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21 July 2014

The Hon PD Cummins AM
Chair
Victorian Law Reform Commission
GPO Box 4637
MELBOURNE VIC 3001


Dear Mr Cummins

Re: Trading Trusts and Oppression Remedies

Thank you for providing me with a copy of the Consultation Paper on the Commission's review of trading trusts and oppression remedies. The Consultation Paper was circulated to all members of the Court. I have had the opportunity to consult with judges on the Court. The following comments are made on behalf of the Court after that consultation.

The use of trading trusts and unit trusts in modern commercial life has become more sophisticated and therefore more complicated. The court's involvement is usually sought when a participant or participants has a complaint of some nature or description. The *Corporations Act 2001* (Cth) adequately addresses oppression remedies in relation to corporations generally (ss 232 and 233) and the particular issues raised by managed investment schemes (Ch 5C). 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.

The real issue is the method by which that is achieved. 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.

The approach adopted in relation to managed investment schemes in Ch 5C of the *Corporations Act* provides a useful illustration. The provisions are uniform nationally and are to be found in one location – the *Corporations Act*. They work practically and effectively with the existing *Trustee Acts*. No less importantly, they prescribe with some precision the

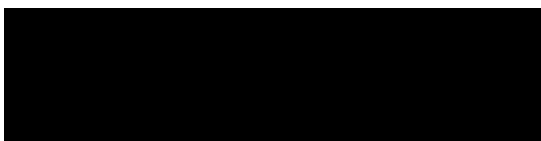
legal relationships between, and obligations owed to, the various participants. Much of the detail provided for in Ch 5C is unnecessary. What it does provide though is a useful catalogue of matters that might be considered when drafting the legislative amendments to extend the availability of oppression remedies to trading trusts and unit trusts. And, at least on the face of things, there would appear to be no lack of Commonwealth legislative power to make laws with respect to oppression in connection with trading trusts where (as will almost always be the case) the trustee is a foreign corporation or a trading or financial corporations formed within the limits of the Commonwealth.

If the amendments are to be made through the *Trustee Act*, then a number of matters may be significant in dealing with applications before the Court involving trading trusts and unit trusts. First, a consequence of amending the *Trustee Act* will be that the state laws on these issues will be different and conflict of laws issues will arise. Of course they can be resolved, but it does little to enhance Australia as an attractive place to do business.

That then brings us to the detail of the drafting of the amendments. That of course is a complex task. The complexity (or lack of complexity) is often not apparent until the task of drafting has been started, if not completed. 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 304 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.

I hope the above is of assistance. I would be happy to discuss these issues further if that would be of assistance.

Yours sincerely




The Hon James Allsop
Chief Justice