NSW GOVERNMENT

New South Wales
Law Reform Commission

Report
144

Laws relating to beneficiaries of trusts

May 2018
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2 May 2018

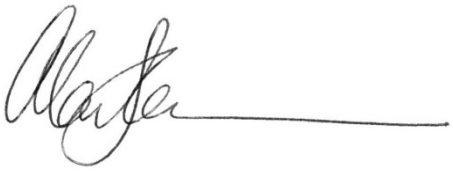
Hon M Speakman SC MP
Attorney General
GPO Box 5341
SYDNEY NSW 2001

Dear Attorney

Law relating to beneficiaries of trusts

We make this report pursuant to the reference to this Commission received 28 April 2017.

Yours sincerely



Alan Cameron AO

Chairperson

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Terms of reference

Pursuant to section 10 of the *Law Reform Commission Act 1967*, the NSW Law Reform Commission is asked to review certain aspects of the law of trusts in NSW and report on whether:

- there is a need to enact statutory provisions to limit the circumstances if any in which the beneficiaries of trusts, as beneficiaries, should be liable to indemnify the trustee or creditors of the trust, if the trustee fails to satisfy obligations of the trust, or remove such liability
- it is appropriate for the liability of investors in unit trusts to be limited to the amount (if any) unpaid on their units in the same way that the liability of investors in shares is limited to the amount (if any) unpaid on their shares.

As part of this review, the Commission is to have regard to:

- the perceived uncertainty of the case law on the liability of trust beneficiaries in New South Wales and elsewhere
- the widespread use of trusts in commercial contexts as well as in the community generally
- the need for safeguards to ensure that any legislation limiting or removing such liability does not support the avoidance of responsibility for insolvent trading.

The Commission is also asked:

- to propose the terms in which any legislation should be enacted, and
- to consult and report on whether New South Wales should adopt the recommendations of the Report, *Trading Trusts - Oppression Remedies*, January 2015, of the Victorian Law Reform Commission.

[Received 28 April 2017]

Recommendations

2. Liability of beneficiaries

Recommendation 2.1

The *Trustee Act 1925* (NSW) should be amended to provide that:

(1) Unless the beneficiary has otherwise expressly agreed, the beneficiary is not, as a beneficiary, liable for, or to indemnify the trustee in respect of any act, default, obligation or liability of the trustee.

(2) This does not affect a beneficiary's liability for unpaid calls (if any) under the terms of the trust, or the beneficiary's liability in any other capacity.

3. Oppression remedies

Recommendation 3.1

Oppression remedies available to shareholders under company law should not be extended to beneficiaries of trading or other trusts under the law of trusts.

1. Introduction

Terms of reference

1.1 The Attorney General has asked us to review two aspects of the law relating to beneficiaries of trusts:

- the liability of beneficiaries, as beneficiaries, to indemnify trustees or creditors when trustees fail to satisfy obligations of the trust, and
- whether oppression remedies available to shareholders under company law should be extended to beneficiaries of trading trusts.

The course of this project

1.2 We published the terms of reference on our website and sought preliminary submissions. We received eight submissions, which are listed in Appendix A and published on our website.

1.3 In October 2017, we released a consultation paper (CP 19) setting out preliminary views on the two questions. We received six submissions in response, which are also listed in Appendix A and published on our website.

1.4 We convened a roundtable of interested experts in the field on 2 March 2018. A list of participants is set out in Appendix B. Following the roundtable, one further submission was received from a participant, which is also listed in Appendix A.

Outline of this report

Liability of beneficiaries to indemnify trustees or creditors

1.5 Chapter 2 addresses the reference on beneficiary liability. The reference is motivated by a long-standing issue arising from a Privy Council decision more than a century ago, under which a beneficiary may be held personally liable to indemnify a trustee. Since then, several proposals for reform or clarification of the law, in the context of managed investments, have been made but not implemented in a number of Australian jurisdictions. We propose that the effect of that decision be reversed by amending the *Trustee Act 1925* (NSW) ("*Trustee Act*").

Oppression remedies for beneficiaries of trading trusts

1.6 Chapter 3 addresses the reference on the remedy for oppression, and considers the recommendation of the Victorian Law Reform Commission ("VLRC") to extend the oppression remedy available to members of a company under the *Corporations Act 2001* (Cth) ("*Corporations Act*") to beneficiaries of trading trusts.

1.7 We are not persuaded that there is a sufficient case for providing a similar discretionary remedy for oppression in the context of the law of trusts. Such a remedy would be inconsistent with a fundamental feature of a discretionary trust – namely, that the trustee has a discretion to discriminate between beneficiaries. Having such a remedy available for some trusts but not others is not desirable because there would be difficulty in identifying those trusts to which it should apply. Moreover, we consider that the law already provides adequate remedies for control of a trustee.

1.8 There are advantages in having consistency across Australian states and territories in laws affecting trading trusts. This is why we carefully considered the VLRC recommendation before declining to adopt it for the above reasons. The VLRC Report has not yet been accepted or adopted in Victoria; so at least at this stage no issue arises from any difference between the law in Victoria and NSW.

1.9 We note that, to the extent that consistency is not achieved by an appellate decision, Commonwealth legislation amending the *Corporations Act* could achieve this outcome.

2. Liability of beneficiaries

2.1 In this chapter we recommend that the rule in *Hardoon v Belilios,*[1] that beneficiaries are (at least in some circumstances) personally liable to indemnify their trustees, be abolished, by providing that beneficiaries of trusts are not, in their capacity as beneficiaries, personally liable to indemnify the trustee.

2.2 The following sections set out the background to our recommendation, and for convenience and ease of reference, repeat much of what was said in the Consultation Paper, updated to take account of submissions and the views expressed at and after the roundtable.

Background

The use of trusts in Australia

2.3 Trusts have been in use in Australia since colonial times, and are in common use today, for a variety of perceived benefits, including the tax advantages they offer. There is a diverse range of trusts, including private (family) discretionary trusts, charitable trusts, trusts for associations and clubs, public unit trusts such as property trusts, special purpose vehicles for major infrastructure projects, and trading trusts used by family businesses and partnerships. In most if not all of these situations, it is likely that beneficiaries, if they turn their minds to the question at all, assume that their liability is limited to the amount (if any) that they invest (or agree to invest) in the venture, and that *at least as beneficiaries* they have no further liability. They may assume a further liability if the trustee acts as their agent, or if they are a director of a corporate trustee, or if they offer a guarantee – but not as passive beneficiaries.

2.4 Trust deeds frequently contain clauses purporting to limit the liability of beneficiaries to indemnify the trustee, which of course would not be needed if the common assumption of limited liability were always correct. In his recent book, Nuncio D'Angelo comments:

> Today, there appears to be a pervasive assumption in the Australian market that the issue has been properly dealt with by provisions in commercial trust

1. *Hardoon v Belilios* [1901] AC 118.

> instruments and the use of a limited liability company as trustee. This assumption is wrong; the risk of unlimited personal liability for enterprise debts is real and the arguments in this chapter may be considered in some quarters to be controversial, particularly as they take issue with general market perceptions, as evidenced in public disclosure documents.[2]

Justice Barrett (as he then was) in his foreword to the book refers to "the comparative fragility of the limited liability of trust beneficiaries".[3]

2.5 If the common assumption of limited liability were to be disturbed, perhaps by some court decision arising from unusual facts, beneficiaries would be visited with an unexpected liability. The following paragraphs set out the decisions that give rise to the doubt about limited liability and the various reports which have analysed the law, together with examples of legislative reform in other jurisdictions that address similar concerns.

Cases concerning beneficiary liability

2.6 The Privy Council decision in *Hardoon v Belilios*[4] is principally cited as the basis for beneficiaries being held liable to indemnify trustees. In that case, the Board was of the opinion that where the only beneficiary of a trust (referred to as a *cestui que trust*) is *sui juris* (that is, has full legal capacity to act on their own behalf), such a beneficiary is subject to an equitable personal obligation to indemnify the trustee:

> The plainest principles of justice require that the *cestui que trust* who gets all the benefit of the property should bear its burden unless he can shew some good reason why his trustee should bear them himself. The obligation is equitable and not legal, and the legal decisions negativing it, unless there is some contract or custom imposing the obligation, are wholly irrelevant and beside the mark. Even where trust property is settled on tenants for life and children, the right of their trustee to be indemnified out of the whole trust estate against any liabilities arising out of any part of it is clear and indisputable; although, if that which was once one large trust estate has been converted by the trustees into several smaller distinct trust estates, the liabilities incidental to one of them cannot be thrown on the beneficial owners of the others. This was decided in *Fraser v Murdoch*, which was referred to in argument. But where the only *cestui que trust* is a person *sui juris*, the right of the trustee to indemnity by him against liabilities incurred by the trustee by his retention of the trust property has never been limited to the trust property; it extends further, and imposes upon the *cestui que trust* a personal obligation enforceable in equity to indemnify his trustee. This is no new principle, but is as old as trusts themselves.[5]

2.7 As the Hon J Campbell QC points out in his helpful supplementary submission, the rule that Lord Lindley discovered and applied in *Hardoon* was that a beneficiary of a trust who is *sui juris*, and absolutely entitled to the trust property, has a personal obligation to indemnify the trustee for liabilities incurred in proper administration of that property, unless he can show some good reason why the trustee should bear them personally.[6] Mr Campbell's submission convincingly demonstrates that the

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2. N D'Angelo, *Commercial Trusts* (LexisNexis Butterworths, 2014) [3.9].
3. R I Barrett, "Foreword" in N D'Angelo, *Commercial Trusts* (LexisNexis Butterworths, 2014) v.
4. *Hardoon v Belilios* [1901] AC 118.
5. *Hardoon v Belilios* [1901] AC 118, 123–124 (emphasis added) (citations omitted).
6. J C Campbell, *Submission BE07*, 2.

cases that Lord Lindley considered do not justify the rule that he drew from them, and that it has long been recognised that Lord Lindley's rule was a novelty:

> It was laid down clearly for the first time in *Hardoon v Belilios* that the right of a trustee to be personally indemnified by his cestui que trust, where the cestui que trust was an absolute beneficial owner, rested on a general principle of equity as much as his right to indemnity out of the trust funds. In most of the earlier cases in which the personal right to indemnity had been enforced the cestui que trust was also creator of the trust, and the right to indemnity could therefore be and often was based on a contract implied from the request to undertake the duties of trustee.[7]

2.8 Nonetheless, as Mr Campbell also recognised, the rule must be regarded as established in Australian law.[8] In *Trautwein v Richardson,* two of the members of a three-judge bench of the High Court regarded the mere fact that a person was the beneficiary of trust property as a sufficient reason for that person having an obligation to indemnify the trustee.[9] The rule has also been accepted in a judgment of Justice Jacobs in the High Court,[10] and in numerous decisions of intermediate courts of appeal.[11]

2.9 The scope of the rule is uncertain. Although expressed in terms of a single beneficiary, as Ford concluded, it should apply "where there is more than one beneficiary and all of them are *sui juris* and entitled to the same interest as absolute owners between them".[12]

2.10 Although the Board in *Hardoon v Belilios* referred to the obligation as "no new principle, but […] as old as trusts themselves" and to the principle as being required by the "plainest principles of justice",[13] courts have declined to apply the principle. For example, the Privy Council itself, in the later case of *Wise v Perpetual Trustee Co Ltd,*[14] reached a different conclusion. The case involved the trustees of a club claiming an indemnity from members of the club for unpaid rent. The Privy Council found against the trustee, on the ground that the rule in *Hardoon* "by no means applies to all trusts, and it cannot be applied to cases in which the nature of the transaction excludes it".[15] "[T]he nature of the transaction" appears to be a

---

7. D Browne, *Ashburner's Principles of Equity* (2nd ed, Butterworths, 1933) 161, referring, as examples, to *Balsh v Hyham* (1728) 2 P Wms 453; 24 ER 810; *German Mining Co; ex parte Chippendale* (1853) 4 De G M & G 19; 43 ER 415, *Jervis v Wolferstan* (1874) LR 18 Eq 18; and *Wynne v Tempest* [1897] 1 Ch 110.
8. J C Campbell, *Submission BE07,* 2.
9. *Trautwein v Richardson* [1946] ALR 129, 131 (Latham CJ), 134-5 (Dixon J). The facts make clear that the beneficiary was sui juris and absolutely entitled.
10. *Marginson v Ian Potter and Co* (1976) 136 CLR 161, 175-6. The other judges did not address the question.
11. See, eg, *Causley v Countryside (No 3) Pty Ltd* (Unreported, NSWCA, 2 September 1996); *Balkin v Peck* (1998) 43 NSWLR 706, 711-712 (Mason P; Priestley JA and Sheppard AJA agreeing); *Rosanove v O'Rourke* [1988] 1 Qd R 171; *Chief Commissioner of State Revenue v CCM Holdings Trust Pty Ltd* [2014] NSWCA 42 [72] (Gleeson JA); and *Wieland v Texxcon Pty Ltd* [2014] VSCA 199, 313 ALR 724 [95].
12. H A J Ford, "Trading Trusts and Creditors' Rights" (1981) 13 *Melbourne University Law Review* 1, 7.
13. *Hardoon v Belilios* [1901] AC 118, 123, 124.
14. *Wise v Perpetual Trustee Co Ltd* [1903] AC 139.
15. *Wise v Perpetual Trustee Co Ltd* [1903] AC 139, 149.

reference, in that case, to the essential nature of club membership, as distinct from, for example, the presence of multiple beneficiaries:

> Clubs are associations of a peculiar nature. They are societies the members of which are perpetually changing. They are not partnerships; they are not associations for gain; and the feature which distinguishes them from other societies is that no member as such becomes liable to pay to the funds of the society or to any one else any money beyond the subscriptions required by the rules of the club to be paid so long as he remains a member. It is upon this fundamental condition, not usually expressed but understood by every one, that clubs are formed; and this distinguishing feature has been often judicially recognised.
>
> …
>
> The question now to be decided may be regarded as not yet covered by authority; and a choice must be made between either ignoring the essential features of a club or holding that the general rule established in *Hardoon v Belilios* is inapplicable to such a body of persons. Their Lordships feel no difficulty in making this choice. The trustees of a club are the last persons to demand that the fundamental conditions on which their *cestuis que trustent* have become such shall be completely ignored.
>
> The appellant in this case is not ... under any legal or equitable obligation to pay or contribute anything towards the indemnity of the plaintiffs; but he has offered to do so, and the plaintiffs are not satisfied with his offer. Their endeavour to obtain more is to be regretted, and cannot succeed. This may seem hard on the trustees; but they have only themselves to blame for their own imprudence in not seeing to their own safety. A decision in their favour would not only be hard on the members of the club, but would be inconsistent with the terms on which they became members.[16]

2.11 Some have regarded this case as overcoming the risk of liability in the unit trust context, but this must be doubted, given the clear emphasis on the nature of a club – including that it is not an association for gain – as influencing the Privy Council's opinion.

2.12 The issue was addressed directly in the Victorian case of *JW Broomhead (Vic) Pty Ltd (in liquidation) v JW Broomhead Pty Ltd*.[17] Justice McGarvie held that the general principle in *Hardoon v Belilios*:

> is that a trustee is entitled to an indemnity for liabilities properly incurred in carrying out the trust and that right extends beyond the trust property and is enforceable in equity against a beneficiary who is *sui juris*. The basis of the principle is that the beneficiary who gets the benefit of the trust should bear its burdens unless he can show some good reason why his trustee should bear the burdens himself.
>
> …
>
> It was argued that the general principle applies only where there is a sole beneficiary. In *Hardoon v Belilios,* the Privy Council stated the law as it applies where the only beneficiary is a person *sui juris*. It was dealing with a case where there was only one beneficiary. Its statement was in accordance with the sound

16. *Wise v Perpetual Trustee Co Ltd* [1903] AC 139, 149, 150 (emphasis added) (citations omitted).
17. *JW Broomhead (Vic) Pty Ltd (in liquidation) v JW Broomhead Pty Ltd* [1985] VR 891.

> judicial practice of not stating a principle wider than necessary for the decision of the case. Such a statement should not be construed as though the Privy Council was following the opposite practice of stating the principle as widely as it was possible to state it.
>
> Neither the submissions of counsel nor the cases have revealed to me any consideration of principle, concept, fairness or practicality which would justify its restriction to the case of a sole beneficiary.
>
> …
>
> I consider that the general principle in *Hardoon v Belilios* applies where there are several beneficiaries".[18]

2.13 The basis of the decision is arguably less clear, because Justice McGarvie also held that, with one exception, the relevant beneficiaries had requested the trustee to become the trustee for them, and were also liable to indemnify the trustee for that reason.[19]

2.14 A more recent example in NSW is the Court of Appeal's decision in *Causley v Countryside (No 3) Pty Ltd.*[20] This case concerned a claim by a trustee of a unit trust that unit holder should indemnify it in respect of trust liabilities that exceeded trust assets. Justice Cole said:

> It was contended generally that because the purpose of the trust was the raising of funds by sale of trust units to the public for the pursuit of a commercial enterprise, persons dealing with the trust would assume they had no right to indemnity from unit holders beyond the trust assets. Further, it was contended that the trustee would not have contemplated that the initial subscribers for units, or presumably subsequent purchasers thereof, would be bound to indemnify the trustee in respect of liabilities in excess of trust assets, nor would the initial subscribers, or subsequent purchasers of trust units, have contemplated an obligation so to indemnify.
>
> There was no evidence to support these submissions. Further, the submissions misunderstand the basis upon which liability to indemnify attaches. [His Honour quoted McGarvie J in *Broomhead*, and continued:]
>
> Expectations of the trustee, or of the *cestui que trust*, *which are not reflected in the terms of the trust deed* upon the basis of which the *cestui que trust* acquired the trust units would rarely, if ever, constitute a sufficient reason why the general equitable principle should be regarded as inapplicable.[21]

2.15 It appears to be current practice, at least in the context of public unit trusts, to include in the trust documents provisions that purport to limit the liability of beneficiaries. Such a provision was considered in *McLean v Burns Philp Trustee Co Pty Ltd*.[22] In that case, Justice Young observed that "[i]t is also clear that by the appropriate clause in a trust deed or contract, a person may limit his liability to a

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18. *JW Broomhead (Vic) Pty Ltd (in liquidation) v JW Broomhead Pty Ltd* [1985] VR 891, 936, 937 (citations omitted).
19. *JW Broomhead (Vic) Pty Ltd (in liquidation) v JW Broomhead Pty Ltd* [1985] VR 891, 937.
20. *Causley v Countryside (No 3) Pty Ltd* (Unreported, NSWCA, 2 September 1996).
21. *Causley v Countryside (No 3) Pty Ltd* (Unreported, NSWCA, 2 September 1996) 5-6 (emphasis added).
22. *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623.

specific fund", and that the "effect of a clause such as [the limitation clause in this case] operates so as to deny the trustee rights against the beneficiary".[23] Justice Young continued (emphasis added):

> The plaintiff referred to *Scott on Trusts*, 3rd ed (1967), as indicating that there might be public policy provisions that would prevent a trustee or a beneficiary being able to limit its liability. However, in my view, that passage in *Scott* does not go to the instant problem at all, but deals with the situation where trustees try to exempt themselves from the consequences of a breach of trust. I do not believe that there is any matter of public policy which militates against a party limiting its liability except in two situations, and this is borne out by cases such as *Head v Kelk* and the other cases cited above. The two exceptions are that where the exclusion of liability is with respect to negligence or breaches of trust, courts will be very careful in approaching the clause and will read it as strictly as possible (see eg *Hollier v Rambler Motors (AMC) Ltd* and *courts will not allow such clauses to be used as a cloak for fraud*. So that where there is a discretionary trust which is so geared to enable a person to avoid his creditors by hiding behind the vehicle of the trust, equity would not allow that to happen. Whilst, of course, no-one in commerce would ever deal with a family trust except after obtaining guarantees from those obtaining the benefit of the transaction*, if the situation did occur that a creditor did not take guarantees, equity would not permit the person who got the benefit of the transaction to say that the creditor could only sue the trustee to the limit of the assets of the trust, because of some exemption clause in the trust deed*.
>
> However, where as here, there is a perfectly proper reason for limiting the liability of investors in a unit trust, a reason which is not contaminated by any fraud of creditors, there is no reason in public policy why the court should not give effect to it.[24]

2.16 The Board in *Hardoon v Belilios* had itself recognised that such exclusions would likely be effective:

> It is quite unnecessary to consider in this case the difficulties which would arise if these shares were held by the plaintiff ... upon special trusts limiting the right to indemnity. In those cases there is no beneficiary who can be justly expected or required personally to indemnify the trustee against the whole of the burdens incident to his legal ownership; and the trustee accepts the trust knowing that under such circumstances and in the absence of special contract his right to indemnity cannot extend beyond the trust estate, i.e., beyond the respective interests of his *cestuis que trustent*. In this case their Lordships have only to deal with a person *sui juris* beneficially entitled to shares which he cannot disclaim. The obligation of such a person to indemnify his trustee against calls upon them appears to their Lordships indisputable in a court of equity unless, of course, there is some contract or other circumstance which excludes such obligation. Here there is none.[25]

2.17 Justice Young's references to the use of such clauses as a cloak for fraud, and more especially to equity not permitting beneficiaries to rely on such a clause if they got the benefit of the transaction, leave a measure of uncertainty as to the scope of the protection that they afford beneficiaries. In addition, the inadvertent or negligent

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23. *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623, 640.
24. *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623, 641 (emphasis added) (citations omitted).
25. *Hardoon v Belilios* [1901] AC 118, 127 (emphasis added).

omission of an exclusion clause, or drafting defects, may expose beneficiaries to unanticipated liability.

2.18 The cases so far referred to concern trustees seeking indemnity from beneficiaries. However, the greater threat to beneficiaries may be posed by the trustee's creditors, who may seek to rely on a right of subrogation, to stand in the trustee's shoes and recover from a beneficiary.[26]

Unit trusts and managed investments

2.19 As was argued in *Causley's* case, investors in public unit trusts are likely to assume that their liability is limited to the amount which they pay to acquire their unit in the trust, in the same way that a shareholder in a limited liability company need not contribute if the company becomes insolvent.

2.20 Recommendations that there be statutory provisions to limit the liability of members of prescribed interest schemes in the same manner as shareholders of companies have been made by the Companies and Securities Law Review Committee in 1984,[27] the Australian Law Reform Commission ("ALRC") and the Companies and Securities Advisory Committee ("CASAC") jointly in 1993,[28] CASAC in 2000,[29] and the Corporations and Markets Advisory Committee ("CAMAC") in 2012.[30] Relevantly, the ALRC and CASAC Report said:

> The liability of investors to creditors of a trust is governed by the general law and the terms of the trust deed. Trustees are personally liable to creditors for trust debts. The trustee may have a right to be indemnified for properly incurred expenses and liabilities out of trust assets or by the trust beneficiaries. The creditors are subrogated to any rights of indemnity the trustee may have. Whether investors are liable to indemnify the trustee is determined by the trust deed in each case. This is unsatisfactory for public investment vehicles. The Corporations Law, by contrast, limits the liability of shareholders. DP 53 proposed a statutory provision to ensure that investors are not under any personal obligation to indemnify the scheme operator or a creditor of the scheme operator where scheme assets are insufficient to cover scheme debts. This proposal was strongly supported in submissions. The Review recommends that the law should limit the liability of investors in collective investment schemes that are trusts to the unpaid amount, if any, of their investment ...[31]

2.21 These recommendations, which were limited in their scope to public trusts, have not been implemented. Ford and Lee say that the Companies Amendment Bill 1985 (Cth), when released for public comment, included a provision for limited liability, but the then Ministerial Council for Companies and Securities decided not to

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26. A Terzic, "Subrogation to the Trustee's Personal Right of Indemnity" (2017) 91 *Australian Law Journal* 736.
27. Companies and Securities Law Review Committee, *Forms of Legal Organisation for Small Business Enterprises*, Discussion Paper 1 (1984).
28. Australian Law Reform Commission and Companies and Securities Advisory Committee, *Collective Investments: Other People's Money*, Report 65 (1993).
29. Companies and Securities Advisory Committee, *Corporate Groups*, Final Report (2000). In 2000, on a limited basis, but the qualification was removed in 2012.
30. Corporations and Markets Advisory Committee, *Managed Investment Schemes*, Report (2012).
31. Australian Law Reform Commission and Companies and Securities Advisory Committee, *Collective Investments: Other People's Money*, Report 65 (1993) [11.37] (footnotes omitted).

proceed with the change. The Ministerial Council preferred to rely instead on "administrative procedures designed to ensure full disclosure on the matter of unit holders' liability and the fact that there could be a clause … excluding liability".[32]

2.22 The reasoning attributed to the Ministerial Council assumes that exclusion clauses are effective, and suggests no policy reason why the liability should not be limited, being concerned only with how the limitation is to be achieved. It is also limited in its application, embracing only vehicles whose constituent terms are publicly available, being registered managed investment schemes.

2.23 It remains unclear why these consistent recommendations, over many years, have not been adopted. They do not appear ever to have been expressly rejected.

The approach in other jurisdictions

2.24 A number of other jurisdictions have adopted provisions that address the liability of investors in publicly offered investment vehicles structured as trusts.[33] Such provisions have been enacted or proposed in parts of the US, in some Canadian provinces, and in Singapore.[34] The text of the relevant provisions was set out in Appendix A to our Consultation Paper and is not repeated here.

2.25 The effect of the Canadian and Singapore provisions appears to be to limit the liability of investors in their equivalents of our public unit trusts, in the same way as for shareholders in companies. In the US provisions, the protection from liability is offered in the context of the trust vehicles having status as separate legal entities, referred to as "statutory trusts".

Our recommendation

2.26 The preliminary submissions and submissions we have received were divided on the approach we should take. All are available on our website.[35]

Recommendation 2.1

The *Trustee Act 1925* (NSW) should be amended to provide that:

(1) Unless the beneficiary has otherwise expressly agreed, the beneficiary is not, as a beneficiary, liable for, or to indemnify the trustee in respect of any act, default, obligation or liability of the trustee.

32. H A J Ford, *Law of Trusts* (4th ed, 2016) [14.1290] – no source for that explanation is quoted (retrieved 20 August 2017). As at 5 April 2018, this reference no longer exists.
33. See N D'Angelo, *Commercial Trusts* (LexisNexis, 2014) [3.91].
34. *Kentucky Revised Statutes* §386A.3-040; *Code of the District of Columbia* §29-1203.04; *Delaware Code* § 3803; *Income Trust Liability Act SBC 2006* (British Columbia) s 2; *Income Trust Liability Act, SS 2006*, c I-2.02 (Saskatchewan); *Income Trusts Liability Act, SA 2004*, c I-1.5 (Alberta); *Trust Beneficiaries' Liability Act 2004* (Ontario) s 1; *Business Trusts Act 2004* (Singapore) s 32.
35. For a brief summary of preliminary submissions, see NSW Law Reform Commission, *Laws Relating to Beneficiaries of Trusts*, Consultation Paper 19 (2017) [2.28].

(2) This does not affect a beneficiary's liability for unpaid calls (if any) under the terms of the trust, or the beneficiary's liability in any other capacity.

2.27 In framing our recommendation, we considered three main issues of principle:

(a) Is the rule in *Hardoon v Belilios* appropriate in the contemporary setting?

(b) Should the issue be addressed on a state (as distinct from a national) basis?

(c) If so, what reform is appropriate?

Is the rule in *Hardoon v Belilios* now appropriate?

2.28 The problems with the rule in *Hardoon v Belilios* include:

- uncertainty about its application, and
- the potential exposure of beneficiaries to unanticipated liabilities.

2.29 As explained, the rule does not apply to all trusts. It seems not to apply where the beneficiaries are not *sui juris*. It does not apply where it would be inconsistent with the nature of the trust, as in the case of a club (or presumably other voluntary non-profit association). It could not extend to "purpose" trusts, nor does it appear capable of application to discretionary trusts. However, the extent of the exceptions to its application is wholly unclear. This leaves the law – and investors - uncertain.

2.30 Further, trust deeds commonly expressly exclude the rule. However, there remains some doubt, in light of *McLean v Burns Philp*, as to when an exclusion clause may be held ineffective; most significantly, when "equity would not permit the person who got the benefit of the transaction to say that the creditor could only sue the trustee to the limit of the assets of the trust, because of some exemption clause in the trust deed".[36] Moreover, it is not clear that a provision in the trust instrument can effectively limit the liability of investors for all purposes, since it could be argued that the trustee was acting as agent for the beneficiaries (who would therefore be liable on that basis), or that creditors are nevertheless entitled to sue beneficiaries directly. Even if the law were clear that inserting an explicit provision in the trust instrument could limit liability, the effectiveness of the limitation would depend on drafting. Legislation would remove the risk posed either by poor drafting or the inadvertent omission of such a clause. Persistent doubt about these matters is not conducive to an informed and confident market.

2.31 As we have observed, at least in most situations, it is likely that beneficiaries, if they turn their minds to the question at all, assume that their liability is limited to the amount (if any) that they invest (or agree to invest) in the venture, and that *at least as beneficiaries* they have no further liability. The use of trusts is widespread. One example is their use by superannuation funds when they invest in major infrastructure projects. There would be a widespread loss of confidence in such structures if liability for such projects were to fall elsewhere than intended or expected.

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36. *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623, 641.

2.32 The question involves balancing the interests of trustees and beneficiaries. As Justice McGarvie explained in *JW Broomhead (Vic) Pty Ltd (in liquidation) v JW Broomhead Pty Ltd*, the rationale of the rule is the principle of benefit and burden: that the beneficiary who gets the benefit of the trust should bear its burdens unless it can show some good reason why the trustee should bear the burdens itself.[37] However, the rationale for the rule does not identify the supposed benefit of the rule, and we think it provides insufficient basis for a beneficiary to be held personally liable to indemnify the trustee. In particular, we note the following:

- The right of a trustee to indemnity *from the trust property* is not in issue. What a beneficiary gains is the benefit of an interest in the trust property, and the principle of benefit and burden is adequately satisfied by allowing the trustee a right of indemnity to the extent of the trust property.

- While in the context of managed investment schemes the assumption that liability is limited is an important consideration, the rule applies equally to private trusts in which the beneficiary is a mere volunteer, and has never agreed, expressly or implicitly, to indemnify the trustee. There does not seem to be any fairness in visiting on such a beneficiary an obligation to indemnify the trustee beyond the trust property.

- The trustee can if it wishes protect itself by taking a specific express covenant of indemnity.

2.33 The potential detriment of the rule to beneficiaries is significant. In a private trust setting, where the likelihood of exclusion by the trust instrument is lower, and where the beneficiaries will often be volunteers, it is not apparent why it is appropriate that such a liability should be imposed on them. The availability of recourse to the trust property should be sufficient to prevent them from inequitably taking the benefit of a trust without the commensurate burden.

2.34 Ostensibly, the benefit of the rule to trustees is considerable, but this is reduced by the doubt about when it applies. Moreover, it is rarely invoked. It may be that abolishing the rule would favour the interests of the beneficiaries over those of the trustee, but the implication is that the trustee should not incur liability beyond the scope of the trust property, at least without specific authority and express indemnity.

2.35 Reference has been made to the capacity of a creditor to be subrogated to a trustee's right of indemnity. Even if entitled to be subrogated, the creditor could have no greater right than the trustee. It therefore needs to be recognised that reform of the rule would impact not only on the rights of trustees, but also on the rights of trust creditors. However, in such cases the benefits of the rule to creditors are marginal. Usually, creditors will not be aware of whether or not the personal right of indemnity has been excluded, and usually they will not care: while they may be interested in the trust property, few would deal with a trustee on the basis of the personal right of indemnity. Thus, it seems unlikely that a creditor would deal with a trustee because of a right to be subrogated to the trustee's right of personal indemnity against beneficiaries. As Justice Young said in *McLean v Burns Philp,* "no-one in commerce would ever deal with a family trust except after obtaining guarantees from those obtaining the benefit of the transaction".[38]

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37. *JW Broomhead (Vic) Pty Ltd (in liquidation) v JW Broomhead Pty Ltd* [1985] VR 891, 936.
38. *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623, 641.

2.36 While creditors could well deal with trustees on the basis of their right to be subrogated to the trustee's right of indemnity from the trust property, we consider that, generally speaking, creditors do not deal with trustees on the assumption that they can have recourse against the beneficiaries personally. Thus we do not consider that, as a matter of commercial reality, creditors' expectations would be disappointed by abolishing the rule in *Hardoon v Belilios*. Nor do we accept that abolishing the rule would prefer the interest of beneficiaries to that of creditors because:

- creditors are not the intended (though they may be indirect) beneficiaries of the rule, the trustee is the intended beneficiary, and
- creditors will still have their right of recourse to the trust assets, and against the trustee personally.

Moreover, in a "commercial" trust setting, the rule is typically excluded by the trust instrument.

2.37 In our view, the rule in *Hardoon v Belilios* works greater hardship on beneficiaries than it confers benefit on trustees or creditors. Abolishing it would relieve hardship to beneficiaries without material injustice to trustees or creditors.

Should NSW deal with this issue?

2.38 While the previous recommendations referred to above[39] relate to managed investment schemes, the problem is not limited to such schemes. The *Corporations Act* covers only registered managed investment schemes, and so does not cover the vast majority of trusts, such as private trading trusts, special purpose vehicles, and unregistered managed investment schemes. Further, trusts which register as managed investment schemes are not *formed* under the *Corporations Act* – they merely register under it. Trusts are fundamentally governed by state law. Thus responsible entities that operate managed investment schemes commonly seek judicial advice as trustees under state trust laws.[40]

2.39 The VLRC report on extending the company law oppression remedy to beneficiaries of trusts (the subject of Chapter 3) demonstrates that these are matters of trust law, not corporations law.[41] The VLRC considered that there may be a question of inconsistency between provisions they recommended inserting in the *Trustee Act 1958* (Vic) and the *Corporations Act*, with the result that a corporation legislation displacement provision of the kind contemplated by the *Corporations Act*[42] should be included. A similar approach could be taken in NSW on this point, but we do not consider that it is necessary.

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39. [2.20].
40. See, eg, *Re AMP Capital Funds Management Ltd* [2016] NSWSC 986, 116 ACSR 198 where Brereton J declined to give the judicial advice, but the jurisdiction to do so is undoubted; considered on appeal at [2016] NSWCA 176, 115 ACSR 421. On appeal, Barrett AJA referred in footnote 3 to *Re Mirvac Ltd* [1999] NSWSC 457, 32 ACSR 107 as establishing "The availability of s 63 of the *Trustee Act 1925* (NSW) as a source of jurisdiction to give judicial advice to the responsible entity of a registered managed investment scheme".
41. Victorian Law Reform Commission, *Trading Trusts – Oppression Remedies*, Report (2015).
42. *Corporations Act 2001* (Cth) pt 1.1A.

2.40 In the context of oppression, the VLRC also considered that it was desirable to make the law applying to trading trusts across Australia uniform or harmonised "to the maximum extent possible".[43] While that is undoubtedly a commendable aspiration, it is our view that until there is a uniform or harmonised trust law, the aspiration of uniformity does not outweigh the desirability of making appropriate reforms to what remains, and will for the foreseeable future remain, a field chiefly governed by state law. Indeed, such reforms may provoke similar reforms in other jurisdictions. We are recommending legislation to secure the appropriate result for trusts governed by NSW law, and, while securing uniformity on this point between NSW and Victoria in particular is desirable, it should not be regarded as a pre-condition of reform in NSW.

2.41 There remains the question whether any necessary reforms could be achieved by amending the *Corporations Act*, as recommended in the reports referred to above.[44] While the case for reform may be strongest for managed investment schemes, such a reform has been recommended on previous occasions at the national level, but not implemented, for reasons which are unclear. Ideally, such reforms should be made by amending the *Corporations Act*. However, in the absence of Commonwealth action over many years, the preferable course is for NSW to enact amendments, and thereby encourage other jurisdictions to follow.

2.42 Moreover, there are many other trusts, which are not registered managed investment schemes, in respect of which the Commonwealth has no legislative power. We have concluded that there is no sound reason why the liability of beneficiaries in legally identical structures should differ depending on whether the structure is publicly offered or not.

2.43 If the proposed reform were limited to public trusts which were registered managed investment schemes, that could be achieved by amending the *Corporations Act*. But our reasoning is that the reform should not be so limited, and should be a generic reform of the law of trusts, implemented by amending the *Trustee Act*. Necessary adjustments to ensure that trust law operates fairly should be made, provided no unacceptable consequence results. Any perceived need for wider reform of aspects of the law of trusts should not delay this reform, which is on a discrete and narrow point. We would welcome a reference on the wider issues such as creditors' rights and insolvency of trusts, perhaps jointly with a Commonwealth agency.

What reform should be made?

2.44 For the above reasons, it is our view that the NSW law of trusts should provide as a general principle that – contrary to the rule in *Hardoon v Belilios* – a beneficiary is not personally liable to indemnify the trustee in respect of liabilities incurred by the trustee in that capacity. Although apparently limited to the "public" trust context, the Canadian and Singapore provisions provide models for such a law.

2.45 Our recommendation only excludes liability of beneficiaries *as beneficiaries*. This is reflected in the Canadian and Singaporean provisions. Our attention was, however, drawn to the possibility of unpaid calls, where the beneficiary has invested in a trust in a manner similar to an investment in a company, under which their investment

43. Victorian Law Reform Commission, *Trading Trusts – Oppression Remedies*, Report (2015) [5.71].
44. [2.20].

(usually in what are called units) is initially partly paid. The trustee in such a case should be able to recover the unpaid amount, and the investor/beneficiary, subject to the terms of the trust instrument, should not be heard to deny that liability.

2.46 It will also be necessary to ensure that a provision intended to protect beneficiaries does not affect the liability of directors (including shadow or de facto directors) of corporate trustees for insolvent trading, or protect beneficiaries who direct trustees to undertake transactions as their agents. Our recommendation seeks to address this by referring, in effect, to any liability of beneficiaries as such.[45]

2.47 The provision should be subject to express agreement to the contrary, thus providing the facility for a trustee to stipulate for a right of indemnity against the beneficiaries on accepting the trust, or on undertaking a particular transaction.

45. See, eg, *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1, 231 CLR 160, 282

3. Oppression remedies

Oppression in corporations law

3.1 Since the mid-20th century, companies and corporations legislation has provided minority shareholders with access to statutory remedies when they claim that those who control the company are conducting the company's affairs in a manner which is oppressive, unfairly discriminatory against or unfairly prejudicial to them.[1]

3.2 These statutory remedies were introduced to afford minority shareholders an alternative to a winding up order, which until then was the only available remedy but might be too drastic or not in their own interest. They originated in England, when the Cohen Committee recommended them in 1945, for the following reasons:

> In many cases, … 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.[2]

3.3 The availability of the remedy has been broadened from time to time to overcome limitations and restrictions identified by the courts. For example, once, a member could obtain relief only for oppression of the member *qua* member. Now, the *Corporations Act* allows a member to seek relief where the company's affairs are being conducted in a manner that is, or a resolution of the company is or would be, oppressive, unfairly prejudicial to or unfairly discriminatory against a member, whether in their capacity as a member or in any other capacity (such as employee). Where the ground is established, the Court has a broad discretion to make appropriate orders to relieve the oppression. By far the most common order is one

1. The remedy was first introduced in *Companies Act 1961* (NSW) s 186; it is now contained in *Corporations Act 2001* (Cth) s 232 and 233. See also Victorian Law Reform Commission, *Trading Trusts – Oppression Remedies*, Report (2015) [3.10]–[3.22].
2. United Kingdom, *Report of the Committee on Company Law Amendment*, Cmd 6659 (1945) [60].

that the controlling majority purchase the oppressed minority's shareholding at valuation.[3]

Oppression in the trust context

The problem

3.4 The oppression provisions of the *Corporations Act* do not apply to trusts. Trusts are widely used in commercial contexts where corporations could have been used and, as discussed in Chapter 2, many businesses are conducted through trading trusts. One type of trust used for this purpose is the unit trust. Beneficiaries of unit trusts hold "units" which represent a share in the trust property, and which have characteristics that are in many ways analogous to company shares. Similar issues may arise between majority and minority unit holders as occur between shareholders in companies.

3.5 Since the trustee of a trading trust is usually a company, there have been attempts in NSW and Victoria to use the oppression remedy under the *Corporations Act*. The courts in NSW and Victoria have differed in their approach to these cases, so that two lines of authority have developed. The VLRC summarised the position as follows:

> It is unclear whether the existing oppression remedy in the Corporations Act already gives the court power to grant relief in the context of trading trusts. One line of authority [the NSW line] has held that beneficiaries are limited to the conventional, and largely ineffective, forms of equitable relief under trust law. An alternate line of decisions [the Victorian line] has held that the court's power under section 232 of the Corporations Act is not limited to an action against the company and extends more broadly to the affairs of a company, including trading trusts of which the company is the trustee.
>
> Even if the latter line of decisions represents the law in Victoria, the existing Corporations Act remedy alone will never be sufficient to protect all beneficiaries of trading trusts, because a beneficiary seeking to access the remedy must also be a shareholder in the corporate trustee.
>
> In a number of cases, the beneficiary will not be a shareholder, which effectively leaves such an individual without any effective remedy at all, unless an alternative statutory remedy is provided.
>
> Even where the beneficiary is a shareholder, the current state of the law is so complicated and unclear, that extensive costs must be expended and delays endured in investigating possible ways of framing a claim in the absence of a clear remedy. This can also lead to oppressed beneficiaries refraining from taking legal action at all, instead settling on less than favourable terms rather than face lengthy and costly litigation with an extremely uncertain outcome.[4]

3.6 The so-called NSW line of authority comprises the following cases:

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3. *Corporations Act 2001* (Cth) s 232-234.
4. Victorian Law Reform Commission, *Trading Trusts – Oppression Remedies*, Report (2015) xi (footnotes omitted).

- *Kizquari Pty Ltd v Prestoo Pty Ltd*[5] (NSW Supreme Court)
- *Re Polyresins Pty Ltd*[6] (Queensland Supreme Court)
- *McEwen v Combined Coast Cranes Pty Ltd*[7] (NSW Supreme Court), and
- *Trust Company Ltd v Noosa Venture 1 Pty Ltd*[8] (NSW Supreme Court).

3.7 The so-called Victorian line of authority comprises the following cases:

- *Vigliaroni v CPS Investment Holdings Pty Ltd*[9]
- *Wain v Drapac*,[10] and
- *Arhanghelschi v Ussher*.[11]

3.8 The explanation for the differing approaches lies in the interpretation of the concept of the "affairs" of a company, and in particular whether they include its conduct as a trustee of a trust. Thus in *Trust Company Ltd v Noosa Venture 1 Pty Ltd,* Acting Justice Windeyer concluded that it was not within power to make an order requiring one trust beneficiary to buy out the interest of the other trust beneficiary, because such an order would be an order in relation to the trust, not in relation to the company.[12]

3.9 In its submission, the Supreme Court expects that the question of whether the NSW line of authority set out above[13] may have given insufficient attention to s 53(a) of the *Corporations Act* will be resolved in due course at appellate level. It also observes that the question "does not require legislation and cannot be resolved by State legislation".[14] This suggests that the difference in the approaches in the two jurisdictions may not persist and may be resolved by the appellate courts.

3.10 Consistent interpretation of the *Corporations Act* across Australia is clearly desirable. However, achieving consistent interpretation of the *Corporations Act* will not solve the underlying problem, since only a shareholder can commence these proceedings and an aggrieved unit holder will not always also be a shareholder.

The VLRC's recommendation

3.11 The VLRC Report recommended that the law of trusts should make oppression remedies available to beneficiaries of "trading trusts", which it defined as including all trusts where "some property held by the trustee is employed under the terms of

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5. *Kizquari Pty Ltd v Prestoo Pty Ltd* (1993) 10 ACSR 606.
6. *Re Polyresins Pty Ltd* [1999] 1 Qd R 599.
7. *McEwen v Combined Coast Cranes Pty Ltd* [2002] NSWSC 1227, 44 ACSR 244.
8. *Trust Company Ltd v Noosa Venture 1 Pty Ltd* [2010] NSWSC 1334, 80 ACSR 485.
9. *Vigliaroni v CPS Investment Holdings Pty Ltd* [2009] VSC 428, 74 ACSR 282.
10. *Wain v Drapac* [2012] VSC 156.
11. *Arhanghelschi v Ussher* [2013] VSC 253.
12. *Trust Company Ltd v Noosa Venture 1 Pty Ltd* [2010] NSWSC 1334, 80 ACSR 485, [104]–[105].
13. [3.6].
14. Supreme Court of NSW, *Submission BE5* [23].

the trust in the conduct of a business". Notably, that definition is not confined to unit trusts, and does not exclude discretionary trusts.

3.12 The VLRC examined whether the law of trusts provided equivalent remedies to those available under the corporations law, and concluded that it did not.[15] The VLRC considered, in particular, remedies arising by way of:

- termination and redemption under the terms of the trust deed
- estoppel
- vesting of the trust pursuant to the rule in *Saunders v Vautier*[16]
- quasi-partnership, and
- fraud on a power.

It concluded that, while there was potential for equitable remedies to fulfil some of the goals of the oppression remedy, each was limited in key respects. The limited statutory power of variation of a trust[17] also did not provide an equivalent remedy.

3.13 The VLRC concluded that reform was needed, for reasons of clarity, simplicity and fairness.[18] Submissions they received and comments made during consultations referred to the injustice or hardship resulting from the lack of a clear remedy. The different approaches in the NSW and Victorian lines of authority may be sufficient evidence of the need for reform to achieve some certainty.

3.14 The VLRC considered carefully and consulted widely on whether the proposed oppression provision should also apply to discretionary trusts; the very nature of which is that the trustee can and must choose between possible beneficiaries and how much to allocate to them. In such circumstances, oppression might be far more difficult to identify and respond to without fundamentally changing the nature of the trust. However, the VLRC concluded that:

> expressly [to] exclude discretionary trusts from the operation of an oppression remedy would create substantial practical difficulties. The Commission acknowledges that the inclusion of discretionary trusts is partly at odds with the way the beneficial interests in these trusts have traditionally been conceptualised. However, the Commission considers that these difficulties can be readily resolved by providing the courts with a broad and flexible range of remedies.[19]

15. Victorian Law Reform Commission, *Trading Trusts – Oppression Remedies*, Report (2015) ch 4.
16. *Saunders v Vautier* (1841) 49 ER 282.
17. Such as under the *Trustee Act 1925* (NSW) s 81.
18. Victorian Law Reform Commission, *Trading Trusts – Oppression Remedies*, Report (2015) [1.23]–[1.35].
19. Victorian Law Reform Commission, *Trading Trusts – Oppression Remedies*, Report (2015) [2.112], see also [2.73]–[2.111].

Submissions and roundtable discussion

3.15 The preliminary submissions and submissions we received expressed a diverse range of views on this issue. All are available on our website.

3.16 Our roundtable included a discussion of this subject. The participants did not report any widespread or pressing need for this remedy, and observed that the VLRC Report referred only to a few instances where the remedy may have been applicable. One submission drew attention to a NSW Supreme Court decision[20] where the Court held that a trustee which had continually made decisions favouring some beneficiaries over others, should be removed; as the submission put it, "a drastic remedy which is not lightly granted".[21]

3.17 Contributors emphasised that the VLRC recommendation was limited to addressing oppression in trading trusts, and that the limitation of their proposal to such trusts meant that it would be important to define such trusts clearly. Participants were not persuaded that the VLRC's definition, which distinguished trading trusts from other trusts on the basis that "some property held by the trustee is employed under the terms of the trust in the conduct of a business",[22] provided a sufficiently rational basis for identifying those trusts for which a novel oppression remedy should be available.

3.18 Further, participants were unconvinced that the remedy was appropriate in the context of discretionary trusts, as a fundamental feature of such trusts is the trustee's discretion to discriminate between potential beneficiaries. Moreover, there are questions about who should have standing to claim relief. This is because a member of a class of eligible beneficiaries in a discretionary trust has no interest in the trust property and is only a beneficiary when the trustee's discretion is exercised in their favour.

3.19 The roundtable noted that the Victorian government had not implemented the VLRC Report, and that while uniformity in this area was desirable, implementing the VLRC recommendation in NSW in the absence of legislation in Victoria would not achieve that.

Our conclusion

Recommendation 3.1

Oppression remedies available to shareholders under company law should not be extended to beneficiaries of trading or other trusts under the law of trusts.

3.20 We do not support introducing a discretionary oppression remedy into the law of trusts.

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20. *Nicholls v Louisville Investments Pty Ltd* (1991) 10 ACSR 723, 728.
21. NSW Bar Association, *Submission BE1* [10].
22. Victorian Law Reform Commission, *Trading Trusts – Oppression Remedies*, Report (2015) [2.57].

3.21 We accept that the law of trusts does not provide beneficiaries with equivalent remedies to the corporations law oppression remedy. However, that is because the two legal institutions are fundamentally different, despite some similarities between one species of trust (namely the unit trust) and a company. The relationships between beneficiaries are not equivalent to the relationships between shareholders. Discretionary trusts, for example, are of their nature intended to allow a trustee to discriminate between beneficiaries.

3.22 One fundamental difference is that a trust is not "controlled" by the majority but by the trustee. A fundamental duty of a trustee is to act impartially between the beneficiaries to avoid benefitting one set of beneficiaries at the expense of another set.[23] For that reason, an "oppressed" beneficiary's remedy is against the trustee for breach of trust, not against the other beneficiaries. As has been noted, one available remedy is to remove and replace the trustee.[24]

3.23 Moreover, the law already provides for the review of trustees' discretionary decisions, if not made in good faith, upon real and genuine consideration, and for a proper purpose. Justice McLelland summarised the grounds of review in *Rapa v Patience*:

> They are, first, that the discretion was not exercised by the trustees in good faith, second, that the discretion was not exercised upon real and genuine consideration (which includes consideration of the wrong question …), third, that the discretion was not exercised in accordance with the purposes for which it was conferred and, fourth, where the trustees have disclosed … the reasons for the exercise of their discretion that those reasons are not sound.[25]

3.24 Similarly, in *Karger v Paul,*[26] Justice McGarvie held that the court will not examine or review the exercise of a discretion in broad and unfettered terms, if the trustees exercise the discretion in good faith, upon real and genuine consideration and in accordance with the purposes for which the discretion is conferred and not for some ulterior purpose. However, the court will examine and review the validity of the trustees' reasons for exercising their discretion, if they choose to state their reasons, and the court may then examine the evidence to decide whether the trustees have failed to exercise the discretion in good faith, upon genuine consideration and in accordance with the appropriate purpose.

3.25 The law has generally avoided the notion that courts should have a general power to amend or rewrite trusts. A general discretionary power to amend trusts on account of "oppression" would invite an expansive new field of trust litigation.

3.26 In our view, the current law of trusts provides adequate and appropriate remedies for a beneficiary who is "oppressed" in the sense in which that term is used in company law.

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23. *Knox v Mackinnon* (1888) 13 App Cas 753, 768; *Re Sandy's Union of London and Smith's Bank v Litchfield* [1916] 1 Ch 511; *Tanti v Carlson* [1948] VLR 401, 405; *Nestle v National Westminster Bank plc* [2000] WTLR 795, quoted in *Re Mulligan (Deceased)* [1998] 1 NZLR 481, 501; *Cowan v Scargill* [1985] Ch 270, 286-7; *Balkin v Peck* (1998) 43 NSWLR 706, 715.
24. *Nicholls v Louisville Investments Pty Ltd* (1991) 10 ACSR 723, 728.
25. *Rapa v Patience* (Unreported, NSWSC, McLelland J, 4 April 1985) 11.
26. *Karger v Paul* [1984] VR 161, 163.

3.27 The main oppression remedy used in corporations cases is the compulsory purchase order. This would have very limited, if any, application in the context of a trust, other than a unit trust. While it may be said that those who choose to employ unit trusts should enjoy protections and remedies that correspond with those available to shareholders, it is in principle undesirable to introduce a radical new remedy into trust law that would, in practice, operate only in a very discrete category of trusts.

3.28 The differing approaches of the Victorian and NSW courts to the availability of the *Corporations Act* remedy where there is a corporate trustee may be resolved at appellate level. If it is not, the appropriate response lies in the field of corporations law, not the law of trusts.

Appendix A: Submissions

Submissions

BE1 NSW Bar Association, 31 January 2018
BE2 Nuncio D'Angelo, 2 February 2018
BE3 Law Society of NSW, 2 February 2018
BE4 The Hon J C Campbell QC, 2 February 20018
BE5 Supreme Court of NSW, 15 February 2018
BE6 The Hon R I Barrett, 28 February 2018
BE7 The Hon J C Campbell QC, 6 April 2018

Preliminary submissions

PBE1 Professor Elise Bant, Mr Tobias Barkley, and Professor Matthew Harding, 27 June 2017
PBE2 The Hon R I Barrett, 28 June 2017
PBE3 Dr Nuncio D'Angelo, 29 June 2017
PBE4 NSW Bar Association, 14 July 2017
PBE5 Dr Scott Donald, 14 July 2017
PBE6 Allens, 14 July 2017
PBE7 Law Society of NSW, 27 July 2017
PBE8 Ashurst Australia, 21 August 2017

Appendix B: Consultation

Attendees at Roundtable

2 March 2018

Dr Nuncio D'Angelo, Norton Rose Fulbright
Dr Scott Donald, UNSW Law
Mr Diccon Loxton, Allens
Mr Marc Kemp, Allens
Mr Alastair McConnachie, NSW Bar Association
Dr Robert Austin, NSW Bar Association
Mr Michael Ryland, Ashurst
Professor Joe Campbell
Ms Alison Silink, Level 22 Chambers
Mr John Stumbles, King and Wood Mallesons
Mr David Castle, David Castle Solicitors
Mr Thomas Russell, Piper Alderman

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