



INSTITUTE OF LEGAL EXECUTIVES®

The Institute of Legal Executives (Victoria)

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~ Incorporated in 1966 ~

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Dr Anthony Bendall
Team Leader
Victorian Law Reform Commission

Dear Dr. Bendall,

Re: *Trading Trusts and Oppression Remedies Consultation Paper*

The Institute thanks the Commission for this opportunity to make a submission concerning the above.

We note that not all questions in the Consultation Paper have been addressed.

Question 1 – What role does the law of contract play in unit trusts?

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’.

Question 2 - How relevant or important is the characterisation of a beneficiary or unitholder’s interest?

We believe that an initial question might be to ask whether the issue relates to a ‘commercial’ transaction, and as noted in 2.33 that how a unit trust ‘is structured is highly relevant’.

**Question 3 - Is there another, more appropriate definition of ‘trading trust’?
Could it include managed investment schemes?**

Managed Investment Schemes are already categorised separately. We think it may ‘muddy the waters’ by seeking to include the same.

Questions 4 and 5 - Are oppression remedies appropriate for all trading trusts? & Are there circumstances in which an oppression remedy might be appropriate for beneficiaries of a discretionary trust?

We agree with the Commission's view that an oppression remedy will rarely be appropriate in the context of a discretionary trust. There may be difficulty in precisely defining 'a limited range of circumstances' in which an oppression remedy is appropriate.

Questions 8 and 9 - Do you agree with the reasoning in *Kizquari*? & Justice Young in *Kizquari* treats the values of shares and the value of units as entirely separate matters. Do you agree with this approach?

We believe it should be clear in such cases that an order for compulsory purchase of shares in the trust company based on valuations of the trust property be available.

Questions 10 and 11 - Which approach to section 233 do you consider preferable, Acting Justice Windeyer's or Justice Davies'? & Do you agree with Justice Davies' interpretation of the purposive approach?

We believe the approach of Justice Davies is preferable.

Question 13 - Do you agree with Justice Ferguson's approach of treating the whole group as one entity?

Yes, particularly noting that otherwise 'the legislation would be rendered virtually useless to remedy the real harm'.

Question 16 - Do you agree that *Arhanghelschi* demonstrates the fundamental importance of the trust deed and/or unitholder agreement?

It appears to demonstrate the importance of differentiating where parties (appear to) deal on commercial terms, as noted above in our response to Question 2; but this differentiation is still subject to any other applicable equitable principles such as unconscionability.

Question 18 - Can the doctrine of estoppel assist a unitholder in redeeming their interest on more favourable terms than provided for in the trust deed?

Possibly so, although in any event estoppel should be available as a relevant issue in the circumstances of the case.

Questions 20 - Can relief under the *Trustee Act 1958* (Vic) provide an effective alternative remedy for oppression of minority shareholders?

If there is uncertainty regarding the breadth of the Court's discretion pursuant to sections 63 and 63A, then the Court's discretion should be specifically expanded.

Question 21 - Could seeking an order under the inherent jurisdiction of the court provide an alternative remedy for minority shareholders?

Yes.

[We also note that we believe the legislation surrounding life tenants in Victoria is particularly unclear.]

Question 25 - Is legislative reform to provide oppression remedies to minority beneficiaries in Victoria justified?

We would agree with the argument that ‘where participants enter willingly and are or should be aware of the provisions of the trust deed or unitholders’ agreement, the legislature and courts should not interfere with the operation of these instruments’ save to expand the Court’s discretion to consider relevant issues such as unconscionability or estoppel.

Question 30 - 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*?

These matters should be left to the discretion of the Court.

Question 31- 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*?

If an amendment is made to the *Trustee Act*, yes.

Questions 32 and 33 - 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? & Should such a provision apply to all trusts? If not, which types of trusts should be covered?

As noted in our response to Question 25.

Yours sincerely,



(Miss) Roz Curnow
Chief Executive Officer
On behalf of the Council of the Institute

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Everyone employed in the legal profession is *important*;
every task done well, whether it be mundane or carried out at a high level of responsibility,
contributes to a better profession.

Experientia Docet Sapientiam: Experience Teaches Wisdom.