Submission:

The Hon R I Barrett

27 February 2018

1. Limitation of liability – registered managed investment schemes

The consultation paper reiterates the case for statutory limitation of the liability of investors in managed investment schemes regulated by the Corporations Act. That, to my mind, should be as uncontroversial today as it has been at law reform advisory level for more than three decades. Such a limitation – whether or not necessary to resolve a doubt arising from trust principles – is no more or less than a logical component of the comprehensive code applying to the particular form of investment vehicle singled out for Commonwealth statutory regulation in the interests of investors. It is not an appropriate subject for the reform of trust law at State level.

2. Limitation of liability – other cases

Beyond that in relation to limitation of beneficiaries' liability, Consultation Paper 19 advances what I respectfully consider to be an unacceptably imprecise and unsubstantiated case. It advocates, at 2.30, "necessary adjustments to ensure they [trusts] operate fairly", yet nowhere in the paper itself or in the several submissions can I find reference to any real life instance of unfair operation that has gone without a remedy.

The circumstances at issue in Hardoon v Belilios were vastly different from those in Wise v Perpetual Trustee. Equity imposed different solutions accordingly; and each was just in its context. That is what equity does. Neither Consultation Paper 19 nor any of the several submissions identifies concrete instances in, say, the last fifty years that have thrown up a demonstrated need for statutory limitation of beneficiaries' liability. In which specific cases have beneficiaries suffered unfairly or unjustly because such a statutory provision did not exist? The reference at 2.33 of the consultation paper to "the liability of investors in legally identical structures" may imply that the mischief thought to be in need of attention is confined to some class of beneficiary (not precisely identified) who is an "investor" in a "structure". Even if that is so, there does not seem to be any explanation of why Parliament should create special protections for such "investors" (whoever they may be).

Generally on the question of limitation of beneficiaries' liability, I see nothing requiring new legislation, beyond the well-documented case of regulated managed investment schemes already mentioned. I find myself very much in sympathy with the following statement in the submission of Dr Scott Donald (14 July 2017):

> "[T]he nuances, calibration and conditionality present in the approach taken by the courts is quite complex and context-dependent. But that flows from a determination to do justice to the equities of the precise situation and is, from that perspective at least, necessary. Continued reliance therefore on the approach taken by the courts, which already accommodates that diversity and subtlety is preferable to any attempted crystallisation that would be effected by statutory intervention in the area given the costs and uncertainties inherent in any legislative reform."

3. Oppression

On the separate question of an oppression remedy in relation to trusts, the main "evil" Consultation Paper 19 seems to identify (at 3.17 to 3.25) is that courts of first instance have adopted divergent interpretations of Commonwealth law. That is not a matter for law reform at State level – and may not be a matter for law reform at all unless inconsistencies come to prevail at appellate level. The remainder of the case the consultation paper seeks to make is, for me at least, difficult to grasp. The thesis seems to be that if the affairs of a trust are administered in a way that would enable a shareholder in a company administered in like manner to bring an oppression suit, a beneficiary of the trust should be able to bring a like statutory action. The immediate response is, "Why?" Which real life situations and concrete cases have established a need for the law to give trust beneficiaries an "oppression" remedy similar to that available to company shareholders? What are the inadequacies of remedies already available to beneficiaries? Which concrete cases demonstrate those inadequacies? And why should trust beneficiaries have a statutory remedy in relation to the affairs of the trust that is not also given to partners in relation to the affairs of a partnership or joint venturers in relation to the affairs of a joint venture?

The consultation paper refers to several decided cases in which a Corporations Act oppression remedy has been denied to a plaintiff who is both a member of the company and a beneficiary of a trust of which the company is trustee. It notes that the disentitlement is even stronger if the plaintiff is a beneficiary but not a member. What the paper conspicuously does not do is explore whether, in the particular circumstances, equity would (or might) have granted appropriate equitable relief purely on the basis of breach of trust or other equitable wrong – a possibility not dealt with to any extent in the cases mentioned. Pertinent to this is the following passage in the judgment of Young CJ in Eq in *McEwen v Combined Coast Crane*s (at [60]):

> "There is probably no reason in principle why the 'legitimate expectation' learning in connection with oppression in companies should not apply in the case of trusts because equity is flexible enough to deal with unconscionable conduct in any appropriate way. If conduct is unconscionable by the standards of a statute in the Corporations Act, there is a lot to be said for the proposition that it would be unconscionable as a matter of general equity; see eg the remarks of Spigelman CJ in Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd (2001) 37 ACSR 672, 679."

As far as I can see, the Commission has not addressed the question whether existing equitable principles and remedies could have dealt adequately with the particular cases it regards as having exposed a lacuna in the law. It is quite insufficient to say, in effect, "Because the plaintiff did not succeed on the statutory cause of action he or she actually pleaded, the law provides no adequate remedy." One must hypothesise about all the potential causes of action that were not pleaded.

The only instance I have found in the materials on the Commission's website of supposed inadequacy of beneficiaries' existing remedies is the reference in the Bar Association's submission to the case of Nicholls v Louisville Investments Pty Ltd. Needham J there found breaches of trust and abuses of fiduciary power and dealt with them in a way that remedied unfairness and removed its source. There was (and is) no need for some added statutory remedy for a case such as that.

In short, the material before the Commission does not establish, in any cogent way, a need for the envisaged statutory remedy.

4. Outcome

Ten persons (or groups) have made submissions to the Commission. The consultation paper itself elicited comment from only two new responders. The level of community interest is thus very small. There is no submission from a trustee company, lending institution, investors' association, small business organisation, chamber of commerce or other market participant directly affected. The submissions are of varying quality. They exhibit no consensus in favour of change. To my mind, the author of the memorandum of 15 February 2018 to the Chief Justice makes a particularly compelling case for the legislature to leave well alone both the matters canvassed in the consultation paper.