



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: BLC:DH1b1435650

2 February 2018

Mr Alan Cameron AO
Chairperson
NSW Law Reform Commission
GPO Box 31
Sydney NSW 2001

By email: nsw-lrc@justice.nsw.gov.au

Dear Mr Cameron,

Review of laws relating to beneficiaries of trusts

The Law Society of NSW welcomes the opportunity to contribute to the NSW Law Reform Commission's ("NSWLRC") review of laws relating to beneficiaries of trusts. The Law Society's Business Law Committee contributed to this submission.

1. Overview

The NSWLRC has been asked to review and report on two aspects of the law relating to the beneficiaries of trusts:

- the liability of beneficiaries, as beneficiaries, to indemnify trustees or creditors when trustees fail to satisfy obligations of the trust, and
- whether oppression remedies available under company law should be extended to beneficiaries of trading trusts.

The Law Society agrees with the preliminary views of the NSWLRC set out in Consultation Paper 19 ("CP 19"), both in relation to the need to introduce legislative reforms to limit the liability of beneficiaries to indemnify the trustee or creditors and in supporting the introduction of oppression remedies for trust beneficiaries.

The Law Society considers that reforms to clarify the extent to which beneficiaries are personally liable to indemnify trustees or creditors should be made through amendment of the *Trustee Act 1925* (NSW).

We reiterate our general support¹ for the recommendations contained in the Victorian Law Reform Commission's Report on Trading Trusts – Oppression Remedies² ("VLRC Report"). We support the introduction of oppression remedies for beneficiaries of all trading trusts, by amendments to the *Trustee Act 1925* (NSW) which provide the courts with a broad and flexible range of remedies. We consider that there should be an express exclusion for managed investment schemes, superannuation trusts and charitable trusts.

We agree with the NSWLRC that uniformity or harmonisation of such legislative change is desirable across Australia.

2. Liability of beneficiaries to indemnify the trustee

The NSWLRC has been asked to consider and report on whether:

1. there is a need to enact statutory provisions to limit the circumstances if any in which the 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;

The community generally has utilised trusts since colonial times, but trusts are also widely used in commercial contexts. The vast majority of trusts, including trading trusts, special purpose vehicles, and unregistered managed investment schemes, are regulated by trust law, rather than under the *Corporations Act 2001* (Cth). In all cases, it is likely that beneficiaries (investors) assume that their liability is limited to the amount that they invest. Beneficiaries may, of course, incur liability in other circumstances such as if the trustee acts as their agent, but likely assume that they incur no additional liability as passive investors. Investors in public unit trusts in particular assume their liability is limited to the amount which they paid to invest in their unit in the trust, in the same way that a shareholder in a limited liability company is not liable to contribute if the company becomes insolvent.³ However, as discussed in CP 19, the extent to which beneficiaries are personally liable to indemnify trustees is not clear.

Trust deeds frequently contain clauses purporting to limit the liability of beneficiaries to indemnify the trustee⁴. However these provisions have not been tested in the courts and their effectiveness remains uncertain. There is a risk that not only could such terms be held to be ineffective to prevent a trustee from seeking indemnity, but that creditors of the trustee could also then subrogate themselves to the rights of the trustee and successfully claim indemnity against those beneficiaries. For commercial and investment trusts, many of which have members of the public as beneficiaries, this uncertainty should be removed through legislative reform.

¹ Law Society of NSW "Review of laws relating to beneficiaries of trusts", 27 July 2017 available at: <http://www.lawsociety.com.au/cs/groups/public/documents/internetpolicysubmissions/1389271.pdf>

² Victorian Law Reform Commission, *Trading Trusts-Oppression Remedies*, January 2015.

³ CP 19, 7.

⁴ After the decision in *JW Broomhead (Vic) Pty Ltd (in liquidation) v. JW Broomhead Pty Ltd* [1985] VR 891, which held that the principle in *Hardoon v Belilios* [1901] AC 118 would also apply where there was more than one beneficiary, all of whom were sui juris, it became standard to include in trust deeds where there was more than one beneficiary, a term to negate that principle so long as the trustee properly incurred liabilities.

The Law Society's position

We consider that a persuasive case for reform has been made out by the NSWLRC in CP 19. The Law Society agrees that for unit trusts, including public or private commercial and investment trusts, the *Trustee Act 1925* (NSW) should be amended to clarify that unitholders are only liable to the trustee for any amounts unpaid on their application for units or any calls on the units in accordance with the trust deed.⁵

We confirm that it is our view the legislative changes would need to be made in NSW to the *Trustee Act 1925* (NSW) for the reasons set out in both CP 19 and by the Victorian Law Reform Commission in its discussion of this issue.⁶

We agree with the NSWLRC that uniformity of such legislative changes be sought as a high priority between all Australian States and Territories.

3. Oppression remedies for trust beneficiaries

The Law Society acknowledges that trust beneficiaries do not have the benefits available to minority shareholders in companies through statutory remedies under the *Corporations Act 2001* (Cth) for claims by them of oppression from majority shareholders or those in charge of the company.

There have been attempts in NSW and Victoria to pursue oppression remedies under the *Corporations Act 2001* (Cth) where the trustee of a trading trust is a company, with varying success. Consistent application of the *Corporations Act 2001* (Cth) across Australia is clearly desirable.⁷

The Law Society's position

The Law Society agrees with the recommendations of the VLRC Report. We support the introduction of oppression remedies for beneficiaries of all trading trusts, by amendment to the *Trustee Act 1925* (NSW) to provide the courts with a broad and flexible range of remedies to allow enable a court to determine an appropriate remedy depending on the terms of the trust deed, the positions of both the minority and majority/controlling beneficiaries and the type of trust. For the purpose of this submission, we are adopting the functional definition of "trading trust" used in the VLRC Report⁸. We also consider that there should be an express exclusion for managed investment schemes, superannuation trusts and charitable trusts, as these trusts are separately regulated.

4. Law Society's position on the draft legislative changes proposed by Dr N D'Angelo as set out in Appendix B of the Consultation Paper

The Law Society considers that the draft legislation in Appendix B is unnecessarily complex and so may not achieve the desired law reform outcomes of clarity, simplicity and fairness.⁹

⁵ The NSWLRC has been asked to report 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;

⁶ Victorian Law Reform Commission, *Trading Trusts-Oppression Remedies*, January 2015.

⁷ See: Australian Securities Commission v Malborough Gold Mines Ltd (1993) 177 CLR 485, 492.

⁸ Ibid ix.

⁹ See: Victorian Law Reform Commission, *Trading Trusts-Oppression Remedies*, January 2015, x.: "The law requires reform for three reasons: clarity, simplicity and fairness."

The draft legislation also provides for third parties to recover liabilities directly from trust beneficiaries in circumstances that increase the potential liabilities of beneficiaries. It is the Law Society's position that this extension of liability is not appropriate.

We would be happy to provide comments on any revised draft proposed legislation to make appropriate changes to the *Trustee Act 1925* (NSW) when such draft legislation is available.

Thank you for the opportunity to provide comments to this review. I would be grateful if questions can be directed at first instance to Liza Booth, Principal Policy Lawyer, by email at [REDACTED]

Yours sincerely,

[REDACTED]

Doug Humphreys OAM
President