CommBar submssion

Trading Trusts – Oppression Remedies

1. The Commercial Bar Association of Victoria (CommBar) makes the following submission in response to the VLRC Consultation Paper dated June 2013 entitled Trading Trusts - Oppression Remedies. CommBar is the representative body for commercial barristers practising at the Victorian Bar.

Summary

2. The key points of the submission are that CommBar:

   (a) supports the introduction of a remedy to facilitate exit by a participant in the business of a trading trust (and entities associated with that participant) where there has been oppression by the trustee or by one unit holder (in a unit trust) over another unit holder;

   (b) considers that the remedy should extend not only to cases of oppression but also cases where the relationship between unitholders has broken down for reasons falling short of oppression; and

   (c) considers that law reform should ideally be uniform across Australia. If law reform is to take the form of amendment to the *Trustee Act* 1958 (Vic), efforts should also be made to promote uniform legislation in other States.

Submission

3. The submission does not respond to all the question contained in the Consultation Paper. Instead, it concentrates on the key issues.

To which entities/structures should any new remedy apply?

4. An appropriate starting point would be to identify the features of the business structures in which existing remedies have been found wanting, and make any new remedy available to other entities with those features. It is suggested that the features of entities where existing remedies are inadequate are:

   (a) a business conducted by a trust;

   (b) participation in the management of the business by the investors;

(c) the profits of the business streamed to trusts associated with the investors/managers; and

(d) inability of investors/managers to exit the arrangement (or exit at a fair price, or on a fair and reasonable basis) if there is a breakdown in the relationship.

5. Factor (b) above would exclude most discretionary trusts from the scope of any new remedy. The most pressing need for law reform is in the context of unit trusts, as it is quite common in Australia for businesses to be conducted through a unit trust structure with a corporate trustee. However, there may be some circumstances where it would be appropriate for an oppression remedy to be applied to a discretionary trust. For example, structures within a business group may consist of one or more unit trusts and one or more discretionary trusts (and maybe even some ordinary companies as well). It may be desirable for the Court to be able to sever all business relationships between the parties when granting relief against oppressive conduct in the unit trust(s).

How does the oppression remedy currently apply to trading trusts?

6. *Vigliaroni* and *Drapac* are authority that the oppression remedy can apply to trading trusts in Victoria (in both cases, unit trusts). CommBar agrees with the approach taken in those cases, namely that once the discretion in s232 is enlivened, s233 empowers the court to make orders "in relation to the company". However, the factual matrix that made it possible to grant relief in those cases will not necessarily be present in all trading trusts.

7. Thus reform is required not only because there is a conflict between the *Kizquari* line of authority and the *Vigliaroni* line of authority, but also because even the *Vigliaroni* line of authority will not extend to all cases where relief may be required.

8. As noted, in the Consultation Paper, 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 (or associated with a beneficiary).

9. Further, even if a trading trust initially has those features, it may lose that structure by, for example, replacement of the corporate trustee. Even though the disgruntled unitholder will remain a member of the trustee company (and accordingly have standing to bring an oppression action), the separation of the company from its role as trustee of the unit trust may (depending on when or how it occurs) make it more

difficult for the plaintiff to argue that relief that involves a buyout of their units is relief "in relation to the company".

10. Another scenario not catered for by the *Vigliaroni* line of authority is where there may simply be a breakdown in the relationship between unitholders leading to a loss of trust and confidence, but without oppressive conduct. If the same situation arose in the context of a pure corporate setting, a member of the company might seek winding up on the just and equitable ground under section 461(1)(k) of the *Corporations Act* 2001 (Cth).

11. By analogy with winding up a company, termination of the trust is a blunt instrument, which may destroy goodwill in the business and harm employees. However, for a unitholder seeking to extract their investment, it is at least a remedy that frees them to pursue other business ventures without the risk of it being alleged against them that they have diverted business opportunities from the trading trust. The threat of a winding up order may also create the necessary incentive to the participants to negotiate a less value-destructive outcome. CommBar accordingly submits that a provision along the lines of s.59C(1) of the *Trustee Act 1936* (SA) which empowers a court to revoke a trust if it is just and equitable to do so would be a useful addition to the Victorian Act.

The case for reform

12. Courts will strive to find a remedy if they can. The remedies available and the results of the various cases turn not only on the view taken of the applicable law but also on differences in the facts and the provisions of the various trust deeds and/or unitholder deeds. For example, in *Kizquari*, the Court was able to make orders for the restoration of funds to the trust, so that exercise by the unitholder of their rights under the trust deed would lead to their receiving a fair price for their units. However, as acknowledged by Young CJ in Eq in the later case of *McEwan v Combined Coast Cranes Pty Ltd* (2002) 44, ACSR 244, putting in train a pre-emption procedure will only assist the plaintiff where the value of the units is not alleged to have been affected by the activities of the defendant(s). Further, even in cases where there is no misappropriation, exit provisions are generally drafted to give the trustee a discretion whether or not to accept a request for redemption or for the other unitholder(s) to have a discretion whether or not to purchase the units of a unitholder who wishes to depart. Such provisions will not assist a unitholder who wishes to exit in circumstances where the other unitholders do not wish to cooperate.

13. While it is difficult to point to a case where the result was harsh, even where the *Vigliaroni* approach has not been applied, nevertheless, CommBar members are able to cite ample anecdotal evidence of hardships resulting from the present state of the law in the form of:

    (a) extensive costs that are spent investigating possible ways of framing a claim when there is no clear remedial pathway; and

    (b) cases where oppressed unitholders have refrained from taking legal action, alternatively have settled on unfavourable terms, rather than fight a protracted court battle given the uncertain legal situation.

14. The premise in paragraph 5.8 of the Consultation Paper is that participants enter willing into trading trust structures. The reality is that participants enter in these structures often unknowingly, generally on the fairly high level advice of their accountants that the structure will be tax effective, but without appreciating the consequences of the structure if the business relationship breaks down in the future.

15. This raises policy questions, including:

    (a) How far should the law go to save people from the consequences of their desire to minimise tax?

    (b) Should the law reform dollar instead be spent on educating advisers as to the "back end" consequences of trading trust structures and the desirability of entering into a well-drafted unitholders' deed, rather than on tampering with trusts law?

16. Although this submission advocates the education effort referred to in the previous paragraph being undertaken, the relational nature of the business relationship and the difficulty in anticipating all possible future events would suggest that this education effort should also be complemented by law reform.

17. CommBar therefore submits that there is a case for reform.

What form should reform take?

18. The ideal situation would be for the reform to apply uniformly throughout Australia. On balance, CommBar consider this issue to be sufficiently important to support amending the *Trustee Act 1958* (Vic) unilaterally to provide oppression remedies for minority beneficiaries and, equally importantly, to provide an exit remedy in the case of a breakdown in the relationship between unitholders for reasons falling short of

oppression. However, this should be complemented by efforts to promote uniformity in state Trustee Acts via SCLJ (the successor of SCAG) or other appropriate body.

19. The use of the passive voice (ie "affairs are being conducted...") in part 2.1F of the *Corporations Act* is highly desirable, since it would extend the remedy beyond oppressive conduct by the Trustee.

20. Apart from specifically empowering the Court to revoke a trust, the orders that are available to the Court should be left general.

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