'The Intimate Connection of Trust and Corporation'

Constraints on the Exercise of the Constitutional Amendment Power in Managed Investment Schemes

By

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Franz J Ranero
Abstract

The objectives of this thesis are twofold. The first and primary objective is the identification of the most appropriate doctrinal approach which courts must adopt in reviewing exercises of the constitutional amendment power in managed investment schemes. The second objective is to evaluate the adequacy of the applicable law in protecting the legitimate rights and interests of the scheme participants. The discussion further provides a medium upon which various underlying themes are explored. These themes include the nature of judicial review upon abuse of power generally by both fiduciaries and non-fiduciaries, the analogy between corporations and managed investment schemes, and the division of power between the two primary scheme organs, being the responsible entity and scheme members in a general meeting.

Managed investment schemes are investment arrangements in which participants forgo control over their capital contributions in consideration for a bundle of rights, derived from the Corporations Law, the scheme constitution as a commercial contract, and the law of equity. Neither the contractual nor the equitable rights of members are indefeasible, as the scheme constitution may be amended, either unilaterally by the responsible entity, or by a special resolution of scheme members.

Exercises of the constitutional amendment power are subject to various restraints, similarly derived from legislation, contract and equity. In relation to unilateral amendments, the Corporations Law provides that an amendment can only be effected where the responsible entity reasonably considers the amendment will not adversely affect members' rights. Restraints are also imposed by equity, such as the responsible entity's obligation to exercise its powers for a proper purpose, being based on the equitable doctrine of fraud on the power. Further equitable restraints placed on the responsible entity are drawn from its position as trustee of the scheme assets, such as the requirement that it act in the best interests of scheme members and treat them impartially. Amendments by members' resolution are similarly open to judicial review based on equitable obligations drawn from a company law context, being namely the requirement that the amendment not involve a fraud on the minority.

The adequacy of the above restraints is judged both by applying the identified law to various hypothetical amendment which may be instigated by scheme participants, as well as by way of a comparative analysis with the protection afforded to company shareholders. It is concluded that the interplay between explicit statutory controls and the various equitable obligations provides the appropriate balance between investor protection and allowing sufficient flexibility in order to facilitate the efficient commercial operation of the scheme.
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## Abbreviations

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<tr>
<td>ALRC/CSAC</td>
<td>Australian Law Reform Commission &amp; Companies and Securities Advisory Commission</td>
</tr>
<tr>
<td>ASIC</td>
<td>The Australian Securities and Investment Commission</td>
</tr>
<tr>
<td>ASX</td>
<td>The Australian Stock Exchange Limited</td>
</tr>
<tr>
<td>CLERB</td>
<td><em>Corporate Law Economic Reform Bill 1998</em> (Cth)</td>
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<td>MIA</td>
<td><em>Managed Investments Act 1998</em> (Cth)</td>
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<td>The Act</td>
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Unless otherwise stated, all references to statutory provisions are references to provisions of the *Corporations Law*.

The law is stated as at 19 April 1999.