



THE LAW SOCIETY  
OF NEW SOUTH WALES

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27 July 2017

Mr Alan Cameron AO  
Chairperson  
NSW Law Reform Commission  
GPO Box 31  
Sydney NSW 2001

By email: [nsw-lrc@justice.nsw.gov.au](mailto:nsw-lrc@justice.nsw.gov.au)

Dear Mr <sup>Alan</sup> Cameron,

### **Review of laws relating to beneficiaries of trusts**

Thank you for the opportunity to contribute to the NSW Law Reform Commission's review of laws relating to beneficiaries of trusts. The Law Society's Business Law Committee contributed to this submission.

The Law Society notes that the review focuses on two aspects of the law relating to beneficiaries and 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 under company law should be extended to beneficiaries of trading trusts.

### **Liability of beneficiaries**

The Law Society considers that to impose any liability on beneficiaries when a trustee has acted in breach of a trust would be contrary to the fundamental principle of equity law that a trustee must act for the benefit of its beneficiaries.

In equity law, a trustee incurs all debts in its own right and, provided the trustee is not acting in breach of trust, it can exercise its right of indemnity against a trust asset. In breaching trust, a trustee is personally liable and loses its ability to exercise its rights of indemnity from trust assets. A creditor of the trustee, if the trustee is in breach of trust, can only satisfy its entitlement from the personal assets of the trustee.

In our view, the current "nil liability" position of beneficiaries should not be altered in any way. Any change to this position would fundamentally undermine the equitable principles upon which trust law is based, being that a trustee holds assets for the benefit of the beneficiaries and cannot personally benefit from such position as trustee.

## Oppression remedies

The Law Society has reviewed the Victorian Law Reform Commission's Report on Trading Trusts – Oppression Remedies<sup>1</sup> (the Report). Generally, we support the recommendations contained in the Report. Our comments in relation to discretionary trusts and trading trusts are set out below.

### Discretionary trusts

The Law Society has concerns about the definition of “beneficiary” in relation to discretionary trusts. The Report notes that a beneficiary's entitlement to trust property is at the discretion of the trustee and that beneficiaries are selected from a nominated class by the trustee.<sup>2</sup> It appears to assume that anyone within such a description is a beneficiary for the purposes of an oppression remedy.

We consider that this is a very broad basis for assessing oppression and allowing standing to take action given that a beneficiary only has a “mere expectancy or hope of consideration by the trustee”<sup>3</sup> and may, in practice, never receive a distribution or other benefit from the trust.

We suggest that the NSW Law Reform Commission give further consideration to the definition of beneficiary in this context.

### Trading trusts

The Report defines trading trusts as a “trust where some property held by the trustee is employed under the terms of the trust in the conduct of a business”.<sup>4</sup>

The Law Society notes that insolvency practitioners often face challenges when seeking to access trust assets for creditors. Recommendation 6 of the Report provides:

In determining whether to grant an oppression remedy, the Supreme Court of Victoria should be required to consider the interests of third parties including, but not limited to, directors, trustees, shareholders, employees and creditors.

We suggest that it would be appropriate for the NSW Law Reform Commission to make a similar recommendation given the commercial nature of the operations of trading trusts.

In our view, different commercial legal vehicles that essentially provide the same operational business functions (companies and trading trusts) should have appropriately similar oppression remedies.

We note that the suggested oppression regime for beneficiaries should not apply to those trusts not included in the definition of “trading trusts” (i.e. super funds, managed investment schemes, charitable trusts) as these are separately regulated.

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<sup>1</sup> Victorian Law Reform Commission, *Trading Trusts – Oppression Remedies*, January 2015.

<sup>2</sup> *Ibid*, 11.

<sup>3</sup> *Gartside v IRC* [1968] AC 553.

<sup>4</sup> Victorian Law Reform Commission, *Trading Trusts – Oppression Remedies*, January 2015, xi.

Thank you for the opportunity to provide comments to this review. I would be grateful if questions can be directed at first instance to Liza Booth, Principal Policy Lawyer, by email at [liza.booth@lawsociety.com.au](mailto:liza.booth@lawsociety.com.au) or phone (02) 9926 0202.

Yours sincerely,



Pauline Wright  
**President**