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Law Reform Commission

Consultation
paper
19

Laws relating to beneficiaries of trusts

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Contact details

NSW Law Reform Commission
GPO Box 31
Sydney NSW 2001 Australia

Phone: 02 8346 1284

Email: nsw-lrc@justice.nsw.gov.au

Internet: www.lawreform.justice.nsw.gov.au

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About the NSW Law Reform Commission

The Law Reform Commission is an independent statutory body that provides advice to the NSW Government on law reform in response to terms of reference given to us by the Attorney General. We undertake research, consult broadly, and report to the Attorney General with recommendations.

For more information about us, and our processes, visit our website: www.lawreform.justice.nsw.gov.au

Table of contents

Participants

Commissioners

Mr Alan Cameron AO (Chairperson)
The Hon Justice Paul Brereton AM, RFD
Ms Tracy Howe

Law Reform and Sentencing Council Secretariat

Ms Erin Gough, Policy Manager
Mr Joseph Waugh PSM, Senior Policy Officer
Ms Anna Williams, Librarian

Terms of reference

Pursuant to section 10 of the *Law Reform Commission Act 1967*, the NSW Law Reform Commission is asked to review certain aspects of the law of trusts in NSW and report on whether:

- 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
- 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.

As part of this review, the Commission is to have regard to:

- the perceived uncertainty of the case law on the liability of trust beneficiaries in New South Wales and elsewhere
- the widespread use of trusts in commercial contexts as well as in the community generally
- the need for safeguards to ensure that any legislation limiting or removing such liability does not support the avoidance of responsibility for insolvent trading.

The Commission is also asked:

- to propose the terms in which any legislation should be enacted, and
- to consult and report on whether New South Wales should adopt the recommendations of the Report, *Trading Trusts - Oppression Remedies*, January 2015, of the Victorian Law Reform Commission.

[Received 28 April 2017]

1. Introduction

Terms of reference

1.1 The Attorney General has asked us to review and report on two aspects of the law relating to 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.

1.2 He has asked us to report on these matters by 30 April 2018.

1.3 We published the terms of reference on our website and sought preliminary submissions. We received eight submissions which are listed in Appendix D and published on our website.

Outline of this paper

Liability of beneficiaries to indemnify trustees or creditors

1.4 Chapter 2 explains the background to the reference on beneficiary liability, a long-standing issue arising from Privy Council authority from over 100 years ago. Several proposals for reform or clarification of the law in the managed investments context have been made but not taken up by Australian governments. Several overseas jurisdictions have made specific provision to limit investor liability, and the text of those provisions is reproduced in Appendix A. One preliminary submission attached a draft proposal for legislation, and that is reproduced in Appendix B.

Oppression remedies for beneficiaries of trading trusts

1.5 Chapter 3 asks whether the oppression remedy available in the *Corporations Act 2001* (Cth) ("*Corporations Act*") context, should be explicitly extended to unit holders in trading trusts. The NSW and Victorian courts have interpreted the *Corporations Act* differently when attempts have been made to apply the oppression remedy through the corporate trustee of such trusts. This different outcome between our states is undesirable in itself and can cause confusion. The Victorian Law Reform Commission ("VLRC") has considered the matter and its report, *Trading Trusts* –

Oppression Remedies,[1] recommends amendments to the *Trustee Act 1958* (Vic) to extend the remedy to trading trusts.

1.6 We intend to rely on the VLRC's work in the first instance and consult on their report, with a view to confirming whether NSW should follow their recommendations. We are nevertheless mindful that at the time of writing the Victorian government has not indicated whether it proposes to adopt the VLRC recommendations.

Consultation on our preliminary views

1.7 We have formed the tentative conclusions set out in this Paper and plan to consult widely before finalising a report to the Attorney General.

1.8 We invite interested parties to make submissions on the matters raised in this paper by **2 February 2018.**

1.9 We also intend to convene roundtables to discuss the matters raised in this paper. Interested parties (in addition to those who have already lodged preliminary submissions) should register their interest in attending a roundtable by emailing us at nsw-lrc@justice.nsw.gov.au.

1. Victorian Law Reform Commission, *Trading Trusts – Oppression Remedies*, Report (2015).

2. Liability of beneficiaries

The use of trusts in Australia

2.1 Trusts have been in common use in Australia since colonial times, and are in common use today, at least in part because of the tax advantages they offer. Trusts range from trusts for charities and clubs, through to public unit trusts such as property trusts, special purpose vehicles used for major infrastructure projects, and trading trusts used by family businesses and partnerships. In all these situations it is likely that investors assume their liability is limited to the amount they invest (or agree to invest) in the venture, and that *at least as investors* they have no further liability. Investors may have liability if the trustee acts as their agent, or if they are a director of a corporate trustee – but not as passive investors.

2.2 Trust deeds frequently contain clauses purporting to limit the liability of beneficiaries to indemnify the trustee, which of course would not be needed if the common assumption of limited liability were always correct. It would disrupt the use of these trust vehicles significantly if the common assumption of limited liability were to be disturbed, perhaps by some court decision arising from unusual facts.

2.3 In his recent book, Nuncio D'Angelo comments as follows:

> Today, there appears to be a pervasive assumption in the Australian market that the issue has been properly dealt with by provisions in commercial trust instruments and the use of a limited liability company as trustee. This assumption is wrong; the risk of unlimited personal liability for enterprise debts is real and the arguments in this chapter may be considered in some quarters to be controversial, particularly as they take issue with general market perceptions, as evidenced in public disclosure documents.[1]

Justice Barrett (as he then was) in his foreword to the book refers to "the comparative fragility of the limited liability of trust beneficiaries".

2.4 The following paragraphs set out the decisions which give rise to the doubt about limited liability and the various reports which have analysed the law, together with examples of legislative change in other jurisdictions that has addressed similar concerns.

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1. N D'Angelo, *Commercial Trusts* (LexisNexis, 2014) [3.9].

Cases concerning beneficiary liability

2.5 One of the earliest authoritative decisions is the Privy Council decision in *Hardoon v Belilios.*[2] In that case the board was of the opinion that where the only beneficiary of a trust (referred to as a *cestui que trust*) is *sui juris* (that is, has full legal capacity to act on their own behalf), such a beneficiary is subject to an equitable personal obligation to indemnify the trustee:

> The plainest principles of justice require that the *cestui que trust* who gets all the benefit of the property should bear its burden unless he can shew some good reason why his trustee should bear them himself. The obligation is equitable and not legal, and the legal decisions negativing it, unless there is some contract or custom imposing the obligation, are wholly irrelevant and beside the mark. Even where trust property is settled on tenants for life and children, the right of their trustee to be indemnified out of the whole trust estate against any liabilities arising out of any part of it is clear and indisputable; although, if that which was once one large trust estate has been converted by the trustees into several smaller distinct trust estates, the liabilities incidental to one of them cannot be thrown on the beneficial owners of the others. This was decided in *Fraser v Murdoch*, which was referred to in argument. But where the only *cestui que trust* is a person *sui juris*, the right of the trustee to indemnity by him against liabilities incurred by the trustee by his retention of the trust property has never been limited to the trust property; it extends further, and imposes upon the *cestui que trust* a personal obligation enforceable in equity to indemnify his trustee. This is no new principle, but is as old as trusts themselves.[3]

2.6 As Ford concluded, "[o]ne would expect that the same principle ought to apply where there is more than one beneficiary and all of them are *sui juris* and entitled to the same interest as absolute owners between them".[4]

2.7 In a subsequent case, *Wise v Perpetual Trustee Co Ltd,*[5] the Privy Council reached a different conclusion. The case involved the trustees of a club claiming an indemnity from members of the club for unpaid rent. The Privy Council found against a trustee on the basis that the rule in *Hardoon* "by no means applies to all trusts, and it cannot be applied to cases in which the nature of the transaction excludes it".[6] "The nature of the transaction" appears to be a reference to the essential nature of club membership, and not, for example, the presence of multiple beneficiaries. The following is an extract from the judgment:

> Clubs are associations of a peculiar nature. They are societies the members of which are perpetually changing. They are not partnerships; they are not associations for gain; and the feature which distinguishes them from other societies is that no member as such becomes liable to pay to the funds of the society or to any one else any money beyond the subscriptions required by the rules of the club to be paid so long as he remains a member. It is upon this fundamental condition, not usually expressed but understood by every one, that

2. *Hardoon v Belilios* [1901] AC 118.
3. *Hardoon v Belilios* [1901] AC 118, 123–124.
4. H A J Ford, "Trading Trusts and Creditors' Rights" (1981) 13 *Melbourne University Law Review* 1, 7.
5. *Wise v Perpetual Trustee Co Ltd* [1903] AC 139.
6. *Wise v Perpetual Trustee Co Ltd* [1903] AC 139, 149.

> clubs are formed; and this distinguishing feature has been often judicially recognised.
>
> …
>
> The question now to be decided may be regarded as not yet covered by authority; and a choice must be made between either ignoring the essential features of a club or holding that the general rule established in *Hardoon v Belilios* is inapplicable to such a body of persons. Their Lordships feel no difficulty in making this choice. The trustees of a club are the last persons to demand that the fundamental conditions on which their *cestuis que trustent* have become such shall be completely ignored.
>
> The appellant in this case is not ... under any legal or equitable obligation to pay or contribute anything towards the indemnity of the plaintiffs; but he has offered to do so, and the plaintiffs are not satisfied with his offer. Their endeavour to obtain more is to be regretted, and cannot succeed. This may seem hard on the trustees; but they have only themselves to blame for their own imprudence in not seeing to their own safety. A decision in their favour would not only be hard on the members of the club, but would be inconsistent with the terms on which they became members.[7]

2.8 Some have regarded this case as overcoming the risk of liability in the unit trust context, despite the clear emphasis on membership of a club as affecting the board's opinion.

2.9 The issue was addressed directly in the Victorian case, *JW Broomhead (Vic) Pty Ltd (in liquidation) v JW Broomhead Pty Ltd*.[8] Justice McGarvie held that the general principle in *Hardoon v Belilios*:

> is that a trustee is entitled to an indemnity for liabilities properly incurred in carrying out the trust and that right extends beyond the trust property and is enforceable in equity against a beneficiary who is *sui juris*. The basis of the principle is that the beneficiary who gets the benefit of the trust should bear its burdens unless he can show some good reason why his trustee should bear the burdens himself.
>
> …
>
> It was argued that the general principle applies only where there is a sole beneficiary. In *Hardoon v Belilios,* the Privy Council stated the law as it applies where the only beneficiary is a person *sui juris*. It was dealing with a case where there was only one beneficiary. Its statement was in accordance with the sound judicial practice of not stating a principle wider than necessary for the decision of the case. Such a statement should not be construed as though the Privy Council was following the opposite practice of stating the principle as widely as it was possible to state it.
>
> Neither the submissions of counsel nor the cases have revealed to me any consideration of principle, concept, fairness or practicality which would justifiy its restriction to the case of a sole beneficiary.
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> …

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7. *Wise v Perpetual Trustee Co Ltd* [1903] AC 139, 149, 150 (citations omitted).
8. *JW Broomhead (Vic) Pty Ltd (in liquidation) v JW Broomhead Pty Ltd* [1985] VR 891.

> I consider that the general principle in *Hardoon v Belilios* applies where there are several beneficiaries".[9]

2.10 The basis of the Judge's decision is arguably less clear because Justice McGarvie also held that, with one exception, the relevant beneficiaries had requested the trustee to become the trustee for them and were also liable to indemnify the trustee for that reason.[10]

2.11 A more recent example of the principle in NSW is the Court of Appeal judgment in *Causley v Countryside (No 3) Pty Ltd.*[11] The case involved a claim by a trustee under a unit trust that it was entitled to be indemnified by unit holders where trust liabilities exceeded trust assets. Justice Cole said:

> It was contended generally that because the purpose of the trust was the raising of funds by the sale of trust units to the public for the pursuit of a commercial enterprise, persons dealing with the trust would assume they had no right to indemnity from unit holders beyond the trust assets. Further, it was contended that the trustee would not have contemplated that the initial subscribers for units, or presumably subsequent purchasers thereof, would be bound to indemnify the trustee in respect of liabilities in excess of trust assets, nor would the initial subscribers, or subsequent purchasers of trust units, have contemplated an obligation so to indemnify.
>
> There was no evidence to support these submissions. Further, the submissions misunderstand the basis upon which liability to indemnify attaches. [His Honour quoted McGarvie J in *Broomhead*, and continued]
>
> Expectations of the trustee, or of the *cestui que trust*, *which are not reflected in the terms of the trust deed* upon the basis of which the *cestui que trust* acquired the trust units would rarely, if ever, constitute a sufficient reason why the general equitable principle should be regarded as inapplicable.[12]

2.12 We understand that current practice is to insert provisions in the trust documents that purport to limit the liability of beneficiaries, but these provisions have never been tested, and either their omission, or weaknesses in their drafting, may expose investors to unexpected liability.[13] In *Hardoon v Belilios* the likelihood that such exclusions could be effective was recognised:

> It is quite unnecessary to consider in this case the difficulties which would arise if these shares were held by the plaintiff ... upon special trusts limiting the right to indemnity. In those cases there is no beneficiary who can be justly expected or required personally to indemnify the trustee against the whole of the burdens incident to his legal ownership; and the trustee accepts the trust knowing that under such circumstances and in the absence of special contract his right to indemnity cannot extend beyond the trust estate, i.e., beyond the respective interests of his *cestuis que trustent*. In this case their Lordships have only to deal with a person *sui juris* beneficially entitled to shares which he cannot disclaim. The obligation of such a person to indemnify his trustee against calls

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9. *JW Broomhead (Vic) Pty Ltd (in liquidation) v JW Broomhead Pty Ltd* [1985] VR 891, 936, 937.
10. *JW Broomhead (Vic) Pty Ltd (in liquidation) v JW Broomhead Pty Ltd* [1985] VR 891, 937.
11. *Causley v Countryside (No 3) Pty Ltd* [1996] NSWCA 97.
12. *Causley v Countryside (No 3) Pty Ltd* [1996] NSWCA 97, 3 (Cole JA, Clarke and Beazley JJA agreeing) (emphasis added).
13. See N D'Angelo, *Commercial Trusts* (LexisNexis, 2014) [3.9] for the summary of the review of prospectus disclosures around these matters.

> upon them appears to their Lordships indisputable in a court of equity unless, of course, there is some contract or other circumstance which excludes such obligation. Here there is none.[14]

2.13 These cases concern trustees seeking to recover from beneficiaries, but creditors may also seek to do so. An unsecured creditor of the trustee may seek to rely on a right of subrogation, to stand in the shoes of the trustee to recover from a beneficiary. This was the subject of a recent article,[15] but will not be further pursued here since the focus of this reference is on the obligation to indemnify the trustee, and even if entitled to be subrogated, the creditor can have no greater right than the trustee.

Unit trusts and managed investments

2.14 As was argued in *Causley's* case, investors in public unit trusts in particular assume that 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.

2.15 A number of review bodies have recommended statutory provisions to limit the liability of members of prescribed interest schemes in the same way as shareholders of companies – the Companies and Securities Law Review Committee in 1984,[16] the Australian Law Reform Commission ("ALRC") and the Companies and Securities Advisory Committee ("CASAC") jointly in 1993,[17] CASAC in 2000[18] and the Corporations and Markets Advisory Committee ("CAMAC") in 2012.[19] The ALRC and CASAC Report in particular said:

> The liability of investors to creditors of a trust is governed by the general law and the terms of the trust deed. Trustees are personally liable to creditors for trust debts. The trustee may have a right to be indemnified for properly incurred expenses and liabilities out of trust assets or by the trust beneficiaries. The creditors are subrogated to any rights of indemnity the trustee may have. Whether investors are liable to indemnify the trustee is determined by the trust deed in each case. This is unsatisfactory for public investment vehicles. The corporations law, by contrast, limits the liability of shareholders. DP 53 proposed a statutory provision to ensure that investors are not under any personal obligation to indemnify the scheme operator or a creditor of the scheme operator where scheme assets are insufficient to cover scheme debts. This proposal was strongly supported in submissions. The Review recommends that

14. *Hardoon v Belilios* [1901] AC 118, 127.
15. A Terzic, "Subrogation to the Trustee's Personal Right of Indemnity" (2017) 91 *Australian Law Journal* 36.
16. Companies and Securities Law Review Committee, *Forms of Legal Organisation for Small Business Enterprises*, Discussion Paper 1 (1984).
17. Australian Law Reform Commission and Companies and Securities Advisory Committee, *Collective Investments: Other People's Money*, Report 65 (1993).
18. Companies and Securities Advisory Committee, *Corporate Groups*, Final Report (2000). In 2000, on a limited basis, but the qualification was removed in 2012.
19. Corporations and Markets Advisory Committee, *Managed Investment Schemes*, Report (2012).

> the law should limit the liability of investors in collective investment schemes that are trusts to the unpaid amount, if any, of their investment ... [20]

2.16 These recommendations, limited in their scope to public trusts, have not been implemented. Ford and Lee say that the Companies Amendment Bill 1985 (Cth), when released for public comment, included a provision for limited liability, but the then Ministerial Council for Companies and Securities decided not to proceed with the change, preferring to rely instead on "administrative procedures designed to ensure full disclosure on the matter of unitholders' liability and the fact that there could be a clause … excluding liability".[21]

2.17 It may be noted that the Ministerial Council's reasoning assumes that exclusion clauses are effective, and does not suggest any public policy reason why the liability should not be limited (being concerned only with how the limitation is to be achieved). It also applies only to vehicles whose constituent terms are publicly available, being registered managed investment schemes.

2.18 It remains unclear why these consistent recommendations over many years have not been adopted. They do not appear to have been expressly rejected.

Can NSW deal with this issue?

2.19 While the above recommendations all relate to managed investments, the problem is not limited to managed investments; indeed, the *Corporations Act 2001* (Cth) ("*Corporations Act"*) does not cover the vast majority of trusts – trading trusts, special purpose vehicles, and unregistered managed investment schemes. Further, trusts which register as managed investments are not formed under the *Corporations Act* – they merely register under it. Trusts are fundamentally governed by state law. Therefore, for example, responsible entities that operate managed investment schemes may seek judicial advice as trustees under the state trustee laws.[22]

2.20 The Victorian Law Reform Commission ("VLRC") report on extending the oppression remedy available under corporations law to investors in trading trusts (the subject of Chapter 3) demonstrates that these are matters of trust law, not corporations law.[23] The VLRC considered that there may be a question of inconsistency between provisions they recommended inserting in the *Trustee Act 1958* (Vic) and the *Corporations Act*, with the result that a corporation legislation displacement provision of the kind contemplated by the *Corporations Act*[24] should be included. We could consider a similar approach in NSW.

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20. Australian Law Reform Commission and Companies and Securities Advisory Committee, *Collective Investments: Other People's Money*, Report 65 (1993) [11.37] (footnotes omitted).
21. H A J Ford, *Law of Trusts* (4th ed, 2016) [14.1290] – no source for that explanation is quoted.
22. See, eg, *Re AMP Capital Funds Management Ltd* [2016] NSWSC 986 where Brereton J declined to give the judicial advice, but did not appear to doubt the ability to do so; considered on appeal at [2016] NSWCA 176 (26 July 2016). On appeal, Barrett AJA referred in footnote 3 to *Mirvac and Mirvac Funds* [1999] NSWSC 457 as establishing "The availability of s 63 of the *Trustee Act 1925* (NSW) as a source of jurisdiction to give judicial advice to the responsible entity of a registered managed investment scheme".
23. Victorian Law Reform Commission, *Trading Trusts – Oppression Remedies*, Report (2015).
24. *Corporations Act 2001* (Cth) pt 1.1A.

2.21 In the oppression context, the VLRC also considered that it was desirable to make the law applying to trading trusts across Australia uniform or harmonised "to the maximum extent possible".[25] The same argument applies to limitation of liability. If we were to recommend legislation, we will need to consider whether to recommend that steps be taken to secure uniformity as a high priority, but not necessarily as a pre-condition of acting in NSW.

2.22 There remains the issue of whether any reforms proposed could be achieved by amending the *Corporations Act*, as recommended in the reports referred to in paragraph 2.15. If the only proposed reform were to public trusts of the kind registered as managed investment schemes, that reform could be achieved by amending the *Corporations Act*. But there is a case for a wider reform – and that would need to be achieved by amending the *Trustee Act 1925* (NSW) ("*Trustee Act*").

The approach in other jurisdictions

2.23 There are a number of provisions in other jurisdictions that address the liability of investors in publicly offered investment vehicles structured as trusts.[26] These provisions have been enacted or proposed in parts of the US, in some Canadian provinces, and in Singapore. The text of the relevant provisions is set out in Appendix A.

2.24 The effect of the Canadian and Singapore provisions appears to be to limit the liability of investors in their equivalents of our public unit trusts, in the same way as it is for shareholders in companies. In the US provisions, the protection from liability is offered in the context of the trust vehicles having status as separate legal entities referred to as "statutory trusts".

Avoiding unexpected and unintended consequences

2.25 Some care will be required in drafting any provisions to ensure that it is only any liability of beneficiaries, as beneficiaries, that is limited.

2.26 The use of trusts is widespread. One example is the use by superannuation funds when they invest in major infrastructure projects. There would be a widespread loss of confidence in such structures if liability for such projects were to fall elsewhere than intended or expected.

2.27 It will also be necessary to ensure that any provisions that protect beneficiaries do not affect the liability of directors (including shadow or defacto directors) of corporate trustees for insolvent trading, or protect beneficiaries who direct trustees to undertake transactions as their agents.

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25. Victorian Law Reform Commission, *Trading Trusts – Oppression Remedies*, Report (2015) [5.71].
26. See N D'Angelo, *Commercial Trusts* (LexisNexis, 2014) [3.91].

Preliminary submissions

2.28 The preliminary submissions we received have expressed quite different views on this issue. All are available on our website and a brief summary follows:

- *Professor Bant, Mr Barkley and Professor Harding* are opposed to dealing just with this issue and not reforming the law of trading trusts more generally:

> (W)hat is required is not ad hoc and piecemeal reform, focussing on only particular aspects of this larger problem, but rather bespoke and holistic regulation of trading trusts that is adapted and appropriate to the particular legal, social and economic challenges they pose. Superannuation trusts and managed investment schemes are the subject of specific legislative regulation and it is arguable that trading trusts should likewise be brought under a firm and coherent regulatory regime. For example, limiting the liability of investors in managed investment schemes can be justified because it is part of a holistic regime that requires the operators of the schemes to have independent financial means. Overall, regulation of trading trusts should clarify how the interests of trading trust investors, creditors and managers are balanced, and whether that balance is different from that adopted in Commonwealth corporations law. Relevant differences between the two might appear in: equity funding requirements, voidable transaction laws, insolvent trading principles, the liability of directors for actions that materially prejudice creditors, liability of those with effective control over trustee corporations, and the availability of criminal penalties for directors engaging in similar behaviour. Limiting reform to one issue – beneficiaries' liability – would be counterproductive.[27]

- *The Hon R I Barrett* prefers that reform be implemented through the *Corporations Act*, not trust law.[28]

- *Dr D'Angelo* would have preferred a wider review, but does favour an amendment to limit liability through the *Trustee Act*, a proposed Part 2A, which is reproduced in Appendix B.[29]

- *The NSW Bar* supports wide consultation on the issue and sees merit in revisiting the rule in *Hardoon v Belilios* to remove any argument that creditors could be subrogated to the trustee's personal right of indemnity.[30]

- *Dr Scott Donald* does not support any reform in this area except by Commonwealth law.[31]

- *Allens* agrees that the question of liability needs clarifying and identifies "a wider problem … that trusts are used as commercial and investment structures when trust law was not designed for that purpose". The wider problem includes the

27. E Bant, T Barkley and M Harding, *Preliminary Submission PBE1,* 2 (footnotes omitted).
28. R I Barrett, *Preliminary Submission PBE2.*
29. N D'Angelo, *Preliminary Submission PBE3.*
30. NSW Bar Association, *Preliminary Submission PBE4.*
31. S Donald, *Preliminary Submission PBE5.*

absence of direct access for trust creditors to trust assets and the lack of a specific insolvency regime for trusts.[32]

- *NSW Law Society* supports maintaining what it calls the "current nil liability position" for beneficiaries.[33]
- *Ashurst Australia* believes that any reform should be uniform across Australia and combined with reform of creditors' access to trust assets. In their view it is necessary to clarify the law for the benefit of institutional and foreign investors, through *Corporations Act* changes for investors in managed investment schemes as well as other commercial trusts.[34]

Our preliminary views

2.29 The following paragraphs set out our preliminary views on the question of the liability of beneficiaries.

2.30 While some may prefer that it was not so, trusts are widely used in commercial contexts where corporations could have been used. Necessary adjustments to ensure they operate fairly should be made provided no unacceptable consequence results. Any perceived need for wider reform of aspects of the law of trusts should not delay this reform, which is on a discrete and narrow point. We would welcome a reference on the wider issues such as creditors' rights and insolvency of trusts, perhaps jointly with a Commonwealth agency.

2.31 It is not clear that a provision in the trust instrument can effectively limit the liability of investors for all purposes, since it could be argued that the trustee was acting as agent for the beneficiaries (who would therefore be liable on that basis) or that creditors are nevertheless entitled to sue beneficiaries directly. Even if the law were clear that inserting an explicit provision in the trust instrument could limit liability, the effectiveness of the limitation would depend on drafting. Legislation would remove the risk posed either by poor drafting or the inadvertent omission of such a clause.

2.32 The case for reform is strongest in the case of managed investment schemes. Such a reform has been recommended on previous occasions at the national level. The recommendations have not been implemented for reasons which are not clear. The ideal reform for managed investment schemes may be an amendment to the *Corporations Act*. The Canadian and Singapore provisions appear to be so limited. However, the failure of the Commonwealth to respond to the issue over many years suggests that NSW can and should adopt the reform through its *Trustee Act*, and encourage the other states and territories to do likewise, pending Commonwealth action.

2.33 In any event there are many other trusts which are not managed investment schemes and the Commonwealth may have no head of power to legislate about them. There may be no reason in principle why the liability of investors in legally identical structures should be different depending on whether the structure is publicly offered, or not.

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32. Allens, *Preliminary Submission PBE6*, 3.
33. Law Society of NSW, *Preliminary Submission PBE7.*
34. Ashurst Australia, *Preliminary Submission PBE8.*

2.34 We welcome submissions on these preliminary views and intend to test them in roundtable discussions.

3. Oppression remedies

Oppression in corporations law

3.1 Since the middle of the 20th century, minority shareholders in companies have had the benefit of statutory remedies when they claim that they are being oppressed by those in charge of, or holding the majority of the shares in, those companies.[1] Before these statutory remedies were made available, such shareholders could only seek a winding up order, which might be too drastic or not in their own interest.

3.2 In England it was the Cohen Committee which recommended these provisions in 1945, and their reasoning was in these terms:

> In many cases, … the winding-up of the company will not benefit the minority shareholders, since the break-up value of the assets may be small, or the only available purchaser may be that very majority whose oppression has driven the minority to seek redress. We, therefore, suggest that the Court should have, in addition, the power to impose upon the parties to a dispute whatever settlement the Court considers just and equitable. This discretion must be unfettered, for it is impossible to lay down a general guide to the solution of what are essentially individual cases. We do not think that the Court can be expected in every case to find and impose a solution; but our proposal will give the Court a jurisdiction which it at present lacks, and thereby at least empower it to impose a solution in those cases where one exists.[2]

3.3 The recommendations of the Cohen Committee are reflected in the *Corporations Act 2001* (Cth) ("*Corporations Act*"). It provides that the court may make an order where the conduct of a company is oppressive. Where the court is satisfied that this has occurred, it has a broad discretion to make appropriate orders. Those who have standing to bring an action include current or former shareholders, or any person the Australian Securities and Investments Commission ("ASIC") thinks appropriate in light of its investigations.[3]

1. First introduced in NSW in *Companies Act 1961* (NSW) s 186. See also Victorian Law Reform Commission, *Trading Trusts – Oppression Remedies*, Report (2015) [3.11]–[3.22].
2. United Kingdom, *Report of the Committee on Company Law Amendment*, Cmd 6659 (1945) [60].
3. *Corporations Act 2001* (Cth) s 232–234.

Oppression in the trust context

The problem

3.4 The oppression provisions of the *Corporations Act* do not apply to trusts. As discussed in Chapter 2 many businesses today are conducted through trading trusts. The same kinds of difficulties might be expected to arise between unitholders in trading trusts, as arise between shareholders in companies.

3.5 The first question is whether the law of trusts provides equivalent remedies to those available under corporations law. The Victorian Law Reform Commission ("VLRC") examined this question thoroughly in chapter 4 of their report,[4] and concluded that the law of trusts does not. We will not repeat their analysis here but invite comment if others take a different view.

3.6 There have been attempts in NSW and Victoria to obtain oppression remedies under the *Corporations Act* in cases where the trustee of a trading trust is a company (as it usually is for such trusts). The courts in NSW and Victoria have produced different outcomes in these cases.

3.7 The VLRC put the matter as follows:

> It is unclear whether the existing oppression remedy in the Corporations Act already gives the court power to grant relief in the context of trading trusts. One line of authority [the NSW line] has held that beneficiaries are limited to the conventional, and largely ineffective, forms of equitable relief under trust law. An alternate line of decisions [the Victorian line] has held that the court's power under section 232 of the Corporations Act is not limited to an action against the company and extends more broadly to the affairs of a company, including trading trusts of which the company is the trustee.
>
> Even if the latter line of decisions represents the law in Victoria, the existing Corporations Act remedy alone will never be sufficient to protect all beneficiaries of trading trusts, because a beneficiary seeking to access the remedy must also be a shareholder in the corporate trustee.
>
> In a number of cases, the beneficiary will not be a shareholder, which effectively leaves such an individual without any effective remedy at all, unless an alternative statutory remedy is provided.
>
> Even where the beneficiary is a shareholder, the current state of the law is so complicated and unclear, that extensive costs must be expended and delays endured in investigating possible ways of framing a claim in the absence of a clear remedy. This can also lead to oppressed beneficiaries refraining from taking legal action at all, instead settling on less than favourable terms rather than face lengthy and costly litigation with an extremely uncertain outcome.[5]

3.8 What is above called the NSW line of authority is the following set of cases:

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4. Victorian Law Reform Commission, *Trading Trusts – Oppression Remedies*, Report (2015) ch 4.
5. Victorian Law Reform Commission, *Trading Trusts – Oppression Remedies*, Report (2015) xi (footnotes omitted).

- *Kizquari Pty Ltd v Prestoo Pty Ltd*[6] (NSW Supeme Court)
- *Re Polyresins Pty Ltd*[7] (Queensland Supreme Court)
- *McEwen v Combined Coast Cranes Pty Ltd*[8] (NSW Supreme Court), and
- *Trust Company Ltd v Noosa Venture 1 Pty Ltd*[9] (NSW Supreme Court).

3.9 What is called the Victorian line of authority is the following set of cases:

- *Vigliaroni v CPS Investment Holdings Pty Ltd*[10]
- *Wain v Drapac*,[11] and
- *Arhanghelschi v Ussher*.[12]

3.10 The explanation for the differing lines of authority lies in the approach taken to the interpretation of the "affairs" of a company that may be the subject of an oppression action. This is exemplified in *Trust Company Ltd v Noosa Venture 1 Pty Ltd* where Acting Justice Windeyer concluded that it was not within power to make an order requiring one trust beneficiary to buy out the interest of the other trust beneficiary, because such an order would be an order in relation to the trust, not in relation to the company.[13]

3.11 Consistent interpretation of the *Corporations Act* across Australia is clearly desirable. As noted by the High Court:

> uniformity of decision in the interpretation of uniform national legislation such as the [Corporations] Law is a sufficiently important consideration to require that an intermediate appellate court – and all the more so a single judge – should not depart from an interpretation placed on such legislation by another Australian intermediate appellate court unless convinced that that interpretation is plainly wrong.[14]

Unfortunately no case has been taken on appeal to resolve these inconsistent views.

3.12 However, achieving consistent interpretation of the *Corporations Act* will not solve the underlying problem, since an aggrieved unit holder will not always also be a shareholder, and it will only be a shareholder who can commence these proceedings.

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6. *Kizquari Pty Ltd v Prestoo Pty Ltd* (1993) 10 ACSR 606.
7. *Re Polyresins Pty Ltd* [1999] 1 Qd R 599.
8. *McEwen v Combined Coast Cranes Pty Ltd* [2002] NSWSC 122.
9. *Trust Company Ltd v Noosa Venture 1 Pty Ltd* [2010] NSWSC 1334.
10. *Vigliaroni v CPS Investment Holdings Pty Ltd* [2009] VSC 428.
11. *Wain v Drapac* [2012] VSC 156.
12. *Arhanghelschi v Ussher* [2013] VSC 253.
13. *Trust Company Ltd v Noosa Venture 1 Pty Ltd* [2010] NSWSC 1334 [104]–[105].
14. *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492.

The VLRC's conclusion

3.13 The VLRC Report recommended that the law of trusts should make oppression remedies available to beneficiaries of trading trusts. The Report included a draft provision to implement its recommendations. It is reproduced in Appendix C.

3.14 Is this reform needed? The VLRC concluded that it was, for reasons of clarity, simplicity and fairness.[15] Submissions they received and comments made during consultations referred to the injustice or hardship resulting from the lack of a clear remedy. The different approaches in the NSW and Victorian lines of authority may be sufficient evidence of the need for reform to achieve some certainty.

3.15 The VLRC considered carefully and consulted widely on whether the proposed oppression provision should also apply to discretionary trusts, trusts in which the very nature of the trust is that the trustee can and must choose between possible beneficiaries and how much to allocate to them. In such circumstances oppression might be far more difficult to identify and respond to without fundamentally changing the nature of the trust. However, the VLRC concluded that:

> expressly [to] exclude discretionary trusts from the operation of an oppression remedy would create substantial practical difficulties. The Commission acknowledges that the inclusion of discretionary trusts is partly at odds with the way the beneficial interests in these trusts have traditionally been conceptualised. However, the Commission considers that these difficulties can be readily resolved by providing the courts with a broad and flexible range of remedies.[16]

Preliminary submissions

3.16 The preliminary submissions we received have expressed quite different views on this issue. All are available on our website and a brief summary follows:

- *Professor Bant, Mr Barkley and Professor Harding* oppose dealing just with this issue and not reforming the law of trading trusts more generally.[17]
- *Mr Barrett* believes that this issue should be dealt with as part of a more general investigation into prejudice or injustice in the administration of trading and commercial trusts, and even if that were found, questions whether the solution was laws of wider application.[18]
- *Dr D'Angelo* supports adopting the VLRC Report.[19]
- *The NSW Bar* supports adopting the VLRC Report.[20]

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15. Victorian Law Reform Commission, *Trading Trusts – Oppression Remedies*, Report (2015) [1.23]–[1.35].
16. Victorian Law Reform Commission, *Trading Trusts – Oppression Remedies*, Report (2015) [2.112] see also [2.73]–[2.111].
17. E Bant, T Barkley and M Harding, *Preliminary Submission PBE1.*
18. R I Barrett, *Preliminary Submission PBE2.*
19. N D'Angelo, *Preliminary Submission PBE3.*
20. NSW Bar Association, *Preliminary Submission PBE4.*

- *Dr Donald* opposes the VLRC proposal on the grounds that any reform in this area should be by Commonwealth law.[21]
- *NSW Law Society* supports adopting the VLRC Report.[22]

Our preliminary views

3.17 The following paragraphs set out our preliminary views on the question of oppression remedies.

3.18 Unit trusts are an accepted way of conducting businesses, and those who choose to use them are entitled to the same kind of protections as those who choose to use companies limited by shares.

3.19 Unit trusts are not discretionary trusts – but, while the case for relief from oppression in discretionary trusts is weaker and there will be difficulties in applying the remedy to such trusts, on balance it is desirable to include discretionary trusts in any reforms.

3.20 The difference in the way the *Corporations Act* is being interpreted and applied in NSW and Victoria is undesirable. Adopting an oppression remedy in trust law in both places will resolve the difference. The NSW Courts' stance does not appear to be driven by a principled objection to providing a remedy for unit holders claiming oppression, but rather by their different interpretation of the *Corporations Act*.

3.21 The Commonwealth could amend the *Corporations Act* provisions in a way that makes the management of a unit trust part of the affairs of a corporation that is a trustee. That would ensure that relief from oppression is available in all unit trusts where the trustee is a corporation, which are likely to be the vast bulk of such trusts. It would also ensure that the law operates in the same way in NSW and Victoria. It would not, however, address the situation where the unit holder was not also a shareholder; it would only be in the capacity of a shareholder that a unit holder could bring an oppression claim.

3.22 Whether or not the Commonwealth amends the *Corporations Act*, if Victoria legislates to the effect of the VLRC Report, then NSW should follow suit.

3.23 While a comprehensive review of the law of trusts remains desirable, this is a discrete aspect of that law which can and should be resolved without waiting for such a review.

3.24 The NSW Government should consult the Victorian and Commonwealth Governments to see whether agreement can be reached on an oppression remedy for trusts.

3.25 We welcome submissions on these preliminary views and intend to test them in roundtable discussions.

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21. S Donald, *Preliminary Submission PBE5.*
22. Law Society of NSW, *Preliminary Submission PBE7.*

Appendix A:
Overseas statutory provisions

United States

National Conference of Commissioners on Uniform State Laws: Uniform Statutory Trust Entity Act (2009)

Implemented in Kentucky: Kentucky Revised Statutes §386A.3-040; and District of Columbia: Code of the District of Columbia §29-1203.04.

304. Statutory trust solely liable for debt, obligation, or other liability of statutory trust.
A debt, obligation, or other liability of a statutory trust or series thereof is solely a debt, obligation, or other liability of the trust or series thereof. A beneficial owner, trustee, agent of the trust, or agent of the trustee is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of the trust or series thereof solely by reason of being or acting as a trustee, beneficial owner, agent of the trust, or agent of the trustee.

Delaware Code: Title 12

§ 3803 Liability of beneficial owners and trustees
(a) Except to the extent otherwise provided in the governing instrument of the statutory trust, the beneficial owners shall be entitled to the same limitation of personal liability extended to stockholders of private corporations for profit organized under the general corporation law of the State.

Canada

Uniform Law Conference of Canada: Income Trusts Act (2008)

8. Unit-holder immunity – income trusts
The liability of a unit-holder of a trust, as a unit-holder, for any obligation or liability arising out of or from the administration, management or assets of the

trust or any conduct of a trustee, administrator or manager of the trust, is limited to the unit-holder's interest in the units of the income trust.

Income Trust Liability Act SBC 2006 (British Columbia)

Similar provisions may be found in Income Trust Liability Act, SS 2006, c I-2.02 (Saskatchewan); Income Trusts Liability Act, SA 2004, c I-1.5 (Alberta).

2. Limited liability
Despite any express or implied indemnity of a trustee of a British Columbia income trust by a beneficiary of the trust, the beneficiary is not, as a beneficiary, liable for any act, default, obligation or liability of the trustee.

Trust Beneficiaries' Liability Act, 2004 (Ontario)

1. Limit on beneficiaries' liability

(1) The beneficiaries of a trust are not, as beneficiaries, liable for any act, default, obligation or liability of the trust or any of its trustees if, when the act or default occurs or the obligation or liability arises,

(a) the trust is a reporting issuer under the *Securities Act*; and

(b) the trust is governed by the laws of Ontario.

Singapore

Business Trusts Act 2004

32. Limitation of liability of unitholders

(1) For the avoidance of doubt, a unitholder of a registered business trust shall not be liable to contribute to the registered business trust or in respect of any debts, liabilities or obligations incurred by the trustee-manager in its capacity as trustee-manager for the registered business trust, other than such outstanding amounts of money, if any, which the unitholder has expressly agreed to contribute to the registered business trust.

(2) The limitation of the liability of a unitholder of a registered business trust referred to in subsection (1) shall apply notwithstanding —

(a) any provision to the contrary in the trust deed of the registered business trust; or

(b) the winding up of the registered business trust.

Appendix B:
Draft proposal by Dr N D'Angelo

Part 2A Beneficiaries

69A Limitation of liability of beneficiaries

(1) General limitation of liability

No beneficiary of a trust is liable to indemnify or otherwise make a payment to the trustee or any third party in connection with a trustee liability except as provided in this Part 2A.

(2) Exceptions

A beneficiary may be so liable only if and to the extent:

(a) expressly provided in the instrument (if any) governing the trust; or

(b) the beneficiary has agreed to be so liable; or

(c) section 69B, section 69C or section 69D applies.

(3) Beneficiary must be of full capacity

(a) Except in relation to section 69D, a beneficiary may only be liable under this Part 2A if they are of full capacity both at the time the relevant trustee liability is incurred and at the time liability is imposed on them by operation of this Part 2A.

(b) A beneficiary may only be liable under section 69D if they are of full capacity both at the time a distribution or transfer of trust property contemplated by section 69D(1)(b) becomes effective and at the time liability is imposed on them by operation of that section.

(4) Beneficiary liable in other capacities

Liability of a beneficiary by operation of this Part 2A is in addition to and does not reduce or otherwise affect or constitute a defence against any liability of that person in any other capacity (including as a trustee of the trust or, where a trustee is a corporation, as an officer of the trustee) but where liability relates to

a specific trustee liability they cannot be made to pay more than the total amount of that liability.

(5) Third party rights

Except in the circumstances contemplated by section 69A(6), if:

(a) a beneficiary is liable by operation of section 69A(2) to indemnify or otherwise make a payment to the trustee in respect of a specific trustee liability; and

(b) the beneficiary has not fully satisfied that indemnity or payment obligation; and

(c) the trustee liability is due and payable but has not been fully satisfied,

the third party to whom that trustee liability is owed may recover it (but only to the extent not paid by the beneficiary to the trustee) directly from the beneficiary as a debt due to the third party by that beneficiary, without having to subrogate to the trustee's indemnity or other right of payment and without having to join the trustee to any proceedings.

(6) Where:

(a) a beneficiary's liability under section 69A(2) (including by operation of section 69D) is to pay an amount to the trustee as a contribution to the trust fund or by way of indemnity in favour of the trustee for trustee liabilities generally, rather than to indemnify or otherwise make a payment to the trustee in respect of a specific trustee liability; and

(b) for any reason the trustee does not or cannot enforce that liability,

then any affected third party may apply to the Court for an order compelling the beneficiary to make that payment.

(7) Payment by a beneficiary to a third party under section 69A(5) or section 69C discharges correspondingly any obligation of the beneficiary to indemnify or otherwise make a payment to the trustee in respect of the relevant trustee liability but does not prejudice any right or claim that beneficiary may have against the trustee, another beneficiary or any other person, including for breach of trust, contribution, indemnity or set off.

69B Trustee liabilities incurred by controlled trustee or at beneficiary's request or direction

(1) Without limiting section 86, a beneficiary is liable to indemnify the trustee in respect of a trustee liability if and to the extent it was incurred, suffered or paid by the trustee:

(a) as a consequence of an exercise by the beneficiary of control of the trustee; or

(b) at the request or direction of that beneficiary (as beneficiary)

and, at the time it is due for payment or is paid, either:

(c) the trustee is unable to be indemnified fully out of trust property in respect of that trustee liability for any reason; or

(d) the trust is insolvent.

(2) The beneficiary is so liable regardless of:

(a) whether in incurring, suffering or paying the trustee liability the trustee breached the trust; or

(b) whether the trust was solvent or insolvent at the time the trustee liability was incurred, suffered or paid by the trustee; or

(c) any person's state of knowledge concerning the solvency of the trust at any time or the trustee's ability to be indemnified out of trust property.

(3) If two or more beneficiaries performed the actions contemplated in section 69B(1)(a) or (b) in relation to a particular trustee liability, they are liable jointly and severally.

(4) It is a defence under this section 69B if it is proven that, before the trustee liability was incurred, suffered or paid by the trustee, the beneficiary received information from the trustee, or was otherwise in possession of information prepared by or for the trustee, that satisfied the beneficiary, and would have satisfied a reasonable person in the position of the beneficiary, that:

(a) the trust was solvent before, and would remain solvent despite, the trustee incurring or paying that trustee liability; and

(b) the trustee would be able to be indemnified fully out of trust property for that trustee liability.

69C Trust debts incurred with actual knowledge or suspicion of trust insolvency

(1) A third party may recover a trust debt from a beneficiary of a trust, as a debt due to it by that beneficiary, if:

(a) the trust is insolvent; and

(b) the trust was insolvent at the time the trust debt was incurred; and

(c) the beneficiary had actual knowledge or suspicion of that insolvency at the time the trust debt was incurred; and

(d) the beneficiary had actual knowledge or suspicion that the trustee was to incur that trust debt before it was incurred; and

(e) the beneficiary had the legal right or practical ability (in any capacity) to prevent the trustee incurring that debt and failed to take all reasonable steps to exercise that right or ability.

(2) If two or more beneficiaries satisfy the criteria in section 69C(1)(c), (d) and (e) in relation to a particular trust debt, they are liable jointly and severally.

(3) It is a defence to an allegation of actual suspicion (but not actual knowledge) of a matter described in section 69C(1)(c) or (d) if it is proven that the beneficiary received information from the trustee, or was otherwise in possession of information prepared by or for the trustee, that satisfied the beneficiary, and would have satisfied a reasonable person in the position of the beneficiary, that the suspicion was unfounded.

69D Recovery of distributions and transfers made when trust insolvent

(1) A beneficiary is liable to pay to the trustee the amount calculated in accordance with section 69D(4) if:

(a) the trust is insolvent; and

(b) any of the following occurred at a time when the trust was insolvent, or its occurrence caused the trust to become insolvent:

(i) trust property, whether in the nature of capital, income or any of other character, is distributed to the beneficiary (including by way of a redemption of a unit, if the trust is a unit trust); or

(ii) trust property is transferred:

(A) to the beneficiary other than by way of a distribution; or

(B) to a relevant related person of the beneficiary; or

(C) to another person wholly or partly for the benefit of the beneficiary or a relevant related person of the beneficiary, on terms that would not be reasonable in the circumstances if the trustee and the transferee were dealing at arm's length; and

(c) either:

(i) the distribution or transfer occurred as a consequence of an exercise by the beneficiary of control of the trustee; or

(ii) at the time of the distribution or transfer there were reasonable grounds for suspecting that the trust was insolvent, or would so become insolvent, as the case may be, and either:

(A) the beneficiary was aware at the time of the distribution or transfer that there were such grounds for so suspecting; or

(B) a reasonable person in the position of the beneficiary would have been so aware.

(2) Except where section 69D(1)(c)(i) applies, it is a defence under this section 69D if it is proven that [consider including defences corresponding to sections 588H(2), (3) and/or (5) of the *Corporations Act*]

(3) The rights of a trustee under this section 69D and amounts recovered from a beneficiary under it, including following an order obtained by an affected third party under section 69A(4), are held by the trustee as trust property.

(4) The amount that may be recovered from a beneficiary under this section 69D is calculated as follows:

(a) if trust property the subject of a distribution or transfer described in section 69D(1)(b) was an amount of money, that amount of money plus interest on that amount from the date of distribution or transfer to the date of payment to the trustee (both included) at the pre-judgement rate prescribed from time to time for the purposes of section 100 of the *Civil Procedure Act 2005*; and

(b) if trust property the subject of a distribution or transfer described in section 69D(1)(b) was other than money, the greater of the arm's length unencumbered value of that property as at the date of the distribution or transfer and its arm's length unencumbered value at the date of payment to the trustee (regardless of whether the beneficiary enjoys the benefit of that property at that date).

69E Interpretation and defined terms

(1) In the interpretation of this Part 2A:

(a) a beneficiary of a trust *controls* a trustee of that trust if the beneficiary has the capacity to determine the trustee's decisions as trustee of that trust. In determining whether a beneficiary has that capacity the practical influence the beneficiary can exert (rather than the rights it can enforce) is the issue to be considered, and any practice or pattern of behaviour affecting the trustee's decisions is to be taken into account (even if it involves breaches of agreements or breaches of trust);

(b) *officer* has the meaning given in section 9 of the *Corporations Act 2001* (Cth);

(c) *relevant related person*, in relation to a beneficiary, means [guidance could be taken from the definition of 'related entity' in section 9 of the *Corporations Act*, and would need to contemplate beneficiaries that are corporations, trustees, in partnerships and natural persons];

(d) a trust is taken to be *solvent* at any time if the trustee is able at that time to pay trust debts as and when they become due and payable out of trust property and (where obliged) its personal property. A trust that is not taken to be solvent is taken to be *insolvent*;

(e) a *third party* is a person other than a trust party to or in favour of whom a trustee is obliged in respect of a trustee liability;

(f) a debt of a trustee is a *trust debt* of a trust if it is owed to a person other than a trust party and the trustee is entitled to apply trust property of that trust to pay it (even if it is also obliged to pay it out of its own property), disregarding for this purpose any application of the clear accounts rule; and

(g) a *trust party*, in relation to a trust, means a person who is a settlor, a trustee, an executor, a protector, an appointor or a beneficiary of that trust, each in that capacity;

(h) a *trustee liability* is a debt, liability, obligation, claim or expense incurred, suffered or paid by a trustee, ostensibly or purportedly in its capacity as

trustee, to or in favour of a person other than a trust party, regardless of whether the trustee is entitled to apply trust property to pay or satisfy it. It includes but is not limited to a trust debt.

(2) In this Part 2A:

(a) a reference to the knowledge, suspicion or awareness of a beneficiary of any matter includes knowledge, suspicion or awareness acquired by the beneficiary in any manner or capacity; and

(b) a reference to a reasonable person in the position of a beneficiary includes a reference to all relevant positions and capacities of the beneficiary, including, in each case, as a trust party of the trust or, where a trustee is a corporation, as a shareholder, employee or officer of the trustee.

69F Application

This Part 2A applies in respect of trusts created either before or after [the commencement date] and, except where section 69A(2)(a) operates, applies regardless of any contrary intention expressed in the instrument (if any) governing the trust.

Appendix C: Oppression remedies – Victorian proposals

Victorian Law Reform Commission *Trading Trusts-Oppression Remedies*, Report (2015) Recommendations

1. The *Trustee Act 1958* (Vic) should provide for the beneficiaries of trading trusts who are subject to oppressive conduct to be able to apply to the Supreme Court of Victoria for a remedy:

    a. in respect of any trading trust other than a managed investment scheme, a regulated or statutory superannuation trust or a charitable trust

    b. notwithstanding compliance by the trustee with the trust deed.

2. The Supreme Court of Victoria should be empowered to make any order that it considers appropriate in relation to the trading trust, in terms similar to section 233 of the *Corporations Act 2001* (Cth). In particular, the new provisions in the *Trustee Act 1958* (Vic) should:

    a. include a non-exhaustive list of the types of orders that may be made, including a power for the court to amend the trust deed

    b. require the court to have regard to the terms of the trust deed.

3. The following people should be able to apply to the Supreme Court of Victoria for an oppression remedy:

    a. a beneficiary of a trading trust (the beneficiary does not have to also be a shareholder in the corporate trustee)

    b. a person to whom a beneficial interest in a trading trust has been transmitted by operation of law

    c. a person to whom the court grants leave.

4. The amendment to the *Trustee Act 1958* (Vic) should expressly state that it does not limit any of the existing powers of the Supreme Court of Victoria.

5. The amendment to the *Trustee Act 1958* (Vic) should include a corporation legislation displacement provision.

6. In determining whether to grant an oppression remedy, the Supreme Court of Victoria should be required to consider the interests of third parties including, but not limited to, directors, trustees, shareholders, employees and creditors.

Appendix D: Preliminary submissions

PBE1 Professor Elise Bant, Mr Tobias Barkley, and Professor Matthew Harding, 27 June 2017

PBE2 The Hon R I Barrett, 28 June 2017

PBE3 Dr Nuncio D'Angelo, 29 June 2017

PBE4 NSW Bar Association, 14 July 2017

PBE5 Dr Scott Donald, 14 July 2017

PBE6 Allens, 14 July 2017

PBE7 Law Society of NSW, 27 July 2017

PBE8 Ashurst Australia, 21 August 2017

Justice
Law Reform
Commission

NSW Law Reform Commission

GPO Box 31
Sydney NSW 2001 Australia

Phone: 02 8346 1284
Email: nsw-lrc@justice.nsw.gov.au
Internet: www.lawreform.justice.nsw.gov.au

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