PUBLIC UNIT TRUSTS: PRINCIPLES, POLICY AND REFORM OF THE TRUSTEE AND MANAGER ROLES

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I. INTRODUCTION

> It is clear that many of the difficulties experienced in the unit trust industry of recent times stemmed from the lack of clarity of roles and of allocation of duties between trustees and managers. This resulted in considerable confusion and reduced accountability. The law as it stands does not always indicate who is responsible for which obligations.[1]

The above quotation is unambiguous recognition of the difficulties inherent in defining the obligations of trustees and managers of public unit trusts.[2] Another source of difficulties exists, though, namely the spectre of impending reform of this entire area of the law. The Australian Law Reform Commission ("ALRC") and the Companies and Securities Advisory Committee ("CSAC") are currently engaged in a joint project aimed at comprehensively reforming the law relating to prescribed interests.

To adapt the words of Mr Charles Williams, then Acting Chairman of the National Companies and Securities Commission ("NCSC"), to write about the

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1 Australian Law Reform Commission and Companies and Securities Advisory Committee *Collective Investment Schemes: Superannuation* Discussion Paper 50 (January 1992) at [5.24].

2 It also perhaps explains why, although this area of the law is the subject of much public debate, there is relatively little case law or written comment.

role of trustees and managers at this time is a bit like writing about recent improvements in farm management immediately before the Flood: the readers may think it all very interesting, but of limited utility.[3] Justification for the exercise though is not too difficult to find: effective and efficient law reform can only be achieved by carefully considering the policy reasons for legislative intervention; analysing the extent to which the current law achieves those aims; and then determining whether there are any better means available. 'Better', in this context, covers a multitude of attributes: better legal certainty, better cost effectiveness, better international competitiveness, better investor protection, and so on. Obviously, difficult value judgements are involved.

The aim here is not to solve the riddle presented to the law reformers; it is simply to summarise the current developments and comment on the various reform options which relate to the roles of trustees and managers of public unit trusts. Some general background material puts the issues in context.

II. GENERAL BACKGROUND

A public unit trusts is, first and foremost, a trust. A trustee hold the legal title to all the trust assets. The beneficial interest is divided into fractions, called units, which are sold to investors. A public unit trust is thus governed by the same principles of trust law that apply to any other trust. There is no limit to the type of property which may be held on trust; for example, in "property trusts" the asset is land; in "equity trusts" it is shares; and in "cash management trusts" it is other investments.

Obviously though, to offer the public a fraction of the beneficial interest under a trust is to offer something like, but not identical with, a share in a registered company. In fact, a unit in a trust falls within the definition of a "prescribed interest" in s 9 of the *Corporations Law*. Because of this public unit trusts are regulated not only by trust law but also by the *Corporations Law*.[4] This regulation extends to prescribing the structure and terms of the trust, the way the trust property may be administered and the information which must be disclosed to investors before and after they invest.

Unit trusts play a significant part in the national economy; they provide a means of collecting substantial amounts of money from numerous investors and directing it into large scale investments. Current estimates suggest that the unit trust industry manages funds in excess of $40 billion, with most of this money being placed in property trusts.[5] Successful regulation of the industry is thus important to the country, not just to the parties directly involved. The

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3 CM Williams "Regulation of Managed Funds" *Address to the 1988 Funds Management Conference* (22-23 June 1988). The 'Flood' of which he was speaking on that occasion was the impending *Corporations Law*.

4 *Corporations Law* Part 7.12 Div 5.

5 Bankers Trust Australia Ltd *Discussion Paper: Regulation of the Managed Funds Industry* (1990).

motivation for participants to become involved in this form of investment is clear: the trust managers hope to profit from fees and commissions earned by effectively managing other people's money; the investors, on the other hand, hope that the manager's skill, combined with the potential for investment diversification and economies of scale, will net for them either income or capital growth profits greater than those which they could hope to achieve on their own behalf.

Many people invest in unit trusts because they lack financial experience. They like the idea of putting their money in the hands of an expert manager. The very term "trust" conveys a sense of security. In addition, such investments have until recently had the added advantage of being readily liquidated: if the trust is listed, the units can be sold at market price on the stock exchange; if the trust is unlisted, although there is no open market for them, the manager is obliged to buy them back, or "redeem" them, at the investor's request. The formula for calculating the buyback price is set out in the trust deed and takes into account the trust's assets and its expenses.

The presence of this compulsory buyback provision in the trust deeds of unlisted trusts has perhaps been the root cause of the most recent spate of property trust collapses. Redemption depends upon the manager being able to realise the underlying trust assets in order to provide the funds to meet the redemption request. Property, particularly in the form of major commercial developments, is not a readily realisable asset; these problems of realisation are compounded in an economic recession.

The other factor blamed for recent trust failures is the ill-defined relationship between the trustee and the manager. The *Corporations Law* requires that the administration of the trust be shared between a trustee and a manager. Neither of the parties is the agent or employee of the other,[6] but each occupies a co-ordinate office, being responsible for a measure of supervision of the other. The aim of this division of responsibility is to protect the investing public. However, the precise function of each of these parties and the way in which their roles are to interact to effectively achieve this stated aim, is not at all clear.

This problem of poorly defined roles is compounded by another related problem. Trustees of public unit trusts must be approved by the regulatory authority. The tendency has been to only approve trustee companies, a group of relatively unsophisticated companies traditionally involved in the administration of private family trusts and deceased estates. Such companies are often small, relatively under-resourced and lacking in the technical expertise possessed by many of the management companies over which they have regulatory responsibility. Also, the initial appointment of such trustee companies is largely in the hands of the management company: fee determination is competitive and trustee companies aggressively compete for new business by discounting fees.[7]

6 *Parkes Management Ltd v Perpetual Trustee Co Ltd* (1987) 3 ACLR 303 at 310 and 314.

7 These and other similarly critical comments were made by Bankers Trust Australia Ltd in a discussion paper proposing sweeping regulatory reforms; note 5 *supra*.

Competitive practices and poorly defined roles seem invariably to lead to administrative practices which fail to adequately protect investors.

All these problems were highlighted in 1990, when certain property trusts encountered severe difficulties in meeting redemption demands. The need for legal reform was obvious. This need had, in fact, been recognised well before 1990: in 1981 the Campbell Committee pointed to the need for comprehensive reform, even suggesting the possibility of separate legislation for prescribed interests;[8] in 1988, the Companies and Securities Law Review Committee ("CSLRC") reaffirmed this finding. At the request of the Federal Attorney-General, the ALRC and the CSAC have now established a Collective Investments Review aimed at comprehensive reform of this area of the law.[9]

After preliminary consultations, this Review identified three main policy goals: to promote commercial stability and efficiency; to adequately protect investors; and to ensure that any adopted legal framework was in harmony with the overseas regulation of similar investment vehicles.[10] The first discussion paper produced by the Review focused on superannuation, rather than unit trusts.[11] Consequently, many issues specific to unit trusts have not been canvassed. Clearly though, these stated policy goals will only be achieved if the reform proposals focus on three things: the governance of unit trust schemes; disclosure to investors; and enforcement mechanisms. The first of these, governance, is really the focus of this article. The other two issues are examined at a more general level in the context of corporate regulation by Mark Blair and John Kluver in this volume.[12]

III. THE BASIC STRUCTURE OF A UNIT TRUST

Typically, a unit trust is established and promoted by a manager.[13] The manager vests the initial trust funds in the trustee and arranges for the issue to itself of the initial units representing those funds. The manager then obtains funds from investors on behalf of the trust and issues units to those investors. The price of the units is calculated according to the net asset backing of the unit plus a service fee for the manager. Additional units may be created at any time by payment to the manager, on behalf of the trustee, of an issue price calculated

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8 Campbell Committee *Australian Financial System - Final Report of the Committee of Inquiry* (1981) at [21.175].

9 Australian Law Reform Commission and Companies and Securities Advisory Committee *Collective Investment Schemes* Issues Paper 10 (September 1991).

10 *Id.*

11 Note 1 *supra.*

12 M Blair "The Debate Over Mandatory Corporate Disclosure Rules " (1992) 15 *UNSWLJ* 177; J Kluver "ASC Investigations and Enforcement: Issues and Initiatives" (1992) 15 *UNSWLJ* 31.

13 *Corporations Law* s 1064(1): the manager must be a public corporation unless either (i) the issue is classed as an excluded issue, offer or invitation (see ss 66(2) and (3), which apply to prescribed interests by virtue of s 1063); or (ii) the Australian Securities Commission grants an exemption, using its powers under s 1084.

at the issue date.[14] The manager is thus responsible for promoting and managing the trust investment. The trustee holds the legal title to the trust assets and has specific duties to perform.

This division of functions between the trustee and the manager is a requirement of the *Corporations Law*.[15] Furthermore, for an offering of units to be lawful, the trust must be embodied in a trust deed that contains certain prescribed covenants[16] and is approved by the Australian Securities Commission ("ASC").[17] These prescribed covenants take precedence over the rules of equity or any inconsistent provisions in individual trust deeds.

The prescribed covenants are expansive and may often provide the only definition of the obligations imposed on both trustee and manager. For example, the most important of these prescribed covenants require the manager to use its best endeavours to carry on its business and the scheme in a proper and efficient manner, and the trustee to exercise due diligence and vigilance in carrying out its function.[18] In addition, there are specific provisions relating to the keeping of accounts, the provision of information, the holding of meetings and the manager's buy-back obligation. The individual trust deed is thus correspondingly less important.[19]

The legislation therefore makes it mandatory to include in the trust deed provisions which clearly differentiate public unit trusts from traditional trusts: the powers and duties which would normally be exercised by the trustee of a traditional trust are, in a unit trust, split into supervisory and managerial functions exercised by the trustee and the manager respectively.[20] This compartmentalisation of functions is said to be inconsistent with the manager being an agent of the trustee. Clearly the manager's role requires more than that the manager simply assist the trustee to execute its functions.[21] However, the precise relationship between the trustee and the manager is not clear.

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14 D Brewster "Fiduciary Obligations of Trust Managers and the Takeover of Unit Trusts" (1990) 8 *Co & Sec LJ* 303 at 304. For a more detailed discussion see HAJ Ford "Unit Trusts" (1960) 23 *Mod L Rev* 129; HAJ Ford and WA Lee *Principles of the Law of Trusts* (2nd ed, 1990) at ch 23.

15 *Corporations Law* Part 7.12 Division 5.

16 *Corporations Law* s 1069 and *Corporations Regulations* 7.12.15. Even if a deed does not expressly contain a particular covenant, s 1069(7) deems a covenant to the same effect to be included in the deed. See also ss 1069(5)-(9A). The ASC may exercise its powers under s 1084(2) to exempt deeds from these requirements.

17 *Corporations Law* s 1065. This means that not only must the deed be approved by the ASC, but so must the trustee: ss 1066, 1067. Presently, such approved trustees include mainly trustee companies regulated by the relevant *Trustee Companies Act*: see NCSC Release 126. In addition, if the units are listed on the Australian Stock Exchange, the trust must also comply with the Listing Rules.

18 *Corporations Law* ss 1069(1)(a) and 1069(1)(e)(i) respectively.

19 Although consistent provisions in individual trust deeds may modify these obligations.

20 This may also occur pursuant to *Trusts Act* 1973 (Qld) s 19 and *Trustees Act* 1962 (WA) s 15, which allow for the division of responsibilities between a custodian trustee and a managing trustee.

21 See the comments of Young J in *Re Application of Permanent Trustee Nominees (Canberra) Ltd* (unreported, Supreme Court of NSW, 24 June 1985) and Hope JA in *Parkes Management Ltd v Perpetual Trustee Co & PT Ltd* (1977) ACLC 29,545 at 29,551.

IV. TRUSTEES AND MANAGERS

Defining and categorising the relationship between the trustee and manager is critical for investor protection: accurate definition and appropriate categorisation would allow investors greater control over their assets and more certainty in recovering remedies.

For investors here, as in most complex commercial transactions, there are several avenues open for the recovery of compensation: investors may allege breaches of statutory, contractual or equitable duties or may allege negligence. In every case, there are uncertainties when the relevant legal principles are applied to unit trusts. The most obvious of these uncertainties can be briefly noted. Consider first the position of the manager.

A. ACTIONS AGAINST THE MANAGER

The manager's mandatory statutory covenants are set out in s 1069 of the *Corporations Law*. Because there is, however, no indication whether these covenants operate in favour of the trustee or in favour of the unitholders, it has been suggested that the unitholders do not have sufficient standing to bring an action against the manager for failure to properly manage the trust.[22] But perhaps here the real problem is the inexplicable failure of litigants to use s 1324 on those occasions where it is appropriate. Broadly speaking, s 1324 depends upon establishing a contravention of the law; litigants do not also have to show that the provision in the law was intended to operate for their benefit: see the wide interpretation given in *Broken Hill Proprietary Co Ltd v Bell Resources Ltd*.[23] Moreover, the section allows the court to award damages as well as grant an injunction.

If, alternatively, investors attempt to rely on a breach of contract by the manager, they also face problems. There is undoubtedly a contract between the manager and each unit holder; this contract is constituted when the manager accepts the application for units submitted by the investor. The precise terms of this contract are, however, not so easy to define. It is possible that the contract simply binds the manager to provide the investor with the units requested. The alternative construction is that the manager's acceptance constitutes an implied covenant to fulfil its obligations under the trust deed. In either case though, a

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22 Eg NCSC Release No 121 at [1.2]: "Investors.... have no rights to deal directly with the management company.... In general all of the investors' rights are exercisable by the trustee on their behalf." This is despite the fact that, for example, the buy-back covenant and the provisions relating to the convening of unitholders' meetings require direct obligations owed by the manager to the unitholders.

23 (1984) 8 ACLR 609. Also see R Baxt "Will Section 574 of the Companies Code Please Stand Up? (And will Section 1324 of the Corporations Act Follow Suit)" (1989) 7 *Co & Sec LJ* 388, suggesting that even a corporate creditor may have standing under this provision. Compare, though, the suggestion that the section may not represent an exception to the rule in *Foss v Harbottle*, and may be conditional on the litigant having some personal right or placing reliance on some other exception to the rule: *Scarel Pty Ltd v City Loan & Credit Corporation Pty Ltd* (1988) 17 FCR 344 at 348; 12 ACLR 730 at 734 and HAJ Ford and RP Austin *Ford's Principles of Corporations Law* (6th ed, 1992) at para [1729].

unit holder who acquires units by purchasing them from another unit holder, rather than from the manager, does not enter into a contract with the manager. Such an investor can only rely on a manager's breach of the original contract if each assignment of a unit also entails assignment of the contractual rights vested in the original unit holder.

Perhaps resort to the law of negligence is fraught with fewer uncertainties for the litigious investor. There is little doubt that the manager owes a duty of care to unitholders. Damages will be recoverable where the manager fails to display the standard of skill and care ordinarily exercised by a reasonably competent unit trust manager. Moreover, where a manager professes to have special skills and abilities, as do most managers in the prospectus promoting the trust, the standard of care may be higher. In *Bartlett v Barclays Bank Trust Co*[24] a case involving a professional trustee rather than a manager, Brightman J held that the standard of care required was not merely that of an ordinary prudent man of business, but was the special care and skill which the defendant professed to have.

Alternatively, the powers of the manager might be regarded as limited by the equitable doctrine of fraud on the power. This doctrine is commonly applied to trustees exercising a power of appointment and company directors making management decisions. If applied to managers, it would provide an avenue for either the unit holder or the trustee[25] to restrict the manager's actions or, failing that, recover equitable compensation.[26]

All the above possibilities would, if successful, allow the investor to recover damages from the manager. The problem with this, even if the difficulties of proof can be overcome, is that most managers do not have significant assets. The right to compensation may therefore be of little value. This perhaps explains the drive to establish managers as fiduciaries: such a relationship between the manager and the unitholder raises the possibility of the unitholder being able to claim a proprietary interest in the assets of the manager and thus obtain priority over the manager's other creditors.

B. IS THE MANAGER A FIDUCIARY?

The advantages to the unitholder in establishing that the manager is a fiduciary are clear. Moreover, a fiduciary is defined very widely. The High Court has held that a person assumes fiduciary obligations by undertaking to act

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24 [1980] WLR 430.

25 Depending upon whether the power was one intended to be exercised for the benefit of the unitholders or for the benefit of the trustee.

26 Although the company law cases are not clear on the point, it seems that the remedies for fraud on the power are restricted to injunctions to prevent the threatened fraud or equitable compensation for the resulting loss, but not the proprietary remedies associated with breaches of fiduciary obligations: see S Worthington "Directors' Duties, Creditors' Rights and Shareholder Intervention" (1991) 18 *MULR* 121.

in the interests of others[27] and by being entrusted with the power to affect the other's interest.[28] Taken literally, these words can clearly be said to encompass the role undertaken by managers of public unit trusts. Moreover, since the manager's role is not undertaken merely as an agent for the trustee, managers cannot rely on the immunities normally granted to agents.

However, the situation may not be quite so simple. Much argument has centred on the definition of a fiduciary. Despite this, it does seem essential that the fiduciary, to be so classified, must have dominion over assets which belong to someone else, either legally or in equity. Thus, trustees, company directors, promoters and agents are fiduciaries. The demands of the fiduciary relationship are attenuated according to the degree of control exercised by the fiduciary. This explains why full disclosure and consent will absolve the fiduciary from the consequences of actions which would otherwise constitute breach; it also explains why activities "outside the ambit of the relationship" cannot constitute a breach of duty by the fiduciary. Furthermore, different fiduciary relationships require different degrees of "fiduciary behaviour": the traditional distinction drawn between trustees and company directors aptly illustrates this.[29]

It therefore seems clear that a bare statement that the manager is a fiduciary, even if in fact true, is not very illuminating. The manager does not hold the legal title to the trust assets, so consequential fiduciary obligations do not automatically arise as they do in the case of the trustee. Furthermore, some of the manager's duties are clearly exercised either as agent for the trustee or in the manager's own interests. The keeping of accounts and the unitholders' register perhaps fall into this category. On the other hand, the manager has the power to supervise the trustee and direct the trustee in investing the trust fund. These powers may be fiduciary: they are powers normally vested in a trustee but which, in a public unit trust, are delegated directly to the manager. Even if such powers are fiduciary, the standard of care required of the manager is not automatically defined: it may be the standard required of a trustee or it may be something less; if trustee standards are imposed, they may be professional trustee standards or the standards of an ordinary prudent man of business.

Uncertain though it seems, a clear definition of the duties owed by a manager and the standards required in executing those duties probably depends upon community expectations: what is the investing community reasonably entitled to expect of the manager in performing its undertakings? Professor Paul Finn has proposed a sliding scale of obligations, with a tortious duty of care at the lower end of the scale, contractual obligations of good faith in the middle, and fiduciary obligations at the upper end.[30] Given the range of functions undertaken by managers and their varying special skills, a case by case judicial

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27 *Hospital Products Ltd v United States Surgical Corporation* (1986) 156 CLR 41 at 70 per Gibbs CJ (approving the test suggested by the NSW Court of Appeal [1983] 2 NSWLR 157) and at 94 per Mason J.

28 *Ibid* at 94 per Mason J.

29 See LS Sealy "The Director as Trustee" [1967] *CLJ* 83.

30 PD Finn "The Fiduciary Principle" in TG Youdan (ed) *Equity, Fiduciaries and Trusts* (1989) pp 1-56.

determination of whether or not the duties have been breached seems to be the only viable option. Such a course seems to have worked remarkably well in negligence cases. Certainly, given the variables, providing a statutory definition of the duties of a manager and the standards required in executing those duties seems an impossible task.

C. ALTERNATIVE ROUTES TO PROPRIETARY REMEDIES

The attraction in establishing a fiduciary relationship is the consequent availability of proprietary remedies. An alternative route to the same end is to find the manager a constructive trustee under the *Barnes v Addy*[31] principle. A manager will find itself in such a position if it "receive(s) and becomes chargeable with some part of the trust property, or.... assist(s) with knowledge of a dishonest and fraudulent design on the part of the trustees".[32] The circumstances where this might be possible are, however, perhaps quite exceptional: the independence of the manager and the trustee is the prime reason for this. In addition, the uncertainty associated with this definition of a constructive trustee raises practical problems: judicial pronouncements do not make it clear what level of knowledge is required nor what constitutes a dishonest and fraudulent design.[33]

D. ACTIONS AGAINST TRUSTEES

Like managers, trustees owe a number of duties to unitholders: those duties derive from the *Corporations Law*, tort, equity and perhaps contract. Although the role of a trustee of a traditional trust is well defined and well understood, the same cannot be said of a trustee of a unit trust. The difficulties all relate to the uncertain way in which the trustee's and manager's roles interact.

The statutory duties imposed on a trustee clearly require the trustee to get in and hold the trust fund.[34] Beyond that though, it is unclear whether they require the trustee simply to supervise the manager or, alternatively, to actively protect the interests of the unitholders.[35] The position in contract is no clearer: the unitholders do not enter into any direct contract with the trustee in the way they do with the manager. Any contractual relationship between the two must be a contract derived in some way either from the statute or from the contract between the manager and the unitholders.

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31 (1874) 9 Ch App 244.

32 *Barnes v Addy* (1874) Ch App 244 at 251-2.

33 See *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373; *Baden Delvaux & Lecuit v Societe Generale* [1983] BCLC 325; *Re Montague Settlements* [1987] 2 WLR 1192. See also RP Austin "Constructive Trusts" in PD Finn (ed) *Essays in Equity* (1985) p 207.

34 *Bank of New South Wales v Vale Corp (Management) Ltd* (unreported, NSW Court of Appeal, 21 October 1981) referred to by R Stewart "Unit Trusts - Legal Relationships of Trustee, Manager and Unitholders" (1988) 6 *Co & Sec LJ* 296.

35 The latter obligations might only be carried out efficiently and effectively if the trustee itself has the power to remove the manager.

Given the contractual uncertainties, the position in tort and equity initially seems quite clear cut. This is not in fact the case, however, at least in equity. The trustee is undoubtedly a fiduciary: the trustee holds the legal title to the trust fund while the unitholders hold the equitable interest;[36] this division of legal and equitable interest, combined with the intention behind such a split, is sufficient to constitute the trustee a fiduciary.[37] However, any fiduciary obligations are patently attenuated by the specific provisions contained in the trust deed, in particular the obligations concurrently imposed on the manager. So, once again, the difficulties of definition relate to the interacting roles of the trustee and manager.

E. COMMENT

All this uncertainty is to the detriment of the unitholders. Economic rationalisation forces many trustees and managers to undertake only the minimum tasks necessary to satisfy their obligations. In the current legal climate, it is certainly open for them to dispute the extent of their respective obligations. The inevitable result is that unitholders' interests suffer. Despite this, it is often not worthwhile for unitholders to take action to prevent or remedy their deteriorating situation: the uncertainties in the law make litigation a time-consuming and expensive exercise. Clearly clarification, if not reform, is necessary in the interests of all parties.

V. REFORM PROPOSALS

As yet, the ALRC and the CSAC have only reported on superannuation.[38] Nevertheless, those findings indicate their likely approach to reform of the law relating to unit trusts. In particular, it seems probable that they will recommend the introduction of a statutory fiduciary duty for both trustees and managers.[39] The principal reason for adopting this approach seems to be their desire to specify a minimum standard of conduct for the trustee and the manager which cannot be departed from by the insertion of exculpatory provisions in the trust deed.

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36 *Costa & Duppe Properties Pty Ltd v Duppe and Ors* [1986] VR 90, which held that this proprietary interest is sufficient to give the unitholder a right to caveat the real property comprising the assets of the trust. Trust deeds now generally expressly prohibit unitholders from caveating any real property comprising the trust assets. In addition to this proprietary interest, the trust deed specifically confers rights and obligations on the unitholders with respect to distribution of income and capital, further contributions, voting rights and so forth.

37 See *McLean v Burns Philp Trustee Company Ltd* (1985) 9 ACLR 926, which held that public unit trusts, although regulated by statute, nevertheless embody the basic elements of trusts.

38 Australian Law Reform Commission Report No 59 *Collective Investments: Superannuation* (1992).

39 *Ibid.* See recommendations 9.1 and 9.2, advocating statutory statements of the fiduciary obligations of responsible entities in relation to superannuation schemes.

Although their aim is commendable, the means of achieving it is questionable. First, stating statutory fiduciary obligations in broad and general terms, as is suggested,[40] may not be effective. It is likely that specific provisions in the trust deed may restrict the areas of operation of the trust or the duties of the trustees and managers in a way that effectively modifies the statutory "absolutes". For example, particularising the trustee's or manager's duty might reduce the opportunities for allegations of conflict of interest and duty. Second, the main advantage of a fiduciary relationship is the recourse it gives unitholders to proprietary remedies. The reform proposals aim to adopt mandatory fiduciary standards without concurrently providing mandatory proprietary remedies for their breach.

If the law is to be reformed, the simplest most cost-effective means ought to be chosen. This is only possible once the aims of the proposed reform have been identified clearly and with some particularity: broad, general statements of desired goals are unlikely to suggest simple and effective reform measures.

VI. CONCLUSION

Obviously, the first step in the reform process is to identify the desired level of investor protection. This level of protection is perhaps somewhere between that given to shareholders and that given to beneficiaries of a traditional trust. The reason for suggesting this is that the mix of statute and general law which produces the public unit trust seems to contemplate such a position for the investor: shareholders are traditionally regarded as the repositories of the power of the company,[41] although they can and almost invariably do vest this management power in the directors; beneficiaries, on the other hand, have no rights to interfere in the management of the trust or to direct the trustee in the exercise of its powers.[42] Unitholders, if the trust is to be legal, cannot have the power to direct the trustee;[43] nevertheless, the statute requires them to have certain rights to interfere in the management of the trust in ways not available to traditional beneficiaries.[44]

Furthermore, the very basis of a company is as a vehicle for risk-taking. A trust, on the other hand, has as its prime purpose the preservation of the trust property. Again, it seems, the unit trust is a hybrid of the two: the investor's desire for high investment returns indicates a preparedness to accept some element of risk; nevertheless, the form of investment, with the investor adopting

40 *Id* in relation to superannuation.

41 *John Shaw v Sons (Salford) Ltd v Shaw* [1935] 2 KB 113 at 134 per Greer LJ.

42 *Re Brockbank* [1948] Ch 206. Although, if all the beneficiaries are sui juris and, together, absolutely entitled to the trust assets, they may agree to terminate the trust: *Saunders v Vautier* (1841) 4 Beav 115; 49 ER 282.

43 *Smith v Anderson* (1880) 15 Ch D 247. See also HAJ Ford note 14 *supra* at 134-5.

44 For example, see *Corporations Law* ss 1069(1)(m) and 1069(13) and *Equitable Group Ltd v Pendal Nominees Pty Ltd* (1985) 3 ACLC 546 for a discussion of the limitations of this provision.

a spread of investments and using the skills of an investment manager, indicate an intention to avoid the high risks inherent in some share investments.

Once the first step has been taken, and an appropriate level of investor protection has been determined, the second step in the reform process is to decide whether there is a cost-effective means for achieving this desired level of investor protection. In this context, 'cost-effective' reform requires the law reformers to have regard to all four entities involved in public unit trusts; both the manager and trustee, who may have imposed upon them greater obligations; the regulators, who may have to police those greater obligations; and, finally, the unitholders who may want to enforce those obligations or, alternatively, recover compensation for their breach. An appropriate balancing of the interests of these four parties depends upon community goals. The most difficult aspect of law reform is precisely this stage of the process: ideals must be meshed with reality.

One thing is certain, though. Reform of commercial law will only keep pace with commercial practice if the law is simple and flexible. Attempting to define precisely the particular rights and obligations of each of the parties to a unit trust is therefore seemingly doomed to failure, later if not sooner. The development of the law of negligence indicates that broad statements of general principle can work: neither the judiciary nor the business community need become paralysed by uncertainty. Admittedly, the development of the law of fiduciary obligations has not been so smooth. In this area, though, the drive by litigants to achieve, and the judiciary to provide, adequate remedies in the form of proprietary interests can be seen as partly to blame. This single difficult issue could be effectively eliminated by statute, as far as public unit trusts are concerned: unitholders could simply be granted or denied proprietary remedies against defaulting managers or trustees. The choice is in the hands of the reformers.

Finally, the radical alternative must be seriously considered. A unit trust is a hybrid creature. Perhaps the creature is simply too complex, and cost-effective law reformers have no option but to play God, driving the hybrid creature to extinction and forcing investors to choose between the security and likely lower returns of traditional trusts as against the potential high returns and risks of corporations.