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Mr Alan Cameron AO
Chairperson
NSW Law Reform Commission
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The logo for Ashurst, featuring the word "ashurst" in a lowercase, bold, sans-serif font.

Dear Mr Cameron

Review of laws relating to beneficiaries of trusts

Thank you for the opportunity to make a submission to the Commission's review of laws relating to beneficiaries of trusts (**Review**).

Beneficiary liability

This submission is limited to the aspect of the Review that is focussed on the liability of beneficiaries, as beneficiaries, to indemnify trustees or creditors when trustees fail to satisfy obligations of the trust.

Our submission is based on our experience as a global law firm advising Australian and offshore clients on their dealings with trusts. This includes trustees, investors, fund managers and third party counterparties. It includes all types of funds that are structured as trusts or whose structure includes trusts, including superannuation funds, registered schemes, other managed investment schemes, private unit trusts, and discretionary trusts. It includes advising on establishment, management and administration, winding up and disputes.

Uniform law reform

We have had the advantage of reading the submissions to the Review published on the Commission's website as at the date of this submission. As a general point, and consistently with a number of those submissions, we submit that any reform of beneficiary liability should be uniform across Australia and should be combined with reform of creditor's access to trust assets.

We submit that the Commission should seek an extension to its terms of reference to permit it to consult, report and make recommendations on creditor's access issues and to identify law reform proposals that should be referred to the Commonwealth and other State Attorneys General with a view to uniform reform across Australia.

We suggest that the topics in the Review should be included in a broader joint reference to the Australian Law Reform Commission, the NSW Law Reform Commission and equivalent law reform agencies in other States and Territories to enable uniform law reform that addresses the relevant issues comprehensively.

Need for reform

We would like to add the following further comments and suggestions to the points noted in other submissions.

1. In our experience there is a widespread lack of understanding in the business community of the potential liability of beneficiaries of trusts.

We agree with the analysis of beneficiary liability in paragraphs 4.1 to 4.6 of the submission of Dr Nuncio D'Angelo to the Review. However, in our experience this analysis is not the position expected by investors, particularly foreign investors, or other parties dealing with commercial trusts (ie trusts where the property held is intended to be used in the conduct of a business). Commonly, it is incorrectly assumed that the liability of a unit holder in a unit trust is limited in the same way as a shareholder in a company.

2. While it is common for trust deeds to include provisions expressly limiting the liability of beneficiaries, and it is common for agreements between a trustee and a third party to include provisions limiting the liability of the trustee to the trust assets, it is less common to include a provision expressly limiting the liability of beneficiaries in an agreement between a trustee and a third party.

In particular, it is not common to see provisions where the third party expressly acknowledges that the trustee is not acting as the agent of any beneficiary. Partly this is because the issue is not well understood, including by lawyers who do not practice in this area, and therefore the issue is either not raised or it is rejected in negotiations. Sometimes the issue is not raised because it is considered that raising it will imply to the third party the possibility of a principal/agent relationship (and of recourse to the beneficiary) that does not exist in fact.

This means that in practice a contractual solution to disputes or uncertainty over the potential liability of beneficiaries is generally not practical.

3. We have noticed particular concerns arising in this respect for foreign investors in the context of:
 - (a) institutional investors who under their mandates and risk management systems have a low tolerance for legal risk – this is particularly noticeable in, for example, foreign investment into infrastructure projects or real estate trusts;
 - (b) venture capital investments where there is a higher level of active monitoring of the underlying business by investors due to the nature of the risk capital; and
 - (c) managed investment schemes (MIS) which also qualify as managed investment trusts (MIT) under relevant tax legislation and rely on a careful balancing of functions between the trustee and the investment manager to satisfy MIT requirements while also optimising the offshore expertise and resources made available to the MIT.

The concerns are exacerbated in the context of major infrastructure projects where the bidding vehicle is a trust and the documents issued with the RFP do not include the relevant limitation of liability for a beneficiary. In that situation bidders are reluctant to seek amendment to the documents to include a limitation of liability lest that may make their bid less attractive.

4. In our submission there is a need to clarify the law on this point, at least for commercial trusts where it creates an unnecessary uncertainty for investment transactions and is potentially an adverse factor in foreign investors' assessment of the adequacy of Australia's legal system for an investor.

Proposed reforms

5. We agree with the comments in some submissions that it is possible and appropriate to clarify the liability of beneficiaries of an MIS which is structured as one or more trusts separately from any law reform in respect of other trusts (including other commercial trusts).

We submit that the *Corporations Act 2001* (Cth) (**Corporations Act**) should be amended to limit the liability of members of an MIS (including an MIS that is not required to be registered) in substantially the same way as the liability of shareholders of a company is limited under section 516 of the Corporations Act.

In our view due to the requirements of the definition of an MIS in the Corporations Act, it is consistent with the policy objectives for collective investment vehicles of that kind to give members of an MIS the same level of certainty as to their liabilities as a member of an MIS as is given by the law to shareholders in a company.

This reform would substantially address the concerns noted in paragraphs 3 and 4 of this submission.

We recognise that this is a matter for the Commonwealth Attorney General (not the New South Wales Attorney General) and in that sense beyond the scope of the Review. We urge the Commission to seek an extension to its terms of reference to permit it to recommend that this law reform proposal is referred to the Commonwealth Attorney General to enable uniform reform across Australia on this point.


6. In our view, due to the widespread lack of understanding in the business community on this issue, it would be desirable to clarify the law on beneficiaries liability for other commercial trusts as well.

We consider that the reform to the *Trustee Act 1925* (NSW) proposed by Dr D'Angelo in Schedule 3 of his submission is worth detailed consideration and consultation with other States for this purpose.

The consultations should also consider exclusions from that regime for MIS (on the basis that the liabilities of a member of an MIS would be limited as set out in paragraph 5 above) and other regulated trusts (eg superannuation funds, which should also have a specific regime tailored to their circumstances like an MIS).

We thank you for the opportunity to participate in the Review. If you would like to discuss further any of the points noted above, please contact Michael Ryland on [REDACTED]

Yours faithfully



Ashurst Australia