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23 June 2017

Ms Erin Gough
Policy Manager
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NSW Department of Justice
GPO Box 31
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Dear Ms Gough

Review of laws relating to beneficiaries of trusts
Preliminary submission

The Commission's terms of reference on this subject pose three questions:

(a) whether there is a need to enact statutory provisions to limit the circumstances, if any, in which beneficiaries of trusts, as beneficiaries, should be liable to indemnify the trustee or creditors of the trust, if the trustee fails to satisfy obligations of the trust, or remove such liability;

(b) whether it is appropriate for the liability of investors in unit trusts to be limited to the amount (if any) unpaid on their units in the same way that the liability of investors in shares is limited to the amount (if any) unpaid on their shares; and

(c) whether New South Wales should adopt the recommendations of the January 2015 report Trading Trusts – Oppression Remedies of the Law Reform Commission of Victoria ("LRCV").

In 1984, 1993 and 1999, I was party to recommendations to Government that steps be taken to remove, by statute, the possibility of personal liability of persons who are investors in collective investment vehicles structured as trusts – or, at least, to limit their liability to amounts unpaid by them.[1]

[1] August 1984 letter from Companies and Securities Law Review Committee to Ministerial Council; Collective Investments: Other People's Money (Australian Law Reform Commission and Companies and Securities Advisory Committee) Vol 1 (1993) para 11.37; Report to the Minister for Financial Services and Regulation on Liability of Members of Managed Investment Schemes (Companies and Securities Advisory Committee), March 2000.

Those recommendations were not concerned with the position of beneficiaries of trusts as such. The focus was upon persons who had chosen to become passive investors in a particular form of investment vehicle implying expectations on their part that their position should be akin to that of a company's shareholders. The recommendations were based on an analogy between shareholders in a company and holders of interests in a managed investment scheme, not any analogy between companies and trusts or any consideration concerning trusts as trusts.

Any implementation of the recommendation made on those three occasions and repeated in the 2012 report of the Corporations and Markets Advisory Committee on managed investment schemes would appropriately be through amendment of *Corporations Act* provisions concerning such schemes.

When it comes to possible reform of laws concerning trusts generally (or even "trading" or "commercial" trusts), it is necessary to confront at the outset the reality that property becomes trust property in a vast array of circumstances. The rights and liabilities of trustees and beneficiaries arise in the same array of circumstances.

Even when attention is confined to trading or commercial trusts, the validity of some uniform approach to beneficiaries' rights and remedies is by no means obvious. There are significant differences between a unit trust established by four or five resources companies as a vehicle for their ownership and operation of mining tenements, a discretionary trust established by husband and wife to conduct a family enterprise for the benefit of themselves and their non-contributing children (even if the trust is technically and nominally settled by someone else) and a testamentary trust under which an erstwhile executor carries on for the benefit of estate beneficiaries (perhaps life tenant and remaindermen) a business formerly conducted by the deceased. A person who is a beneficiary of such a trust does not exhibit any implied expectation of protections beyond those inherent in the particular kind of trust

In relation to the aspect of the Commission's terms of reference concerning a statutory remedy in cases of oppression[2], the threshold question must be what special feature of trusts in general or trading or commercial trusts in particular cause them to be distinguishable, for these purposes, from partnerships, joint ventures, franchise agreements and other forms of association entered into in trade or commerce in which one person may be vulnerable to oppression through the conduct of another.

The legislative landscape has changed significantly since an oppression remedy was put at the disposal of members of companies by the United Kingdom parliament in 1947. For example, provisions of what is now the *Australian*

[2] "Oppression" is here used as shorthand for the composite species of conduct referred to in s 232 of the *Corporations Act* 2001 (Cth).

Consumer Law [3] empower courts to make remedial orders in various circumstances of conduct in trade or commerce falling short of specified statutory norms. Conduct that is misleading or deceptive (or likely to mislead or deceive) and conduct that is unconscionable (within the meaning of the unwritten law) are among the proscribed categories[4] Someone who contravenes these statutory provisions cannot rely on contractual or other general law rights to resist the concomitant statutory consequences.

Beneficiaries of trading or commercial trusts today have statutory remedies in case of misleading or deceptive conduct and unconscionable conduct engaged in in trade or commerce. They have these remedies because of their connection with trade or commerce, not because they are trust beneficiaries. Any new remedy in cases of oppression would cover ground beyond that occupied by these existing remedies.

It follows, in my opinion, that the appropriate investigation regarding oppression in the context of trusts is not whether some analogy with company law circumstances suggests that trust beneficiaries should given (or, at least, not be denied) remedies enjoyed by company shareholders but whether the laws imposing norms of conduct to be observed in trade and commerce generally are insufficient to address particularly identified prejudice or injustice encountered in the administration of trading and commercial trusts. Identifying relevant prejudice or injustice in a concrete way is an indispensable first step.

If such an investigation were to show that there are issues of prejudice or injustice in relation to trading and commercial trusts that are not adequately dealt with by existing laws but would be resolved by the creation of an oppression remedy, the next question would be whether the relevant prejudice or injustice was, of its nature, somehow unique to trading or commercial trusts or was, in reality, one to which the generality of participants in trade or commerce were exposed. Beneficiaries of trading or commercial trusts should not be the sole recipients of new statutory protections that are, as an objective matter, also deserved by others involved in trade and commerce.[5]

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[3] And parallel provisions of the *Australian Securities and Investments Commission Act* 2001 (Cth) and other statutes dealing with specific sectors.

[4] An informative account of the development of the provisions concerning unconscionability and their possible improvement may be found in the report Strengthening Statutory Unconscionable Conduct and the Franchising Code of Conduct presented to the Commonwealth Government in February 2010. The point emerging clearly from that report is that the framers of successive laws providing remedies for victims of unconscionability did not single out particular groups or categories of participants in trade or commerce for individual attention. Rather, the emphasis was upon a particular species of conduct that might cause any commercial participant to be prejudiced at the hands of another, regardless of roles and functions. In this respect, the concept of oppression that the Commission is now asked to consider should be seen as conceptually indistinguishable from the concept to unconscionability, although the content of the two is obviously different.

[5] At para 4.65 of its report of January 2015, LRCV quoted a submission referring to "application of oppression remedies to cases of *oppression generally (irrespective of*

On my reading of its January 2015 report, LRCV did not undertake an analysis of the kind just outlined. Rather, it worked from a starting point of perceived similarities between companies and trading trusts at various levels and proceeded to consider whether there was any good reason to continue to deny beneficiaries of such trusts remedies available to shareholders of companies. If the Commission were now to proceed in a similar way it would, in my respectful opinion, approach the matter from an altogether too narrow base.

In company law, conduct is "oppressive" if it is burdensome, harsh or wrongful or exhibits commercial unfairness. At the moment, I must confess myself unable to see any abstract reason why beneficiaries of trading or commercial trusts should be considered deserving of some statutory protection against oppression in that sense that would not also be deserved by other persons engaged in trade and commerce. The Commission must, in my respectful opinion, test the validity of that preliminary view.

The Commission may find, on full investigation, that the answer to the question whether oppression remedies of the kind available under company law should be extended to beneficiaries of trading trusts is:

> "Yes, but only because those beneficiaries are part of a general body of participants in trade and commerce which deserves such remedies."

Another way of framing the same answer might be:

> "If regard is had solely to the attributes distinguishing those beneficiaries from the general body of participants in trade or commerce, no."

Yours faithfully

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The Hon R I Barrett

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structure) so that a just and equitable result could be achieved for an oppressed party" [emphasis added]. Having done so, however, the Commission continued with its consideration of trusts alone, possibly because it did not think that its narrow terms of reference allowed it to do otherwise.