NEW SOUTH WALES
BAR ASSOCIATION

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SUBMISSION IN RESPONSE TO THE NSW LAW REFORM COMMISSION CONSULTATION PAPER 19 - REVIEW OF LAWS RELATING TO BENEFICIARIES OF TRUSTS

1. The New South Wales Bar Association supports the preliminary views expressed in Consultation Paper 19 (**CP19**) at [2.29]-[2.33] and [3.17]-[3.24]. Those views are consistent with those expressed in the preliminary submissions made by the Bar Association on 14 July 2017 (Preliminary Submission PBE4).

2. The Bar Association makes the following further submissions in connection with matters canvassed in the Consultation Paper.

Liability of beneficiaries

Whether reform should await a reform of the law of trading trusts more generally

3. The Bar Association agrees that any perceived need for wider reform to the law of trusts ought not delay the introduction of legislation to clarify that beneficiaries in a trust have no liability to indemnify the trustee or creditors of the trust.

4. The concern that trading trusts are used where corporations could have been used (cf CP19 [2.30]) raises complex questions as to the legitimate use of trusts in a commercial context. As Professor Bant, Mr Barkley and Professor Harding point out (Preliminary Submission PBE1), those questions would require consideration of a range of legal, economic and social issues before a coherent regime for the regulation of trading trusts can be settled on. Achieving a wider reform of this kind is likely to be a controversial and lengthy process.

5. There is no reason why the more modest reform proposed in CP19 should not be effected now. It seems unlikely that any broader reform would involve retention of some potential for beneficiaries to be liable to the trustee or to creditors, particularly when shareholders in a corporation have no such liability. On the other hand, not effecting the reform proposed in CP19 would perpetuate the uncertainty that presently exists as to whether, and the circumstances in which, beneficiaries can be liable.

The form of any legislation

6. The Bar Association suggests that any proposed legislation be limited to clarifying that beneficiaries in a trust have no liability to indemnify the trustee or creditors of the trust solely by reason of the fact that they are beneficiaries.

7. A more detailed codification of the law, of the kind contained in Appendix B to CP 19, has difficulties. First, it is inevitable that elements of any codification will be contentious and this may

impede the introduction of any reform. Secondly, pending wider reform, it is well within the ability of the courts to identify on a case by case basis circumstances where those who happen to be beneficiaries may be liable e.g. where they direct or control the trustee as a shadow or de facto director, or direct a trustee to undertake particular transaction as their agent. Thirdly, any attempt to regulate liability where a trust is insolvent leads to conceptual difficulties because it is in the nature of a trust that the creditor's remedy is against the trustee, not the fund (see *Alyk (HK)Ltd v Caprock Commodities Trading Pty Ltd* [2015] NSWSC 1006 at [21]-[26] per Black J). This is reflected in the circumstance that, in the absence of contrary agreement, the liability of the trustee is not limited by the assets of the trust; and in the clear accounts rule.

8. If legislation is limited to specifying that beneficiaries in a trust have no liability to indemnify the trustee or creditors of the trust *solely by reason of the fact that they are beneficiaries*, this should address the concern expressed in CP19 at [2.25]-[2.27] (i.e. that any change not preclude a beneficiary being liable on some other legal basis).

Oppression remedies

Whether reform should await a reform of the law of trading trusts more generally

9. The Bar Association agrees that the introduction of an oppression remedy for trusts ought not await the implementation of any wider reform. As CP19 points out, the reality is that unit trusts are an accepted way of conducting commerce [3.18], and any change to that position will not be rapidly achieved. So long as trading trusts continue to be used, the uncertainty attending whether an oppression remedy is available is highly undesirable and makes it difficult for practitioners to provide satisfactory advice to client investors locked in dispute with the trustee or other investors.

Discretionary trusts

10. The Bar Association agrees with the view expressed at CP [3.19], namely, that any oppression remedy ought to extend to discretionary trusts. It is not uncommon in the context of a family business to find a discretionary trading trust being used as a way of providing income to members of the family. While such an arrangement may operate harmoniously for many years, in time families can grow and splinter and tensions arise. This can lead to oppression where, for example, the trustee continually makes decisions favouring some beneficiaries over others (notwithstanding that distribution to particular beneficiaries is in the trustee's discretion). In such a case a court has power to remove the trustee (*Nicholls v Louisville Investments Pty Ltd* (1991) 10 ACSR 723 at 728 per Needham J); but that is a drastic remedy which is not lightly granted. An oppression remedy would provide a more flexible way of dealing with the situation, including by enabling the court to wind up the trust.

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