

63. Interpretation in Part IIIB

(1) In this Part —

“conveyance on sale” includes —

- (a) every instrument and decree or order of any court or of the Commissioner of Titles, whereby any property or any estate or interest in any property on the sale thereof is transferred to or vested in the purchaser or any other person on his behalf or by his direction;
- (b) every transfer or assignment of a lease of any lands; and
- (c) every decree or order of any court or of the Commissioner of Titles for, or having the effect of an order for, foreclosure;

“custodian trustee” has the same meaning as it has in section 15 of the *Trustees Act 1962*;

“discretionary trustee” means a trustee of any property over which any person has a power of appointment which was not created by will;

“disposition”, in relation to a unit, includes —

- (a) a transfer or other disposition of the unit;
- (b) the allotment or issue of the unit;
- (c) the redemption, surrender or cancellation of the unit;
- (d) the variation, abrogation or alteration of a right pertaining to the unit with respect to the capital of the unit trust scheme; and
- (e) any means by which a unit is disposed of or the rights of its holder are diminished;

“provisional public trust” means a unit trust scheme that is registered under section 63ADA(2);

“start up period” means —

- (a) in relation to a unit trust scheme except a provisional public trust to which paragraph (b) applies — the period of one year beginning on the day on which the first units under the scheme are issued; or
- (b) in relation to a provisional public trust for which the prospectus or information memorandum has been, or is to be, lodged with the Australian Securities and Investments Commission — the period of one year beginning on —
 - (i) the day on which the first units under the scheme are issued; or
 - (ii) the day of lodgement,whichever period is the later to expire;

“transfer”, in relation to a unit, means a conveyance, transfer, or instrument chargeable as a conveyance;

“trustee” means, unless the contrary intention appears, a trustee who is not a discretionary trustee or a unit trustee;

“unit” means any right or interest, whether described as a unit or otherwise, of a beneficiary under a unit trust scheme and includes an interest in a unit;

“unit trustee” means a trustee of a unit trust scheme; and

“unit trust scheme” means, unless the contrary intention appears, a private unit trust scheme within the meaning in subsection (2).

(1aa) For the purposes of sections 63AA(2a)(a) and 63AB(2)(g), the Commissioner may treat 2 or more parcels of land as a single parcel of land if the Commissioner is satisfied that it is appropriate to do so having regard to —

- (a) the ownership of the parcels of land;
- (b) the proximity of the parcels of land;
- (c) the use of the parcels of land; and
- (d) any other matter the Commissioner considers to be relevant.

[(1a), (1b) repealed]

(2) A unit trust scheme is a private unit trust scheme if at the time of any conveyance, transfer or other disposition of a unit —

- (a) the unit trust scheme is not —
 - (i) one to which Division 11 (sections 1451 to 1465) of Part 11.2 of the Corporations Law applied by reason of section 1452 of that Law; or
 - (ii) a managed investment scheme registered under section 601EB of the Corporations Act,

or is a scheme referred to in subparagraph (i) or (ii) but no units have been issued to the public or an insufficient number of persons is beneficially entitled to units under the scheme; and

- (b) the unit trust scheme —
 - (i) is not an approved deposit fund or a pooled superannuation trust within the meaning of the *Superannuation Industry (Supervision) Act 1993* of the Commonwealth; or
 - (ii) is an approved deposit fund within the meaning of the *Superannuation Industry (Supervision) Act 1993* of the Commonwealth but no units have been issued to the public or an insufficient number of persons is beneficially entitled to units under the scheme.

(3) An insufficient number of persons is beneficially entitled to units under a unit trust scheme if —

- (a) fewer than 50 persons are so entitled; or
- (b) 20 or fewer persons are so entitled to 75% or more of the total issued units under the scheme.

(4) For the purposes of subsection (2)(a) and (b)(ii) —

- (a) each partner in a partnership that holds units under a unit trust scheme is to be treated as beneficially entitled to the same proportion of the units as the proportion of the partnership assets to which the partner would be entitled on the dissolution of the partnership and after all the debts and liabilities of the partnership had been discharged; and
- (b) a person is to be treated as beneficially entitled to a unit held by the person or by a related person.

(5) For the purposes of subsection (4), the following persons are related —

- (a) individuals who are spouses or de facto partners of each other or between whom the relationship is that of parent and child;
 - (b) related corporations;
 - (c) a trustee and a trustee of another trust if —
 - (i) there is any beneficiary common to the trusts, whether the beneficiary has a vested share or is contingently entitled or may benefit from a discretionary trust; and
 - (ii) the beneficiary's share or interest in each trust constitutes more than 50% of the trust property or of the issued units in the unit trust scheme;
 - (d) an individual and a corporation if the individual is a majority shareholder, director or secretary of the corporation or a related corporation;
 - (e) an individual and a trustee if —
 - (i) the individual is a beneficiary under the trust, whether the individual has a vested share or is contingently entitled or may benefit from a discretionary trust; and
 - (ii) the individual's share or interest in the trust constitutes more than 50% of the trust property or of the issued units in the unit trust scheme;
 - (f) a corporation and a trustee if —
 - (i) the corporation or a majority shareholder, director or secretary of the corporation is a beneficiary of the trust; or
 - (ii) a related corporation to the corporation is a beneficiary of the trust,

and that beneficiary's share or interest in the trust constitutes more than 50% of the trust property or of the issued units in the unit trust scheme.
- (6) For the purposes of subsection (5) —
- (a) an illegitimate person is to be treated as the legitimate child of that person's parents;
 - (b) it is irrelevant whether a relationship is of the whole or half-blood, or whether it is a natural relationship or a relationship established by a written law;
 - (c) a **“majority shareholder”**, in relation to a corporation, is a person who would have a substantial holding in the corporation under the definition of “substantial holding” in section 9 of the Corporations Act even if the reference in that definition to 5% were a reference to 50%; and
 - (d) a **“trustee”** includes a discretionary trustee and a unit trustee.
- (7) For the purposes of subsection (5), the share or interest of a person in a trust is to be determined as the greatest share or interest that the person could derive at any time from the trust whether by the fulfilment of any condition, the outcome of any contingency or the exercise of any power or discretion or otherwise, and in particular a person that may benefit from a discretionary trust is to be deemed to be entitled to —

- (a) the property subject to the discretionary trust, unless the Commissioner determines otherwise; or
- (b) such part of that property as the Commissioner determines.

[Section 63 inserted by No. 37 of 1979 s. 41; amended by No. 112 of 1982 s. 5; No. 33 of 1987 s. 15; No. 39 of 1994 s. 21; No. 48 of 1996 s. 44; No. 24 of 1999 s. 4; No. 3 of 2001 s. 18; No. 10 of 2001 s. 167; No. 36 of 2001 s. 26; No. 2 of 2003 s. 32; No. 66 of 2003 s. 17.]