingly and, without limiting the generality of the foregoing, apply and have effect as if-
    - (a) the interest were shares offered or intended to be offered to the public for subscription or purchase;
    - (b) persons accepting any offer or invitation in respect of or subscribing for or purchasing any such interest were subscribers for shares;
    - (c) a reference in paragraph (a) of subsection (4) of section 40 of this Act to "the corporation" were a reference to the financial or business undertaking or scheme, the common enterprise or the investment contract to which the statement relates;
    - (d) the reference in subparagraph (iv) of paragraph (a) of subsection (4) of section 40 of this Act to "the directors" were a reference to the management company for the interest and the directors thereof; and
    - (e) in subparagraph (vi) of paragraph (a) of subsection (4) of section 40 of this Act a reference to "debentures" were a reference to an interest and a reference to "the trustee for the debenture holders" were a reference to the trustee for, or representative of, the holders of the interests;
- (b) by striking out from subsection (2) the word "Registrar" and inserting in lieu thereof the word "Commission";
- (c) by striking out from subsection (3) the passage " Registrar" and inserting in lieu thereof the word " Commission"; and
- (c) by striking out from section (3) the passage "by writing under his hand" and inserting in lieu thereof the passage "by instrument in writing".

Amendment of  
principal Act, s. 84-  
Register of interest  
holders.

73. Section 84 of the principal Act is amended-

(a) by striking out from subsection (1) the passage "The management company" and inserting in lieu thereof the passage "Subject to subsection (4) of this section, the management company";

(b) by inserting after subsection (1) the following subsections:-

(1a) A management company incorporated in a proclaimed State or Territory of the Commonwealth which-

(a) keeps a register of holders of interests in accordance with the law of the proclaimed State or Territory, being a law that corresponds with the preceding provisions of this section; and

(b) keeps within the State a register containing, with respect to the holders of interest who are resident within the State, the information prescribed by subsection (1) of this section,

shall be deemed to comply with subsection (1) of this section.

(1b) A management company that is to be deemed by subsection (1a) of this section to comply with subsection (1) of this section shall, within fourteen days after receiving a written request from a holder of an interest resident in the State, make available for inspection by him a copy of the register of holders of interests kept under the law of the proclaimed State or Territory.

Penalty: Two hundred dollars. Default penalty; and

(c) by striking out subsections (2) and (3) and inserting in lieu thereof the following subsections:-

(2) The provisions of Division IV of Part V (section 157 excepted) of this Act shall, with such adaptations and modifications as are necessary, apply to and in relation to the registers kept under subsection (1) of this section and under paragraph (b) of subsection (1a) of this section.

(3) A management company which-

(a) keeps a register of holders of interests pursuant to subsection (1) of this section or paragraph (b) of subsection (1a) of this section, at a place within five kilometres of the office of the Commission; and

(b) provides reasonable accommodation and facilities for persons to inspect and take copies of its list of interest holders,

need not comply with the provision of paragraph (a) of subsection (1) of section 85 of this Act in relation to the deed under which the interests are held unless the Commission by order published in the *Gazette* otherwise directs.

(4) The Minister may by notice published in the *Gazette* declare that, subject to such terms and conditions as are specified in the notice, a specified management company is not required to comply with the provisions of subsection (1) of this section in respect of a deed specified in the notice.

Repeal of s. 85 of principal Act and enactment of section in its place.

Returns, information, etc, relating to interests.

74. Section 85 of the principal Act is repealed and the following section is enacted and inserted in its place:-

85. (1) Where a deed is or has at any time been an approved deed under subsection (1) of section 77 of this Act, the management company shall, so long as the deed or any deed in substitution in whole or in part for the deed, remains in force lodge with the Commission within two months after the end of each financial year applicable to the deed a return in the prescribed form containing-

- (a) a list of all persons who, at the end of the financial year, were holders of the interests to which the deed relates, showing the name and address of each holder and the extent of his holding and, if his interest consists of a specific interest in any property, a description of the property and its location sufficient to identify it;
- (b) a summary of-
  - (i) all purchases and sales of land and marketable securities affecting the interests of the holders during the financial year; and
  - (ii) all other investments affecting the interests of the holders made during the financial year, showing the descriptions and quantifies of those investments;
- (c) a statement of the total amount of brokerage affecting the interests of the holders paid or charged by the management company during the financial year and the proportion thereof paid to any stock or share broker, or any partner, employee or nominee of any stock or share broker, who is an officer of the company and the proportion retained by the company;
- (d) a list of all parcels of land and marketable securities, and other investments, held by the trustee or representative in relation to the deed, as at the end of the financial year, showing the value of the land, securities or other investments and the basis of valuations; and
- (e) such other statements and particulars (if any) as may be prescribed.

(2) Any document required to be lodged with the Commission by the management company under subsection (1) of this section shall be signed by at least one director of the management company.

(3) A company to which subsection (1) of this section applies shall, if so requested by any holder of an interest to which the deed relates within a period of one month after the end of the financial year, send by post or cause to be sent by post to the holder, within two months after the end of the financial year, a copy of the documents which the company is required to lodge with the Commission by virtue of paragraphs (b) to (e) (inclusive) of subsection (1) of this section.

## **Section 267**

Amendment of seventh schedule of principal Act.

267. The seventh schedule to the principal Act is amended by striking out clause 34 and inserting in lieu thereof the following clause:-

34. A declaration-

- (a) that no units or sub-units of interests purchased or subscribed for pursuant to the statement shall be made available to applicants later than six months after the date appearing in the statement pursuant to paragraph 1; and
- (b) unless the conditions of issue of the units or sub-units expressly provide that certificates be not issued, that certificates shall be issued by the trustee or representative to purchasers of or subscribers for units or sub-units of interests purchased or subscribed for pursuant to the statement not more than two months after the units or sub-units are made available.

am. Companies Act Amendment Act 1980 (SA) No. 26 of 1980 (assented to 17 April 1980)

## **Section 10**

Amendment of principal Act, s. 77-  
Approved deeds.

10. Section 77 of the principal Act is amended by striking out paragraph (a) and inserting in lieu thereof the following paragraph: -

- (a) the Commission has granted its approval to the deed under this Division or the deed was approved under a corresponding enactment;

## **Section 11**

Amendment of principal Act, s. 79-  
Approval of trustees.

11. Section 79 of the principal Act is amended by striking out subsection (2).

## **Companies Regulations 1979 (SA)**

as at 31 October 1980

## **Section 12**

Matters and things to be included in deeds.

12. (1) For the purposes of paragraph (b) of subsection (2) of section 78 of the Act, the following are the matters and things required to be included in a deed:-

- (a) such particulars as are sufficient to disclose the nature of the undertaking, scheme, enterprise or investment contract, and the nature of the interests, to which the deed relates;
- (b) a provision expressly appointing a company or other person (being a company or person that has been approved by the Minister) as trustee for or representative of the holders of the

- interests to which the deed relates;
- (c) except where no property is to be vested in the trustee or representative, a provision creating a trust, or containing a declaration of trust, and setting out full particulars of the trust, including precise information as to the circumstances in which the money, marketable securities, investments and other property subject to the trust are or will be vested in the trustee or representative, and the duties and obligations of the trustee or representative, and the duties and obligations of the trustee or representative towards the holders of those interests in regard to that property;
  - (d) a provision for, and full particulars with respect to –
    - (i) the retirement, removal and replacement of the trustee or representative;
    - (ii) the retirement, removal and replacement of the management company, or, if the management company is not liable to be removed by the trustee or representative or by the interest holders, a statement of that fact;
    - (iii) the appointment, retirement, removal and replacement of the auditor of the accounts relating to interests under the deed;
    - (iv) the duration, if ascertainable, of the undertaking scheme, enterprise or investment contract or, if the duration is not ascertainable, a statement of that fact; and
    - (v) the termination or winding up of the undertaking scheme, enterprise or investment contract;
  - (e) a provision binding the management company and trustee that –
    - (i) neither the management company nor the trustee or representative appointed by or under the deed will invest any money that is available for investment under the deed in any interest; and
    - (ii) the management company will not vest under the deed in such trustee or representative any property that is an interest,  
unless there is in existence in respect of that interest a deed that is an approved deed under Division V of Part IV of the Act or a corresponding law of a proclaimed State within the meaning of that Division;
  - (f) where the interests to which the deed relates consist of rights or interests in or arising out of an investment relating to property that tends to depreciate in value through use or effluxion of time, particulars of the provision made or to be made for the replacement of that property and the source or sources from which the replacement is to be made or from which the cost of the replacement is to be made or from which the cost of the replacement is to be met or, if no provision is made, a statement of that fact;
  - (g) full particulars of –
    - (i) the method of calculation of the price at which an interest to which the deed relates may be sold by the

- management company;
- (ii) the circumstances in which the management company or other person may be required to purchase from the holder of an interest any interest for which the holder has subscribed or which he has acquired, and the method of calculation of the purchase price of the interest;
  - (iii) the circumstances in which, and the methods by which, all or any of the investments or other property comprising or forming part of an interest to which the deed relates may be varied;
  - (iv) the conditions governing the transfer of the interests to which the deed relates;
  - (v) the conditions governing the distribution of income to the holder of those interests; and
  - (vi) the remuneration of the trustee or representative and of the management company, respectively, and the manner in which that remuneration is provided for, including the charges (if any) that will be made for that remuneration upon the subscription for or sale of an interest to which the deed relates and upon the distribution of income and capital or otherwise in connection with the relevant undertaking, scheme, enterprise or investment contract;
- (h) specific provisions relating to the convening of meetings of interest holders;
  - (i) specific provisions whereby the management company undertakes to keep and maintain an up-to-date register of interest holders and to make that register available for inspection, free of charge, to any interest holder at any time when the company's office is required by the Act to be accessible to the public;
  - (j) where the deed is capable of modification, provisions governing the modification of the deed;
  - (k) a declaration –
    - (i) that no units or sub-units of interests purchased or subscribed for pursuant to the statement issued by the management company under section 82 of the Act shall be allotted later than six months after the date of the statement; and
    - (ii) unless the conditions of issue of the units or sub-units expressly provide that certificates be not issued – that certificates shall be issued by the trustee or representative to purchasers of or subscribers for units or sub-units of interests purchased or subscribed for pursuant to the statement not more than two months after the allotment of the units or sub-units; and
      - (1) where the deed requires, or confers a right on interest holders to enter into an agreement in connection with the undertaking, scheme, enterprise or investment contract, a provision incorporating, whether by way of annexure or otherwise, the terms and form of that agreement.

- (2) In this regulation "company", "interest", "investment Contract" and "Management Company" have the same respective meanings as Division V of Part IV of the Act.

### **Companies (South Australia) Code**

as at October 1984

**Section 96(1) [Form to be attached to prospectus]** A form of application for shares in or debentures of a corporation or a form to accompany a deposit of money with, or a loan of money to, a corporation shall not be issued by the corporation or by any other person unless the form is attached to a prospectus and a copy of the form and a copy of the prospectus have been registered by the Commission under this Code<sup>1</sup>.

#### **History**

S. 96(1) amended by No. 108 of 1983, s. 42.

1. A.C.T.: "Act".

## **Division 6 – Prescribed Interests**

### **Sections 164 – 177**

#### **SECTION 164 INTERPRETATION**

**164(1) [Definitions]** In this Division, unless the contrary intention appears-

"company" means-

- (a) a public company;
- (b) a corporation that is a public company under the corresponding law in force in a participating State or in a participating Territory<sup>2</sup>;
- (c) a corporation that is a public company under the law of a declared State or declared Territory and is registered as a foreign company in [name of State]<sup>1</sup>;
- (d) in relation to a prescribed interest that relates to an undertaking, scheme, enterprise, contract or arrangement (in this paragraph referred to as the "relevant undertaking") - a body corporate (other than a body corporate of a kind referred to in paragraph (a), (b) or (c))-
  - (i) formed or incorporated in [name of State]<sup>1</sup> or in a participating State or participating Territory; or
  - (ii) formed or incorporated in a declared State or declared Territory and registered as a foreign company in [name of State]<sup>1</sup>,

being a body corporate that is declared by the Commission, by instrument in writing, to be a company for the purposes of this Division in relation to the relevant undertaking or in relation to a class of undertakings, schemes, enterprises, contracts or arrangements that includes the relevant undertaking; or

- (e) in relation to a prescribed interest that relates to an undertaking, scheme, enterprise, contract or arrangement (in this paragraph referred to as the "relevant undertaking") - a body corporate (other than a body corporate of a kind referred to in paragraph (a), (b) or (c)) formed or incorporated in a participating State or participating Territory, being a body corporate that is, pursuant to a provision, of a law in force in that State or Territory<sup>3</sup> that corresponds with paragraph (d), declared by the Commission, by instrument in writing, to be a company for the purposes of the provisions of the law in force in that State or Territory<sup>3</sup> that correspond with this Division in relation to the relevant undertaking or in relation to a class of undertakings, schemes, enterprises, contracts or arrangements that include the relevant undertaking;

**"declared State"** means a State that is declared by the Commission, by order in writing published in the *Gazette*, to be a declared State for the purposes of this Division;

**"declared Territory"** means a Territory that is declared by the Commission, by order in writing published in the *Gazette*, to be a declared Territory for the purposes of this Division;

**"financial year"**, in relation to a deed, means the period of 12 months ending on 30 June or on such other date as is specified in the deed in lieu of 30 June;

**"management company"**, in relation to any prescribed interests used or proposed to be issued or any deed that relates to any prescribed interests issued or proposed to be issued, means a company by or on behalf of which the prescribed interests have been or are proposed to be issued, and include any person for the time being exercising the functions of the management company.

**History**

Definition of "company" substituted by No. 108 of 1983, s. 59.

1. A.C.T. For "[name of State]" read "the Australian Capital Territory".
2. A.C.T.: For "law in force in a participating State or in a participating Territory" read "law of a participating State or participating Territory".
3. A.C.T.: For "law in force in that State or Territory" read "law of that State or Territory".

**164(2) [Deed]** A reference in this Division to a deed shall be read as including a reference to any instrument amending or affecting the deed.

**164(3) [Deemed covenants]** Any deed to which approval has been granted under a corresponding previous law of the State<sup>1</sup> shall, if it does not contain the covenants concerned, be deemed to contain covenants to the effect of the covenants required to be contained in a deed under sub-section 168(1) except the covenants required under sub-paragraphs 168(1)(b)(i), (ii) and (iii), and sub-sections 168(3), (4), (5) and (6) apply in relation to the deed accordingly.

**History**

S. 164(3) amended by No. 108 of 1983, s. 59.

1. A.C.T. "Territory".  
Tas.: For "the State" read "Tasmania"

**165(1) [Approved deed]** For the purposes of this Division, a deed is an approved deed if-

- (a) an approval has been granted to the deed under this Division or under any corresponding previous law of the State;<sup>1</sup> and
- (b) an approval has been granted under this Division or under any corresponding previous law of the State<sup>1</sup> to the trustee or representative appointed for the purposes of the deed acting as trustee or representative and that approval has not been revoked and the trustee or representative has not ceased to hold office.

1. A.C.T. "Territory".  
Tas.: For "the State" read "Tasmania"

## SECTION 166 APPROVAL OF DEEDS

**165(2) [Deed approved under corresponding law]** In the case of a management company formed or incorporated in a participating State or participating Territory, a deed is an approved deed for the purposes of this Division if-

- (a) an approval has been granted to the deed under the provisions of the law, or of the previous law, in force in that State or Territory<sup>1</sup> that correspond with this Division; and
- (b) an approval has been granted under the provisions of the law, or of the previous law, in force in that State or Territory<sup>1</sup> that correspond with this Division to the trustee or representative appointed for the purposes of the deed acting as trustee or representative and that approval has not been revoked and the trustee or representative has not ceased to hold office.

### History

S. 165(2) amended by No. 108 of 1983, s. 60.

1. A.C.T. For "law; or the previous law, in force in that State or Territory" read "law, or of the previous law, of that State or Territory".

**166(1) [Approval by Commission]** Where a deed makes provision for the appointment of a person as trustee for or representative of the holders of prescribed interests issued or proposed to be issued by a company, the Commission may, subject to this section, grant its approval to the deed.

### History

S. 166(1) amended by No. 108 of 1983, s. 61.

**166(2) [Compliance with Division and regulations]** The Commission shall not grant its approval to a deed unless the deed-

- (a) complies with the requirements of this Division; and
- (b) makes provision for such other matters and things as are required by or under the regulations to be included in the deed.

**166(3) [Deed or sworn copy of Commission]** Within 7 days after approval has been granted to a deed under this section, the management company shall lodge with the Commission the deed, or a copy of the deed verified by a statement in writing, and a copy so lodged shall for all purposes, in the absence of proof that it is not a true copy, be regarded as an original.

### History

S. 166(3) amended by No. 108 of 1983, s. 61.

## SECTION 167 APPROVAL OF TRUSTEES

**167(1) [Approval by Commission]** The Commission may, subject to such terms and conditions as it thinks fit, grant its approval to a person acting as trustee or representative for the purposes of a deed.

### History

S. 167(1) amended by No. 108 of 1983, s. 62.

**167(2) [Revocation of approval]** The Commission may, at any time, by reason a breach of a term or condition subject to which the approval was granted or for any other reason, revoke an approval granted under this section or under any corresponding previous law of the State.<sup>1</sup>

- 1. A.C.T. "Territory"  
Tas.: For "the State" read "Tasmania".

## **SECTION 168 COVENANTS TO BE INCLUDED IN DEEDS**

**168(1) [Required covenants]** Subject to sub-section (2); a deed shall, for the purposes of paragraph 166(2)(a), contain covenants to the following effect:

- (a) a covenant binding the management company that it will use its best endeavours to carry on and conduct its business in a proper and efficient manner and to ensure that any undertaking, scheme or enterprise to which the deed relates is carried on and conducted in a proper and efficient manner;
- (b) covenants binding the management company-
  - (i) that the management company will pay to the trustee or representative, within 30 days after their receipt by the company, any moneys that, under the deed, are payable by the company to the trustee or representative;
  - (ii) that the management company will not sell or issue, or permit to be sold or issued, a prescribed interest to which the deed relates otherwise than at a price calculated in accordance with the provisions of the deed;
  - (iii) that the management company will, at the request of the holder of a prescribed interest, purchase, or cause to be purchased, that prescribed interest from the holder and that the purchase price will be a price calculated in accordance with the provisions of the deed; and
  - (iv) that the management company will not, without the approval of the trustee or representative, publish or cause to be published any advertisement, circular or other document containing any statement with respect to the sale price of prescribed interests to which the deed relates or the yield from those prescribed interests or containing any invitation to buy prescribed interests;
- (c) covenants binding the trustee or representative that he or it will-
  - (i) exercise all due diligence and vigilance in carrying out his or its functions and duties and in watching the rights and interests of the holders of the prescribed interests to which the deed relates;
  - (ii) keep or cause to be kept proper books of account in relation to those prescribed interests;
  - (iii) cause those accounts to be audited at the end of each financial year by a registered company auditor; and
  - (iv) send or cause to be sent by post a statement of the accounts with the report of the auditor on those accounts within 2 months of the end of the financial year to each of the holders of those prescribed interests;
- (d) a covenant binding the management company and the trustee or representative, respectively, that no moneys available for investment under the deed will be invested in or lent to the management company, the trustee or representative, or any person (other than a banking corporation or a corporation declared pursuant to paragraph 97(7)(b) to be an authorized dealer in the short term money market) who is associated with the management company or with the trustee or representative;
- (e) a covenant binding the management company that the company will-

- (i) make available to the trustee or representative, or to any registered company auditor appointed by him or it, for inspection all the books of the company whether kept at the registered office or elsewhere; and
  - (ii) give to the trustee or representative or to any such auditor such oral or written information as the trustee or representative or the auditor requires with respect to all matters relating to the undertaking, scheme or enterprise of the company or any property (whether acquired before or after the date of the deed) of the accompany or otherwise relating to the affairs of the company;
- (f) a covenant binding the management company that the management company will make available, or ensure that there is made available, to the trustee or representative such details as the trustee or representative requires with respect to all matters relating to the undertaking, scheme or enterprise to which the deed relates;
- (g) covenants binding the management company and the trustee or representative, respectively, that the management company or the trustee or representative, as the case may be, will not exercise the right to vote in respect of any shares relating to the prescribed interests to which the deed relates held by the management company or by the trustee or representative at any election for directors of a corporation shares in which are so held, without the consent of the majority of the holders of the prescribed interests to which the deed relates present in person and voting given at a meeting of those holders convened in the manner provided for in paragraph (h) for the purpose of authorizing the exercise of the right at the next election; and
- (h) a covenant binding the management company that the management company will, within 21 days after an application is delivered to the company at its registered office, being an application by not less than 50, or one-tenth in number, whichever is the less, of the holders of the prescribed interests to which the deed relates, by sending notice by post of the proposed meeting at least 7 days before the proposed meeting to each of the holders of the prescribed interests to which the deed relates at his last known address or, in the case of joint holders, to the joint holder whose name appears first in the company's records, convene a meeting of the holders for the purpose of laying before the meeting the accounts and balance-sheet that were laid before the last preceding annual general meeting of the management company or the last audited statement of accounts of the trustee or representative, and for the purpose of giving to the trustee or representative such directions as the meeting thinks proper.

**History**

S. 168(1)(c), (e) and (g) amended and (1)(d) substituted by No. 108 of 1983, s. 63.

**168(2) [Specified deed need not contain covenants]** The Commission may, by instrument in writing, declare that, subject to such terms and conditions as are specified in the instrument, a specified deed that makes provision for the appointment of a specified person as trustee for or representative of the holders of the prescribed interests to which the deed relates is not required to contain covenants to the effect of such of the matters referred to in sub-section (1), or to contain such of the matters provided for in regulations made for the purposes of paragraph 166(2)(b), as are specified in the instrument and the Commission may, by instrument in writing, revoke the first-mentioned instrument or vary it in such manner as it thinks fit.

**History**

S. 168(2) substituted by No. 108 of 1983, s. 63.

**168(2A) [Copy of instrument to be published in Gazette]** The commission shall cause a copy of an instrument executed under sub-section (2) to be published in the *Gazette*, but failure of the Commission to do so does not affect the validity of the instrument.

**History**

S. 168(2A) inserted by No. 108 of 1983, s. 63.

**168(3) [Meeting of holders of prescribed interests]** A meeting convened for the purposes of a covenant contained in a deed pursuant to paragraph (1)(g) of (h) shall be held at the time and place specified in the notice, being a time not later than 2 months after the giving of the notice, under the chairmanship of-

- (a) such person as is appointed for that purpose by the holders of the prescribed interests to which the deed relates present at the meeting; or
- (b) where no such appointment is made, a nominee of the trustee or representative approved by the Commission,

and shall be conducted in accordance with the provisions of the deed or, in so far as the deed makes no provision, as directed by the chairman of the meeting.

**168(4) [Continuation of enterprise]** Notwithstanding anything to the contrary contained in an approved deed, the undertaking, scheme, enterprise, contract or arrangement to which the deed relates may be continued in operation or existence if it appears to be in the interests of the holders of the prescribed interests to which the deed relates during such period as is, or such periods as are, agreed upon by the trustee or representative and the management company.

**168(5) [Trustee or representative to comply with direction]** Where a direction is given to the trustee or representative at a meeting convened pursuant to a covenant complying with paragraph (1)(h), the trustee or representative-

- (a) shall comply with the direction unless it is inconsistent with the deed or this Code;<sup>1</sup> and
- (b) is not liable for anything done or omitted to be done by him or it pursuant to that direction.

**History**

S. 168(5)(b) substituted by No. 108 of 1983, s. 63.

- 1. A.C.T. "Act".

**168(6) [Court may rule on objection]** Where the trustee or representative is of the opinion that a direction so given is inconsistent with the deed or this Code<sup>1</sup> or is otherwise objectionable, the trustee or representative may apply to the Court for an order confirming, setting aside or varying the direction and the Court may make such order as it thinks fit.

- 1. A.C.T. "Act".

## **SECTION 169 PRESCRIBED INTERESTS TO BE ISSUED BY COMPANIES ONLY**

**169** A person, other than a company or an agent of a company authorized for that purpose under the common or official seal of the company, shall not issue to the public, offer to the public for subscription or purchase, or invite the public to subscribe for or purchase, any prescribed interest.

## **SECTION 170 STATEMENT TO BE ISSUED**

**170(1) [Statement in writing to be registered]** A company or an agent of a company shall not issue to the public, offer to the public for subscription or purchase, or invite the public to subscribe for or purchase, any prescribed interest unless a statement in writing in relation to that prescribed interest has been registered by the Commission under Division 1.

**History**

S. 170(1) substituted by No. 153 of 1981, s. 43.

**170(2) [Deemed prospectus]** For the purposes of the registration of the statement referred to in sub-section (1), and for all other purposes, the statement shall be deemed to be a prospectus issued by a company.

**History**

S. 170(2) substituted by No. 153 of 1981, s. 43.

**170(3) [Application of laws relating to prospectuses]** Subject to sub-section (4) and (5), all provisions of this Code<sup>1</sup> and rules of law relating to-

- (a) prospectuses;
- (b) the offer or intended offering to the public of shares for subscription or purchase;
- (c) the inviting or intended inviting of the public of subscribe for or purchase shares; and
- (d) the issuing or intended issuing of forms of application for shares,

shall, with such adaptations as are necessary, apply and have effect in relation to prescribed interests as if-

- (e) the prescribed interests were shares that were offered or intended to be offered to the public for subscription or purchase or that the public were invited or intended to be invited to subscribe for or purchase;
- (f) persons accepting any offers or making offers pursuant to any invitation in respect of, or subscribing for or purchasing, any such prescribed interests were subscribers for shares;
- (g) the references in paragraph 99(4)(a) to the corporation were references to the financial or business undertaking or scheme, the common enterprise or the investment contract to which the statement relates;
- (h) the reference in sub-paragraph 99(4)(a)(iv) to the directors of the corporation were a reference to the management company for the prescribed interest and the directors of that company; and
- (j) the reference in sub-paragraph 99(4)(a)(vi) to debentures were a reference to prescribed interests and the reference in that sub-paragraph to the trustee for the debenture holders were a reference to the trustee for, or representative of, the holders of the prescribed interests.

**History**

S. 170(3) substituted by No. 153 of 1981, s. 43.

1. A.C.T.: "Act".

**170(4) [Statement to include prescribed matters]** Subject to sub-section (5), the statement shall set out the prescribed matters, and shall contain the prescribed reports, with such adaptations (if any) as the circumstances of each case require and the Commission approves.

**170(5) (Prescribed matter inappropriate)** A matter or report referred to in subsection (4) may be omitted from a statement if, having regard to the nature of the prescribed interest, the Commission is of the opinion that the matter or report is not appropriate for inclusion in the statement and has by instrument in writing approved the omission.

**170(6) [Registration under corresponding law]** Where a statement in respect of management company formed or incorporated in a participating State or participating Territory has been registered under the provisions of the law in force in that State or Territory<sup>1</sup> that correspond with Division 1, that statement shall, for the purposes of this Division, be deemed to

have been registered by the Commission under Division 1 and anything required to be done before registration under that Division shall be deemed to have been done.

**History**

S. 170(6) substituted by No. 108 of 1983, s. 64.

1. A.C.T.: For "law in force in that State or Territory" read "law of that State or Territory".

**SECTION 171 NO ISSUE WITHOUT APPROVED DEED**

**171(1) [Prohibition of issue of prescribed interest without approved deed]** A person shall not issue to the public, offer to the public for subscription or purchase, or invite the public to subscribe for or purchase, any prescribed interest unless, at the time of the issue, offer or invitation, there is in force, in relation to the interest, a deed that is an approved deed.

**171(2) [Reference to approval prohibited]** A person shall not, in any deed, prospectus, statement, advertisement or other document relating to a prescribed interest, make any reference to an approval of a deed or of a trustee or representative granted under-

- (a) this Division or a previous corresponding law of the State<sup>1</sup>; or
- (b) the provisions of the law in force in a participating State or in a participating Territory<sup>2</sup> that correspond with this Division, or a previous corresponding law in force in a participating State or in a participating Territory.<sup>2</sup>

1. A.C.T.: "Territory".

Tas.: For "the State" read "Tasmania".

2. A.C.T.: For "law in force in a participating State or in a participating Territory" read "law of a participating State or a participating Territory".

**SECTION 172 REGISTER OF HOLDERS OF PRESCRIBED INTERESTS**

**172(1) [Management company to keep register]** The management company shall, in respect of each deed with which the company is concerned, keep at the registered office or principal place of business in the State<sup>1</sup> of the company, or a such other place in the State<sup>1</sup> as the Commission approves, a register of the holders of prescribed interests under the deed and enter in the register-

- (a) the names and addresses of the holders;
- (b) the extent of the holding of each holder and, if his prescribed interest consists of a specific interest in any property, a description of the property sufficient to identify it;
- (c) the date at which the name of each person was entered in the register as a holder; and
- (d) the date at which any person ceased to be a holder.

**History**

S. 172(1) amended by No. 108 of 1983, s. 65.

1. A.C.T.: "Territory".

Tas.: For "the State" read "Tasmania".

**172(2) [Deemed compliance]** A management company formed or incorporated IN a participating State, participating Territory, declared State or declared Territory that-

- (a) keeps a register of holders of prescribed interests in accordance with the provisions of the law in force in that State or Territory<sup>2</sup> that correspond with sub-section (1); and

- (b) keeps within the State<sup>1</sup> a register containing with respect to the holders of prescribed interests who are resident within the State<sup>1</sup> the information prescribed by sub-section (1),

shall be deemed to comply with sub-section (1).

**History**

S. 172(2)(a) amended by No. 108 of 1983, s. 65.

1. A.C.T.: "Territory".

Tas.: For "the State" read "Tasmania".

2. A.C.T.: For "law in force in that State or Territory" read "law of that State or Territory".

**172(3) [Copy of register]** A management company that is deemed by sub-section (2) to comply with sub-section (1) shall, within 14 days after receiving a written request from a holder of a prescribed interest resident in the State,<sup>1</sup> make available for inspection by him a copy of the register of holders prescribed interests kept as mentioned in paragraph (2)(a).

1. A.C.T.: "Territory".

Tas.: For "the State" read "Tasmania".

**172(4) [Application of Division 4 of Part V]** The provisions of Division 4 of Part V (except section 262) shall, with such adaptations and modifications as are necessary, apply to and in relation to the registers kept under sub-section (1) and under paragraph (2)(b).

**172(5) [Exemption from sec. 173(1)(c)]** A management company that-

- (a) keeps a register of holders of prescribed interests pursuant to sub-section (1) or paragraph (2)(b) at a place in the State<sup>1</sup> within 25 kilometres of the office of the State Commission<sup>2</sup>; and
- (b) provides reasonable accommodation and facilities for persons to inspect and take copies of its list of holders of prescribed interests,

need not comply with the provision of paragraph 173(1)(c) in relation to the deed under which the prescribed interests are held unless the Commission, by order in writing published in the *Gazette*, otherwise directs.

1. A.C.T.: "Territory".

Tas.: For "the State" read "Tasmania".

2. Vic., Qld., W.A., Tas.: "Commissioner for Corporate Affairs". A.C.T.: "Corporate Affairs Commission for the Territory".

**172(6) (Omitted by No. 108 of 1983, s. 65.)**

## **SECTION 173 RETURNS, INFORMATION, & c., RELATING TO PRESCRIBED INTERESTS**

**173(1) [Return etc. to Commission]** Where a deed is or has at any time been an approved deed under sub-section 165(1), the management company shall lodge with the Commission-

- (a) so long as the deed, or any deed in substitution in whole or in part for the deed, remains in force - within 2 months after the end of each financial year applicable to the deed or substituted deed; or
- (b) if the deed ceases to be in force and no deed has been substituted in whole or in part for the deed, or any such substituted deed ceases to be in force - within 2 months after the deed or substituted deed, as the case may be, ceases to be in force,

a return in the prescribed form containing-

- (c) a list of all persons who, at the end of the relevant financial year, were holders of the prescribed interests to which the deed or substituted deed relates; and

(d) such other particulars as are prescribed,

and accompanied by the prescribed documents.

**173(2) [Signature]** Any document required to be lodged with the Commission by the management company under sub-section (1) shall be signed by at least one director of the management company.

**173(3) [Copies to holder]** A company to which sub-section (1) applies shall, if so requested by any holder of a prescribed interest to which the deed relates within a period of one month after the end of the relevant financial year, send by post or cause to be sent by post to the holder, within 2 months after the end of the relevant financial year, a copy of each of the documents that the company is required to lodge with Commission by virtue of that sub-section (other than the list referred to in paragraph (1)(c)).

**173(4) [Recognized company]** Sub-section (1) does not apply to a management company that is a recognized company and has complied with the provision of the law in force in the participating State or in the participating Territory<sup>1</sup> in which it was incorporated that corresponds with this section.

1. A.C.T.: For "law in force in the participating State or in the participating Territory" read "law of the participating State or participating Territory".

**173(5) [Relevant financial year]** A reference in this section to the relevant financial year shall be read as a reference-

- (a) in a case to which paragraph (1)(a) applies – to the financial year referred to in that paragraph in respect of which the return is lodged; or
- (b) in a case to which paragraph (1)(b) applies-
  - (i) if the deed ceases to be in force at the expiration of the last day of a financial year applicable to the deed – that financial year; or
  - (ii) in any other case – the period commenced at the expiration of the last preceding financial year applicable to the deed and ended on the day on which the deed ceased to be in force.

## **SECTION 174 PENALTY FOR BREACH OF CERTAIN PROVISIONS OR COVENANTS**

**174(1) [Offences]** A person shall not-

- (a) contravene or fail to comply with a provision of section 169, 170 or 171; or
- (b) fail to comply with a covenant contained or deemed to be contained in any deed that is or at any time has been an approved deed.

Penalty: \$20,000 or imprisonment for 5 years, or both.

**174(2) [Civil liability preserved]** A person is not relieved from any liability to any holder of a prescribed interest by reason of any contravention of, or failure to comply with, a provision of this Division.

## **SECTION 175 WINDING UP OF SCHEMES, & c.**

**175(1) [Meeting to be convened]** Where-

- (a) the management company under a deed is in the course of being wound up; or
- (b) in the opinion of the trustee or representative, the management company has ceased to carry on business or has, to the prejudice of holders of prescribed interests to which the deed relates, failed to comply with a provision of the deed, the trustee or representative shall convene a meeting of those holders in the manner set out in sub-section (2).

Penalty: \$2,500.

**175(2) [Notice of meeting]** A meeting under sub-section (1) shall be convened by sending by post notice of the proposed meeting at least 21 days before the proposed meeting to each holder at his last known address, or, in the case of joint holders, to the joint holder whose name appears first in the company's records.

**175(3) [Conduct of meeting]** The provisions of sub-section 168(3) apply to such a meeting as if the meeting were a meeting referred to in that sub-section.

**175(4) [Court order confirming resolution]** If at any such meeting a resolution is passed by a majority of not less than three-quarters in value of the holders of the prescribed interests present in person and voting at the meeting that the undertaking, scheme, enterprise, contract or arrangement to which the deed relates be wound up, the trustee or representative shall, within 28 days after the day on which the meeting is held, apply to the Court for an order confirming the resolution.

Penalty: \$2,500.

**175(5) [Court's powers]** On an application by the trustee or representative, the Court may, if it is satisfied that it is in the interest of the holders of the prescribed interests, confirm the resolution and may make such orders as it thinks necessary or expedient for the effective winding up of the undertaking scheme, enterprise, contract or arrangement.

**SECTION 176 POWER TO EXEMPT FROM COMPLIANCE WITH DIVISION AND NON – APPLICATION OF DIVISION IN CERTAIN CIRCUMSTANCES**

**176(1)** (Omitted by No. 108 of 1983, s. 66.)

**176(2) [Non-application]** This Division does not apply in the case of the sale of any prescribed interest by a personal representative, liquidator, receiver or trustee in bankruptcy in the normal course of realization of property.

**SECTION 177 LIABILITY OF TRUSTEE**

**177(1) [Certain provisions void]** Subject to this section, a provision contained in a deed that is or has been at any time an approved deed, or in any contract with the holders of prescribed interests to which such a deed relates, is void in so far as it would have the effect of exempting a trustee or representative under the deed from, or indemnifying a trustee or representative against, liability for breach of trust where the trustee or representative fails to show the degree of care and diligence required of a trustee or representative having regard to the powers, authorities or discretions conferred on the trustee or representative by the deed.

**177(2) [Releases]** Sub-section (1) does not invalidate-

- (a) any release otherwise validly given in respect of anything done or omitted to be done by a trustee or representative before the giving of the release; or

- (b) any provisions enabling such a release to be given-
  - (i) on the agreement to the giving of the release of a majority of not less than three-quarters in nominal value of holders of prescribed interests present in person and voting at a meeting convened for the purpose; and
  - (ii) either with respect to specific acts or omissions or on the trustee or representative ceasing to act.

am. Companies and Securities Legislation (Miscellaneous Amendments) Act 1985 (Cth) No. 192 of 1985

### **Section 59 Approval of deeds**

59. Section 166 of the Principal Act is amended by adding at the end the following sub-sections:

"(4) Where an instrument or instruments amending a deed has or have been made, the management company shall, on being required by the Commission to do so, lodge with the Commission a printed copy (in this sub-section referred to as a 'relevant copy') of the deed as amended by the instrument or instruments, being a copy that -

- (a) is verified by a statement in writing;
- (b) bears an indication sufficient to distinguish it from-
  - (i) the deed as lodged, or the copy of the deed lodged, as the case may be under sub-section (3);
  - (ii) the instrument, or each of the instruments, as the case may be; and
  - (iii) each copy (if any) of the deed previously lodged under this sub-section; and
- (c) if an amendment or amendments made by the instrument or instruments has not or have not, as at the date on which the relevant copy is lodged under this sub-section, come into operation - has marked on it, in relation to the provision, or in relation to each provision, as they case may be, altered, omitted or inserted by the amendment or amendments, a note that identifies the instrument that altered, omitted or inserted the provision and contains a statement to the effect that -
  - (i) in the case of a provision that has been altered or omitted - the alteration or omission; or
  - (ii) in the case of a provision that has been inserted - the provision inserted, has not yet come into operation, and the relevant copy so lodged shall for all purposes, in the absence of proof to the contrary, be regarded as a true copy of the deed as so amended.

"(5) Where a provision of an instrument affects the operation of a deed otherwise than by way of textual amendment, the management company shall not lodge a copy of the deed with the Commission under sub-section(4) unless a copy of the instrument is annexed to the copy of the deed.

"(6) In sub-sections (4) and (5), 'instrument' includes an instrument made before the commencement of section 59 of the Companies and Securities Legislation (Miscellaneous Amendments) Act 1985."

**Section 22 Interpretation**

22. Section 164 of the Principal Act is amended:

- (a) by inserting in subsection (1) the following definitions:

"buy-back arrangements', in relation to a deed relating to prescribed interests, means arrangements made to ensure that the management company can comply with a buy-back covenant contained in the deed;

'buy-back covenant', in relation to a deed relating to prescribed interests, means a covenant binding the management company that it will, if asked by the holder of a prescribed interest to which the deed relates, buy the prescribed interest, or cause it to be bought, from the holder at a price calculated in accordance with the deed;";

- (b) by omitting from subsection (3) ", (ii) and (iii)," and substituting "and (ii), paragraphs 168(1)(ba) and (bb) and subparagraphs 168 (1)(c)(ia) and (ca)(ii),";

- (c) by adding at the end the following subsection:

"(4) Where, as at the commencement of section 22 of the Co-operative Scheme Legislation Amendment Act 1989:

- (a) approval had been granted to a deed under this Division; and

- (b) the deed contains a covenant to the effect of the covenant required to be contained in a deed under paragraph 168(1)(ba);

the deed shall, if it does not contain the covenants concerned, be deemed to contain covenants to the effect of the covenants required to be contained in a deed under paragraph 168(1)(bb) and subparagraphs 168(1)(c)(ia) and (ca)(ii).".

**Section 23 Covenants to be included in deeds**

23. Section 168 of the Principal Act is amended:

- (a) by omitting from subparagraph (1)(b)(ii) "deed;" and substituting "deed; and";

- (b) by omitting subparagraph (1)(b)(iii);

- (c) by omitting paragraph (1)(c) and substituting the following paragraphs:

"(ba) a buy-back covenant;

(bb) a covenant binding the management company to make and to maintain at all times, adequate buy-back arrangements;

- (c) a covenant binding the trustee or representative;

(i) to exercise all due diligence and vigilance in carrying out his, her or its functions and duties and in protecting the rights and interests of the holders of the prescribed interests to which the deed relates;

- (ia) to supervise the making and maintaining of adequate buy-back arrangements and to monitor the maintaining of such arrangements and the extend of compliance with the buy-back covenant;
  - (ii) to keep, or cause to be kept, proper books of accounts in relation to those prescribed interests; and
  - (iii) to cause a registered company auditor to audit those accounts at the end of each financial year;
- (ca) a covenant binding the trustee or representative to send, or cause to be sent, within 2 months after the end of each financial year, to each of the holders of those prescribed interests
- (i) a statement of the accounts for that financial year in relation to those prescribed interests;
  - (ii) a statement that describes the buy-back arrangements in effect when it is sent and states whether or not, in the opinion of the trustee or representative, those arrangements are adequate; and
  - (iii) a copy of the auditor's report on those accounts;"
- (d) by inserting after subsection (1) the following subsection:

"(1A) Nothing in subsection (1) limits the generality of anything else in it."

#### **Section 24**

24. After section 174 of the Principal Act the following section is inserted:

Buy-back covenant and buy-back arrangements

"174A. (1) Where a deed ceases after the commencement of section 24 of the Co-operative Scheme Legislation Amendment Act 1989 to be an approved deed, the management company may nevertheless comply with the terms of a buy-back covenant contained, or taken to be contained, in the deed.

"(2) As soon as practicable after the trustee or representative in relation to a deed that is or has at any time been an approved deed becomes of the opinion that the buy-back arrangements are inadequate, he, she or it shall notify the management company in writing that he, she or it is of that opinion.

"(3) Where, at the end of the period of 21 days starting on the day on which a notice is given under subsection (2), the trustee or representative is still of that opinion, he, she or it shall, as soon as practicable after the end of that period, notify the Commission in writing that he, she or it is of that opinion.

"(4) Where, at the end of the period of 21 days starting on the day on which a notice is given under subsection (2), the buy-back arrangements are inadequate, the management company contravenes this subsection.

"(5) Where:

- (a) the management company in relation to a deed that is or has at any time been an approved deed contravenes a buy-back covenant contained in the deed; and

- (b) as at the end of 14 days after the contravention, neither the management company nor the trustee or representative has notified the Commission in writing of the contravention;

the management company and the trustee or representative each contravene this subsection.

Penalty: \$2,500 or imprisonment for 6 months, or both."

**Companies (South Australia) Regulations as at 1984**

as at 1984

**Division 3 Prescribed interests**

**REGULATION 50 MATTERS AND THINGS TO BE INCLUDED IN A DEED**

**50** For the purposes of paragraph 166(2)(b) of the Code<sup>1</sup>, the matters and things required to be included in a deed shall be those referred to in Schedule 5.

<sup>1</sup> A.C.T. "Act"

**REGULATION 51 PRESCRIBED MATTERS FOR THE PURPOSES OF SUB-SECTION 170(4) OF THE CODE<sup>1</sup>**

**51** For the purposes of sub-section 170(4) of the Code<sup>1</sup>, the matters and reports set out in Schedule 6 are the prescribed matters and reports.

<sup>1</sup> A.C.T. "Act"

**REGULATION 52 RETURN TO BE LODGED UNDER SUB-SECTION 173(1) OF THE CODE<sup>1</sup>**

**52** A return lodged under sub-section 173(1) of the Code<sup>1</sup> shall be accompanied by a copy of the statement of accounts and reports of the auditor prepared in relation to the financial year to which the return relates in compliance with covenants included in the relevant deed in pursuance of paragraph 168(1)(c) of the Code<sup>1</sup>.

<sup>1</sup> A.C.T. "Act"

**Schedule 5**  
**50**

Regulation

**MATTERS AND THINGS TO BE INCLUDED IN A DEED PURSUANT TO  
PARAGRAPH 166(2)(b) OF THE CODE<sup>[1]</sup>**

1. Such particulars as are sufficient to disclose the nature and extent of the undertaking, scheme, enterprise or investment contract, the nature of the prescribed interests and the rights of the holders of the prescribed interests, to which the deed relates.
2. A provision expressly appointing a person (being a person approved by the Commission) as trustee for or representative of the holders of the prescribed interests to which the deed relates.
3. (1) Except where no property is to be vested in the trustee or representative, a provision creating a trust or containing a declaration of trust in respect of the property to be so vested.

- (2) Where a trust is, or is to be, created or a declaration of trust is, or is to be, made, full particulars of the trust, including precise information as to the circumstances in which any money, marketable securities, investments and other property subject to the trust are, or will be, vested in the trustee or representative.
  - (3) Where no property is to be vested in the trustee or representative or where part of the property is not to be vested, full particulars of any person, and the functions of that person, in whom that property or part of that property is to be vested, including precise information as to the circumstances in which any money, marketable securities, investments and other property to which the undertaking, scheme, enterprise or investment contract relates are or will be vested in that person, and the duties and obligations of that person towards the holders of the prescribed interests in regard to that money, those marketable securities or investments or that other property.
  - (4) Full particulars of the functions of the trustee or representative including precise information as to the duties and obligations of the trustee or representative towards the holders of the prescribed interests and other persons.
4. Full particulars with respect to –
- (a) the retirement, removal and replacement of the trustee or representative;
  - (b) the retirement, removal and replacement of the management company or, if the management company is not liable to be removed by the trustee or representative or by the holders of prescribed interests, a statement of that fact;
  - (c) the appointment, removal and replacement of the auditor of the accounts relating to prescribed interests under the deed;
  - (d) subject to sub-section 168(4) of the Code<sup>[2]</sup>, the duration, if ascertainable, of the undertaking, scheme, enterprise or investment contract, or any part thereof, or, if the duration is not ascertainable, a statement of that fact; and
  - (e) the termination or winding up of the undertaking, scheme, enterprise or investment contract.
5. Provisions binding the management company and trustee or representative that –
- (a) neither the management company nor the trustee or representative appointed by or under the deed will invest any money that is available for investment under the deed in any prescribed interest; and
  - (b) the management company will not vest under the deed in such trustee or representative any prescribed interest,
- unless there is in existence in respect of that prescribed interest a deed approved under Division 6 of Part IV of the Code<sup>[2]</sup> or a corresponding law in force in a declared State or declared Territory, or in<sup>[3]</sup> a participating State or participating Territory, within the meaning of that Division.
6. Where the prescribed interests to which the deed relates consist of rights or interests in or arising out of an investment relating to property that tends to depreciate in value through use or effluxion of time, particulars of the provisions made or to be made for the replacement of that property and the source or sources from which the replacement is to be made or from which the cost of the replacement is to be met or, if no provision is made, a statement of that fact.
7. Full particulars of

- (a) the method of calculation of the price at which a prescribed interest to which the deed relates may be sold by the management company;
  - (b) the circumstances in which the management company may be required to purchase, or cause to be purchased, from the holder of a prescribed interest any prescribed interest for which the holder has subscribed or which he has acquired, and the method of calculation of the purchase price of the prescribed interest;
  - (c) the circumstances in which, and the methods by which, all or any of the investments or other property to which the deed relates may be varied;
  - (d) the conditions governing the transfer of the prescribed interests to which the deed relates;
  - (e) the conditions governing the distribution of income to the holders of those prescribed interests; and
  - (f) the remuneration of the trustee or representative and of the management company, respectively, and the manner in which that remuneration is provided for, including the charges (if any) that will be made for that remuneration upon the subscription for or sale of a prescribed interest to which the deed relates and upon the distribution of income and capital or otherwise in connection with the relevant undertaking, scheme, enterprise or investment contract.
8. Provisions providing for the convening of meetings of holders of prescribed interests, other than meetings held pursuant to a covenant contained in a deed pursuant to paragraph 168(1)(h) of the Code<sup>[2]</sup>.
9. Provisions whereby the management company undertakes to keep and maintain an up-to-date register of holders of prescribed interests and to make that register available for inspection, free of charge, to any holder of a prescribed interest at any time when the company's office is required to be open and accessible to the public.
10. Where the deed is capable of modification, provisions governing the modification of the deed, including a provision that where, in the opinion of the trustee or representative, the rights of the holders of prescribed interests may be adversely affected, the modification may be effected only with the consent of the holders of prescribed interests given at a meeting convened in accordance with the provisions of the deed.
11. A declaration –
- (a) that no prescribed interests purchased or subscribed for pursuant to the statement issued by the management company under section 170 of the Code<sup>[2]</sup> shall be allotted later than 6 months after the date of the statement; and
  - (b) unless the conditions of issue of the prescribed interests expressly provide that certificates be not issued – that certificates shall be issued by the trustee or representative to purchasers of or subscribers for prescribed interests purchased or subscribed for pursuant to the statement not more than 2 months after the allotment of the prescribed interests.
12. Where the deed requires, or confers a right on, holders of prescribed interests to enter into an agreement in connection with the undertaking, scheme, enterprise or investment contract, a provision incorporating, whether by way of annexure or otherwise, the terms and form of that agreement.

#### **History**

Sch. 5, para. 2 amended by S.R. 1983 No. 316

[1] A.C.T.: "ACT".

[2] A.C.T.: "Act".

[3] A.C.T.: For "law in force in a declared State or declared Territory, or in "real of a declared State or declared Territory, or of".

## Schedule 6

### STATEMENT REQUIRED PURSUANT TO SECTION 170 OF THE CODE<sup>[1]</sup>

#### PART I

#### MATTERS REQUIRED TO BE STATED IN STATEMENT

1. The date of the settlement.
2. The date of, and parties to, the approved deed relating to the prescribed interests.
3. The date of, and parties to, any deed or instrument by which any of the provisions of the approved deed relating to the prescribed interests has or have been amended or abrogated.
4. The name of the trustee or representative under the approved deed and the address of the trustee's or representative's registered office, principal place of business or, in the case of a natural person, business address.
5. A summary of the provisions of the approved deed regulating the retirement, removal and replacement of the trustee or representative.
6. The name of the management company and the address of its registered office or Principal place of business, as the case may be, and, if applicable, the name of its principal office, in each State and Territory.
7. The names, descriptions and address of all the directors of the management company or of all the members of its governing body, as the case may be.
8. A summary of the provisions of the approved deed regulating the retirement, removal and replacement of the management company.
9. The name and address of the auditor of the accounts relating to prescribed interests under the approved deed.
10. A summary of the provisions of the approved deed regulating the appointment, retirement, removal and replacement of the auditor.
11. The duration, if ascertainable, of the undertaking, scheme, enterprise or investment contract, or of any part of the undertaking, scheme enterprise or investment contract, to which the approved deed relates or, if the duration is not ascertainable, that fact.
12. Full particulars with respect to the termination or winding up of that undertaking, scheme, enterprise or investment contract, or of any part of that undertaking, scheme, enterprise or investment contract.
13. Such particulars as are sufficient to disclose the true nature of the undertaking, scheme, enterprise or investment contract in respect of which the prescribed interests are to be issued or offered to the public for subscription or purchase and the property to which the prescribed interests relate.
14. The nature of the prescribed interests to be so issued or offered and the rights in relation to the undertaking, scheme, enterprise or investment contract to which the prescribed interests relate of the persons who become the holders of the prescribed interests.
15. The address where the register of holders of the prescribed interests is or will be kept and the days on which and the hours during which the register is or will be accessible to the

public.

16. The method of calculation provided by the approved deed of the price at which the management company may sell the prescribed interest or any right in respect of the prescribed interests.
17. Such particulars as are sufficient to describe the duties and obligations imposed on the trustee or representative appointed by the approved deed relating to the prescribed interests.
18. The name and address of each person or corporation with whom or with which a holder of a prescribed interest is required, obliged or entitled, in connection with the undertaking, scheme, enterprise or investment contract or any part of the undertaking, scheme, enterprise or investment contract, to enter into any contract whether by way of lease or otherwise.
19. The full names, descriptions and residential addresses of the directors of each corporation (if any) referred to in clause 18.
20. Where any real or personal property to which the prescribed interests relate is or will become vested in the trustee or representative, the nature and description of the property and the conditions or circumstances under which it is or will become so vested.
21. Where the undertaking, scheme, enterprise or investment contract relates to rights or interests in or arising out of an investment relating to property that ordinarily depreciates in value through use or effluxion of time, such particulars as are sufficient to disclose the true particulars of the provision made for the replacement of property and the source or sources from which that replacement is to be made or from which the cost of that replacement is to be met.
22. (1) This clause applies to property purchased or acquired, or proposed to be purchased or acquired, in relation to the undertaking, scheme, enterprise or investment contract to which the deed relates-
  - (a) where the property is to be paid for wholly or partly out of the proceeds of the issue of prescribed interest offered by the statement for subscriptions or purchase; or
  - (b) where the purchase or acquisition of the property has not been completed at the date of the issue of the statement.(2) With respect to the purchase of any property to which sub-clause (1) refers-
  - (a) the name and address of the vendor or vendors;
  - (b) a full and true description of the property;
  - (c) the amount of cash or other considerations paid or payable to the vendor or each vendor, as the case may be; and
  - (d) short particulars of any transaction relating to the property, in which any vendor of the property or any person who is, or was at the time of the transaction, a promoter or director of the management company, or a member of its governing body, had any interest direct or indirect,  
including particulars sufficient to disclose the true nature and extent of any interest of a promoter or director of the management company, or a member of its governing body, whether as a director, member of a governing body, shareholder, partner or otherwise, in the property, in the business of the vendor, in the business of each vendor, or in each transaction.
23. The amount, if any, paid within the 2 preceding years, or payable, as commission (but not

- including commission to sub-underwriters) for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any prescribed interests, or the rate of any such commission, and the names of any promoters or directors of the management company, or members of its governing body, who are entitled to receive any such commission and the amount or rate of that commission.
24. The amount or estimated amount of-
    - (a) the expenses of setting up the undertaking, scheme, enterprise or investment contract; and
    - (b) the expenses of the issue,
 and the names of the persons by whom any of these expenses have been paid or are payable.
  25. Any amount or benefit paid or given, or intended to be paid or given, to a promoter, the management company, a director of the management company or a member of the governing body of the management company out of the proceeds of an issue of prescribed interests, excluding amounts or benefits required to be disclosed elsewhere in the statement, and the consideration for the payment or giving of the amount or benefit.
  26. The obligations imposed upon the management company to purchase, or cause to be purchased, from any holder of a prescribed interest that prescribed interest and a statement of the method provided by the approved deed for the calculation of the purchase price.
  27. Where the Commission-
    - (a) under sub-section 168(2) of the Code<sup>[2]</sup> declares that a specified deed is not required to contain one or more of the covenant or matters referred to in that sub-section; or
    - (b) under section 215C of the Code<sup>[2]</sup> exempts a management company from compliance with all or any of the provisions of Division 6 of Part IV,
 particulars, including particulars of any terms and conditions applicable of that declaration or exemption, as the case requires.
  28. A summary of the rights and obligations of the management company and of the trustee or representative governing the valuation of any investment made or property held in relation to the undertaking, scheme, enterprise or investment contract.
  29. A summary of the provisions of the approved deed whereby investments or other property comprising or forming part of the undertaking, scheme, enterprise or investment contract to which the approved deed relates may be varied.
  30. Full information regarding the remuneration of the trustee or representative and the management company respectively, the manner in which under the provisions of the approved deed that remuneration is provided for, and the charges (if any) that will be made by way of that remuneration upon the sale of or subscription for any prescribed interests to which the approved deed relates and upon the distribution of income and capital or otherwise in connection with the relevant undertaking, scheme, enterprise or investment contract.
  31. Whether the prescribed interests or any rights in respect of the prescribed interests, to which the approved deed relates, are transferable by the holders of the prescribed interests, and, if so, a summary of the provisions of the approved deed regulating such a transfer.
  32. Where the statement relates to different classes of prescribed interests, the right of voting at meetings of holders of prescribed interests conferred by the several classes of prescribed

- interest respectively.
33. A summary of the provisions of the approved deed relating to the distribution to the holders of the prescribed interests of the income derived from the undertaking, scheme, enterprise or investment contract.
  34. Full information as to whether, and to what extent, any factor other than cash receipts by way of dividend, interest or bonus has been or will be taken into account in calculating the amount of income that will be payable to the holders of the prescribed interests.
  35. If any reference is made to the yield of income obtained or likely to be obtained by the holders of the prescribed interests, a statement as to whether, and to what extent, anything other than cash receipts by way of dividends, interest or bonuses has been taken into account in calculating the yield.
  36. A summary of the provisions of the Code<sup>[2]</sup> and of the approved deed regulating the convening of meetings of holders of the prescribed interests.
  37. The name and description and the date of commencement of operation of every other undertaking, scheme, enterprise or investment contract involving the issue of prescribed interests to the public conducted by the management company within the 5 years immediately preceding the date of the statement.
  38. A declaration –
    - (a) that no prescribed interests purchased or subscribed for pursuant to the statement shall be issued to applicants later than 6 months after the date appearing in the statement pursuant to clause 1; and
    - (b) unless the conditions of issue of the prescribed interests expressly provide that certificates are not to be furnished, that certificates will be sent by the trustee or representative to purchasers of or subscribers for prescribed interests purchased or subscribed for pursuant to the statement not more than 2 months after the prescribed interests are issued.
  39. A summary of the provisions of the approved deed with respect to the undertakings –
    - (a) by or on behalf of the management company relating to the issue of prescribed interests to which the approved deed relates; and
    - (b) by or on behalf of the trustee or representative relating to the issue of certificates of title to the prescribed interests to holders of prescribed interests.

## **PART II**

### **REPORTS TO BE CONTAINED IN STATEMENT**

40. A report by the directors or members of the governing body, as the case may be, of the management company summarising the current investments of the trust or relating to the undertaking, scheme, enterprise or investment contract, made up to date not more than 28 days before the issue of the statement.
41. A report or reports by a person who at the time of making the report or reports, being a time not earlier than 28 days before the date of issue of the statement, was a registered company auditor, and whose name must appear as such in the statement, setting out –
  - (a) such information as sufficiently discloses the number of distributions (if any) of income to holders of prescribed interests to which the approved deed relates in each of the 5 financial years immediately preceding the date of the statement during which those prescribed interests had been in existence, the amount of each distribution and the extent to which each distribution consisted of any component other than dividends, interest and bonuses, and where it consisted of any

- component other than dividends, interest and bonuses, the nature and value of each of those components;
- (b) such information as sufficiently discloses the selling price and the purchase price respectively, of those prescribed interests on the date upon which each distribution was made;
  - (c) such information as sufficiently discloses the selling price and purchase price, respectively, of those prescribed interests on such date, being a date within a period of 28 days immediately preceding the date of the statement as is specified in the relevant report;
  - (d) in respect of every issue of prescribed interests relating to any other undertaking, scheme, enterprise or investment contract conducted or entered into by the management company within the 5 financial years immediately preceding the date of the statement, similar information to that required under paragraphs (a), (b) and (c);
  - (e) the profits and losses of the undertaking, scheme, enterprise or investment contract to which the deed relates, in respect of each of the 5 financial years immediately preceding the date of the statement, and the assets and liabilities of that undertaking, scheme, enterprise or investment contract, as at the last date to which the accounts kept by or on behalf of the trustee or representative were made up, being a date no more than 12 months before the issue of the statement; and
  - (f) the profits or losses of the management company (and of every corporation with which the holder of a prescribed interest is required, obliged or entitled, pursuant to the undertaking, scheme, enterprise or investment contract, to enter into any contract) in respect of each of the 5 financial years immediately preceding the date of the statement during which the company and corporation, respectively, were carrying on business, and the rates of dividend (if any) paid by that company and of that corporation in respect of each of those years, and the assets and liabilities of that company and of that corporation as at the last date to which its accounts were made up being a date no more than 12 months before the issue of the statement.
42. For the purposes of clause 41, where the proceeds or any part of the proceeds of the issue of the prescribed interests are to be applied directly or indirectly in the purchase of any business, a registered company auditor's report setting out –
- (a) the profits and losses of the business in respect of each of the 5 financial years immediately preceding the last date to which the accounts of the business were made up; and
  - (e) the assets and liabilities of the business at the date to which the accounts of the business were made up,
- being a date no more than 12 months before the issue of the statement.
43. (1) A report by the directors or members of the governing body, as the case may be, of the management company (and of every corporation with which the holder of a prescribed interest is required, obliged or entitled pursuant to the undertaking, scheme, enterprise or investment contract to enter into any contract) as to whether, after due enquiry by them in relation to the interval between the date to which the accounts used in the preparation of the report referred to in clause 41 were made up and a date not earlier than 28 days before the issue of the statement, they have become aware of any circumstances that in their opinion materially have affected or will affect the trading or profitability, or the value of the assets, of that company or corporation, or of the undertaking, scheme, enterprise or investment contract to which the deed relates.
- (2) Where the directors or members of the governing body, as the case may be, have become aware of any circumstances referred to in sub-clause (1), full details must be set out in the report.

**PART III**  
**DIRECTIONS APPLICABLE TO PARTS I AND II**

44. If –
- (a) the undertaking, scheme, enterprise or investment contract to which the deed relates has been carried on;
  - (b) a business to which clause 42 refers has been carried on; or
  - (c) a corporation has carried on business;
- for less than 5 financial years, and the accounts of that undertaking, scheme, enterprise or investment contract, or business corporation have only been made up in respect of 4 financial years, 3 financial years, 2 financial years, or one financial year, this Schedule has the effect as if references to 4 financial years, 3 financial years, 2 financial years, or one financial year, as the case may be, were substituted for references to 5 financial years.
45. Where any property to be acquired by the trustee or representative is to be taken on lease this Schedule shall have effect as if the expression "vendor" included the lessor, and the expression "purchase money" included the consideration for the lease, and the expression "sub-purchaser" included a sub-lessee.
46. For the purposes of clause 22 where the vendors or any of them are a firm, the members of the firm shall not be treated as separate vendors.

**History**

Sch. 6 amended by S.R. 1983 No. 316

[1] A.C.T.: "ACT".

[2] A.C.T.: "Act".

**Income Tax and Social Services Contribution Assessment Act 1936-1964 (Cth)**

as at 1964

**Section 26**

**Certain items of assessable income.**

*Cf. I.T.A., s. 4.*

Amended by No. 58  
1941, s. 5; No. 10,  
1943, s.8; No. 6.  
1946, s.6; No. 63.  
1947, s. 5; No. 43,  
1954, s. 4; No. 69,  
1963, s. 6; and No.  
110, 1964, s. 8.

26. The assessable income of a taxpayer shall include –

- (a) profit arising from the sale by the taxpayer of any property acquired by him for the purpose of profit-making by sale, or from the carrying on or carrying out of any profit-making undertaking or scheme;

am. Income Tax Assessment Amendment Act (No. 3) 1984 (Cth) No. 47 of 1984 (assented to 25 June 1984)

**Section 10**

10. After section 25 of the Principal Act the following section is inserted:

Assessable income to include certain profits

"25A. (1) The assessable income of a taxpayer shall include profit arising from the sale by the taxpayer of any property acquired by him for the purpose of profit-making by sale, or from the carrying on or carrying out of any profit-making undertaking or scheme."

**Section 11 Certain items of assessable income**

11. Section 26 of the Principal Act is amended –

(a) by omitting paragraph (a);