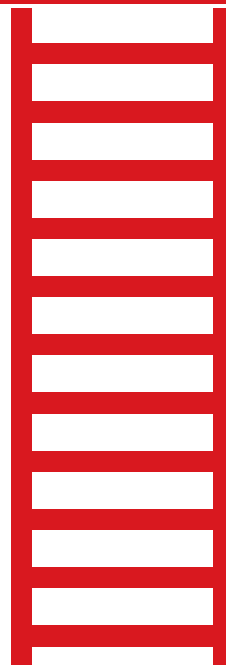
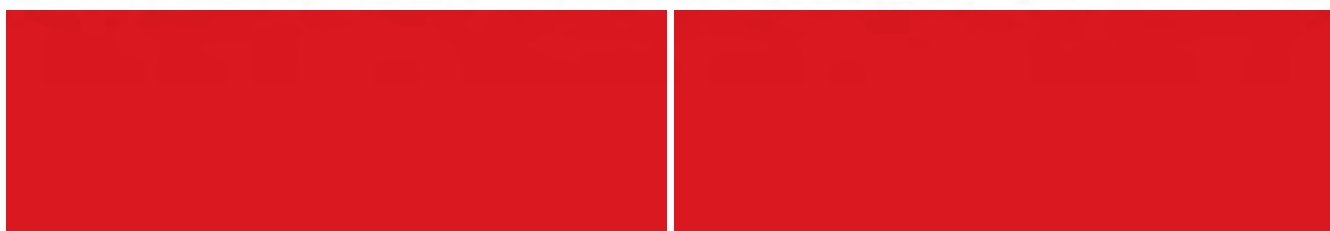


# Trading Trusts— Oppression Remedies

CONSULTATION PAPER

JUNE 2014





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Jesse Jager

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# Trading Trusts— Oppression Remedies

**CONSULTATION PAPER**

JUNE 2014



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  
**[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. They can be used by small, family businesses as well as larger enterprises. Sections 232 to 234 of the *Corporations Act 2001* (Cth) provide a range of remedies for shareholders subject to oppressive conduct by a corporation.

The Victorian Law Reform Commission (VLRC) has been asked to review the desirability of similar legislative oppression remedies for beneficiaries of trading trusts in Victoria.

In examining protections for beneficiaries, the VLRC has been asked to consider the sufficiency of existing remedies for oppressive conduct by trustees. This raises the question of whether the remedies in the *Corporations Act* already apply to beneficiaries of trusts. The current legal position 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> However, 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>

The VLRC has also been asked to have regard to the interaction between state and Commonwealth laws, and the interests of other parties such as creditors, trustees, directors and employees.

This consultation paper opens discussions about the issues arising from the terms of reference. I encourage anyone who has experience in oppressive behaviour by trustees, skills and knowledge in corporations and trusts law or other insights into the questions raised in the paper, to make a submission by 21 July 2014.



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

June 2014

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1 *Kizquari Pty Ltd v Prestoo Pty Ltd* (1993) 10 ACSR 606; *Re Polyresins Pty Ltd* [1999] 1 Qd R 599; *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 v Drapac* [2012] VSC 156 (Ferguson J); *Arhangelschi v Richard Milne Ussher & Ors* [2013] VSC 253 (16 May 2013).

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# Call for submissions

The Victorian Law Reform Commission invites your comments on this consultation paper.

## What is a submission?

Submissions are your ideas or opinions about the law under review and how to improve it. This consultation paper contains a number of questions, listed on pages 68–69, that seek to guide submissions. You do not have to address all or any of the questions to make a submission.

Submissions can be anything from a personal story about how the law has affected you to a research paper complete with footnotes and bibliography. We want to hear from anyone who has experience with the law under review. Please note that the Commission does not provide legal advice.

## What is my submission used for?

Submissions help us understand different views and experiences about the law we are researching. We use the information we receive in submissions, and from consultations, along with other research, to write our reports and develop recommendations.

## How do I make a submission?

You can make a submission in writing, or verbally to one of the Commission staff, if you need assistance. There is no required format for submissions. However, we encourage you to answer the questions on pages 68–69.

Submissions can be made by:

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

Online form at [www.lawreform.vic.gov.au](http://www.lawreform.vic.gov.au)

Mail: GPO Box 4637, Melbourne Vic 3001

Fax: (03) 8608 7888

Phone: (03) 8608 7800, 1300 666 557 (TTY) or 1300 666 555 (cost of a local call)

## Assistance

Please contact the Commission if you require an interpreter or need assistance to make a submission.

## Publication of submissions

The Commission is committed to providing open access to information. We publish submissions on our website to encourage discussion and to keep the community informed about our projects.

We will not place on our website, or make available to the public, submissions that contain offensive or defamatory comments, or which are outside the scope of the reference. Before publication, we may remove personally identifying information from submissions that discuss specific cases or the personal circumstances and experiences of people other than the author. Personal addresses and contact details are removed from all submissions before they are published, but the name of the submitter is published.

The views expressed in the submissions are those of the individuals or organisations who submit them and their publication does not imply any acceptance of, or agreement with, those views by the Commission.

We keep submissions on the website for 12 months following the completion of a reference. A reference is complete on the date the final report is tabled in Parliament. Hard copies of submissions will be archived and sent to the Public Records Office Victoria.

The Commission also accepts submissions made in confidence. These submissions will not be published on the website or elsewhere. Submissions may be confidential because they include personal experiences or other sensitive information. The Commission does not allow external access to confidential submissions. If, however, the Commission receives a request under the *Freedom of Information Act 1982 (Vic)*, the request will be determined in accordance with the Act. The Act has provisions designed to protect personal information and information given in confidence. Further information can be found at [www.foi.vic.gov.au](http://www.foi.vic.gov.au).

Please note that submissions that do not have an author's or organisation's name attached will not be published on the Commission's website or made publicly available and will be treated as confidential submissions.

## Confidentiality

When you make a submission, you must decide whether you want your submission to be public or confidential.

- **Public submissions** can be referred to in our reports, uploaded to our website and made available to the public to read in our offices. The names of submitters will be listed in the final report. Private addresses and contact details will be removed from submissions before they are made public, but the name of the submitter is published.
- **Confidential submissions** are not made available to the public. Confidential submissions are considered by the Commission but they are not referred to in our final reports as a source of information or opinion other than in exceptional circumstances.

Please let us know your preference when you make your submission. If you do not tell us that you want your submission to be treated as confidential, we will treat it as public.

## Anonymous submissions

If you do not put your name or an organisation's name on your submission, it will be difficult for us to make use of the information you have provided. If you have concerns about your identity being made public, please consider making your submission confidential rather than submitting it anonymously.

More information about the submission process and this reference is available on our website: [www.lawreform.vic.gov.au](http://www.lawreform.vic.gov.au)

**Submission deadline: 21 July 2014**



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# Terms of reference

[Referral to the Commission pursuant to section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic) on 29 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.

---

# Glossary

|                          |   |
|--------------------------|---|
| <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 by a company or a member of shares in the company.   |
| <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 paper 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.   |

|                                   |   |
|-----------------------------------|---|
| <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 (A), who has acted on an assumption or expectation induced by another person (B), from the detriment which would flow from A's change of position if B 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 paper 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.  |

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|--------------------|--|
| <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.  |
| <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>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. 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 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.  |

# Background

- 2 Referral to the Commission**
- 4 Previous reviews of the rule by law reform bodies**
- 4 Conduct of this reference**

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# 1. Background

## Referral to the Commission

- 1.1 On 29 October 2013, the Attorney-General, the Hon. Robert Clark, MP, asked the Commission, under section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic), to review and report on the desirability of having 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 by a trustee. The terms of reference appear at page vii. The Commission is to report by 3 February 2015.
- 1.2 Section 232 of the Corporations Act provides that the court may make an order where the conduct of a company's affairs or the actual act, omission or resolution of a company is:
- contrary to the members' interests; or
  - oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members, whether in that capacity or any other capacity.

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.

- 1.3 Section 234 sets out who has standing to bring an action.<sup>1</sup> 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.

- 1.4 This reference deals with 'trading trusts', which are a form of commercial trust. The particular features of this type of trust and the approach the Commission has taken are discussed in Chapter 2, below.
- 1.5 One question is whether the Corporations Act already gives the court power to grant an oppression remedy in the context of trading trusts. The current legal position is unclear. A line of cases has held that beneficiaries are limited to the conventional forms of equitable relief under trust law.<sup>2</sup> However, 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>3</sup>
- 1.6 The problem is particularly relevant in two scenarios. First, where a trading trust utilises a corporate trustee, and creates a structure that affords the advantages of a trust but operates in a similar fashion to a company. In this instance, a member may have a nominal shareholding in a corporate trustee. However, the value of the investment will be located in the units held by the beneficiary. If the trustee engages in oppressive conduct that devalues the units rather than the shares, then under the *Kizquari v Prestoo* ('*Kizquari*') approach<sup>4</sup> the member will be limited to enforcing the terms of the trust deed and equitable, rather than oppression, remedies. If a private trust is used, it may be difficult for the member to extricate themselves from the trust structure, due to the absence of a ready market for units. The second related scenario is when the unitholder, who is also a member of the corporate trust, is seeking a specific oppression remedy not usually available to a beneficiary. For instance in *Vigliaroni v CPS Investment Holdings* ('*Vigliaroni*')<sup>5</sup> and likewise in *Wain v Drapac* ('*Drapac*')<sup>6</sup> the plaintiffs sought a compulsory buyout of their units, which is not available through conventional equitable doctrine.
- 1.7 Under trust law, there are limited avenues for minority unitholders to extricate themselves from a trust.<sup>7</sup> 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 unitholders with the first choice to purchase the units.<sup>8</sup> This makes the use of these clauses problematic 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.
- 1.8 The other option for a beneficiary is to seek to vest the trust pursuant to the rule in *Saunders v Vautier*,<sup>9</sup> which requires the trustee to distribute the trust property to the beneficiaries.<sup>10</sup> In practice, however, the rule is of limited value since it requires the agreement of all those having a beneficial interest in the trust property, which will usually include the trustee and majority beneficiaries.

2 *Kizquari Pty Ltd v Prestoo Pty Ltd* (1993) 10 ACSR 606; *Re Polyresins Pty Ltd* [1999] 1 Qd R 599; *McEwen v Combined Coast Cranes Pty Ltd* [2002] 44 ACSR 244; *Trust Company Ltd v Noosa Venture 1 Pty Ltd* (2010) 80 ACSR 485; This is discussed in Chapter 3.

3 *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] VSC 253 (16 May 2013). See Chapter 3, page 25, for a discussion of the two differing lines of authority.

4 (1993) 10 ACSR 606. This will be explained in greater detail from [3.40]–[3.51].

5 (2009) 74 ACSR 282.

6 [2012] VSC 156 (26 April 2012).

7 The remedies currently available to beneficiaries in equity are further discussed in Chapter 4.

8 For example, see the facts of *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd* [2007] VSC 40 (23 August 2007).

9 (1841) 4 Beav 115. This rule is further discussed in Chapter 4.

10 Law Reform Commission of Saskatchewan, *The Rule in Saunders v Vautier and the Variation of Trusts*, Consultation Paper (1994) 3.

- 1.9 Beneficiaries could seek to rely upon section 63 and section 63A of the *Trustee Act 1958* (Vic) which arguably grants the court powers to vary the beneficial interest of unitholders. However, the statutory requirements for the exercise of these powers are not easily compatible with trading trusts. Moreover, it is unlikely that a court has any inherent jurisdiction to alter the beneficial interests of unitholders.<sup>11</sup>
- 1.10 The reference also raises a number of subsidiary questions. For instance: are oppression remedies currently an effective option for shareholders? If so, would inserting similar remedies into the *Trustee Act 1958* (Vic) be appropriate? Does the current law surrounding equitable remedies allow for equivalent relief, and if it does not, is there potential for development in the law?

## Previous reviews of the rule by law reform bodies

- 1.11 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>12</sup> The ALRC recommended that an oppression remedy be available for investors in such schemes, which could include trading trusts.<sup>13</sup>
- 1.12 A number of earlier reviews of aspects of trusts law by other law reform bodies also raise related issues that the Commission has been able to consider. These bodies include:
- the Scottish Law Commission<sup>14</sup>
  - the British Columbia Law Institute<sup>15</sup>
  - the Law Reform Commission of Saskatchewan.<sup>16</sup>

## Conduct of this reference

### Division

- 1.13 The Chair of the Commission has exercised his powers under section 13(1)(b) of the Victorian Law Reform Commission Act to constitute a Division to guide and oversee the conduct of the reference.

### Consultation paper and submissions

- 1.14 This paper draws from the preliminary research conducted by Commission staff. It describes the law, identifies and asks questions about the issues arising from the terms of reference and explores options for reform. The questions are listed on pages 68–69.
- 1.15 The Commission is seeking submissions in response to the questions in the consultation paper by 21 July 2014. Information about how to make a submission is set out on page v.

11 *Arakella v Paton* (2004) 60 NSWLR 334; *Westfield Qld No 1 Pty Ltd v Lend Lease Real Estate Investments Ltd* [2008] NSWSC 516 (29 May 2008), [36] (Einstein J) considering the effect of s 81 under *Trustee Act 1925* (NSW).

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

13 *Ibid* 127.

14 Scottish Law Commission, *Report on Variation and Termination of Trusts*, Report No 206 (2007).

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

16 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).



# Trusts and companies in Victoria

- 6** Introduction
- 7** Express trusts
- 11** Trading trusts
- 13** A comparison of trading trusts and corporations

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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 A theme running through the chapter is the twin distinction between investment/donatory trusts,<sup>1</sup> and investment/trading trusts. The analysis introduces the key features of the express trust and shows how these features are adapted to trading trusts.
- 2.3 It is important to note at the outset that the idea of a trading trust arguably only reflects a difference in function, rather than a distinction between trading and other forms of trust based on principle. Similarly to other forms of investment trusts, a trading trust has a trustee which holds trust property on behalf of beneficiaries. The trading trust differs fundamentally in the sense that the trustee trades—i.e. actively carries on a business. The overall question this consultation paper seeks to address is whether this functional difference generates different legal outcomes, in particular whether an oppression remedy is, or ought to be, available.
- 2.4 The last sections of the chapter deal with the key features of the corporate structure, in particular the doctrine of separate legal personality. This chapter shows how the doctrine relates to trading trusts, and the need for shareholder remedies. The purpose of this analysis is to lay the groundwork for Chapter 3 by illustrating the significance of extending shareholder remedies to trading trusts.

### Description of the trust

- 2.5 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 (ed), *Equity and Commercial Relationships* (Lawbook Co, 1987) 49.

2 J D Heydon and M J Leeming, *Jacobs’ Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 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 ed, 2006) 1.

- 2.6 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 the 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 and statutory trusts. However, this consultation paper is only concerned with express trusts.

## Express trusts

- 2.7 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>
- 2.8 Since the genesis of an express trust is the intention of the settlor, an express trust will be created by a trust deed, which contains 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. Indeed, the extent to which a trustee can exclude their obligations, thereby indemnifying themselves against a suit from the beneficiaries, is unclear.
- 2.9 Although the trust deed contains 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 may constitute a breach of trust, making the trustee personally liable. Furthermore, express trusts are broadly divided into two categories: discretionary and unit trusts.

## Discretionary trusts

- 2.10 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>
- Family trusts are usually in the form of discretionary trusts, since the trustee is able to decide the individual distribution and the amount of taxable income to the beneficiaries on an annual basis.<sup>9</sup>
- 2.11 A discretionary trust is generally structured for tax reasons and to minimise potential liability to 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 appointer controls the trust, and as a beneficiary will generally receive the income from the trust.

4 Ibid 2.  
 5 Ibid 44.  
 6 Ibid 44–5.  
 7 *Armitage v Nurse* [1998] Ch 241; *Reader v Fried* [2001] VSC 495 (19 December 2001).  
 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.

- 2.12 The discretionary nature of the beneficiaries' interest raises an important question as to whether a beneficiary has an interest in the trust property. However, the authorities on this question are divided.<sup>10</sup> 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>11</sup>

## Unit trusts

- 2.13 A unit trust differs from a discretionary trust, as the unit trust deed specifies the objects that are entitled to a beneficial interest in the trust property.<sup>12</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>13</sup>
- 2.14 As an investment vehicle, the unit trust can either be public or private. In Australia, public unit trusts are typically used for passive collective investment rather than active investment by the unitholder, or the carrying on of a business by the trustee.<sup>14</sup> For instance, in the context of superannuation, a beneficiary will invest money into a superannuation fund, which will usually delegate their duty of investment to a fund manager or asset consultant. Another example is managed investment schemes, which are regulated by Chapter 5C of the *Corporations Act 2001* (Cth).
- 2.15 Private unit trusts are also used for passive collective investment. However, private unit trusts can be used to create a structure where the corporate trustee actively carries on a business rather than merely investing the trust property and distributing the income to beneficiaries.
- 2.16 Sin has argued that a fundamental difference between unit trusts and other forms of express trusts is the absence of a settlor.<sup>15</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>16</sup>
- 2.17 Like discretionary trusts, 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 often located in unitholders' agreements that create a layer of obligation additional to the unit trust deed, often between individual unitholders, similar to shareholders' agreements in proprietary companies.<sup>17</sup> Ordinarily, the doctrine of privity would prevent a unitholder from obtaining remedies in contract from another unitholder.<sup>18</sup> A unitholder agreement, however, can alter the relationship between unitholders, possibly preventing the requisite conduct for 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>19</sup>

10 Ibid 428–430.

11 Ibid 430; citing *Re Gestetner Settlement* [1953] Ch 672, 688; *McLean v Burns Philp Trustee Co Ltd* (1985) 2 NSWLR 623.

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

13 Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 17.

14 Ibid 10.

15 Kam Fam Sin, *The Legal Nature of the Unit Trust* (Clarendon Press, 1997) 55.

16 Ibid; see also 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) 49.

17 Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 28.

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

19 Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 28. For example see *Arhanghelschi v Cladwyn Pty Ltd* [2013] VSC 253 (16 May 2013) [46]–[48] (Ferguson J).

- 2.18 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>20</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, since this is based on the reality that in contrast to a discretionary trust, unitholders will typically provide capital for a subscription of a specific quantity of units.<sup>21</sup>

## Question

- 1 In your view, what roles do the intention of the settlor and the law of contract play in unit trusts?

- 2.19 It is not always clear whether the interest of a unitholder is of a proprietary character. In theory, a beneficiary of a trust is supposed to be 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 trust property.<sup>22</sup> It has been suggested that implicit within this reasoning is the possibility that the trust deed is capable of excluding a unitholder's proprietary right 'in the underlying trust assets.'<sup>23</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; and 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>24</sup>

The High Court has recognised that rights to particular trust assets may be excluded by the terms of the trust deed.<sup>25</sup> Moreover, even in that case the beneficiaries may approach the court to have the trust duly administered.<sup>26</sup>

- 2.20 It has been suggested that the proprietary nature of the beneficiary's right 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>27</sup>

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

21 M Vrisakis, 'Co-habitation of contract and trust relationships in contemporary investment trusts' (2008) 2 *Journal of Equity* 274, 274–9; cited in Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 32–3.

22 *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 221 ALR 196, 205.

23 John Tarrant, 'Unit Trusts in the 21st century' (2006) 20 *Commercial Law Quarterly Review* 12, 12. As will be shown in Chapter 3, this argument has ramifications for a potential oppression remedy if the reasoning from *Drapac* is applied.

24 *Ibid* 13.

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

26 *Ibid*. See also 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.

27 Mowbray et al, *Lewin on Trusts* (Thomson Sweet & Maxwell, 18th ed, 2008) 7; citing *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] UKHL 12; *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709.

Whether an oppression remedy is analogous to a proprietary remedy, which a beneficiary can enforce against a trustee or third parties, is unclear. However, in *Wain v Drapac* Justice Ferguson 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.<sup>28</sup> Following the above reasoning, it is necessary to demonstrate that a unitholder has a proprietary interest in the units under the trust. It is not clear whether this means that in order to obtain an oppression remedy a unitholder must demonstrate that they possess a proprietary interest in the whole of the trust property.

- 2.21 A comparison with the legal position of company shares would suggest that this is not the case, as a share grants no beneficial interest in the assets of the company.<sup>29</sup> However, it is strongly arguable following *Drapac* that a beneficiary must show that they possess a proprietary interest in the units in order for an oppression remedy to be granted.

## Question

### 2 How relevant or important is the characterisation of a beneficiary or unitholder's interest?

- 2.22 The possibility of exclusion through the trust deed arguably collapses some of the distinctions between an interest under a unit trust and a share in a company. However, it is conventionally thought that there is a fundamental conceptual difference between the two.<sup>30</sup> Indeed, a share:

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>31</sup>

Arguably, a degree of equivalence between the interests of shareholders and unitholders reinforces the argument that similar remedies, including oppression remedies, should be available to the beneficiaries of trading trusts.

- 2.23 Indeed, Sin has argued that unit trusts and companies are similar in the sense that both are constituted through contract, 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>32</sup>

- 2.24 Even if Sin's argument is not adopted, the functional similarity between the unit trust and company might be such that the value of the shares and units is examined cumulatively.<sup>33</sup> This issue will be explored more fully in Chapter 3.

28 *Wain v Drapac* [2012] VSC 156 (26 April 2012) [19]; discussed at pages 30–31.

29 R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013) 130 [4.170]; citing *Macaoura v Northern Assurance Co Ltd* [1925] AC 619.

30 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.

31 *Ibid.*

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

33 *Wain v Drapac* [2012] VSC 156 (26 April 2012), [19] (Ferguson J).

## Trading trusts

### Definition of trading trusts

2.25 Ford and Hardingham have suggested that:

the 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 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>34</sup>

2.26 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-beneficiary' 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>35</sup>

2.27 Applying these definitions, a trading trust can either be public or private, in the sense that investment in the trust is open to the public, and can include discretionary trusts, unit trusts or a mixture of the two.<sup>36</sup> 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 in the context of oppression remedies. This is because public trusts are in practice often regulated by Chapter 5C of the Corporations Act. 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>37</sup> As will be shown 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. These terms may be calculated analogously to an offer on-market.

2.28 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>38</sup> A unit trust can clearly meet this definition when the corporate trustee actively uses the trust property for carrying on a business. The trustee of a family trust, which utilises a discretionary trust structure, will also usually fall within the definition of a trading trust.

34 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.

35 D Hayton, 'Trading Trusts, Trustees' Liabilities and Creditors', in *The International Trust* (Jordans, 3rd ed, 2011) 523.

36 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 ed, 2007) 748.

37 However 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: Australian Law Reform Commission and Companies and Securities Advisory Committee, *Collective Investments: Other People's Money*, ALRC Report 65 (1993) [11.33]. It should be noted that the paper also recommended placing restrictions on the ability of investors to redeem their units (see chapter 7).

38 G E Dal Pont, D R Chalmers and J K Maxton, *Equity and Trust: Commentary and Materials* (Lawbook Co, 4th ed, 2007) 747.

2.29 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>39</sup>

## Question

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

2.30 In the Commission’s view, an oppression remedy will rarely be appropriate in the context of a discretionary trust. A unitholder will have provided consideration for their beneficial interest in the trust. However, a beneficiary under a family trust will often have provided no consideration for their beneficial interest in the trust estate. In such a case, a buyout is impossible since any interest that a beneficiary has will be at the discretion of the trustee. It is arguable, however, that an oppression remedy is appropriate in a limited range of circumstances.

2.31 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 it is supposed that the trustee only makes distributions to A and B, it is unlikely that the other family members hold a beneficial interest in the trust estate.<sup>40</sup> Arguably, following the reasoning of *Vigliaroni*,<sup>41</sup> A or B could seek an oppression remedy against the other as an object of the trust, or the corporate trustee. Despite the presence of a discretionary trust, the structure closely resembles a small proprietary company where an oppression remedy would ordinarily be granted.

## Questions

4 Are oppression remedies appropriate for all trading trusts?

5 Are there circumstances in which an oppression remedy might be appropriate for beneficiaries of a discretionary trust?

39 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) 50.

40 P Young, C Croft and M Smith, *On Equity* (Lawbook Co, 2009) 429–3; citing *R & I Bank of Western Australia Ltd v Anchorage Investments Pty Ltd* (1992) 10 WAR 59.

41 *Vigliaroni v CPS Investment Holdings Pty Ltd* (2000) 74 ACSR 282, discussed at more length at pages 29–30.



- 2.32 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.
- 2.33 However, an alternative scenario is where parties use a unit trust to structure a joint venture. In this case, the original parties might be 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 shown 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.
- 2.34 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>42</sup>

This is relevant in the context of oppression, since as will be shown in Chapter 3, the oppression remedy is most common in the case of small proprietary companies where the shareholders actively manage the business.

## A comparison of trading trusts and corporations

- 2.35 A fundamental difference between a trust and 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>43</sup>

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>44</sup> Importantly, the reasoning from *Salomon v Solomon & Co Ltd* suggests that the doctrine applies even where the company has no substantial capital.<sup>45</sup>

- 2.36 As we have seen, 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 a company, a trust has no separate personality at law, meaning that individuals who act as trustees are personally liable in an action against the trustee.<sup>46</sup>

42 G C Spavold, 'The Unit Trust: A Comparison with the Corporation' (1991) 3 *Bond Law Review* 2, 2.  
 43 R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013) 124 [4.140].  
 44 *Salomon v Salomon & Co Ltd* [1897] AC 22.  
 45 R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013) 126 [4.150].  
 46 P Agardy, 'Aspects of Trading Trusts' (2006) 14 *Insolvency Law Journal* 7, 9.

- 2.37 In practice, the trustee can utilise two devices to mitigate personal liability. The first is to insert exclusion clauses into the terms of the trust deed. However, the validity of these clauses, and the extent to which they can exclude a trustee’s fiduciary duties, remains unclear.<sup>47</sup>
- 2.38 Secondly, 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 adopt a structure which utilises both. However, the conceptual distinction is important since there is a clear difference at law between the two entities. Indeed, 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.
- 2.39 The separate legal personality of the company means, however, that the company is the proper plaintiff in an action against the directors.<sup>48</sup> Thus:
- if 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>49</sup>
- 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.
- 2.40 However, the general law and the statutory regime under the Corporations Act create a number of exceptions to the rule from *Foss v Harbottle* that provides shareholder remedies either against the company or directors.<sup>50</sup> The oppression remedy under section 232 of the Corporations Act is perhaps the broadest remedy available to a shareholder.<sup>51</sup> Oppression is a broad concept, which includes excessive payment to management, issuing shares for the purpose of diluting a member’s shareholding and denying a shareholder access to information.<sup>52</sup> Where a shareholder has the requisite standing and oppression is proven, the court has the power to grant wide-ranging remedies including:
- winding up
  - modification of the company’s constitution
  - the compulsory purchase of shares from either the company or another shareholder.<sup>53</sup>

47 *Armitage v Nurse* [1998] Ch 241; *Reader v Fried* [2001] VSC 495 (19 December 2001).

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

49 R P Austin and I M Ramsay, *Ford’s Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013) 131 [4.175].

50 *Ibid* 688 [10.300].

51 *Ibid* 709–11 [10.435].

52 *Ibid* Ch 10.

53 See section 233(1) of the *Corporations Act 2001* (Cth) for a complete list of possible court orders.

- 2.41 One question that this reference seeks to answer is whether the Corporations Act gives the court power to grant an oppression remedy in an action by the shareholder/beneficiaries against the trustee of a trading trust. The current legal position with respect to this question is unclear. A line of cases has held that the appropriate recourse of beneficiaries is limited to the forms of equitable relief.<sup>54</sup> However, an alternate line of cases has held that the court's power under section 232 is not limited to an action against the company, as such.<sup>55</sup> These cases are discussed in more detail in Chapter 3.
- 2.42 Unlike trading trusts, the Corporations Act imposes numerous formal requirements upon companies, such as reporting and auditing requirements.<sup>56</sup> Moreover, companies must apply to be formally registered with the Australian Securities and Investment Commission.<sup>57</sup> In the case of small proprietary companies, which have no formal constitution, the Corporations Act contains provisions which act as replaceable rules, which together form the basis of the constitution.<sup>58</sup> However, these replaceable rules will not apply to proprietary companies with a single member who is also the sole director.<sup>59</sup>
- 2.43 The situation is formally different for private unit trusts. As Spavold explains:

The unit trust is constituted by a deed of trust. Under the terms of the trust deed certain property is to be held in trust for the benefit of persons known as 'unit holders'. Each unit holder owns a 'unit' in the trust fund. The beneficial interest of the trust is made up of a number of units. Each unit is equal to every other unit. When an investor purchases a unit from the trustee or manager the money paid for the unit becomes part of the trust property and is invested by the trustee. The deed of trust regulates the rights powers and duties of the trustee unit holders and if applicable the manager. In this manner it serves the same purpose as the memorandum of association and articles of association of a company.<sup>60</sup>

Although the formal requirements are different, arguably the function that a unit trust deed serves is essentially the same as a company constitution.

54 *Kizquari Pty Ltd v Prestoo Pty Ltd* (1993) 10 ACSR 606; *Re Polyresins Pty Ltd* [1999] 1 Qd R 599; *McEwen v Combined Coast Cranes Pty Ltd* [2002] 44 ACSR 244; *Trust Company Ltd v Noosa Venture 1 Pty Ltd* (2010) 80 ACSR 485.

55 *Vigliaroni & Ors v CPS Investment Holdings Pty Ltd* (2009) 74 ACSR 282; *Wain v Drapac* [2012] VSC 156 (Ferguson J); *Arhanghelschi v Richard Milne Ussher & Ors* [2013] VSC 253 (16 May 2013).

56 *Corporations Act 2001* (Cth) ss 286, 301.

57 *Ibid* s 117.

58 R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013) 197–8 [6.011]; See chapter 6 for a complete description of the types and effect of replaceable rules.

59 *Corporations Act 2001* (Cth) s 135; R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013) 199 [6.011].

60 G C Spavold, 'The Unit Trust: A Comparison with the Corporation' (1991) 3 *Bond Law Review* 2, 8.



# The oppression remedy in the Corporations Act

- 18** The oppression remedy—purpose, operation and effectiveness
- 25** Does the existing oppression remedy apply to trading trusts?

## 3. The oppression remedy in the Corporations Act

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

- 3.1 This chapter examines the development of the statutory oppression remedy in corporations law, its purpose, operation and effectiveness. It 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).

#### History and scope of the oppression remedy

- 3.2 Company law historically relies on the principle of majority rule. Board and shareholder decisions of companies are usually determined by a simple majority vote.<sup>1</sup> While this notion of majority rule is fundamental to company law, it contains an inherent risk of abuse.<sup>2</sup>
- 3.3 This risk was exacerbated by the rule in *Foss v Harbottle*.<sup>3</sup> According to Brockett this rule provided ‘that wrongs to the company should be redressed only by action [taken] by the company in its own name,<sup>4</sup> rather than the action of individual members or groups of members, and that ‘courts should not interfere with the internal management of companies acting within their powers.’<sup>5</sup> However, rigid adherence to the rule often denied minority shareholders recourse against directors and majority shareholders.<sup>6</sup> For this reason, the courts developed a number of ‘exceptions’.<sup>7</sup> However, numerous commentators have argued that the ‘exceptions’ to the rule in *Foss v Harbottle* are in reality not exceptions at all, but situations where the rule simply cannot apply.<sup>8</sup>
- 3.4 In addition, numerous practical and legal difficulties concerning ‘the operation of the exceptions have meant that relatively few derivative actions have proceeded.’<sup>9</sup> The main difficulties centred on the effect of ratification of the allegedly oppressive conduct by the general meeting of shareholders.<sup>10</sup> If effective, the purported ratification could deny the company as a whole, and hence minority shareholders, any right of action against the directors. There were also problems caused by the strict criteria that must be established before a court may grant relief.<sup>11</sup>

1 There are exceptions: for example, a resolution altering the company constitution requires a special resolution, carried by a majority of 75% of shareholders: *Corporations Act 2001* (Cth) s 136(2).

2 Elizabeth Boros, *Minority Shareholders’ Remedies* (Clarendon Press, 1995) 5.

3 (1843) 2 Hare 461.

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

5 *Ibid.*

6 *Ibid.*

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

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

10 *Ibid.*; citing Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 19.

11 Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) 19, cited in R Brockett, ‘The Valuation of Minority Shareholdings in an Oppression Context – A Contemporary Review’ (2012) 24.2 *Bond Law Review* 101, 102.

3.5 According to Brockett:

The 'proper plaintiff' rule in *Foss v Harbottle* did not provide an adequate mechanism for the enforcement of directors' and other officers' duties where the company improperly refused or failed to take action.<sup>12</sup>

3.6 Since the middle of the twentieth century, a realisation of these risks and difficulties has led a number of jurisdictions, including Australia, to introduce statutory remedies for the relief of minority shareholders in certain circumstances.

3.7 This process began in the 1940s in the United Kingdom, with the report and recommendations of the Cohen Committee.<sup>13</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>14</sup>

3.8 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>15</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>16</sup>

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

3.10 Section 210 (and the various legislative provisions that succeeded it in the United Kingdom)<sup>18</sup> was 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 Law*. According to Austin and Ramsay:

12 R Brockett, 'The Valuation of Minority Shareholdings in an Oppression Context – A Contemporary Review' (2012) 24.2 *Bond Law Review* 101, 103; citing Companies 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].

13 Cohen Committee, *Report of the Committee on Company Law Amendment* (1945) <[http://www.takeovers.gov.au/content/Resources/other\\_resources/Cohen\\_Committee.aspx](http://www.takeovers.gov.au/content/Resources/other_resources/Cohen_Committee.aspx)>.

14 R P Austin and I M Ramsay, *Ford's Principles of Corporations Law*, (LexisNexis Butterworths, 15th ed, 2013) 709 [10.430].

15 Restrictions on transfers of shares [58], Excessive remuneration of Directors [59].

16 Cohen Committee, *Report of the Committee on Company Law Amendment* (1945) [60] <[http://www.takeovers.gov.au/content/Resources/other\\_resources/Cohen\\_Committee.aspx](http://www.takeovers.gov.au/content/Resources/other_resources/Cohen_Committee.aspx)>.

17 R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013) 709 [10.430].

18 Ibid.

19 Consisting of the *Companies Act 1981* (Cth), 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*.

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

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 2001* (Cth).<sup>21</sup>

- 3.11 The ambit of these sections is broader than that previously available to shareholders under the common law, particularly as it applies to both current and former members of a company.<sup>22</sup>
- 3.12 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
  - (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.
- 3.13 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, it is necessary to consider the extent to which the phrase also comprehends other capacities of a member (such as a member who is a beneficiary of a trust of which the corporation is a trustee).
- 3.14 Prior to 1983, the provision referred only to 'oppressive' conduct, with no reference to prejudicial or unfairly discriminatory conduct, acts, omissions or resolutions. This original formulation proved problematic, as courts in England and, to a lesser extent, Australia tended to apply a fairly restrictive definition, despite the expansive approach taken by the Cohen Committee in its initial recommendation.<sup>23</sup>
- 3.15 Arguably a wider interpretation was given in *Elder v Elder & Watson Ltd*, in which the Scottish Court of Session broadly equated oppression with lack of fair dealing.<sup>24</sup> However, a more narrow interpretation given by Viscount Simonds in the House of Lords in *Scottish Co-operative Wholesale Society v Meyer*,<sup>25</sup> 'equating "oppression" with "burdensome, harsh and wrongful" conduct'<sup>26</sup> was the approach generally initially adopted by the English courts.<sup>27</sup>
- 3.16 In Australia, a wider approach was adopted from the start<sup>28</sup> and greater emphasis placed on the wide discretion given to the court.<sup>29</sup> This broader 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*:<sup>30</sup>

20 R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013) 710 [10.430].

21 Ibid.

22 Further details regarding *locus standi* requirements are set out in section 234 of the *Corporations Act 2001* (Cth), which is discussed below.

23 Elizabeth Boros, *Minority Shareholders' Remedies* (Clarendon Press, 1995) 117–118.

24 (1952) SC 49, 54.

25 [1959] AC 324, 342.

26 Elizabeth Boros, *Minority Shareholders' Remedies* (Clarendon Press, 1995) 117.

27 Ibid.

28 *Re Broadcasting Station 2GB Pty Ltd* [1964–5] NSWLR 1648; *Re Associated Tool Industries Ltd* (1963) 5 FLR 55.

29 *Re Bright Pine Mills Pty Ltd* [1969] VR 1002.

30 (2009) 238 CLR 304, 334 [72].



...Their language and history indicate that sections 232 and 233 are to be read broadly. The imposition of judge-made limitations on their scope is to be approached with caution.

- 3.17 Even as originally formulated, the section significantly enlarged the scope of remedies available to members.<sup>31</sup> According to Ford and Ramsay:

It did not require the conduct complained of to be unlawful, and allowed proceedings to be instituted by an individual member, notwithstanding the rule in *Foss v Harbottle*.<sup>32</sup>

The remedy applied to the conduct of both shareholders and directors.<sup>33</sup> However, the original wording suggested that the remedy was available only against oppressive conduct that was positive and continuing.<sup>34</sup> The remedies were also not as broad and flexible as under the present wording.<sup>35</sup>

- 3.18 The present breadth of the oppression provision and the range of flexible remedies a court is able to order once oppression is established has made it one of the most widely used corporate law remedies.<sup>36</sup>

- 3.19 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).

- 3.20 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>37</sup>

### Available forms of relief

- 3.21 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;

31 R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013) 710 [10.430].

32 R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013) 710 [10.430]; citing (1843) 2 Hare 461.

33 Ibid.

34 Ibid.

35 R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013) 710 [10.430].

36 I M Ramsay, 'An Empirical Study of the Use of the Oppression Remedy' (1999) 27 *Australian Business Law Review* 23; cited in R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013) 710 [10.430].

37 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 2001* (Cth) was crucial, on pages 29–32.

- (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>38'</sup>
- 3.22 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>39</sup>
- 3.23 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>40</sup>
- 3.24 The wide range of exemplary remedies outlined in section 233, underlined by the virtually unlimited discretion to make any other order, empowers the court to address the full variety of circumstances in which oppression may occur. In contrast to the remedies available to beneficiaries under existing trust law, which are generally limited to addressing breaches of trust by trustees by seeking a relatively limited range of equitable remedies, section 233 provides the courts with the ability to take action in any case where oppressive, prejudicial or discriminatory conduct is found to have occurred.<sup>41</sup> Moreover, such action can proceed not only against the company, but also against the directors and other shareholders.<sup>42</sup>
- 3.25 One of the main objectives of broad statutory powers to deal with oppression by corporations was to provide aggrieved shareholders with remedies beyond the winding up of the company.<sup>43</sup> Given the drastic consequences of winding up a company, courts will generally try to avoid granting that remedy, particularly where the company continues to trade successfully.<sup>44</sup> In that context, the court will seek to apply other available remedies, such as requiring the purchase of shares held by the oppressed shareholder, at a fair value.<sup>45</sup>
- 3.26 The extensive powers under section 233 provide a broad range of remedies to relieve the oppression in the most effective way in the particular circumstances. For example, in *Re Spargos Mining NL*,<sup>46</sup> Justice Murray of the Supreme Court of Western Australia ordered the appointment of a new board, the amendment of the company's articles and for the new board to report to the court every three months.<sup>47</sup>

38 R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013) 737 [10.490].

39 R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 15th ed 2013) 737 [10.490]; citing *Meyer v Scottish Co-op Wholesale Society* [1954] SC 381, 388.

40 R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013) 737 [10.490].

41 Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 119–20.

42 Ibid.

43 A power to order a winding up of a company on the ground that the court is of the opinion that to do so would be 'just and equitable' has existed for some time and is now provided by section 461(1)(k) of the *Corporations Act 2001* (Cth). Sections 461(1)(g) and (h) also give the court this power on the ground of oppressive, unfairly prejudicial or unfairly discriminatory conduct, which effectively overlaps with Part 2F.1. See: Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 119–20; R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013) 697–709 [10.383]–[10.420].

44 Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 120.

45 See *Fedorovitch v St Aubins Pty Ltd* (1999) 17 ACLC 1558, [10] (Young J)

46 (1990) 3 ACSR 1, 50–1.

47 *Re Spargos Mining NL* (1990) 3 ACSR 1, 50–1. For a full summary of facts see Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 120.

## Who may apply for relief?

- 3.27 Standing to bring an action is covered by section 234.<sup>48</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;
  - (b) a person who has been removed from the register of members because of a selective reduction of capital;
  - (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;
  - (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>49</sup>
- 3.28 While this provision is broad in scope, several common law principles limiting it have developed, including:
- unregistered purchasers lack standing
  - applicants with collateral purposes may be denied standing, as may those who come to the court with unclean hands
  - when the company is in liquidation, the liquidator is the appropriate plaintiff.<sup>50</sup>

## What constitutes oppression?

- 3.29 Numerous reported cases have defined oppressive, unfairly prejudicial or unfairly discriminatory conduct under Part 2F.1.<sup>51</sup>
- 3.30 Relief is not available merely because a member disagrees or is dissatisfied with the management of the company or dissatisfied with their own position 'or the fact that they cannot control the management of the company. Something more than this is required.'<sup>52</sup>
- 3.31 Chief Justice Spigelman in *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* stated that while 'irreconcilable differences may establish a basis for winding up, they do not of themselves constitute oppression or unfair prejudice'.<sup>53</sup> According to Brockett:
- the courts have held that oppression connotes a lack of probity and fair dealing<sup>54</sup> (although this not a necessary condition),<sup>55</sup> is something that is burdensome, harsh or wrongful,<sup>56</sup> or is inequitable or unjust,<sup>57</sup> or exhibits commercial unfairness.<sup>58</sup>

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

49 Ibid 714-15 [10.440].

50 Ibid 715 [10.440].

51 Ibid 720 [10.450]; Richard Brockett, 'The Valuation of Minority Shareholdings in an Oppression Context – A Contemporary Review' (2012) 24.2 *Bond Law Review* 101, 105.

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

53 (2001) 37 ACSR 672, [89].

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

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

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

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

58 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.

- 3.32 According to Brockett, ‘the conduct [complained of] must relate to the “affairs of the company”<sup>59</sup>, which has been interpreted broadly.<sup>60</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>61</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>62</sup> Moreover, ‘the test requires the weighing of the particular member’s interest against that of the company as a whole.’<sup>63</sup>
- 3.33 Examples of oppressive behaviour, Brockett states, include where a majority shareholder:<sup>64</sup>
- runs the company in their own interests and ignores the interests of minority shareholders<sup>65</sup>
  - improperly issues shares to themselves to out vote other shareholders<sup>66</sup>
  - excludes a minority shareholder from being involved in the management decisions of the company<sup>67</sup>
  - redirects business opportunities from the company to themselves<sup>68</sup>
  - pays themselves excessive salaries at the expense of paying dividends to shareholders.<sup>69</sup>
- 3.34 According to Brockett, ‘these actions may impact on the value of a minority shareholder’s investment and frequently lead to disputes between the parties.’<sup>70</sup>

### Types of company covered

- 3.35 Oppression remedies contained in the Part apply to:
- companies limited by shares
  - companies limited by guarantee<sup>71</sup>
  - unlimited companies
  - public no liability companies
  - co-operative societies that are incorporated.<sup>72</sup>

59 *Corporations Act 2001* (Cth) s 53.

60 Richard Brockett, ‘The Valuation of Minority Shareholdings in an Oppression Context – A Contemporary Review’ (2012) 24.2 *Bond Law Review* 101, 106; see: *Australian Securities Commission v Lucas* (1992) 7 ACSR 676, 677; *Vigliaroni v CPS Investment Holdings* (2009) 74 ACSR 282, [63] discussed on pages 29–32.

61 *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.

62 *Wayde v New South Wales Rugby League* (1985) 180 CLR 459.

63 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* (1985) 180 CLR 459.

64 These examples have been discussed further in Richard Brockett, ‘The Valuation of Minority Shareholdings in an Oppression Context – A Contemporary Review’ (2012) 24.2 *Bond Law Review* 101, at 106.

65 *Re Spargos Mining NL* (1990) 3 ACSR 1.

66 *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.

67 *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (1998) 28 ACSR 688.

68 *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.

69 *Sanford v Sanford Courier Service* (1986) 10 ACLC 548; *Wayde v New South Wales Rugby League* (1985) 180 CLR 459.

70 Richard Brockett, ‘The Valuation of Minority Shareholdings in an Oppression Context – A Contemporary Review’ (2012) 24.2 *Bond Law Review* 101, 106.

71 *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, *Ford’s Principles of Corporations Law* (LexisNexis Butterworths, 15th edition, 2013) 711 [10.435].

72 *Shears v Chisholm* (1992) 9 ACSR 691, 691, 693; cited R P Austin and I M Ramsay, *Ford’s Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013) 711 [10.435].

3.36 While Part 2F.1 can apply to different types of companies, 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. According to Ford 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>73</sup>

3.37 The editors of *Ford's Principles of Corporations Law* suggest several reasons for this.<sup>74</sup> Shareholders in such companies may frequently be involved in the management of the company, or be employed as officers and directors.<sup>75</sup> A dispute with majority shareholders may see such engagements, and the remuneration associated with them, terminated.<sup>76</sup> Moreover, shareholders in small companies are more vulnerable than those in larger, public companies.<sup>77</sup> The lack of a liquid market for shares may make it difficult for an aggrieved minority shareholder to sell his or her shares.<sup>78</sup> 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>79</sup> Significantly, these difficulties are very similar to those commonly experienced by beneficiaries of trading trusts.

## Question

6 How well has the oppression remedy worked to protect shareholders?

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

3.38 Given the terms of reference for this review, one crucial issue to be considered is whether or not the existing oppression remedy in Part 2F.1 of the *Corporations Act 2001* (Cth) already applies to beneficiaries of trading trusts, at least where they are also shareholders in the corporate trustee.

3.39 There is a clear division in the view of Australian courts as to this question.<sup>80</sup> *Kizquari Pty Ltd v Prestoo Pty Ltd*<sup>81</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*<sup>82</sup> ('*Vigliaroni*') declined to follow *Kizquari*, emphasising the importance of section 53 of the *Corporations Act*.<sup>83</sup>

73 I M Ramsay, 'An Empirical Study of the Use of the Oppression Remedy' (1999) 27 *Australian Business Law Review* 23, cited in R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013) 712[10.435].

74 R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013) 711–12 [10.435].

75 Ibid.

76 Ibid.

77 Ibid.

78 Ibid.

79 Ibid.

80 See R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013) 713–4 [10.435]; Braydon Heape, 'Oppression Proceedings and Trust Remedies: What are the limits?', (2013) 31 *Companies & Securities Law Journal* 325; Michael May, 'Oppression in the context of corporate trustees', (2013) 87 *Australian Law Journal* 271; Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming).

81 (1993) 10 ACSR 606

82 (2009) 74 ACSR 282

83 See pages 29–30.

## Question

- 7 In your view, does the existing oppression remedy apply to trading trusts? If not, should it?

### ***Kizquari* and related cases**

- 3.40 *Kizquari*, a decision of Justice Young in the Supreme Court of New South Wales, concerned a company that was trustee of a unit trust. According to Heape:
- each of the Lane, Cuciti and Gabbey families participated in the business and had interests in a third of the units in the unit trust and in the shares of the defendant trustee company. Lane retired from active employment in the business and the remaining employees then paid themselves excessive salaries. The plaintiff, (the trustee of the Lane family trust) sought orders that it have its shares and units bought out by the other investors.<sup>84</sup>
- 3.41 If this conduct had occurred on the part of a company trading in its own right, it would have been a clear case of oppression, meriting relief under Part 2F.1, as the funds of the company available to be distributed to members of the company would be reduced by 'the excessive salary being paid to another member.'<sup>85</sup> According to May:
- in *Kizquari*, the payment was not made out of funds held by the company owned in its own right, and so the payment did not diminish the amount available to be paid out as dividends- rather it decreased the amount that the company could distribute as trustee of the trust.<sup>86</sup>
- 3.42 Heape argues further that:
- Young J found that excessive remuneration had been paid to the remaining employees and that the amounts should be paid back to the trust fund by the Cuciti and Gabbey families as a matter of trust law. However, his Honour rejected the submission that the court should order a compulsory purchase of shares in the trust company based on valuations of the trust property.<sup>87</sup>
- 3.43 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>88</sup>

84 Braydon Heape, 'Oppression Proceedings and Trust Remedies: What are the limits?' (2013) 31 *Company & Securities Law Journal* 325, 327.

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

86 *Ibid.*

87 Braydon Heape, 'Oppression Proceedings and Trust Remedies: What are the limits?', (2013) 31 *Company & Securities Law Journal* 325, 327.

88 *Kizquari Pty Ltd v Prestoo Pty Ltd* (1993) 10 ACSR 606, 612–613.

3.44 Moreover, Justice Young expressly declined to follow *Re Bodaibo Pty Ltd*,<sup>89</sup> where in the context of granting an oppression remedy Justice Vincent 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>90</sup>

3.45 *Kizquari* was followed in *Re Polyresins*:<sup>91</sup>

where Justice Chesterman considered an application by a majority shareholder for a winding-up order, or alternatively an order compelling the minority shareholder to purchase the majority shareholder's shares.<sup>92</sup>

It was unclear on the facts whether the company held property on trust,<sup>93</sup> but Justice Chesterman 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>94</sup>

3.46 In *McEwen v Combined Coast Cranes Pty Ltd*<sup>95</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.

3.47 In *Surf Road Nominees Pty Ltd v James*<sup>96</sup> Justice Einstein held that these cases were 'authority for the proposition that sections 232 and 233 of the *Corporations Act* are inapplicable in the circumstances.'<sup>97</sup>

3.48 The *Kizquari* approach was strongly endorsed in *Ciccarello: re Adelaide Property Development Pty Ltd v Cubelic*,<sup>98</sup> where Justice Mansfield held:

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 sections 232 and 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>99</sup>

3.49 Indeed Acting Justice Windeyer in *Trust Co Ltd v Noosa Venture I ('Noosa Venture')*<sup>100</sup> recently 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 than 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>101</sup>

89 (1992) 6 ACSR 509.

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

91 [1999] 1 Qd R 599.

92 Michael May, 'Oppression in the context of corporate trustees', (2013) 87 *Australian Law Journal* 271, 273; citing *Re Polyresins Pty Ltd* [1999] 1 Qd R 599, 614.

93 *Ibid.*

94 *Re Polyresins Pty Ltd* [1999] 1 Qd R 599, 614.

95 (2002) 44 ACSR 244; cited in Michael May, 'Oppression in the context of corporate trustees', (2013) 87 *Australian Law Journal* 271, 273.

96 [2004] NSWSC 61 (20 February 2004).

97 *Ibid* [219]; cited in Michael May, 'Oppression in the context of corporate trustees' (2013) 87 *Australian Law Journal* 271, 274.

98 [2008] FCA 141.

99 *Ibid* [28]; cited in Michael May, 'Oppression in the context of corporate trustees' (2013) 87 *Australian Law Journal* 271, 274.

100 (2010) 80 ACSR 485; cited in Braydon Heape, 'Oppression Proceedings and Trust Remedies: What are the limits?' (2013) 31 *Company & Securities Law Journal* 325, 327.

101 *Trust Co Ltd v Noosa Venture I Pty Ltd* (2010) 80 ACSR 485, [105].

- 3.50 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>102</sup> In the judge’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>103</sup>
- 3.51 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 will be considered below.

## Questions

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

### A broader scope: The Vanmarc approach

- 3.52 In *Vanmarc Holdings Pty Ltd v PW Jess and Assoc Pty Ltd (Vanmarc)*,<sup>104</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.
- 3.53 In *Vanmarc* the plaintiffs sought relief on a number of different grounds, including an oppression remedy under section 246AA of the 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.
- 3.54 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 buyout 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 s 246AA in the case of a trustee company) (see too: *re Bountiful Pty Ltd* (1994) 12 ACLC 902, 905).<sup>105</sup>
- 3.55 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>106</sup>

102 Ibid [100].

103 Michael May, ‘Oppression in the context of corporate trustees’ (2013) 87 *Australian Law Journal* 271, 275-6: citing Ibid [105].

104 (2000) 34 ACSR 222; R P Austin and I M Ramsay, *Ford’s Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013) 713–14 [10.435]; Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 139–141.

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

106 Ibid.



- 3.56 A number of commentators<sup>107</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’**

- 3.57 In *Vigliaroni*,<sup>108</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.
- 3.58 *Vigliaroni* involved a successful business comprised of unit trusts and companies, predominantly involved in the concreting industry (CPS Investment Holdings), that was primarily owned by the Vigliaroni family. Two sons of the original family, Dominic and Ivan Vigliaroni, were involved in the business, which had been managed for many years by Mr Gargaro, a trusted financial advisor and manager. Disputes arose when the relationship between Mr Gargaro and the Vigliaronis broke down due to alleged actions by Mr Gargaro to appropriate group business and assets for himself and to exclude the Vigliaronis.
- 3.59 Among Gargaro’s alleged actions was the creation of a number of businesses in the mid-1990s, operated by unit trusts, in which he was given a large equity stake, for no consideration. The other equity holders were Dominic and Ivan Vigliaroni. Over time, Ivan and Gargaro excluded Dominic’s equity interest in the business. Dominic later alleged he was not made aware of this decision. Gargaro engaged in transactions and business activities for his own personal benefit, which was in breach of fiduciary and statutory duties. Gargaro’s breach of duty was made worse by the fact that he was the Vigliaronis’ financial advisor.<sup>109</sup>
- 3.60 The Vigliaronis launched proceedings against Gargaro and the various relevant entities on a number of grounds, including that Gargaro’s actions were oppressive under Part 2F.1 of the Corporations Act. They sought a forced buyout of Gargaro’s interests in the group under section 233, or alternatively a winding up under section 233 or section 467(1), on just and equitable grounds. The Vigliaronis were largely successful in all actions, including the action to apply sections 232 and 233 to force a buyout of Gargaro’s interests in both shares and units.
- 3.61 In making 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 those 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 of a trustee company and accordingly I conclude that I should depart from the view expressed by Justice Young 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.

107 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, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 141.

108 (2009) 74 ACSR 282.

109 Ibid 285–292 [4]–[22]; The summary of the facts in [3.58]–[3.60] relies in part upon the summary in Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 144.

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>110</sup>

## Questions

- 10 Which approach to section 232 do you consider preferable, Acting Justice Windeyer's or Justice Davies'?
- 11 Do you agree with Justice Davies' interpretation of the purposive approach?
- 12 Do you agree with Justice Davies' interpretation of section 53?

### *Drapac and Arhanghelschi*

- 3.62 Justice Davies' approach in *Vigliaroni* was approved and further developed by Justice Ferguson, also of the Supreme Court of Victoria, in *Wain v Drapac* ('*Drapac*').<sup>111</sup> In that case, with a view to securing their participation in management, Mr Drapac issued Mr Wain and Mr Murchie, with units in property trusts, and with shares in the trustee companies.<sup>112</sup> Moreover, Mr Drapac controlled the business group as a whole. It was argued that Drapac caused the termination of employment of Wain and the forced resignation of Murchie. At trial Wain and Murchie argued oppression based on the manner of their termination including 'the termination of their directorships and the planned dilution of their interests.'<sup>113</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.
- 3.63 Besides the oppression proceeding, *Drapac* also involved arguments covering employment law, directors' duties and contract. Moreover, Bergman notes that similarly to *Vigliaroni* the request for relief related to shares and units in various entities in a group, which differed from a number of other cases, where the requested relief from oppression concerned a limited number of single entities, generally involving a 'valueless corporate trustee acting for a valuable trust.'<sup>114</sup>

110 Ibid 305–306 [68].

111 [2012] VSC 156 (26 April 2012) (currently subject to appeal); See R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013); Braydon Heape, 'Oppression Proceedings and Trust Remedies: What are the limits?' (2013) 31 *Company & Securities Law Journal* 325, 326; Michael May, 'Oppression in the context of corporate trustees' (2013) 87 *Australian Law Journal* 271, 274–5; Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 155–160.

112 Braydon Heape, 'Oppression Proceedings and Trust Remedies: What are the limits?' (2013) 31 *Company & Securities Law Journal* 325, 326. Ibid.

114 Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 156; See, eg, *Trust Co Ltd v Noosa Venture I Pty Ltd* (2010) 80 ACSR 485.

- 3.64 The defence in *Drapac* raised a series of arguments against the grant of the oppression remedy. These included an issue of standing, as the allegedly oppressed parties (Murchie and Wain) were not personally beneficiaries of the units held in the Drapac Group, so that the nexus required by the phrase ‘a member in any other capacity’ in section 232(e) had not been shown.<sup>115</sup> It was further argued that the corporate trustees had not committed any acts of oppression, but that if there had been any such acts, they were conducted by Drapac personally, ‘with the inference that section 232 cannot apply because there was no oppression in the affairs of the company.’<sup>116</sup> Finally, Drapac argued, even if he was personally liable, the appropriate remedy was to apply relevant provisions of the *Trustee Act 1958* (Vic), rather than the oppression remedies in Part 2F.1 of the *Corporations Act*.<sup>117</sup>
- 3.65 Justice Ferguson rejected all of these submissions. 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>118</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>119</sup>

## Question

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

- 3.66 Justice Ferguson was satisfied that making the orders was an appropriate exercise of discretion. She proceeded to order Drapac and his company Briaroaks to purchase Wain and Murchie’s interests, both shares and units, at fair value.<sup>120</sup> Justice Ferguson went on, in a separate decision, to value the various interests cumulatively.<sup>121</sup>

115 Ibid 157; citing *Wain v Drapac* [2012] VSC 156 (26 April 2012) [281].  
 116 Ibid 158; citing *Wain v Drapac* [2012] VSC 156 (26 April 2012) [282].  
 117 Ibid; citing *Wain v Drapac* [2012] VSC 156 (26 April 2012) [282].  
 118 In *Trust Co Ltd v Noosa Venture I Pty Ltd* (2010) 80 ACSR 485, [105].  
 119 *Wain v Drapac* [2012] VSC 156 (26 April 2012) [287].  
 120 Ibid [293].  
 121 *Wain v Drapac (No 2)* [2013] VSC 381 (31 July 2013).

## Question

- 14 Even under the more liberal approach adopted in *Vigliaroni* and *Drapac*, in order to claim an oppression remedy, the plaintiff needs to be both a member/ shareholder and a beneficiary. Is this appropriate and desirable?

3.67 While Justice Ferguson largely followed the reasoning of Justice Davies in *Vigliaroni*, she buttressed this approach with the ‘quasi-partnership’ concept, expounded by Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd* (*‘Ebrahimi’*).<sup>122</sup> Justice Ferguson used *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 on 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>123</sup> Justice Ferguson follows a broad, liberal approach to applying statutory oppression remedies, irrespective of the structure of the relevant entity, ‘so that a just and equitable result can be provided to the oppressed party.’<sup>124</sup>

## Question

- 15 Do you agree with Justice Ferguson’s use of the ‘quasi-partnership’ doctrine as set out in *Ebrahimi*?

3.68 At the time of writing, the decision in *Drapac* is before the Victorian Court of Appeal. Presuming the appeal proceeds to hearing, this could provide the first opportunity for an intermediate appellate court to clarify the existing conflicting authorities outlined above.

3.69 Justice Ferguson also demonstrated her support for the *Vigliaroni* approach in the subsequent decision of *Arhangelschi v Ussher* (*‘Arhangelschi’*).<sup>125</sup> The case involved a dispute between ‘partners’ in a radiology practice conducted through a unit trust. In this case a minority unitholder radiologist was ousted from the business by the other unitholders, ‘pursuant to the express terms permitted by a unitholders’ agreement.’<sup>126</sup> Justice Ferguson found against the plaintiff, on the ground that the majority acted in accordance with the terms of the unitholders agreement and moreover used this agreement to distinguish ‘the case from the equitable rights of parties in other (quasi) partnerships where no such agreements apply.’<sup>127</sup>

122 [1973] AC 360. *Ebrahimi* is discussed at some length in Chapter 4 below, at pages 47–49.

123 Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 157; citing *Wain v Drapac* [2012] VSC 156 (26 April 2012) [273].

124 Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 157.

125 [2013] VSC 253 (16 May 2013); See Peter A Clarke, *Arhangelschi 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, peteraclark.com.au) <<http://www.peteraclark.com.au/2013/05/27/arhangelschi-v-usscher-2013-vsc-253-16-may-2013-oppression-conduct-of-the-affairs-of-trustee-company-oppressive-unfairly-prejudicial-or-unfairly-discriminatory-sections-232-and-233-corporatio/>>; cited in Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 159.

126 Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 159.

127 Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 159–60.

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

Here it is submitted, 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>128</sup>

3.71 Despite the result, the reasoning of Justice Ferguson clearly allows for the grant of an oppression remedy to unitholders under Part 2F.1 of the Corporations Act.<sup>129</sup>

## Question

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

3.72 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 Venture* underlines the uncertain state of the law in this area. This is potentially an argument for statutory intervention of some sort, to clarify the parameters and operation of the law.

<sup>128</sup> *Arhanghelschi v Ussher* [2013] VSC 253 (16 May 2013) [51] (citations omitted).

<sup>129</sup> *Arhanghelschi v Ussher* [2013] VSC 253 (16 May 2013) [51] (citations omitted); also see Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 160.



# Forms of equitable relief

- 36 Introduction
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## 4. Forms of equitable relief

### Introduction

- 4.1 This chapter examines the different forms of equitable relief available to beneficiaries from trustees and majority unitholders. The purpose of the chapter is to consider primarily those equitable remedies that will enable beneficiaries to extricate their interests from the trust structure. As explained in Chapter 3, the remedy that achieves this objective for a company is the buyout order. The following analysis will therefore consider whether there is an equivalent form of relief in equity.
- 4.2 An important distinction, which underpins the analysis that follows, is that the termination of a unit 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>1</sup>
- 4.3 It is unclear whether it is 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 2001* (Cth).<sup>2</sup> Rather ‘the trust simply comes to an end in certain circumstances and the property is distributed among the beneficiaries.’<sup>3</sup>
- 4.4 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>4</sup>
- 4.5 In general terms equitable doctrine enables a trust to be terminated by:
- the exercise of reserved powers of termination or revocation, by the court, and by the beneficiaries being of full age and capacity. A trust must be terminated when, according to its terms, the trust fund must be distributed amongst the ascertainable beneficiaries.<sup>5</sup>

However, for reasons that will become apparent throughout this chapter, not all of these mechanisms are appropriate in the context of trading trusts. An obvious problem is that most of these mechanisms deal with the situation of terminating the trust, rather than allowing a unitholder to redeem their interest.

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1 *Horwath Corporation Pty Ltd v Huie* (1999) 32 ACSR 413, 415 [14].  
2 P Young, C Croft and M Smith, *On Equity* (Lawbook Co, 2009) 502; Also see the conclusions from Corporations and Markets Advisory Committee, ‘Managed Investment Schemes’ (Report, July 2012) 57 cited in Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 80.  
3 Corporations and Markets Advisory Committee, ‘Managed Investment Schemes’, (Report, July 2012) 57; cited in Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 80.  
4 P Young, C Croft and M Smith, *On Equity* (Lawbook Co, 2009) 502.  
5 H A J Ford, W A Lee and P M McDermott, LBC Information Services, *Principles of the Law of Trusts*, vol 3 (at 119) [16.000].



4.6 The Commission has identified a number of possible equitable doctrines which directly or indirectly achieve these objectives. The most important are:

- termination pursuant to the terms of the trust deed
- vesting of the trust pursuant to the rule in *Saunders v Vautier*
- relief under the *Trustee Act 1958* (Vic)
- an order to alter the beneficial interest of unitholders
- the doctrines of quasi-partnership and fraud on power.

Each of these is considered in turn.

## Termination and redemption under the trust deed

### General principles

4.7 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 that deal with the termination of the trust. If conditions under the trust deed are met then:

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>6</sup>

4.8 The trust deed can 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 the units by the trustee or another unitholder. As was explained in Chapter 3, this is the comparable mechanism of a buyout order in equity, and has been the impetus behind the case law to date, where unitholders have sought an oppression remedy.

4.9 The reasons why the provisions of the trust deed leave unitholders in an unsatisfactory position are twofold. First, the parties may simply not have contemplated the problem that may arise in the event that a unitholder seeks to extricate themselves from the trust.<sup>7</sup> Secondly, even where this eventuality is contemplated, the terms of the trust deed will typically provide that an offer to redeem units must be made first to existing unitholders.<sup>8</sup> This may prevent a unitholder from redeeming their units for the value of the initial investment.

4.10 Another issue is that where the trust deed sets out a procedure for valuation, this itself may not lead to a result where the unitholder can redeem their interest at market value.

4.11 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>9</sup> However, it is not clear that these principles are appropriate in the context of redemption pursuant to the terms of the trust deed.

6 P Young, C Croft and M Smith, *On Equity* (Lawbook Co, 2009) 503; citing *Re Gaydon* [2001] NSWSC 473 (8 June 2001) [29].

7 See the facts of *Wain v Drapac* [2012] VSC 156 (26 April 2012) discussed in Chapter 3 at pages 30–33.

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

9 H A J Ford, W A Lee and P M McDermott, LBC Information Services, *Principles of the Law of Trusts*, vol 3 (at 119), [16.210]; citing *Hyman v Permanent Trustee Co of NSW Ltd* (1914) 14 SR (NSW) 348; *Carr v Carr* (1987) 8 NSWLR 492; *Re White* [2001] Ch 392.

- 4.12 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 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 unitholder is put on notice that it will be difficult to extricate themselves from the trust.
- 4.13 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>10</sup> However, because of adverse tax consequences these provisions are rarely included in trust deeds.<sup>11</sup>

## Question

- 17 Are there any circumstances in which termination under the trust deed could provide a satisfactory remedy to minority beneficiaries?

## Estoppel

- 4.14 Even where a redemption clause is unambiguous, other equitable doctrines, in particular estoppel, may be relied upon by unitholders. Although the requirements are somewhat unclear, 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 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>12</sup>
- 4.15 In *Accurate Financial Consultants v Koko Black* ('*Koko Black*')<sup>13</sup> 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-Streeton however found that Hills had made a representation:

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

11 Ibid 502–3.

12 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 428–9 (Brennan J); cited in *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd* (2008) 66 ACSR 325, 342 [125] (Dodds-Streeton JA).

13 (2008) 66 ACSR 325.

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>14</sup>

Furthermore, she 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>15</sup>

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>16</sup>

- 4.16 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>17</sup> suggest that the action will generally only be appropriate in circumstances where the trust structure resembles a partnership or joint venture. Indeed, 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.
- 4.17 It should be noted that since the decision in *Vigliaroni*, if similar facts arose to those in *Koko Black*, arguably, the minority unitholders could have sought an oppression remedy on the basis that the representations made by Hills gave rise to a legitimate expectation that the business venture was to be conducted over the long term.
- 4.18 As shown in Chapter 3, it is probably 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 under section 232 of the Corporations Act this would arguably reduce the need to rely upon the doctrine of estoppel, since the remedies available under section 233 can be tailor made in response to the conduct constituting oppression.

## 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?

14 *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd* (2008) 66 ACSR 325, 352 [181].

15 *Ibid* 352 [184].

16 *Ibid* 352–3 [185]–[187].

17 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 428–9 (Brennan J); cited in *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd* (2008) 66 ACSR 325, 342 [125] (Dodds-Streton JA).

## The rule in *Saunders v Vautier*

- 4.19 According to the authors of *Law of Trusts and Trustees*, the rule in *Saunders v Vautier*<sup>18</sup> says 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>19</sup>
- 4.20 The rule has been rationalised on the basis that the:  
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>20</sup>
- 4.21 It is important to note that the rule also applies to the beneficiaries of a discretionary trust.<sup>21</sup>
- 4.22 The rule therefore only applies when the beneficiaries possess an absolute vested beneficial interest in the trust estate. In practice, however, the rule from *Saunders v Vautier* can be easily circumvented through the trustees’ right of indemnity from the trust property and a personal right from the beneficiaries.<sup>22</sup> Moreover, the application of the rule also depends upon the precise terms of the trust deed.<sup>23</sup>
- 4.23 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>24</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>25</sup> It follows that ‘the court will act cautiously in ordering any vesting where the issue is in dispute between the beneficiaries.’<sup>26</sup> Indeed, the rule from *Saunders v Vautier* has no application in such a case.
- 4.24 The importance of the trust deed reveals the limitations of applying *Saunders v Vautier* to trading trusts. First, if the trust deed includes a limitation upon the beneficiary’s interest or a trustee’s right of indemnity then the principle will not apply. However, perhaps more fundamentally, 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.

18 (1841) 4 Beav 115.

19 Underhill and Hayton, *Law of Trusts and Trustees* (LexisNexis Butterworths, 16th ed, 2003) 27; cited in Scottish Law Commission, *Report on Variation and Termination of Trusts*, Report No 206 (2007) 7.

20 Law Reform Commission of Saskatchewan, *The Rule in Saunders v Vautier and the Variation of Trusts*, Consultation Paper (1994) 6.

21 H A J Ford, W A Lee and P M McDermott, LBC Information Services, *Principles of the Law of Trusts*, vol 3 (at 119) [16.090]; citing *Re Smith* [1928] Ch 915.

22 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.

23 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.

24 *Byrnes v Kendle* (2011) 243 CLR 253, 286–7 (Heydon and Crennan JJ).

25 Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 79.

26 Ibid.

- 4.25 Sin has argued that, in any case, the rule from *Saunders v Vautier* is conceptually inappropriate to unit trusts, since the rule is fundamentally ‘about the wish of a donor and the right of the donee.’<sup>27</sup> As discussed in Chapter 2, Sin has a different view of the unit trust, based on contract. The unit trust is created by a trust deed, which comprises a series of contractual relationships between trustee-manager and unitholder.<sup>28</sup> In this case, the only appropriate mechanism to terminate a unit trust is by the consent of all contracting parties, including the trustee and manager.<sup>29</sup> It is unclear, however, whether Sin’s analysis is appropriate to private unit trusts, which usually do not have a manager separate to the position of trustee.
- 4.26 Nonetheless, Sin’s argument can be supported on policy grounds since it has been suggested that the rule from *Saunders v Vautier* can be understood in terms of a:
- basic paradox at the heart of a property system operating within the tenets of liberalism: where a donor of an interest tries to restrict a donee’s freedom to dispose of that interest, then the legal system must choose between competing freedom[s], that of the donor or that of the donee.<sup>30</sup>
- Since the beneficial interest under a unit trust is not obtained by gift, it is unclear whether the rule from *Saunders v Vautier* can be justified on policy grounds in that context.
- 4.27 Sin’s argument can also be extended to justify an absence of oppression remedies for unitholders on the basis that the rationale underpinning a unit trust lies in contract. If so, it arguably follows that if the trust deed provides a mechanism for the termination of the trust, or the redemption and valuation of units, the court should give effect to these provisions.

## Variation of trusts

### Variation of trusts under the *Trustee Act 1958* (Vic)

- 4.28 *The Trustee Act 1958* (Vic) confers a broad jurisdiction upon the Supreme Court to administer trusts. According to *Principles of the Law of Trusts*:
- the legislation applies where property is held upon trusts arising under any instrument, other than trusts affecting property settled by Act of Parliament.<sup>31</sup>
- A court has a wide array of powers including the ability to vest the trust property and appoint new trustees.<sup>32</sup> A court also has the ability to hear an application by a trustee for an ‘opinion, advice, or direction on any question regarding the management or administration of trust property or interpretation of the trust deed, or to seek an opinion of the court in relation to advantageous dealings.’<sup>33</sup> Moreover, section 63 allows the court to authorise a trustee, upon application, to deal with trust property beyond the terms of the trust deed.
- 4.29 However, as outlined in Chapter 1, the application of oppression remedies and an examination of equivalent equitable relief suggests a more limited inquiry. If the trust deed provides that a unitholder has a certain number of units, then a variation by court order would be a potential mechanism to obtain a redemption other than through the terms of the trust deed.

27 Kim Fam Sin, *The Legal Nature of the Unit Trust* (Clarendon Press, 1997) 117.

28 Ibid 117–8.

29 Ibid.

30 Graham Moffat, ‘Trusts Law: A Song Without End?’ (Review Article) (1992) 55 *Modern Law Review* 123, 129; cited in Kim Fam Sin, *The Legal Nature of the Unit Trust* (Clarendon Press, 1997) 119.

31 H A J Ford, W A Lee and P M McDermott, LBC Information Services, *Principles of the Law of Trusts*, vol 3 (at 119) [15.070].

32 *Trustee Act 1958* (Vic) pt IV, divs 1–2.

33 Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 64, citing *Trustee Act 1958* (Vic), s 63(1).

4.30 Section 63A gives the court the power to vary beneficial interests under a trust:

- (1) Where property, whether real or personal, is held on trusts arising, whether before or after the commencement of this Act, under any will settlement or other disposition, the Court may if it thinks fit by order approve on behalf of—
  - (a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of minority or other incapacity is incapable of assenting; or
  - (b) any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons, so however that this paragraph shall not include any person who would be of that description, or a member of that class (as the case may be) if the said date had fallen or the said event had happened at the date of the application to the Court; or
  - (c) any person unborn; or
  - (d) any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined—any arrangement (by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts, or enlarging the powers of the trustees or managing or administering any of the property subject to the trusts:

Provided that except by virtue of paragraph (d) of this subsection the Court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person.
- (2) In the foregoing subsection ‘protective trusts’ means trusts specified in paragraphs (a) and (b) of subsection (1) of section thirty-nine of this Act or any like trusts, the principal beneficiary has the same meaning as in the said subsection (1) and ‘discretionary interest’ means an interest arising under the trust specified in paragraph (b) of the said subsection (1) or any like trust.
- (3) Notice of an application to the Court for an order pursuant to subsection (1) of this section shall be given to such persons as the Court may direct.
- (4) Nothing in the foregoing provisions of this section shall apply to trusts affecting property settled by Act of Parliament.
- (5) Nothing in this section shall limit the powers conferred by section sixty-three of this Act section sixty-four of the Settled Land Act 1958 or section one hundred and seventy-one of the Property Law Act 1958.

4.31 It is unlikely that the power under section 63A enables a court to vary the beneficial interests of unitholders analogously to a court-ordered buyout under the Corporations Act.

4.32 Indeed, according to *Principles of 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>34</sup>

This is clearly reflected by the four categories of beneficiaries specified under section 63A.<sup>35</sup>

4.33 This illustrates an obvious difficulty for unitholders since as discussed above, it is difficult to envisage a situation when a unitholder would be able to avail themselves of the rule in *Saunders v Vautier* generally.

## Question

19 How much does the rule in *Saunders v Vautier* underpin the provisions of the *Trustee Act 1958 (Vic)*?

4.34 Section 63 of the *Trustee Act 1958 (Vic)* arguably provides a broader power than 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.
- (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.

4.35 There is some uncertainty regarding the breadth of the court's discretion under sections 63 and 63A. As discussed below, the reasoning of Justice Einstein in *Westfield v Lend Lease ('Westfield')*<sup>36</sup>, which concerned applications under both the Victorian and New South Wales Trustee Acts, suggests a court does not have jurisdiction under section 63 of the Victorian legislation to alter beneficial interests. This issue will be explored further in the context of the analogous New South Wales provision.

34 H A J Ford, W A Lee and P M McDermott, LBC Information Services, *Principles of the Law of Trusts*, vol 3 (at 119) [15.090]; also see *George v Kollias* [2007] VSC 46 (5 March 2007).

35 However a contrary view of the policy underpinning the UK Variation of the *Trusts Act 1958 (Vic)* 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(5) *Modern Law Review* 719.

36 [2008] NSWSC 516 (29 May 2008) [62].

- 4.36 The view of Justice Einstein in *Westfield*, was implicitly adopted by Justice Robson in *Re Estate of Barns* ('*Re Barns*')<sup>37</sup> who said that:

I find s 63 does not permit the court to vary the powers of a trustee to allow the beneficial interests in the estate to be altered inter se. I find that s 63A permits the court to agree on behalf of a beneficiary, otherwise not able to agree, to an arrangement between beneficiaries to vary the terms of a trust. That power does not, however, permit the Court to give effect to an arrangement to vary the beneficial interests of the beneficiaries that otherwise does not have the agreement of all the beneficiaries of the estate.<sup>38</sup>

This reasoning suggests that the power of the court under section 63A is limited by the application of the rule in *Saunders v Vautier*,<sup>39</sup> and moreover, at least under section 63, is to give the trustee power which is not provided for under the trust deed.<sup>40</sup> The distinction between a grant of power and an alteration of interests can sometimes be a fine one. However, Justice Robson appears to acknowledge that the former may involve an incidental alteration of the beneficial interest.<sup>41</sup> Although the boundaries are unclear, it appears that a scheme which is designed to alter the beneficial interests of unitholders cannot be approved under sections 63 and 63A.

- 4.37 It should be noted that some of the statutory equivalents of section 63A and section 63 in other Australian jurisdictions are of broader application. On its face, section 59C of the *Trustee Act 1936* (SA) enables a trustee to approach the court for a variation on behalf of any beneficiary. Ford et al 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>42</sup>

- 4.38 The wording of this section bears a resemblance to the drafting of the oppression remedy under section 232 of the Corporations Act. However, in *Benjiza v Adriatic Fisheries Pty Ltd* the court refused to wind up a trust under section 59C on the basis that the court did not have the power to do so.<sup>43</sup>
- 4.39 Section 81 of the *Trustee Act 1925* (NSW) is also of wider operation than section 63 of the Victorian legislation. Section 81(1)(a) provides that the court's power extends to making an 'adjustment of the respective rights of the beneficiaries, as the Court may think fit.' Like the South Australian legislation, section 81 does not limit beneficiaries to a particular type or class. However, the section does not clearly include buyouts analogous to relief under section 233 of the Corporations Act.

37 [2011] VSC 314 (5 July 2011).

38 Ibid [7].

39 In the case, his Honour held that it followed from this reasoning 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] VSCA 77 (2 May 2012) [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: [42]–[43].

40 *Re Estate of Barns* [2011] VSC 314 (5 July 2011) [44]–[45].

41 Ibid [51].

42 H A J Ford, W A Lee and P M McDermott, LBC Information Services, *Principles of the Law of Trusts*, vol 3 (at 119), [15.230]; citing s 59C(3) (b).

43 (1984) 37 SASR 545; cited in H A J Ford, W A Lee and P M McDermott, LBC Information Services, *Principles of the Law of Trusts*, vol 3 (at 119) [15.230].



4.40 The case of *Arakella v Paton* ('*Arakella*')<sup>44</sup> provides a useful example of these issues. In that case, a trustee of a trading trust sought advice under section 81 to transfer all the units under the trading trust to a company called New Co. Consequently, the unitholders would receive shares in the new corporate entity. There were several difficulties with this arrangement, which was similar to a scheme of arrangement under section 411 of the Corporations Act. The most important of these was that the proposed redemption did not follow the valuation mechanism under the trust deed, and the agreement from the unitholders for such an arrangement had to be unanimous.

4.41 Justice Austin found that section 81 permitted the court to make an order reflecting the proposed arrangement. The general approach for considering section 81 is to adopt:

a construction which reflects the breadth of the Court's jurisdiction. The Court should not construe the sections as subject to any fetters or limitations beyond what is clearly imported by the statutory language. One approaches the central question in the case, namely whether the court is capable of forming the opinion that the proposed transaction is expedient in the management or administration of any property vested in the trustees, in that light.<sup>45</sup>

4.42 After finding that the power under section 81 is a broad one, Justice Austin suggested that it could be exercised if two conditions were met. The first was whether the proposed variation extended to the substratum of the trust, in which case it would be invalid.<sup>46</sup> This issue relates to the equitable doctrine of fraud on power and will be considered later in this chapter. The second condition was whether the order of the court 'is the implementation of the Trustee's proposal',<sup>47</sup> which on the facts was clearly satisfied.

4.43 Since *Arakella* concerned the restructuring of a unit trust, it is not clear whether the section could be used in a similar way to a buyout under the Corporations Act.<sup>48</sup> Justice Austin however suggested that the wording of section 81(1) seems to contemplate a power of 'alteration of the trusts and therefore the interests of the beneficiaries.'<sup>49</sup> However he added that:

the wording of the New South Wales provision does not purport to authorise the Court to make orders varying beneficial interests at large, but only in the management or administration of trust property. It cannot be suggested that the section is a substitute for variation of trusts legislation.<sup>50</sup>

It is not clear what constitutes management of the trust, since in *Arakella*, the trustees were managing the trust in a way contrary to the terms of the trust deed. It is possible, however, that under the reasoning of Justice Austin a unitholder may be able to obtain a buyout of their units under section 81, analogously to an oppression remedy.

44 *Arakella v Paton* (2004) 60 NSWLR 334.

45 *Ibid* 352 [80] (Austin J).

46 *Ibid* 353 [84] (Austin J); citing *Cachia v Westpac Financial Services Ltd* (2000) 170 ALR 65 (Hely J).

47

*Ibid*.

48 Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 64.

49 *Arakella v Paton* (2004) 60 NSWLR 334, 357 [101] (Austin J).

50 *Ibid* 357 [102] (Austin J).

- 4.44 A different approach to Justice Austin in *Arakella* was expressed by Justice Einstein in *Westfield*. He suggested that the approach in *Arakella* should be restricted to effecting a ‘fundamental reorganisation of the trust’, rather than a termination.<sup>51</sup> Indeed, in *Westfield* the order sought would have wound up the trust. However Justice Einstein also suggests that the purpose of the power under section 81:

is not to permit the substantive alteration of the trust or its termination, but to give the trustees power to administer the trust in a more satisfactory and effective way.<sup>52</sup>

According to Justice Einstein, any adjustment of the beneficiary’s rights, which is sought under section 81, must be ‘incidental or consequential.’<sup>53</sup> Bergman points out, however, that whether one adopts the view from *Arakella* or *Westfield* is of little help to unitholders since:

In most oppression cases, it is provisions of the trust deeds themselves that facilitate the ‘oppressive conduct,’ and in such circumstances, the Trustee Acts are incapable of coming to the aid of unitholders.<sup>54</sup>

## Question

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

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

- 4.45 An alternative to a trustee seeking an order under the Trustee Act is to seek an order pursuant to an inherent power of the court to alter beneficial interests.

- 4.46 Justice Austin in *Arakella* 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>55</sup>

- 4.47 According to *Principles of the Law of Trusts*, it seems implicit in this reasoning that the New South Wales Supreme Court has no inherent power to alter the beneficial interests of trusts. Moreover, there are five reasons why no inherent jurisdiction exists.

51 *Westfield Qld No 1 Pty Ltd v Lend Lease Real Estate Investments Ltd* [2008] NSWSC 516 (29 May 2008) [62].

52 *Ibid* [53]; citing *Re Shipwrecked Fisherman and Mariners Royal Benevolent Society Charity* [1959] Ch 220, 228.

53 *Westfield Qld No 1 Pty Ltd v Lend Lease Real Estate Investments Ltd* [2008] NSWSC 516 (29 May 2008) [55].

54 Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 65.

55 *Arakella v Paton* (2004) 60 NSWLR 334, 360 [112] (Austin J); cited in H A J Ford, W A Lee and P M McDermott, *LBC Information Services, Principles of the Law of Trusts*, vol 3 (at 119), [15.270].

4.48 First, *Arakella* should be taken as persuasive authority.<sup>56</sup> Second, if such a jurisdiction were recognised it would invariably undermine the intention of the settlor and could potentially deprive some beneficiaries of their entitlements.<sup>57</sup> Third, the legislation is based upon English statutes, which were a response to the specific context of high inheritance taxes.<sup>58</sup> Fourth, if an alteration is sought because the deed does not reflect the intentions of the settlor, alternative remedies are available.<sup>59</sup> Finally, where a beneficiary has unjustly been deprived of a beneficial interest, statutory relief already exists to rectify the injustice in certain cases.<sup>60</sup> Ford et al conclude:

there is no justification for the retention in Australia of any of the existing variation of trusts legislation because they mimic English legislation that had as its context the imposition of crippling inheritance taxes on life tenants and remainderman. In Australia today there are no inheritance taxes and hardly any life tenants.<sup>61</sup>

4.49 While these criticisms certainly have merit for traditional trusts, such as those discussed in Chapter 2, it is not clear whether they are appropriate to trading trusts, particularly unit trusts, which may have no settlor.

## Question

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

## Quasi-partnerships

4.50 It is well established that the beneficiaries of a unit trust are not formally partners.<sup>62</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>63</sup>

4.51 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>64</sup>

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

56 H A J Ford, W A Lee and P M McDermott, LBC Information Services, *Principles of the Law of Trusts*, vol 3 (at 119), [15.270].

57 Ibid.

58 Ibid.

59 Ibid.

60 Ibid.

61 Ibid [15.275].

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

63 D Hayton, 'Trading Trusts, Trustees' Liabilities and Creditors', in *The International Trust* (Jordans Publishing Ltd, 3rd ed, 2011) [7.2].

64 Ibid.

- 4.52 However, counsel in a line of Australian cases<sup>65</sup> have sought to rely upon the decision of *Ebrahimi v Westbourne Galleries Ltd* ('*Ebrahimi*')<sup>66</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>67</sup>
- 4.53 Indeed as Bergman argues:
- 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>68</sup>
- 4.54 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 the son of Mr Nazar entered the business, and was transferred 100 shares from Ebrahimi and Nazar. However, Nazar and his son used their greater voting power to remove Ebrahimi from the board.
- 4.55 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>69</sup>
- 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>70</sup> His Lordship 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>71</sup>
- 4.56 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 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>72</sup>
- 4.57 A difficulty, however, with the reasoning from *Ebrahimi* is that even where these elements are established the case arguably only stands for the proposition that a winding up order can be granted. 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. Indeed, where a buyout of a minority unitholder is sought, it is not clear whether the principles from *Ebrahimi* are applicable.<sup>73</sup>

65 *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).

66 [1973] AC 360.

67 Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 78.

68 *Ibid* 76.

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

70 *Ibid* 379.

71 *Ibid* 380.

72 *Ibid* 379.

73 *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd* [2007] VSC 40 (23 August 2007) [117].

4.58 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 Hills from compulsorily acquiring the units of the minority unit holders.<sup>74</sup> This reasoning was endorsed by Justice of Appeal Dodds-Streeton on appeal suggesting that the reasoning from *Ebrahimi* is limited to a winding up order.<sup>75</sup>

4.59 A contrary view however 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>76</sup>

In contrast to *Koko Black*, a corollary of this reasoning is that a buyout order is available in the case of a quasi-partnership. However, since Justice Cooke goes further suggesting that a quasi-partnership is a precondition for a buyout order, the application of this reasoning is doubtful in Australia, since a buyout order is an established remedy when oppression is found.

4.60 However, the above passage was recently endorsed in the *Drapac* case, although the precise emphasis is uncertain.<sup>77</sup> Justice Ferguson appears to have accepted the proposition that the facts of the case led to the conclusion that Wain, Murchie and Drapac were in a quasi-partnership analogous to *Ebrahimi* due to a breakdown in trust and confidence.<sup>78</sup> However, this reasoning is conducted in relation to an analysis of sections 232 and 233 of the Corporations Act. Arguably, Justice Ferguson is thus doing no more than suggesting that the reasoning from *Ebrahimi* can inform the criteria for an oppression remedy. Bergman, however, points out that Justice Ferguson does not challenge the submission that a buyout is available in a case of quasi-partnership, which suggests that this interpretation is still open.<sup>79</sup>

4.61 Regardless of which view is adopted, it is important to remember that the reasoning from *Ebrahimi* is only applicable to those trading trusts that resemble partnerships. For a quasi-partnership to be found, a unitholder would almost certainly have to both own shares in the corporate trustee, and actively contribute to the management of the enterprise.

## Question

22 In your view, can the 'quasi-partnership' approach adopted in *Ebrahimi* apply to trading trusts? If so, can a beneficiary obtain a remedy other than the winding up of the trust?

74

Ibid.

75

*Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd* (2008) 66 ACSR 325, 341 [122] (Dodds-Streeton JA).

76

*Croly v Good* [2010] EWHC 1 Ch, [18]; cited in *Wain v Drapac* [2012] VSC 156 (26 April 2012) [274] (Ferguson J).

77

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

78

Ibid [277].

79

Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 108.

## Fraud on the power

- 4.62 In *Cachia v Westpac Financial Services* ('*Cachia*')<sup>80</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>81</sup>
- 4.63 The doctrine as stated by Justice Hely has several elements. The first proposition is a rule of interpretation. Thus, a power must not be exercised beyond the scope 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>82</sup> This gives rise to the second element, that power must be exercised in good faith and for a proper purpose.
- 4.64 However, even the good faith requirement may arguably be limited by the terms of the trust deed. It has been suggested that in order to establish fraud on power, a unitholder would have to show that the 'trustee's actions have eroded the "substratum" of the UT [unit trust].'<sup>83</sup> An exclusion clause could be inserted into the trust deed, providing the trustee with an unfettered discretion,<sup>84</sup> so long as the substratum remained unaltered. It is not clear whether the substratum refers to the fundamental purpose of the trust,<sup>85</sup> or to the 'irreducible core' of trusteeship.<sup>86</sup> The former appears to be the preferred approach in *Cachia*.<sup>87</sup>
- 4.65 Indeed, in *Cachia* Justice Hely held that the doctrine was not made out in circumstances where the trustee had amended, by 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>88</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>89</sup>
- 4.66 There were two important aspects of the reasoning. First, the trust deed did not preclude the type of amendment on the facts.<sup>90</sup> Secondly, a reorganisation of the trust did not necessarily entail an alteration of the substratum of the trust.<sup>91</sup>
- 4.67 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, which would otherwise constitute fraud on power.<sup>92</sup>

80 (2000) 170 ALR 65.

81 Ibid 83 [74]; citing *Lancedale Holdings Pty Ltd v Health Group Australasia Pty Ltd* [1999] NSWSC 609 (Bryson J).

82 *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 (23 August 2007) [103] (Hargrave J); *Jacometti Pty Ltd v Boomaroo Nurseries & Wholesale Supplies Pty Ltd* [2011] VSC 612 (1 December 2011) [48] (Habersberger J).

83 Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 90.

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

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

86 *Armitage v Nurse* [1998] Ch 241.

87 *Cachia v Westpac Financial Services Ltd* (2000) 170 ALR 65, 82 [68], 83 [72] (Hely J).

88 Ibid.

89 Ibid 83 [75] (Hely J). 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 (Young J).

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

91 Ibid 83 [72] (Hely J).

92 Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 94.

- 4.68 Since fraud on power can potentially 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*,<sup>93</sup> which related to the compulsory acquisition of shares, are relevant. However, the authorities in this respect are uncertain.<sup>94</sup> In this context, fraud on power is sometimes referred to as a fraud on the minority. However, in this instance the doctrine usually refers to shareholders rather than unitholders.<sup>95</sup>
- 4.69 A problem, however, with the application of the fraud on power doctrine is the limited 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 a response to oppression under section 233.<sup>96</sup> Although in *Cachia*, the unitholders sought equitable compensation,<sup>97</sup> as shown in Chapter 3, this will not be a satisfactory remedy in many cases of oppression.
- 4.70 In *Koko Black*, the unitholders sought an injunction preventing Hill from compulsorily acquiring their units.<sup>98</sup> It is not clear whether a mandatory injunction enforcing a buyout order, beyond the terms of the trust deed, is an available remedy in response to fraud on power.

## Question

- 23 Are there circumstances in which the doctrine of fraud on power could provide a useful remedy to minority beneficiaries?

93 (1995) 182 CLR 432.

94 *Cachia v Westpac Financial Services Ltd* (2000) 170 ALR 65, 86–86 [85]–[90] (Hely J); *Arakella v Paton* (2004) 60 NSWLR 334, 364 [127].

95 Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 106.

96 *Ibid* 103.

97 *Cachia v Westpac Financial Services Ltd* (2000) 170 ALR 65, 340 [18] (Hely J).

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





# Possible reform mechanisms

- 54** The need for legislation
- 55** Option 1: Status quo
- 56** Option 2: Amendment of the *Trustee Act 1958 (Vic)*

## 5. Possible reform mechanisms

### The need for legislation

- 5.1 As outlined in Chapters 3 and 4, considerable uncertainty exists about the availability of adequate remedies under the current law for minority unitholders confronted by oppressive behaviour. This contrasts with the broad and flexible way the courts have interpreted the oppression remedies in the *Corporations Act 2001* (Cth) applying to minority shareholders.
- 5.2 Bergman argues that where the courts have determined that beneficiaries—especially unitholders—have suffered oppression, this has led them to interpret section 53 of the Corporations Act to provide relief,<sup>1</sup> as to do otherwise would be unfair.<sup>2</sup>

### Question

- 24 Has the lack of a clear oppression remedy for minority beneficiaries of a trading trust caused substantive injustice or hardship? If possible, please give examples.

- 5.3 In this chapter, two approaches to legislative reform are discussed:
- Option 1 is to leave the current legislation unamended, preserve the status quo, and await development of the law by the courts.
  - Option 2 is to amend the *Trustee Act 1958* (Vic) to provide equivalent remedies to some or all of those available to shareholders under Part 2F.1 of the Corporations Act.
- 5.4 The Commission invites submissions on which option or other alternative is best suited to the law concerning trading trusts and oppression remedies in Victoria.

1

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

2

Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 196.

## Option 1: Status quo

- 5.5 While there is an argument that the lack of oppression remedies for beneficiaries is unfair and should be remedied, there is a countervailing view that no overwhelming policy argument for such reform has been demonstrated. As Bergman points out, the use of trading trusts (especially unit trusts) in almost identical circumstances to a private trading company is virtually unique to Australia. Given the characteristics inherent to their private nature, private trading trusts have kept a very low profile. By contrast, public unit trusts, which are used in a similar fashion within Australia and elsewhere, have received a high profile both domestically and internationally, prompting the adoption of the Managed Investment Scheme provisions in Chapter 5C of the Corporations Act. Cases of oppressive conduct occur overwhelmingly in private, as opposed to public, entities.<sup>3</sup>
- 5.6 This has resulted in a situation where private trusts in Australia have received insufficient 'public or legal attention to prompt legislators'<sup>4</sup> to extend relief against oppression to beneficiaries. As Bergman notes, it would thus seem reasonable to question whether legislative reform is justifiable 'from an economic policy viewpoint given the issue has not caused the type of serious financial consequences that may otherwise be expected to justify legislative reform.'<sup>5</sup>
- 5.7 Although cases of oppression in private trusts have not prompted legislative intervention analogous to Chapter 5C of the Corporations Act, this does not necessarily mean that legislation is required or that the current law is inadequate.<sup>6</sup>
- 5.8 The argument for the introduction of an oppression remedy for unitholders in private unit trusts, however, needs to be balanced against the view that the fundamental nature of such private trusts is determined by the trust deed. It can be argued 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.

## Question

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

3 See I M Ramsay, 'An Empirical Study of the Use of the Oppression Remedy' (1999) 27 *Australian Business Law Review* 23, 26; P Almond, 'Members Rights & Remedies for Oppressive or Unfair Conduct under Part 2F.1 of the Corporations Act' (Paper presented at Continuing Legal Education Seminar, Melbourne, 2005); G Magner, *Small Business Shareholder: Breaking Up is Hard to Do: Departing Shareholders and Resorting to Court Orders – Oppression Actions Under the Corporations Act* (Hall & Wilcox Lawyers, January 2011); all cited by Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 194.

4 Ari Bergman, *Unitholder Rights Compared to Shareholder Rights in the Context of Oppression* (SJD Thesis, Monash University, forthcoming) 194.

5 Ibid.

6 Ibid.

## Option 2: Amendment of the *Trustee Act 1958* (Vic)

- 5.9 A second option is to amend the Trustee Act to provide for oppression remedies for minority beneficiaries. However, doing so would raise issues concerning the interaction between state and Commonwealth laws.
- 5.10 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>7</sup>
- 5.11 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>8</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>9</sup>
- 5.12 In this context, the Corporations Act, while Commonwealth law, contains provisions in Part 1.1A which provide, in short, that:<sup>10</sup>
- that Act is intended to have concurrent operation with state laws, including ones which impose additional liabilities on companies or directors<sup>11</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>12</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 were would otherwise be an inconsistency between the corporations legislation and the provision of the state law.<sup>13</sup>
- 5.13 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>14</sup>

### Is a corporation legislation displacement provision necessary?

- 5.14 In the Commission’s view, consideration needs to be given to the operation of Part 1.1A of the Corporations Act in relation to minority beneficiaries who are shareholders in the relevant corporate trustee.

7 *Corporations (Commonwealth Powers) Act 2001* (Vic) s 4(1)(a).  
8 *NSW v Commonwealth* (‘Incorporation case’) (1990) 169 CLR 482.  
9 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.  
10 For a discussion, and summary of the following principles see *Loo v DPP (Vic)* (2005) 12 VR 665.  
11 *Corporations Act 2001* (Cth) s 5E.  
12 *Ibid* s 5F.  
13 *Ibid* s 5G.  
14 *P v P* (1984) 181 CLR 583.

- 5.15 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 was amended to provide similar remedies to part 2F.1 of the Corporations Act, a question may arise as to whether there would be inconsistency between Part 2F.1 of the Corporations Act and the new provisions which would render them invalid by virtue of s 109 of the Constitution:
- While s 5E(1) of the Corporations Act 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>15</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 intending 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>16</sup>
- 5.16 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 s 5G of the Corporations Act. As discussed in paragraph 5.12 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).

## Questions

- 26 Could new remedies under the Trustee Act coexist with those under the Corporations Act?
- 27 If the Trustee Act is amended to provide oppression remedies, should this be supplemented by a Corporations legislation displacement provision?

- 5.17 A number of further issues would arise if this option were adopted. These include: the scope of the remedies to be available to oppressed beneficiaries; whether they should reflect those available under Part 2F.1 of the Corporations Act;<sup>17</sup> the range of orders available to the courts where oppression was established; whether the provisions should apply to all trusts and, if not, which ones; and the potential for such remedies to be excluded by an express provision of the trust deed. These all need to be considered.

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

16 This being a species of s 109 inconsistency often called “operational inconsistency”. See generally, *P v P* (1984) 181 CLR 583, 602-3. The Australian Law Reform Commission and the Companies and Securities Advisory Committee in 1993 released a report into collective investment schemes. 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 Australian Law Reform Commission and Companies and Securities Advisory Committee, *Collective Investments: Other People’s Money*, ALRC Report No 65 (1993) [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.

## Questions

- 28 Should the *Trustee Act 1958* (Vic) be amended to provide oppression remedies for minority beneficiaries?
- 29 If so, to what extent should the provisions reflect those in Part 2.1F of the Corporations Act?
- 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?
- 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?
- 32 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?
- 33 Should such a provision apply to all trusts? If not, which types of trusts should be covered?
- 34 Are there any alternative legislative reforms that, in your view, should be considered to protect the rights of oppressed beneficiaries?

# Interests of other parties

- 60** Introduction
- 61** Directors of the corporate trustee
- 61** Creditors
- 63** Employees

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## 6. Interests of other parties

### Introduction

- 6.1 The previous chapter explored the various reform mechanisms to 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. Clearly, this 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 quite 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. 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 The Corporations Act and the general law create a complex legal framework of the legal duties owed by third parties, in particular directors and creditors. Chapter 2 outlined some of the differences between general law duties owed under trust law and company law with an emphasis upon the significance of the company's separate legal personality.
- 6.4 In the Commission's view, it is not clear that the introduction of oppression remedies for trading trusts would either alter or affect these frameworks. 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 to beneficiaries.
- 6.5 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 have been discussed in Chapters 3 and 5.



## Directors of the corporate trustee

6.6 Chapter 2 outlined the basic proposition that directors owe duties directly to the company.<sup>2</sup> The chapter also outlined the key differences between directors and trustees. However, the facts of many of the cases considered in this consultation paper show that typically the trustee of a trading trust will be a corporate trustee.

6.7 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 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>

6.8 There are a number of 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>

6.9 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>

6.10 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.

## Question

35 Would the introduction of statutory oppression remedies for beneficiaries of trading trusts affect the interests of directors or trustees? If so, how?

## Creditors

6.11 According to *Jacobs' Law of Trusts in Australia*:

on 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>8</sup>

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

<sup>3</sup> R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013) 136 [4.225].

<sup>4</sup> 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) 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 (ed), *Equity and Commercial Relationships* (Lawbook Co, 1987) 63.

<sup>7</sup> *Hurley v BGH Nominees Pty Ltd* (1984) 10 ACLR 197; *ASC v AS Nominees* (1995) 133 ALR 1, 18–19 (Finn J); 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> J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 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.

- 6.12 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>9</sup> and potentially to the personal claim against the beneficiaries.<sup>10</sup>
- 6.13 A creditor may also seek access to the assets of the directors. Without a personal guarantee, however, the doctrine of the corporate separate personality ordinarily prevented this.
- 6.14 The introduction of section 197 of the Corporations Act, however, enables a creditor in certain circumstances to enforce a debt against the director of the corporate trustee. That section states:

Directors liable for debts and other obligations incurred by corporation as trustee

- (1) A person who is a director of a corporation when it incurs a liability while acting, or purporting to act, as trustee, is liable to discharge the whole or a part of the liability if the corporation:
- (a) has not discharged, and cannot discharge, the liability or that part of it; and
  - (b) is not entitled to be fully indemnified against the liability out of trust assets solely because of one or more of the following:
    - (i) a breach of trust by the corporation;
    - (ii) the corporation's acting outside the scope of its powers as trustee;
    - (iii) a term of the trust denying, or limiting, the corporation's right to be indemnified against the liability.

The person is liable both individually and jointly with the corporation and anyone else who is liable under this subsection.

Note: The person will not be liable under this subsection merely because there are insufficient trust assets out of which the corporation can be indemnified.

- (2) The person is not liable under subsection (1) if the person would be entitled to have been fully indemnified by one of the other directors against the liability had all the directors of the corporation been trustees when the liability was incurred.
  - (3) This section does not apply to a liability incurred outside Australia by a foreign company.
  - (4) This section does not apply to a liability incurred by a registrable Australian body outside its place of origin.
  - (5) This section does not apply to a corporation that is an Aboriginal and Torres Strait Islander corporation.
- 6.15 *Ford's Principles of Corporations Law* has described the context surrounding the need for section 197 as follows:

When, in the 1970s many private businesses were organised as trading trusts to gain advantages under income tax law, it became usual for a trading trust to be established with a limited company as trustee. When such a company became insolvent, a creditor for a debt not related to the trust could have no access to trust assets. Creditors for trust-related debts could have no direct access to the trust assets but could stand in the shoes of the trustee when it went into liquidation to exercise whatever right of indemnity the trustee had to resort to the trust assets to pay the debts.

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J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) 574.  
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) 75–6.

Usually the trustee company would have few assets in its own right and creditors were dependant on the trustee's right of indemnity. That right of indemnity could be reduced if the trustee had acted outside the scope of the trust.<sup>11</sup>

- 6.16 As shown in Chapter 2, the trust deed is capable of excluding many of the trustee's duties including the right of indemnity. Section 197 was introduced in the event that the trust deed excluded the right of indemnity, or a right of set-off of the beneficiaries reduced the amount otherwise owed to the trustee.<sup>12</sup>
- 6.17 As outlined in Chapter 3, the principles from *Vigliaroni* and *Drapac* mean that a creditor of a trading trust will not be able to obtain an oppression remedy unless they are unitholders and shareholders in the corporate trustee.
- 6.18 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 of the law under section 233 of the Corporations Act. The flexibility of the oppression remedy allows the court to take the position of creditors into account before deciding on the appropriate order.<sup>13</sup> In the view of the Commission, the availability of oppression remedies by the beneficiaries of trading trusts is not likely to disturb the current position of creditors.

## Question

- 36 Would the introduction of statutory oppression remedies for beneficiaries of trading trusts affect the interests of creditors? If so, how?

## Employees

- 6.19 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>14</sup> However, in Chapter 3 it was shown that courts will rarely order a winding up order in any case. It follows that in the view of the Commission, the availability of oppression remedies to trading trusts is not likely to increase the possibility of an adverse impact upon employees.

## Question

- 37 Would the introduction of statutory oppression remedies for beneficiaries of trading trusts affect the interests of employees? If so, how?

11 R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013) 1202 [20.170]; citing *RWG Management Ltd v CCA (Vic)* [1985] VR 385.

12 R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2013) 1202 [20.170].

13 *Wayde v NSW Rugby League Ltd* (1985) 180 CLR 459, 466 (Mason ACJ, Wilson, Deane and Dawson JJ); suggests that the interests of various groups can be considered by court in determining whether an oppression remedy should be granted; see *Corporations Act 2001* (Cth), annotated edition (Thomson Reuters, 2011) 260.

14 *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd* (2008) 66 ACSR 325, 341 [119]–[120] (Dodds-Streeton JA); *Wain v Drapac* [2012] VSC 156 (26 April 2012).



# Conclusion

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## 7. Conclusion

- 7.1 This consultation paper has covered a broad range of issues relevant to trading trusts and oppression remedies, as well as canvassing potential options for reform.
- 7.2 The Commission invites submissions from all areas of the community. It particularly invites submissions from those who have been affected by oppressive behaviour by trustees of trading trusts as well as from professionals with specialist knowledge in trusts law, corporations law, litigation and remedies.
- 7.3 You can provide input into the Commission’s review of trading trusts and oppression remedies by responding to the questions throughout the paper. The Commission’s questions also appear on pages 68-90. Information about how to provide the Commission with a submission is on page v. To allow the Commission time to consider your views before deciding on final recommendations, **submissions are due by 21 July 2014.**
- 7.4 While you are encouraged to consider the questions throughout the paper, the Commission accepts any appropriate form of written submission as stated at page v.
- 7.5 Your responses to the questions and provision of other information will assist the Commission to determine whether changes are needed to improve the operation of this specialised but important area of the law.

# Questions

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## Questions

- 1 In your view, what roles do the intention of the settlor and the law of contract play in unit trusts?
- 2 How relevant or important is the characterisation of a beneficiary or unitholder's interest?
- 3 Is there another, more appropriate definition of 'trading trust'? Could it include managed investment schemes?
- 4 Are oppression remedies appropriate for all trading trusts?
- 5 Are there circumstances in which an oppression remedy might be appropriate for beneficiaries of a discretionary trust?
- 6 How well has the oppression remedy worked to protect shareholders?
- 7 In your view, does the existing oppression remedy apply to trading trusts? If not, should it?
- 8 Do you agree with the reasoning in *Kizquari*?
- 9 Justice Young in *Kizquari* treats the values of shares and the value of units as entirely separate matters. Do you agree with this approach?
- 10 Which approach to section 232 do you consider preferable, Acting Justice Windeyer's or Justice Davies'?
- 11 Do you agree with Justice Davies' interpretation of the purposive approach?
- 12 Do you agree with Justice Davies' interpretation of section 53?
- 13 Do you agree with Justice Ferguson's approach of treating the whole group as one entity?
- 14 Even under the more liberal approach adopted in *Vigliaroni* and *Drapac*, in order to claim an oppression remedy, the plaintiff needs to be both a member/shareholder and a beneficiary. Is this appropriate and desirable?
- 15 Do you agree with Justice Ferguson's use of the 'quasi-partnership' doctrine as set out in *Ebrahimi*?
- 16 Do you agree that *Arhanghelschi* demonstrates the fundamental importance of the trust deed and/or unitholder agreement?
- 17 Are there any circumstances in which termination under the trust deed could provide a satisfactory remedy to minority beneficiaries?
- 18 Can the doctrine of estoppel assist a unitholder in redeeming their interest on more favourable terms than provided for in the trust deed?



- 19 How much does the rule in *Saunders v Vautier* underpin the provisions of the *Trustee Act 1958* (Vic)?
- 20 Can relief under the *Trustee Act 1958* (Vic) provide an effective alternative remedy for oppression of minority shareholders?
- 21 Could seeking an order under the inherent jurisdiction of the court provide an alternative remedy for minority shareholders?
- 22 In your view, can the 'quasi-partnership' approach adopted in *Ebrahimi* apply to trading trusts? If so, can a beneficiary obtain a remedy other than the winding up of the trust?
- 23 Are there circumstances in which the doctrine of fraud on power could provide a useful remedy to minority beneficiaries?
- 24 Has the lack of a clear oppression remedy for minority beneficiaries of a trading trust caused substantive injustice or hardship? If possible, please give examples.
- 25 Is legislative reform to provide oppression remedies to minority beneficiaries in Victoria justified?
- 26 Could new remedies under the Trustee Act coexist with those under the Corporations Act?
- 27 If the Trustee Act is amended to provide oppression remedies, should this be supplemented by a Corporations legislation displacement provision?
- 28 Should the *Trustee Act 1958* (Vic) be amended to provide oppression remedies for minority beneficiaries?
- 29 If so, to what extent should the provisions reflect those in Part 2.1F of the Corporations Act?
- 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?
- 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?
- 32 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?
- 33 Should such a provision apply to all trusts? If not, which types of trusts should be covered?
- 34 Are there any alternative legislative reforms that, in your view, should be considered to protect the rights of oppressed beneficiaries?
- 35 Would the introduction of statutory oppression remedies for beneficiaries of trading trusts affect the interests of directors or trustees? If so, how?
- 36 Would the introduction of statutory oppression remedies for beneficiaries of trading trusts affect the interests of creditors? If so, how?
- 37 Would the introduction of statutory oppression remedies for beneficiaries of trading trusts affect the interests of employees? If so, how?







Victorian  
Law Reform  
Commission

**Trading Trusts–  
Oppression Remedies**  
CONSULTATION PAPER

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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