

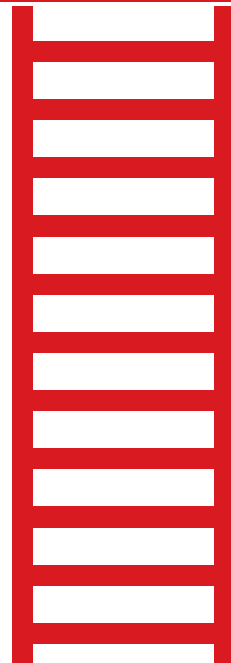
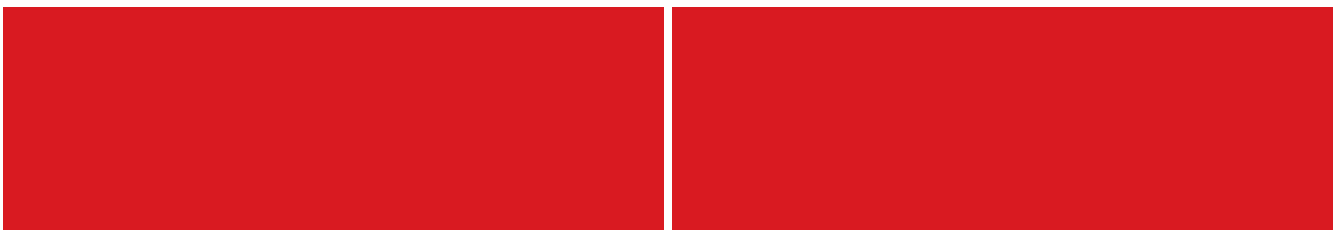


Victorian  
Law Reform  
Commission

# Trading Trusts— Oppression Remedies

REPORT

JANUARY 2015



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**CHAIR**

The Hon. Philip Cummins AM\*

**COMMISSIONERS**

Helen Fatouros

Bruce Gardner PSM

Dr Ian Hardingham QC\*

His Honour David Jones AM

Eamonn Moran PSM QC\*

Alison O'Brien\*

The Hon. Frank Vincent AO QC

\*Commissioners working on this reference

**CHIEF EXECUTIVE OFFICER**

Merrin Mason

**REFERENCE TEAM**

Anthony Bendall (team leader)

Jesse Jager

**COVER DESIGN**

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# Trading Trusts— Oppression Remedies

**REPORT**

JANUARY 2015



Victorian  
Law Reform  
Commission

Victorian Law  
Reform Commission  
GPO Box 4637  
Melbourne  
Victoria 3001  
Australia  
DX 144, Melbourne

Level 3  
333 Queen Street  
Melbourne  
Victoria 3000  
Australia

Telephone  
+61 3 8608 7800  
Freecall  
1300 666 555  
*(within Victoria)*  
Fax  
+61 3 8608 7888

Email  
[law.reform@lawreform.vic.gov.au](mailto:law.reform@lawreform.vic.gov.au)  
[www.lawreform.vic.gov.au](http://www.lawreform.vic.gov.au)

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## Preface

In Australia, trading trusts are often used as an alternative to companies as a way to structure businesses. These businesses, both large and small, form a significant part of the Australian economy.

Sections 232 to 234 of the *Corporations Act 2001* (Cth) provide a range of remedies for shareholders subject to oppressive conduct by a corporation. Whether these remedies already apply to beneficiaries of trading trusts is unclear. A line of cases has held that beneficiaries are limited to the conventional forms of equitable relief under trust law.<sup>1</sup> It is clear from an examination of these cases that such forms of relief are not equivalent to the Corporations Act oppression remedy in either scope or effectiveness.

An alternate line of cases has held that the court's power under section 232 is not limited to an action against the company, and extends more broadly to the affairs of a company, including trading trusts.<sup>2</sup> This leaves the current law in a state of uncertainty.

Even if the latter line of decisions represents the law in Victoria, the existing Corporations Act remedy alone will not 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.<sup>3</sup>

In its review pursuant to the reference made to it by the Victorian Attorney-General the Hon. Robert Clark in October 2013, the Victorian Law Reform Commission (the Commission) has concluded that, in the interests of clarity, simplicity and fairness, there should be a statutory oppression remedy for beneficiaries of trading trusts. This should be effected by amendment of the *Trustee Act 1958* (Vic).

The Commission has reached this conclusion after extensive research and consultation with judges, legal practitioners, professional associations, academics and others with knowledge and experience of trusts and corporations law. I thank those who contributed their time and insights.

I would like to thank my fellow Commissioners who worked on this reference. Dr Ian Hardingham QC, Eamonn Moran PSM QC and Alison O'Brien constituted the reference Division, which I chaired. They brought to the reference a wide range of perspectives and a rich knowledge of the law.

Finally, I acknowledge and warmly thank the research team, Dr Anthony Bendall and Jesse Jager, for their valuable work on the reference.

I commend the report to you.



**The Hon. Philip Cummins AM**  
Chair, Victorian Law Reform Commission

January 2015

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1 *Kizquari Pty Ltd v Prestoo Pty Ltd* (1993) 10 ACSR 606; *Re Polyresins Pty Ltd* (1998) 28 ACSR 671; *McEwen v Combined Coast Cranes Pty Ltd* (2002) 44 ACSR 244; *Trust Company Ltd v Noosa Venture 1 Pty Ltd* (2010) 80 ACSR 485.

2 *Vigliaroni & Ors v CPS Investment Holdings Pty Ltd* (2009) 74 ACSR 282; *Wain & Ors v Drapac & Ors* [2012] VSC 156 (26 April 2012);

3 *Arhanghelschi v Richard Milne Ussher & Ors* (2013) 94 ACSR 86.  
Ibid.

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## Terms of reference

(Matter referred to the Commission pursuant to section 5(1) of the *Victorian Law Reform Commission Act 2000* by the Victorian Attorney-General, the Hon. Robert Clark MP, on 24 October 2013).

Sections 232 to 234 of the *Corporations Act 2001* provide a range of remedies for shareholders for oppressive conduct by a corporation. The Victorian Law Reform Commission is asked to review and report on the desirability of having similar legislative remedies in Victoria to protect the rights of the beneficiaries of trading trusts who may be subject to oppressive conduct by a trustee.

In conducting the review, the Commission is to have regard to:

- whether adequate remedies for beneficiaries subject to oppressive conduct by the trustee of a trading trust are already available under Victorian statute or the common law
- the interaction between State and Commonwealth laws, and the jurisdictional limits imposed on the Victorian Parliament
- the interests of other parties which may be involved in, or interact with trading trusts including creditors, trustees, directors and employees.

The Commission is to report by 3 February 2015.



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# Glossary

Except where otherwise noted, the definitions below are drawn from or based on those in the *Encyclopaedic Australian Legal Dictionary*.<sup>1</sup>

<b>Beneficiary</b>	A beneficial owner of property who does not hold the legal title, but for whose benefit the legal title is held by a trustee under a trust arrangement. There may be one or more beneficiaries holding the beneficial interest in the trust property. A beneficiary holds an equitable interest in the property and can deal with this beneficial interest as an owner.
<b>Buyout</b>	Court-ordered purchase of shares in a company. <sup>2</sup>
<b>Chose in action</b>	An intangible personal property right that is incapable of physical possession and can only be claimed or enforced by a legal or equitable action.
<b>Company</b>	An association of a number of persons with a common object or objects; usually a business or professional association, registered under the <i>Corporations Act 2001</i> (Cth). Used interchangeably in this report with 'corporation'.
<b>Constitution</b>	Documents by which a corporation is formed and governed.
<b>Corporation</b>	A legal entity created by charter, prescription, or legislation. The fundamental difference between a corporation and other business entities is that the law treats a corporation as a separate legal person: <i>Corporations Act 2001</i> (Cth), section 124.
<b>Creditor</b>	A person to whom money or property is owed.
<b>Derivative action</b>	A suit brought by a person who relies, not on a cause of action belonging to him or her personally, but on one belonging to another person. It is an exception to the principle that one person cannot sue to obtain relief on behalf of another person who has been injured by a wrongdoer.
<b>Director</b>	A person employed as an officer of a company and having an obligation to perform the duties of management of the business of the company, acting as a member of the board of directors.

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<sup>1</sup> LexisNexis, *Encyclopaedic Australian Legal Dictionary* (at 18 November 2014).  
<sup>2</sup> This definition was developed by the Commission.

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<b>Discretionary trust</b>	A trust in which the trust fund is held, not in fixed proportions for listed beneficiaries, but subject to a discretion conferred on the trustee, usually with respect to both capital and income, to pay or distribute the fund among the potential beneficiaries. The trustee's discretion usually extends to deciding in what proportions and on what occasions payments are to be made, including whether the whole of the income or capital is to be paid to one potential beneficiary to the exclusion of all others.
<b>Equitable relief or remedy</b>	A remedy granted to a plaintiff by a court in exercise of its equitable jurisdiction. Equitable remedies are sought where common law remedies, such as damages, are inadequate to right the wrong done to the plaintiff. Examples of equitable remedies are specific performance, rectification, injunctions, set-off, and tracing. Equitable remedies are discretionary and, unlike common law damages, are not available as of right on proof of breach and loss.
<b>Equity</b>	The separate body of law, developed in the Court of Chancery, which supplements, corrects, and controls the rules of common law.
<b>Estoppel</b>	The doctrine designed to protect a person (B), who has acted on an assumption or expectation induced by another person (A), from the detriment which would flow from B's change of position if A were allowed to withdraw the assumption or expectation that led to the change.
<b>Express trust</b>	A trust created by express language evincing an intention to create a trust. An express trust may be created <i>inter vivos</i> or by will.
<b>Fiduciary duty</b>	An equitable duty to act in good faith for the benefit of another. Persons subject to a fiduciary duty are not permitted to profit from their positions (other than where expressly permitted) or to put themselves in a position where the fiduciary duty and personal interest may conflict.
<b>Inter vivos</b>	Between living persons; during life. In relation to a deed or other instrument, one that is executed between living persons.
<b>Member</b>	A person registered in a company's register of members as the holder of shares. Used interchangeably in this report with 'shareholder'.
<b>Oppression</b>	Actions by a company amounting to an unjust detriment to the interests of a member or members of a company or a beneficiary of a trust, but not merely prejudicial or discriminatory.
<b>Partner</b>	A person carrying on a business in common with one or more persons with a view to profit.
<b>Proprietary interest</b>	Ownership.
<b>Remedy</b>	The means available at law or in equity by which a right is enforced or the infringement of a right is prevented, redressed, or compensated.
<b>Resolution</b>	A decision made by the members, directors, creditors, or contributories of a company at a meeting, usually by means of a vote.
<b>Settlor</b>	A person who creates a trust by manifesting a sufficiently certain intention that a trust was intended in favour of one or more beneficiaries or purposes recognised as valid objects of a trust. The terms of the trust deed, which is executed by both the settlor and the trustee, usually spell out the terms of the trust.

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<b>Shareholder</b>	A person registered in a company's register of members as the holder of shares. Used interchangeably with 'member'.
<b>Shares</b>	Any one of the portions into which the capital stock of a company is divided. A share represents the interest of a shareholder in a company.
<b>Trading trust</b>	A trust where some property held by the trustee is employed under the terms of the trust in the conduct of a business. <sup>3</sup>
<b>Trust</b>	A device by which one person holds property for the benefit of another person. A trust imposes a personal equitable obligation upon a person (trustee) to deal with property for the benefit of another person or class of persons (beneficiary) or for the advancement of certain purposes, private or charitable. For a trust to exist there must be sufficient certainty of intention, object, and subject matter.
<b>Trust deed</b>	A deed in which the provisions of a trust are set out. Most trusts created in Australia are created by the execution of a deed of trust, the parties to which are a settlor and a trustee. The settlor will 'settle' some property, usually a sum of money, on the trustee to hold (together with any accretions) as the trust fund on the terms of the trust as set out in the trust deed.
<b>Trustee</b>	A person to whom property is conveyed, devised or bequeathed (i.e. left or given by will) for the benefit of another. The trustee owes a fiduciary duty to the beneficiaries under the trust. A person can be appointed or constituted trustee by an act of the parties concerned, by order or declaration of a court, or by operation of law. A trustee may be a natural person or, under the trustee legislation, a body corporate. Duties are imposed on a trustee, either by statute or by common law, to ensure that the terms of the trust are carried out, and that the trustee acts prudently with regard to trust property and makes proper distribution to those entitled.
<b>Unit trust</b>	A trust in which the beneficial interest in the trust property is divided in the trust instrument into fractions and each beneficiary has a fixed entitlement depending upon the number of units held by that beneficiary.
<b>Unitholder</b>	A beneficiary under a unit trust.
<b>Units</b>	The fractions by which the beneficial interest in unit trust property is measured.
<b>Vesting</b>	The transfer to a trustee of the property subject to the trust.
<b>Winding up</b>	A form of external administration under which a person called a 'liquidator' assumes control of a company's affairs in order to discharge its liabilities in preparation for its dissolution. The liquidator ascertains the liabilities of the company, converts its assets into money, terminates its contracts, disposes of its business, distributes the net assets to creditors and any surplus to the proprietors, and extinguishes the company as a legal entity by formal dissolution.

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## Executive summary

On 24 October 2013, the Attorney-General asked the Victorian Law Reform Commission to review the desirability of introducing similar remedies to those provided to shareholders of companies under sections 232 to 234 of the *Corporations Act 2001* (Cth) to protect the rights of beneficiaries of trading trusts who may be subject to oppressive conduct.

The law requires reform for three reasons: clarity, simplicity and fairness.

In Victoria, trusts are regulated by a combination of the *Trustee Act 1958* (Vic) and judge-made law. For this reason, reform of the law will require amendment of the Trustee Act.

Two important findings of the report, based on the Commission's research and consultation, are:

- Existing remedies under equitable doctrines, corporations or trusts legislation are inadequate for beneficiaries of trading trusts facing oppression.
- Trading trusts and corporations should be treated in a similar fashion as regards oppression remedies.

Where minority shareholders of a company wish to extricate themselves from it, due to the fact that the company's affairs or conduct are contrary to their interests, oppressive or unfair, they can usually sell their shares or seek to obtain an oppression remedy under the Corporations Act. Under existing trust law, there are limited avenues for minority beneficiaries or unitholders in similar circumstances.

For beneficiaries, simply disposing of their interests or units by selling them is problematic. The trust deed will usually contain a clause providing for the purchase of units and the method of valuing them. However, these clauses often provide the other beneficiaries with the first choice to purchase the units. This makes the use of these clauses difficult where there is a disagreement with the trustee or majority unitholders. The absence of a ready market for units from private trading trusts exacerbates the problem. Moreover, other trust remedies, whether based on equitable doctrines or statute, also appear unsuitable to provide relief against oppressive conduct.

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## Trading trusts

Trading trusts are a form of commercial trust. For the purpose of the proposed reforms, the Commission has adopted a functional definition of ‘trading trust’ that includes all trusts where ‘some property held by the trustee is employed under the terms of the trust in the conduct of a business’.<sup>1</sup>

Applying a functional approach, the Commission determined that, notwithstanding this broad definition of trading trust, managed investment schemes,<sup>2</sup> charitable trusts and regulated and statutory superannuation trusts did not require additional remedies. These types of trusts are already subject to significant regulation under Commonwealth and Victorian law,<sup>3</sup> which would prevent, minimise or provide protection against oppressive conduct. Moreover, applying an oppression remedy via the Trustee Act to these types of trusts could create significant jurisdictional issues.

## Corporations Act

Section 232 of the Corporations Act provides that the court may make an order where the conduct of a company is oppressive. Where the court is satisfied that conduct of this type has occurred, section 233 gives it a broad discretion to make appropriate orders. Section 234 sets out who has standing to bring an action, including current or former members of the company (namely shareholders) or any person the Australian Securities and Investment Commission (ASIC) thinks appropriate, in light of its investigations.

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 has held that beneficiaries are limited to the conventional, and largely ineffective, forms of equitable relief under trust law.<sup>4</sup> An alternate line of decisions 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.<sup>5</sup>

Even if the latter line of decisions represents the law in Victoria,<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup>

In some situations, this can lead to manifest unfairness, given the fact that in contemporary Australia, trading trusts are often used as an alternative and in a very similar way to companies as a way to structure businesses. If a company structure is utilised, remedies will be available to oppressed shareholders. If a trading trust structure is adopted, this will probably not be the case. In the Commission’s view, this differential treatment of shareholders and beneficiaries cannot be justified.

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1 H A J Ford and I J Hardingham, ‘Trading Trusts: Rights and Liabilities of Beneficiaries’ in P D Finn (ed), *Equity and Commercial Relationships* (Lawbook Co, 1987) 48.

2 As defined in s 9, *Corporations Act 2001* (Cth).

3 For managed investment schemes, Chapter 5C of the *Corporations Act 2001* (Cth); for charitable trusts, *Charities Act 1978* (Vic); and for superannuation trusts, the *Superannuation Industry (Supervision) Act 1993* (Cth).

4 *Kizquari Pty Ltd v Prestoo Pty Ltd* (1993) 10 ACSR 606; *Re Polyresins Pty Ltd* (1998) 28 ACSR 671; *McEwen v Combined Coast Cranes Pty Ltd* (2002) 44 ACSR 244; *Trust Company Ltd v Noosa Venture 1 Pty Ltd* (2010) 80 ACSR 485.

5 *Vigliaroni & Ors v CPS Investment Holdings Pty Ltd* (2009) 74 ACSR 282; *Wain v Drapac* [2012] VSC 156 (26 April 2012); *Arhanghelschi v Richard Milne Ussher & Ors* (2013) 94 ACSR 86.

6 *Ibid.*

7 *Ibid.*

8 Submission 5 (Commercial Bar Association of Victoria) 5.

As a result, the central recommendation of the Commission is that the Trustee Act should provide for beneficiaries of trading trusts<sup>9</sup> subject to oppressive conduct to be able to apply to the court<sup>10</sup> for a remedy. In the Commission’s view, this should be the case notwithstanding anything contained in the trust deed.

## Details of the recommended reform

### Scope

The recommended oppression remedy should have similar breadth and flexibility to that provided by the Corporations Act to shareholders, bearing in mind the multiplicity of ways in which oppressive conduct can arise.<sup>11</sup> As a result, the Commission also recommends that the court be given a broad discretion in similar terms to those used in section 233 of the Corporations Act, and a non-exhaustive, exemplary list of possible orders be included in the Trustee Act, where oppression is established.

The precise wording of the Corporations Act remedies would have to be adapted to accommodate the law of trusts. In the Commission’s view, the key features of the non-exhaustive list are:

- to terminate the trust
- to modify the terms of the trust deed
- to regulate the conduct of the trading trust
- to order the purchase of, or payment for the renunciation of, a right under the trading trust.

The first and last of these powers are akin to the winding up and buyout orders available under the Corporations Act, respectively.

### Standing

A similarly inclusive view should be adopted with regard to standing to seek an oppression remedy. This means that there should be no requirement for an applicant seeking an oppression remedy to be a shareholder or member of the corporate trustee. Rather, any beneficiary or individual having a beneficial interest in a trading trust should be able to apply to the court. In addition, a person to whom the court grants leave should also be able to apply, in line with ASIC’s power to grant standing under section 234 of the Corporations Act.

### Existing powers

While the Commission takes the view that the court’s existing powers, under the doctrines of equity, the Trustee Act and its inherent jurisdiction do not provide equivalent relief to the recommended oppression remedy, it is important that the recommended legislative amendment not have the effect of limiting any of the court’s current powers. The reforms are intended to supplement, rather than replace, existing avenues. The Commission therefore recommends that an express provision be included in the amended Trustee Act, making it clear that the court’s new powers regarding oppression do not limit any existing powers of the court.

### Third parties

The terms of reference require the Commission to consider the interests of other parties that may be involved in, or interact with, trading trusts including creditors, trustees, directors and employees. The Corporations Act and the general law create a complex legal framework of the legal duties owed to third parties, in particular directors and creditors.

9 As defined above.

10 Throughout this report, where the Commission refers to the power of the court under the proposed amendment, the Commission means the Supreme Court of Victoria. The Commission considers that difficulties may arise where a claimant seeks an oppression remedy in a court which is not vested with jurisdiction under the Corporations Act. The Supreme Court of Victoria has jurisdiction to make orders under both the Trustee Act (including the proposed amendments) and the Corporations Act.

11 Submission 4 (Federal Court of Australia) 2.

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In the Commission's view, it is not clear that the introduction of oppression remedies for trading trusts would alter or affect this framework. However, clearly the grant of at least some types of remedies in the context of oppression will affect the specific interests of third parties.

For this reason, the Commission recommends that, in determining whether to grant an oppression remedy, the court should be required to consider the interests of third parties including, but not limited to, directors, trustees, shareholders, employees and creditors.

The Commission has made six recommendations, which appear on page xiv of the report.

## **Conclusion**

The need for legislative reform is clear. The traditional doctrines of trust law have kept pace with neither the commercial realities of the 21st century, nor the use of trading trusts in contemporary Australia. The current oppression remedies in the Corporations Act do not provide a clear and comprehensive solution.

The recommended reforms if enacted should provide beneficiaries with a fairer, more certain way to seek redress when faced with oppressive conduct. However, given their limits and flexibility, the recommended reforms should not place an unjustified or onerous burden on trustees, directors or third parties associated with the relevant businesses.

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## 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.



# Introduction

- 2** This reference
- 3** The current law
- 5** The need for reform
- 7** Structure of this report

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# 1. Introduction

## This reference

- 1.1 On 24 October 2013, the Attorney-General, the Hon. Robert Clark, MP, asked the Victorian Law Reform Commission, under section 5(1)(a) of the *Victorian Law Reform Commission Act 2000*, to review the desirability of introducing similar remedies to those provided to shareholders of companies under sections 232 to 234 of the *Corporations Act 2001* (Cth) (Corporations Act) to protect the rights of beneficiaries of trading trusts who may be subject to oppressive conduct by a trustee. The terms of reference are on page vi. The Commission was asked to report by 3 February 2015.

## Reviews and legislative responses in other jurisdictions

- 1.2 This reference is the first public review of trading trusts and oppression remedies in Victoria and, as far as the Commission is able to ascertain, the first in any common law jurisdiction. In 1993, the Australian Law Reform Commission (ALRC), in conjunction with the Companies and Securities Advisory Committee, examined collective investment schemes.<sup>1</sup> The ALRC recommended that an oppression remedy be available for investors in such schemes, which could include trading trusts.<sup>2</sup>
- 1.3 Earlier reviews of aspects of trusts law by other law reform bodies raised related issues that the Commission has been able to consider. These bodies include:
- the Scottish Law Commission<sup>3</sup>
  - the British Columbia Law Institute<sup>4</sup>
  - the Law Reform Commission of Saskatchewan.<sup>5</sup>
- 1.4 Singapore is the only jurisdiction identified to have legislated to provide a statutory oppression remedy in the specific context of trading trusts.<sup>6</sup> Where a ‘business trust’ is registered under the *Business Trusts Act* (Singapore, cap 30, 2008 rev ed), an oppression remedy is available to any unitholder or debenture holder. However, registration is voluntary.<sup>7</sup>

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1 Law Reform Commission (Australia) and Companies and Securities Advisory Committee, *Collective Investments: Other People’s Money*, ALRC Report No 65 (1993). The Law Reform Commission is now known as the Australian Law Reform Commission (ALRC).

2 Ibid 127.

3 Scottish Law Commission. *Report on Variation and Termination of Trusts*, Report No 206 (2007); Scottish Law Commission, *Report on Trust Law*, Report No 239 (2014).

4 British Columbia Law Institute, *Report on the Variation and Termination of Trusts*, Report No 25 (2003).

5 Law Reform Commission of Saskatchewan, *The Rule in Saunders v Vautier and the Variation of Trusts*, Consultation Paper (1994); Law Reform Commission of Saskatchewan, *Trustees Act: Proposals for Reform*, Report (2002).

6 *Business Trusts Act* (Singapore, cap 30, 2008 rev ed) s 41.

7 Ibid s 4.

- 1.5 In Canada, federal and provincial statutes provide very broad oppression remedies against Canadian corporations to address a virtually unlimited array of unfair or oppressive conduct. Oppression can be claimed by virtually any ‘stakeholder’ for corporate actions that infringe on the stakeholder’s legitimate expectations, whether or not the stakeholder is a shareholder of the corporation in question. The oppression remedy is available to a wide range of corporate stakeholders, including secured and unsecured creditors, debtors, directors and officers, as well as shareholders.<sup>8</sup>
- 1.6 The Canadian and Singaporean provisions are set out at **Appendix D**.

### The Commission’s process

- 1.7 The Commission’s review was led by the Hon. Philip Cummins AM and a Division which he chaired. The other Division members were Dr Ian Hardingham QC, Eamonn Moran PSM QC and Alison O’Brien.
- 1.8 On 13 June 2014, the Commission published a consultation paper that described the current law and identified possible reform options.<sup>9</sup> The consultation paper sought written submissions on possible reforms.
- 1.9 Submissions were invited by 21 July 2014, though the Commission accepted contributions after that date. Seven submissions were received and can be viewed on the Commission’s website.<sup>10</sup> They are listed at **Appendix A**.
- 1.10 The Commission also held a roundtable conference on 11 June 2014, which considered the desirability of legislative reform. Participants discussed the need for an oppression remedy for beneficiaries, the current law relating to corporations and trusts, and options for reform.
- 1.11 The roundtable was attended by academics and legal practitioners with particular expertise and experience in this area of law, and representatives of the Victorian Bar and the Financial Services Council. The list of participants is at **Appendix C**.

## The current law

### Oppression remedy in the Corporations Act

- 1.12 Section 232 of the Corporations Act provides that the court may make an order where the conduct of a company’s affairs or a company’s actual act, omission or resolution is contrary to the members’ interests, oppressive or unfairly prejudicial or discriminatory against a member or members ‘whether in that capacity or any other capacity’.
- 1.13 Where these grounds are satisfied, section 233 provides that the court can make ‘any order ... that it considers appropriate in relation to the company’, including an order ‘regulating the conduct of the company’s affairs in the future’, or that the company be wound up, or its constitution be modified or repealed.

8 Stephen J Maddox, *The Oppression Remedy in Canada— How Americans Doing Business with Canadian Companies May Have a Right to Relief from Unfair Conduct* (2009) Lexology <<http://www.lexology.com>>.

9 Victorian Law Reform Commission, *Trading Trusts—Oppression Remedies*, Consultation Paper No 21 (2014).

10 Victorian Law Reform Commission, *Trading Trusts—Oppression Remedies* (15 August 2014) <<http://www.lawreform.vic.gov.au>>.

- 1.14 Section 234 sets out who has standing to bring an action. The following types of individuals can apply for relief in relation to a company:
- a member of the company, even if the application relates to an act or omission that is against:
    - the member in a capacity other than as a member; or
    - another member in their capacity as a member;
  - a person who has been removed from the register of members because of a selective reduction of capital;
  - a person who has ceased to be a member of the company if the application relates to the circumstances in which they ceased to be a member;
  - a person to whom a share in the company has been transmitted by will or by operation of law; or
  - a person whom ASIC thinks appropriate having regard to investigations it is conducting or has conducted into:
    - the company's affairs; or
    - matters connected with the company's affairs.<sup>11</sup>
- 1.15 As discussed more fully in Chapter 3, 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 has held that beneficiaries are limited to the conventional, and largely ineffective, forms of equitable relief under trust law.<sup>12</sup> However, an alternate line of decisions 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.<sup>13</sup>
- 1.16 The latter has relied upon a broader interpretation of section 53 of the Corporations Act to provide relief to beneficiaries,<sup>14</sup> based on the proposition that to do otherwise would be unfair.<sup>15</sup>
- 1.17 Whichever line of authority is followed in a particular case, it is clear that the oppression remedy in the Corporations Act will not be available to a beneficiary who is not also a shareholder in the corporate trustee. This means that reliance on the existing Corporations Act provisions would exclude large numbers of beneficiaries potentially subject to oppressive conduct.

11 R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013) 714 [10.440], citing s 234 of the Corporations Act.

12 *Kizquari Pty Ltd v Prestoo Pty Ltd* (1993) 10 ACSR 606; *Re Polyresins Pty Ltd* (1998) 28 ACSR 671; *McEwen v Combined Coast Cranes Pty Ltd* (2002) 44 ACSR 244; *Trust Company Ltd v Noosa Venture 1 Pty Ltd* (2010) 80 ACSR 485.

13 *Vigliaroni & Ors v CPS Investment Holdings Pty Ltd* (2009) 74 ACSR 282; *Wain v Drapac* [2012] VSC 156 (26 April 2012); *Arhanghelschi v Richard Milne Ussher & Ors* (2013) 94 ACSR 86.

14 *Ibid.*

15 Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming) 194.

## Trusts and trading trusts

- 1.18 In Victoria, trusts are regulated by a combination of the *Trustee Act 1958* (Vic) (Trustee Act) and judge-made law. For this reason, reform of the law will require amendment of the Trustee Act.
- 1.19 This reference deals with ‘trading trusts’, which are a form of commercial trust. The particular features of this type of trust are discussed more fully in Chapter 2.
- 1.20 The Commission has sought to achieve a balance between inclusivity, so as to examine the desirability of affording a remedy to any beneficiary that could be subject to oppressive conduct, and pragmatism, recognising that some forms of trading trusts are already subject to significant regulation and thus may not require reform by way of an oppression remedy.
- 1.21 The Commission has adopted a functional definition of ‘trading trust’ that includes all trusts where ‘some property held by the trustee is employed under the terms of the trust in the conduct of a business’.<sup>16</sup>
- 1.22 Applying this approach, the Commission determined that, notwithstanding this broad definition of ‘trading trust’, managed investment schemes,<sup>17</sup> charitable trusts and regulated and statutory superannuation trusts did not require additional remedies. These types of trusts are already subject to significant regulation under Commonwealth and Victorian law,<sup>18</sup> which would prevent, minimise or provide protection against oppressive conduct. Moreover, applying an oppression remedy via the Trustee Act to these types of trusts could create significant jurisdictional issues.

## The need for reform

- 1.23 In the Commission’s view, the law requires reform for three reasons: clarity, simplicity and fairness. These themes were raised frequently during consultations and submissions.

### Clarity, simplicity and fairness

- 1.24 The case for reform was strongly made by the Commercial Bar Association of Victoria in its submission, which stated that reform is needed not only due to conflicting and uncertain case law, but due to the fact that even on the more liberal interpretation of the Corporations Act, the law will not extend to all cases where relief from oppression may be required.<sup>19</sup>
- 1.25 In some cases, the plaintiff will not be a shareholder, which effectively leaves such persons without any effective remedy at all, unless an alternative statutory remedy is provided.
- 1.26 In its consultation paper, the Commission posed the question whether the lack of a clear oppression remedy in either the Corporations Act or the Trustee Act for minority beneficiaries of a trading trust caused substantive injustice or hardship.<sup>20</sup> Several submissions addressed this issue.
- 1.27 Peter Agardy of the Victorian Bar argued that the number of cases brought to court for decision does not reflect the size of the problem: not all cases get to court, and most of those are settled and not reported. He also pointed out that many of the entities that encounter problems are family businesses and other small-to-medium enterprises that cannot afford the costs and distress of litigation.<sup>21</sup>

16 H A J Ford and I J Hardingham, ‘Trading Trusts: Rights and Liabilities of Beneficiaries’ in P D Finn (ed), *Equity and Commercial Relationships* (Lawbook Co, 1987) 48.

17 As defined in s 9, *Corporations Act 2001* (Cth).

18 For managed investment schemes, Chapter 5C of the *Corporations Act 2001* (Cth); for charitable trusts, *Charities Act 1978* (Vic); and for superannuation trusts, the *Superannuation Industry (Supervision) Act 1993* (Cth).

19 Submission 5 (Commercial Bar Association of Victoria).

20 Victorian Law Reform Commission, *Trading Trusts—Oppression Remedies*, Consultation Paper No 21(2014) 54, 69 [Question 24].

21 Submission 2 (Peter Agardy, Victorian Bar) 4.

- 1.28 The Commercial Bar Association of Victoria submitted that there is anecdotal evidence of hardships resulting from the present state of the law in the form of:
- (a) extensive costs that are spent investigating possible ways of framing a claim when there is no clear remedial pathway; and
  - (b) cases where oppressed unitholders have refrained from taking legal action, alternatively have settled on unfavourable terms, rather than fight a protracted court battle given the uncertain legal situation.<sup>22</sup>
- 1.29 In his submission, Professor Matthew Conaglen argued for a functional approach to the problems caused by oppression or unfairness in the conduct of businesses, regardless of their formal structure:
- ... it seems to me that this makes the case for an oppression remedy strongly. Where the business is organised as a corporation, it has been thought fit to provide the courts with power to correct oppressive conduct (in ss 232-234 of the Corporations Act). Functionally speaking, the equity owners of a business should be in no worse position for having chosen to arrange their business affairs through a different legal structure, be it a trust or some other legal arrangement. If, as a matter of legislative policy, it is important for the courts to be able to rectify oppression between equity owners, it is arguable from a functional perspective that it should not matter which legal structure has been adopted.<sup>23</sup>
- 1.30 In their submission, Cornwall Stodart and Ari Bergman put the view that the inability of unitholders or beneficiaries who have been oppressed to successfully seek a remedy reflects adversely on the law and the judicial process. They called for the legislature to take action to provide 'lucidity, certainty and trust in the law'.<sup>24</sup>
- 1.31 The Federal Court of Australia also called for the law to be clarified:
- The remedies provided by the *Trustee Act 1958* (Vic) do not extend to, or envisage, oppression remedies of the kind provided in the Corporations Act. That omission should be rectified. The manner in which trading trusts and unit trusts are now part of complicated commercial arrangements necessitates clear identification of the availability of these remedies for all participants in trading trusts and unit trusts.<sup>25</sup>
- 1.32 Views expressed in consultations and submissions suggest that beneficiaries of trading trusts are confronted with substantial practical problems in the absence of a statutory oppression remedy.
- 1.33 In some situations, this can lead to manifest unfairness, given the fact that in contemporary Australia, trading trusts are often used as an alternative and in a very similar way to companies as a way to structure businesses. While trusts are used in other jurisdictions for commercial purposes, it has been suggested that the treatment of trading trusts in Australia is a unique phenomenon.<sup>26</sup>
- 1.34 A contrary view put during consultations was that the presence of hardship does not necessarily mean that legislative reform is justified. Arguably, the problem of hardship is only evident since trading trusts and companies are treated differently. Participants in consultations suggested that there might be policy reasons for the difference, which outweigh the potential hardship of denying an oppression remedy to beneficiaries of trading trusts.<sup>27</sup>

22 Submission 5 (Commercial Bar Association of Victoria) 5.

23 Submission 1 (Professor Matthew Conaglen, University of Sydney Law School) 2.

24 Submission 6 (Cornwall Stodart and Ari Bergman) 7.

25 Submission 4 (Federal Court of Australia) 1.

26 Nuncio D'Angelo, *Commercial Trusts* (LexisNexis Butterworths, 2014) 72–3, citing David Ipp, 'The Diligent Director' (1997) 18(6) *Company Lawyer* 162, 167; Christopher McCall, 'Trustees—Risks They Never Thought They Ran' (1995) 6 *Private Client Business* 419, 422–3.

27 Submission 3 (Professor Elise Bant and Associate Professor Matthew Harding, University of Melbourne Law School).

- 1.35 The Commission considers that this argument is insufficient for two reasons:
- Existing remedies, including equitable doctrines and relief under corporations or trusts legislation for beneficiaries of trading trusts facing oppression are inadequate and uncertain.
  - Adopting a functional approach, trading trusts and corporations should be treated in a similar fashion, as regards the availability of oppression remedies.

This will be discussed in more detail in Chapters 3 and 4.

### **Recommended reform**

- 1.36 The central recommendation of the Commission in this report is that the Trustee Act should provide a remedy for beneficiaries of trading trusts subject to oppressive conduct.
- 1.37 Oppressed beneficiaries of trading trusts should be able to apply to the court<sup>28</sup> for a remedy. In the Commission's view, this should be the case, notwithstanding anything contained in the trust deed.
- 1.38 Chapter 5 contains a more detailed discussion of the form and content of the recommended reforms.

### **Structure of this report**

- 1.39 Chapter 2 examines the scope of the remedy and whether and how 'trading trust' should be defined in the recommended new provisions, by looking at the various forms of trusts.
- 1.40 In Chapter 3, the operation of the existing oppression remedy in the Corporations Act is discussed in detail, including the desirability of extending similar protections to beneficiaries.
- 1.41 Chapter 4 considers the existing equitable and statutory remedies in trusts law, and why they do not provide an adequate alternative to the Commission's recommended reforms.
- 1.42 Chapter 5 reiterates the need for legislative reform in Victoria, including the problems with the current law and options for reform. It includes the Commission's specific recommendations for amendments to the Trustee Act to provide a remedy to beneficiaries subject to oppressive conduct.
- 1.43 Chapter 6 examines the potential effects of the recommended reforms on the interests of third parties. It also includes a discussion of how these effects can best be mitigated or managed.
- 1.44 Chapter 7 concludes the report.





# Trusts and companies in Victoria

- 10** Introduction
- 11** Express trusts
- 16** A comparison of trading trusts and corporations
- 19** Trading trusts
- 30** Conclusion

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## 2. Trusts and companies in Victoria

### Introduction

- 2.1 This chapter explores the key features of trusts and companies that relate to the grant of an oppression remedy. The chapter focuses on the different types of express trusts, with an emphasis on those aspects that relate to trading trusts.
- 2.2 The main aim of this chapter is to provide a definition of trading trusts. The method employed throughout the chapter is comparative—by introducing the key features of express trusts and showing how these features are adapted to trading trusts.
- 2.3 A key theme running through the chapter is the twin distinction between commercial/traditional trusts, and commercial/trading trusts.<sup>1</sup> It is important to note that the latter distinction arguably only reflects a difference in function, rather than a distinction between trading trusts and other forms of trust based on principle.
- 2.4 Although a trading trust has a trustee which holds trust property on behalf of beneficiaries in a similar way to other forms of investment trusts, the trading trust differs fundamentally in the sense that the trustee trades, that is actively carries on a business. In the Commission's view, this functional difference between trading trusts and traditional trusts strongly suggests that the question of legislative reform to the former should not be restricted by legal principles underpinning the latter.
- 2.5 The chapter is structured as follows: the first section provides a description of the types of trusts covered by this reference, namely express trusts, which can be divided into two further types, discretionary and unit trusts. The second section outlines the Commission's approach to answering the questions posed by the terms of reference. The third section outlines the Commission's recommended definition of trading trusts and how particular aspects of the definition relate to the application of the oppression remedy.

### Description of the trust

- 2.6 A trust has been defined as 'an institution developed by equity and cognisable by a court of equity'.<sup>2</sup> The essence of the institution is that a trust will exist 'when the owner of a legal or equitable interest in property is bound by an obligation, recognised by and enforced in equity, to hold that interest for the benefit of others, or for some object or purpose permitted by law.'<sup>3</sup>

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1 This distinction is developed by H A J Ford and I J Hardingham in 'Trading Trusts: Rights and Liabilities of Beneficiaries' in P D Finn, *Equity and Commercial Relationships* (Lawbook Co, 1987) 49; In that article the authors use the terminology of investment and donatory trusts to reflect the distinction between commercial and traditional trusts.

2 J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th edition, 2006) 1, citing *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145,175.

3 J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th edition, 2006) 1.

2.7 Thus, the institution of a trust contains several core elements, namely, ‘the trustee, the trust property, the beneficiary or charitable purpose, and the personal obligation annexed to property.’<sup>4</sup> Despite these elements, there are different types of trusts:

- express trusts created by the intention of the settlor
- resulting trusts created by operation of law
- constructive trusts
- statutory trusts.

However, this report is only concerned with express trusts.

## Express trusts

2.8 Express trusts are created by the will of the settlor, in the sense that the settlor intends to make a gratuitous transfer of property to the trustee.<sup>5</sup> An express trust can arise through a will where the testator takes the place of the settlor, or *inter vivos*.<sup>6</sup>

2.9 Since the genesis of an express trust is the intention of the settlor, an express trust will be created by a trust deed, which defines the rights, duties and powers of the trustees and beneficiaries. It is important to note that in principle a trust deed is capable of excluding many of a trustee’s duties other than those which constitute ‘the irreducible core’<sup>7</sup> of trusteeship.

2.10 Although the trust deed defines the primary duties owed by the trustee, a trustee will also owe fiduciary duties and other obligations in equity directly to the beneficiaries. Breach of these duties will constitute a breach of trust, perhaps making the trustee personally liable. Furthermore, express trusts are broadly divided into two categories: discretionary and fixed trusts. The latter includes unit trusts.

## Discretionary trusts

2.11 A discretionary trust describes a situation where a beneficiary’s entitlement to the trust property is at the discretion of the trustee. The right of the beneficiary to trust property:

is not immediately ascertainable. Rather, the beneficiaries are selected from a nominated class by the trustee or some other person and this power may be exercisable once or from time to time.<sup>8</sup>

2.12 Family trusts are usually in the form of discretionary trusts, since the trustee is able to decide which members of the family are to receive a distribution and how much each distributee is to receive.<sup>9</sup>

2.13 A discretionary trust is generally structured for tax reasons and to minimise potential liability of the beneficiaries. Typically, the trustee will be a corporate trustee in order to take advantage of the company’s separate legal personality. The directors of the corporate trustee are usually beneficiaries. A discretionary trust also usually has an ‘appointor’ who has the power to appoint and remove trustees. In practice, therefore, the appointor controls the trust, and as a beneficiary will generally receive income from the trust.

4 Ibid 2.

5 Ibid 44.

6 Ibid 44–5.

7 *Armitage v Nurse* (1998) Ch 241 (Millett LJ); *Reader v Fried* [2001] VSC 495. See M Bryan, ‘Contractual Modification of the Duties of a Trustee’ in S Worthington, *Commercial Law & Commercial Practice* (Hart Publishing, 2003); D A Trukhtanov, ‘The irreducible core of trust obligations’ (2007) 123 *Law Quarterly Review* 342.

8 *Federal Commissioner of Taxation v Vegners* (1989) 90 ALR 547, 552.

9 P Young, C Croft and M Smith, *On Equity* (Lawbook Co, 2009) 428.

- 2.14 The discretionary nature of the beneficiaries' interest raises an important question as to whether a beneficiary has an interest in the trust property. Even where a beneficiary has no proprietary interest, a trustee will still owe duties to the beneficiary including fiduciary duties and the duty of prudent investment. Moreover, a beneficiary 'generally has sufficient interest to approach the court to have the trust duly administered.'<sup>10</sup>

## Unit trusts

- 2.15 A unit trust differs from a discretionary trust, as the unit trust deed provides for a fixed interest by reference to units held by the beneficiaries in the trust.<sup>11</sup> As the name suggests, the beneficial interests are divided into units of the trust property. Bergman has defined the unit trust as a 'trust that has been established whereby the trustee of the trust holds property on behalf of unitholders whose units provide a substantially fixed proportional entitlement or interest'.<sup>12</sup>
- 2.16 The trust deed of a unit trust is the primary source of rights and obligations. However, in private unit trusts the rights and obligations are sometimes located in unitholders' agreements, often between individual unitholders, that create a layer of rights and obligations additional to those found in the unit trust deed, similar to shareholders' agreements in proprietary companies.<sup>13</sup> Ordinarily, the doctrine of privity would prevent a unitholder from obtaining remedies in contract from another unitholder.<sup>14</sup> A unitholder agreement, however, can alter the relationship between the unitholders, possibly pre-empting the grant of an oppression remedy. For example, a unitholder agreement can provide that majority unitholders have a broad discretion to remove a minority unitholder, which would have implications for any finding of oppression in the trading trust context.<sup>15</sup>

## Unit trusts and contract

- 2.17 The role of contract in the context of unit trusts beyond a formal unitholder agreement is unclear. The traditional view is that the relationship between a trustee and a beneficiary is governed by the ordinary principles of trust law and equity.<sup>16</sup> However, it has recently been suggested that a contractual relationship can coexist with, and arise out of, the traditional fiduciary relationship of trustee and beneficiary. This is based on the reality that in contrast to a discretionary trust, unitholders will typically provide capital for a specific quantity of units.<sup>17</sup>
- 2.18 In their submission, Cornwall Stodart and Ari Bergman suggested that:

[B]eyond the relationship of settlor and trustee, there has been increasing support in legal academic and judicial circles for according a broader role to contract law in the context of trusts, most notably with respect to the relationship between the unitholder and the trustee, and to a lesser extent, between unitholders (in cases where there is no unitholders' agreement). The law is undeveloped and, therefore, the rights that may arise from those potential contractual relationships are difficult to determine.<sup>18</sup>

10 P Young, C Croft and M Smith, *On Equity* (Lawbook Co, 2009) 428, citing *Re Gestetner Settlement* [1953] Ch 672, 688; *McLean v Burns Philp Trustee Co Ltd* (1985) 2 NSWLR 623.

11 P Young, C Croft and M Smith, *On Equity* (Lawbook Co, 2009) 431.

12 Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming) 14.

13 *Ibid* 28-9.

14 *AF&ME Pty Ltd v Aveling* (1994) 14 ACSR 499.

15 Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming) 28-9; For example see *Arhanghelschi v Cladwyn Pty Ltd* (2013) 14 ACSR 86 [46]–[48]; *Gra-Ham Australia Pty Ltd v Perpetual Trustees WA Ltd* (1989) 1 WAR 65.

16 J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th edition, 2006) 1, citing *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145, 175.

17 M Vrisakis, 'Co-habitation of contract and trust relationships in contemporary investment trusts' (2008) 2 *Journal of Equity* 274, 274–9; Also see *Barclays Wealth Trustees (Jersey) Limited and Barclays Wealth Fund Managers (Jersey) Limited v Equity Trust (Jersey) Limited* [2014] JRC 102D; Nuncio D'Angelo, *Commercial Trusts* (LexisNexis Butterworths, 2014) 91–5.

18 Submission 6 (Cornwall Stodart and Ari Bergman) 2. This joint submission was made on behalf of Ari Bergman and Cornwall Stodart. While there was broad agreement between Mr Bergman and Cornwall Stodart on most matters raised in the Commission's consultation paper, in some instances their views diverge. The submission identifies the divergence. Where relevant, this report also identifies any divergence of opinion.

- 2.19 The Institute of Legal Executives (Victoria) submitted that:
- we believe the law of contract can coexist with the traditional fiduciary relationship of trustee and beneficiary where the trust is one in which unitholders provide capital for a subscription of a specific quantity of units. This is particularly so in this type of trust as in essence the parties are ‘commercial contractors’.<sup>19</sup>
- 2.20 Even if a formal contractual relationship is absent, contractual ideas are still relevant in the context of trading trusts.<sup>20</sup> D’Angelo argues that the contractualisation of trust law has occurred because:
- commercial parties bargaining at arm’s length, who seek the advantages and benefits of the trust form as the vehicle for their enterprise, will import contractual and contract-like devices into their documentation suite in shaping the trust framework to modify prima facie outcomes which are inconsistent with their objectives; indeed, the trust instrument has been described as the ‘third source of law’ in relation to a trust, after the general law and applicable statutes; ‘the trust instrument has primacy’.<sup>21</sup>
- 2.21 Notwithstanding the absence of a formal contract, contractual principles are relevant to the issues raised by this reference for two reasons. First, where commercially astute parties have bargained at arm’s length, it is arguable that the rights and obligations of the parties outlined in the trust deed and at general law should not be disturbed. Under this approach, the beneficiaries have accepted a certain legal status quo as part of the consideration for receiving an interest. As explained by D’Angelo, the benefits of the trust:
- come at a price; in placing themselves outside the Act and within the legal framework that govern[s] trusts, participants forgo certain protections and expose themselves to a range of uncertainties and legal risks.<sup>22</sup>
- 2.22 The second issue is whether a statutory oppression remedy for trading trusts should be capable of being affected either by a unitholders’ agreement<sup>23</sup> or through the trust deed.

### Commercial trusts and the functional approach

- 2.23 An important foundation of the approach taken by the Commission is the idea that the trust is not a stagnant institution, but rather can be legitimately adapted to account for changing commercial expectations. This principle was highlighted by Lord Browne-Wilkinson in *Target Holdings v Redferns*:
- In the modern world the trust has become a valuable device in commercial and financial dealings. The fundamental principles of equity apply as much to such trusts as they do to the traditional trusts in relation to which these principles were originally formulated. But in my judgment it is important, if the trust is not to be rendered commercially useless, to distinguish between the basic principles of trust law and those specialist rules developed in relation to traditional trusts which are applicable only to such trusts and the rationale of which has no application to trusts of quite a different kind.<sup>24</sup>
- 2.24 As explained by Michael Bryan, Lord Browne-Wilkinson was not suggesting the overhaul of the entire rationale of traditional trust law, but rather ‘by placing the commercial trust in contradistinction to its “traditional” counterpart Lord Browne-Wilkinson is developing an important functional distinction between different types of trust.’<sup>25</sup>

19 Submission 7 (Institute of Legal Executives (Victoria)) 1.

20 For example see: *Byrnes v Kendle* (2011) 243 CLR 253; *Associated Alloys Pty Ltd v CAN 001 452 106 Pty Ltd* (2000) 202 CLR 588.

21 Nuncio D’Angelo, *Commercial Trusts* (LexisNexis Butterworths, 2014) 85, citing J D Heydon and M J Leeming, *Jacobs’ Law of Trusts in Australia* (LexisNexis Butterworths, 7th edition, 2006) 362, [1617].

22 Nuncio D’Angelo, *Commercial Trusts* (LexisNexis Butterworths, 2014) 103.

23 For example see *Arhanghelschi v Cladwyn Pty Ltd* (2013) 94 ACSR 86, 99-100 [46]–[48].

24 *Target Holdings v Redferns* [1996] 1 AC 421, 435.

25 Michael Bryan, ‘Reflections on Some Commercial Applications of the Developments in Commercial Law and Trusts Law’ in I Ramsay, *Key Developments in Corporate Law And Trusts Law: Essays in Honour of Professor Harold Ford* (LexisNexis Butterworths, 2002) 206.

2.25 In contrast, Matthew Conaglen states that if it is assumed that the principles of traditional trust law apply, then:

a large part of the difficulty grappling with the Reference arises out of the fact that it raises a functional question (as to whether the courts need a power to provide a remedy to correct conduct which is oppressive as between equity owners of a business) but applies it to a doctrinal context (as to trading trusts specifically). This generates considerable difficulty in defining the trading trusts to which any such remedy should apply.<sup>26</sup>

2.26 While this argument has merit, the Commission prefers the approach implied by the reasoning of Lord Browne-Wilkinson described above. Nuncio D’Angelo has recently adopted this functional approach in the context of examining the differences in insolvency law in the treatment of trusts and companies.

2.27 In D’Angelo’s view, commercial trusts are functionally distinct from traditional trusts.<sup>27</sup> According to D’Angelo, a commercial trust has the following distinguishing features when compared with a traditional trust. A commercial trust:

- may be private but may also be public
- has a remunerated corporate trustee who will accept almost no personal liability
- raises equity funds from arm’s length investors who purchase their equitable interest, and thus acquire beneficial status, by subscription or transfer<sup>28</sup>
- borrows and incurs other substantial debts at arm’s length
- applies the aggregated equity and debt funds in risk-taking enterprise
- resembles and functions much like a trading corporation
- operates as a business entity despite not being a separate legal entity.<sup>29</sup>

2.28 According to D’Angelo, a consequence of this shift is that:

the legal framework which governs trusts has not kept up with this evolutionary shift. It is inadequate in that it does not properly accommodate the legitimate commercial expectations of those who participate in those trusts. Commerce has raced ahead of the law and left a significant regulatory gap because the law continues to view commercial trusts largely through the lens of traditional trust law, which is hostile to risk-taking behaviour, is overly protective of beneficiaries and is patently not designed to facilitate commerce...

The result is that the allocation of legal and insolvency risk among the key participants in the commercial trust is determined by rules and policies that are different from those which apply to companies and are in some cases inappropriate for modern commercial enterprise. In the absence of legislative guidance to the contrary the courts apply (and have no choice but to apply) ancient trust principles that were built on the premise of the trust as a risk-averse guardian to questions of risk allocation among arms length commercial stakeholders in a business enterprise.<sup>30</sup>

26 Submission 1 (Professor Matthew Conaglen, University of Sydney Law School) 1.

27 Nuncio D’Angelo, *Commercial Trusts* (LexisNexis Butterworths, 2014) 6–7; also see John H Langbein, ‘The Secret Life of the Trust: The Trust as an Instrument of Commerce’ (1997) 107 *Yale Law Journal* 165. The special features of commercial trusts have also been recently considered by the Scottish Law Reform Commission. However, their definition of commercial trusts is broader than trading trusts and potentially includes purpose trusts and certain types of charitable trusts; see Scottish Law Commission, *Report on Trust Law*, Report No 239 (2014) 32.

28 As will be explained later in this chapter, the subscription attribute of trading trusts is a key feature of unit trusts. However, this reference will also deal with discretionary trusts, which differ fundamentally in this respect.

29 Nuncio D’Angelo, *Commercial Trusts* (LexisNexis Butterworths, 2014) 6–7.  
30 *Ibid* 7–8.

- 2.29 Although D'Angelo's argument is specific to the context of insolvency, the Commission believes that the same logic is applicable to oppression remedies. In the Commission's view, the purposes for which trading trusts are utilised are sufficiently similar to those of corporations to warrant the adoption of a functional approach.
- 2.30 As Sin has argued, another important difference between unit trusts and other forms of express trusts is the absence of a settlor.<sup>31</sup> This reinforces the distinction between trusts for commercial purposes and trusts designed to reflect a gratuitous transfer of property from the settlor to the trustee.<sup>32</sup>
- 2.31 The importance of this distinguishing feature was highlighted in the submission by Cornwall Stodart and Ari Bergman:
- ...[e]ssentially, a trust is a contractual obligation between the settlor and trustees in terms of how the trustees deal with the property of the trust. The intention of the settlor is often considered by the Courts in determining how a particular trust deed is to be construed. This is frequently based on a view that, since a trust is created by the settlor with property that had previously been his, the settlor's intentions about the operations of the trust and the conditions under which the trust property is dealt with should be determinative. In our experience, the emphasis on the settlor's intention is largely misplaced:
- In any event, many unit trusts are created by declaration rather than by deed of settlement: i.e., there is no settlor.
  - Most deeds of settlement are created by settlors of convenience: the settlor is a professional acting for a family friend of the appointor and the settlement sum is nominal.<sup>33</sup>
- 2.32 However, other submissions emphasised the importance of the settlor as a basis for conceptualising express trusts. Indeed, it was suggested that:
- [i]f the fundamental organising idea at the heart of the trust is the principle of settlor autonomy, then, all else being equal, there may be reasons to take a 'lighter touch' approach to the regulation of trusts than corporations, including in the matter of oppression remedies.<sup>34</sup>
- 2.33 While this view is certainly true for many types of express trusts, it is not clear how it is to be applied to trading trusts, particularly when there is no settlor. In the Commission's view, the absence of a settlor presents a strong case for the functional approach. A difficulty with the view that emphasises the primacy of the settlor is that it does not account for the purpose for which the trust was created.

31 Kam Fam Sin, *The Legal Nature of the Unit Trust* (Clarendon Press, 1997) 55. This difference was also emphasised in Robert Flannigan, 'Business Applications of the Express Trust' (1998) 36 *Atlanta Law Review* 630, 638.

32 Kam Fam Sin, *The Legal Nature of the Unit Trust* (Clarendon Press, 1997) 55; also see H A J Ford and I J Hardingham, 'Trading Trusts: Rights and Liabilities of Beneficiaries' in P D Finn, *Equity and Commercial Relationships* (Lawbook Co) 49.

33 Submission 6 (Cornwall Stodart and Ari Bergman) 2.

34 Submission 3 (Professor Elise Bant and Associate Professor Matthew Harding, University of Melbourne Law School) 1.

## A comparison of trading trusts and corporations

### Formal differences between trusts and corporations

- 2.34 A fundamental difference between a trust and a company is that the latter is deemed at law to be a separate legal entity. The doctrine of separate legal personality means that:
- [For] certain purposes a company is a legal entity separate from the legal persons who became associated for its formation or who are now its members and its directors. For certain purposes there is a corporate screen around the members and directors. Courts often refer to that screen as the “corporate veil”.
- To say that a company is a separate legal entity means that the company can have legal rights, privileges, duties or liabilities without them being rights, privileges, duties or liabilities of its members or directors.<sup>35</sup>
- 2.35 The importance of the doctrine of separate legal personality is illustrated by the fact that it applies even to a proprietary company, which only has a single controlling shareholder, who is also the manager of the business.<sup>36</sup> Importantly, the reasoning from *Salomon v Salomon* suggests that the doctrine applies even where the company has no substantial capital.<sup>37</sup>
- 2.36 A trust is conceptually different from a company. Like a company, a trust requires real people to administer the trust property and carry out the terms of the trust deed. However, unlike the company, the trust has no separate personality at law, meaning that individuals who act as trustees are personally liable in an action against the trustee.<sup>38</sup>
- 2.37 Moreover, the trustee will usually be a corporate trustee. This affords certain tax advantages and limited liability, which follows from the doctrine of separate legal personality. Thus, a clear demarcation between trusts and companies is somewhat artificial since in practice businesses often adopt a structure that utilises both. However, the conceptual distinction is important since there is a clear difference at law between the two entities. The problem that this reference seeks to address reflects this. Despite clear conceptual differences, Victorian case law has suggested that oppression remedies, which are shareholder remedies, can also apply to trusts. These issues will be explored further in Chapter 3.
- 2.38 The separate legal personality of the company means, however, that the company is the proper plaintiff in an action against the directors.<sup>39</sup> Thus
- [i]f a company sustains a loss for which it has a right of action a member as such does not have a direct right of action for the loss. Under the separate entity doctrine the company’s loss is not in law the shareholder’s loss, even though the company’s loss might reduce the value of the member’s shares.<sup>40</sup>
- 2.39 It follows that in a proceeding against the directors or other members of management designated with corporate authority whose conduct would have amounted to a legal wrong, the company is the proper plaintiff. However, as the directors control the company, including the ability to initiate legal proceedings, in practice it is unlikely that the company would seek redress for defective management. This means that unlike beneficiaries, shareholders have little direct recourse against management.

35 R P Austin, I M Ramsay, *Ford’s Principles of Corporations Law* (LexisNexis Butterworths, 14th edition, 2010) [4.140] 118.

36 *Salomon v Salomon & Co Ltd* [1897] AC 22.

37 R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford’s Principles of Corporations Law* (at 109) [4.150].

38 P Agardy, ‘Aspects of Trading Trusts’ (2006) 14 *Insolvency Law Journal* 7, 9.

39 This rule is generally referred to as the rule from *Foss v Harbottle* (1843) 2 Hare 461. This is discussed further in Chapter 3.

40 R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford’s Principles of Corporations Law* (at 109) [4.175].



## The nature of units and shares

- 2.40 As previously explained, a unit represents a beneficiary's fixed entitlement to an equitable interest. A share, however, grants no beneficial interest in the assets of the company.<sup>41</sup>
- 2.41 The precise nature of a unitholder's interest is not always clear. In theory, a beneficiary of a trust is beneficially entitled in equity to the trust property. However, the High Court has recently emphasised that the provisions of the trust deed are the starting point in considering whether a unitholder has a proprietary interest in the underlying trust property.<sup>42</sup> The trust deed is capable of excluding a unitholder's proprietary interest 'in the underlying trust assets.'<sup>43</sup> According to Tarrant there are broadly two types of unit trusts:
- trusts where the trust fund is held by unitholders each holding a beneficial interest, or equitable interest of some type, in each individual asset
  - trusts where the unitholders have an interest in the trust fund as a whole but the trust deed specifically provides that unitholders have no interest at all in the underlying trust assets.<sup>44</sup>
- 2.42 The High Court recognised that proprietary interests in particular trust assets may be excluded by the terms of the trust deed.<sup>45</sup> However, even in such a case the beneficiaries may approach the court to have the trust duly administered.<sup>46</sup>
- 2.43 It has been suggested that the proprietary nature of the beneficiary's right, even if it is only a right to have the trust duly administered, is the basis upon which a beneficiary can enforce a remedy against the trustee or third parties. Indeed a trust:
- is not a mere obligation. It may confer on a beneficiary the equitable ownership of a trust asset, or a partial equitable interest in the asset. Even if he has neither, a beneficiary can enforce the trust against anyone to whom a trust asset may come, except a *bona fide* purchaser for value without notice, so he has a proprietary right or interest in a broader sense of the term. Though some remedies sought by beneficiaries do not turn upon the existence of a proprietary interest (and certainly not a proprietary interest in the narrow sense of a transmissible interest), the proprietary nature, in the wide sense, of a beneficiary's rights, is at the heart of the proprietary remedy which can be asserted against trustees and others into whose hands trust property can be followed or traced.<sup>47</sup>
- 2.44 In *Wain v Drapac (Drapac)*,<sup>48</sup> Justice Ferguson (as she then was) accepted that it was necessary to consider whether the parties were beneficially entitled to the units, prior to considering whether the parties could obtain an oppression remedy in the form of a buyout order.<sup>49</sup> This is clearly correct as a matter of standing. On the other hand, it is the Commission's view that whether the beneficial interest is in the units or a more limited proprietary interest should not necessarily determine the type of relief that may be granted by way of an oppression remedy.
- 2.45 The possibility of exclusion through the trust deed arguably allows for the reduction of some of the differences between an interest under a unit trust and a share in a company. However, it is conventionally accepted that there is a fundamental conceptual difference between the two.<sup>50</sup> A share:

41 R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford's Principles of Corporations Law* (at 109) [4.170], citing *Macaura v Northern Assurance Co Ltd* [1925] AC 619.

42 *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98.

43 John Tarrant, 'Unit Trusts in the 21st century' (2006) 20(3) *Commercial Law Quarterly* 12.

44 *Ibid* 13.

45 *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98, 116–7.

46 *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98, 116–7; also see P Young, C Croft and M Smith, *On Equity* (Lawbook Co, 2009) 430, citing: *Re Gestetner Settlement* [1953] Ch 672, 688; *McLean v Burns Philp Trustee Co Ltd* (1985) 2 NSWLR 623.

47 J Mowbray, L Tucker, N Le Poidevin and E Simpson, *Lewin on Trusts* (Thomson Sweet & Maxwell, 18th edition, 2008) 7, citing *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] UKHL 12; *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709.

48 *Wain v Drapac* [2012] VSC 156 (26 April 2012).

49 *Ibid* [19].

50 P Young, C Croft and M Smith, *On Equity* (Lawbook Co, 2009) 433, citing *Charles v Commissioner of Taxation (Cth)* (1954) 90 CLR 598, 609.

confers upon the holder no legal or equitable interest in the assets of the company; it is a separate piece of property ... But a unit under the trust deed before us confers a proprietary interest in all the property which for the time being is subject to the trust deed ...<sup>51</sup>

2.46 Cornwall Stodart submitted that:

the interest of a beneficiary or a unitholder in a trust is fundamentally different in nature from a share in a company, which confers upon the holder no legal or equitable interest in the assets of the company but is a separate piece of property.<sup>52</sup>

2.47 Nevertheless, there is or may be a degree of equivalence between the interests of shareholders and unitholders, which reinforces the proposition that similar remedies, including oppression remedies, should be available to the beneficiaries of trading trusts. This proposition will be developed further in the next section.

## The functional similarity between trading trusts and corporations

2.48 Despite the formal doctrinal differences between companies and trading trusts, there are functional similarities. According to D'Angelo:

- Both forms can be used to attract and pool equity funds from a potentially infinite number of investors.
- Both are sufficiently flexible to accommodate a low-value single-purpose venture between a small fixed group of investors with restricted transferability of interests, and a high-value multi-purpose enterprise entity among an open-ended class of investors whose interests are freely tradeable on a public securities exchange.
- Both can be used to borrow or otherwise raise financial accommodation from arm's length financiers.
- Both place invested funds in the control of managers (or, in law and economics terms, 'agents') who may be separate from and otherwise unrelated to the economic owners. A company has a board of directors while a trust has a trustee, which may be empowered to perform similar functions.
- In both cases, in larger enterprises those managers/agents will appoint a chief executive and a management team to exercise delegated executive functions under their oversight and supervision. In both cases, those managers/agents are vested with broad discretionary authority to take risks with the invested equity and debt capital for the purpose of generating profits on behalf of the equity investors, whose expectations for return on their investment are risk and profit based.
- Equity investors in both enjoy the benefit of an inbuilt fiduciary regime for moderating that broad discretionary authority and controlling those managers/agents.
- In both cases, prima facie rules within these regimes are able to be modified to reflect more closely the specific bargain between the participants, by terms in the constituent instrument and ancillary documents.
- In both cases, equity investors' participation will be segregated and separately identified to facilitate the distribution of profits and capital, and transferability.<sup>53</sup>

2.49 D'Angelo argued that it is these features, coupled with the inherent flexibility of the trust, which has led to trading trusts being utilised in a similar way to companies.<sup>54</sup> As D'Angelo notes, 'this is precisely what occurred in England with the pre-1844 unincorporated joint stock companies, and in the United States with the Massachusetts trust.'<sup>55</sup>

51  
52  
53  
54  
55

Ibid.  
Submission 6 (Cornwall Stodart and Ari Bergman) 2.  
Nuncio D'Angelo, *Commercial Trusts* (LexisNexis Butterworths, 2014) 96–7.  
Ibid 98.  
Ibid.

2.50 Sin has argued that unit trusts and companies are similar by focusing on D'Angelo's penultimate point cited above at [2.48], in the sense that both are created through an instrument, namely, the trust deed and the company constitution. For Sin, the drafting of a unit trust deed ensures that:

a unit is a single chose in action, and therefore a kind of personal property, which is transferable and in many cases redeemable. It is a chose comprising a bundle of contractual rights as well as rights conferred by statute. In ordinary cases, the trust fund of a unit trust may be characterized as a sum of capital and a unit only confers on its owner a right in money, being a proportion of the net value of the trust fund calculated and realizable as the trust deed may provide; a unitholder has no right in individual assets.<sup>56</sup>

2.51 While the doctrinal differences between shares and units seem clear,<sup>57</sup> in the Commission's view this is not a sufficient reason to deny the availability of an oppression remedy. There are three reasons for this. First, it is not clear that there is a conceptual connection, other than a requirement of standing, between the nature of a beneficiary's interest and the availability of an oppression remedy. This issue will be explored below. Secondly, the broad nature of the oppression remedy, and the way it has been interpreted, suggest that a court will examine numerous factors in determining the precise nature of the relief. The proprietary nature of a member's interest in the trust property may be a determining factor in the grant of a buyout order,<sup>58</sup> but this does not preclude the availability of other forms of relief. And lastly, while the differences between shares and units may need to be acknowledged for the purpose of legal analysis, the difference is unimportant from a fairness view point given that:

- The assets of a company are managed by those who control the company; and
- The assets of a trust are managed by the trustee or those who control the (corporate) trustee.<sup>59</sup>

2.52 Notwithstanding the formal differences between companies and trusts, the Commission has adopted a functional approach to answering the questions posed by this reference. There are two caveats to this approach however. The first is that differences between the two entities may yield a differing underlying rationale, which may affect the availability of certain remedies. The second, somewhat related to the first caveat, is that there may be an overarching policy basis for the differing treatment of trusts and companies.

## Trading trusts

2.53 This section outlines the Commission's definition of trading trusts. The definition has two aspects: first, the underlying concept, and second, the scope. As discussed previously in this chapter, a trading trust only differs from other forms of express trust in terms of its functions, rather than the inherent characteristics of the legal form.

2.54 As noted by Matthew Conaglen:

This approach, obviously, takes little cognisance of the legal form in which the business is structured – that is the point of a functional analysis. If that is the argument that is being made, then there seems to be a case for saying that the oppression remedy should be made available to all businesses, leaving the courts to develop principles as to when and how it should be applied in individual cases, taking into account the specific legal form in which the business is being run.<sup>60</sup>

56 Kim Fam Sin, *The Legal Nature of the Unit Trust* (Clarendon Press, 1997) 6.

57 See above at [2.40].

58 *Wain v Drapac* [2012] VSC 156 (26 April 2012).

59 Submission 6 (Cornwall Stodart and Ari Bergman) 2.

60 Submission 1 (Professor Matthew Conaglen, University of Sydney Law School) 2.

- 2.55 During consultations and submissions, it was suggested that a difficulty with the functional approach is that it ignores the underlying rationale for ‘viewing trusts as distinct institutions serving values and aims that are different from those that underpin corporations.’<sup>61</sup> It was also suggested that the differences between trusts and companies could generate practical challenges for the application of the oppression remedy.
- 2.56 In the Commission’s view, these criticisms are partly justified. However, any difficulties generated by a difference in legal form can be dealt with by a careful consideration of the available remedies. As explained by Matthew Conaglen, the emphasis upon the functional similarity between trading trusts and companies creates a strong policy basis for legislative intervention.<sup>62</sup>

### The functional definition of trading trusts

- 2.57 In the Commission’s view, the key functional aspect of trading trusts is that the trustee trades, meaning that it carries on a business. Ford and Hardingham have suggested that:

[t]he distinction between a trading trust and other trusts is that some property held by the trustee is employed under the terms of the trust in the conduct of a business. In most trading trusts, it will be the trustee who conducts the business but in some, the terms of the trust require the trustee to stand by while a third party conducts the business using the trust property on behalf of the beneficiaries.

As a distinguishing mark, the concept of the conduct of a business may be difficult to apply in a marginal case. But it sets up a contrast between the direct employment of trust property in the commercial activity of the trustee and investment by the trustee in the commercial activity of some other entrepreneur.<sup>63</sup>

- 2.58 There has been a close connection historically between the development of small proprietary companies and trading trusts. Justice Lindgren has noted that:

the expression, ‘the modern trading trust’ evokes the concept of a proprietary company with a small number of shareholders or one shareholder and nominal capital. The substantial capital that forms the basis of the business is held by the company as trustee. The trust may be a discretionary trust or a unit trust, for example. Choice of the trading trust structure and of the particular kind of trust is dictated largely by tax and other commercial considerations.<sup>64</sup>

- 2.59 Justice Hayton has defined trading trusts extra-judicially as existing where:

under the terms of a trust, trust property held by trustees is used for the conduct of a business. In a private trust, it will normally be the trustees who carry out the trading activities but in a public trust (where the opportunity to become a beneficiary may lawfully be offered to the public) the trustees will be custodian trustees, having some extra monitoring duties imposed upon them in respect of a manager, like the manager of an authorised unit trust who will conduct the business for the benefit of the ‘investor-beneficiaries’ who will have purchased the status of a beneficiary. In a private trust, beneficiaries will normally be ‘donee-beneficiaries’ as the objects of the settlor’s bounty, although they can be investor-beneficiaries who have purchased their beneficial interests.<sup>65</sup>

61 Submission 3 (Professor Elise Bant and Associate Professor Matthew Harding, University of Melbourne Law School) 1.

62 Submission 1 (Professor Matthew Conaglen, University of Sydney Law School) 2.

63 H A J Ford and I J Hardingham, ‘Trading Trusts: Rights and Liabilities of Beneficiaries’, in P D Finn, *Equity and Commercial Relationships* (Lawbook Co, 1987) 48.

64 Kevin Lindgren, ‘The birth of the trading trust’ (2011) 5 *Journal of Equity* 1, 2.

65 D Hayton, ‘Trading Trusts, Trustees’ Liabilities and Creditors’, in *The International Trust* (Jordans, 3rd edition, 2011) 523.

- 2.60 Applying these functional definitions, a trading trust can either be public (in the sense that investment in the trust is open to the public) or private, and can also include discretionary trusts, unit trusts or a mixture of the two.<sup>66</sup>

## The scope of the proposed amendment to the *Trustee Act 1958* (Vic)

### Managed investment schemes, superannuation trusts and charitable trusts

- 2.61 Throughout consultations, there was discussion about whether the scope of the proposed amendment to the Trustee Act should extend to managed investment schemes under Chapter 5C of the Corporations Act. There was also discussion about the inclusion of superannuation trusts and charitable trusts.

- 2.62 At the roundtable on 11 June 2014 there was general agreement that regulated and statutory superannuation and charitable trusts *should be expressly excluded* from the scope of the amendment.

- 2.63 Ari Bergman and Cornwall Stodart submitted that:

Oppression Remedies are not considered appropriate for superannuation trusts (and in particular, self-managed superannuation funds) as those trusts may be controlled by members and are highly regulated by the *Superannuation Industry (Supervision) Act 1993* (Cth).<sup>67</sup>

- 2.64 In the Commission's view, it is not clear that trusts regulated by the *Superannuation Industry (Supervision) Act 1993* (Cth)<sup>68</sup> would fall within the functional definition of trading trusts. Insofar as they do, the Commission agrees with the submission that these trusts be expressly excluded from the scope of the recommended amendment. The Commission also considers that statutory superannuation schemes that are exempt from the operation of the *Superannuation Industry (Supervision) Act 1993* (Cth) should also be excluded.<sup>69</sup>

- 2.65 In the Commission's view, in certain instances charitable purpose trusts may fall within the functional definition of trading trusts. These trusts are fundamentally different from other forms of trust. According to the editors of *Jacobs' Law of Trusts*:

The charitable trust is a form of express trust, but it is important to distinguish clearly between charitable trusts and declared private trusts because of the important principles of law relating to the former which are not applicable to the latter.<sup>70</sup>

- 2.66 The key difference between charitable purpose trusts and private trusts for the purpose of this reference is that the former are 'trusts for purposes not persons.'<sup>71</sup> Therefore, it is difficult to envisage a situation where an individual would be able to argue an oppression remedy analogously to a shareholder under the Corporations Act. Additionally, the Attorney-General has the power to appoint inspectors 'to inquire into the management or administration' of charitable trusts.<sup>72</sup> Because of these differences, the Commission recommends the exclusion of charitable purpose trusts from the scope of the amendment.<sup>73</sup>

66 A trust structure which includes both unit and discretionary trusts is sometimes referred to as a hybrid trust; see G E Dal Pont, D R Chalmers and J K Maxton, *Equity and Trust: Commentary and Materials* (Lawbook Co, 4th edition, 2007) 748.

67 Submission 6 (Cornwall Stodart and Ari Bergman) 3.

68 As defined by s 19 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

69 For example those public sector superannuation schemes listed under Schedule 1AA, Part 3 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

70 J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th edition, 2006) 138, citing *A-G (NSW) v Perpetual Trustee Co Ltd* (1940) 63 CLR 209, 222.

71 J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th edition, 2006) citing *BSH Holdings Pty Ltd v Commissioner of State Revenue* (2000) 2 VR 454, 456 [9].

72 *Charities Act 1978* (Vic) s 9(1)(b).

73 Purpose trusts will usually not fall within the definition of trading trusts, but see *Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204.

- 2.67 The Commission has also considered whether managed investment schemes, which are currently regulated by Chapter 5C of the Corporations Act, should be expressly excluded.
- 2.68 Managed investment schemes raise more complex issues, since from a functional perspective they may closely resemble private trading trusts. Matthew Conaglen suggested that:
- if an incident of oppression were to occur in such a context, why should the equity owners of that business not also have available to them the sort of protection which is already available to equity owners of corporations, and potentially the equity owners of trading trusts (if such is the recommendation of the Commission). Oppression is oppression, no matter in what formal legal context it occurs.<sup>74</sup>
- 2.69 Cornwall Stodart and Ari Bergman also submitted that oppression remedies should be available to managed investment schemes.<sup>75</sup> However, the Institute of Legal Executives (Victoria) submitted that managed investment schemes should be expressly excluded.<sup>76</sup>
- 2.70 Participants at the roundtable on 11 June 2014<sup>77</sup> generally agreed that managed investment schemes should be expressly excluded. Although it was acknowledged that it was possible from a jurisdictional perspective to amend the Trustee Act to affect the operation of managed investment schemes,<sup>78</sup> participants at the roundtable concluded that this was undesirable from a policy point of view. The view expressed in consultations was that Chapter 5C represents a comprehensive attempt by the Commonwealth to regulate managed investment schemes. As such, there is a strong policy argument for uniformity of regulation for managed investment schemes. It is also the Commission's view that a similar argument for exclusion can be made for trusts regulated by the *Superannuation Industry (Supervision) Act 1993* (Cth).
- 2.71 From a practical standpoint, it is also arguable that the introduction of oppression remedies is less necessary in the context of public trusts since one of the distinguishing features of these trusts is the ability of the unitholders to redeem their units.<sup>79</sup> As discussed in Chapter 3, the rationale of applying oppression remedies to trading trusts is often to allow unitholders to redeem their units on more favourable terms than provided for under the trust deed.
- 2.72 Although the terms of reference potentially include both public and private trusts, in the Commission's view the definition of trading trust should be limited to private trusts for present purposes.

### Discretionary trusts

- 2.73 There was less agreement throughout consultations and submissions about whether discretionary trusts should be expressly excluded from the scope of the amendment. Consultations and submissions focused on two key issues regarding discretionary trusts. First, whether discretionary trusts should be expressly excluded. And secondly, if not, whether courts should have a more limited range of remedies to relieve a beneficiary of a discretionary trust from the effects of oppressive conduct.

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74 Submission 1 (Professor Matthew Conaglen, University of Sydney Law School) 2.

75 Submission 6 (Cornwall Stodart and Ari Bergman) 3–4.

76 Submission 7 (Institute of Legal Executives (Victoria)) 1.

77 Hereafter referred to as the roundtable.

78 It was pointed out in submissions that the provisions of Chapter 5C already 'work practically and effectively with the existing *Trustee Acts*.' See Submission 4 (Federal Court of Australia) 1.

79 A contrary view was put forward by the Australian Law Reform Commission and the Companies and Securities Advisory Committee, which suggested that oppression remedies should be available to investors in collective investments schemes. See: Law Reform Commission (Australia) and Companies and Securities Advisory Committee, *Collective Investments: Other People's Money*, ALRC Report No 65 (1993), available at <<http://www.alrc.gov.au/report-65>> [11.33]. It should be noted that the paper also recommended placing restrictions on the ability of investors to redeem their units.



- 2.74 A family trust, which utilises a discretionary trust structure, may also fall within the functional definition of a trading trust, since as Dal Pont, Chalmers and Maxton explain ‘the main characteristic of the “trading trust” is that the trust property is used in the conduct of business.’<sup>80</sup> A discretionary trust can clearly meet this definition when the corporate trustee actively uses the trust property for carrying on a business.
- 2.75 According to Ford and Hardingham, the trustee of a trading trust:
- may hold the business on discretionary trust for a delineated range of objects; in other cases it may hold on fixed trust for unitholders. The former model may be appropriate where the objects are members of a particular family – for example, the original proprietor, his spouse and children. The latter model will be appropriate where the beneficiaries are more at arm’s length being, for example, former partners in the business whose original equity is now defined by reference to units held under the trust. The latter model is also appropriate where it is envisaged that, at a later time, there may be inducted into the business more “partners”.<sup>81</sup>
- 2.76 However, despite discretionary trusts falling within the functional definition of trading trust, some participants in consultations argued that discretionary trusts should be expressly excluded from the scope of the amendment. This proposition was broadly based on four perceived problems:
1. In a discretionary trust, a beneficiary will have no clear proprietary interest, capable of being valued.
  2. Discretionary trusts are insufficiently analogous with companies, unlike unit trusts.
  3. The inclusion of discretionary trusts may lead to unforeseeable remedial issues including:
    - a. The fact that the courts have a limited discretion to supervise discretionary trusts<sup>82</sup>
    - b. It may be impractical to include such trusts.
  4. Even where a beneficiary holds an interest, capable of valuation, such an instance will be highly unusual, even exceptional.
- 2.77 However, other participants were convinced that discretionary trusts should be included. This was because omitting discretionary trusts entirely could result in many cases of oppression not being addressed. Some participants suggested that if discretionary trusts were included, there should be a limit to judicial discretion. It was suggested at the roundtable that a remedy for discretionary trusts could be limited to the conferral of a more expansive power on the court to order that the trustee provide reasons for the exercise of its discretion.<sup>83</sup> Similarly, power could be conferred on the court to review the reasonableness of decisions made by trustees of discretionary trading trusts.
- 2.78 The expediency of the conferment of such court powers to discretionary trusts generally, however, is beyond the terms of reference. Moreover, the Commission considers that it would be somewhat artificial to confer such powers in relation to discretionary trading trusts as opposed to discretionary trusts more generally.
- 2.79 Participants also noted that that even if discretionary trusts were expressly excluded, under the *Vigliaroni* and *Drapac* line of reasoning discussed in Chapter 3, the oppression remedy under the Corporations Act would still be available. This would create a highly undesirable situation, from a policy standpoint, of two parallel regimes dealing with trading trusts in Victoria, with differing scopes and coverage.

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80 G E Dal Pont, D R Chalmers and J K Maxton, *Equity and Trust: Commentary and Materials* (Lawbook Co, 4th edition, 2007) 747.  
 81 H A J Ford and I J Hardingham, ‘Trading Trusts: Rights and Liabilities of Beneficiaries’, in P D Finn, *Equity and Commercial Relationships* (Lawbook Co, 1987) 50.  
 82 *Karger v Paul* [1984] VR 162.  
 83 For an examination of the current approach see: *Mandie & Anor v Memart Nominees Pty Ltd* [2014] VSCA 181 (20 June 2014).

- 2.80 There was also a divergence of opinion on this issue in the written submissions made to the Commission.
- 2.81 Cornwall Stodart submitted that discretionary trusts should be excluded:
- In our view, several difficulties confront applying Oppression Remedies to discretionary trusts, not least being that there are no individual beneficiaries, rather persons who have the right to be considered for benefit, which connotes a broad intent unstrained by notions of fairness.<sup>84</sup>
- 2.82 Professor Elise Bant and Associate Professor Matthew Harding cautioned against the inclusion of discretionary trusts:
- It seems reasonable to assume that the core policy objective of oppression remedies is to protect the entitlements and voting power enjoyed by minority shareholders of corporations. In the case of unit trusts, where beneficiaries have entitlements (but not, we would note, voting power) it seems reasonable to pursue this policy objective to a degree. Matters are different in the case of discretionary trusts, where beneficiaries have neither entitlements nor voting power. If oppression remedies are to apply to discretionary trusts, this must be in the service of different policy objectives. In working out what these different policy objectives might be, one relevant consideration is the extent to which settlors of discretionary trusts value an institution that entails the relatively unfettered freedom of choice and action that the trustee of a discretionary trust enjoys. This question is not a legal one; it stands to be answered in light of empirical data. But if settlors of discretionary trusts do value such an institution, then fettering the discretion of the trustees of such trusts via oppression remedies might frustrate the law’s aim to facilitate settlor autonomy.<sup>85</sup>
- 2.83 However, the Commercial Bar Association of Victoria<sup>86</sup> and the Institute of Legal Executives (Victoria)<sup>87</sup> suggested that there may be a limited range of circumstances where an oppression remedy would be appropriate in the context of a discretionary trust.
- 2.84 The Commercial Bar Association of Victoria suggested a number of criteria in determining whether the court should order an oppression remedy. It submitted that:
- An appropriate starting point would be to identify the features of the business structures in which existing remedies have been found wanting, and make any new remedy available to other entities with those features. It is suggested that the features of entities where existing remedies are inadequate are:
- (a) a business conducted by a trust;
  - (b) participation in the management of the business by the investors;
  - (c) the profits of the business streamed to trusts associated with the investors/managers; and
  - (d) the inability of investors/managers to exit the arrangement (or exit at a fair price, or on a fair and reasonable basis) if there is a breakdown in the relationship.<sup>88</sup>
- 2.85 The submission goes on to point out that criterion (b) would ‘exclude most discretionary trusts from the scope of any new remedy.’<sup>89</sup> However, the Commercial Bar Association of Victoria also submitted that an oppression remedy could be appropriate:

84 Submission 6 (Cornwall Stodart and Ari Bergman) 3.

85 Submission 3 (Professor Elise Bant and Associate Professor Matthew Harding, University of Melbourne Law School) 1–2.

86 Submission 5 (Commercial Bar Association of Victoria) 3.

87 Submission 7 (Institute of Legal Executives (Victoria)) 2.

88 Submission 5 (Commercial Bar Association of Victoria) 2–3.

89 Ibid 3.



[a] business group may consist of one or more unit trusts and one or more discretionary trusts (and maybe even some ordinary companies as well). It may be desirable for the Court to be able to sever all business relationships between the parties when granting relief against oppressive conduct in the unit trusts.<sup>90</sup>

2.86 However, other submissions took a broader approach. Matthew Conaglen suggested that discretionary trusts should be included, since based on the functional view, the ‘oppression remedy should be made available to all businesses’.<sup>91</sup> Furthermore, Ari Bergman argued that:

to exclude discretionary trusts from the application of Oppression Remedies would result in a significant group of oppressed trust beneficiaries lacking access to effective remedies.<sup>92</sup>

2.87 Bergman also argued that:

there are circumstances where certain beneficiaries of discretionary trusts develop economic relationships (e.g. via loan accounts) with the trust ... [these] may give rise to legitimate expectations for those economic interests to be protected against oppressive conduct by the trustee. Further, there are circumstances where discretionary trusts form part of larger groups of entities in which oppression may occur, and remedying the rights of oppressed parties may require recognition of their rights as beneficiaries of discretionary trusts.<sup>93</sup>

### The Commission’s view

2.88 In the Commission’s view, an oppression remedy will rarely be appropriate in the context of a discretionary trust. According to D’Angelo, discretionary trusts will generally be utilised by families ‘and/or other related parties and so the beneficiaries are not “equity investors”’<sup>94</sup> in the same way that unitholders are with respect to a unit trust. In most instances, therefore, beneficiaries of discretionary trusts will not possess an interest capable of valuation.

2.89 Notwithstanding these matters, the Commission recommends that discretionary trusts should not be expressly excluded from the scope of the amendment. There are several practical reasons for this position. As explained above at [2.79] and supported by submissions from the Commercial Bar Association of Victoria and Ari Bergman, if discretionary trusts were expressly excluded, particular difficulties would result in seeking any recommended oppression remedy in circumstances where, for example, the beneficial interests in a unit trust are held on discretionary trust.<sup>95</sup> It was suggested during consultations that a great many trading trusts are structured in this manner.<sup>96</sup>

2.90 The Commission also considers that to exclude discretionary trusts altogether would create additional uncertainty, due to the conflicting *Vigliaroni/Drpac* and *Kizquari* lines of authority. As discussed in Chapter 3, under the former line of authority, the presence of a discretionary trust does not necessarily preclude the availability of an oppression remedy under section 233. As explained above at [2.79], if discretionary trusts are expressly excluded from the recommended amendment to the Trustee Act, then relief may still be available under the Corporations Act where the beneficiary is also a shareholder in the corporate trustee. In the Commission’s view, this would be a backward step, due to the potential for even greater legal uncertainty.

90 Ibid 3.  
 91 Submission 1 (Professor Matthew Conaglen, University of Sydney Law School) 2.  
 92 Submission 6 (Cornwall Stodart and Ari Bergman) 3.  
 93 Ibid 3.  
 94 Nuncio D’Angelo, *Commercial Trusts* (LexisNexis Butterworths, 2014) 13.  
 95 *Wain v Drpac* [2012] VSC 156 (26 April 2012).  
 96 Submission 2 (Peter Agardy, Victorian Bar) 2.

- 2.91 Additional issues are raised if the corporate trustee of a discretionary trust conducts the principal business activity. Indeed some roundtable participants were concerned that the broad and flexible nature of remedies available under section 233 of the Corporations Act would be ill suited to beneficiaries of a discretionary trust. This can be seen by comparing the interest of a beneficiary of a unit trust with that of a discretionary trust.
- 2.92 A unitholder will usually have provided consideration for their beneficial interest in the trust. However, a beneficiary under a discretionary trust will often have provided no consideration for their beneficial interest in the trust estate. In such a case, a buyout is arguably impossible since any interest that a beneficiary has in the trust property will be at the discretion of the trustee. Another example is where a discretionary beneficiary has not actively participated in the management of the business. In that instance, probably neither an order akin to winding up<sup>97</sup> nor a buyout remedy would be appropriate. However, these remedial issues do not demonstrate that discretionary trusts should be excluded from consideration altogether.
- 2.93 Some participants at the roundtable suggested that including discretionary trusts would create conceptual problems since ordinarily, the class of objects of a discretionary trust is not totally ascertainable.<sup>98</sup> Although the beneficiary would still have an interest in the sense of being entitled to the due administration of the trust, which is proprietary in nature,<sup>99</sup> the interest is not capable of giving rise to an oppression remedy. In the Commission's view, however, the conceptual basis of the oppression remedy is broader.
- 2.94 The proprietary character of a member's (or former member's) interest is merely a precondition for an oppression remedy in terms of standing under section 234. However, the proprietary character of a member's interest does not explain the basis of the oppression remedy. This is illustrated by the fact that section 234(a)(i) allows for an oppression remedy to be granted to a member of a company 'in a capacity other than as a member.' In such a case, the member's shareholding merely serves as a gateway for relief.
- 2.95 However, it should be noted that although section 234 is of broad operation, its scope is not unlimited. Austin and Ramsay explain:
- it cannot be every relationship of a member to a company which demands relief. The types of relationship relevant to the section probably differ according to the size and nature of the company and whether the particular relationship in the circumstances has significance independent of membership of the company. For example, a member employed by the company may be prejudiced in the capacity of employee. Whether the section is attracted would seem to depend on whether, in the circumstances, the employment relation was a way in which the member received a return for investment or whether the employment was independent of being a member. So, for example, where a small company is so organised that benefits are tied to being a director rather than a shareholder, a member-director who is unfairly prejudiced as director no longer has to resort to an application for winding up on the just and equitable ground, s 461(1)(k), but can ask the court to make some other more suitable order under Pt 2F.<sup>100</sup>
- 2.96 The breadth of section 234 reinforces the argument that an oppression remedy should be available to beneficiaries of a discretionary trust who have no proprietary interest in the trust property, but can show an interest in a broader sense, that is a right of due administration of the trust. Following the reasoning of cases dealing with oppression remedies under the Corporations Act, the absence of a proprietary interest in the trust

97 For instance an order terminating the trust. The differences between winding up a company and the termination of a trust will be explored further in Chapter 4.

98 *McPhail v Doulton*; *Re Baden's Deed Trust* [1971] AC 424; *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98; H A J Ford, W A Lee, M Bryan, J Glover, I G Fullerton, Thomson Reuters, *Ford and Lee: The Law of Trusts*, (4 December 2014) [1.8830].

99 I Hardingham and B Baxt, *Discretionary Trusts* (Butterworths, 2nd ed, 1984) 141; also see *Chief Commissioner of Stamp Duties for New South Wales v Buckle* (1998) 192 CLR 226; *Lygon Nominees Pty Ltd v Commissioner of State Revenue* (2007) 23 VR 474, 494.

100 R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford's Principles of Corporations Law* (at 109) [10.470].

property will be a relevant factor in determining whether a particular oppression remedy should be granted.<sup>101</sup> However, the absence of such an interest should not preclude the award of such a remedy.

### The scope of the available remedies

2.97 A further issue raised in consultations and submissions was the breadth of potential remedies if discretionary trusts are included in the definition. Ari Bergman submitted that:

[were] Oppression Remedies to apply to discretionary trusts, it would be appropriate for the Legislature to set out the criteria that must be met in order to invoke the Oppression Remedies.<sup>102</sup>

2.98 The Commission agrees with this submission in that the criteria for an award of an oppression remedy must be clear. However, insofar as this submission suggests that the criteria for a finding of oppression should be narrower or more limited for discretionary trusts, the Commission disagrees. The Commission's general approach for defining oppressive conduct is considered further in Chapter 5.

2.99 Some participants at the roundtable focused on the nature of the beneficiary's beneficial interest and the relevance of this criterion to discretionary trusts. As previously explained, this approach is difficult to reconcile with the operation of oppression remedies under the Corporations Act. From a practical standpoint, the emphasis upon a beneficiary in a discretionary trust having no beneficial interest in the trust property is difficult to justify, given the fact that it is also possible for unitholders in unit trusts to hold no proprietary interest in the underlying trust assets.<sup>103</sup> If a proprietary interest in the trust property were a conceptual test for an oppression remedy, then it would be possible to circumvent the entire regime through the inclusion of specific provisions in the trust deed.

2.100 Moreover, it is not clear to the Commission why a statutory oppression remedy to beneficiaries of trading trusts should be limited to specific types of interests. Nor is it clear to the Commission why a beneficiary of a discretionary trust should only be able to seek a more limited oppression remedy.

2.101 In the Commission's view, although a buyout order analogous to that available under section 233 of the Corporations Act is unlikely where a discretionary beneficiary holds no interest capable of valuation, there is a limited range of circumstances where it may be appropriate for a court to make an order terminating the trust or an order for a beneficiary or trustee to pay a beneficiary to renounce their rights under the trading trust.<sup>104</sup>

2.102 Suppose that A and B are directors and shareholders of a company which is the corporate trustee of a family trust, and jointly exercise powers of the appointor under the trust deed. The objects of the trust will ordinarily include A and B and other family members such as spouses, children and grandchildren. If the trustee only makes distributions to A and B, then it could be contended, as Justice Ipp stated, that the:

combination of powers may amount to a general power of appointment and, as such, or in their own right, they may be a form of property or (perhaps a little less likely) they may constitute some form of property interest in the underlying assets in the trust fund.<sup>105</sup>

101 *Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459, 466.

102 Submission 6 (Cornwall Stodart and Ari Bergman) 4.

103 *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98, 116–7.

104 *R & I Bank v Anchorage Investments* (1993) 10 WAR 59, 83 (Ipp J); also see *Re Richstar Enterprises Pty Ltd* (ACN 099 071 968); *Australian Securities and Investment Commission v Carey (No 6)* (2006) 233 ALR 475, 480 [19] 485–6 [36]–[37] (French J).

105 *Ibid.*

- 2.103 If B was a minority shareholder, and oppression was shown, then B might seek an oppression remedy against A as a shareholder and an object of the trust. Despite the presence of a discretionary trust, the structure closely resembles a small proprietary company where an oppression remedy would ordinarily be granted. Matthew Conaglen submitted that this functional equivalence ‘makes the case for an oppression remedy strongly.’<sup>106</sup>
- 2.104 In the Commission’s view, the above scenario may constitute an appropriate case for an order akin to winding up under section 233 of the Corporations Act, such as terminating the trust, or an order that A pay B fair value in return for renouncing any future claim that B may have to be considered as an object of the trust. Of course, the court may in the exercise of its discretion decide to do nothing more than appoint a new and independent trustee.
- 2.105 The Commission considers that in determining fair value, the court should take into account all the relevant circumstances of the case. In certain circumstances, it will be appropriate for a court to treat what is fair as going beyond what the beneficiary is strictly entitled to at equity. To provide complete redress for the oppressive conduct,<sup>107</sup> the court may have to take into account other matters, such as the circumstances in which the beneficiary acquired an interest in the trust and the purpose for which the interest was conferred. Accordingly, the discretion of the court should be understood as permitting it to make a broad and inclusive assessment.
- 2.106 The Commission acknowledges that such scenarios may be unlikely to arise before the courts. However, in the view of the Commission, this is not an argument for the total exclusion of discretionary trusts, or for the range of remedies to be more limited than for unit trusts.
- 2.107 In the Commission’s view, given the above scenario, it is unlikely that beneficiaries other than A and B could obtain analogous relief, even if they were readily ascertainable. However, it is conceivable that these beneficiaries could avail themselves of other remedies. The beneficiaries would have the right ‘to compel the trustee to consider whether or not to make a distribution to him or her and a right to the proper administration of the trust.’<sup>108</sup> Similarly to the submission of Bergman, discussed above at [2.87], this view endorses a definition of ‘interest’ or rights under a trading trust broader than a beneficial interest in the trust property. According to Lord Wilberforce:

No doubt in a certain sense a beneficiary under a discretionary trust has an ‘interest’: the nature of it may, sufficiently for the purpose, be spelt out by saying that he has a right to be considered as a potential recipient of benefit by the trustees and a right to have his interest protected by a court of equity. Certainly that is so, and when it is said that he has a right to have the trustees exercise their discretion ‘fairly’ or ‘reasonably’ or ‘properly’ that indicates clearly enough some objective consideration (not stated explicitly in declaring the discretionary trust, but latent in it) must be applied by the trustees and that the right is more than a mere *spes*. But that does not mean that he has interest which is capable of being taxed by reference to its extent in the trust fund’s income: it may be a right, with some degree of concreteness or solidity, one which attracts the protection of a court of equity, yet it may still lack the necessary quality of definable extent which must exist before it can be taxed.<sup>109</sup>

- 2.108 In the Commission's view, this reasoning strongly makes the case for the inclusion of discretionary trusts. Where the interest of a beneficiary falls short of a proprietary interest in the trust property, then this will be a factor against an order terminating the trust or an order for the purchase or renunciation of a right under the trading trust. However, the Commission views it as inappropriate to categorically circumscribe the relief available to beneficiaries of a discretionary trust from an otherwise broad and flexible oppression remedy.
- 2.109 It was also suggested during submissions that since the beneficiaries of discretionary trusts have 'neither entitlements nor voting power',<sup>110</sup> and the policy rationale of oppression remedies is the protection of both, this makes a strong case for exclusion.<sup>111</sup>
- 2.110 The Commission agrees that where a beneficiary of a discretionary trust has no entitlement or voting power, then this will limit the range of orders that a court can make. In the latter case, an absence of voting power would be a strong factor against an order for the termination of the trust. The interest and voting power of beneficiaries will be relevant considerations for a court determining whether to grant an oppression remedy. This is supported by the consideration that the policy basis for remedying oppressive conduct is the protection of a minority interest.<sup>112</sup>
- 2.111 While in most instances it is true to say that a policy basis of the oppression remedy is the protection of voting power, it is possible for a member with no voting rights to obtain an oppression remedy under Part 2F.1 of the Corporations Act.<sup>113</sup> It follows that the absence of voting power on the part of a discretionary beneficiary is an insufficient reason to deny an oppression remedy.
- 2.112 The Commission considers that to expressly 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.

### Unit trusts

- 2.113 A unit trust differs from a discretionary trust, as the unit trust deed specifies the objects and entitlements rather than leaving benefits to be determined from time to time by the trustee.<sup>114</sup> As the name suggests, the beneficial interests are divided by reference to units. Bergman has defined the unit trust as a 'trust that has been established whereby the trustee of the trust holds property on behalf of unitholders whose units provide a substantially fixed proportional entitlement or interest'.<sup>115</sup>
- 2.114 In the Commission's view, it is easier to see how an oppression remedy could apply to a unit trust than to a discretionary trust. However, similarly to discretionary trusts, unit trusts can be structured in different ways.
- 2.115 The structure of a unit trust will often be determined by the role of the unitholders in the business. Usually, a unitholder will provide capital to a unit trust as an investment in exchange for units. In this case, the management of the business will be conducted by the directors of the corporate trustee rather than the unitholder. Moreover, the unitholder will not ordinarily own shares in the corporate trustee. In fact, this scenario closely resembles the division between management and shareholders.

110 Submission 3 (Professor Elise Bant and Associate Professor Matthew Harding, University of Melbourne Law School) 1.

111 Ibid 1–2.

112 Committee on Company Law Amendment, *Report of the Committee on Company Law Amendment* (Cohen Report) 1945 <<http://www.takeovers.gov.au>>; for a contrary view see R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford's Principles of Corporations Law* (at 109) [10.440.12].

113 *Cassegrain v CTK Engineering Pty Ltd* (2005) 54 ACSR 249, 253 [16] 268 [97].

114 P Young, C Croft and M Smith, *On Equity* (Lawbook Co, 2009) 431.

115 Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University forthcoming) 14.

- 2.116 An alternative scenario is where the parties use a unit trust to structure a joint venture. In this case, the original parties might be simultaneously directors and shareholders in the corporate trustee and unitholders. Control of the business will ordinarily be determined by the percentage of shares in the corporate trustee. As will be discussed in Chapter 3, the case law suggests that the way the unit trust is structured is highly relevant to the question of whether an oppression remedy can be granted.
- 2.117 The role that a unitholder wishes to have in management is dependent upon the nature of the investment. As Spavold explains:
- An investor who contributes substantially all of the assets to be used in a business with which he is very familiar will want to have substantial involvement in the management of the business. In contrast involvement in management (except in extraordinary circumstances) will not be desired by an investor who only wishes to pool his funds with other persons so that the pooled fund may be efficiently and profitably invested by professional investment managers who are familiar with the financial markets.<sup>116</sup>
- 2.118 This is relevant in the context of the oppression remedy since, as will be shown in Chapter 3, the oppression remedy is most commonly sought in the case of small proprietary companies where the shareholders actively manage the business.
- 2.119 Some participants during consultations suggested that an oppression remedy should only be available to unitholders who actively participate in the management of the business. There are two implications from this argument. First, investors who are not managers in the business should not be able to seek a buyout order otherwise than on the terms of the trust deed. In practice, this would mean that usually an oppression remedy would only be available, following the *Vigliaroni* and *Drapac* line of authority, when the unitholder is also a shareholder in the corporate trustee. Secondly, these investors should not be able to avail themselves of the oppression remedy more generally.
- 2.120 It was suggested during consultations that a difficulty with the requirement that a unitholder also hold shares in the corporate trustee is that this will only arise in a limited range of circumstances. The majority of unit trusts involve beneficiaries investing at arm's length from management. As is discussed in Chapter 4, ordinarily the only remedy available to a unitholder would be to seek a buyout order under the terms of the trust deed. The desirability of this situation will be explored further in Chapters 4 and 5.
- 2.121 Regarding the second implication referred to, the Commission considers that this would represent a narrow approach. The effect of this submission would be to give legislative force to the *Vigliaroni* and *Drapac* line of authority through an amendment to the Trustee Act. The defects of this approach will be considered further in Chapter 5.

## Conclusion

- 2.122 For the reasons outlined above, the Commission has adopted a functional definition of 'trading trusts' that includes all trusts where 'some property held by the trustee is employed under the terms of the trust deed in the conduct of a business,'<sup>117</sup> including discretionary trusts. Adopting this approach, the Commission recommends that managed investment schemes, regulated and statutory superannuation trusts and charitable trusts be excluded from the scope of the proposed amendment.

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G C Spavold, 'The Unit Trust: A Comparison with the Corporation' (1991) 3 *Bond Law Review* 249, 249–5.  
H A J Ford and I J Hardingham, 'Trading Trusts: Rights and Liabilities of Beneficiaries' in P D Finn (ed), *Equity and Commercial Relationships* (Lawbook Co, 1987) 48.

# The oppression remedy in the Corporations Act

**32** Introduction

**32** The oppression remedy—purpose, operation and effectiveness

**40** Does the existing oppression remedy apply to trading trusts?

**46** Conclusion



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## 3. The oppression remedy in the Corporations Act

### Introduction

- 3.1 This chapter discusses whether the existing statutory oppression remedy in corporations law offers effective relief to shareholders, that is, whether it achieves the purpose for which it was enacted. This is an important consideration in determining the desirability of having similar legislative remedies to protect the rights of beneficiaries. The chapter goes on to examine the differing views as to whether trading trusts are already covered by the remedy provided in Part 2F.1 of the *Corporations Act 2001* (Cth) and what impact, if any, this has on the need for legislative reform in Victoria.
- 3.2 The Commission’s view is that the existing oppression remedy in the Corporations Act has been effective in protecting the rights of shareholders. It is for this reason that the Commission considers that it forms a useful model for the recommended provisions in the *Trustee Act 1958* (Vic) applying to beneficiaries of trading trusts.
- 3.3 However, even if the more liberal of the two lines of authority<sup>1</sup> ultimately represents the law in Victoria, the existing Corporations Act remedy alone will never be sufficient to protect beneficiaries. This is due to the requirement for a beneficiary seeking to access the remedy to be a shareholder in the corporate trustee.<sup>2</sup> This is one of the main reasons that the Commission recommends that a broad oppression remedy be included in the Trustee Act for beneficiaries of trading trusts.

### The oppression remedy—purpose, operation and effectiveness

#### History and scope of the oppression remedy

- 3.4 The oppression remedy developed via statute over the course of the 20th century in jurisdictions including Australia, in order to overcome problems arising from the historical reliance of company law on majority rule, exacerbated by the rule in *Foss v Harbottle*.<sup>3</sup>
- 3.5 In *Foss v Harbottle*, two shareholders sued the five directors for fraud involving misappropriation of company funds. They claimed that the directors should compensate the company. According to Austin and Ramsay ‘the plaintiffs sued on behalf of themselves and all other shareholders except the defendants.’<sup>4</sup> The Vice-Chancellor, Sir James Wigram, dismissed the suit on the grounds that the body corporate was the proper plaintiff, rather than individual members or groups of members.<sup>5</sup>

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1 These cases are discussed below from [3.59]–[3.83].

2 See Chapter 5.

3 (1843) 2 Hare 461; 67 ER 189.

4 R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford’s Principles of Corporations Law* (at 109) [10.300.6].

5 R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford’s Principles of Corporations Law* (at 109) [10.300.6], citing *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189.



- 3.6 According to Austin and Ramsay, the ‘proper plaintiff’ rule may be justified on these grounds:
- the general principle that the person injured should be able to decide whether to bring proceedings to seek redress for that injury;
  - if members were allowed to bring proceedings complaining of a wrong done to the company, there would be a risk of a multiplicity of actions; and
  - the company is better able than an individual member to judge whether litigation should be commenced.<sup>6</sup>
- 3.7 However, rigid adherence to the rule often denied minority shareholders recourse against directors and majority shareholders.<sup>7</sup> For this reason, the courts developed a number of ‘exceptions’.<sup>8</sup> Austin and Ramsay have formulated these exceptions as follows:
- (1) where it is alleged that somebody in the company is taking it, or has taken it, into a transaction *ultra vires* the company (note that the doctrine of *ultra vires* has been abolished in Australia);
  - (2) where action is taken on a matter outside the constitution and the constitution requires a resolution of a general meeting of a higher status than an ordinary resolution to authorise the action;
  - (3) where an individual or personal right of a member has been, or is being, infringed and the irregularity is not one that can be condoned by the company in general meeting; and
  - (4) where condonation by the general meeting would be a fraud on the company and the wrongdoers themselves are in control of the company.
- A fifth exception is where the interests of justice require that the minority shareholder be given standing to sue on behalf of the company.<sup>9</sup>
- 3.8 Numerous commentators have argued that these ‘exceptions’ are in reality ‘situations where the rule simply cannot apply.’<sup>10</sup>
- 3.9 According to Brockett:
- The ‘proper plaintiff’ rule in *Foss v Harbottle* did not provide an adequate mechanism for the enforcement of the duties of directors and officers duties where the company improperly refused or failed to take action.<sup>11</sup>
- 3.10 Since the middle of the 20th century, a realisation of these risks and difficulties has led to the introduction of statutory remedies for the relief of minority shareholders.
- 3.11 This process began in the 1940s in the United Kingdom, with the report and recommendations of the Cohen Committee.<sup>12</sup> This Committee recognised that an order for winding up a company could sometimes be too drastic a remedy, or may not effectively relieve a shareholder subject to oppressive conduct.<sup>13</sup>

6 R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford’s Principles of Corporations Law* (at 109) [10.240].

7 Richard Brockett, ‘The Valuation of Minority Shareholdings in an Oppression Context—A Contemporary Review’ (2012) 24.2 *Bond Law Review* 101, 102.

8 Keith Fletcher, ‘CLERP and Minority Shareholder Rights’ (2001) 13 *Australian Journal of Corporations Law* 290, 291, cited in Richard Brockett, ‘The Valuation of Minority Shareholdings in an Oppression Context—A Contemporary Review’ (2012) 24.2 *Bond Law Review* 101, 102.

9 R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford’s Principles of Corporations Law* (at 109) [10.300.9].

10 Richard Brockett, ‘The Valuation of Minority Shareholdings in an Oppression Context—A Contemporary Review’ (2012) 24.2 *Bond Law Review* 101, 102, citing K W Wedderburn, ‘Shareholders’ Rights and the Rule in *Foss v Harbottle*’ (1957) 15(2) *Cambridge Law Journal* 194, 203.

11 Richard Brockett, ‘The Valuation of Minority Shareholdings in an Oppression Context—A Contemporary Review’ (2012) 24.2 *Bond Law Review* 101, 103, citing Company and Securities Law Reform Committee, *Enforcement of the Duties of Directors and Officers of a Company by means of a Statutory Derivative Action*, Report No 12 (1990) [5]–[6].

12 Committee on Company Law Amendment, *Report of the Committee on Company Law Amendment* (Cohen Report) (1945) <<http://www.takeovers.gov.au>>.

13 R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford’s Principles of Corporations Law* (at 109) [10.430].

- 3.12 Most relevantly for this reference, the Committee discussed the problem of oppression of minority shareholders in the following terms:

**60. Oppression of minorities.**

We have carefully examined suggestions intended to strengthen the minority shareholders of a private company in resisting oppression by the majority. The difficulties to which we have referred in the two preceding paragraphs<sup>14</sup> are, in fact, only illustrations of a general problem. It is impossible to frame a recommendation to cover every case. We consider that a step in the right direction would be to enlarge the power of the Court to make a winding-up order by providing that the power shall be exercisable notwithstanding the existence of an alternative remedy. In many cases, however, 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.<sup>15</sup>

- 3.13 This recommendation led to the enactment in 1947 of a new provision that became section 210 of the *Companies Act 1948* (UK).<sup>16</sup> According to Austin and Ramsay 'section 210 empowered the court to give other relief against oppressive conduct of a company's affairs.'<sup>17</sup>

- 3.14 Section 210 (and the various legislative provisions that succeeded it in the United Kingdom)<sup>18</sup> were the model for section 186 of the *Australian Uniform Companies Act 1961* (Cth), which subsequently became section 320 of the *Companies Code*<sup>19</sup> and then section 260 of the *Corporations Act 1989* (Cth). According to Austin and Ramsay:

As a result of amendments to the *Corporations Law* made by the *Company Law Review Act 1998* (Cth) s 260 became s 246AA of the *Corporations Law* on 1 July 1998.<sup>20</sup>

- 3.15 By virtue of the *Corporate Law Economic Reform Program Act 1999* (Cth), this formed the basis of the current sections 232 and 233 in Part 2F.1 of the *Corporations Act*.<sup>21</sup>

- 3.16 Section 232 of Part 2F.1 provides:

The Court may make an order under section 233 if:

- (a) the conduct of a company's affairs; or
- (b) an actual or proposed act or omission by or on behalf of a company; or
- (c) a resolution, or a proposed resolution, of members or a class of members of a company;

is either:

- (d) contrary to the interests of the members as a whole; or

14 Restrictions on transfers of shares [58], Excessive remuneration of Directors [59].  
15 Committee on Company Law Amendment, *Report of the Committee on Company Law Amendment* (Cohen Report) (1945) [60] <<http://www.takeovers.gov.au>>.

16 Available at <<http://www.legislation.gov.uk>>, last accessed on 8 April 2014.

17 R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford's Principles of Corporations Law* (at 109) [10.430].

18 Ibid.

19 Consisting of provisions set out in the *Companies Act 1981* (Cth), as adopted and amended by State legislation and set out in the *Companies (New South Wales) Code*, the *Companies (Victoria) Code*, the *Companies (Western Australia) Code*, the *Companies (South Australia) Code*, the *Companies (Tasmania) Code*, the *Companies (Queensland) Code* and the *Companies (Northern Territory) Code*.

20 R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford's Principles of Corporations Law* (at 109) [10.430].

21 Ibid.

- (e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.

For the purposes of this Part, a person to whom a share in the company has been transmitted by will or by operation of law is taken to be a member of the company

- 3.17 The reference in paragraph (e) to the impact on a member or members ‘whether in that capacity or in any other capacity’ is of particular significance to this reference. Traditionally, that phrase has been applied where the member is also a director, creditor or employee of the company. However, for the purposes of this reference, its significance lies in its potential inclusion of a member who is a beneficiary of a trust of which the corporation is a trustee.
- 3.18 It is also significant in considering how the Commission’s recommended amendment to the Trustee Act might operate. This is further discussed in Chapter 5.
- 3.19 While a narrow interpretation of the oppression remedy has at times caused difficulties in the United Kingdom,<sup>22</sup> despite the expansive language used by the originating Cohen Committee, the Australian approach has always been broader.<sup>23</sup>
- 3.20 This broad approach has now been emphasised by Chief Justice French in the decision of the High Court of Australia in *Campbell v Backoffice Investments Pty Ltd*:
- ...Their language and history indicate that ss 232 and 233 are to be read broadly. The imposition of judge-made limitations on their scope is to be approached with caution.<sup>24</sup>
- 3.21 According to Austin and Ramsay ‘the present breadth of the oppression provision and the range of flexible remedies a court is able to order has made it “one of the most widely used corporate law remedies”’.<sup>25</sup>
- 3.22 This wide use also tends to support the Commission’s conclusion that Part 2F.1 of the Corporations Act has effectively protected the rights of shareholders. Two of the submissions also support this view.<sup>26</sup> The remaining submissions, while not directly addressing this issue, do not put an opposing view. Moreover, in that they support legislative reform to offer an oppression remedy to beneficiaries, they could also be seen by implication to endorse the effectiveness of Part 2F.1.
- 3.23 Some other jurisdictions, notably Canada, have taken an even broader view. The Canadian oppression remedy is known as ‘the broadest, most comprehensive and most open-ended shareholder remedy in the common law world.’<sup>27</sup> The oppression remedy in the *Canada Business Corporations Act*<sup>28</sup> ‘seeks to enforce fairness and equity, and is not limited to the enforcement of lawful conduct. The potential protection it offers corporate stakeholders is awesome’.<sup>29</sup>
- 3.24 One further matter that is of crucial importance for the consideration of whether and how oppression remedies apply to beneficiaries of trading trusts is the definition given in section 53 of the Corporations Act of the expression ‘a company’s affairs’, as used in section 232(a).

22 *Scottish Co-operative Wholesale Society v Meyer* [1959] AC 324, 342; see Elizabeth Boros, *Minority Shareholders’ Remedies* (Clarendon Press, 1995) 117–118.

23 *Re Broadcasting Station 2GB Pty Ltd* [1964-5] NSWLR 1648; *Re Associated Tool Industries Ltd* (1963) 5 FLR 55; *Re Bright Pine Mills Pty Ltd* [1969] VR 1002.

24 (2009) 238 CLR 304, 334 [72].

25 R P Austin and I M Ramsay, *Ford’s Principles of Corporations Law* (at 109) [10.430], citing I M Ramsay, ‘An Empirical Study of the Use of the Oppression Remedy’ (1999) 27 *Australian Business Law Review* 23.

26 Submission 4 (Federal Court of Australia) 1; Submission 6 (Cornwall Stodart and Ari Bergman) 4.

27 Stanley M. Beck, ‘Minority Shareholders Rights in the 1980s’ in *Corporate Law in the 80s: Law Society of Upper Canada Special Lectures* (Richard de Boo, 1982) 311, 312; cited in Bruce Welling, *Corporate Law in Canada: the Governing Principles* (Scribblers, 3rd edition, 2006) 533–556.

28 RSC 1985, c.C-44. The Canadian provisions form a useful model and comparator and will be further discussed in Chapter 5, below.

29 Dennis H Peterson, *Shareholders Remedies in Canada*, (LexisNexis Butterworths Canada, 2009) [17-1].

- 3.25 Section 53 defines ‘a company’s affairs’ to include (relevantly):
- (a) ...business, trading, transactions and dealings (...including transactions and dealings as... trustee)...
  - (b) in the case of a body corporate (not being a licensed trustee company within the meaning of Chapter 5D or the Public Trustee of State or Territory) that is a trustee (but without limiting the generality of paragraph (a)) - matters concerned with the ascertainment of the identity of the persons who are beneficiaries under the trust, their rights under the trust and any payments that they have received, or are entitled to receive, under the terms of the trust.<sup>30</sup>

### Available forms of relief

- 3.26 Once oppressive, unfairly prejudicial or unfairly discriminatory conduct is established, the power of the court to make orders granting relief is set out in section 233 of the Corporations Act, which provides:
- 1) The Court can make any order under this section that it considers appropriate in relation to the company, including an order:
    - (a) that the company be wound up;
    - (b) that the company’s existing constitution be modified or repealed;
    - (c) regulating the conduct of the company’s affairs in the future;
    - (d) for the purchase of any shares by any member or person to whom a share in the company has been transmitted by will or by operation of law;
    - (e) for the purchase of shares with an appropriate reduction of the company’s share capital;
    - (f) for the company to institute, prosecute, defend or discontinue specified proceedings;
    - (g) authorising a member, or a person to whom a share in the company has been transmitted by will or by operation of law, to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company;
    - (h) appointing a receiver or a receiver and manager of any or all of the company’s property;
    - (i) restraining a person from engaging in specified conduct or from doing a specified act;
    - (j) requiring a person to do a specified act.<sup>31</sup>
- 3.27 Because the specific orders listed are only examples, it is open to the court to make any other orders it thinks appropriate. However, it falls to the applicant to ‘indicate the nature of the relief sought.’<sup>32</sup>
- 3.28 According to Austin and Ramsay, ‘the remedy that is the least intrusive that will eliminate the oppression should be considered first by the court.’<sup>33</sup>
- 3.29 The extensive powers provided under section 233 provide a broad range of remedies to relieve the oppression in the most effective way in the particular circumstances.<sup>34</sup> For example, in *Re Spargos Mining NL*,<sup>35</sup> Justice Murray of the Supreme Court of Western Australia ordered the appointment of a new board, the amendment of the company’s

30 See discussion of *Vigliaroni v CPS Investment Holdings Pty Ltd* (2009) 74 ACSR 282; *Wain v Drapac* [2012] VSC 156 (26 April 2012), in which s 53 of the Corporations Act was crucial.

31 For a detailed discussion of these orders see: R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford’s Principles of Corporations Law* (at 109), [10.490].

32 R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford’s Principles of Corporations Law* (at 109) [10.490], citing *Meyer v Scottish Co-op Wholesale Society* 1954 SC 381, 388.

33 R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford’s Principles of Corporations Law* (at 109) [10.490].

34 *Ibid.*  
35 (1990) 3 ACSR 1.

articles, and for the new board to report every three months.<sup>36</sup>

- 3.30 The broad, flexible nature of the discretion and orders available to courts under Part 2F.1 of the Corporations Act have clear implications for this reference. This will be further discussed in Chapter 5.

### Who may apply for relief?

- 3.31 Standing to bring an action is covered by section 234.<sup>37</sup> This section provides that the following types of individuals can apply for relief in relation to a company:
- (a) a member of the company, even if the application relates to an act or omission that is against:
    - (i) the member in a capacity other than as a member; or
    - (ii) another member in their capacity as a member; or
  - (b) a person who has been removed from the register of members because of a selective reduction of capital; or
  - (c) a person who has ceased to be a member of the company if the application relates to the circumstances in which they ceased to be a member; or
  - (d) a person to whom a share in the company has been transmitted by will or by operation of law; or
  - (e) a person whom ASIC thinks appropriate having regard to investigations it has conducted or is conducting into:
    - (i) the company's affairs; or
    - (ii) matters connected with the company's affairs.<sup>38</sup>
- 3.32 In the Australian Law Reform Commission and Companies and Securities Advisory Committee report *Collective Investments: Other People's Money*, the recommended oppression remedy could be sought by 'an investor in a collective investment scheme or by the Commission.'<sup>39</sup> It should be remembered that the subject of that report included, but was broader than, trading trusts. Thus an 'investor' could be a beneficiary or unitholder of a trading trust, but may not necessarily be so.
- 3.33 In the Singapore *Business Trusts Act* (2008), the remedy may be sought by 'any unitholder or any holder of a debenture of a registered business trust'.<sup>40</sup>
- 3.34 In the Canada Business Corporations Act, 'a "complainant" may apply to a court for an order'. Section 238 of that Act provides:
- "complainant" means:
- (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
  - (b) a director or an officer or a former director or officer of a corporation or any of its affiliates
  - (c) the Director<sup>41</sup> or
  - (d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.<sup>42</sup>

36 *Re Spargos Mining NL* (1990) 3 ACSR 1, 50–1, cited in Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming) 130.

37 R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford's Principles of Corporations Law* (at 109) [10.440].

38 *Corporations Act 2001* (Cth) s 234.

39 Law Reform Commission (Australia) and Companies and Securities Advisory Committee, *Collective Investments: Other People's Money*, ALRC Report No 65 (1993) 152 [260AQ(1)].

40 *Business Trusts Act* (Singapore, cap 30, 2008 rev ed) s 41(1).

41 A statutory regulator appointed under section 260 of the Canada Business Corporations Act.

42 Canada Business Corporations Act s 260.

- 3.35 The requirements for standing in respect of trading trusts and who should be able to seek any oppression remedy are further discussed in Chapter 5.

### What constitutes oppression?

- 3.36 Numerous reported cases have defined oppressive, unfairly prejudicial or unfairly discriminatory conduct under Part 2F.1.<sup>43</sup>
- 3.37 Relief is not available merely because a member disagrees or is dissatisfied with the management of the company or dissatisfied with his or her own position 'or the fact that they cannot control management. Something more than this is required.'<sup>44</sup>
- 3.38 Chief Justice Spigelman of the New South Wales Supreme Court in *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* stated that: 'Irreconcilable differences may establish a basis for winding up, they do not of themselves constitute oppression or unfair prejudice.'<sup>45</sup> According to Brockett 'the courts have held that oppression connotes a lack of probity and fair dealing'<sup>46</sup> (although this is not a necessary condition),<sup>47</sup> is something which is burdensome, harsh or wrongful,<sup>48</sup> or is inequitable or unjust,<sup>49</sup> or exhibits commercial unfairness.<sup>50</sup>
- 3.39 According to Brockett 'the conduct [complained of] must relate to the "affairs of the company",<sup>51</sup> which has been determined to be of considerable breadth.'<sup>52</sup> In determining whether allegations of oppression are made out, the court must examine conduct in the context in which it takes place, rather than in isolation.<sup>53</sup> Where the conduct complained of involves company directors, the court must also examine whether they are acting honestly in the interests of the company.<sup>54</sup> Moreover, '[t]he test requires the weighing of the particular member's interest against that of the company as a whole.'<sup>55</sup>
- 3.40 Examples of oppressive behaviour given by Brockett include where a majority shareholder:
- runs the company in their own interests and ignores the interests of minority shareholders<sup>56</sup>
  - improperly issues shares to themselves to outvote other shareholders<sup>57</sup>
  - excludes a minority shareholder from being involved in the management decisions of the company<sup>58</sup>
  - redirects business opportunities from the company to themselves<sup>59</sup>

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43 R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford's Principles of Corporations Law* (at 109) [10.450]; Richard Brockett, 'The Valuation of Minority Shareholdings in an Oppression Context—A Contemporary Review' (2012) 24.2 *Bond Law Review* 101, 105.

44 Richard Brockett, 'The Valuation of Minority Shareholdings in an Oppression Context A Contemporary Review' (2012) 24.2 *Bond Law Review* 101, 105.

45 (2001) 37 ACSR 672, 687 [89], cited in Richard Brockett, 'The Valuation of Minority Shareholdings in an Oppression Context—A Contemporary Review' (2012) 24.2 *Bond Law Review* 101, 105.

46 *Scottish Co-op Wholesale Society Ltd v Meyer* [1959] AC 324, 363.

47 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 360.

48 *Scottish Co-op Wholesale Society Ltd v Meyer* [1959] AC 324, 342.

49 *ASC v Multiple Sclerosis Society of Tasmania* (1993) 10 ASCR 489.

50 Richard Brockett, 'The Valuation of Minority Shareholdings in an Oppression Context—A Contemporary Review' (2012) 24.2 *Bond Law Review* 101, 105-6, citing *Morgan v 45 Flers Avenue Pty Ltd* (1986) 10 ACLR 692, 704.

51 *Corporations Act 2001 (Cth)* s 53, cited in Richard Brockett, 'The Valuation of Minority Shareholdings in an Oppression Context—A Contemporary Review' (2012) 24.2 *Bond Law Review* 101, 106.

52 Richard Brockett, 'The Valuation of Minority Shareholdings in an Oppression Context—A Contemporary Review' (2012) 24.2 *Bond Law Review* 101, 105; see: *Australian Securities Commission v Lucas* (1992) 7 ACSR 676, 677; *Vigliaroni v CPS Investment Holdings* (2009) 74 ACSR 282.

53 *Reid v Bagot Well Pastoral Co Pty Ltd* (1993) 12 ACSR 197, 212, cited in Richard Brockett, 'The Valuation of Minority Shareholdings in an Oppression Context—A Contemporary Review' (2012) 24.2 *Bond Law Review* 101, 106.

54 *Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459, cited in Richard Brockett, 'The Valuation of Minority Shareholdings in an Oppression Context—A Contemporary Review' (2012) 24.2 *Bond Law Review* 101, 106.

55 Richard Brockett, 'The Valuation of Minority Shareholdings in an Oppression Context—A Contemporary Review' (2012) 24.2 *Bond Law Review* 101, 106, citing *Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459.

56 *Re Spargos Mining NL* (1990) 3 ACSR 1, cited in Richard Brockett, 'The Valuation of Minority Shareholdings in an Oppression Context—A Contemporary Review' (2012) 24.2 *Bond Law Review* 101, 106.

57 *Hannes v MJH Pty Ltd* (1992) 7 ACSR 8, cited in Richard Brockett, 'The Valuation of Minority Shareholdings in an Oppression Context—A Contemporary Review' (2012) 24.2 *Bond Law Review* 101, 106.

58 *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (1998) 28 ACSR 688, cited in Richard Brockett, 'The Valuation of Minority Shareholdings in an Oppression Context—A Contemporary Review' (2012) 24.2 *Bond Law Review* 101, 106.

59 *Scottish Co-operative Wholesale Ltd v Meyer* [1959] AC 324, cited in Richard Brockett, 'The Valuation of Minority Shareholdings in an Oppression Context—A Contemporary Review' (2012) 24.2 *Bond Law Review* 101, 106.



- pays themselves excessive salaries at the expense of paying dividends to shareholders.<sup>60</sup>

3.41 The fact that there has been such significant consideration of these issues by the courts, and that the existing provisions have been interpreted broadly, also has clear implications for the Commission's consideration of the desirability and the form of amendments to the Trustee Act. This is further discussed in Chapter 5.

### Types of company covered

3.42 Oppression remedies contained in Part 2F.1 apply to:

- companies limited by shares
- companies limited by guarantee<sup>61</sup>
- unlimited companies
- public and proprietary no liability companies
- co-operative societies which are incorporated.<sup>62</sup>

3.43 While Part 2F.1 can apply to any type of company, a study of oppression cases published in the late 1990s found that the oppression remedy has been used mostly in relation to small or closely held companies, where 'shareholders are often involved in the management of the company'.<sup>63</sup> According to Austin and Ramsay 'the study found that in over 50% of the cases studied, the number of shareholders in the relevant company was 10 or fewer (with most cases having five or fewer shareholders) and that in over 43% of the cases, all or most of the shareholders were involved in the management of the company.'<sup>64</sup>

3.44 Austin and Ramsay suggest several reasons for this:

- Shareholders in such companies may frequently be involved in the management of the company, or be employed as officers and directors. A dispute with majority shareholders may see such engagements, and the remuneration associated with them, terminated.
- Moreover, shareholders in small companies are more vulnerable than those in larger, public companies.
- The lack of a liquid market for shares may make it difficult for an aggrieved minority shareholder to sell his or her shares.
- Such companies may also have express limitations or restrictions on the right of shareholders to sell their shares, frequently requiring that any sale of shares must be approved by the directors or a majority of shareholders.<sup>65</sup>

3.45 Significantly, these difficulties are very similar to those commonly experienced by beneficiaries of trading trusts.

3.46 Again, the types of trusts potentially subject to the availability of an oppression remedy is of crucial importance to this reference. This is discussed at length in Chapter 2.

60 *Sanford v Sanford Courier Service* (1986) 10 ACLC 548; *Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459, cited in Richard Brockett, 'The Valuation of Minority Shareholdings in an Oppression Context—A Contemporary Review' (2012) 24.2 *Bond Law Review* 101, 106.

61 *Australian Securities Commission v Multiple Sclerosis Society of Tasmania* (1993) 10 ACSR 489, *Sutherland v NRMA Ltd* (2003) 47 ACSR 428, both cited in R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford's Principles of Corporations Law* (at 109) [10.435].

62 *Shears v Chisholm* (1992) 9 ACSR 691, 691, 693, cited in R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford's Principles of Corporations Law* (at 109) [10.435].

63 R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford's Principles of Corporations Law* (at 109) [10.435], citing I M Ramsay, 'An Empirical Study of the Use of the Oppression Remedy' (1999) 27 *Australian Business Law Review* 23.

64 *Ibid.*

65 R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford's Principles of Corporations Law* (at 109) [10.435].

## Does the existing oppression remedy apply to trading trusts?

- 3.47 Given the terms of reference for this review, one issue to be considered is whether or not the existing oppression remedy in Part 2F.1 of the Corporations Act already applies to beneficiaries of trading trusts where there is a corporate trustee and if so, whether this existing remedy provides adequate relief.
- 3.48 There is a divergence in the judgments of Australian courts on this question.<sup>66</sup> *Kizquari Pty Ltd v Prestoo Pty Ltd*<sup>67</sup> (*Kizquari*) held that beneficiaries of a unit trust could not obtain oppression remedies. Justice Davies, however, in *Vigliaroni v CPS Investment Holdings Pty Ltd* (*Vigliaroni*), declined to follow *Kizquari*, emphasising the importance of section 53 of the Corporations Act.<sup>68</sup>

### *Kizquari* and related cases

- 3.49 *Kizquari*, a decision of Justice Young (as then he was) in the Supreme Court of New South Wales, ‘concerned a company that was trustee of a unit trust.’<sup>69</sup>

- 3.50 In relation to the argument that an oppression remedy should be granted, Justice Young held:

I do not consider that I should accede to this submission. The company in question is Prestoo Pty Ltd. This company is a trustee company. It has no assets of its own. It operates a business as a trustee on the basis of loan capital. The only oppression is in relation to the operation of the trust. That oppression has not affected the value of the shares one whit. The shares in Prestoo either have no value or alternatively a value of \$1 being the amount paid for each share and they continue to have that value. It would be a very bold step indeed to order the Gabbeyes and the Cucitis to buy the plaintiffs’ \$1 share for a sum anything like say \$189,000 on the basis that the plaintiffs thereby relinquished any interest in the trust.<sup>70</sup>

- 3.51 Moreover, Justice Young expressly declined to follow *Re Bodaibo Pty Ltd*,<sup>71</sup> where in the context of granting an oppression remedy, Justice Vincent of the Supreme Court of Victoria valued the shares in the corporate trustee in relation to the units. Justice Young said that:

No other cases have been cited by counsel as situations where one can make an order in respect of a trustee company under s 260. My view is that one cannot do so.<sup>72</sup>

- 3.52 *Kizquari* was followed in *Re Polyresins Pty Ltd*.<sup>73</sup> In that case, it was unclear on the facts whether the company held property on trust,<sup>74</sup> but Justice Chesterman of the Supreme Court of Queensland made the following comment:

If the trust has been validly constituted, then the shares in the company are worth no more than face value and it is inappropriate for the court to order a compulsory purchase. I accept the submissions that in an application under s 260 the court cannot deal with equitable interests conferred by a trust of which a company is trustee. Nor can it value the shares in the company by reference to the assets held on trust.<sup>75</sup>

66 See R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford’s Principles of Corporations Law* (at 109) [10.435.12]; Braydon Heape, ‘Oppression Proceedings and Trust Remedies: What are the limits?’ (2013) 31 *Company and Securities Law Journal* 325; Michael May, ‘Oppression in the context of corporate trustees’ (2013) 87 *Australian Law Journal* 271; Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming).

67 (1993) 10 ACSR 606.

68 (2009) 74 ACSR 282.

69 Michael May, ‘Oppression in the context of corporate trustees’ (2013) 87 *Australian Law Journal* 271, 272; for a fuller description of the facts in *Kizquari*, see the Commission’s consultation paper, Victorian Law Reform Commission, *Trading Trusts—Oppression Remedies*, Consultation Paper No 21 (2014) 26; also see Braydon Heape, ‘Oppression Proceedings and Trust Remedies: What are the limits?’ (2013) 31 *Company and Securities Law Journal* 325.

70 *Kizquari Pty Ltd v Prestoo Pty Ltd* (1993) 10 ACSR 606, 612–3.

71 (1992) 6 ACSR 509.

72 *Kizquari* (1993) 10 ACSR 606, 613.

73 (1998) 28 ACSR 671.

74 Michael May, ‘Oppression in the context of corporate trustees’ (2013) 87 *Australian Law Journal* 271, 273.

75 *Re Polyresins Pty Ltd* (1999) 28 ACJR 671, 685, cited in Michael May, ‘Oppression in the context of corporate trustees’ (2013) 87 *Australian Law Journal* 271, 273.



- 3.53 In *McEwen v Combined Coast Cranes Pty Ltd*<sup>76</sup> Chief Judge in Equity Young said (at [46]):  
It is well established that where oppression has occurred in a company which holds all its assets on trust, there is no diminution in value of the plaintiff's share in the company despite the oppressions.<sup>77</sup>
- 3.54 In *Surf Road Nominees Pty Ltd v James*<sup>78</sup> Justice Einstein held that these cases were 'authority for the proposition that ss 232 and 233 of the Corporations Act are inapplicable in the circumstances.'<sup>79</sup>
- 3.55 The *Kizquari* approach was strongly endorsed in *Ciccarello, Re Adelaide Property Development Pty Ltd v Cubelic*,<sup>80</sup> where Justice Mansfield said:  
The preponderance of authority is to the effect that, where oppression has occurred in a company which is a bare trustee so that all its assets are held in trust, relief under s 232 and s 233 of the *Corporations Act* is inappropriate. Oppressive conduct does not result in diminution of the value of the shares in the trustee company.<sup>81</sup>
- 3.56 In *Trust Co Ltd v Noosa Venture 1 Pty Ltd (Noosa Venture)*,<sup>82</sup> Acting Justice Windeyer said:  
With respect to the decision of Davies J [in *Vigliaroni*] and accepting the requirement for coherence in corporations law I find it difficult to accept that an order 'in relation to the company' includes an order in relation to the affairs of the company because if that were the legislative intention it would have been easy enough to insert the words 'or the affairs of the company' after the words 'the company' in the commencement part of s 233(1) of the Act. It is a question of power not scope.<sup>83</sup>
- 3.57 Acting Justice Windeyer reached this conclusion despite the fact that section 53 says that 'the affairs of a company include transactions and dealings as trustee and property held as trustee.'<sup>84</sup> In his Honour's view, an order requiring one trust beneficiary to buy out the interest of another trust beneficiary would be an order in relation to the trust, not in relation to the company.<sup>85</sup>
- 3.58 In these observations, Acting Justice Windeyer was responding directly to an alternate line of decisions, beginning in 2009 and emanating from the Supreme Court of Victoria. They are considered below.

### A broader scope: The *Vanmarc* approach

- 3.59 In *Vanmarc Holdings Pty Ltd v PW Jess and Assoc Pty Ltd (Vanmarc)*,<sup>86</sup> a decision that pre-dates both *McEwen* and *Surf Road Nominees*, Justice Mandie in the Supreme Court of Victoria, while not being directly inconsistent with the *Kizquari* reasoning, took a broader approach.
- 3.60 In *Vanmarc*, the plaintiffs sought relief on several grounds, including an oppression remedy under section 246AA of the then current Corporations Law. The defendants sought to have the matter wholly or partly struck out, on the basis of the reasoning in *Kizquari* and the related cases discussed above.

76 (2002) 44 ACSR 244.

77 *McEwen v Combined Coast Cranes Pty Ltd* (2002) 44 ACSR 244, cited in Michael May, 'Oppression in the context of corporate trustees' (2013) 87 *Australian Law Journal* 271, 273.

78 [2004] NSWSC 61 (20 February 2004).

79 *Surf Road Nominees Pty Ltd v James* [2004] NSWSC 61 (20 February 2004) [219], cited in Michael May, 'Oppression in the context of corporate trustees' (2013) 87 *Australian Law Journal* 271, 274.

80 [2008] FCA 141.

81 *Ciccarello, Re Adelaide Property Development Pty Ltd v Cubelic* [2008] FCA 141, cited in Michael May, 'Oppression in the context of corporate trustees' (2013) 87 *Australian Law Journal* 271, 274.

82 (2010) 80 ACSR 485, cited in Braydon Heape, 'Oppression Proceedings and Trust Remedies: What are the limits?' (2013) 31 *Company and Securities Law Journal* 325, 327.

83 *Trust Company Ltd v Noosa Venture 1 Pty Ltd* (2010) 80 ACSR 485, 516 [105].

84 *Ibid* 519, [100].

85 Michael May, 'Oppression in the context of corporate trustees' (2013) 87 *Australian Law Journal* 271, 275–6, citing *Trust Company Ltd v Noosa Venture Pty Ltd* (2010) 80 ACSR 485, 516 [105].

86 (2000) 34 ACSR 222; also see R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford's Principles of Corporations Law* (at 109) [10.435.12]; Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming) 149–153.

- 3.61 In relation to the striking out application, Justice Mandie cited *Kizquari* extensively, concluding:

In the present proceeding, it is probably also the case that a combination of trust remedies and recourse to the buy-out provisions of the trust deed will ultimately provide adequate relief for the plaintiffs (if any is required). It is probably also the case that the shares in the trustee companies will be found as is usual to have no value, so that an order of the kind made in *Re Bodaibo Pty Ltd* should not be made (even assuming that such an order is ever appropriate under s246AA in the case of a trustee company) (see too: *Re Bountiful Pty Ltd* (1994) 12 ACLC 902, 905).<sup>87</sup>

- 3.62 However, Justice Mandie did not categorically reject any possibility for the oppression remedies to be applied to cases involving unit trusts and corporate trustees:

Nevertheless, I do not think that the prospect of relief under s 246AA can be ruled out in the case of a trustee company, however unlikely that prospect may be. In that regard, it must be remembered that the powers of the court under that section are not confined to orders for winding up or for the compulsory sale and purchase of shares but include orders restraining a person from engaging in specified conduct or from doing a specified act and requiring a person to do a specified act.<sup>88</sup>

- 3.63 A number of commentators<sup>89</sup> have seen Justice Mandie's decision as a step towards the even more expansive position later taken by the Victorian courts in *Vigliaroni* and *Drapac*, discussed below.

### ***Vigliaroni*—'the affairs of the company'**

- 3.64 In *Vigliaroni*,<sup>90</sup> Justice Davies in the Supreme Court of Victoria declined to follow the *Kizquari* line of authority described above. In doing so, she created a distinct, competing line of authority, which produces a significant degree of legal uncertainty.

- 3.65 *Vigliaroni* involved a successful business comprising unit trusts and companies, primarily involved in the concreting industry, which was controlled by the Vigliaroni family.<sup>91</sup>

- 3.66 The Vigliaronis launched proceedings against Mr Gargaro, their manager and financial advisor, and the related entities on several grounds, including that Gargaro's actions were oppressive under Part 2F.1 of the Corporations Act. They sought a forced buyout under section 233, winding up under section 233 and relief pursuant to section 467(1). The Vigliaronis were largely successful in the actions, including the application of sections 232 and 233 to force a buyout of Gargaro's interests in both the shares and units.<sup>92</sup>

- 3.67 In reaching her decision, Justice Davies expressly declined to follow the *Kizquari* line of authority:

None of those cases considered the scope of the oppression power and jurisdiction of the court to grant relief, having regard to s 53, although s 53 appeared in the legislation at the time those cases were decided in terms similar to the provision as it now appears. It would appear that s 53 was not brought to the attention of the courts in those cases. Section 53 has been brought to my attention and I must decide in light of s 53 whether my powers are circumscribed so that I cannot make an order under s 233 in respect of a trustee company. In my view, s 53 puts beyond any doubt that the court's jurisdiction and powers under the statutory oppression provisions are not circumscribed in respect

87 *Vanmarc Holdings Pty Ltd v PW Jess and Assoc Pty Ltd* (2000) 34 ACSR 222, 229–30 [36].

88 *Ibid* 229–30 [36].

89 A Monichino, 'Unitholder Disputes: Availability of Corporations Act Relief?' (Paper presented at Leo Cussen Institute Corporate and Commercial Law Intensive Seminar, Melbourne, 17 March 2010) 18, cited in Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming) 141.

90 *Vigliaroni v CPS Investment Holdings Pty Ltd* (2009) 74 ACSR 282.

91 Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming) 154–5; for a fuller description of the facts in *Vigliaroni*, see the Commission's consultation paper, Victorian Law Reform Commission, *Trading Trusts—Oppression Remedies*, Consultation Paper No 21 (2014) 29.

92 Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming) 155.

of a trustee company and accordingly I conclude that I should depart from the view expressed by Young J in *Kizquari* and the cases which have supported that view, in view of s 53. I would also respectfully disagree with the view that Chesterman J expressed in *Re Polyresins Pty Ltd*, which Young JA cited with approval in *McEwan* that the equitable interests in the trust cannot be dealt with by the court under s 233. The only limitation imposed on the court on the kind of order that it can make under s 233 is the requirement for the order to be one that that the court considers appropriate “in relation to the company”. The phrase “in relation to” requires a rational and discernible link between the remedy and the company in which the oppression has occurred. In other words, any remedy granted under s 233 must not be extraneous to achieving the object of relieving the oppression and must be appropriate to putting an end to the causes of oppression, including where the company acts as trustee and the oppression relates to the affairs of the trust. In appropriate cases, the remedy may include orders dealing with the equitable interests in the trust, in my view.<sup>93</sup>

### **Tomanovic**

- 3.68 The case of *Tomanovic v Global Mortgage Equity Corporation Pty Ltd*<sup>94</sup> arguably casts some doubt on the application of the *Kizquari* approach, without fully endorsing the alternative posited in *Vigliaroni*.
- 3.69 The case concerned a breakdown of a business relationship between Mr Tomanovic and Mr Sayer that comprised a complex corporate structure also containing a unit trust. The parties agreed, through an unexecuted heads of agreement, to separation on the basis that Tomanovic would receive a lump sum payment, and that each would operate half of the business. Negotiations fell through and Tomanovic sought an oppression remedy on the basis that Sayer had not signed the heads of agreement, diverted assets for his own benefit and excluded Tomanovic from the management of the business.<sup>95</sup> The New South Wales Court of Appeal overturned the decision of Justice Austin at first instance, holding that the conduct of Sayer amounted to oppression.<sup>96</sup> Importantly, the Court of Appeal made draft orders that Sayer buy out Tomanovic’s shares in the company to be valued at a later date.<sup>97</sup>
- 3.70 The importance of the case for this reference is that the draft orders appear to envisage that the value of Tomanovic’s units in the trust could be taken into account as part of the process of valuing the shares.<sup>98</sup> Justice of Appeal Campbell referred to both the *Kizquari* and the *Vigliaroni* lines of authority, and said that:

No attention was paid, at either the trial or on the argument of the appeal, to the way in which the available remedy for Oppression operated in relation to the units in the 9 Argyle Street Unit Trust. Even if the court were to make a buyout order concerning Argyle HQ, that would not have any effect on the beneficial ownership of the assets it held on trust - the beneficial ownership of those assets could be altered only if a buyout order were to be made concerning the units in the 9 Argyle Street Unit Trust. When the Trust has at all times been an important part of the overall commercial group, failure to deal with ownership of units in the Trust would result in any relief granted by the Court not totally resolving the commercial relations between the parties.<sup>99</sup>

93 *Vigliaroni v CPS Investment Holdings Pty Ltd* (2009) 74 ACSR 282, 305–306 [68].

94 *Tomanovic v Global Mortgage Equity Corporation Pty Ltd* (2011) 84 ACSR 121.

95 This summary of the facts reflects Snezana Vojvodic and Monique Nymeyer, ‘Australia: Shareholder Oppression—No Divorce Where Marriage Still “Commercially Viable”’ (4 May 2010) Mondaq Commercial Litigation and Dispute Resolution Update <<http://www.mondaq.com>>, cited in Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming) 166–167.

96 *Tomanovic v Global Mortgage Equity Corporation Pty Ltd* (2011) 84 ACSR 121. For a full summary of the facts see Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming) 167.

97 *Tomanovic v Global Mortgage Equity Corporation Pty Ltd* (2011) 84 ACSR 121.

98 *Ibid* 189 (Campbell JA) 191 (Macfarlan JA) 194 (Young JA).

99 *Ibid* 188 (Campbell JA).

3.71 Justice of Appeal Campbell went on to say:

After judgment had been reserved, further submissions were invited from the parties on that topic. The Respondents' submissions in response to that invitation objected to the matter being raised at this stage, when it was not part of the case of the Appellants at either the trial or on appeal.

Once this objection is taken, it must be acceded to, as the Court is in no position to be satisfied that the availability of relief concerning the units in the Trust could not be affected by facts additional to those investigated at the trial.<sup>100</sup>

3.72 Bergman notes that despite these remarks, it is not clear in the later proceeding whether the units were actually taken into account as part of the process of valuing the shares, since at that stage the parties agreed to a buyout process as part of winding up the business.<sup>101</sup>

3.73 In the Commission's view, the case is difficult to reconcile fully with the *Kizquari* approach. Under Justice of Appeal Campbell's reasoning, merely treating the value of the units as transposed into the value of the shares does not answer the question of what happens to the beneficial ownership in the unit trust, and thus will not 'totally [resolve] the commercial relations between the parties'.<sup>102</sup> However, this difficulty appears to have arisen since the Court of Appeal considered it necessary to make orders consistently with the way the case was argued on appeal. While, as noted above at [3.70], the judgments refer to the *Kizquari* and *Vigliaroni* line of cases, they did not clearly indicate a preference for either. In the Commission's view, this means that *Tomanovic* does not support either approach.

3.74 The Commission notes, however, that the approach of valuing the shares with respect to the units adopted by Justice of Appeal Campbell had been utilised in the reasoning of Justice Davies in *Vigliaroni* and Justice Ferguson in *Drapac*.<sup>103</sup>

3.75 Moreover, according to Bergman, the highly unusual facts<sup>104</sup> of the case 'reflected aspects of estoppel and specific performance',<sup>105</sup> which takes the reasoning beyond the analysis considered in this chapter.

### ***Drapac and Arhanghelschi***

3.76 Justice Davies' approach in *Vigliaroni* was approved and developed by Justice Ferguson of the Supreme Court of Victoria, in *Wain v Drapac (Drapac)*.<sup>106</sup> In that case, 'with a view to securing their participation in management',<sup>107</sup> the defendant, Mr Drapac, issued the plaintiffs, Mr Wain and Mr Murchie, with units in property trusts, and with shares in the trustee companies.<sup>108</sup> At trial, Wain and Murchie argued oppression including 'the termination of their directorships and the planned dilution of their interests'.<sup>109</sup> The plaintiffs sought orders that Drapac or other entities in the corporate group purchase their shares in the trustee companies and their units in the trusts.<sup>110</sup>

100 Ibid 189 [305]–[306].

101 Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming) 168, citing *Tomanovic v Global Mortgage Equity Corporation Pty Ltd (No 2)* (2011) 288 ALR 385; 86 ACSR 119.

102 *Tomanovic v Global Mortgage Equity Corporation Pty Ltd* (2011) 84 ACSR 121, 188.

103 *Wain v Drapac (No 2)* [2013] VSC 381 (31 July 2013) [40].

104 This point was made in *Tomanovic v Global Mortgage Equity Corporation Pty Ltd* (2011) 84 ACSR 121, 191 (Young JA).

105 Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming) 167; see the reasoning of Young JA at 191, [318]–[320] in *Tomanovic v Global Mortgage Equity Corporation Pty Ltd* (2011) 84 ACSR 121.

106 *Wain v Drapac* [2012] VSC 156 (26 April 2012). See R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford's Principles of Corporations Law* (at 109) [10.435.12]; Braydon Heape, 'Oppression Proceedings and Trust Remedies: What are the limits?' (2013) 31 *Company and Securities Law Journal* 325, 326; Michael May, 'Oppression in the context of corporate trustees' (2013) 87 *Australian Law Journal* 271, 274–5; Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming) 170–4.

107 Braydon Heape, 'Oppression Proceedings and Trust Remedies: What are the limits?' (2013) 32 *Company and Securities Law Journal* 325, 326.

108 Braydon Heape, 'Oppression Proceedings and Trust Remedies: What are the limits?' (2013) 32 *Company and Securities Law Journal* 325, 326. For a fuller description of the facts in *Drapac*, see the Commission's consultation paper, Victorian Law Reform Commission, *Trading Trusts—Oppression Remedies*, Consultation Paper No 21 (2014) 30.

109 Braydon Heape, 'Oppression Proceedings and Trust Remedies: What are the limits?' (2013) 32 *Company and Securities Law Journal* 325, 326.

110 Ibid.

3.77 Justice Ferguson made the requested orders. She approved the decision in *Vigliaroni*, especially in relation to the importance of section 53:

The words “in respect of” have a very wide meaning. Bearing this in mind, and with respect, in my opinion Windeyer AJ’s construction of this legislation<sup>111</sup> is too narrow. Were that interpretation to be accepted, then in cases such as the present, where there is a complex corporate structure that is a mixture of companies and trusts but in a real sense only one business is conducted by the corporate group, the legislation would be rendered virtually useless to remedy the real harm that has been caused by the oppressive conduct. It would strike me as odd if the court could take into account oppressive or unfair conduct in the company’s affairs in determining whether relief may be granted but then could not give effective relief to redress the harm caused by that conduct. That this is not intended is, I think, clear from the terms of s 233 in respect of at least one form of order for which specific provision is made. In this regard, the section provides that the court may make any order that it considers appropriate in relation to the company including an order regulating the company’s affairs in the future. As noted above, the company’s affairs includes its business, transactions and dealings with others. In my view, it is clear that the legislative intent was to include the power to grant relief provided that (in the words of Davies J) there is a “rational and discernible link between the remedy and the company in which the oppression has occurred.” In a complex corporate structure (such as the Drapac Group) there is such a link between the companies and the relevant trusts which together operate the business. In my opinion, there is power to grant the relief sought and consideration now needs to be given to whether, as a matter of discretion, it should be given.<sup>112</sup>

3.78 Justice Ferguson was satisfied that making the orders was ‘an appropriate exercise of discretion.’<sup>113</sup> Her Honour proceeded to order Drapac and his company Briaroaks to purchase Wain and Murchie’s interests, both shares and units, at fair value.<sup>114</sup> Justice Ferguson went on, in a separate decision, to value the interests cumulatively.<sup>115</sup>

3.79 While Justice Ferguson largely followed the reasoning of Justice Davies in *Vigliaroni*, she relied upon the ‘quasi-partnership’ concept, expounded by Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd (Ebrahimi)*.<sup>116</sup> Justice Ferguson relied upon *Ebrahimi* to explain that remedies for oppressive conduct are not entirely the construct of corporations law statutes. Rather, they draw on established ‘equitable principles based in the doctrine of “legitimate expectations” that arise between quasi-partners in the creation of a [business] venture, whatever the form of the entity in which the venture takes place.’<sup>117</sup> Justice Ferguson followed a broad, liberal approach to applying statutory oppression remedies, irrespective of the structure of the relevant entity.

3.80 While an appeal against the decision in *Drapac* was lodged with the Victorian Court of Appeal, the substantive issues did not proceed to hearing. This meant that a potential opportunity for an intermediate appellate court to clarify the conflicting authorities did not arise.

3.81 Justice Ferguson also relied upon the *Vigliaroni* approach in the subsequent decision of *Arhanghelschi v Ussher (Arhanghelschi)*.<sup>118</sup> The case involved a dispute between ‘partners’ in a radiology practice conducted through a unit trust. Justice Ferguson found against the plaintiff, on the ground that the majority acted in accordance with the terms of the

111 *Trust Company Ltd v Noosa Venture I Pty Ltd* (2010) 80 ACSR 485 [105].

112 *Wain v Drapac* [2012] VSC 156 (26 April 2012) [287].

113 Braydon Heape, ‘Oppression Proceedings and Trust Remedies: What are the limits?’ (2013) 32 *Company and Securities Law Journal* 325, 326, citing *Wain v Drapac* [2012] VSC 156 (26 April 2012) [287]–[293].

114 *Wain v Drapac* [2012] VSC 156 (26 April 2012) [293].

115 *Wain v Drapac (No 2)* [2013] VSC 381 (31 July 2013).

116 [1973] AC 360. *Ebrahimi* is discussed at some length in Chapter 4 below, [4.52]–[4.68].

117 Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming) 169, citing *Wain v Drapac* [2012] VSC 156 (26 April 2012) [273].

118 (2013) 94 ACSR 86; See Peter A Clarke, *Arhanghelschi v Ussher* [2013] VSC 253 (16 May 2013): *Oppression, conduct of the affairs of trustee company oppressive, unfairly prejudicial, or unfairly discriminatory, section 232 and 233 Corporations Act* (27 May 2013, peteraclarke.com.au) <<http://www.peteraclarke.com.au>>, cited in Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming) 173.



unitholders' agreement; moreover, she used this agreement to distinguish 'the case from the equitable rights of parties in other (quasi) partnerships where no such agreements apply.'<sup>119</sup>

- 3.82 As a result, Justice Ferguson rejected the plaintiff's claim, finding that the conduct was not oppressive under section 232:

Here, in my opinion, there is nothing commercially unfair to Dr Arhanghelschi. This is not a case where equitable considerations have a role to play. Whilst the doctors referred to themselves as partners, they chose to regulate their relationship primarily through the terms of the Unitholders Deed. That is a distinguishing feature of this case.<sup>120</sup>

- 3.83 Despite the result, the reasoning of Justice Ferguson clearly allows for the grant of an oppression remedy to unitholders or beneficiaries under Part 2F.1 of the Corporations Act.<sup>121</sup>

## Conclusion

- 3.84 The cases reviewed above indicate the current tension in Australian law between two competing lines of authority. The fact that *Vigliaroni* was criticised in *Noosa Ventures* underlines the uncertain state of the law in this area. This is an argument for statutory intervention, to clarify the parameters and operation of the law.
- 3.85 In its consultation paper, the Commission asked a series of questions about the opposing lines of authority.<sup>122</sup> Several submissions address this issue. Three submissions indicated support for the *Vigliaroni/Drapac* approach.<sup>123</sup> The Commercial Bar Association of Victoria expressly agrees with the approach taken in these cases, that once the discretion in section 232 of the Corporations Act is 'enlivened', section 233 empowers the court to make orders 'in relation to the company', including trusts of which the company is trustee.<sup>124</sup>
- 3.86 One submission favoured the *Kizquari* line of authority,<sup>125</sup> referencing Justice Young in *John J Starr (Real Estate) Pty Ltd v Robert R Andrew (A'Asia) Pty Ltd*,<sup>126</sup> where he noted that courts are reluctant to use oppression remedies to assist franchisees in enforcing franchise contracts with a corporate franchisor.<sup>127</sup> It reiterates that Justice Young's approach in *Kizquari* and *Starr* is that non-shareholder rights are to be enforced outside the oppression remedies and that there do not appear to be any previous authorities to support Justice Davies' approach in *Vigliaroni*.<sup>128</sup>
- 3.87 However, regardless of which line of authority is ultimately found to reflect the law in Australia, the Corporations Act cannot provide a comprehensive or complete remedy for all beneficiaries. This is due to the requirement for such beneficiaries to be shareholders in the corporate trustee. This is one of the reasons that the Commission recommends that the Trustee Act be amended to provide for an oppression remedy for beneficiaries of trading trusts.

119 Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming) 173.

120 *Arhanghelschi v Ussher* (2013) 94 ACSR 86, 100 [51] (citations omitted).

121 *Ibid*; also see Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming) 173.

122 Victorian Law Reform Commission, *Trading Trusts—Oppression Remedies*, Consultation Paper No 21(2014) 68, questions [7]–[13].

123 Submission 1 (Professor Matthew Conaglen, University of Sydney Law School) 2; Submission 5 (Commercial Bar Association of Victoria) 3–5; and Submission 7 (Institute of Legal Executives (Victoria)) 2.

124 Submission 5 (Commercial Bar Association of Victoria) 2.

125 Submission 6 (Cornwall Stodart and Ari Bergman) 5.

126 (1991) 6 ACSR 63.

127 *Ibid*.

128 Submission 6 (Cornwall Stodart and Ari Bergman), 5.

# Forms of equitable and statutory relief

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## 4. Forms of equitable and statutory relief

### Introduction

- 4.1 This chapter will examine the different forms of equitable and statutory relief available to beneficiaries. The purpose of the chapter is to consider whether existing forms of relief in a situation of oppression enable beneficiaries to extricate their interests from the trust structure.
- 4.2 As explained in Chapter 3, the remedy that achieves this objective for a company is the buyout order. Another important remedy, which partially achieves this objective, is the winding-up order. The following analysis will consider whether there are equivalent forms of relief in equity and under statute.
- 4.3 Several participants during consultations suggested that the application of existing equitable doctrine has been settled by the approach adopted in *Vigliaroni v CPS Investment Holdings Pty Ltd (Vigliaroni)* and *Wain v Drapac (Drapac)*. The implication of this approach is that existing equitable doctrine is ill-suited to provide similar relief to the oppression remedy; the focus of these cases was on the possibility of extending relief under the *Corporations Act 2001* (Cth) to trading trusts.
- 4.4 In the Commission's view, existing equitable doctrines and statutory remedies do not allow for the type of relief granted in the *Vigliaroni* and *Drapac* line of cases. Thus, the Commission considers that the limited nature of existing equitable doctrines and statutory remedies underpins the argument for legislative reform.
- 4.5 As explained in Chapter 3, under section 233 of the Corporations Act, the broad and flexible nature of the oppression remedy allows for different forms of relief. There are equitable and other remedies that may serve similar purposes. However, this report will not consider the full array of alternative remedies. Buyout and winding-up orders are particularly significant, being the remedies sought in the *Vigliaroni* and *Drapac* line of cases. Generally speaking, under trust law the equivalent remedies available in equity are redemption and termination. Although these will be the primary focus of this chapter, the Commission has also considered the equitable doctrines of quasi-partnership and fraud on power.
- 4.6 The consultation paper outlined equitable remedies that operated in a similar way to some of the remedies available to relieve oppression. The submissions that addressed these issues were of the express opinion that the ordinary remedies available in trust law were insufficient. The overall conclusion is that none of these remedies performs the same function as the oppression remedy under the Corporations Act.



- 4.7 The most important situations to be considered are where the trading trust is terminated, or units are redeemed pursuant to the terms of the trust deed. The Commission has identified a number of difficulties in relying on the terms of the trust. These will be discussed below.<sup>1</sup>
- 4.8 However, a fundamental difficulty is that even where redemption of units or termination of the trust is possible, these remedies do not offer the kind of remedial flexibility achieved through the oppression remedy. In the Commission's view, this deficiency creates a strong case for reform.
- 4.9 The consultation paper also considered whether provisions of the *Trustee Act 1958* (Vic) and the inherent jurisdiction of the court could be used to provide beneficiaries with relief akin to an order for buyout or winding up. The Commission has taken the view that neither the provisions of the Trustee Act nor the inherent jurisdiction of the court provide beneficiaries with adequate remedies to relieve against oppressive conduct.
- 4.10 The first section of this chapter explains the conceptual difference between the remedies of termination and winding up. The next sections examine a number of equitable avenues including:
- termination and redemption pursuant to the terms of the trust deed
  - estoppel
  - vesting of the trust pursuant to the rule in *Saunders v Vautier*
  - quasi-partnership
  - fraud on power.
- The final sections consider statutory relief under trustee legislation and pursuant to the inherent jurisdiction of the court.

## Termination and winding up

- 4.11 An important distinction, which underpins the analysis that follows, is that the termination of a trust is fundamentally different from that of a company. As explained by Justice Young:
- there is a very real distinction between a corporation and a trust, in that with a corporation the property is vested in the corporation itself, but with a trust the property and the prima facie liability for the debts is vested in the trustee.<sup>2</sup>
- 4.12 Thus, it is not possible to terminate a trust in the same way that a partnership is dissolved, or a company is wound up pursuant to section 461 of the Corporations Act.<sup>3</sup> Rather 'the trust simply comes to an end in certain circumstances and the property is distributed among the beneficiaries.'<sup>4</sup> In contrast to the court's power to wind up companies under the Corporations Act, with regards to trusts '[t]he court has a duty to uphold and protect trusts, not to destroy them.'<sup>5</sup>
- 4.13 An exception to this principle, where the trust is insolvent, is that 'the creditors may have a corporate trustee wound up under the Corporations Act and a liquidator appointed. That liquidator will, in a practical sense, terminate or "wind up" the trust.'<sup>6</sup>

1 From paragraphs [4.22] following.

2 *Horwath Corporation Pty Ltd v Huie* (1999) NSWSC 583 (19 March 1999) [14].

3 P Young, C Croft and M Smith, *On Equity* (Lawbook Co, 2009) 502. Also see the conclusions from CAMAC, 'Managed Investment Schemes' (Report, July 2012) 57, cited in Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming) 59.

4 CAMAC, 'Managed Investment Schemes' (Report, July 2012) 57, cited in Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming) 85.

5 P Young, C Croft and M Smith, *On Equity* (Lawbook Co, 2009) 502, citing *Re Gaydon* [2001] NSWSC 473 (8 June 2001) [29].

6 P Young, C Croft and M Smith, *On Equity* (Lawbook Co, 2009) 502.

- 4.14 In general terms equity allows a trust to be terminated pursuant to the terms of the trust deed including a power of revocation, and when the beneficiaries are in agreement and 'have an absolute indefeasible interest in the trust assets, and call for the trustee to pay over the fund'.<sup>7</sup>
- 4.15 However, for reasons that will be considered, these mechanisms are not always appropriate in the context of trading trusts. A significant limitation is that most of these mechanisms deal with outright termination of the trust, rather than the redemption by a beneficiary of their interest.

## Termination and redemption under the trust deed

### General principles

- 4.16 As outlined in Chapter 2, the trust deed sets out the primary rights and obligations of beneficiaries in a trading trust. The trust deed will usually contain provisions dealing with the termination of the trust. If conditions under the trust deed are met:
- the trust will be wound up under the secondary contractual provisions of the trust deed, or the trust property will be held under subsidiary trusts as contained in the deed. The court will give effect to those provisions.<sup>8</sup>
- 4.17 The trust deed may contain terms which specify the conditions for the termination of the trust. Where the trading trust is a unit trust, the trust deed will usually specify the mechanism for the redemption of units by the trustee or for purchase by another unitholder.

### Termination pursuant to the trust deed

- 4.18 The general opinion expressed during consultations and submissions was that termination under the terms of the trust deed was unsatisfactory. The Commercial Bar Association of Victoria submitted:
- [t]he remedies available and the results of the various cases turn not only on the view taken of the applicable law but also on the differences in the facts and the provisions of the various trust deeds and/or unitholder deeds. For example, in *Kizquari*, the Court was able to make orders for the restoration of funds to the trust, so that exercise by the unitholder of their rights under the trust deed would lead to their receiving a fair price for their units. However as acknowledged by Young CJ in Eq in the later case of *McEwan v Combined Coast Cranes Pty Ltd (2002) 44, ACSR 244*, putting in train a pre-emption procedure will only assist the plaintiff where the value of the units is not alleged to have been affected by the activities of the defendant(s). Further, even in cases where there is no misappropriation, exit provisions are generally drafted to give the trustee discretion whether or not to accept a request for redemption or for the other unitholder(s) to have discretion whether or not to purchase the units of a unitholder who wishes to depart. Such provisions will not assist a unitholder who wishes to exit in circumstances where the other unitholders do not wish to cooperate.<sup>9</sup>
- 4.19 Cornwall Stodart and Ari Bergman submitted that termination pursuant to the trust deed may be useful in a limited range of circumstances.<sup>10</sup> However, this will only be the case where:
- there is no negative impact on the value of the trust assets that the oppressed minority beneficiary receives as a result of the termination.<sup>11</sup>

7 Ibid 501.  
8 P Young, C Croft and M Smith, *On Equity* (Lawbook Co, 2009) 503, citing *Re Gaydon* [2001] NSWSC 473 (8 June 2001) [29].  
9 Submission 5 (Commercial Bar Association of Victoria) 4.  
10 Submission 6 (Cornwall Stodart and Ari Bergman) 6.  
11 Ibid 6.

- 4.20 This submission reflects the fact that there is generally no market for the sale of units in private trading trusts. Moreover, it also reflects the problem identified by the Commercial Bar Association of Victoria discussed above, that the terms of the trust deed will not generally account for the possibility that the trustee could, through conduct, devalue or appropriate trust property, which would consequently affect the value of the beneficiaries' units.
- 4.21 As discussed in Chapter 2 at [2.16], the terms of the trust can be supplemented through additional agreements between shareholders and unitholders. However according to Peter Agardy, 'it is rare to see competently drawn agreements of this kind in place. In many cases there are no such agreements at all.'<sup>12</sup> Participants during consultations also suggested that similar logic could be applied to the terms of the trust deed.

### The Commission's view

- 4.22 The Commission agrees that there may be circumstances where there would be no injustice in terminating the trust or redemption of units pursuant to the trust deed. However, as the above submissions reflect, this may not always be the case. Moreover, as shown in Chapter 5, an oppression remedy that allows the court to make orders notwithstanding compliance with the trust deed does not mean that a court will ignore the terms of the trust. On the contrary, the Commission's recommendations envisage judicial reasoning explicitly being engaged with the terms of the trust instrument. In the Commission's view the reasoning of Justice Ferguson in *Arhangelschi* supports this approach.
- 4.23 The case of *Gra-Ham Australia Pty Ltd v Perpetual Trustees WA Ltd*<sup>13</sup> is another example of the interaction between general law principles and the terms of the trust deed. In that case, unitholders in a public unit trust applied to redeem their units after the 1987 stock market crash. Pursuant to the terms of the trust deed, the unitholders applied for a valuation from a date seven days prior to the redemption, which was also before the stock market crash. The manager of the unit trust convened a general meeting of all unitholders and amended the trust deed to provide that redemptions were to be valued at the date of redemption.<sup>14</sup> As Bergman notes, the trust deed in the case provided 'the majority unitholders with the power to amend the terms of the trust deed and bind all unitholders to the amended terms.'<sup>15</sup>
- 4.24 The Western Australian Court of Appeal found against the unitholder on the basis that the manager of the unit trust had acted in accordance with the terms of the trust deed, and had acted *bona fide* for the benefit of all the unitholders.<sup>16</sup> Although the unitholder was not a shareholder in the corporate trustee, meaning that the statutory oppression remedies could not apply, Chief Justice Malcolm suggested that the principles of the equitable doctrine of fraud on power articulated by the High Court in *Peters' American Delicacy Co Ltd v Heath*<sup>17</sup> were equally applicable to unit trusts.<sup>18</sup> Whether the doctrine of fraud on power provides a suitable alternative to the statutory oppression remedy will be considered further below.
- 4.25 In the Commission's view, the reasoning in the case demonstrates the importance of considering the terms of the trust deed in determining whether oppression has occurred. The Commission envisages that a similar inquiry would be required under the proposed amendment. It should be noted that under section 232 of the Corporations Act, while the

12 Submission 2 (Peter Agardy, Victorian Bar) 2.

13 (1989) 1 WAR 65.

14 This summary of the facts reflects Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming) 38.

15 Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming) 38.

16 *Gra-Ham Australia Pty Ltd v Perpetual Trustees WA Ltd* (1989) 1 WAR 65, 81.

17 (1939) 61 CLR 457.

18 *Gra-Ham Australia Pty Ltd v Perpetual Trustees WA Ltd* (1989) 1 WAR 65, 77–81.

fact that an exercise of a power in good faith is a relevant consideration,<sup>19</sup> a finding that a decision was made in good faith will not preclude a finding that conduct was oppressive.<sup>20</sup>

- 4.26 In the Commission’s view, there are a number of reasons why the provisions of the trust deed leave unitholders in an unsatisfactory position.
- 4.27 First, the parties may simply not have contemplated the problem that may arise in the event that a unitholder seeks to realise their interest.<sup>21</sup> In such a case, it is not clear that any remedy, other than the rule in *Saunders v Vautier*, would be available. Where the trust does contain a termination provision, as submitted by the Commercial Bar Association of Victoria, referred to above at [4.18],<sup>22</sup> the approach of Justice Young in *Kizquari* shows that the ordinary principles of trust law, in combination with the terms of the trust deed, may allow for an order equivalent to a buyout. However, this will depend on the specific terms of the trust.
- 4.28 Secondly, even where these eventualities are contemplated by the trust instrument, the terms of the trust deed will typically provide that an offer to redeem units must be made first to existing unitholders.<sup>23</sup> This may prevent a unitholder from redeeming their units for full value. A substantial number of participants in consultations and submissions suggested that this would lead (and had led) to manifestly unjust outcomes for beneficiaries.
- 4.29 There is some authority which suggests that in the context of the distribution of a beneficiary’s interest, in a difficult case a court can assist with valuation by reference to criteria external to the procedure set out in the trust deed.<sup>24</sup> However, in the Commission’s view, it is not clear that these principles are appropriate in the context of redemption pursuant to the terms of the trust deed.
- 4.30 As suggested in Chapters 2 and 3, the underlying reason why this situation might be unsatisfactory for individual unitholders is the absence of a ready market for units in private unit trusts. Arguably, this is a fundamental feature of private unit trusts, and it follows that if a unitholder decides to invest in a private unit trust, and the trust deed contains specific provisions regarding redemption and termination, then the unitholders are put on notice that it will be difficult to extricate themselves from the trust. This reasoning appears to have been adopted by Justice Ferguson in *Arhanghelschi*.<sup>25</sup>
- 4.31 During consultations, participants generally rejected this reasoning. A difficulty is that it presupposes that beneficiaries of trading trusts have been adequately advised (or can be advised) of the precise wording and implications of the trust deed. A substantial number of participants at the round table rejected this reasoning, suggesting that the reality was more complex. Peter Agardy submitted that:

In my experience business people usually rely on their lawyers and accountants to recommend appropriate structures for their business. It is often the tax accountants that recommend a trading trust with a corporate trustee, usually a unit trust with discretionary trusts to own the units....

The result is that when there is a dispute between the persons in businesses they are caught in a web of uncertainty. Their rights and obligations are determined by corporations law and trust law. It is rare for the directors of the corporate trustee (who are often also shareholders of the trustee company and beneficiaries of the discretionary trusts that own the units in the unit trust) to fully understand their structures... and that they have left themselves without an obvious remedy when they argue.<sup>26</sup>

19 *Advance Bank Australia Ltd v FAI Insurances Ltd* (1987) 9 NSWLR 464, 493–4 (Mahoney JA); *Peters’ American Delicacy Co Ltd v Heath* (1939) 61 CLR 457, 512–3; *Campbell v Backoffice Investments Pty Ltd* (2008) 66 ACSR 359, 406.

20 *Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459, 471–2; *Re George Raymond Pty Ltd* (2000) 36 ACSR 381, 386–7.

21 See the facts of *Wain v Drapac* [2012] VSC 156 (26 April 2012); discussed in Chapter 3 at [3.76]–[3.83].

22 Submission 5 (Commercial Bar Association of Victoria) 4.

23 For example see the facts of *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd* (2008) 66 ACSR 325.

24 H A J Ford, W A Lee, M Bryan, J Glover, I G Fullerton, Thomson Reuters, *Ford and Lee: The Law of Trusts* (4 December 2014) [16.210], citing *Hymn v Permanent Trustee Co of NSW Ltd* (1914) 14 SR (NSW) 348; *Carr v Carr* (1987) 8 NSWLR 492; *Re White* [2001] Ch 392.

25 *Arhanghelschi v Ussher* (2013) 94 ACSR 86.

26 Submission 2 (Peter Agardy, Victorian Bar) 2.

- 4.32 The Commercial Bar Association of Victoria also implicitly rejected this argument, suggesting that it presupposed that:
- participants enter willingly into trading trust structures. The reality is that participants enter into these structures often unknowingly, generally on the fairly high level advice of their accountants that the structure will be tax effective, but without appreciating the consequences of the structure if the business relationship breaks down.<sup>27</sup>
- 4.33 In the Commission's view, these submissions show that the problems besetting minority unitholders will not be resolved by a call for the more careful drafting of trust deeds.
- 4.34 Some participants, while acknowledging the validity of these arguments, suggested that they raised a further policy question: given that the underlying consideration of trust law is to protect the autonomy of the settlor, then should the law intervene to allow the court to override the express terms of the trust?<sup>28</sup> This question raises policy considerations that will be examined further in Chapter 5.

### Unilateral termination of the trust deed

- 4.35 It is possible to unilaterally terminate a trust pursuant to a special power of revocation, if this power is included in the trust deed.<sup>29</sup> However, because of adverse tax consequences these provisions are rarely included in trust deeds.<sup>30</sup>

### Estoppel

- 4.36 Even where a redemption clause is unambiguous, other equitable doctrines, in particular estoppel, may be relied on by unitholders. Although the requirements are somewhat fluid, estoppel requires that the plaintiff demonstrate that:
- (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise. For the purposes of the second element, a defendant who has not actively induced the plaintiff to adopt an assumption or expectation will nevertheless be held to have done so if the assumption or expectation can be fulfilled only by a transfer of the defendant's property, a diminution of his rights or an increase in his obligations and he, knowing that the plaintiff's reliance on the assumption or expectation may cause detriment to the plaintiff if it is not fulfilled, fails to deny to the plaintiff the correctness of the assumption or expectation on which the plaintiff is conducting his affairs.<sup>31</sup>
- 4.37 In *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd (Koko Black)* the majority unitholder Mr Hills, who was a director in the corporate trustee Koko Black Pty Ltd, attempted to rely on a power under clause 7.2 of the trust deed, which allowed for the compulsory acquisition of units. Justice of Appeal Dodds-Streton however found that Hills had made a representation:

27 Submission 5 (Commercial Bar Association of Victoria) 5.

28 Submission 3 (Professor Elise Bant and Associate Professor Matthew Harding, University of Melbourne Law School) 1.

29 P Young, C Croft and M Smith, *On Equity* (Lawbook Co, 2009) 502.

30 *Ibid* 502–3.

31 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 428–9, cited in *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd* (2008) 66 ACSR 325, 342.

that investors would be entitled to retain their investment until either successful expansion on a substantial scale was achieved, substantial capital gain secured and the routine reinvestment of all profit was no longer required, or at least, until there had been a reasonable opportunity to achieve these goals. The compulsory redemption of the investors' interests while the reinvestment policy continued and the business was on the verge of a new phase of significant growth is inconsistent with that meaning, which clearly accords with the understanding to which Messrs Jackson and West deposed.<sup>32</sup>

- 4.38 Furthermore, Justice of Appeal Dodds-Streeton found that Hills had
- in order to implement his business plans, induced the appellants to invest funds and otherwise to participate in the conduct and management of the business and to forgo any return or benefit from its successful operation and growth. The appellants' investment of funds and other contributions were induced by, inter alia, Mr Hills' repeated, although relatively imprecise representations that their investment would be for 'the long term', in order to facilitate significant expansion, and, implicitly, consequent capital growth.<sup>33</sup>
- 4.39 Moreover, it was clear on the facts that the minority unitholders had acted in reliance on the representations of a long-term venture to their detriment by investing in the business.<sup>34</sup>
- 4.40 On the facts, the estoppel claim was made out, which prevented Hills from compulsorily acquiring the units of the minority despite a clear power in the trust deed. However, the requirements for an estoppel claim<sup>35</sup> suggest that the action will generally only be appropriate in circumstances where the trust structure resembles a partnership or joint venture. The representations arose in *Koko Black* because the unitholders had negotiated the future course of the business and the terms of the trust deed. Thus, where unitholders seek to merely invest funds without taking part in the management of the business, it is less likely that estoppel will be relevant.
- 4.41 For these reasons, participants during consultations were generally sceptical about the possibility of estoppel fulfilling the same function as the oppression remedy. Cornwall Stodart and Ari Bergman submitted that:
- estoppel based on *Koko Black* may assist, but the facts that give rise to estoppel do not commonly apply to cases involving oppression of beneficiaries.<sup>36</sup>
- 4.42 The Institute of Legal Executives (Victoria) made submissions to similar effect.<sup>37</sup>
- 4.43 As shown in Chapter 3, it is not necessary under Australian law to demonstrate a lack of good faith or unconscionability in order to obtain an oppression remedy. If an oppression remedy is available for beneficiaries of a trading trust this would reduce the need to rely upon the doctrine of estoppel.

## The rule in *Saunders v Vautier*<sup>38</sup>

- 4.44 Throughout consultations, it became apparent that the rule in *Saunders v Vautier* does not provide an adequate basis for the termination of trading trusts in order to provide similar relief to the oppression remedy. However, in the Commission's view, an understanding of the rule is useful from an analytical perspective. There are two reasons for this.

32 *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd* (2008) 66 ACSR 325, 352.

33 *Ibid.*

34 *Ibid.* 352–3.

35 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 428–9, cited in *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd* (2008) 66 ACSR 325, 342.

36 Submission 6 (Cornwall Stodart and Ari Bergman). According to Ari Bergman an example of where the doctrine of estoppel may assist unitholders can be found in *Tomanovic v Global Mortgage Equity Corporation* (2011) 84 ACSR 121,191; See Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming).

37 Submission 7 (Institute of Legal Executives (Victoria)) 2.

38 (1841) 4 Beav 115.



- 4.45 First, the conceptual basis of the rule further highlights the functional differences outlined in Chapter 2 between trading trusts and other forms of express trusts. Secondly, and allied to the first, the rule in *Saunders v Vautier* may be useful in explaining the policy rationale of the variation of trusts legislation, which will be discussed later in the chapter.
- 4.46 According to the authors of the *Law of Trusts and Trustees*, this rule provides that ‘if the beneficiaries are adults under no disability and entitled between them to the whole beneficial interest they can terminate the trust and divide the trust property between them.’<sup>39</sup>
- 4.47 The rule has been rationalised on the basis that:
- beneficiaries are the ultimate owners of the trust property, and if competent, should be able to decide what is to be done with it. If there is a sole capacitated beneficiary, and the beneficial interest has vested in him so that either he or his heirs must inevitably be entitled to the property free of the trustee’s control the time has come to dispense with the trustee. To the objection that the settlor apparently intended that the trustee remain in place, it can be replied that if the settlor has made an absolute gift of the beneficial interest in property, the settlor’s primary intention is simply to make the gift. Once vesting has occurred, there is no reason to retain the paraphernalia of the trust.<sup>40</sup>
- 4.48 It is important to note that the rule also applies to the beneficiaries of a discretionary trust.<sup>41</sup>
- 4.49 The rule therefore applies when the beneficiaries are of full capacity and, as between themselves, are exclusively entitled to have the trust duly administered.<sup>42</sup> In practice, however, the operation of the rule in *Saunders v Vautier* is limited by any right of indemnity the trustee may have from the trust property.<sup>43</sup> In such a case the trustee itself will have an interest in the trust property.<sup>44</sup> Accordingly, the application of the rule also depends upon the precise terms of the trust deed.<sup>45</sup>
- 4.50 As outlined in Chapter 2, the traditional view of an express trust is of a gratuitous transfer of property by the settlor. Moreover, the intention to transfer the trust property is ordinarily manifested in the trust deed.<sup>46</sup> Thus, the rule in *Saunders v Vautier* is essentially an exception to the principle that the trust property vests in accordance with the terms of the trust deed.<sup>47</sup> It follows that ‘the court will act cautiously in ordering any vesting where the issue is in dispute between the beneficiaries.’<sup>48</sup> The rule from *Saunders v Vautier* has no application in any case where unanimity of purpose is absent.
- 4.51 In the Commission’s view, the rule is not practically suited to the function of trading trusts, especially where the beneficiaries have invested at arm’s length. In such a case, it is less likely that the beneficiaries would reach an agreement to terminate the trust. The rule is therefore of no assistance to a minority unitholder who is either being oppressed by the majority, or simply wishes to sell their minority unitholding.

39 Underhill and Hayton, *Law of Trusts and Trustees* (16th edition, 2003) 27, cited in ‘Report on Variation and Termination of Trusts’, Scottish Law Commission, 2007, 7.

40 ‘The rule in *Saunders v Vautier* and the Variation of Trusts’, Law Reform Commission of Saskatchewan, 1994, 6.

41 H A J Ford, W A Lee, M Bryan, J Glover, I G Fullerton, Thomson Reuters, *Ford and Lee: The Law of Trusts* (4 December 2014) [16.090], citing *Re Smith* [1928] Ch 915; also see *Sir Moses Montefiore Jewish Home v Howell & Co Pty Ltd (No 7)* [1984] 2 NSWLR 406.

42 P Young, C Croft and M Smith, *On Equity* (Lawbook Co, 2009) 501.

43 P Young, C Croft and M Smith, *On Equity* (Lawbook Co, 2009) 501, citing *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98.

44 *Ibid.*

45 P Young, C Croft and M Smith, *On Equity* (Lawbook Co, 2009) 501. According to Sin, a contractual right owed under the trust deed will also preclude the operation of the rule. See Kim Fam Sin, *The Legal Nature of the Unit Trust* (Clarendon Press, 1997) 117–8.

46 *Byrnes v Kendle* (2011) 243 CLR 253, 286–8 (Heydon and Crennan JJ).

47 Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming) 84–5.

48 *Ibid.* 85.

## Quasi-partnerships

4.52 It is well established that the beneficiaries of a unit trust are not formally partners.<sup>49</sup> However, a partnership may be implied if the beneficiaries are granted ‘powers sufficient to enable them as a practical matter to control the trustees’ conduct of the business.’<sup>50</sup>

4.53 According to Justice Hayton, writing extra-judicially:

It is not exactly clear what degree of involvement in the activities of the trustee-manager will suffice as carrying on a business in common. However it is clear that the fact that, under the rule in *Saunders v Vautier*, the beneficiaries, if together absolutely entitled and of full capacity, can terminate the trust and require the assets to be transferred to them does not mean that they are participants in the conduct of the business. Until they take advantage of the rule they have no right to give directions or be consulted—unless given such right by the trust instrument.<sup>51</sup>

It follows that an examination of the trust deed is required in order to determine whether a relationship of partnership exists.

4.54 However, counsel in a line of Australian cases<sup>52</sup> have sought to rely upon the decision of *Ebrahimi v Westbourne Galleries Ltd (Ebrahimi)*<sup>53</sup> to suggest that beneficiaries of a trading trust can stand in a relationship of quasi-partnership. That is, the relationship lacks the formal characteristics of a partnership but still possesses certain fundamental equitable characteristics.<sup>54</sup>

4.55 Indeed, as Bergman argued:

a quasi-partnership refers to the concept that joint participants in a business venture may have legitimate partnership-type expectations of each other notwithstanding the fact that the vehicle in which the business is conducted is not formally a legal partnership and the purported legitimate expectations may not have been formally contracted.<sup>55</sup>

4.56 In *Ebrahimi*, Mr Ebrahimi and Mr Nazar had been formal partners in a carpet business. However, a company was formed with both holding a 50 per cent shareholding, and acting as directors. Later Mr George Nazar, the son of Mr Nazar, entered the business, and was transferred 100 shares from Ebrahimi and Nazar. Nazar and his son used their greater voting power to remove Ebrahimi from the board.

4.57 Lord Wilberforce held that in a small proprietary company, such as this, the members of the company were:

in substance partners, or quasi-partners, and that a winding up order may be ordered if such facts are shown as could justify a dissolution of partnership between them.<sup>56</sup>

4.58 Furthermore, Lord Wilberforce responded to counsel’s submission that even a small proprietary company was fundamentally different from a partnership by suggesting that both entities are based on equitable considerations.<sup>57</sup> Lord Wilberforce stated:

a company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in.<sup>58</sup>

49 *Smith v Anderson* (1880) 15 Ch D 247 (James LJ).

50 D Hayton, ‘Trading Trusts, Trustees’ Liabilities and Creditors’, in *The International Trust* (Jordans Publishing Ltd, 3rd edition, 2011) [7.2].

51 *Ibid.*

52 *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd* [2007] VSC 40 (23 August 2007); *Wain v Drapac* [2012] VSC 156 (26 April 2012).

53 [1973] AC 360.

54 Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming) 81–3.

55 *Ibid.* 81.

56 *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 375.

57 *Ibid.* 379.

58 *Ibid.* 380.



4.59 Lord Wilberforce appears to have relied upon equitable considerations, some of which are closely related to fiduciary principles. According to Lord Wilberforce the application of equitable principles will be appropriate when:

(i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing relationship has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be ‘sleeping members’), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members’ interest in the company – so if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.<sup>59</sup>

4.60 A difficulty with the reasoning from *Ebrahimi* concerning this reference, is that even where these elements are established the case may only stand for the proposition that a winding-up order can be made. As discussed in Chapter 3, a winding-up order is an exceptional remedy to alleviate oppression, and is often inappropriate in the context of trading trusts. Where a minority unitholder seeks a buyout, it is not clear that the principles from *Ebrahimi* are applicable.<sup>60</sup>

4.61 Participants during consultations stressed that under Australian law, *Ebrahimi* would be of no avail to a minority unitholder seeking a buyout order. Cornwall Stodart and Ari Bergman submitted that there are:

[s]ome cases in the UK which suggest that it [*Ebrahimi*] can apply to trading trusts. [However] it is difficult to see how a successful invocation of the quasi-partnership approach can result in any remedy other than termination under the trust deed.<sup>61</sup>

4.62 The Commission agrees with this submission. In *Koko Black*, at trial, Justice Hargrave held that the plaintiff could not rely on the reasoning from *Ebrahimi* in order to obtain an injunction preventing Mr Hills from compulsorily acquiring the units of the minority unitholders.<sup>62</sup> On appeal, this reasoning was endorsed by Justice of Appeal Dodds-Streton, suggesting that the reasoning from *Ebrahimi* is limited to a winding-up order.<sup>63</sup>

4.63 However, a contrary view has been expressed by Justice Cooke, who said that:

...if it is found that the company falls into this quasi-partnership category, the court is more likely to conclude that it is unfair to fail to give effect to, or bring to an end arrangements which have been made on an informal basis, even though they do not give rise to legal entitlements, or to exclude a participator from the management or conduct of the company’s business, if it was part of the arrangement that he should take part in it. Furthermore, the most commonly sought remedy in unfair prejudice petitions is an order that the petitioner’s shares should be bought out by one or more of the respondents, and the establishment of a quasi partnership is normally a precondition for the court to find that such a buyout should be made without a minority discount.<sup>64</sup>

4.64 The above passage was recently endorsed in *Drapac*, although the precise significance of the endorsement is uncertain.<sup>65</sup> Although Justice Ferguson accepted that the relationship between the parties had broken down, it was not clear that Wain, Murchie and Drapac were in a relationship of quasi-partnership.<sup>66</sup> Justice Ferguson’s analysis of *Ebrahimi* was in relation to the equitable principles which underpin sections 232 and 233 of the Corporations Act.

4.65 The reasoning of Justice Ferguson in *Drapac* has been considered by Cornwall Stodart and Ari Bergman in the following terms:

59 Ibid 379.

60 *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd* [2007] VSC 40 (23 August 2007) [115]–[116].

61 Submission 6 (Cornwall Stodart and Ari Bergman).

62 *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd* [2007] VSC 40 (23 August 2007) [116].

63 *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd* (2008) 66 ACSR 325, 341.

64 *Croly v Good* [2010] EWHC 1 (Ch) [8], cited in *Wain v Drapac* [2012] VSC 156 (26 April 2012) [274].

65 *Wain v Drapac* [2012] VSC 156 (26 April 2012) [274].

66 Ibid [277]–[279].

Ferguson J’s reference to *Ebrahami* sought to lend weight to the application of oppression remedies to cases of oppression generally (irrespective of structure) so that a just and equitable result could be achieved for an oppressed party. While Ferguson J largely followed the thinking of Davies J in *Vigliaroni*, her Honour supported it by introducing the ‘quasi-partnership’ concept. Ferguson J asserted that the ‘quasi-partnership’ principles could be used as a bridge to support statutory relief under the CA oppression remedies, especially when applied to a buyout. *Koko Black* excluded buyouts as a remedy under *Ebrahami*.<sup>67</sup>

- 4.66 The reasoning of Justice Ferguson can be explained by the historical and conceptual connection between the *Ebrahami* doctrine and the oppression remedy.<sup>68</sup> Canadian cases have used the reasoning from *Ebrahami* as an explanation for the evolution of an oppression remedy based on the idea of legitimate expectations.<sup>69</sup> As was shown in Chapter 3, legitimate expectations are also an important aspect of Australian oppression remedy cases.
- 4.67 In the Commission’s view, it is unlikely that where a quasi-partnership is established, a unitholder may obtain any relief other than termination of the trust. Moreover, the reasoning from *Koko Black* would suggest that a buyout order is unavailable.<sup>70</sup> The approach of Justice Ferguson in *Drapac* is arguably not at odds with this approach.
- 4.68 However, regardless of which view is adopted, it is important to remember that the reasoning from *Ebrahami* is only applicable to those trading trusts that resemble partnerships. For a quasi-partnership to be found, a unitholder would arguably have to both own shares in the corporate trustee, and actively contribute to the management of the enterprise. In the Commission’s view, this is a substantial practical limitation upon the utility of the quasi-partnership doctrine in the context of trading trusts.

## Fraud on power

- 4.69 In the consultation paper, the Commission asked:
- Are there circumstances in which the doctrine of fraud on power could provide a useful remedy to minority beneficiaries?<sup>71</sup>
- 4.70 The content of the submissions received in response suggest that there is some potential for the doctrine to provide unitholders with equivalent relief to the statutory oppression remedy. Consequently, the following section will expand on the analysis of the doctrine as referred to in the consultation paper.
- 4.71 The basis of the equitable doctrine of fraud on power is similar to the general concept underpinning shareholder remedies, namely, a restraint upon the principle of majority rule.<sup>72</sup> The latter idea, in the corporate law context, is often referred to as fraud on the minority.<sup>73</sup> According to Stefan Lo, the principles underpinning the cases concerning fraud on minority should be understood as particular instances of fraud on power in the context of general meetings and alterations to company constitutions.<sup>74</sup> Austin and Ramsay explain that:

67 Submission 6 (Cornwall Stodart and Ari Bergman) 6.

68 See Mendy Chernos, Michael D. Briggs and Brandon Kain, ‘Recent Watershed Developments in Oppression Remedies and Shareholder Activism’ (2006) 40 *Annual Review of Civil Litigation* 33, 41–2, citing *Diligent v RWMD Operations Kelowna Ltd* (1976) 1 BCLR 36; *Ontario Inc v Harold E Ballard Ltd* (1991) 3 BLR (2d) 123; *LeBlanc v Corporation Eighty-Six Ltd* (1997) 192 NBR (2d) 321; *McAteer v Devoncraft Developments Ltd* (2001) 307 AR 1; *Cohen v Jonco Holdings Ltd* (2005) 192 Man R (2d) 252; also see *Westfair Foods Ltd v Watt* (1991) 79 DLR (4th) 55; *Nanef v Con-Crete Holdings Ltd* (1995) 23 OR (3d) 481.

69 Ibid.

70 *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd* (2008) 66 ACSR 325, 341.

71 Victorian Law Reform Commission, *Trading Trusts—Oppression Remedies*, Consultation Paper No 21 (2014).

72 Stefan Lo, ‘The continuing role of equity in restraining majority shareholder power’ (2004) 16 *Australian Journal of Corporate Law* 1, 2; also see *Estmanco (Kilner House) Ltd v Greater London Council* [1982] 1 All ER 437, 445 (Megarry VC).

73 R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford’s Principles of Corporations Law* (at 109) [10.030].

74 R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford’s Principles of Corporations Law* (at 109) [10.030]; Stefan Lo, ‘The continuing role of equity in restraining majority shareholder power’ (2004) 16 *Australian Journal of Corporate Law* 1, 3.

It appears that the juridical basis of the law of fraud on the minority lies in the doctrine of fraud on a power. This broad doctrine, which was developed in courts of equity, applies to many types of powers. For example, in the law of property it applies to anyone who has power to distribute property among a class of persons. In administrative law it applies to the exercise of administrative discretions.<sup>75</sup>

4.72 According to Austin and Ramsay there are broadly three types of restraint against majority voting power in corporations. These are:

(1) majority voting for alterations of the constitution or variation of rights of members (see [10.060]);

(2) majority unwilling to direct that proceedings be brought by the company where a wrong has been committed against the company (see [10.130]); and

(3) majority voting in other cases: see [10.140].<sup>76</sup>

4.73 Austin and Ramsay explain that:

There are procedural differences between categories (1) and (2). In (1) the wrong is done to the minority and they can sue in their own right in personal proceedings for a declaration that the resolution for alteration is invalid and an injunction restraining its implementation. Usually some members of the minority will sue by means of representative proceedings on behalf of themselves and all other members of the minority. A case in category (1) can properly be termed a fraud on the minority. In category (2), however, the wrong is done to the company. It is a fraud on the company and a member of the minority can move only on behalf of the company to bring proceedings by way of derivative action, unless it is an exceptional case where the member has a personal right which has been infringed.<sup>77</sup>

4.74 It is clear that category 2 raises questions of a derivative action rather than an oppression remedy. However, even conceptually, it is difficult to apply the logic of a wrong done to a company to trust law. As stated in Chapter 2, a trust has no separate legal personality, and is thus not a separate entity.

## The development of the doctrine

4.75 As explained by Stefan Lo, the equitable doctrine of fraud on a power 'was developed by the courts of equity to restrain actions constituting abuse of power.'<sup>78</sup> The requisite standard amounting to fraud in equity is lower than the common law, 'which relates to actual dishonesty.'<sup>79</sup>

4.76 Since fraud on power could involve an amendment to a trust deed to allow for a compulsory acquisition of a minority unitholding, it has been suggested that the principles from *Gambotto v WCP Ltd (Gambotto)*,<sup>80</sup> which related to the compulsory acquisition of shares, are relevant. However, the authorities in this respect are uncertain.<sup>81</sup>

4.77 Whether or not the principles from *Gambotto* can be applied to unit trusts by analogy, Lo suggested that the equitable principles underpinning the earlier decision of *Allen v Gold Reefs*<sup>82</sup> form the foundation of the doctrine of fraud on power.<sup>83</sup> In that case, the shareholders amended the company constitution to allow for the grant to any shareholder

75 R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford's Principles of Corporations Law* (at 109) [10.030].

76 Ibid [10.050].

77 Ibid.

78 Stefan Lo, 'The continuing role of equity in restraining majority shareholder power' (2004) 16 *Australian Journal of Corporate Law* 1, 2, citing *Aleyn v Belchier* (1758) 28 All ER 634, 637; also see *Peters' American Delicacy Co Ltd v Health* (1939) 61 CLR 457, 502 (Dixon J); *Ngurli Ltd v McCann* (1953) 90 CLR 425.

79 Stefan Lo, 'The continuing role of equity in restraining majority shareholder power' (2004) 16 *Australian Journal of Corporate Law* 1, 2, citing *Nocton v Lord Ashburton* [1914] AC 932 *Vatcher v Paull* [1915] AC 372, 378 (Lord Parker); *LGSS Pty Ltd v Egan* [2002] NSWSC 1171 (unreported, 4 December 2002, BC200207290) (Austin J).

80 (1995) 182 CLR 432.

81 *Cachia v Westpac Financial Services Ltd* (2000) 170 ALR 65, 85–6 [85]–[90] (Hely J); *Arakella v Paton* (2004) 60 NSWLR 334, 372 (Austin J).

82 [1900] 1 Ch 656.

83 Stefan Lo, 'The continuing role of equity in restraining majority shareholder power' (2004) 16 *Australian Journal of Corporate Law* 1, 4.

of a lien securing their debts to the company.<sup>84</sup> According to the Master of the Rolls, the test for determining the validity of the alteration was whether:

The power, thus conferred on companies to alter the regulations contained in their articles, is limited only by the provisions contained in the statute and the conditions contained in the company's memorandum of association. Wide, however, as the language of s50 is, the power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised not only in the manner required by law, but also bona fide for the benefit of the company as a whole, and it must not be exceeded. These conditions are always implied and are seldom, if ever expressed.<sup>85</sup>

4.78 On the facts as stated by Lo:

the alteration was made in good faith and for the benefit of the company, as it was clearly in the interests of the company for monies owing to the company to be repaid, even though the alteration of the articles was directed at a single shareholder only, being the only holder of fully paid shares.<sup>86</sup>

4.79 In Lo's view, the above reasoning shows that the exercise of powers in good faith is the fundamental basis of the fraud on power doctrine.<sup>87</sup>

4.80 According to Lo, a further aspect of the equitable doctrine of fraud on power is the restraint on majority shareholders from extinguishing 'valuable proprietary rights of shareholders or rights conferred on shareholders in the constitution.'<sup>88</sup>

4.81 There is some disagreement in the literature as to whether the doctrine of fraud on the minority is confined to the two situations stated above, namely, alterations of the constitution and extinguishment of a proprietary interest. McPherson has argued that the doctrine is restricted in this way.<sup>89</sup> In contrast, Lo has argued that the reasoning of Lord Lindley in *Allen v Gold Reefs* and other cases suggests that the doctrine is broader.<sup>90</sup>

### Comparison with the statutory oppression remedy

4.82 Lo states: 'conduct which would amount to fraud on a minority in equity would generally also be conduct that is oppressive or unfairly prejudicial or unfairly discriminatory.'<sup>91</sup> Moreover, Lo suggests that, based on the view that fraud on the minority is conceptually underpinned by the doctrine of fraud on power, an understanding of the statutory oppression remedy can be informed by equitable principles.<sup>92</sup> Indeed, a similar approach appears to have been taken by Justice Ferguson in *Drapac*.

4.83 Given the breadth and flexibility of the oppression remedy, it is not clear whether the equitable doctrine of fraud on power has a separate role to play in Australian corporate law. Lo suggests that it may be appropriate to rely on the doctrine of fraud on power where a buyout has been offered to shareholders at a fair price.<sup>93</sup> In England there is authority which suggests that a court will not provide additional statutory relief if the previous offer 'gives all the relief that the applicant could realistically expect to obtain

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84 For a full summary of the facts see Stefan Lo, 'The continuing role of equity in restraining majority shareholder power' (2004) 16 *Australian Journal of Corporate Law* 1, 3.  
85 *Allen v Gold Reefs* [1900] 1 Ch 656, 671 (Lindley MR).  
86 Stefan Lo, 'The continuing role of equity in restraining majority shareholder power' (2004) 16 *Australian Journal of Corporate Law* 1, 3.  
87 *Ibid* 4.  
88 Stefan Lo, 'The continuing role of equity in restraining majority shareholder power' (2004) 16 *Australian Journal of Corporate Law* 1, 6, citing *Cook v Deeks* [1916] 1 AC 554, 564; *Menier v Hooper's Telegraph Works* (1874) LR 9 Ch App 350 (James LJ).  
89 B P McPherson, 'Oppression of Minority Shareholders Part I: Common Law Relief' (1963) 36 *Australian Law Journal* 404, 406.  
90 Stefan Lo, 'The continuing role of equity in restraining majority shareholder power' (2004) 16 *Australian Journal of Corporate Law* 1, 6, citing *Allen v Gold Reefs* [1900] 1 Ch 656, 671 (Lindley MR); *British Equitable Assurance Company Ltd v Baily* [1906] AC 35; *Peters' American Delicacy Co Ltd v Health* (1939) 61 CLR 457, 504–5 (Dixon J); *Clemens v Clemens Bros Ltd* [1976] 2 All ER 268.  
91 Stefan Lo, 'The continuing role of equity in restraining majority shareholder power' (2004) 16 *Australian Journal of Corporate Law* 1, 21, citing *Shears v Phosphate Co-operative Co of Australia Ltd* (1988) 14 ACLR 747; *Ex parte Schwarcz* (No 2) [1989] BCLC 427; M Chew, *Minority Shareholders' Rights and Remedies* (Butterworths, 2000) 102–3.  
92 Stefan Lo, 'The continuing role of equity in restraining majority shareholder power' (2004) 16 *Australian Journal of Corporate Law* 1, 21, citing *O'Neil v Phillips* [1999] 2 All ER 961, 967 (Lord Hoffman).  
93 Stefan Lo, 'The continuing role of equity in restraining majority shareholder power' (2004) 16 *Australian Journal of Corporate Law* 1, 23.

pursuant to the statutory remedy.<sup>94</sup> As Lo points out, a difficulty may arise if the shareholder desires a remedy other than a buyout order.<sup>95</sup>

- 4.84 It is not clear, however, how relevant this reasoning is to Australia. As shown in Chapter 3, there are few limitations on the discretion of the court under section 233 of the Corporations Act. There is authority to suggest that if a buyout offer is made at fair value to a shareholder, then a court will not make a winding-up order.<sup>96</sup> However, in the Commission's view, this is merely a reflection of the fact that courts will avoid making a winding-up order unless it is warranted in the circumstances.<sup>97</sup>
- 4.85 Lo has further argued that it may be advantageous for shareholders to rely on the doctrine of fraud on power, where the alleged oppression relates to an expropriation of a proprietary interest.<sup>98</sup> Lo stated that in *Gambotto*, the High Court held that the onus of proof is reversed, and is instead upon the party attempting to ratify the expropriation.<sup>99</sup>
- 4.86 In the Commission's view, there is merit in Lo's argument that the fraud on power doctrine is the conceptual antecedent to the statutory oppression remedy. However, a significant limitation to the general law doctrine is the lack of certainty regarding the availability of remedies. It is not clear that a court has at its disposal the full array of remedies under section 233 in an action alleging fraud on power. This problem will become more apparent when the doctrine is applied to unit trusts.

## The doctrine of fraud on power applied to unit trusts

### General principles

- 4.87 In *Cachia v Westpac Financial Services Ltd (Cachia)*,<sup>100</sup> Justice Hely stated that:
- the equitable doctrine of "fraud on the power" requires that a power, including an amendment power, reserved in a trust must not be exercised for a purpose, or with an intention beyond the scope of or not justified by the instrument creating the power: *Vatcher v Paull* [1915] AC 372, 378. The same principle applies to the exercise of a statutory power. In each case, the power has to be exercised bona fide, for the purpose for which it is given.<sup>101</sup>
- 4.88 The doctrine as stated by Justice Hely has several elements. The first is a matter of interpretation. Thus, a power must not be exercised other than as contemplated by the trust deed. It arguably follows that the trust deed can be drafted in a way allowing for the exercise of a particular power, which would otherwise constitute equitable fraud.<sup>102</sup> This gives rise to the second element, that the power must be exercised in good faith and for a proper purpose.
- 4.89 In *Cachia*, the manager of the Westpac Real Property Growth Trust proposed to make several amendments to the unit trust deed including the clauses relating to redemption. Since the exercise of power constituted a variation of the trust deed, Justice Hely stated:
- There are, however, some authorities which suggest that a power to vary a trust deed may be held not to extend to a variation which would alter the substratum of the trust: see, eg, *Re Dyer* [1935] VR 273; *In re Ball's Settlement Trusts, Ball v Ball* [1968] 1 WLR 899; *Re Blocksidge* [1997] 1 Qd R 234; *Kearns v Hill* (1990) 21 NSWLR 107; *Locke v*

94 Stefan Lo, 'The continuing role of equity in restraining majority shareholder power' (2004) 16 *Australian Journal of Corporate Law* 1, 23, citing *Re A Company (No 003843 of 1986)* [1987] 4 BCC 80; *Re A Company (No 006834 of 1988)* [1989] BCLC 365.

95 Stefan Lo, 'The continuing role of equity in restraining majority shareholder power' (2004) 16 *Australian Journal of Corporate Law* 1, 23.

96 *John J Starr (Real Estate) Pty Ltd v Robert R Andrew (A'sai)* (1991) 9 ACLR 1372, 1375.

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98 Stefan Lo, 'The continuing role of equity in restraining majority shareholder power' (2004) 16 *Australian Journal of Corporate Law* 1, 23.

99 Stefan Lo, 'The continuing role of equity in restraining majority shareholder power' (2004) 16 *Australian Journal of Corporate Law* 1, 23–4, citing *Gambotto v WCP* (1995) 182 CLR 432, 447.

100 (2000) 170 ALR 65.

101 *Cachia v Westpac Financial Services Ltd* (2000) 170 ALR 65, 83 [74], citing *Lancedale Holdings Pty Ltd v Health Group Australasia Pty Ltd*

[1999] NSWSC 609 (23 June 1999).

102 *Cachia v Westpac Financial Services Ltd* (2000) 170 ALR 65, 83 [74]–[76]; also see *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd*

[2007] VSC 40 [103] (23 August 2007); *MJ Jacometti Pty Ltd v Boomaroo Nurseries & Wholesale Supplies Pty Ltd* [2011] VSC 612 [48]

(1 December 2011).



*Westpac Banking Corporation* (1991) 25 NSWLR 593 at p 602. *This may be no more than an application of the equitable doctrine of fraud on the power, referred to in 74 of these reasons* [emphasis added].<sup>103</sup>

- 4.90 In *Cachia* Justice Hely held that the doctrine was not made out in circumstances where the trustee had amended, at a special meeting, the redemption clause of the trust deed so that units could be compulsorily redeemed through the issue of units in a new trust.<sup>104</sup> Although this meant that unitholders were unable to redeem their units for market value, this did not constitute a lack of good faith, since the 'provisions introduced by the amendments were not directed against only some of the unitholders. They affected all unitholders equally, and in the same way.'<sup>105</sup>
- 4.91 In terms of whether the power had been validly exercised, there were two important aspects of the reasoning. First, the trust deed did not preclude the type of amendment on the facts.<sup>106</sup> Secondly, a reorganisation of the trust did not necessarily entail an alteration of the substratum of the trust.<sup>107</sup>
- 4.92 The passage at [4.89] could be interpreted as suggesting that the requirements of the doctrine will be satisfied if the variation does not alter the substratum of the trust. Matthew Conaglen however submitted that:

It seems to me that this underplays the potential application of the doctrine of fraud on a power. Its application will depend on the specific power which is at issue in a given case, as there is a fraud on that power where that power is used for a purpose for which that power was not given. In the context of a power to change the constitution of a unit trust (or any other trust) one can readily understand the argument that a trustee would not act in fraud of that power unless it was used in a way that undermined the substratum of the trust. But that is not necessarily the case in respect of all powers which a trustee might use in a potentially oppressive manner... However, this point does not undermine the argument that there will be cases, functionally, where oppression may need to be remedied and where the fraud on a power doctrine will not avail.<sup>108</sup>

- 4.93 The Commission agrees with this submission. The statement of principle from *Cachia* at [4.89], should be read as suggesting that a power to vary the trust deed will usually not constitute a fraud on power unless it alters the substratum of the trust.

## Remedies

- 4.94 A problem, however, with the application of the fraud on power doctrine is the limited range of remedial options. Although the conduct that potentially falls within the doctrine is expansive, this is not clearly mirrored by equivalent powers available to a court in response to oppression under section 233 of the Corporations Act.<sup>109</sup> In *Cachia*, the unitholders sought equitable compensation.<sup>110</sup> As was discussed in Chapter 3, this will not often be a satisfactory remedy in cases of oppression.
- 4.95 In *Koko Black*, the unitholders sought an injunction preventing Mr Hill from compulsorily acquiring their units.<sup>111</sup> However, it is not clear whether an injunction enforcing a buyout order, beyond the terms of the trust deed is an available remedy in response to fraud on power. It has been suggested that the court does not have such a power.<sup>112</sup> Matthew

103 *Cachia v Westpac Financial Services Ltd* (2000) 170 ALR 65, 82 [68].

104 *Ibid.*

105 *Cachia v Westpac Financial Services Ltd* (2000) 170 ALR 65, 83 [75]. Arguably, the approach adopted by Hely J is different to the test for oppression under s 232. Although conduct which applies to all shareholders equally is unlikely to be oppressive, see *Catto v Hampton Australia Ltd (in liq) (No 3)* (2004) 89 SASR 234, a finding of oppression is still possible; see *John J Starr (Real Estate) Pty Ltd v Robert R Andrew (A'asia) Pty Ltd* (1991) 9 ACLC 1372, 1375–6.

106 *Cachia v Westpac Financial Services Ltd* (2000) 170 ALR 65, 83 [74]–[76].

107 *Ibid* 83 [72].

108 Submission 1 (Professor Matthew Conaglen, University of Sydney Law School) 3.

109 Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming) 103.

110 *Cachia v Westpac Financial Services Ltd* (2000) 170 ALR 65, 70 [18].

111 *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd* [2007] VSC 40 (23 August 2007).

112 Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming) 91–3 also see 101–2.

Conaglen submitted that:

[a]s to the remedy for fraud on a power, this depends on whether the power is legal or equitable. In Australia, there is also case law which (based on a misunderstanding of English authority) suggests that the exercise of power is merely voidable, as opposed to void (which is the predominant view in England). Either way, however, neither approach would provide the court with an obvious basis for making a buyout order.<sup>113</sup>

4.96 Participants at the roundtable were generally sceptical regarding application of the fraud on power doctrine. Most participants suggested that the doctrine was not as flexible as the oppression remedy, in either the corporate law or trusts context.

4.97 Cornwall Stodart and Ari Bergman submitted that:

Fraud on the power is a breach of trust for which aggrieved unitholders/beneficiaries are able to seek remedies that commonly include declarations, injunctions, rescission or restitution. Within the context of oppressive conduct in trusts, such remedies are, therefore, of potential value in assisting oppressed unitholders/beneficiaries. However, the traditional doctrine of fraud on the power (in a Unit Trust context) will generally only provide relief to a unitholder against the trustee rather than against fellow unitholders.

Most claims of oppression relate to circumstances where the alleged infringer has acted in accordance with the terms of the empowering document but in a manner that is oppressive to the aggrieved party. In such circumstances, the doctrine is generally inapplicable.<sup>114</sup>

4.98 As noted in Matthew Conaglen's submission,<sup>115</sup> there are two practical limitations on the application of the fraud on power doctrine.

4.99 First, an invocation of the doctrine relates to the alleged abuse of power by trustees.<sup>116</sup> This may be the case where the unitholder takes no part in management and there is a separation in responsibilities between unitholders and the controllers of the corporate trustee. However, as shown in Chapter 3, many unit trusts adopt a different structure where unitholders are actively involved in the business. In such cases, the oppressive conduct will be alleged against other unitholders rather than the corporate trustee.

4.100 It has been suggested that, in the context of corporate law, it may be possible to allege an action of fraud on power against a fellow shareholder. Lo stated:

It is important at this point to distinguish between two different aspects of fraud which could occur in situations giving rise to an argument for the 'fraud on the company' exception. The first aspect of fraud arises when it is the directors who have engaged in improper actions in breach of their fiduciary duties to the company. This is the fraudulent conduct of the directors which constitutes the original wrong done to the company, and in relation to which the company could sue. The second aspect of fraud arises when the majority shareholders refuse to take action against the wrongdoers. By preventing the company from seeking a remedy and allowing the company to suffer loss, the shareholders commit a further wrong to the company, thereby perpetuating another fraud on the company. It may well be that the shareholders who control the general meeting are the same persons as the directors who committed the original wrongs, however when a minority shareholder seeks to bring a derivative action, the shareholder is complaining about both the original wrong done to the company plus the additional wrong which the company suffers when the appropriate organs of the company fail to prosecute the wrong.<sup>117</sup>

113 Submission 1 (Professor Matthew Conaglen, University of Sydney Law School) 3.

114 Submission 6 (Cornwall Stodart and Ari Bergman) 7.

115 Submission 1 (Professor Matthew Conaglen, University of Sydney Law School).

116 Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming) 95–6.

117 Stefan Lo, 'The continuing role of equity in restraining majority shareholder power' (2004) 16 *Australian Journal of Corporate Law* 1, 12.

- 4.101 In the Commission’s view, both of these aspects are inappropriate to the context of trading trusts. Both aspects presuppose the separate legal personality of the company, and the consequent legal duties owed to it by directors, and arguably shareholders in certain limited circumstances.<sup>118</sup> An analogy with trading trusts, however, is difficult to sustain. Indeed, a beneficiary does not ordinarily owe equitable or fiduciary obligations to other beneficiaries.<sup>119</sup> Thus, the Commission agrees with Bergman’s statement:
- the traditional doctrine of fraud on the power in a trust context will generally only provide relief to a unitholder against the trustee rather than against fellow unitholders.<sup>120</sup>
- 4.102 Secondly, the application of the fraud on power doctrine may be limited by the terms of the trust deed. Where the trust deed indemnifies a trustee to the extent that a certain power has been exercised in a certain way, then in order to establish fraud on power, a unitholder may have to show that the ‘trustee’s actions have eroded the ‘substratum’ of the UT [unit trust].<sup>121</sup> An exclusion clause could be inserted into the trust deed, providing the trustee with an unfettered discretion,<sup>122</sup> so long as the substratum remained unaltered. It is not clear whether the substratum refers to the fundamental purpose of the trust,<sup>123</sup> or to the ‘irreducible core’ of trusteeship.<sup>124</sup> The former appears to be the preferred approach in *Cachia*.<sup>125</sup>
- 4.103 According to Bergman, both the ‘substratum’ and ‘irreducible core’ tests provide limited protection to unitholders where the trust deed contains an exclusion clause indemnifying the trustee for conduct that would otherwise constitute fraud on power.<sup>126</sup> This would suggest that the fraud on power doctrine is of limited use to unitholders where the trust deed contains a wide exclusion clause.
- 4.104 The Commission agrees that there is some potential for the development of the doctrine of fraud on power in this area. Equitable considerations underpinning the doctrine will continue to inform the operation of the statutory oppression remedy under the Corporations Act and by extension, the amendment proposed by this reference.<sup>127</sup>
- 4.105 However, the Commission considers that the remedial flexibility offered under the Corporations Act is greater than under general law. The Commission also considers that there are two further practical difficulties in relying on the fraud on power doctrine. First, the potential breadth of exclusion clauses contained in the trust deed; and secondly, the inability to bring an action against a unitholder.

118 *Brunninghausen v Glavanics* (1999) 46 NSWLR 538, 549–550 (Handley JA).

119 This may depend upon the view taken regarding the role of contractual obligations in unit trusts, discussed above at [2.17]; also see Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming) 32.

120 Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming) 95.

121 *Ibid* 96.

122 *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd* [2007] VSC 40 (23 August 2007) [103].

123 *Cachia v Westpac Financial Services Ltd* (2000) 170 ALR 65, 82 [68].

124 *Armitage v Nurse* [1998] Ch 241, 253 (Millett LJ).

125 *Cachia v Westpac Financial Services Ltd* (2000) 170 ALR 65, 82 [68] and [72].

126 Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming) 94–102.

127 The continuing role that equitable considerations play in underpinning the statutory oppression remedy has been acknowledged in several cases; see *Wain v Drapac* [2012] VSC 156 (26 April 2012); *Campbell v Backoffice Investments Pty Ltd* (2008) 66 ACSR 359, 406 [279] (Basten JA); *Moepeke Pty Ltd v Airport Fine Foods Pty Ltd* (2007) 61 ACSR 395, 405 [41]–[42].



## The Trustee Act 1958 (Vic)

### Administration of trusts under the Trustee Act

- 4.106 The *Trustee Act 1958* (Vic) by Part IV—entitled ‘Powers of the Court’—confers a suite of powers upon ‘the Court’ to administer trusts. By section 3(1) of the Act ‘Court’ is defined to mean the Supreme Court, and the County Court ‘in relation to property or an estate or interest in property the value of which property does not exceed the jurisdictional limit of the County Court.’ The County Court’s monetary jurisdictional limit was repealed by section 3(1) of the *Courts Legislation (Jurisdiction) Act 2006* (Vic) and thus it now formally has the same jurisdiction as the Supreme Court under Part IV.
- 4.107 A court has a wide array of powers including power to appoint new trustees and subsequently vest the trust property.<sup>128</sup> A court also has the ability to hear an application by a trustee for advice on the management or administration of the trust in relation to proposed dealings.<sup>129</sup> Moreover, section 63 allows the court to authorise a trustee, upon application, to exercise powers in the administration and management of the trust beyond the terms of the trust deed.
- 4.108 However, as outlined in Chapter 1, the application of oppression remedies and an examination of equivalent equitable relief suggest a more limited inquiry. If the trust deed provides that a unitholder has a certain number of units, then a variation by the court may arguably confer power on the trustee to redeem those units, other than pursuant to the terms of the trust deed if that be ‘expedient’. As will be shown below, there is some authority to suggest that a court has an incidental power to alter the beneficial interests of the beneficiaries, even where this is contrary to some of the beneficiaries’ wishes, or to the terms of the trust deed.<sup>130</sup>
- 4.109 However, when considering the issues that arise throughout this section, two matters must be borne in mind. First, termination of the trust is conceptually different from altering beneficial interests. It will be recalled that the concept of winding up is foreign to the law of trusts. Indeed, Justice Barrett speaking of the statutory powers of winding up under the Corporations Act<sup>131</sup> said:
- I mention them only to emphasise that, in the absence of applicable statutory powers, it is no business of the Court to act so as to put an end to a trust’.<sup>132</sup>
- 4.110 As explained by Dal Pont, Chalmers and Maxton, this has led to powers being conferred upon the court to vary the terms of trusts ‘but [in] continuation of the administration of the trust[s].’<sup>133</sup> This appears to be based on a perceived limitation of the criterion of expediency within section 63, namely, that:
- the jurisdiction is exercisable only where expedient in the interests of the beneficiaries as a whole and is limited by its terms to questions of ‘management or administration’ of the trust. For this reason, it does not confer jurisdiction on the court to alter the substratum of the trust.<sup>134</sup>
- 4.111 The second issue is that even if such a power is conferred under the Trustee Act, it would be limited in a key respect. Indeed, according to Cornwall Stodart and Ari Bergman:

128 Part IV, Division 1 and Division 2, *Trustee Act 1958* (Vic).

129 *Supreme Court (General Civil Procedure) 2005* (Vic), O54.02.

130 Recently the Scottish Law Reform Commission released a series of reports and discussion papers on the variation and termination of trusts. In the final report the Commission made a number of detailed recommendations dealing with the alteration of beneficial interests and termination of trusts by court order. Although the Commission recommended expanding the current powers of the court, it explicitly stated that ‘the power of the court to alter trusts’ purposes does not apply to commercial trusts or to public trusts.’ See Scottish Law Reform Commission, *Report on Trust Law*, Report No 239 (2014) 244; also see recommendation 99, 246.

131 For example s 461 and Part 5C.9.

132 *Re Gaydon* [2001] NSWSC 473 (8 June 2001) [30].

133 G E Dal Pont, D R C Chalmers and J K Maxton, *Equity and Trusts Commentary and Materials* (Lawbook Co, 4th edition, 2007) 687.

134 G E Dal Pont and Tina Cockburn, *Equity and Trusts in Principle* (Lawbook Co, 2005) 323.

The Trustee Act 1958 (Vic) only governs the conduct of trustees and not the conduct of a majority of beneficiaries or the conduct of those who control the (corporate) trustee.<sup>135</sup>

- 4.112 In the Commission's view, this suggests a substantial limitation on the reliance of the current provisions of the Trustee Act, to provide equivalent relief to an oppression remedy. As shown in Chapter 3, many instances of oppression in trading trusts relate to conduct by other unitholders. This issue was explicitly raised during consultations and is explored further below.

### Variation pursuant to section 63A of the Trustee Act

- 4.113 Section 63A gives the court the power to consent to the variation of beneficial interests under a trust in certain circumstances.
- 4.114 However, it is clear that section 63A does not empower a court to vary the beneficial interests of unitholders or to order remedies against oppression as under the Corporations Act.
- 4.115 Indeed, according to the editors of *Ford and Lee: The Law of Trusts*:
- [a] principal object [of the legislation] is to enable the court to approve an arrangement for the variation of a trust on behalf of persons unable to give approval themselves, that is beneficiaries who cannot vary or terminate the trust under the rule in *Saunders v Vautier*.<sup>136</sup>
- 4.116 This is clearly reflected by the four categories of beneficiaries specified under section 63A.<sup>137</sup> It does not follow, however, that the consent of all the beneficiaries is required in order for the court to exercise its power under section 63A.<sup>138</sup>
- 4.117 This illustrates an obvious difficulty for unitholders since, as discussed above, it is difficult to envisage a situation where unitholders would be able to avail themselves of the rule in *Saunders v Vautier* generally.

### Section 63

- 4.118 Section 63 of the *Trustee Act 1958* (Vic) provides a different power from that provided by section 63A. Section 63 provides that:
- (1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, expenditure or other transaction, is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument (if any) or by law, the Court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose on such terms and subject to such provisions and conditions (if any) as the Court thinks fit and may direct in what manner any money authorized to be expended, and the costs of any transaction are to be paid or borne as between capital and income.
  - (2) The Court may from time to time rescind or vary any order made under this section, or may make any new or further order.

135 Submission 6 (Cornwall Stodart and Ari Bergman) 6.

136 H A J Ford, W A Lee, M Bryan, J Glover, I G Fullerton, Thomson Reuters, *Ford and Lee: The Law of Trusts* (4 December 2014) [15.090]; also see *George v Kollias* [2007] VSC 46 (5 March 2007).

137 However a contrary view of the policy underpinning the UK *Variation of Trusts Act 1958* was explored by analysing the decision of *Goulding v James* [1997] 2 All ER 239, 246, in P Luxton, 'Variation of Trusts: Settlor's Intentions and the Consent Principle in *Saunders v Vautier*' (1997) 60 *Modern Law Review* 719; Also see *Re Dion Investments Pty Ltd* [2014] NSWCA 367 [46] (Barrett JA) [1] (Beazley P agreeing).

138 In *Re Estate of Barns* (2011) 7 ASTR 349 Justice Robson held that the court did not have the power to make an order pursuant to s 63A to vary the terms of a trust deed unless all the beneficiaries consented. On appeal, Williams AJA (Buchanan JA and Bongiorno JA agreeing) held that the power of the court was not so limited: see *Perpetual Trustee Victoria Limited v Barns* (2012) 34 VR 387, 394 [35]. This was because the Attorney-General, who did not formally consent to the variation, was a party before the court and did not object to the making of an order under s 63A: see *Perpetual Trustee Victoria Limited v Barns* (2012) 34 VR 387, 395–6 [42]–[43].

- (3) An application to the Court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.

- 4.119 Most Australian jurisdictions contain provisions akin to section 63.<sup>139</sup> The powers conferred under the sections, however, are not identical. The Commission does not propose to consider the applicability of relief against oppression in every Australian jurisdiction.
- 4.120 Regarding the operation of section 63, Cornwall Stodart and Ari Bergman submitted that:
- The Trustee Act 1958 (Vic) only governs the conduct of the trustees and not the conduct of a majority beneficiary or the conduct of those who control the (corporate) trustee.<sup>140</sup>
- 4.121 Rather than governing the conduct of trustees, the section allows the court to grant a power to a trustee if certain conditions are met. The Commission agrees that the section does not directly govern the conduct of shareholders and directors of the corporate trustee, since this would create jurisdictional issues. Moreover, although section 63 grants a beneficiary standing,<sup>141</sup> it clearly cannot be used to compel a particular course of conduct by a beneficiary in a trading trust.
- 4.122 In the Commission's view, section 63 is fundamentally limited in two key respects.
- 4.123 First, the cases that consider section 63, and the statutory equivalents in other jurisdictions, suggest that a court will not use section 63 to fashion relief for beneficiaries akin to oppression remedies, including orders akin to a buyout or winding up. Orders of this kind would be equivalent to the court taking over the management of the trust. Rather, the cases suggest that the provisions are designed to confer administrative powers, not otherwise available, on the trustees.<sup>142</sup>
- 4.124 Second and linked to the first, the only way powers under section 63 will be effective is if the trustee is willing to exercise them.
- 4.125 The reasoning in the case of *Re Estate of Barns*<sup>143</sup> suggests that section 63 should not be interpreted as providing the court with the ability to mandate that a trustee exercise its powers in a particular way. In that case, Justice Robson held that the grant of power pursuant to section 63 must be for the management or administration of the trust.<sup>144</sup> Moreover, an alteration of the beneficial interests contained in the trust deed was permissible only:
- to the extent that they might incidentally be affected by the exercise of the powers which the section does in terms confer.<sup>145</sup>
- 4.126 In the Commission's view, the approach adopted by Justice Robson in *Re Estate of Barns* demonstrates that section 63 is designed to facilitate the administration and management of trusts by trustees. Although the court has the ability to confer powers on trustees beyond the terms of the trust deed, this presupposes the willingness of trustees to administer the trust. Conduct which gives rise to oppression is fundamentally different since it presupposes that the trustee or beneficiaries are at odds with each other.

139 *Trustee Act 1925* (ACT) s 81; *Trustee Act 1936* (SA) s 59(c); *Trustee Act 1973* (Qld) ss 94–95; *Trustee Act* (NT) s 50(a); *Trustee Act 1898* (Tas) s 47; *Trustee Act 1962* (WA) s 89; *Trustee Act 1925* (NSW) s 81.

140 Submission 6 (Cornwall Stodart and Ari Bergman) 6.

141 *Trustee Act* s 63(3).

142 This point has been recently emphasised in *Re Dion Investments Pty Ltd* [2014] NSWCA 367, (30 October 2014) [99] (Barrett JA) [1] (Beazley P agreeing) [117] (Gleeson JA).

143 (2011) 7 ASTR 349.

144 *Re Estate of Barns* (2011) 7 ASTR 349, 359 [35], citing *Royal Melbourne Hospital v Equity Trustees Ltd (as trustee of the estate of Langford (deceased))* (2007) 18 VR 469, 506 [175]; also see *Riddle v Riddle* (1952) 85 CLR 202, 214 (Dixon J) 221 (Williams J) 227 (Fullagar J in dissent on a separate point); *Arakella v Paton* (2004) 60 NSWLR 334; *Westfield Qld No 1 v Lend Lease Real Estate* (2008) 1 ASTLR 525, 541–2; *Trust Company Fiduciary Services Pty Ltd v Challenger Managed Investments Ltd* (2008) 68 ACSR 356; *Re Arthur Brady Family Trust*; *Re Trekmore Trading Trust* [2014] QSC 244 (30 September 2014); *Re Dion Investments Pty Ltd* [2014] NSWCA 367 (30 October 2014), [92]–[99] (Barrett JA) [1] (Beazley P agreeing) [117] (Gleeson JA).

145 *Re Downshire Settled Estates*; *Marquess of Downshire v Royal Bank of Scotland* [1953] Ch 218, 248, cited in *Royal Melbourne Hospital v Equity Trustees Ltd (as trustee of the estate of Langford (deceased))* (2007) 18 VR 469, 502 [156].

- 4.127 The Commission therefore considers that section 63 cannot practically be used to fashion relief akin to an oppression remedy.

## Variation of trusts in other jurisdictions

### Variation pursuant to section 59C of the *Trustee Act 1936 (SA)*

- 4.128 Some of the statutory equivalents of section 63A and section 63 in other Australian jurisdictions are of broader application. Section 59C of the *Trustee Act 1936 (SA)* provides:
- (1) The Supreme Court may, on the application of a trustee, or of any person who has a vested, future, or contingent interest in property held on trust—
    - (a) vary or revoke all or any of the trusts; or
    - (b) where trusts are revoked—
      - (i) distribute the trust property in such manner as the Court considers just; or
      - (ii) resettle the trust property upon such trusts as the Court thinks fit; or
    - (c) enlarge or otherwise vary the powers of the trustees to manage or administer the trust property.
  - (2) In any proceedings under this section the interests of all actual and potential beneficiaries of the trust must be represented, and the Court may appoint counsel to represent the interests of any class of beneficiaries who are at the date of the proceedings unborn or unascertained.
  - (3) Before the Court exercises its powers under this section, the Court must be satisfied—
    - (a) that the application to the court is not substantially motivated by a desire to avoid, or reduce the incidence of tax; and
    - (b) that the proposed exercise of powers would be in the interests of beneficiaries of the trust and would not result in one class of beneficiaries being unfairly advantaged to the prejudice of some other class;and
    - (c) that the proposed exercise of powers would not disturb the trusts beyond what is necessary to give effect to the reasons justifying the exercise of the powers;
    - (d) that the proposed exercise of powers accords as far as reasonably practicable with the spirit of the trust.
  - (4) An order made by the Supreme Court in the exercise of powers conferred by this section is binding upon all present and future trustees and beneficiaries of the trust.
  - (5) This section does not apply to—
    - (a) a trust affecting property settled by an Act; or
    - (b) a charitable trust.
  - (6) This section does not derogate from any other power of the Supreme Court to vary or revoke a trust, or to enlarge or otherwise vary the powers of trustees.

4.129 On its face, section 59C(1)(a)(i) of the *Trustee Act 1936* (SA) enables a trustee or a beneficiary to approach the court for a variation of the trust deed. The editors of *Ford and Lee: The Law of Trusts* have suggested that underpinning section 59C is the requirement that:

the exercise of the powers given should be in the interests of beneficiaries of the trust and should not result in one class of beneficiaries being unfairly advantaged to the prejudice of some other class.<sup>146</sup>

4.130 Significantly, the wording of this section bears a resemblance to the drafting of the oppression remedy under section 232 of the Corporations Act. However, a key difference is that the section only allows for the distribution of trust assets, once a trust has been revoked. Thus, section 59C cannot be used to obtain relief equivalent to a buyout unless a winding-up order is also sought.

4.131 However, in *Benzija v Adriatic Fisheries Pty Ltd*, the court refused to wind up a trust under section 59C on the basis that, on the facts, the court did not have the power to do so.<sup>147</sup>

4.132 Interpreting the section, Justice Bollen said:

It is difficult to know when to use it. There are no positive criteria stating the possible circumstances in which orders may be made. There are stated circumstances in which the Court should not exercise powers given by the section. One is that the exercise of the powers must not 'disturb the trusts beyond what is necessary to give effect to the reasons justifying the exercise of the power.' Yet there is no hint in the section of what reasons Parliament might think adequate for the exercise of the jurisdiction.<sup>148</sup>

4.133 On the facts, however, Justice Bollen said:

I think that an exercise of the powers given by the section would not be in the interests of all the beneficiaries. I think it in the interests of all that the vessel should, under direction of the trustees, continue operating. I think that the continuation of it is likely to produce good profits to all concerned. Moreover, I think that a revocation and distribution of the property, would as Mr. Lunn suggests, unduly advantage the Benzijas to the detriment of the Cubelics.<sup>149</sup>

4.134 Justice Bollen said it was clear that section 59C enabled a court, in the exercise of its discretion, to revoke a trust.<sup>150</sup> However, the power of the court did not extend 'merely to help a disgruntled minority holder.'<sup>151</sup> Nor should the discretion be invoked when one party had made an offer to buyout the interest of the other at fair value.<sup>152</sup>

### Variation pursuant to section 81 of the *Trustee Act 1925* (NSW)

4.135 Section 81 of the *Trustee Act 1925* (NSW) is also of wider operation than section 63 of the Victorian Act. Section 81(1)(a) provides that the court's power extends to making an order:

(1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or disposition, or any purchase, investment, acquisition, expenditure, or transaction, is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the instrument, if any, creating the trust, or by law, the Court:

<sup>146</sup> H A J Ford, W A Lee, M Bryan, J Glover, I G Fullerton, Thomson Reuters, *Ford and Lee: The Law of Trusts* (4 December 2014) [15.230], citing s 59C(3)(b).

<sup>147</sup> (1984) 37 SASR 545, 559; H A J Ford, W A Lee, M Bryan, J Glover, I G Fullerton, Thomson Reuters, *Ford and Lee: The Law of Trusts* (4 December 2014) [15.230].

<sup>148</sup> *Benzija v Adriatic Fisheries Pty Ltd* (1984) 37 SASR 545, 559.

<sup>149</sup> *Ibid* 562.

<sup>150</sup> *Ibid* 559.

<sup>151</sup> *Ibid* 562.

<sup>152</sup> *Ibid* 563.

- (a) may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, including adjustment of the respective rights of the beneficiaries, as the Court may think fit, and
- (b) may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.
- 4.136 Like the South Australian legislation, section 81 does not limit beneficiaries to a particular type or class. Importantly, the section expressly includes the power to adjust the respective rights of beneficiaries.
- 4.137 According to Justice Rein:
- s 81 cannot be used to subvert the beneficial disposition in the trust instrument, but if an order is made in the management or administration of trust property, it is permissible under s 81 to accommodate the beneficial interest to the new situation created by the new order'.<sup>153</sup>
- 4.138 In the Commission's view, despite the reliance in the Victorian authorities on cases dealing with section 81, the New South Wales Trustee Act section appears to have broader operation than section 63. Even so, as stated above, the section does not enable a court to mandate that the trustee exercise its powers in a particular way, or to vary the beneficial entitlement.<sup>154</sup>

### Variation of trusts under the inherent jurisdiction of the court

- 4.139 Cornwall Stodart and Ari Bergman submitted that:
- there are authorities to suggest that there is no inherent jurisdiction in the court to provide an alternative remedy for minority beneficiaries. Hence the scope for minority beneficiaries to receive an alternative remedy is, at best, uncertain under the current law.<sup>155</sup>
- 4.140 In *Chapman v Chapman* the House of Lords held that the inherent jurisdiction of the court did not extend to the alteration of beneficial interests.<sup>156</sup>
- 4.141 Moreover, Justice Austin in *Arakella v Paton* stated that:
- The Court's power under s 81 cannot be used to subvert the beneficial disposition in the trust instrument, but if an order is made in the management or administration of trust property, it is permissible under the section to accommodate the beneficial interests to the new situation created by the order. In my opinion that position is indistinguishable from the approach taken by Myers AJ in the *Ku-ring-gai Council* case. It is unnecessary to debate whether it is different from the position under the UK provision, as explained by the English Court of Appeal in the *Chapman* case.<sup>157</sup>
- 4.142 According to the editors of *Ford and Lee: The Law of Trusts*, it is implicit in this reasoning that the New South Wales Supreme Court has no inherent power to alter the beneficial interests of trusts.<sup>158</sup> The Commission considers that the reasoning from *Arakella* and *Chapman* is equally applicable to Victoria.
- 4.143 Thus, the argument that the inherent jurisdiction of the court does not extend to the alteration of beneficial interests is highly persuasive, and by parity of reasoning, does not extend to the grant of relief akin to an oppression remedy.

153 *Trust Company Fiduciary Services Ltd v Challenger Managed Investments Ltd* (2008) 68 ACSR 356, 363–4 [24], citing *Arakella v Paton* (2004) 60 NSWLR 334, 360 [112].

154 Although this point was not expressly discussed, its correctness appears to have been assumed in the reasoning of Barrett JA in *Re Dion Investments Pty Ltd* [2014] NSWCA 367 (30 October 2014) [87]–[100] (Barrett JA), [1] (Beazley P agreeing).

155 Submission 6 (Cornwall Stodart and Ari Bergman) 6.

156 *Chapman v Chapman* [1954] AC 424, 445 (Viscount Simonds), citing *Re Walker* [1901] 1 Ch 879, 885.

157 *Arakella v Paton* (2004) 60 NSWLR 334, 360 [112]; cited in H A J Ford, W A Lee, M Bryan, J Glover, I G Fullerton, Thomson Reuters, *Ford and Lee: The Law of Trusts* (4 December 2014) [15.270].

158 H A J Ford, W A Lee, M Bryan, J Glover, I G Fullerton, Thomson Reuters, *Ford and Lee: The Law of Trusts* (4 December 2014) [15.270].

## Conclusion

- 4.144 This chapter has considered three potential alternatives to the oppression remedy: existing equitable doctrine, variation pursuant to the Trustee Act and the inherent jurisdiction of the court.
- 4.145 The Commission has considered termination and redemption pursuant to the terms of the trust deed, estoppel, vesting of the trust pursuant to the rule in *Saunders v Vautier*, quasi-partnership and fraud on power. The general conclusion of the Commission is that while there is potential for equitable doctrines to fulfil some of the goals of the oppression remedy, each doctrine is limited in key respects.
- 4.146 The Commission agrees that there are a limited number of circumstances where the relief afforded by the trust deed itself will be appropriate for beneficiaries or unitholders. However, in the Commission's view, reliance on variable terms of the trust deed is no real substitute for reform.
- 4.147 The Commission agrees with submissions that there is some potential for the doctrine of fraud on power to assist unitholders subject to oppressive conduct. The narrow range of remedies and structures which are appropriate for the application of the doctrine, however, illustrates its inherent limitations.
- 4.148 Although section 63 of the *Trustee Act 1958* (Vic) allows the court to confer powers on trustees beyond the terms of the trust, it does not allow a court to mandate a trustee to act in a particular way. Thus, the purpose of the section is fundamentally different to the oppression remedy contained in the Corporations Act.
- 4.149 Lastly, it is unlikely that the Supreme Court of Victoria has an inherent jurisdiction to alter beneficial interests, and thus by extension, the power to provide relief akin to oppression remedy such as a buyout order.





# Possible reform mechanisms

- 74** Amendment to the *Trustee Act 1958* (Vic)
- 76** Form of the amendment
- 83** Constitutional/jurisdictional issues
- 84** Other matters

## 5. Possible reform mechanisms

### Amendment to the *Trustee Act 1958* (Vic)

- 5.1 As outlined in Chapter 1, the Commission’s view is that the current law needs to be reformed for reasons of clarity, simplicity and fairness. This leads to the central recommendation that the *Trustee Act 1958* (Vic) provide such a remedy for beneficiaries of trading trusts subject to oppressive conduct.

#### Should the oppression remedy apply to all trusts?

- 5.2 As stated in Chapter 1 and further explained in Chapter 2 the scope of the amendment seeks a balance between inclusivity, so as to afford a remedy to any beneficiary subject to oppressive conduct, and pragmatism, in that some forms of trading trusts are already subject to significant regulation and should be excluded.
- 5.3 For this reason, the Commission has adopted a definition of ‘trading trust’ that includes all trusts where ‘some property held by the trustee is employed under the terms of the trust in the conduct of a business’.<sup>1</sup> This would include all forms of trading trusts, excluding only those already subject to extensive regulation and supervision.
- 5.4 This would mean that the recommended provisions in the Trustee Act would be worded to also apply to all trading trusts, including discretionary trusts, with the only explicit exclusions applying to managed investment schemes,<sup>2</sup> charitable trusts<sup>3</sup> and regulated<sup>4</sup> and statutory<sup>5</sup> superannuation trusts.
- 5.5 This is in line with the broad, functional approach adopted by the Commission, to maximise remedies and protection from oppression.

#### What effect should the trust deed have on the oppression remedy?

- 5.6 In the consultation paper, the following question was asked:
- What effect should the trust deed have on the availability of any oppression remedies included in the Trustee Act? Should it be possible to exclude their operation by express provisions in the trust deed?<sup>6</sup>
- 5.7 In formal submissions and during other consultations, the Commission received a number of responses.

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1 H A J Ford and I J Hardingham, ‘Trading Trusts: Rights and Liabilities of Beneficiaries’ in P D Finn (ed), *Equity and Commercial Relationships* (Lawbook Co, 1987) 48.

2 As defined in *Corporations Act 2001* (Cth) s 9.

3 Subject to extensive regulation under the *Charities Act 1978* (Vic).

4 As regulated by s 19 *Superannuation Industry (Supervision) Act 1993* (Cth).

5 For example those public sector superannuation schemes listed under Schedule 1AA, Part 3 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

6 Victorian Law Reform Commission, *Trading Trusts—Oppression Remedies*, Consultation Paper No 21 (2014), 58, 69 [Question 32].

- 5.8 Ari Bergman submitted that:
- the Oppression Remedies should not be capable of being excluded by express provisions in the trust deed: otherwise it would defeat the purpose of the remedies, which is to provide the minority beneficiaries with protection against commercially unfair practices on the part of the trustee or those who control the trustee.<sup>7</sup>
- 5.9 Most participants at the roundtable agreed with the above proposition. Furthermore, participants at the roundtable generally argued that the court should have the express power to override or amend the terms of the trust deed. This was based on the view that otherwise, the effect of the deed could lead to manifest injustice and undermine the whole concept of an oppression remedy.
- 5.10 However, some participants felt that the power of the court should be restricted or guided by a generally worded provision ensuring that the court, in exercising its discretion, have regard to the overall terms of the trust.
- 5.11 The Commission favours an oppression remedy for trading trusts that is akin to the statutory remedy under the *Corporations Act 2001* (Cth). Section 233(1)(b) of that Act enables a court to modify the company's existing constitution. Moreover, some legislative schemes, which provide an oppression remedy for trading trusts, enable a court to modify the terms of the trust deed.<sup>8</sup>
- 5.12 The Commission's view is that a similar provision should accompany the amendment of the Trustee Act. The Commission agrees with the above submissions that without a broad power to modify the trust deed, a court may not be able to effectively remedy the oppressive conduct.
- 5.13 The Commission considers that the Supreme Court of Victoria is the appropriate court for the proposed amendment. The Corporations Act defines the term 'court' as including 'the Supreme Court of a State or Territory'.<sup>9</sup> As will be seen below, difficulties may arise where a claimant seeks an oppression remedy in a court which is not vested with jurisdiction under the Corporations Act.<sup>10</sup> However, the Supreme Court of Victoria has jurisdiction to make orders under both the Trustee Act (including the proposed amendments) and the Corporations Act.

## Recommendation

- 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.

7 Submission 6 (Cornwall Stodart and Ari Bergman) 8.

8 *Business Trusts Act* (Singapore, cap 30, 2008 rev ed) s 41(2); *Canada Business Corporations Act* RSC 1985c C-44, ss 241(2), 241(3).

9 *Corporations Act 2001* (Cth) s 58AA(1)(b).

10 *Corporations Act 2001* (Cth) s 58AA(1)(b) and 58FF(2); *Re Douglas Webber Events Pty Ltd* [2014] NSWSC 1544 (6 November 2014) [34]–[35].

## Form of the amendment

- 5.14 A number of further issues will arise and decisions will need to be made if the recommended amendments are adopted. These include:
- the range of conduct that constitutes ‘oppression’
  - the scope of the remedies to be available to oppressed beneficiaries
  - whether and to what extent they should be equivalent to those available under Part 2F.1 of the Corporations Act<sup>11</sup>
  - who should be able to apply for an order.

## What constitutes ‘oppression’?

- 5.15 As outlined in Chapter 3, numerous reported cases have defined oppressive, unfairly prejudicial or unfairly discriminatory conduct under Part 2F.1 of the Corporations Act.<sup>12</sup> The fact that there has been such significant consideration of these issues by the courts and that they have been interpreted broadly argues strongly for the recommended provisions in the Trustee Act to be worded as closely as possible to the existing provisions in the Corporations Act.

- 5.16 This position was also supported in two submissions received by the Commission.<sup>13</sup>

- 5.17 In the submission received from the Federal Court of Australia, Chief Justice Allsop, writing on behalf of the Court after consultation with the other judges, stated:

It would be unfortunate if the amendments created a third or even fourth set of provisions which were different in substance (or form) from the existing oppression remedies in ss 232 and 233 of the *Corporations Act*. Put another way, particular fact situations often engage the *Corporations Act* and the *Trustee Act*. Where there was *no difference in substance* between the facts applying to a corporation and a trading trust, it would be an unhappy state of affairs if the application of the oppression remedies resulted in different outcomes. Therefore, there is merit in considering amending the *Trustee Act* to provide for the oppression remedies akin to those in ss 232 and 233 of the *Corporations Act*. The principles which underpin those provisions and the court’s consideration of those provisions demonstrate the flexibility necessary in seeking to make available remedies under the broad umbrella of ‘oppression’: see, by way of example, *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR at [59], [61]–[65] and [176]–[179]. The need for flexibility arises because the extent of human endeavour, ingenuity and ‘unfair’ conduct is itself limited only by the human imagination.<sup>14</sup>

- 5.18 As discussed below, the Commission endorses this submission regarding the scope of the available remedies to relieve against oppressive conduct. It follows that the meaning of oppression under the amendment should be consistent with the case law pertaining to the Corporations Act.

- 5.19 If a narrower meaning of oppression were adopted, practical difficulties would arise for the reasons suggested in the submission of the Federal Court.

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11 The Australian Law Reform Commission and the Companies and Securities Advisory Committee released a report into collective investment schemes in 1993. The Commission and the Advisory Committee recommended that investors should be able to avail themselves of oppression remedies based upon the current statutory provisions of the Corporations Act: see Law Reform Commission (Australia) and Companies and Securities Advisory Committee, *Collective Investments: Other People’s Money*, ALRC Report No 65 (1993) (ALRC/CSAC Report) [11.33]. The submissions made to the Commission appear to have suggested that the proposed amendments be closely modelled on the statutory relief available to shareholders: see proposed section 260AQ at 152–4 of the report.

12 For a discussion of these cases see: R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford’s Principles of Corporations Law* (at 109) [10.450]; Richard Brockett, ‘The Valuation of Minority Shareholdings in an Oppression Context—A Contemporary Review’ (2012) 24.2 *Bond Law Review* 101, 105.

13 Submission 4 (Federal Court of Australia); Submission 6 (Cornwall Stodart and Ari Bergman).

14 Submission 4 (Federal Court of Australia) 2.

- 5.20 The Commission notes that section 232(d) of the Corporations Act currently adopts the concept of the interests of the members of the company. A number of cases have suggested that the meaning of ‘interests’ should not necessarily be confined to the commercial interest of the members.<sup>15</sup> In the law of trusts, however, there is authority for the proposition that the duty to act in the best interests of the beneficiaries refers to their economic interests.<sup>16</sup>
- 5.21 In the Commission’s view, the meaning of ‘the interests of the beneficiaries’ under the proposed statutory remedy should not be confined to their economic or commercial interests. Since the amendments involve the interaction between trusts and companies, the Commission recommends a definition of ‘interests’ which reflects the current jurisprudence under the Corporations Act.

### Scope of the oppression remedy

- 5.22 As discussed in Chapter 3, section 233 of the Corporations Act gives the court a wide discretion to make orders granting an oppression remedy. It also contains a non-exhaustive list of possible orders, by way of example.<sup>17</sup>
- 5.23 In the Commission’s consultation paper,<sup>18</sup> the following questions were asked:
- Should the orders available to the court be specified, or left to what the court ‘considers appropriate’ as in section 233 of the Corporations Act?
- Section 233 of the Corporations Act provides a non-exhaustive list of examples of the types of order available. Should a similar list be included in any amendment to the *Trustee Act*?

The majority of submissions<sup>19</sup> expressly endorsed the concept of a broad discretion for the court to make whatever order is appropriate in the circumstances. Two submissions<sup>20</sup> also expressly endorsed the inclusion of a non-exhaustive list of possible orders, by way of example, as provided in section 233 of the Corporations Act. While not expressly dealing with the issue, two other submissions<sup>21</sup> did not oppose a broad discretion, nor a list of examples.

- 5.24 One of the submissions, from Professor Elise Bant and Associate Professor Matthew Harding of the University of Melbourne Law School, questioned the utility and effect of such a broad discretion being given to the court, especially in respect of discretionary trusts:

It should not be assumed that just because the subject matter of such remedies will be trusts, courts should be given a wide-ranging and open-ended discretion in operating them. We would urge the Commission to give some thought to the extent to which legislative provisions might seek to guide and direct judicial application of any oppression remedies in the Trustee Act, so that these remedies can be administered in a predictable and transparent fashion. Here, possible models of appropriate legislation might be developed along the lines of the guiding criteria used to assist courts in determining unconscionable conduct under s 21 of the Australian Consumer Law.<sup>22</sup>

15 R Baxt, E Finnane and J Harris, *Corporations Legislation 2011* (Lawbook Co, 10th ed, 2011) 260 citing; *Turnbull v NRMA Ltd* (2004) 186 FLR 360; *Shelton v NRMA Ltd* (2004) 51 ACSR 278; *Szencorp Pty Ltd v Clean Energy Council Ltd* (2009) 69 ACSR 365; *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304.

16 *Cowan v Scargil* [1985] Ch 270, 286–7; also see Geoffrey Nicoll, ‘Corporate Ownership and Control in the Financial Markets’ (2011) 10 *Canberra Law Review* 36.

17 R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford’s Principles of Corporations Law* (at 109) [10.490].

18 Victorian Law Reform Commission, *Trading Trusts—Oppression Remedies*, Consultation Paper No 21(2014) 58.

19 Submission 4 (Federal Court of Australia); Submission 5 (Commercial Bar Association of Victoria); Submission 6 (Cornwall Stodart and Ari Bergman); Submission 7 (Institute of Legal Executives (Victoria)).

20 Submission 4 (Federal Court of Australia); Submission 6 (Cornwall Stodart and Ari Bergman).

21 Submission 1 (Professor Matthew Conaglen, University of Sydney Law School); Submission 2 (Peter Agardy, Victorian Bar); Submission 3 (Professor Elise Bant and Associate Professor Matthew Harding, University of Melbourne Law School).

22 Submission 3 (Professor Elise Bant and Associate Professor Matthew Harding, University of Melbourne Law School) 1–2.

- 5.25 The Commission has considered this submission and, bearing in mind that some compromise between predictability and flexibility is unavoidable, the Commission has opted for a more flexible approach. The legislative policy behind an oppression remedy is, in the Commission's view, broader than the concept of 'unconscionability'. This accords with views expressed in submissions, particularly that from the Federal Court of Australia.<sup>23</sup>
- 5.26 As a result, the Commission recommends that the court be given a broad discretion, in similar terms to those used in section 233 of the Corporations Act, and that a non-exhaustive, exemplary list of possible orders be included in the new provisions in the Trustee Act.
- 5.27 In considering what should be included in this list of examples, the Commission has considered the relevant provisions in the Singapore Business Trusts Act,<sup>24</sup> the Canada Business Corporations Act,<sup>25</sup> and the draft recommended provisions in the ALRC/CSAC report.<sup>26</sup> All of these provisions appear at Appendix D.
- 5.28 The Commission notes that the precise wording of section 233 of the Corporations Act would have to be adapted to accommodate the law of trusts. These provisions would also require careful drafting to accommodate the recommendations contained in this report.

### Proposed list of possible orders

- 5.29 In the Commission's view, the non-exhaustive, exemplary list of possible orders could be in a similar form to the following list, which is based on section 233.

The Court can make any order under this section that it considers appropriate in relation to the trading trust, including an order:

- that the trust be terminated;
- that existing terms of the trading trust be modified in any manner;
- regulating the conduct of the trading trust in the future;
- for the purchase of, or payment for the renunciation of, the rights of a beneficiary under the trading trust by another beneficiary or other beneficiaries or by the trustee of the trading trust;
- for the trustee of the trading trust to institute, prosecute, defend or discontinue specified proceedings;
- authorising a person with rights under the trading trust to institute, prosecute, defend or discontinue specified proceedings in the name of or otherwise on behalf of the trustee;
- removing and replacing the trustee or trustees of the trading trust;
- restraining a person from engaging in specified conduct or from doing a specified act;
- requiring a person to do a specified act.

If an order under this section modifies or replaces the terms of a trading trust or replaces the trustee or trustees of a trading trust, the trustee or trustees for the time being of the trading trust do not have the power to change the terms of the trading trust and the appointor (if any) of the trading trust does not have the power to remove or replace the trustee or trustees of the trading trust if that change or replacement would be inconsistent with the provisions of the order, unless the leave of the court is first obtained.

23 Submission 4 (Federal Court of Australia); quoted above at [5.17].

24 *Business Trusts Act* (Singapore, cap 30, 2008 rev ed) s 41.

25 *Canada Business Corporations Act*, RSC 1985, c C-44, s 241.

26 Law Reform Commission (Australia) and Companies and Securities Advisory Committee, *Collective Investments: Other People's Money*, ALRC Report No 65 (1993).



- 5.30 The Commission considers that given the nature of the problems confronting beneficiaries identified in Chapter 1, the most important powers that a court should possess are:
- to terminate the trust
  - to modify the terms of the trust deed
  - to regulate the conduct of the trading trust
  - to order the purchase of, or payment for the renunciation of, a right under the trading trust.
- 5.31 The first and last of these powers are akin to the winding up and buyout orders available under the Corporations Act, respectively.

#### An order that the trust be terminated

- 5.32 The equitable principles governing termination and redemption are discussed in Chapter 4. It is clear that a court does not have any inherent or existing statutory power to terminate a trust. Nor is it clear that equitable doctrine can be invoked to terminate a trust.
- 5.33 Plainly, an express power to terminate the trust should be included in the non-exhaustive statutory list.

#### An order that the existing terms of the trust be modified

- 5.34 As outlined at [5.6]–[5.13] the Commission recommends that the court should be given a broad power to modify the trust deed, where this is necessary to remedy oppressive conduct. The terms of the trust deed should not be determinative or pre-emptive.

#### An order for the purchase of rights under the trading trust

- 5.35 The wording at [5.29] is generally appropriately adapted to the power to make a buyout order under section 233(1)(d) of the Corporations Act. In most circumstances, the meaning of rights under a trading trust will correspond to a beneficiary's beneficial interest. A clear example is the interest of a beneficiary in a unit trust.
- 5.36 However, as demonstrated in Chapter 2, difficulties may arise in identifying the beneficial interest of a beneficiary in a discretionary trust. Moreover, a beneficiary of a discretionary trust will not usually possess an interest capable of purchase, but merely a right to have the trust administered. In such a case it may be appropriate for a court to order that a trustee or beneficiary pay a beneficiary, at fair value (as set out at 2.105), for their renunciation of any future claim from the trust.
- 5.37 In those rare cases where it is necessary to make such orders, it is the Commission's view that the court should adopt a broader view of rights under the trading trust than the meaning of beneficial interest.
- 5.38 There are certain circumstances, especially in the case of discretionary trusts, where it would be appropriate for the court to have regard to, but not be bound by, the terms of the trust deed. The Commission thus recommends that a provision to similar effect accompany the amendment.

#### Orders regulating the conduct of the trading trust

- 5.39 The Commission notes that in certain circumstances a beneficiary may require additional remedies in order to fully relieve the oppressive conduct. This may arise where the trading trust is part of a broader structure which encompasses both trusts and companies.

- 5.40 In order to provide an effective remedy, a court may have to make orders that affect the internal management of the company, as the trustee of a trading trust will typically be a corporate trustee. An instance, according to the Commercial Bar Association of Victoria, is where the remedy necessarily involves the complete severance of the business relationship between the parties.<sup>27</sup>
- 5.41 Under section 233 of the Corporations Act, a shareholder can seek remedies including an order ‘regulating the company’s affairs.’<sup>28</sup> Similarly, under the proposed amendment, a beneficiary may seek an order regulating the conduct of the corporate trustee. A difficulty with orders of this kind is that they relate to the affairs of corporations and the conduct of shareholders and directors. An attempt to include such a provision in the Trustee Act may create jurisdictional issues involving the interaction of state and Commonwealth laws. As will be seen below, it is possible for a legislative displacement provision to be included, to counteract this problem.
- 5.42 The Commission notes that section 233(3) of the Corporations Act contains the following provision:
- If an order made under this section repeals or modifies a company’s constitution, or requires the company to adopt a constitution, the company does not have the power under section 136 to change or repeal the constitution if that change or repeal would be inconsistent with the provisions of the order, unless:
- (a) the order states that the company does have the power to make such a change or repeal; or
- (b) the company first obtains the leave of the Court.
- 5.43 The proposed amendment may be adapted to section 233(3) by addressing the power of the trustee to modify the terms of the trust deed and the capacity of an appointor to change the trusteeship.

## Recommendation

- 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.

### Who should be able to apply for an order?

- 5.44 As outlined in Chapter 3, the standing provisions of the Corporations Act are set out in section 234 of that Act, in fairly broad terms. However, it is clear from the cases examined in Chapter 3 that the current law, while uncertain, clearly does not extend to a beneficiary who is not also a shareholder in the corporate trustee.
- 5.45 The Commission’s view is that the availability of the oppression remedy for beneficiaries should be at least as broad and flexible as the current Corporations Act provisions relating to shareholders. This means that there should be no requirement for a beneficiary to be a shareholder or member.

- 5.46 In the Australian Law Reform Commission/Companies and Securities Advisory Committee report, the recommended oppression remedy could be sought by ‘an investor in a collective investment scheme or by the Commission.’<sup>29</sup> It should be remembered that the subject of that report included, but was broader than, trading trusts. Thus an ‘investor’ could have been a beneficiary or unitholder of a trading trust, but might not necessarily have been so.
- 5.47 In the Singapore Business Trusts Act, the remedy may be sought by ‘any unitholder or any holder of a debenture of a registered business trust’.<sup>30</sup>
- 5.48 In the Canada Business Corporations Act, ‘a “complainant” may apply to a court for an order’. Section 238 of that Act provides:
- ‘complainant’ means:
- (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
  - (b) a director or an officer or a former director or officer of a corporation or any of its affiliates
  - (c) the Director <sup>31</sup>; or
  - (d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.
- 5.49 The Commission’s view is that an inclusive approach should be adopted, meaning that there should be no requirement for an applicant for the oppression remedy to be a shareholder or member of the corporate trustee.

## Recommendation

- 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.

- 5.50 The Commission has included the third listed category in the recommendation above, ‘[a] person to whom the court grants leave’, to reflect section 234(e) of the Corporations Act which provides that a person will have standing when:
- ASIC thinks [it] appropriate having regard to investigations it is conducting or has conducted into:
- (i) the company’s affairs; or
  - (ii) matters connected with the company’s affairs.<sup>32</sup>

<sup>29</sup> Law Reform Commission (Australia) and Companies and Securities Advisory Committee, *Collective Investments: Other People’s Money*, ALRC Report No 65 (1993) 152 [260AQ(1)].

<sup>30</sup> *Business Trusts Act* (Singapore, cap 30, 2008 rev ed) s 41(1).

<sup>31</sup> A statutory regulator appointed under section 260 of the Canada Business Corporations Act.

<sup>32</sup> For a discussion of circumstances surrounding intervention by ASIC, see ASIC information sheet 180; R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford’s Principles of Corporations Law* (at 109) [10.440.18].

- 5.51 The leave requirement has been included to preserve the breadth and flexibility of the oppression remedy. However, the Commission envisages that leave will be granted only where a court considers that the person is sufficiently connected to the trust’s affairs; or matters connected with the trust’s affairs. Moreover, the Commission proposes that such a person would have to demonstrate a compelling interest, not otherwise protected by law.

### The court’s existing powers

- 5.52 Participants in the roundtable raised the possibility of existing law offering some avenues of relief to beneficiaries subject to oppressive conduct.
- 5.53 While the Commission does not take the view that these existing avenues of relief provide a suitable alternative to the recommended statutory remedy, it is important that any legislative amendment not have the unintended or unforeseen consequence of limiting any of the court’s current palliative powers.
- 5.54 For this reason, a provision should be expressly included in the amendment provisions, making it clear that the court’s new powers with respect to oppression do not limit the existing powers of the court.

## Recommendation

- 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.

### Exit remedy

- 5.55 An important theme of this report is the inadequacy of remedies available to beneficiaries under trust law and the *Vigliaroni/Drpac* line of authority. As explained in Chapter 4, beyond termination pursuant to the trust deed, there are very few mechanisms available to a beneficiary which enable the extrication of their interest from a trading trust. A key recommendation of this report is for orders equivalent to winding up or buyout to be part of a broad oppression remedy for trading trusts.
- 5.56 However, at the roundtable several participants noted that there are many cases when a winding-up or buyout order may be justified in circumstances falling short of oppression. For instance section 461(1)(k) of the Corporations Act allows the court to make a winding-up order when it is just and equitable to do so. There is authority for the proposition that a court can make a winding-up order under this ground when deadlock between the members constitutes an irreconcilable breakdown in the business relationship.<sup>33</sup> Although oppression may encompass situations of deadlock, this is not necessarily so.<sup>34</sup> This point was also made in several submissions.<sup>35</sup>
- 5.57 Although the relationship between a situation of deadlock and the oppression remedy is a close one, the Commission notes that these recommendations are beyond the scope of the terms of reference.

33 *Nassar v Innovative Precasters Group Pty Ltd* (2009) ACSR 343, 366 [132].

34 *Nassar v Innovative Precasters Group Pty Ltd* (2009) ACSR 343, 360 [98]; Also see Carlos L Israels, ‘The Sacred Cow of Corporate Existence: Problems of Deadlock and Dissolution’ (1952) 19 *University of Chicago Law Review* 778.

35 Submission 2 (Peter Agardy, Victorian Bar) 3–4; Submission 5 (Commercial Bar Association of Victoria) 4.

## Constitutional/jurisdictional issues

- 5.58 Amending the Trustee Act to provide for oppression remedies for beneficiaries, as recommended by the Commission, will raise issues concerning the interaction between state and Commonwealth laws.
- 5.59 The constitutional basis for the Corporations Act is found both in the legislative powers of the Commonwealth in section 51 of the Constitution (especially section 51(xx), the power to make laws with respect to trading or financial corporations) and in the referral of powers by the states (see the Corporations Act, section 3). In particular, the states, through Acts such as the *Corporations (Commonwealth Powers) Act 2001* (Vic), referred to the Commonwealth the power to make laws with respect to the matters relating to the original text of the Corporations Act.<sup>36</sup>
- 5.60 The current referral reflects the position that the Commonwealth's legislative power does not cover the whole scope of corporate entities (section 51(xx) being relevantly directed to 'trading or financial corporations'), that the power in section 51(xx) was extended only to the regulation of trading and financial corporations once 'formed'<sup>37</sup> and that the High Court had found that jurisdiction under state corporations laws (under the previous regime) could not be vested in the Federal Court.<sup>38</sup>
- 5.61 In this context, the Corporations Act, while Commonwealth law, contains provisions in Part 1.1A which provide, in short, that:<sup>39</sup>
- that Act is intended to have concurrent operation with state laws, including ones which impose additional liabilities on companies or directors<sup>40</sup>
  - the states can declare a matter to be an 'excluded matter' so that, simply put and subject to the Commonwealth making a regulation to the contrary, part or all of the Corporations Act does not apply with respect to that matter;<sup>41</sup> and
  - the states can declare a provision of a state law to be a 'corporations legislation displacement provision' so that, in short, the corporations legislation does not operate to the extent that there would otherwise be an inconsistency between the corporations legislation and the provision of the state law.<sup>42</sup>
- 5.62 Part 1.1A of the Corporations Act is designed against the operation of section 109 of the Constitution, which provides that, where a state law is inconsistent with a Commonwealth law, the latter shall prevail and the former shall be invalid to the extent of the inconsistency.<sup>43</sup>

### Is a corporation legislation displacement provision necessary?

- 5.63 In the Commission's view, consideration needs to be given to the operation of Part 1.1A of the Corporations Act in relation to beneficiaries who are shareholders in the relevant corporate trustee.
- 5.64 As discussed in Chapter 3, there is a clear division in the view of Australian courts regarding the question of whether the remedy in Part 2F.1 of the Corporations Act already applies to such beneficiaries. If it does and the Trustee Act is amended to provide similar remedies, a question may arise as to whether there would be inconsistency between Part 2F.1 and the new provisions which would render them invalid by virtue of section 109 of the Constitution:

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36 *Corporations (Commonwealth Powers) Act 2001* (Vic) s 4(1)(a).  
 37 *NSW v Commonwealth ('Incorporation case')* (1990) 169 CLR 482.  
 38 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.  
 39 For a discussion and summary of the following principles see *Loo v DPP (Vic)* (2005) 12 VR 665.  
 40 *Corporations Act 2001*(Cth) s 5E.  
 41 *Ibid* s 5F.  
 42 *Ibid* s 5G.  
 43 *P v P* (1984) 181 CLR 583.

- While section 5E(1) of the Corporations Act, which provides that the corporations legislation is not intended to exclude or limit the concurrent operation of any law of a state, is relevant to determining a question of inconsistency, it is not necessarily determinative; in particular, it will not avoid invalidity arising out of a ‘direct’ inconsistency (or textual collision) between Commonwealth and state laws.<sup>44</sup>
  - In some cases, a Commonwealth law conferring jurisdiction on a court will be construed as intending to provide an exclusive remedy with respect to a particular matter, rendering a state law conferring jurisdiction with respect to that matter invalid.
  - In other cases, a Commonwealth law conferring jurisdiction on a court will be construed as intended to exist against the background of state laws, including state laws conferring like jurisdiction on the courts. In such cases, inconsistency will not arise unless a court actually exercises jurisdiction under the Commonwealth law, in which case, the determination in the exercise of the jurisdiction under the Commonwealth law will prevail (and any exercise of state jurisdiction with respect to the same matter will be invalid).<sup>45</sup>
- 5.65 If the second scenario considered above arose, the state could declare the relevant provisions of the Trustee Act to be corporations legislation displacement provisions under section 5G of the Corporations Act. As discussed in paragraph [5.41] above, this would avoid any issue of inconsistency arising (as, to the extent that there might otherwise be inconsistency, the Corporations Act would not apply).
- 5.66 For these reasons, the Commission recommends that the amendments to the Trustee Act should include a corporation legislation displacement provision.

## Recommendation

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

## Other matters

### The need for uniformity

- 5.67 A number of the submissions received by the Commission stressed the desirability of uniform, or at least harmonised laws, across Australia.
- 5.68 Cornwall Stodart and Ari Bergman made the following submission:

We would prefer that comprehensive oppression remedies be incorporated into the national legislation (constitutional restrictions permitting). It is submitted that, in the context of oppression, the CA [Corporations Act], rather than the Trustee Acts, is the primary legislative instrument by which unitholders should have access to relief...

The federal legislature have historically been reluctant to regulate trusts under the CA and there is no certainty that it will be persuaded to change that attitude. Failing action by the Commonwealth, consideration should be given to amendments to the Trustee Acts to include relief against oppression as an alternative. Amendments to the *Trustee Act 1958 (Vic)* would afford protection in those oppression cases where there is no corporate trustee.<sup>46</sup>

44 *Momcilovic v The Queen* (2011) 245 CLR 1, 74 (French CJ), 134 (Gummow J) 142 (Hayne J, dissenting on the broader inconsistency point) 238–39 (Crennan and Kiefel JJ) 189 (Heydon J).

45 This being a species of s 109 inconsistency often called ‘operational inconsistency’. See generally, *P v P* (1984) 181 CLR 583, 602–3.

46 Submission 6 (Cornwall Stodart and Ari Bergman) 7.

- 5.69 The Commercial Bar Association of Victoria submitted:
- The ideal situation would be for the reform to apply uniformly throughout Australia. On balance, CommBar consider this issue to be sufficiently important to support amending the *Trustee Act 1958* (Vic) unilaterally to provide oppression remedies for minority beneficiaries...However, this should be complemented by efforts to promote uniformity in state Trustee Acts via SCLJ (the successor of SCAG) or other appropriate body.<sup>47</sup>
- 5.70 The Federal Court of Australia, in its submission, stated that:
- It would be desirable, if not essential, for there to be harmonious Commonwealth and State laws providing these remedies for trading trusts and unit trusts.<sup>48</sup>
- 5.71 The Commission agrees that it is highly desirable that, to the maximum extent possible, uniform or harmonised laws apply to trading trusts across Australia. For this reason, if the Commission's recommendations are accepted and implemented, the Commission encourages the Victorian Government to take appropriate steps to achieve this. However, the Commission considers that enactment of Victorian legislation should not wait upon the achievement of full harmonisation.

## Tax

- 5.72 The Commercial Bar Association of Victoria's submission, made the following observation:
- ...The reality is that participants enter in these structures often unknowingly, generally on the fairly high level advice of their accountants that the structure will be tax effective, but without appreciating the consequences of the structure if the business relationship breaks down in the future.
- This raises policy questions, including:
- How far should the law go to save people from the consequences of their desire to minimise tax?<sup>49</sup>
- 5.73 While the apparent use of trading trusts 'as a device for evading, avoiding and minimising direct and indirect taxes'<sup>50</sup> is a policy issue to be considered when considering the desirability of extending oppression remedies to the beneficiaries of such trusts, in the Commission's view, it should not be determinative.
- 5.74 As D'Angelo pointed out:
- Absent empirical evidence, it is difficult to estimate the relative weight of taxation benefits over other factors in the expansion of commercial usage of the trust.<sup>51</sup>
- 5.75 D'Angelo also stated that:
- Australian tax laws expressly contemplate trusts and as a matter of policy deliberately extend certain benefits to participants in them if they are structured a certain way and conform to ongoing requirements; in this context, the trust is not used as an instrument of tax evasion or avoidance.<sup>52</sup>

And elsewhere:

...those benefits could be swept away with the stroke of a legislative pen.<sup>53</sup>

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47 Submission 5 (Commercial Bar Association of Victoria) 5.  
 48 Submission 4 (Federal Court of Australia) 2.  
 49 Submission 5 (Commercial Bar Association of Victoria) 5.  
 50 Nuncio D'Angelo, *Commercial Trusts*, (LexisNexis Butterworths, Australia, 2014) 33.  
 51 Ibid 34.  
 52 Ibid 33.  
 53 Ibid 79.



- 5.76 The policy basis for the taxation benefits offered to beneficiaries of trading trusts is not the subject of this reference. In the Commission’s view, if such benefits are seen to be undesirable or unjustified, the solution lies in reform of the taxation laws at a Commonwealth level, rather than denying remedies to beneficiaries subject to oppressive or unfair conduct.

## Education

- 5.77 In a related point, the Commercial Bar Association of Victoria posed the following question in its submission to the Commission:

Should the law reform dollar instead be spent on educating advisers as to the ‘back end’ consequences of trading trust structures and the desirability of entering into a well-drafted unitholders’ deed, rather than on tampering with trusts law?

Although this submission advocates the education effort referred to in the previous paragraph being undertaken, the relational nature of the business relationship and the difficulty in anticipating all possible future events would suggest that this education effort should also be complemented by law reform.<sup>54</sup>

- 5.78 The Commission endorses this submission. Law reform to extend oppression remedies to beneficiaries and efforts to educate accountants, lawyers and other professional advisers as to the potential consequences of trading trust structures should not be mutually exclusive. Based on submissions received, other consultations and its own research, the Commission recommends law reform. It also encourages greater efforts from within the professions to educate professional advisers.

# Interests of other parties

- 88** Introduction
- 89** Directors of the corporate trustee
- 90** Creditors
- 92** Employees

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## 6. Interests of other parties

### Introduction

- 6.1 The previous chapter explored the various reform mechanisms that enable beneficiaries of trading trusts to obtain oppression remedies. The terms of reference require the Commission to consider the interests of other parties which may be involved in, or interact with, trading trusts including creditors, trustees, directors and employees. Any such considerations will depend upon the nature of the recommendations, and in particular, the type of remedies that are made available to the beneficiaries of trading trusts.
- 6.2 Chapter 3 outlined in detail the different remedies that a court can order in response to oppression under section 233 of the *Corporations Act 2001* (Cth). It is clear that, at a general level, most of these remedies will impact upon the interests of other parties. For instance, a winding-up order will impact upon the employment of the company's officers or other employees. These considerations are relevant for a court in determining whether it is appropriate to grant an oppression remedy.<sup>1</sup> In the Commission's view, the same logic can be readily applied to trading trusts.
- 6.3 In the Commission's view, it is not clear that the introduction of oppression remedies for trading trusts would either alter or affect existing frameworks under the Corporations Act. For instance, the conduct of directors or trustees amounting to a breach of duty may itself constitute oppressive conduct. However, it is not clear that providing oppression remedies for beneficiaries of trading trusts would affect the duties owed by trustees or directors of corporate trustees.
- 6.4 An important issue that affects other interested parties was discussed in Chapter 3. Under the *Vigliaroni* and *Drapac* approach, third parties such as directors, creditors and employees might be able to avail themselves of oppression remedies when they are also shareholders of the corporate trustee. The limitations implicit in this approach are discussed in Chapters 3 and 5.

## Directors of the corporate trustee

- 6.5 Chapter 3 outlined the basic proposition that directors owe duties directly to the company.<sup>2</sup> However, the facts of many of the cases considered in this report show that typically the trustee of a trading trust will be a corporate trustee.
- 6.6 At law, the doctrine of separate legal personality means that where a company acts as a trustee, the directors will owe duties to the company rather than the beneficiaries of the trading trust.<sup>3</sup> Although, as was shown in Chapter 2, a trustee owes duties directly to the beneficiaries, the interposition of a corporate trustee would ordinarily prevent beneficiaries from claiming directly against the directors.<sup>4</sup>
- 6.7 There are exceptions to this principle. The first is if a director knowingly assists the company in a breach of trust, then the director may be liable under the principles from *Barnes v Addey*.<sup>5</sup> As Ford and Hardingham explain, the beneficiaries could argue:
- to the extent that any breach of fiduciary duty has been committed by the trustee company, the directors, as the brains and hands of the company, must have knowingly assisted in that breach and thus, once again, should share full responsibility.<sup>6</sup>
- 6.8 The second possible exception is that there might be circumstances where the directors of a corporate trustee owe fiduciary duties directly to the beneficiaries of a trading trust.<sup>7</sup>
- 6.9 If oppression remedies, however, were granted to the beneficiaries of a trading trust, this may alleviate the need to find a fiduciary duty owed by the directors of corporate trustees.
- 6.10 In the consultation paper, the Commission asked what impact the legislative reforms would have upon directors and trustees. According to Cornwall Stodart and Ari Bergman:
- [t]he introduction of statutory oppression remedies for beneficiaries of trading trusts would potentially expose the trustee and directors of the corporate trustee to greater liabilities than those to which they are currently subjected.<sup>8</sup>
- 6.11 Some participants at the roundtable, however, suggested that the introduction of a statutory oppression remedy would have little impact upon the liability owed by directors. This was based on the view that courts already have the power to join a director to an oppression proceeding under the Corporations Act.
- 6.12 The Commission agrees with the submission stated above, that the introduction of a statutory oppression remedy would increase the liability of directors and trustees, insofar as their conduct falls within the ambit of the amendment. The Commission does not view this as an undesirable outcome of the amendment.

<sup>2</sup> *Percival v Wright* [1902] 2 Ch 421.

<sup>3</sup> R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford's Principles of Corporations Law* (at 109) [4.225].

<sup>4</sup> H A J Ford and I J Hardingham, 'Trading Trusts: Rights and Liabilities of Beneficiaries' in P D Finn, *Equity and Commercial Relationships* (Lawbook Co) 58.

<sup>5</sup> (1874) LR 9.

<sup>6</sup> H A J Ford and I J Hardingham, 'Trading Trusts: Rights and Liabilities of Beneficiaries' in P D Finn, *Equity and Commercial Relationships* (Lawbook Co, 1987) 63. However in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 the High Court held that the breach of trust which was assisted must be dishonest or fraudulent.

<sup>7</sup> *Hurley v BGH Nominees Pty Ltd* (1984) 10 ACLR 197; *ASC v AS Nominees* (1995) 133 ALR 1, 18–19; Although in *AS Nominees* Finn J appears to leave the possibility open, his Honour suggests that the imposition of a direct fiduciary duty is unlikely, given the availability of other remedies.

<sup>8</sup> Submission 6 (Cornwall Stodart and Ari Bergman) 8.

## Creditors

### The right of indemnity

6.13 According to Heydon and Leeming:

[o]n a judgment at law against a trustee, the creditor ordinarily could not levy execution against the trust property; this is so even though the debt is founded upon a debt incurred in the course of trading by the trustee, because the execution does not extend to equitable assets where the whole beneficial interest is not in the judgment debtor.<sup>9</sup>

6.14 Since the corporate trustee of a trading trust will be nominally capitalised, a creditor may also seek access to the assets of the trust. A creditor may potentially access the assets of the trust through subrogation to the trustee's right of personal indemnity to the trust property,<sup>10</sup> or potentially to the trustees' personal claim against the beneficiaries.<sup>11</sup>

6.15 It is possible, however, for the trustees' right of indemnity to be modified by the terms of the trust deed. Matthew Conaglen submitted that:

There is complicated case law as to whether the trustee's proprietary right of indemnity against trust assets (as distinct from the personal right of indemnity against the trust beneficiaries) is capable of being removed by the trust deed: see, e.g., *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties* [1984] 1 Qd R 576, 585; *Agusta Pty Ltd v Provident Capital Ltd* [2012] NSWCA 26 at [39], (2012) 16 BPR 30,397; *Franknelly Nominees Pty Ltd v Abrugiato* [2013] WASCA 285 at [205]-[235]. On the basis of this case law, there is a sound basis for arguing that the indemnity provided for by s 36(2) of the Trustee Act 1958 (Vic) is capable of being removed by the trust deed, on the basis of s 2(3) of the same Act (and by analogy with the reasoning adopted in the *Franknelly* decision), but that is not beyond doubt. That, obviously, does not mean that the indemnity cannot be removed by legislation (or by a court order where legislation so empowered the court), but the point is that this would be a consequence for third party creditors, who would lose their ability to subrogate to that indemnity. The extent of that consequence depends on the extent to which trusts in Victoria exclude the trustees's proprietary right of indemnity.<sup>12</sup>

6.16 Some participants at the roundtable suggested that as part of the proposed reforms to the *Trustee Act 1958* (Vic), a court should have the express power to modify the trustee's right of indemnity. This view was based on the argument that a court should be given maximum flexibility under the proposed amendment, once the criterion of standing is established. As noted by Matthew Conaglen, such an inclusion would affect the interests of creditors.

6.17 A contrary view however, was expressed by Cornwall Stodart and Ari Bergman who submitted:

[t]he introduction of statutory oppression remedies for beneficiaries of trading trusts should not affect the interests of creditors...In determining appropriate remedies, the Court often has regard to the interests of creditors.<sup>13</sup>

6.18 The Commission has considered whether it is appropriate for the Court to be given an express power to modify the trustee's right of indemnity. It is not clear, however, in what circumstances it would be necessary for the court to modify the right of indemnity in order to relieve beneficiaries from oppressive conduct.

9 J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th edition, 2006) 574, citing *Daly v Union Trustee Co of Aust Ltd* (1898) 24 VLR 460, 468; *Re Staff Benefits Pty Ltd* [1979] 1 NSWLR 207; also see *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, 367.

10 J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th edition, 2006) 574.

11 H A J Ford and I J Hardingham, 'Trading Trusts: Rights and Liabilities of Beneficiaries' in P D Finn, *Equity and Commercial Relationships* (Lawbook Co, 1987) 75–6; Daniel Whitehead, 'Pride or prejudice: A better understanding of the English law risks of corporate trustees can benefit a large number of investors' (2011) 30 *International Financial Law Review* 32; also see *Hardoon v Bellios* [1901] AC 118.

12 Submission 1 (Professor Matthew Conaglen, University of Sydney Law School) 3.

13 Submission 6 (Cornwall Stodart and Ari Bergman) 8.

- 6.19 The Commission notes that Recommendation 2 provides that the court can make ‘any order it considers appropriate’ which includes an order modifying the trustee’s right of indemnity. It is therefore unnecessary for an express power to be provided.
- 6.20 While the Commission accepts that ordinarily it would be undesirable for a court to interfere with the interests of creditors, the preferable approach, consistent with the broad and flexible nature of the oppression remedy, is for this to be at the discretion of the court.
- 6.21 Participants at the roundtable suggested that if the court is given the power to modify the trustee’s right of indemnity, then the amendment should expressly state that a court must consider the interests of creditors. The Commission accepts this recommendation. Moreover, the Commission recommends that a provision be included in the amendment providing that a court should consider the interests of third parties including, but not limited to, directors, trustees, shareholders, employees and creditors.

## Recommendation

- 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.

## Standing

- 6.22 As outlined in Chapter 3, the principles from the *Vigliaroni* and *Drapac* line of authority mean that creditors of a trading trust will not be able to obtain an oppression remedy unless they are both unitholders and shareholders in the corporate trustee.
- 6.23 However, as explained in Chapter 5, although the Commission is not recommending that standing be expressly extended to creditors, the Commission proposes that other parties may obtain the leave of the court to seek an oppression remedy.
- 6.24 In contrast to Canada and Singapore, Australian courts have been reluctant to extend the availability of oppression remedies ‘in order to avoid an unwarranted assumption of the responsibility of the company.’<sup>14</sup> It has been suggested that creditors who are also members of a company can seek leave under section 234 of the Corporations Act. Austin and Ramsay explain that:
- There is English authority that the oppression remedy is broad enough to include a member who is affected in the capacity of a creditor, even where the loan to the company is not made directly by the member but is made through another company which the member controls: *R & H Electric Ltd v Haden Bill Electrical Ltd* [1995] 2 BCLC 280.<sup>15</sup>
- 6.25 In the Commission’s view, a creditor may arguably qualify as a party to whom the court may grant leave in the event that their interest is affected by oppressive conduct. The Commission, however, considers that a court should have regard to matters considered above at [5.51] and the current law relating to creditors, which would suggest that a creditor would receive standing only in limited circumstances.<sup>16</sup>

14 R N Chesterman, ‘Oppression by the majority—or of it?’ (2004) 25 *Australian Bar Review* 103, 108, citing *Thomas v HW Thomas Ltd* [1984] 1 NZLR 686, 697; *Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459, 467.

15 R P Austin and I M Ramsay, LexisNexis Butterworths, *Ford’s Principles of Corporations Law* (at 109) [10.470].

16 The possibility of extending standing under an amendment to the Corporations Act to certain types of creditors that hold debentures has been recently considered by Ari Bergman, *Should statutory oppression remedies apply to unit trusts? A comparison of unitholder and shareholder rights* (SJD Thesis, Monash University, forthcoming) 189-90. It is also worth noting that debenture holders currently have standing to seek an oppression remedy under Singapore legislation: *Business Trusts Act* (Singapore, cap 30, 2008 rev ed) s 41(1).

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- 6.26 Clearly, if an oppression remedy involved compensation or the reduction of debt, a grant of the remedy could reduce the assets otherwise available to creditors. However, this is presently the position under section 233 of the Corporations Act. The flexibility of the oppression remedy already allows the court to take the position of creditors into account before deciding on the appropriate order.<sup>17</sup> The Commission considers that this flexibility, coupled with Recommendation 6, will protect creditors' interests while preserving the effectiveness of the oppression remedy.
- 6.27 In the view of the Commission, the availability of oppression remedies to the beneficiaries of trading trusts is not likely to disturb the current law relating to creditors.

## Employees

- 6.28 It has been suggested in a number of cases that a court will take into account the position of employees if a winding-up order is sought in response to an oppression remedy.<sup>18</sup> However, in Chapter 3 it is shown that courts rarely order a winding-up. It follows that in the view of the Commission, the availability of oppression remedies in the context of trading trusts is not likely to increase the possibility of an adverse impact upon employees.
- 6.29 Participants at the roundtable stressed the advantages to employees where the court has a discretion to make orders relieving oppression other than a winding-up order. Participants thought the potential impact on employees, where a winding-up order is the only order a court can make, affords a strong argument in favour of a broad and flexible oppression remedy.

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17 *Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459, 466; suggests that the interests of various groups can be considered by court in determining whether an oppression remedy should be granted; see R Baxt, E Finnae and J Harris, *Corporations Legislation 2011* (Lawbook, 10th ed, 2011) 260.

18 *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd* (2008) ACSR 325, 341 [119]–[120]; *Wain v Drapac* [2012] VSC 156 (26 April 2012).



# Conclusion

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## 7. Conclusion

- 7.1 In Australia, trading trusts are often used as an alternative to companies as a way to structure businesses. This is true of small, family businesses as well as larger, more complex entities. Sections 232 to 234 of the *Corporations Act 2001* (Cth) provide a range of remedies for shareholders of a company subject to oppressive conduct.
- 7.2 As discussed throughout this report, similar remedies are available to beneficiaries of a trading trust only in very limited circumstances. Even this largely relies on judicial reasoning that remains contentious and uncertain.<sup>1</sup> Beneficiaries who are not also shareholders in the corporate trustee have even more limited opportunities for redress.
- 7.3 The need for legislative reform is clear. The traditional doctrines of trust law have kept pace with neither the commercial realities of the 21st century, nor the use of trading trusts in contemporary Australia. The current oppression remedies in the *Corporations Act* do not provide a clear and comprehensive solution.
- 7.4 The Commission is pleased to have had the opportunity to consider, and make constructive proposals on, the implications of this for beneficiaries of trading trusts and the use of trusts by businesses in Victoria more generally.
- 7.5 The legislative amendments that the Commission recommends in this report are a proportionate and targeted response to gaps and uncertainty in the current law.
- 7.6 The recommended reform should provide beneficiaries with a fairer, more certain way to seek redress when faced with oppressive conduct. However, given the limits and flexibility of the recommended reforms, they should not place an unjustified or onerous burden on trustees, directors or third parties associated with the relevant businesses.
- 7.7 The Commission commends this report to you.



# Appendices

- 96** **A. Submissions**
- 96** **B. Consultations**
- 96** **C. Participants in roundtable, 11 June 2014**
- 97** **D. Existing legislative provisions in other jurisdictions**

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# Appendices

## A. Submissions

1. Professor Matthew Conaglen, University of Sydney Law School
2. Peter Agardy, Victorian Bar
3. Professor Elise Bant and Associate Professor Matthew Harding, University of Melbourne Law School
4. Federal Court of Australia
5. Commercial Bar Association of Victoria
6. Cornwall Stodart and Ari Bergman
7. Institute of Legal Executives (Victoria)

## B. Consultations

1. Professor Ian Ramsay, University of Melbourne Law School
2. Ari Bergman
3. The Hon. Robert Austin, Senior Legal Consultant, Minter Ellison Lawyers

## C. Participants in roundtable, 11 June 2014

The Hon. Robert Austin (by phone)  
Professor Elise Bant  
Susan Barkehall-Thomas  
Ari Bergman  
Elisabeth Boros  
Eve Brown on behalf of the Financial Services Council (by phone)  
Professor Michael Bryan  
Professor Matthew Conaglen  
Daniel Crennan  
John Glover  
Associate Professor Matthew Harding  
Ian Hardingham QC  
Albert Monichino QC  
Michael Shand QC  
Carolyn Sparke QC

## D. Existing legislative provisions in other jurisdictions

### Business Trusts Act (Singapore, cap 30, 2008 rev ed)

#### Remedies in cases of oppression or injustice

41.

1. Any unitholder or any holder of a debenture of a registered business trust may apply to the court for an order under this section on the ground —
  - (a) that the affairs of the registered business trust are being conducted by the trustee-manager of the registered business trust, or the powers of the directors of the trustee-manager of the registered business trust are being exercised, in a manner oppressive to one or more of the unitholders or holders of debentures of the registered business trust including himself or in disregard of his or their interests as unitholders or holders of debentures of the registered business trust; or
  - (b) that some act of the trustee-manager of the registered business trust, carried out in its capacity as trustee-manager of the registered business trust, has been done or is threatened or that some resolution of the unitholders or holders of debentures of the registered business trust or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the unitholders or holders of debentures of the registered business trust (including himself).
2. If on such application the court is of the opinion that either of the grounds referred to in subsection (1) is established, the court may, with a view to bringing to an end to or remedying the matters complained of, make such order as it thinks fit and, without prejudice to the generality of the foregoing, the order may —
  - (a) direct or prohibit any act or cancel or vary any transaction or resolution;
  - (b) regulate the conduct of the affairs of the trustee-manager of a registered business trust in relation to the registered business trust in future;
  - (c) authorise civil proceedings against the directors of the trustee-manager of the registered business trust to be brought in the name of or on behalf of all the unitholders of the registered business trust as a whole by such person or persons and on such terms as the court may direct;
  - (d) provide for the purchase of the units in or debentures of the registered business trust by other unitholders or holders of debentures of the registered business trust;
  - (e) provide that the registered business trust be wound up; or
  - (f) provide that the costs and expenses of and incidental to the application for the order are to be raised and paid out of the trust property of the registered business trust or to be borne and paid in such manner and by such persons as the court deems fit.
3. Where an order under this section makes any alteration in or addition to the trust deed of any registered business trust, then, notwithstanding anything in any other provision of this Act but subject to the provisions of the order, the trustee-manager of the registered business trust concerned shall not have power, without the leave of the court, to make any further alteration in or addition to the trust deed that is inconsistent with the provisions of the order; but subject to the foregoing provisions of this subsection the alterations or additions made by the order shall have the same effect as if duly made by special resolution of the unitholders of the registered business trust.
4. A copy of any order made under this section shall be lodged by the applicant with the Authority within 7 days after the making of the order.

5. Any person who contravenes subsection (4) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$10,000 and, in the case of a continuing offence, to a further fine not exceeding \$1,000 for every day or part thereof during which the offence continues after conviction.
6. This section shall apply to a person who is not a unitholder of a registered business trust but to whom units in the registered business trust have been transmitted by operation of law as it applies to the unitholders of a registered business trust; and references to a unitholder or unitholders shall be construed accordingly.

### **Canada Business Corporations Act RSC 1985, c C-44**

241.

- (1) A complainant may apply to a court for an order under this section.

Grounds

- (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
  - (a) any act or omission of the corporation or any of its affiliates effects a result,
  - (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
  - (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly regards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

Powers of court

- (3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,
  - (a) an order restraining the conduct complained of;
  - (b) an order appointing a receiver or receiver-manager;
  - (c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;
  - (d) an order directing an issue or exchange of securities;
  - (e) an order appointing directors in place of or in addition to all or any of the directors then in office;
  - (f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;
  - (g) an order directing a corporation, subject to subsection (6), or any other person, to pay a security holder any part of the monies that the security holder paid for securities;
  - (h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;
  - (i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 155 or an accounting in such other form as the court may determine;
  - (j) an order compensating an aggrieved person;

- (k) an order directing rectification of the registers or other records of a corporation under section 243;
- (l) an order liquidating and dissolving the corporation;
- (m) an order directing an investigation under Part XIX to be made; and
- (n) an order requiring the trial of any issue.

#### Duty of directors

- (4) If an order made under this section directs amendment of the articles or by-laws of a corporation,
  - (a) the directors shall forthwith comply with subsection 191(4); and
  - (b) no other amendment to the articles or by-laws shall be made without the consent of the court, until a court otherwise orders.

#### Exclusion

- (5) A shareholder is not entitled to dissent under section 190 if an amendment to the articles is effected under this section.

#### Limitation

- (6) A corporation shall not make a payment to a shareholder under paragraph (3)(f) or (g) if there are reasonable grounds for believing that
  - (a) the corporation is or would after that payment be unable to pay its liabilities as they become due; or
  - (b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities.

#### Alternative order

- (7) An applicant under this section may apply in the alternative for an order under section 214.

### **Law Reform Commission (Australia) and Companies and Securities Advisory Committee, *Collective Investments: Other People's Money*, ALRC Report No 65 (1993)**

Remedy in cases of oppression etc. - collective investment schemes

260AQ.

- (1) The Court may, on application by an investor in a collective investment scheme or by the Commission, make an order under this section in relation to the scheme if it finds:
  - (a) that:
    - (i) the affairs of the scheme are being conducted in a way that is; or
    - (ii) an act or omission, or a proposed act or omission, by or on behalf of the scheme operator was or would be; or
    - (iii) a resolution, or a proposed resolution, of a meeting of investors or of a class of investors in the scheme was or would be;oppressive or unfairly prejudicial to, or unfairly discriminatory against, 1 or more investors (the 'oppressed investor or investors'), whether as investor or otherwise; or
- (b) that the scheme is being conducted in a way that is contrary to the interests of the investors as a whole.



- (2) The Court may make such orders as are just. Some examples of the kinds of orders that the Court can make are:
  - (a) an order that the scheme be terminated;
  - (b) an order for regulating the conduct of affairs of the scheme in the future;
  - (c) an order amending the constitution of the scheme;
  - (d) an order for the redemption of interests of any of the investors;
  - (e) an order requiring the scheme operator to buy specified interests in the scheme from an investor;
  - (f) an order directing the scheme operator to institute, prosecute, defend or discontinue specified proceedings;
  - (g) an order restraining a person from engaging in specified conduct or from doing a specified act or thing;
  - (h) an order requiring a person to do a specified act or thing.
- (3) A person who has notice of an order that applies to the person must not knowingly contravene it.
- (4) The Court must not make an order that the scheme be terminated if terminating it would unfairly prejudice the oppressed investor or investors.
- (5) If an order amends the scheme's constitution, then, despite anything else in this Law but subject to the order, the constitution is not capable of being further amended so that it is inconsistent with the amendment ordered unless the Court gives leave.
- (6) If:
  - (a) 1 or more investors make an application under this section; and
  - (b) an office copy of the order disposing of the application made by the Court is not lodged with the Commission within 14 days after it is made;the applicant, or each of the applicants, is guilty of an offence.
- (7) This section and an order under this section have effect despite anything else in the scheme's constitution or in this Law.



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**Trading Trusts–  
Oppression Remedies**  
REPORT

GPO Box 4637  
Melbourne  
Victoria 3001  
Australia

Level 3  
333 Queen Street  
Melbourne  
Victoria 3000  
Australia

**Telephone**  
+61 3 8608 7800

**Freecall**  
1300 666 555  
*(within Victoria)*

**Fax**  
+61 3 8608 7888

**Email**  
[law.reform@lawreform.vic.gov.au](mailto:law.reform@lawreform.vic.gov.au)  
[www.lawreform.vic.gov.au](http://www.lawreform.vic.gov.au)

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