The Hon Philip Cummins AM
Chair
Victorian Law Reform Commission

By e-mail

17 July 2014

Trading Trusts: Oppression Remedies

Dear Sir,

We set out below our submission in respect of the current Victorian Law Reform Commission consultation on Trading Trusts: Oppression Remedies. As we participated in a roundtable held by the Commission on 11 June, we will confine our submission to reiterating and amplifying three points that we and others made on that day.

First, we would urge the Commission, in deciding the extent to which it is appropriate to regulate trusts in the same way as corporations, to consider the reasons for and against viewing trusts as distinct institutions serving values and aims that are different from those that underpin corporations. For instance, if the fundamental organising idea at the heart of the trust is a 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.

Secondly – and this point is related to our first point – we would reiterate the concerns expressed on 11 June as to the applicability of oppression remedies to 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.

A third point relates to the question of how oppression remedies might be crafted in the setting of the Trustee Act, especially as they apply to 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 those 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.

Thank you once again for the opportunity to participate in the consultation on these important reforms. Please do not hesitate to contact us if you would like to discuss this submission further.

Yours faithfully,

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