Should statutory oppression remedies apply to unit trusts?

A comparison of unitholder and shareholder rights

by

Ari Bergman, BA (Hons)
LLB (Hons) (Monash), GAICD, GIA (Cert), CTA

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_____________________________
Ari Bergman
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Abstract

This thesis analyses the case for amendments to be made to the Corporations Act 2001 (Cth) (‘the CA’) to afford Australian unitholders the same rights of recourse as Australian shareholders under statutory oppression remedies. Australian unit trusts and companies operate under similar commercial conditions, and the types of disputes that arise concerning shareholders and unitholders are comparable. However, there are distinct structural differences between unit trusts and companies that affect the legal principles that apply to such disputes. Given these differences, the unit trust structure may not adequately protect the interests of the venturers if the business relationship breaks down.

One of the most common forms of dispute in such circumstances involves allegations of oppressive conduct. For companies, Part 2F.1 of the CA (which contains the statutory oppression remedies) can provide effective relief to oppressed shareholders. In contrast, unit trusts are predominantly subject to traditional trust law principles, which lack tailored oppression remedies that shareholders enjoy under Part 2F.1. In particular, this thesis demonstrates that the grounds for securing relief under trust law principles are more difficult for oppressed unitholders to establish. Even where such grounds are successfully established, the remedies available are often inadequate to provide substantive and effective relief to unitholders.

Notwithstanding the CA has only limited jurisdiction over unit trusts (especially private unit trusts), oppressed unitholders have sometimes sought relief under Part 2F.1 in an attempt to access more effective remedies than those available under trust law. While a number of earlier decisions determined unitholders are entitled to relief under Part 2F.1, it is argued that the judicial grounds used to support such relief are debatable, therefore the status of the law remains unclear.

In addition, several recent court decisions have rejected these earlier findings. Such contradictory decisions expose the abstruseness of the legislation in this area. Therefore, with inadequate protections against oppression afforded to unitholders under trust law, it is submitted there is a strong argument for legislative reform, ideally by extending the rights of unitholders to access statutory oppression remedies under Part 2F.1 of the CA.
Certification by Main Supervisor

I certify that to the best of my knowledge any editorial assistance in the writing of this thesis has been appropriately described and acknowledged.

_____________________________________
Associate Professor John Duns

Main Supervisor
Declaration

I, Ari Bergman, declare that this thesis contains no material which has been accepted for the award of any other degree or diploma in any university or other institution and affirm that to the best of my knowledge the thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

___________________________  Date: 26th June 2014

Ari Bergman
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Secondly, I would like to acknowledge the assistance of the professional editing services of Lorien Vecellio (who provided a review of the footnotes in this thesis to ensure the citations were accurate and in accordance with the AGLC), and Sally Asnicar of Full Proofreading Services who assisted with language, formatting, consistency and compliance with drafting requirements under the AGLC. I would especially like to thank Sally for her efficient and timely assistance in bringing this seemingly neverending project to completion.

Thirdly, I would like to thank my employer, the owners of the Spotlight Group and in particular Don Hilton for allowing me the opportunity to complete this thesis while balancing my responsibilities to the Spotlight Group.

During the long process of completing this thesis, I unfortunately lost both my parents Dr Fred and Dr Bruria Bergman. I would like to acknowledge them both for instilling in me an appetite for academic development and achievement, without which I would not have undertaken this project.

Finally, my wife Esther, who supported me in completing this thesis over a period of eight years notwithstanding my work and other commitments, which left the raising of our three young children akin to the task of being a single mother. I therefore dedicate this thesis to my wife Esther for allowing me the opportunity to fulfil my dream of completing this thesis.
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Glossary of Terms, Abbreviations and Acronyms

The following terms, abbreviations, and acronyms have been used in this thesis:

- **ASIC**: Australian Securities & Investments Commission.
- **ATO**: Australian Taxation Office.
- **CA**: The *Corporations Act 2001* (Cth).
- **CAMAC**: The Corporations and Markets Advisory Committee set up in 1989 to establish a national scheme for corporations and financial markets to provide independent advice on the administration of, or changes to the relevant laws.
- **CAORs**: *Corporations Act* Oppression Remedies currently contained in Part 2F.1 of the *CA*, or the applicable oppression provisions contained in previous versions of the *CA* and the state based predecessors to the *CA*.
- **Ch 5C**: Chapter 5C of the *CA*.
- **CL**: Company Law or Corporate Law. The general law and statutory regulations dealing with companies.
- **CT**: A corporate trustee (ie a company that acts as a trustee of a trust).
- **MIS**: A managed investment scheme pursuant to Ch 5C of the *CA*, meaning a public unit trust for the purposes of this thesis.
- **Oppression or oppressive conduct**: Conduct generally by a majority against a minority that may be regarded at law as oppressive, unfairly prejudicial or unfairly discriminatory pursuant to statutory and general law principles.
- **Private UT**: A unit trust that is not a public unit trust and is used for private enterprise similar to a private company. A Private UT can conduct any type of business, including active operations and the investors may be actively involved as principals of the operating business. Note that Private UTs with more than 20 members may be required to register as a form of public unit trust pursuant to the MIS regulations of the *CA*.
• **Public UT:** A trust vehicle for collective pooled investment whereby the investor unitholders are passive and the trust does not generally operate an active business. Often attracts a larger number of investors and is required to register under Ch 5C (MIS) provisions of the *CA*.

• **RE:** A ‘Responsible Entity’ is a public company holding an Australian financial services licence issued by ASIC that operates an MIS.

• **SLE:** A Separate Legal Entity.

• **Thesis contention:** The contention is that *CAORs* should be amended to apply to UTs.

• **Thesis question:** Whether *CAORs* should be amended to apply to UTs.

• **Treasury:** The Commonwealth Treasury.


• **UT:** A unit trust that has been established whereby the trustee of the trust holds property on behalf of unitholders whose units provide essentially a fixed proportional entitlement or interest.

• **VLRC:** Victorian Law Reform Commission.
Chapter 1: Introduction

1.1 Context: Unit Trust vs. Company

Over the past few decades, unit trusts (‘UTs’) have become an increasingly attractive commercial vehicle worldwide. UTs have enjoyed international popularity as vehicles for managing pooled investment funds from passive investors in the form of public UTs (‘Public UTs’). In Australia, UTs have attracted even greater popularity as vehicles for private enterprise. On a basic level, a UT is a form of trust used for commercial purposes that is structured to allow investors to subscribe for units (ie a fixed interest) similar to shareholders who subscribe for shares in a company. UTs were devised to obtain the best features of both a trust and a company. While a UT is used for commercial purposes akin to a company, a traditional trust (from which UTs were developed) ‘was not in its origin and perhaps never has been primarily a device of commerce.’ Accordingly, UTs operate somewhat precariously alongside companies in the commercial world without the inherent structural characteristics attributable to companies.

In many senses, their structural differences have made UTs increasingly popular. While mimicking many attributes of companies sought by investors, UTs provide other potential benefits, predominantly with respect to their flexibility and

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1 See definitions of Public and Private UTs in chapter 2.2.
2 The true definition of the UT is a topic of debate discussed in chapter 2.2.
4 R P Meagher, W M C Gummow and K S Jacobs, Jacobs’ Law of Trusts in Australia (Butterworths, 6th ed, 1977) lxxvii. Note chapter 2.3 of this thesis discusses the importance of recognising the origins of the company as a trust in the form of a deed of settlement company.
5 As highlighted throughout, the UT is ‘regarded as an alternative to the company as an investment vehicle. And like the company, it has been used for commercial activities other than investment.’ Kam Fan Sin, The Legal Nature of the Unit Trust (Clarendon Press, 1997) 2. There are structural distinctions between the two, eg the right for unitholders to apply for redemption of units, or the common occurrence in Private UTs for unitholders to utilise loan accounts to reinvest profits for operating purposes (given the inability for UTs to retain profits, unlike companies). For example, see Vigliaroni v CPS Investment Holdings Pty Ltd [2009] VSC 428 (29 September 2009) ('Vigliaroni'), where the unitholders each had substantial loan accounts in which the value of the UT resided (rather than in the units).
6 Company traits are mimicked via the terms of its trust deed eg ownership of units akin to shares which can be bought and sold, voting rights, management mechanisms, or limited liability via the use of a corporate trustee (‘CT’). Note, however, that unlike shareholders, unitholders may be liable unless the trust deed is drafted correctly (JW Broomhead (Vic) Pty Ltd (in liq) v JW Broomhead Pty Ltd (1985) 3 ACLC 355 (‘Broomhead’)). See discussion in chapter 2.4.3.
taxation treatment. The various benefits associated with UTs means they are often recommended by corporate/tax advisors and presented as a desirable alternative to companies. However, from a legal perspective the question arises whether UTs are well structured to be ‘fit for purpose’ when being applied in commercial circumstances. A UT is generally able to provide these ‘corporate’ attributes without the same strict regulatory framework associated with companies, allowing a degree of unregulated flexibility often desired by stakeholders. Conversely, this lack of appropriate corporate regulatory framework also creates greater risks for stakeholders, especially in comparison to shareholders.

In Australia, the legal anatomy of a company is based on the Corporations Act 2001 (Cth) (‘CA’), a legislative instrument subject to extensive and continued reform as it attempts to provide stakeholders with a stable, efficient and just legal framework within which companies can operate. In contrast, the law applying to UTs is based largely on a combination of trust, equity and contract law. Despite the common applications of the CA to commercial enterprises in Australia, it has limited application to the administration and regulation of UTs. The only direct jurisdiction of the CA is in relation to a relatively small number of Public UTs that fall within the definition of a managed investment scheme

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7 Trust income and capital is distributed pre-tax because a trust is not a separate taxable entity. This means that receipts retain their character as they flow through a trust (as do capital gains discounts), whereas a company is a taxable entity. See G E Dal Pont and Donald R C Chalmers, Equity and Trusts in Australia and New Zealand (Lawbook, 4th ed, 2007) 694.
8 Other benefits include asset protection, as trust property cannot be used to satisfy the claims of creditors of a trustee, making a trading trust a useful means of protecting property in the event of insolvency. Ibid.
9 With the limited exceptions of managed investment schemes (‘MISs’) and listed Public UTs, which are governed to varying degrees under the Corporations Act 2001 (Cth) (‘CA’), discussed at length in chapter 3.4.
10 As Dal Pont commented:

   "Importantly, the government regulation and onerous statutory duties imposed on companies apply less strictly to trusts (although this varies according to the type, purpose and size of the trust). For these and other reasons the unit trust remains a popular means of effecting joint investment … and a common method of carrying on business."

   Dal Pont and Chalmers, above n 7, 688.
11 ie shareholders, directors, creditors, government etc.
12 As Spavold noted (in contrast to the position of unitholders): ‘The effect of these provisions [under the CA] and the common law derivative action is to provide the shareholder with comprehensive personal protection for his investment in the company from possible abuses of management.’ Guy C Spavold, ‘The Unit Trust: A Comparison with the Corporation’ (1991) 3(2) Bond Law Review 6, 249, 262 available at: <http://epublications.bond.edu.au/blr/vol3/iss2/6>.
13 In most cases, UTs are indirectly covered by the CA where a company acts as the CT, but the difficulty in translating this indirect jurisdiction from the CA to the UT via the CT is a significant consideration in determining the need for legislative intervention, as discussed in chapter 3.3.
14 The distinction between Public UTs and Private UTs is defined and explained in chapter 2.2.
Chapter 1: Introduction

(MIS). Moreover, private UTs (‘Private UTs’), which are commonly used as an alternative to private proprietary companies, are not directly covered by the CA.16

When disputes arise in circumstances where shareholders in companies are ordinarily subject to the jurisdiction of the CA, unitholders involved in similar disputes (such as oppression) may not come under the same jurisdiction. From a corporate/company law (‘CL’) point of view, UTs have largely been treated as a legal ‘orphan’—far removed from their equity law origins yet not yet fully included within the CL ‘family’.17 Summarising the legal status of UTs, Ford stated: ‘The fruit of this union of the law of trusts and the law of limited liability companies is a commercial monstrosity …’18 The predicament of uncertainty in which the UT finds itself provides the context for this thesis.

1.2 Oppression and Unit Trusts—Scope of Thesis and Relevance

To determine the scope of this thesis, consideration was given whether to limit the study to UTs or to include trusts or other structures generally (notably discretionary trusts and superannuation funds).19 In determining this provided too large a scope of research for the thesis, a broader comparative analysis of all types of trust structure is worthy of more substantive work. Interestingly, further research into other forms of trusts is likely to occur given the Victorian Law Reform Commission (‘VLRC’) was recently provided with terms of reference in September 2013 to explore the broader topic of ‘Trading trusts-oppression remedies’. The VLRC is due to report by February 2015;20 the relevance of the brief is discussed in chapter 8.5 of this thesis.

15 Even this application of the CA to Public UTs is limited to a specifically drafted and restrained chapter in the CA: Chapter 5C (‘Ch 5C’).
16 As discussed in chapter 6.6 of this thesis, more recent cases such as Vigliaroni have challenged the conclusion that the CA does not apply to Private UTs.
17 Sin refers to a UT as an ‘orphan’. Sin, Legal Nature of the Unit Trust, above n 5, 2. Sin’s publication deals predominantly with Public UTs.
19 For example, in Australia a variety of trusts are used for commercial purposes, therefore consideration was also given to whether trust stakeholders’ rights should be included.
As the author was interested in exploring the subject of UTs in comparison to companies, a narrower topic was sought to provide fertile area for research within the scope allowed. One of the starkest contrasts between the rights of stakeholders in UTs vis-à-vis companies is under circumstances of oppressive conduct. The topic of oppression therefore provided an appropriate subject for research.

‘Oppressive conduct’ refers to situations where minority shareholders (or in the case of UTs, minority unitholders) find themselves either in conflict with the majority, or in circumstances where the majority act towards the minority in a way that may be regarded, at law, as oppressive, unfairly prejudicial or unfairly discriminatory pursuant to statutory and general law principles.

To understand how oppressive conduct arises, it is necessary to appreciate the environment in which businesses are established, whereby business owners pay much attention to the operational aspects of their new company, but less thought goes into the legal structure of the venture. This is commonly left to accountants who base their decisions on tax implications, rather than considering how to manage other potential risks such as shareholder disputes. As Gerard Magner noted:

In all the excitement and ‘blue sky’ thinking, it is often the case that little attention is paid to what might happen if someone starts behaving in an unfair way to the other(s) or if the personal relationship between the owners simply breaks down. The law recognises that situations can arise in the conduct of the affairs of a company that might be unfair or reflect a breakdown in the relationship between the shareholders but which an aggrieved (usually minority) shareholder might not be in a position to do anything about without external assistance. Such external assistance is most commonly found in the ‘oppressive conduct’ and ‘just and equitable winding up’ provisions of the Corporations Act 2001.

The Corporations Act Oppression Remedies under Part 2F.1 of the CA (‘CAORs’) provide shareholders (particularly minority shareholders) with broad protection against unfair and oppressive conduct. Shareholders enjoy the protection of an extensive range of provisions under the CA, and CAORs stand out in providing protection to shareholders. This applies even where a company and its directors

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22 Chapter 5.5 provides a summary and explanation of the relevant provisions for relief in the CAORs.
have acted in accordance with the strict terms of the company’s constitution and the other provisions of the CA but the conduct is nevertheless deemed unfair, oppressive or prejudicial to the shareholders. The CAORs therefore provide shareholders with an overarching level of protection against such conduct, which imbues them with a basic level of certainty and confidence in investing capital into such structures.

Although unitholders have access to an array of other protections and remedies, they do not enjoy the same degree of protection afforded to shareholders under the CAORs, regardless of the fact they are just as vulnerable to oppressive conduct as shareholders and are thereby comparatively disadvantaged. While recent cases have challenged this hypothesis under specific circumstances, those decisions have been relatively controversial. Despite these cases highlighting the uncertainty in this area of law, to date there has been limited substantive commentary on the issue by the legal profession. Given the lack of research on the topic, this thesis specifically addresses the status of unitholders in circumstances of oppression. As oppressive conduct is more common in private rather than public vehicles, the analysis conducted will similarly focus on the predicament of unitholders in Private UTs (which provided the bulk of judicial decisions on the subject). The findings provide a valuable basis for the contention that reform of the CA is necessary to address the deficiencies in protections and remedies available to oppressed unitholders.

23 One of the main reasons why this thesis contends that the CA be amended—to remedy such discriminatory exclusion.
25 Indeed, the identification of numerous cases that have grappled with the question of whether CAORs can be applied to UTs supports the value of addressing the current ambiguities. It also reinforces the contention to amend the CA to clarify and broaden the legislation decisively. The first key case was in the Supreme Court of Victoria, Re Bodaibo Pty Ltd (1992) 6 ACSR 509 (‘Re Bodaibo’) and more recently, Wain v Drapac [2012] VSC 156 (26 April 2012) (‘Drapac’), which is currently under appeal.
26 Mason CJ’s endorsement in the preface to Sin, Legal Nature of the Unit Trust, above n 5, noted that although the legal profession exists in a ‘world awash with legal publication … [the] topic has been largely neglected by legal commentators.’ There are a number of reasons for this lack of research into unitholder rights generally, specifically in cases of oppression. Most notably, the application of UTs as a private trading vehicle is almost exclusively an Australian phenomenon. As oppression almost exclusively occurs in the domain of private entities, the UT oppression issue has lacked broader international attention.
1.3 Outline and Structure of the Thesis

This thesis contends that the CAORs should be amended to provide protection and remedies to oppressed unitholders. To establish the arguments that support the main contention and recommendations of this thesis, it is structured as follows:

Chapter 2 defines the subject of this thesis, namely UTs. This is especially important given the common misconception that UTs are easily defined, or are indeed capable of definition. The chapter also provides a history of the development of UTs in contrast to companies, which assists in overcoming a traditional misconception that UTs and companies—and the laws that apply to them—are inherently different. This leads to the inference that, at least in principle, CL concepts such as relief against oppression can be applied to UTs. The unique nature and application of UTs is also explored, specifically within the modern Australian context that culminated in trusts being used as a trading alternative to private companies. These distinctions are important to develop a clear understanding of why the issue of oppression of unitholders has largely escaped the focus of legislators. Finally, chapter 2 provides an analysis of the nature and structure of UTs to assist in understanding the framework within which unitholder rights operate in comparison to shareholder rights.

Chapter 3 considers the conceptual parameters within which CL principles apply to UTs and how case law has dealt with this issue. In addition, as CAORs are legislated under the CA, the manner in which the CA deals generally with UTs is reviewed. More specifically, how Public UTs are regulated under the MIS regime. This analysis is important in determining whether there are inherent obstacles against applying a CL principle such as relief against oppression to UTs, and the scope for the CA to extend jurisdiction over UTs.

This chapter also reviews the various areas in which the Corporations and Markets Advisory Committee (‘CAMAC’) suggests the MIS regime requires reform to address the problems encountered in regulating trusts under the CA. On the one hand, these proposed reforms highlight the difficulties in providing the CA with jurisdiction over trusts; on the other hand, they intimate the ability for the CA to adapt by addressing these issues. This has important implications when considering the scope of the CA to provide relief against oppression to unitholders.
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Chapter 4 provides a broad review of trustee obligations and unitholder rights in the CL context. This assists in understanding the scope for unitholders to seek relief in oppressive circumstances under trust law principles. This chapter also explores the comparative legal position with respect to directors versus trustee duties, and the rights of unitholders to seek direct action against directors of corporate trustees (‘CTs’) compared to the derivative action rights available to shareholders. This is intended to contextualise further the position of unitholders compared to shareholders in dealing with oppression.

The chapter also analyses the specific trust and contract law tools available to unitholders in dealing with oppressive conduct, including the ability to dissolve trusts, replace the trustee, or seek a buyout or redemption of unitholder interests. A particular focus is the doctrines of fraud on the power and fraud on the minority, which provide the general law basis to the statutory oppression remedies and their applicability to UTs. The scope for unitholders to access such remedies is crucial in considering whether unitholders are relatively disadvantaged compared to shareholders when dealing with cases of oppression. This theoretical analysis is illustrated via a case study involving a Private UT,27 which serves to demonstrate the deficiencies in unitholder rights when addressing oppression.

Chapter 5 provides a summary of the statutory provisions under the CA dealing with relief against oppressive conduct. The chapter then considers whether the provisions address circumstances of oppression in cases involving UTs, and whether unitholders have standing to apply for relief.

Chapter 6 reviews the case law dealing with the issue of whether CA ORs should apply to UTs. Specifically, it explores early cases that suggested such relief was available,28 followed by a series of cases that rejected this position.29 This created a subsequent shift in case law to provide limited relief via unitholders’ shareholdings in the CT.30 Lastly, recent cases arguing that the CA expressly allow for the provision of relief against oppression for UTs are discussed.31 The chapter also reviews the legal analyses for several of these cases, demonstrating different

27 See for example, Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd [2007] VSC 40 (23 August 2007) (‘Koko Black’).
28 See for example, Re Bodaibo (1992) 6 ACSR 509.
29 See for example, Kizquari Pty Ltd v Prestoo Pty Ltd (1993) 10 ACSR 606 (‘Kizquari’).
30 See for example, Vanmarc Holdings Pty Ltd v PW Jess & Associates Pty Ltd (2000) 34 ACSR 222 (‘Vanmarc’).
31 See, for example, Vigliaroni [2009] VSC 428 (29 September 2009).
approaches to the issue that serve to highlight the uncertainty raised by the case law.

Chapter 7 considers the possible direction of the law without statutory intervention as proposed by this thesis, which leads to the conclusion that reform of the CA is required to redress the uncertainty that will inevitably continue. The chapter concludes by suggesting a framework for legislative amendment to the CAORs to provide clear and express relief to unitholders, as well as the possibility of similar legislative amendments to the relevant Trustee Acts\(^\text{32}\) in addition to, or as an alternative to, CA intervention. The chapter highlights the Victorian Attorney-General’s request of the VLRC to consider the need for addressing oppression issues in trading trusts as a significant validation of the position of this thesis. The chapter summarises the arguments to support the contention that legislative reform is required to address the disadvantaged status of unitholders compared to shareholders in dealing with oppression. The chapter also considers reasons why such amendments to the CAORs have not occurred to date, and potential issues in implementing such changes in the current regulatory climate.

Chapter 8 provides the five main conclusions of this thesis, namely:

1. Unitholders should enjoy similar protections to shareholders given the common circumstances in which UTs and companies operate.

2. The historical argument that CL should not apply to UTs (given perceived legal distinctions between UTs and companies) is no longer appropriate given the modern application of UTs in Australia.

3. The laws that govern unitholder rights in circumstances of oppression under trust and contract law are inadequate in comparison to shareholder rights under the CAORs.

4. While recent cases have rejected the historical view that the CAORs cannot be applied to cases involving UTs, the correctness of these recent decisions is debatable. Nor do they deal with the full spectrum of circumstances in which oppression against unitholders may arise, thereby leaving the relevant law in a state of uncertainty and inadequacy.

\(^{32}\) Collectively, the Trustee Act 1925 (ACT), Trustee Act 1925 (NSW), Trustee Act (NT), Trusts Act 1973 (Qld), Trustee Act 1936 (SA), Trustee Act 1898 (Tas), Trustee Act 1958 (Vic) and Trustees Act 1962 (WA).
The reforms being proposed and applied to the *CA* relative to Public UTs illustrate the broad flexibility and increasing appropriateness of the *CA* in dealing with UTs generally, illustrating (for example) the potential for the *CA* effectively to extend its jurisdiction to govern both Public and Private UTs in cases of oppression.

By developing the arguments outlined above, this thesis attempts to prove its main contention that legislative amendment is merited to provide unitholders with satisfactory relief under the *CAORs* akin to the protection afforded to shareholders.
Chapter 2: Definition, Development and Nature of Unit Trusts

2.1 Introduction

An appropriate definition of UTs has long been the topic of significant legal debate. As UTs and unitholders are the focus of this thesis, it is essential to determine a definition for the purposes of clarity. This was done by reviewing the general laws applicable to UTs and various commentaries on them.

This chapter explores the origins, history and development of UTs, which highlights the common ancestry UTs share with companies internationally as well as in Australia. This provides an informative background in determining whether CL principles including CAORs should be applied to UTs. A review of the unprecedented development of Private UTs in Australia is useful to explain their uniqueness in the global context, and is a significant factor in explaining the lack of any definitive legislative reform to amend the CAORs to apply to UTs.

Exploration of the nature and structure of UTs is also essential to understand the general manner in which UTs operate within an oppressive context, as well as whether UTs can prove to be structurally compatible with the application of CAORs.

2.2 Challenges in Defining a Unit Trust

A UT is commonly understood to be a form of fixed trust in which the beneficiaries of the trust subscribe for units that fix their proportional interest in it. Legal commentators and jurists have generally assumed that the nature and definition of a UT are well-recognised concepts. For example, Wynn-Parry J described the phrase ‘unit trust’ as ‘an expression now well-known and

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33 In a similar fashion to shareholders receiving shares in a company, although with a series of inherent differences given the different nature of units in a trust compared to the nature of shares in a company, discussed further at chapter 2.4.

understood.' Nevertheless, the term is of relatively recent provenance and to define it is not as clear-cut as Wynn-Parry J stated. Ford commented: ‘the expression “unit trust” is a term of convenience and not a term of art capable of having legal consequences.’ In fact, UTs may ‘take as many forms as human ingenuity can devise.’ Given UTs are not constituted or registered pursuant to a legislative framework, the question of definition requires further exploration.

An early definition of a UT was provided by H A J Ford in 1960:

Basically, a unit trust is an arrangement whereby property is held on trust for a large number of investors. It is constituted by a deed regulating the rights, powers and duties of the parties to the arrangement. These parties are usually a manager, a trustee and investors, the last being commonly known as unit holders. The manager purchases property and vests the title to it in the trustee who, at the outset, holds [sic] on trust for the manager.

While Ford’s description accurately described a Public UT, UTs have since taken other forms that diverge substantially from Public UTs, most notably private trading UTs. Small businesses in Australia commonly operate under the control and management of a small number of joint venture owners, or Private UTs. Importantly, Private UTs have attracted little legal analysis compared to their larger counterparts, Public UTs. In fact, UTs are often incorrectly defined to include certain characteristics that are applicable to Public UTs but not accurate

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37 Ibid [1.7330].
38 Meagher and Gummow, above n 4, 59 [314].
39 As distinct from companies. One exception is Public UTs that are registered investment schemes or property trusts pursuant to the CA.
40 H A J Ford, ‘Unit Trusts’ (1960) 23(2) The Modern Law Review 129. This assumption continues largely unchallenged in certain commercial spheres. As Sin similarly stated in 1997: ‘At a collective level, the unit trust is a vehicle for collective investment.’ Sin, Legal Nature of the Unit Trust, above n 5, 132.
41 Although it is worth noting that subsequently, Ch 5C of the CA abolished the requirement for a dual manager/trustee structure.
42 Hughes summarised the distinction between Private and Public UTs as follows:

There are two types of unit trusts: private and public. Private unit trusts tend to be used to provide the basis for the operation of commercial enterprises. The fact that the participants hold units allows ownership to be transferred, with or without the consent of the other parties, in the event that, say, one of the parties wishes to retire from the business. On the other hand, public unit trusts are used to attract investment from the public in a variety of investment schemes.

for all UTs (specifically Private UTs operated in Australia). For example, UTs are often defined as:

- a device used solely for collective passive (as distinct from active) investment by unitholders;
- not conducting trading/operating businesses;
- including the right for unitholders to redeem units;
- excluding mutual covenants between unitholders; and
- requiring a split between manager and trustee as separate entities.

The above are all characteristics of Public UTs, the form of UT traditionally accepted on the international investment stage, but are not features common to all Australian Public UTs and certainly not applicable to Australia’s unique Private UTs.

In Australia, UTs (or categories of UTs such as property trusts or superannuation funds) are referred to under various pieces of legislation and ancillary regulatory or explanatory instruments. Primarily, these legislative instruments deal with...
federal and state revenue law\textsuperscript{52} but also address areas such as banking, finance and other industries that commonly deal with UTs.\textsuperscript{53} For the most part, such references assume the definition of a UT is commonly understood, therefore substantive definitions are not provided despite dealing extensively with the taxation treatment of, or transactions relating to UTs.\textsuperscript{54} Most significantly, in the context of this thesis, there is no definition of ‘unit trust’ contained in the \textit{CA}.\textsuperscript{55}

Slater QC cited references to UTs in taxation legislation,\textsuperscript{56} commenting:

These excerpts disclose two fundamental assumptions on the part of the author \textup{[of the legislation]}: that a trust is ‘an entity’, a concept that can only mean ‘a person in [tax] law’; and that ‘unit trust’ and ‘discretionary trust’ are normative terms, ie terms which identify a class of cases such that, of any given instance, it can be said whether it falls within or without the class. These assumptions are simply mistaken…\textsuperscript{57}

As Slater noted, it is a common misconception that UTs can be easily defined and over recent years, legal commentators have increasingly highlighted the

\textsuperscript{52} For example, \textit{Land Tax Act 2005} (Vic) s 3, or similarly, the \textit{Duties Act 2000} (Vic) s 3.

\textsuperscript{53} For example, \textit{Banking Act (No 132) 1974} (Cth) s 3, which defines a unit in a UT as a form of ‘security’, or \textit{Venture Capital Act 2002} (Cth) s 9.10.

\textsuperscript{54} For example, \textit{Income Tax Assessment Act 1936} (Cth) ss 102P, 102J, which deals with public or corporate UTs for the purposes of taxation. There are a range of references to UTs in both the \textit{Income Tax Assessment Act 1936} (Cth) and the \textit{Income Tax Assessment Act 1997} (Cth), but all these references assume that the basic concept of a UT is something that does not require even a simple definition. Later, for the purposes of defining the ‘corporate UT’ and ‘public trading trust’, which are effectively taxed as companies rather than trusts under Division 6B in Pt III of ITAA (1936), the \textit{Income Tax Assessment Act 1997} (Cth) s 202A merely states: ‘a “unit trust” means a trust to which a unit trust scheme relates and includes: (a) a cash management trust; (b) a property trust; (c) an arrangement declared by the Minister, by notice published in the Gazette, to be a unit trust for the purposes of this definition.’ The \textit{Income Tax Assessment Act 1997} (Cth) s 995-1 also refers to the topic of UTs in its definitions.

\textsuperscript{55} Nevertheless, some legislation that deals with UTs in more specific and substantive terms does attempt to formally define the ‘unit trust’, providing largely effective definitions for the purposes of the relevant legislation. For example, the \textit{Duties Act 2000} (Vic) s 3 describes a UT as ‘a right to any such right or interest … that entitles the beneficiary to participate proportionately with other unitholders in a distribution of the property of the trust on its vesting,’ and a UT scheme as any arrangement ‘made for the purpose, or having the effect, of providing, for persons having funds available for investment, facilities for the participation by them, as beneficiaries under a trust, in any profits, income or distribution of assets arising from the acquisition, holding, management or disposal of any property whatever pursuant to the trust …’

\textsuperscript{56} For example, \textit{Income Tax Assessment Act 1936} (Cth) s 202A.

\textsuperscript{57} Slater, ‘Unit Trusts: Law and Lore’, above n 35, 187.
complexities this presents when trying to apply laws to UTs. For example, Professors Glover and von Nessen stated:

[A] reference to ‘unit trusts’ may … be suggestive of a unity which does not exist. ‘Unit trust’ is not a term of art with agreed or authoritative reference in the general law. The term is not defined by statute. Indeed, it may be a legal solecism to make a priori assumptions about unit trusts.

Sin also noted: ‘It is … not illegitimate to ask whether the unit trust is a trust at all or whether the unit is some other kind of relationship that merely bears the logo of the trust.’

Nevertheless, wary of philosophising the UT out of existence, Slater pragmatically concludes that ‘perhaps all that can be said is that “unit trusts” are those in which the interests of beneficiaries are measured in “units”.’ For the purposes of this thesis, such a simple definition is not only workable, but is also likely to be technically the most appropriate. Accordingly, a broad definition of a UT has been adopted as ‘a trust that has been established whereby the trustee of the trust holds property on behalf of unitholders whose units provide a substantially fixed proportional entitlement or interest,’ bearing some similarities to shares in a company. As Tarrant noted: ‘few general assumptions can be made concerning UTs.’ Indeed, a simple definition is in fact the most accurate.

Discussions on the subject have tended to be within revenue law contexts for the purposes of defining the treatment of UTs (and their unitholders) pursuant to the relevant taxation or duty requirements.

Noting the discretionary elements sometimes found in trust deeds, the question is whether it is possible to define the UT, ie whether there are indeed common characteristics that provide the basis for a uniform definition of the UT, given the varying and often discretionary terms found in so called ‘unit trust deeds’, with reference to the revenue law cases of CPT Custodian Pty Ltd v Commissioner of State Revenue (2005) 79 ALJR 1724 (‘CPT Custodian’) [14]-[16] and MSP Nominees Pty Ltd v Commissioner of Stamps (SA) (1999) 198 CLR 494 (‘MSP Nominees’), 501-2.


Sin explores this topic at length. While he challenges the traditional understanding of the nature of UTs from a number of angles, his primary stance is that ‘the trust in the unit trust is contractual in creation.’ Sin, Legal Nature of the Unit Trust, above n 5, 4.


The exact nature of a unitholder’s interests should be distinguished from that of a shareholder in a company (which is a choice in action) but this has been the topic of much debate, discussed in detail in chapter 2.4.4.

2.3 History and Development of Unit Trusts

A common assumption among legal commentators is that there is a clear distinction between the nature of UTs to that of companies, and that the laws relating to them are similarly distinct. Until recently, this approach has been responsible in part for maintaining the apparent reticence by legislators and the judiciary to extend company legislation to include UTs. Even when the CA was extended to cover Public UTs, it occurred in a contained and limited manner.

As the objective of this thesis is to establish that CAORs should be extended to include UTs, it is first necessary to consider the history and development of UTs, not only to understand their nature more fully, but also to demonstrate that the distinction between UTs and companies has been overstated. This supports the inference that CL concepts such as CAORs are in fact compatible with the structure and principles that define UTs. Further, an analysis of the history and unique development of Australian Private UTs is particularly helpful in explaining why the legislature has to date failed to recognise clearly the need for CAORs to be applied to UTs.

2.3.1 Origins and Development of Commercial Trusts

When considering the application of CL principles such as CAORs to UTs, it is important to revisit the somewhat obvious fact that a UT is not a company. Rather, ‘a unit trust is first and foremost a trust,’ and an institution ‘devised, nurtured and developed within the exclusive jurisdiction of equity.’

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65 Discussed further in chapter 2.4.
66 For example, Cachia v Westpac Financial Services Ltd (2000) 170 ALR 65.
67 Discussed in chapter 3.3.
68 Slater wrote: ‘Tracing the origins of the “unit trust” helps to illuminate an understanding of the concept [of the UT], but does not assist in arriving at a definition.’ Slater, ‘Unit Trusts: Law and Lore’, above n 35, 189.
70 Dal Pont and Chalmers, above n 7, 418. The courts of equity evolved, as their name suggests, to allow for equitable remedies where the common law, which dealt only with matters of law and were subject to strict protocols, would otherwise result in an unfair decision being handed down; A R Fullarton, A Critical Analysis of Tax Avoidance Schemes in Australia: A Paper that Examines Taxation Avoidance Schemes in Australia and the Legislation Aimed at Combating Such Schemes; and the Response to Australia's Anti-avoidance Legislation by Its South Pacific Neighbours (Curtin University of Technology, November 2003). Trusts descended from equitable ‘use’. The use enabled property owners to ‘evade inconvenient consequences arising from holding land.’ See Simon Tait, ‘Unitholder Agreements’ (2006) 40(10) Tax Institute of Australia 27. The duty was
By the 17th century, trusts were already an established part of asset protection and tax planning in Britain, and became relatively accepted concepts by the late 19th century. During the 20th century, trusts expanded from being principally landholding and estate-planning vehicles into instruments of commercial activity. Due to this versatility, the trust ‘leaped out of the family circle and … ventured into the commercial arena.’ Nevertheless, as Agardy commented: ‘[t]he trading trust is an artificial device and its use in trade and commerce is innovative.’ Given its equitable origins, the compatibility of the trust to the commercial field was not seamless. As noted in Jacobs’ Law of Trusts, ‘… the trust was not in its origin and perhaps never has been primarily a device of commerce.’

The commercial trust has likewise appeared in various forms in many countries that have adopted a UK style legal system, although in other jurisdictions, including many European countries trusts are barely understood at all.

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51 By the late 19th century, courts were empowered ‘to issue not only legally correct remedies but also to ensure they are fair remedies under the rules of equity,’ Fullarton, above n 70, 8.
52 Dal Pont and Chalmers, above n 7, 420. As Dal Pont and Chalmers comment: ‘[a] salient aspect of the modern-day trust has been its penetration into commercial life. It has become a popular vehicle for management and commerce. Whereas the 19th century use of trusts was principally for the retention and redistribution of wealth within the family, the 20th century expansion of the use of trusts has been predominantly in the commercial field.’ Ibid, 687.
53 Sin, Legal Nature of the Unit Trust, above n 5, 1. Commentators have noted that the most dramatic and novel use of trusts, in recent terms, continues to be in the commercial area. See John H Langbein, ‘The Secret Life of the Trust: The Trust as an instrument of Commerce’ (1997) 107 Yale Law Journal 165 cited by Dal Pont and Chalmers, Ibid, 420. The manipulation of equity to achieve commercial objectives not otherwise available at common law has a very long history, dating back to the origins of the trust. See, for example, Octavo Investments Pty Ltd v Knight (1979) 4 ACLR 575.
55 See, for example, the discussion on the rule against perpetuities in Public UTs by Glover and von Nessen, outlining one these pieces of historic equitable ‘baggage’, Glover and von Nessen, above n 60.
57 As a general rule, those countries that derived their legal systems from England as a result of British settlement have the trust as part of their legal machinery. Ford and Lee note that ‘some other countries, while not deriving the main body of their law from England, have imported the trust, sometimes under pressure of commercial practice’ and that ‘[c]ountries which adopted the trust as a transplant had to pass legislation stating principles which in Australian jurisdictions remain largely enshrined in case law.’ Ford and Lee, Principles of the law of trusts, above n 36, [1100].
58 Sin, Legal Nature of the Unit Trust, above n 5, 43. See also Steven L Schwarz, ‘Commercial Trusts as Business Organizations: An Invitation to Comparatists’ (2003) 13(3) Duke Journal of Comparative & International Law 321. Given the inconsistent understanding of trusts in the international arena, an effort was made to provide some structure to dealing with these strange devices through the 1985 Hague Convention on the Law Applicable to Trusts and on their
2.3.2 The Early Unit Trust—Deed of Settlement Company

The origins of UTs and companies are closely interwoven, beginning with a common equitable ancestry. Gower expressed ‘the limited company as the product of the marriage of the trust and the corporation and the unit trust as “the offspring of a later union between the trust and the limited company”’. Indeed, the earliest company (the deed of settlement company) was a form of UT. In describing the historical and legal framework that created the UT, Sir Anthony Mason CJ remarked:

the unit trust was an ingenious response to the demands of commerce. The unit trust was a response to the demand for a suitable investment vehicle. It is a hybrid, resting partly in trust and partly in contract and… the unit trust has close historical links with the law of corporations, notably through the deed of settlement company.

While commentators’ opinions differ as to when the first UTs appeared, it is submitted that the establishment of the deed of settlement company provides the answer. The deed of settlement company was conceived in the mid-18th century as a reaction to the restrictions on obtaining company registrations under the Bubble Act 1720 (6 Geo I. c. 18) (‘Bubble Act’), thus allowing the benefits of incorporation without actual incorporation. In all respects, the structure of the
The deed of settlement company resembled a UT. This structure became the model for registered companies under legislation enacted in the mid-19th century.

While the term ‘unit trust’ did not become popular until the 1930s, the deed of settlement company was in fact the original UT.

This common ancestry between UTs and companies is important in understanding subsequent judicial discussion about cross-pollination between UT and CL principles. As Sir Anthony Mason remarked, ‘Lawyers who do not have an eye to legal history may not appreciate just how extensive was the role of the trust in the emergence of the limited liability company.’

The restrictions imposed by the Bubble Act that precipitated the creation of the deed of settlement company were largely removed when the Act was repealed in 1825, although deed of settlement companies continued as a popular form of business organisation until the introduction of registered companies in 1844.

Registration of limited liability companies became easier and more defined under...

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Note: The text continues with more detailed historical and legal analysis, including references to specific legal cases and authorities.
Chapter 2: Definition, Development and Nature of Unit Trusts

legislation\(^{91}\) and subsequently, UTs in the form of deed of settlement companies quickly became redundant. Not long after, the earliest references to UTs (as a distinct creation from deed of settlement companies) began to emerge in a simple form, both in the UK\(^{92}\) and the US (in the form of the ‘Massachusetts Trust’).\(^{93}\) However, these UTs (which operated as simple Public UTs) walked a delicate line to avoid falling within company legislation requirements.\(^{94}\) One of the fundamental distinctions between UTs and companies established during this early period was that contract played no role between the stakeholders in a UT\(^{95}\)—a position that has been challenged more recently.\(^{96}\)

The key distinctions that attracted investors to these early Public UTs was their ability to redeem units,\(^{97}\) and the perception that the investment approach taken by trustees was more conservative and safer than with companies.\(^{98}\) In the early 20th century, the introduction of the Public UT structure that provided a separate manager from the trustee aimed to strengthen the perception of these managed investment trusts as safe investment options.\(^{99}\) These early Public UTs developed into the global managed funds that now dominate the international market in pooled diversified investment structures. While the growth of such funds has been

\(^{91}\) In the form of the *Joint Stock Companies Act 1840*, *Joint Stock Companies Act 1844*, *The Limited Liability Act 1855*, *Joint Stock Companies Act 1856*, culminating in *The Companies Act 1862*.

\(^{92}\) Slater, ‘Unit Trusts: Law and Lore’, above n 35, 188.

\(^{93}\) UTs were referred to as a ‘Massachusetts Trust’ in light of an early case. As a result, a US business trust today is often called a ‘Massachusetts Trust’ in legal circles. See *Morrissey v Commissioner of Internal Revenue* (1935) 296 US 344 <http://supreme.justia.com/cases/federal/us/296/344/case.html>. In the late 19th century and early 20th century, the Massachusetts Trust was commonly used as an investment vehicle for rail, gas and other utility assets, given the lack of restrictions on capital limits (as these businesses required massive capital raising) and the uncertainty whether the underlying assets might be deemed prohibited real estate assets for the purposes of CL. Sheldon A Jones, Laura M Moret and James M Storey, ‘The Massachusetts Business Trust and Registered Investment Companies’ (1988) 13 *Delaware Journal of Corporate Law* 421, 427.

\(^{94}\) In light of the prohibition against an illegal association. Two early seminal cases dealt with the subject, namely *Sykes v Beadon* (1879) 11 Ch D 170 and *Smith v Anderson* (1880) 15 Ch D 247. Sin noted that the UTs in these cases closely resembled the Deed of Settlement Company. For a detailed discussion on these early UT cases, see Sin, *Legal Nature of the Unit Trust*, above n 5, 24–28.

\(^{95}\) As distinct to the statutory contract applied by CL to companies. This was a central feature of two early seminal cases dealt with the subject, namely *Sykes v Beadon* (1879) 11 Ch D 170 and *Smith v Anderson* (1879) 15 Ch D 247.

\(^{96}\) As discussed in chapter 2.4.4, this has implications for the historical position that companies and trusts and the laws that govern them are fundamentally different.

\(^{97}\) Sin noted that the redemption procedure at this infant stage of the UT was very complicated, but it significantly distinguished the joint stock company, which was supposed to continue indefinitely. Sin, *Legal Nature of the Unit Trust*, above n 5, 26.

\(^{98}\) Ibid 23.

\(^{99}\) Ibid 30. Indeed, Australia dropped the need for this split structure for Public UTs relatively recently pursuant to the *Managed Investments Act 1998* (Cth), as discussed in chapter 2.3.3.
significant over the last century, Public UTs have at times experienced mixed fortunes and suffered steep declines in popularity, particularly in times of economic downturn when investors suffered losses. Invariably, each downturn that results in investor losses has prompted reforms to the regulatory regime governing international Public UTs.\(^{100}\)

### 2.3.3 Unit Trusts in Australia

Given the inextricable historical links between the Australian legal and commercial landscape with the UK, it is not surprising that the origins and development of UTs in Australia mainly followed the UK’s model and trends.\(^{101}\) Accordingly, the earliest vehicle referred to as a ‘unit trust’ (apart from the deed of settlement company) was formed in 1936 as the predictably named ‘First Australian Unit Trust’.\(^{102}\)

As Sin explained, the Australian UT was imported from the British, with one significant distinction: ‘there was no wholesale import of the British regulatory regime’ into the Australian regulatory regime dealing with unincorporated securities such as UTs.\(^{103}\) In particular, Sin observed that ‘Australian UTs have never been made subject to restrictions on underlying investments.’\(^{104}\) This flexibility, along with sustained economic prosperity in the Australian economy in the decades following the Second World War, provided the catalyst for what Ford

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\(^{100}\) For example, the regulation of UTs underwent a major overhaul as with all financial services in the UK with the introduction of Financial Services Act 1986 (UK). This became the precursor to the Australian legislative regime for MISs.


\(^{102}\) Acquired by ANZ Bank in 1983 and renamed ANZ Funds Management Ltd. See Slater, ‘Unit Trusts: Law and Lore’, above n 35; see also Sin, PhD Thesis, above n 81, 52; B T Mees, M S Wehner and P F Hanrahan, ‘Fifty Years of Managed Funds in Australia’ (Preliminary Research Report, Centre of Corporate Law and Securities Regulation, 1 July 2004, 9 <http://www.law.unimelb.edu.au/1170A300-7711-11E2-B87B0050568D0140> ). Another UT established shortly after the First Australian UT was Second Provident UT, established in 1939. This UT was subject to one of the formative Australian cases, *Charles v Federal Commissioner of Taxation* (1954) 90 CLR 598 (‘*Charles v FCT*’), dealing with the nature of a unitholder’s interest in a UT and the taxation treatment of any profits derived therefrom.


\(^{104}\) Ibid.
referred to in 1960 as ‘the recent proliferation’ of UTs in Australia.\textsuperscript{105} This soon gave rise to a significant disparity between the popularity of UTs and the lack of relevant legislation to govern them. The first regulation of Public UTs (as part of broader investment regulation) took effect in 1954.\textsuperscript{106}

With increased regulatory protection, but without the investment restrictions of the UK relating to property, the Australian Public UT industry continued to grow throughout the 1960s and 1970s.\textsuperscript{107} Importantly, the taxation benefits that UTs provided in Australia became better appreciated, facilitating further growth in both Public UTs and Private UTs.\textsuperscript{108} Given these taxation benefits, Slater noted: ‘in the late 1970s, some mining and other property companies established related unit trusts as a means of passing income to investors without it first being subjected to company tax.’\textsuperscript{109} As Public UTs continued to boom throughout the 1970s and 1980s, it took the Commonwealth Treasury (‘Treasury’) a relatively long time to appreciate the novel taxation structures businesses were deploying by their use. While some of the taxation benefits enjoyed by UTs were eventually removed or diminished by Treasury and the Australian Taxation Office (‘ATO’),\textsuperscript{110} the changes were not enough to curb enthusiasm for Public UTs, which continued to grow in size and number.

\textsuperscript{105} Ford, ‘Unit Trusts’, above n 40, 129. By 1959, there were about 80,000 investors investing approximately AE45 million in UTs, and by 1965, this number had more than doubled to AE125 million. A substantial industry was born and since the late 1950s, it has even been represented by its own industry group, the Unit Trust Association of Australia. See Mees, Wehner and Hanrahan, above n 102, 15.

\textsuperscript{106} Sin, PhD Thesis, above n 81, 61. An interesting observation about the legislation was that the Victorian model made the provision of an independent trustee (who was separate from the manager) a mandatory requirement. Sin observed this requirement can be distinguished from the relevant British legislation, where no such requirement existed. According to Sin, this was presumably because in the UK, separate managers and trustees were assumed to occur as an inherent part of the British UT structure. As discussed further in chapter 2.3.3, parliament in fact removed the requirement for separate trustee and managers in the more recent 1998 CL reforms. This illustrates a substantial distinction between the manner in which UTs have been viewed in Australia compared to the UK.

\textsuperscript{107} In the public sphere, it was property UTs that gained the most prominence. As Slater noted: ‘In 1970, Lend Lease established the General Property Trust, effectively as a vehicle for public investment in property it had developed and over which it retained management rights. These new versions of “unit trusts” had greater flexibility of reinvestment and, in the case of GPT, a liquidity facility arising from a listing on the stock exchange.’ Slater, ‘Unit Trusts: Law and Lore’, above n 35, 188.

\textsuperscript{108} For a summary of the tax benefits, see Spavold, above n 12, 252.

\textsuperscript{109} Slater, ‘Unit Trusts: Law and Lore’, above n 35, 188.

\textsuperscript{110} As Spavold commented:

Treasury have sought to diminish the benefit of the unit trust by the introduction of the imputation system and the franking credits ... The franking system only eliminates corporate taxation if the taxpayer has other taxable income against which to offset the ‘franking tax credits’. Any income tax benefit available to unitholders of UTs is removed in relation to income earned from all types of UTs.
The market collapses in the late 1980s prompted a rush on redemptions that could not be met due to illiquidity, leading to a complete review of the Public UT regime in Australia.\footnote{Sin described the ‘…fraud, dishonesty, misleading advertisement, inaccuracy, and inept timing of valuation of trust assets, lack of independence of investment advisers, and the mismatch between the long term investments and short term redemption.’ Sin, \textit{Legal Nature of the Unit Trust}, above n 5, 45.} On 1 July 1998, reforms were finally enacted in the form of the \textit{Managed Investments Act 1998} (Cth), implementing many of the proposals in the form of the new Chapter 5C (‘Ch 5C’) of the Act.\footnote{Dal Pont and Chalmers, above n 7, 689.} Ch 5C created a legislative regime for collective investments unique to Australia.\footnote{Tehani Goonetillek commented on the state of the current managed fund industry in Australia: On a global scale, Australia’s funds management industry is the fourth largest, being valued at AS$1.7 trillion in 2010, and is expected to reach nearly $2 trillion by 2015. Its importance to the economy is demonstrated by the fact that the current value of funds under management is ‘20 per cent larger than the market capitalisation of the entire domestic equity market (AS$1,403 billion) and represents around 135 per cent of the country’s nominal GDP’. No small player, Australia’s position in the world market is ahead of the United Kingdom ($729 billion), and its major trading partners–Hong Kong ($583 billion), Singapore ($600 billion), and Japan ($661 billion). Tehani Goonetillek, ‘Obligations and liabilities of the key players in managed investment schemes: Contentious questions arising from Trio Capital’ (2011) 29 \textit{Companies & Securities Law Journal} 419.} Accordingly, through what is now Ch 5C of the present \textit{CA}, Public UTs have been brought within the jurisdiction of CL and the industry has continued to experience significant growth.\footnote{Spavold, above n 12, 252-3.}

During the difficult economic climate of the late 1980s to early 1990s, a number of cases emerged from the financial crisis faced by Public UTs.\footnote{As with the Global Financial Crisis of 2007, discussed below.} Until then, the issues raised by these cases had been relatively unexplored within the context of UT law. Thus, it soon became apparent that the principles of trust law (whether contained in equity or covered within the various state based Trustee Acts) were inadequate to deal with what were effectively quasi-CL issues. Conversely, CL had already dealt with many of the issues that UTs encountered—the courts therefore looked to CL principles to guide their decisions in dealing with UT issues.\footnote{Sin, \textit{Legal Nature of the Unit Trust}, above n 5, 45.} The application of CL principles in the UT arena was justified by certain jurists on the basis ‘that both the UT and the registered company are siblings of
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the same parent, the deed of settlement company.” Nevertheless, there has been significant judicial debate over the application of CL principles to UTs.

The realisation among taxation practitioners of the benefits of UTs led to the quiet emergence of Private UTs in Australia in the 1970s. The development of Private UTs was, and continues to be, unique to Australia given our particular taxation and corporate regulatory regime compared to other jurisdictions. The novel application of the UT structure as a private commercial trading vehicle was exemplary of what Kitto J once described as ‘an antipodean mutation’. Despite their growing popularity, Private UTs, unlike their larger counterparts (Public UTs) remained largely under the radar of public regulatory scrutiny. While the high profile financial failures of Public UTs resulted in subsequent moves by the Commonwealth Government to introduce further regulation under the auspices of the CA, Private UTs have to date been excluded from such moves.

It is pertinent to consider the reasons for the conspicuous omission of Private UTs within the jurisdiction of the CA, as well as the lack of any attempts to incorporate them into the legislation (including the application of CAORs). It is suggested that the reasons for such exclusion are multiple, including the perceived lack of financial materiality that Private UTs represent in comparison to the immense managed investment industry, and accordingly the comparatively lower public profile of cases involving disaffected unitholders. The reforms that prompted Public UTs to be incorporated into the CA were instigated in response to the momentum of a global regulatory trend that did not apply to Private UTs. A further reason is the complex legal challenge posed by attempting to ensure compatibility between the provisions of the CA and Private UTs, which are

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118 See chapter 3.
119 For example, in O’Brien v Komesaroff (1982) 41 ALR 255, the case involved a breach of copyright claim against a lawyer (Komesaroff) in relation to his unlawful use of precedent trust deeds from the early 1970s. During that era, taxation practitioners such as Mark Leibler of well-known tax law firm Arnold Bloch Leibler began to promote the benefits of private trusts generally, especially discretionary trusts, but also UTs as a tax vehicle for private commercial use, as distinct from a vehicle for public collective investment.
122 Specifically by bringing the Public UT under the scrutiny of the CA.
essentially unregistered private trusts. This was achieved in part with respect to Public UTs by requiring onerous registration conditions and a raft of changes to the CA. It is likely the legislature neither had the desire nor perceived the need to enter into an arguably more complex project for the sake of regulating Private UTs.

Notwithstanding that Private UTs—unlike Public UTs—have largely travelled under the radar (given they did not involve large groups of unitholders or considerable material financial losses, as is invariably the case with private disputes), this lack of public profile does not absolve the need for reform for Private UTs. In particular, this thesis demonstrates there is clearly a need for their further regulation under the relevant areas of the CA such as the CAORs.

2.4 Nature and Structure of Unit Trusts

In considering the rights of unitholders, it is first essential to understand the basic nature and structure of UTs. As emphasised earlier in this chapter, a UT is fundamentally a trust onto which many attributes of a company have been superimposed. Sin commented the nature of a UT ‘can only be meaningful in terms of its points of resemblance to and difference from the trust and the company.’ Accordingly, it is important to consider how the nature of a UT differs from a company in determining the rights of unitholders generally, and with respect to oppression in particular.

2.4.1 Structure of Unit Trusts

A UT is a trust in which beneficial entitlement is held proportionally divided into units, which are issued to the unitholders. As it is a trust, a UT is not a legal

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123 Registration involves significant amendments to the structure of the Public UT, and satisfaction of a range of regulatory requirements for Public UTs stipulated by the CA.
124 In fact, this thesis submits that the incorporation of the Public UT into the CA has been only partially successful, and there remains a high degree of legal uncertainty relating to a range of issues facing the regulation of MISs. See chapter 2.4.3.
125 It is interesting to compare CA reform to the area of tax reform. The Federal Government attempted to introduce an ‘entity taxation regime’ in 2000 that would have taxed trusts (including UTs) as companies. The backlash to the proposal (compounded by the introduction of the GST) caused the government to back down. Agardy, ‘Aspects of Trading Trusts’, above n 18, 2.
126 Sin, Legal Nature of the Unit Trust, above n 5, 3.
127 Spavold summarised the basic structure of a UT as follows:

The unit trust is constituted by a trust deed. Under the terms of the trust deed, certain property is to be held in trust by the trustee for the benefit of persons known as ‘unitholders’. Each unitholder owns a ‘unit’ in the trust fund. The beneficial interest in the trust is made up of a number of units. Each unit
person (unlike a company), and requires a trustee (who enjoys a right of indemnity) to act on behalf of the beneficiaries to own and deal with the trust’s assets. Given the potential liability of trustees and the suitability of company structures to facilitate decision-making functions, a company is commonly used as trustee of UTs. In contrast to the structure of companies, trustees are protected by trust law via a right of indemnity against trust assets. Accordingly, while the UT structure exhibits a degree of asset protection against third parties, unlike a company, creditors may in certain circumstances access the assets of the UT via the trustee’s right to indemnity.

The trust deed is the fundamental constituent document that sets out the parameters of a UT and is substantially able to dictate the exact nature and operation of the relevant UT. Accordingly, any determination as to the rights or obligations of parties such as unitholders requires a review of the specific terms
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contained in the relevant trust deed. Importantly, the trust deed has even greater significance (as virtually the sole determinant of unitholder rights) than the company constitution, given the additional effect of the CA on shareholder rights.

The structure of UTs differs between Private UTs and Public UTs. The structure of a Public UT often includes the use of a separate management entity that is charged with managing the trust assets and is independent of the trustee. Further, the overlay of the CA provisions dealing with MISs has structural relevance to the nature of Public UTs, given the requirements it imposes.

Private UTs commonly employ a ‘unitholders’ agreement’ to which the unitholders and trustee are all parties. These unitholders’ agreements mirror the shareholders’ agreements commonly found in proprietary companies. Where a unitholders’ agreement has been entered into, it will naturally have a significant impact on the relationship between unitholders. When considering the rights of unitholders in the context of oppression, the unitholders’ agreement will be of primary consideration to the extent that it provides any express contractual rights relevant to the circumstances.

Importantly, any UT, as a trust, is subject to the laws of equity and the statutes dealing with trusts such as the Trustee Acts found in each state. The equitable

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135 UT deeds commonly cover topics such as process for becoming a unitholder and receiving units, rights of the unitholders, the appointment, role and replacement of the trustee, the ability to sell or redeem units, the rights of unitholders to income and capital for taxation and accounting purposes, the voting rights of unitholders, appointment and operation of the committee that controls the UT on behalf of the unitholders, matters relating to vesting of the trust, and other provisions which mirror provisions found in a company constitution (such as access to trust records, voting processes, etc). Slater provided a list of ‘exemplary’ provisions commonly found in the trust deed of UTs. Slater, ‘Unit Trusts: Law and Lore’, above n 35, 190.

136 Explored in more detail in chapter 2.4.2.

137 Prior to the introduction on 1 July 1998 of the current framework contained in Ch 5C, the applicable CL (the precursor to the CA) required investment schemes to have both a trustee and a manager (as was the traditional structure of public unit investment trusts globally). The relationship between them and the division of their responsibilities was unclear, therefore the requirement for the manager and trustee to be independent entities was abolished for Public UTs under the CA in amendments introduced in 1999. Nevertheless, this structure remains popular for managed investment UTs in Australia, and particularly abroad.

138 Discussed further in chapter 3.4.

139 In addition to the UT deed.

140 In which joint venture investors seek to apply additional contractual rights and obligations that are beyond those covered in the constitution or under the CA. The benefit of the unitholders’ agreement likewise provides the ability to contract certain terms that may be unwieldy if inserted into the trust deed.

141 See for example Arhanghelchi v Ussher [2013] VSC 253 (‘Arhanghelchi’).

142 For example, the State of Victoria’s Trustee Act 1958 (Vic).
principles that were established over time, which have been partially reflected through the Trustee Acts, provide the trust law foundations for determining the rights and obligations of beneficiaries and trustees and the basis upon which courts may intervene in these relationships where disputes arise (for example, in cases of alleged oppression).  

2.4.2 Nature of Unitholder Interest

A unit held under a trust deed is fundamentally different in nature from a share in a company, which confers upon the holder no legal or equitable interest in the assets of the company but is a separate piece of property. By contrast, in Charles v FCT, the High Court of Australia confirmed that the trust deed of a UT ‘confers a proprietary interest in the property’ of the trust, so that the beneficiary enjoys rights to the underlying nature of the assets in the trust. The inherent nature of a UT as a trust in which the beneficiaries have a fundamental beneficial right to the trust assets provides a series of important structural, accounting and taxation ramifications, namely that there is no beneficial separation between the beneficiary/unitholder and the trust assets. This has the valuable benefit of allowing income to stream to unitholders of a UT without being taxed (unlike with companies).

The exact nature of a unitholder’s interest in the assets of a UT has been an area of considerable debate within the taxation context and has provided fertile ground

\[\text{\begin{footnotesize}143\end{footnotesize}}\]

A detailed discussion of the rights and obligations under the relevant equitable and statutory provisions is outlined in chapter 4.2.2.

\[\text{\begin{footnotesize}144\end{footnotesize}}\]

Dal Pont and Chalmers, above n 7, 687.

\[\text{\begin{footnotesize}145\end{footnotesize}}\]

(1954) 90 CLR 598, which considered the taxation status of income received by unitholders. The Court held:

A share confers upon the holder no legal or equitable interest in the assets of the company; it is a separate piece of property; and if a portion of the company’s assets is distributed among the shareholders the question whether it comes to them as income or as capital depends upon whether the corpus of their property (their shares) remains intact despite the distribution … But a unitholder under the trust deed before us confers a proprietary interest in the property which for the time being is subject to the trust of the deed …; so that the question whether moneys distributed to unitholders under the trust form part of their income or of their capital must be answered by considering the character of those moneys in the hands of the trustees before the distribution is made.

at 609.

\[\text{\begin{footnotesize}146\end{footnotesize}}\]

In contrast to the nature of the company.

\[\text{\begin{footnotesize}147\end{footnotesize}}\]

Other than the fact that the trustee is holding such assets on the beneficiary’s behalf.

\[\text{\begin{footnotesize}148\end{footnotesize}}\]

Company income is first taxed in the company before being distributed to shareholders (albeit with the relief provided by the introduction of the franking credit regime to avoid double taxation for shareholders). The flow through taxation attribute of trusts is sometimes referred to as the ‘trust conduit theory’, which assumes that the trust is merely an open conduit for the beneficiary to receive the benefit of the trust assets. For a discussion on the ‘trust conduit theory’ and its prevailing merit, see David Schabe, ‘The Trust Conduit Principle: A Foundationless Theory’ (1999) Journal of Australian Taxation 194.
for conflict between taxpayers and revenue authorities. Indeed, it has provided the
bulk of judicial, professional and academic discussion regarding UTs in
Australia,\(^\text{149}\) highlighting the fact that UTs remain very open for continued
consideration and legislative reform.\(^\text{150}\) For example, as recent revenue cases have
emphasised, it is simplistic to assume that all UTs are simply fixed trusts in which
only the unitholders have rights in the trust assets.\(^\text{151}\) Tarrant noted that the High
Court decision in *CPT Custodian*\(^\text{152}\) was “a timely reminder that the property rights
created from one unit trust to another can vary considerably. Very few general
assumptions regarding the rights of unitholders can be made.”\(^\text{153}\)

Beyond taxation, the beneficial relationship of unitholders to UT assets has wider
implications for unitholders’ rights and obligations. For example, in contrast to a
shareholder’s limited interest, the broader nature of a unitholder’s interest in a UT
led to the question of whether the interest of a unitholder in the assets of a UT was
a caveatable interest for the purpose of property law in *Costa & Duppe Properties
Pty Ltd v Duppe* (‘*Costa v Duppe*’).\(^\text{154}\) The case reaffirmed a common theme in
UT cases, namely that there can be no generalisations for concluding whether a

\(^{149}\) See for example, as noted, *Charles v FCT* (1954) 90 CLR 598, whether capital gains derived by
trust were normal income in hands of unitholder; *Costa v Duppe* [1986] VR 90, caveatable
interest—whether unitholder has proprietary interest in trust assets; *Comptroller of Stamps v
Yellowco Five Pty Ltd* (1992) 91 ATC 2022, stamp duty on transfer of property by sole unitholder
to trustee; *MSP Nominees* (1999) 198 CLR 494, stamp duty—redemptions of units by respective
unitholders not receipt or acquisition by remaining unitholder of any beneficial interest; *Kent v SS
‘Maria Luisa’ (No 2)* (2003) 130 FCR 12, whether unitholder or trustee liable for negligence claim
linked to trust asset; *Arjon Pty Ltd v Commissioner of State Revenue* (2003) 8 VR 502; *CPT
Custodian* (2005) 79 ALJR 1724; *Commissioner of State Revenue v Karingal 2 Holdings Pty Ltd*
(2005) 8 VR 532, land tax—whether a sole unitholder had an equitable estate in land owned by the
UT.

\(^{150}\) The key question in these cases is whether unitholders, who (arguably) have an interest in the
underlying assets of the UT to the extent that the unitholder can be considered the ‘owners’ of the
trust assets. See Nicholas Wiley, ‘Is the Sole Unitholder in a Unit Trust the “Owner” of Trust

\(^{151}\) Most notably, the rights of the trustee were shown to be possible challenges to that concept, in
addition to the common drafting in UT deeds that often allows a level of discretion to trustees of
the trust; in particular the ability to issue more units. *CPT Custodian*, [48]; See also *Colonial First
State Investments Ltd v FCT* [2011] FCA 16; *Chief Commissioner of Stamp Duties (NSW) v
‘Unit Trusts: Law and Lore’, above n 35, 192. See further: Tara Lucke, Matthew Burgess and
Liam Polkinghorne, ‘Fixed trusts and unit trusts: one and the same?’ (2013) 48(6) *Taxation in
unit-trusts-one-and-the-same>.

\(^{152}\) (2005) 79 ALJR 1724.

\(^{153}\) Tarrant, above n 64, 12.

\(^{154}\) [1986] 90 CLR 598.
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unitholder has such a right and that each case is determined on the wording of the trust deed, specifically, how the unitholder’s rights are defined in that deed.\textsuperscript{155}

A further aspect of the concept that beneficiaries are entitled to the assets of a trust is that beneficiaries may determine to wind up the trust if they are all sui juris and together absolutely entitled to trust property pursuant to the rule in \textit{Saunders v Vautier} (‘\textit{Saunders}’).\textsuperscript{156} Sin noted that this principle is generally believed to have status above the express provisions of the trust deed.\textsuperscript{157} Interestingly, recent cases where unitholders have been able to wind up a UT under the rule of \textit{Saunders} has emphasised the complexity of stakeholder considerations in determining the rights of unitholders.\textsuperscript{158} In contrast to the rule in \textit{Saunders} is the right of shareholders to wind up a company voluntarily pursuant to a special majority of 75%.\textsuperscript{159} While traditional trust law required that all beneficiaries exercised the power under \textit{Saunders},\textsuperscript{160} CL recognised the impracticality of removing effective ‘veto’ rights from minority shareholders for this and other material shareholder decisions.\textsuperscript{161}

The nature of unitholder interests is different to shareholder interests as a matter of law but in practice, investors perceive units as virtually identical to shares in the practical rights they provide. Sin noted, ‘The common perception is that units are a kind of property analogous to shares. And it is the submission of this work that this perception is justified.’\textsuperscript{162} Notwithstanding the formal legal distinctions

\textsuperscript{155} See also \textit{Ambasax Pty Ltd v Evindon Pty Ltd} (Unreported, Supreme Court of Victoria, Phillips AJ and McDonald AJA, 10 November 1995); \textit{Schmidt v 28 Myola Street Pty Ltd} (2006) 14 VR 447; and \textit{Nimdale Pty Ltd, Ex parte} (Unreported, Supreme Court of Queensland, Ambrose J, 30 September 1988).

\textsuperscript{156} (1841) 49 ER 282.


\textsuperscript{159} Section 491.

\textsuperscript{160} Note that in appropriate cases, particular beneficiaries may nevertheless have the right to call for those beneficiaries’ entitlement in the trust.

\textsuperscript{161} Indeed, the changes to enshrine compulsory acquisition laws for companies were in direct response to the High Court decision in \textit{Gambotto v WCP Ltd} (1995) 182 CLR 432 (‘\textit{Gambotto}’) to avoid ‘greenmailing’ by minority interests. Discussed below, see also Ian Ramsay and Benjamin B Saunders, ‘What do you do with a High Court decision you don't like? Legislative, judicial and academic responses to \textit{Gambotto v WCP Ltd}’ (2011) 25 \textit{Australian Journal of Corporate Law} 112. While Ch 5C provides mirrored compulsory acquisition provisions for Public UTs, there are no such provisions that apply to Private UTs. In practice, however, most UT deeds, or unitholder agreements provide a similar majority voting provision.

\textsuperscript{162} Sin, \textit{Legal Nature of the Unit Trust}, above n 5, 264. As an example, Sin referred to the fact that: modern unit trusts provide for the transfer of units by way of instruments of transfer to be executed by the transferors and the transferees and to be delivered to the trustee… Disposal of units therefore
between shareholders and unitholders, they operate in identical circumstances, therefore it follows that the law should provide equal protection to unitholders and shareholders, for example, in relation to the CAORs to which shareholders have access but unitholders may not.\textsuperscript{163}

2.4.3 Liability of Unitholders

While it is apparent that unitholders having a beneficial interest in the assets of a UT provides them with certain additional ‘rights’ in those assets (over those enjoyed by shareholders in companies),\textsuperscript{164} there is also a disadvantage. Pursuant to the principles in \textit{Hardoon v Belilios}\textsuperscript{165} and subsequently in \textit{Broomhead},\textsuperscript{166} this relationship can potentially result in unitholders being proportionally liable for the debts of a UT as a result of the trustee’s right to indemnity (whereas shareholders enjoy statutorily prescribed limited liability).\textsuperscript{167} While \textit{McLean v Burns Philp Trustee Company Pty Ltd}\textsuperscript{168} confirmed that the potential personal liability of beneficiaries for the debts of a trust could be excluded by a clause limiting the trustee’s right of recourse to assets of the trust,\textsuperscript{169} cases have arisen where trust deeds have not expressed the limitation correctly. The issue therefore continues to be a subject of court action.\textsuperscript{170}

Importantly, in 2000, CAMAC determined to align the rights of unitholders with shareholders by proposing to limit the liability of unitholders statutorily with respect to MISs (ie Public UTs) on the basis that unitholders should enjoy the same protection as shareholders given the identical practical circumstances in which liability may arise.\textsuperscript{171} However, CAMAC rejected the proposal applying to

\textsuperscript{163}A main contention discussed in detail in this thesis.
\textsuperscript{164}Given shareholders do not have a beneficial interest in the assets of the company.
\textsuperscript{165}[1901] AC 118.
\textsuperscript{166}(1985) 3 ACLC 355. Also see \textit{Countryside (No 3) Pty Ltd v Best/Lawson} [2001] NSWSC 1152 (14 December 2001) (‘\textit{Countryside}’).
\textsuperscript{167}Agardy, ‘Aspects of Trading Trusts’, above n 18, 4. Interestingly, the potential liability of unitholders was largely unknown until \textit{Broomhead}. See \textit{Countryside} [41].
\textsuperscript{168}(1985) 9 ACLR 926.
\textsuperscript{169}Except where this would be contrary to public policy, for example, \textit{McLean v Burns Philp Trustee Company Pty Ltd} (1985) 9 ACLR 926.
\textsuperscript{170}For example, \textit{Burns v Leda Holdings Pty Ltd} [1988] 1 Qd R 214 dealing with liquidators’ right to claim against former unitholders.
\textsuperscript{171}Corporations & Markets Advisory Committee, ‘Report to the Minister for Financial Services and Regulation on Liability of Members of Managed Investment Schemes’ (Report, March 2000)
unregistered (ie Private UTs) without providing any reasoning as to the distinction between the need to protect unitholders in Public UTs but not Private UTs. 172 While no explanation was given, the fact remains that unitholder liability affects unitholders in Private UTs no less than those in Public UTs. 173 It appears the most likely reason for CAMAC’s position is one of pragmatism in that (unlike Private UTs) Public UTs were already within the jurisdiction of the CA and therefore inherently subject to additional reforms such as limitation of liability. Conversely, the question of whether the CA has jurisdiction over unregistered Private UTs is far less certain. 174 In light of jurisdiction issues, this pragmatism will need to be considered when addressing the proposal that CAORs should apply to both Public and Private UTs. 175

2.4.4 Role of a Contract in Unit Trusts

Beyond the traditional equitable based relationships between unitholders and trustees, over recent years there has been debate concerning the role of contract in determining these relationships, in stark contrast to the traditional view that contract played no part in UTs. 176 In considering unitholders’ rights and the role of contract, Michael Vrisakis noted that the question of whether ‘a contractual relationship can exist in tandem with a trust relationship is not an arid and academic issue. On the contrary, various practical and significant consequences can flow.’ 177 When considering the issue of oppression, which inherently deals


172 For the purposes of this thesis and the question of implementing legislative changes to the CA in regulating UTs, the subsequent discussion contained in the report provides an important insight into the various public policy considerations posed when considering legislative intervention to provide shareholder type rights to unitholders.

173 Indeed, the cases dealing with the issue were mostly relating to Private UTs, see Broomhead (1985) 3 ACLC 355. As Davies AJ subsequently noted in the case of Countryside [2001] NSWSC 1152 (14 December 2001).

174 Discussed in detail in chapter 6.

175 The amendments were never implemented, although the issue has been raised again in the recent CAMAC Discussion Paper. Corporations and Markets Advisory Committee, ‘Managed Investment Schemes’ (Discussion Paper, June 2011)


176 The early UTs survived the early CL prohibitions against illegal ‘association’ on the basis that there was no such ‘association’ between the parties. See James LJ stated in Smith v Anderson (1880) 15 Ch D 247 with respect to the issue of mutual covenants between unitholders. See also Sykes v Beadon (1879) 11 Ch D 170.

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with the rights and obligations between unitholders, the role of contract is therefore significant.\textsuperscript{178}

With reference to a company’s statutory contract,\textsuperscript{179} Spavold commented:

S 180 of the Corporations Law creates statutory contracts between the shareholders, the shareholders and the company, and the company and its officers in the terms of the memorandum of association and the articles of association … In contrast … the trust deed does not and cannot form a contract between unitholders. The general rights of a unitholder as a beneficiary under a trust are not subject to a contract with any other person. However, any additional and further right given to the unitholder under the trust deed is subject to the terms of the trust deed. In this manner, rights can be created which belong to the unitholders as a whole and which can only be enforced with the approval of the majority of the unitholders … \textsuperscript{180}

Notwithstanding, this historical position (that contract played no role) has been appropriately reviewed in modern times.\textsuperscript{181} The view that has prevailed over the last decade is that contractual obligations may exist between unitholder and trustee/manager and potentially between unitholder and unitholder. As noted by Justice Hill, ‘There is nothing by way of principle which would prevent the rights of a beneficiary in a fund being both contractual and equitable.’\textsuperscript{182}

In recent years, cases and commentary have highlighted the basic proposition that the process of unitholders being offered and subscribing for units in a UT prima facie incorporates the fundamental elements of a contractual relationship between

\textsuperscript{178} The question of the role of contractual relationships in the UT structure needs to be analysed from the various vantages of the stakeholders in the UT, namely between the unitholders and trustees (and where relevant, the manager), and/or between unitholder and unitholder, and/or a combination of these relationships.


\textsuperscript{180} Spavold, above n 12, 257.

\textsuperscript{181} See for example, Justice Austin in the recent decision in the NSW Supreme Court in \textit{Basis Capital Funds Management Ltd v BT Portfolio Services Ltd & Ors} (2008) 67 ACSR 297 [101]. It is interesting to note that as late as 1991, Spavold still assumed that there was no contract in the UT. Ibid.

\textsuperscript{182} Justice Graham Hill was referring to superannuation funds, a fixed trust similar to a UT that is structured and regulated specifically to provide superannuation benefits. In Australia, superannuation funds receive concessional taxation treatment, and are regulated by a range of legislation, most importantly the taxation legislation that governs the \textit{Superannuation Industry Supervision Act (1993)} (Cth). Justice Graham Hill, ‘The True Nature of a Member’s Interest in a Superannuation Fund’ (speech delivered at the 2002 Law Council of Australia’s Annual Superannuation Conference in Adelaide, 20-23 February 2002), above n 51, quoted in Vrisakis, above n 177.
the unitholder and the trustee. To that extent, unitholders can be distinguished from beneficiaries in other forms of trusts who do not need to ‘sign up’ to the beneficial relationship.

Determining the existence of a contractual relationship between unitholders is, however, less straightforward. Without a similar statutory framework for UTs, no such ‘statutory contract’ can be applied to the relationship between unitholders in a UT. While the traditional view historically rejected the concept, Sin cited a series of cases from Gra-Ham Pty Ltd v Perpetual Trustees WA Ltd (‘Gra-Ham’) arguing for the existence of such mutual contractual rights in UTs. In Gra-Ham, Malcolm CJ in the Supreme Court of Western Australia concluded that a contract in the form of a UT deed existed between unitholders and based on CL cases, his Honour held that a term in the trust deed allowing the majority to alter the terms of the trust was contractually enforceable on the minority.

While Gra-Ham was not followed by Heerey J in AF & ME Pty Ltd v Aveling (‘AF & ME’), Sin cited a series of subsequent cases confirming contractual

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183 Justice Austin in the recent decision in the NSW Supreme Court in Basis Capital Funds Management Ltd v BT Portfolio Services Ltd & Ors (2008) 67 ACSR 297 [101]. As described in Michael Vrisakis’ article, one of the central issues of the case dealt with whether a contract existed in parallel with the trust interest that an investor would derive from holding a unit in the trust (which was established as a registered MIS). Ibid.

184 Such as discretionary trusts.

185 Australian Corporation Law–Principles and Practice stated that one of the major distinctions between the UT and the deed of settlement company was the fact that ‘there are no mutual covenants between unitholders in a unit trust.’ Various authors, see Australian Corporation Law–Principles and Practice, above n 47 ch 2.1.0045 at n 151.

186 Discussion of the case law on whether unitholders provide mutual covenants is outlined in Kam Fan Sin, ‘Enforcing the Unit Trust Deed Amongst Unitholders’ (1997) 15 Company and Securities Law Journal 10.

187 (1989) 1 WAR 65. Given its relevance to the contentions of this thesis, Gra-Ham’s case is discussed in detail at chapter 3.2.

188 Sin outlines the case law relating to this question in his article, ‘Enforcing the Unit Trust Deed Amongst Unitholders’, above n 186.

189 Allen v Gold Reefs of West Africa Ltd [1900] 1 Ch 656 and Peters’ American Delicacy Co Ltd v Heath (1939) 61 CLR 457 (‘Peters’).

190 Malcolm CJ held: ‘the fact alteration diminished, prejudiced or altered the rights of unitholders was not sufficient to prevent the alteration from being validly made.’ See Gra-Ham (1989) 1 WAR 65, 81.

191 (1994) 14 ACSR 499. Heeley J held that the central basis of the applicants’ claim (that the trust deed constituted a contract between the unitholders) was bad in law—the mechanisms under the trust deed were not constructed by the imposition of contractual obligations. Rather, power was given to the manager to achieve objects in the trust deed, but that power did not involve contractual obligation on the manager, still less on anybody else.
rights do exist in UTs, although not necessarily between unitholders. Nevertheless, Sin concludes that the intention by all parties to be bound by the trust deed of the UT can be used as evidence of the existence of a multi-partite contract between the unitholders and the manager, which could extend the contractual rights between the unitholders themselves. Sin proceeds to make the novel conclusion that the UT is a trust embedded in a contract:

[T]he trust cannot, but the contract can, explain the tripartite relationships found in the unit trust; that the unit trust has its genesis in the contract; and that the trust is simply part of the contract creating the unit trust. The conclusions that follow must be that the parties’ rights and liabilities fall primarily within the domain of contract law and that, insofar as a trust relationship has been created by the unit trust contract between particular parties, trust law also operates.

While Sin’s view has not yet been adopted by the courts, his review of case law suggests the standpoint that contractual obligations exist between unitholders may be gaining momentum, further blurring the lines between UTs and companies. Were the role of contract in UTs to be formally accepted by the law, this would overcome a perceived major distinction that had been used to justify the inapplicability of CL principles (such as oppression remedies) to UTs.

While Sin’s novel contention that a UT is built upon contract rather than trust law has merit, in practice the overwhelming weight of case law dealing with UTs continues to rely on trust law as the structural basis for establishing unitholder rights. Nevertheless, Sin’s analysis and contention is useful in providing further

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193 See Sin, ibid 121. Interestingly, Sin suggested that the majority of UTs were Public UTs, where the intention for unitholders to ‘associate’ with each other is less pronounced. Accordingly, a Private UT, where the unitholders are clearly seeking to associate, may have more grounds for proving the existence of a contract between unitholders.
194 Sin, ibid 129.
195 The writer is unaware of any court decision supporting Sin’s view.
196 Arguably, the existence of contract may result in certain UTs (with more than 20 members) being in breach of the prohibition against forming an illegal association pursuant to s 115 of the CA. The issue is discussed at length in Sin, above n 186, at 116 and Ron Jorgenson, ‘A Matter of Trusts: Supersized professional practice unit trusts’ 2007 41(10) Taxation in Australia 587. As Smith v Anderson (1880) 15 Ch D 247 and the other cases dealing with ‘illegal associations’ illustrate, the existence of s 115 and its predecessors highlight the historical intention by the legislation to require certain associations that engage in commercial activity of a required scale to be registered as a company so that, among other things, stakeholders/investors in such enterprises receive the benefit and protection provided by CL, such as the provisions granting relief against oppressive conduct.
197 As illustrated throughout this thesis and in detail in chapter 4.
evidence of the palpable shift among the legal fraternity and judiciary to bring the rights of unitholders closer to those of shareholders, adding weight to the proposal to bring unitholders’ rights in line with the status of that of shareholders in cases of oppression outlined herein.

2.5 Conclusions of Chapter 2

The discussion in this chapter established the definition and nature of a UT, which (in general terms) operates in a similar fashion to a company and provides unitholders with rights similar to those of shareholders, notwithstanding the structural distinctions due to the nature of a UT as a trust. The history of UTs illustrates a common ancestry between a UT and a company; in particular, its development in Australia has resulted in a modern form of Private UT that functions commercially in a very similar fashion to a private company, placing unitholders in comparable circumstances and vulnerabilities to those faced by shareholders, including oppression. While perceived distinctions (such as the role of contract) between UTs and companies had historically been used as a justification for precluding UTs from the jurisdiction of CL,98 such perceived distinctions are increasingly being challenged. The inclusion of Public UTs within the jurisdiction of the CA is a good example of the growing acknowledgement that unitholders should enjoy the protection of the Act. The next chapter explores the manner in which CL principles apply generally to UTs, in order to determine the scope in which CAORs may be applied.

98 For example, see Cachia (2000) 170 ALR 6, which is discussed further in this thesis at chapter 3.2.
Chapter 3: Application of Corporate Law to Unit Trusts

3.1 Introduction

In order to explore the contention that the CAORs should be extended to include UTs, it is important to consider how CL principles generally, and relief against oppression in particular interact with UT structures, and therefore whether it is feasible to superimpose CA provisions of this nature onto UTs. This chapter explores the discussion around whether CL principles and the CA can successfully be applied to UTs. Also considered is the manner in which Public UTs have been incorporated within the jurisdiction of the CA via Ch 5C and the way in which the CA deals with listed Public UTs. In addition, the issues faced by the inclusion of Public UTs under the CA umbrella are taken into account, as well as the resulting calls for further reforms to better integrate Public UTs within the CA’s jurisdiction. The analysis in this chapter establishes the extent to which the CA has effectively regulated UTs in the form of Public UTs, which suggests there are no general structural impediments preventing the CA from being further extended to regulate both Public and Private UTs via the CAORs. Nevertheless, this chapter highlights the need for any CA reforms (eg with respect to the CAORs) to carefully consider and address the specific nature of UTs, so that any such reforms to the CA provisions are tailored to deal with the structural characteristics of UTs.

3.2 General Corporate Law Principles and Unit Trusts

While the interaction between CL and UTs is well documented, the precise application of CL principles to UTs is a complex topic that has resulted in substantial confusion and uncertainty. As Sin noted:

‘The fact that two institutions have the same origin should not per se lead to the conclusion that the same body of principles apply. Brothers, despite their common
parents, are not twins automatically … The apparent similarity of these two formulations is deceptive.”

Despite their common ancestry, the effect of this distinction results in a range of issues when applying CL to UTs. The contention that the CAORs should be extended to unitholders assumes that CAORs (or their common law equivalents in the form of fraud on the minority) do not already apply to unitholders and that other trust law remedies are inadequate. It further assumes that CL principles are capable of application to UTs. In order to explore these assumptions, it is necessary to contextualise how CL (whether statutory or common law) applies to UTs generally.

Commentators have often referred to the influence of trust law principles on CL principles. Early last century, the renowned English jurist and historian Frederic William Maitland commented that trust law had been central to the development of CL. Regarding the interaction of CL and UT law principles, Sin pointed out that recently, CL has also begun influencing the development of trust law:

There was a cross-cultivation of principles. This was a necessary consequence of [the common ancestry via the deed of settlement company]. During the early

200 For example, echoing the CL requirement that ‘the power [to alter the constitution] must be exercised bona fide for the benefit of the company as a whole,’ (see Latham CJ in Peters’ (1939) 61 CLR 457). In addition, Malcolm CJ determined in Gra-Ham that the alteration to the trust deed could not have been made ‘otherwise than bona fide for the benefit of the unitholders as a whole.’ Sin commented on the application of the phrase ‘as a whole’ to UTs that:

The very notion of units, as investments, has strong connection with underlying assets. Unlike shareholders, unitholders are acquiring rights rather than participating in a business, which, even if there is any in a particular UT, is conducted by the trustee, as trustee. A company is a separate legal entity whilst a UT is not. ‘The company as a whole’, even in the commercial sense rather than in the legal sense, connotes a body with perpetual existence and limited liability. As a result, the term ‘the company as a whole’ has almost attained the status as a term of art of company law ... Therefore, ‘the company as a whole’ is a concept evolving around characteristics of registered companies which may not be shared by UTs.

Sin proceeded to outline various other aspects of the UT that provide challenges when attempting to apply CL principles. Ibid 252.
201 Discusses in chapter 4.4.
202 The company also developed within the jurisdiction of the Court of Chancery, which invariably meant that equity played an important role in shaping CL. Sin noted the context which equity provided to the development of early CL. Sin, Legal Nature of the Unit Trust, above n 5, 12.
203 For example, Maitland stated in the early part of the 20th century that:

of late years under American teaching we have learned to couple together the two terms ‘corporations’ and ‘trusts’. In the light of history we may see this as a most instructive conjunction. And yet an apprentice of English law might well ask what the law of trusts has to do with the law of corporations. Could two topics stand farther apart from each other in an hypothetical code ... To such questions English history replies that, none the less, a branch of the law of trusts became a supplement for the law of corporations, and some day when English history is adequately written one of the most interesting and curious tales that it will have to tell will be that which brings trust and corporation into intimate connection with each other.

Fisher (ed), above n 84, at 271-2.
history of the company, equity had already established a coherent body of law in relation to the trust. The fact that companies were within equity’s jurisdiction meant that trust concepts had become a ready source of principles of corporate relationships, such as the duty of the directors towards the company. Recently, there are signs of a reverse cultivation: in unit trust problems that have been encountered in the company context, courts have been prepared to apply Company Law principles—apparently based on the justification of their common parentage of the deed of settlement company.\(^{204}\) (emphasis added).

Within the context of this thesis, the question arises as to how CL is able to apply to UT law—and unitholder rights specifically. Early Australian cases such as *Charles v FCT* highlighted the structural distinctions between UTs and companies.\(^ {205}\) Importantly, however, this case focussed on the taxation ramifications caused by the distinction rather than issues relating to unitholder rights per se. Unitholder rights did not come into the spotlight meaningfully until the late 1980s, when Public UTs faced increasing liquidity issues during that period of economic turmoil.

For example, a relatively early case dealing with the application of CL to UTs (involving potentially oppressive conduct in a Public UT) was *Gra-Ham*.\(^ {206}\) In this case, a unitholder made an application to redeem units immediately after the stock market collapse of 1987. The unitholder was relying on the trust deed, which stated the applicable valuation date of the units was seven days prior to the redemption application, hence the units would be valued prior to the stock market collapse. However, the UT manager did not process the redemption, and a subsequent special general meeting of unitholders resolved to amend the trust deed to make the applicable redemption date the *actual* date of the redemption application (ie after the stock market collapse). Obviously, this resulted in a substantially lower redemption price for the unitholder. The trust deed provided the majority unitholders with the power to amend the terms of the trust deed and bind all unitholders to the amended terms. The case considered the validity of the

\(^{204}\) Sin, above n 5.

\(^{205}\) (1954) 90 CLR 598, which considered the taxation status of income received by unitholders, above n 102.

\(^{206}\) (1989) 1 WAR 65. *Gra-Ham* predated *Gambotto* but drew upon many of the common law precedents applied in *Gambotto*. As discussed in chapter 4.4.2, *Gambotto* was the seminal case in expanding the protections afforded to oppressed shareholders. It dealt with the right of the majority to amend the company constitution to facilitate the compulsory acquisition of minority shareholders.
majority’s retrospective amendment of the Trust Deed.

Drawing heavily on similar CL decisions and based largely on the principles of contract law (ie that a contractual association exists between unitholders and the trustee), Malcolm CJ found against the aggrieved unitholder, determining that the manager had acted lawfully in accordance with the trust deed. Given the aggrieved unitholder was not a shareholder, the CAORs were inapplicable, so Malcolm CJ turned to CL principles for guidance with the following justification:

As Kennedy J observed [in the first instance trial]: ‘... there are, of course, both similarities and differences between companies and unit trusts. The modern company, however, finds its ancestry in a particular kind of deed of settlement of unincorporated companies … Dixon J observed that ‘the power of altering articles of association now conferred by statute had its analogue, if not its source, in clauses found in deeds of settlement by which a specific majority of the members of companies constituted or registered by such instruments were empowered to alter or add to their provisions.’ Furthermore, as Gower has pointed out, ‘unit trusts offer to the public an investment practically indistinguishable from shares in a limited company …’ But, unlike the position as between shareholders in a company … there exist no mutual rights and obligations between unitholders, and unitholders generally have a proprietary interest in the fund … in contrast to the position of shareholders in relation to the assets of a company … Finally as already noted, the power to amend the article of a company is a statutory power ...

Later, citing various grounds for allowing a retrospective amendment to a constitution, a precedent established by CL case Peters’, Malcolm CJ concluded plainly:

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207 This case provides some weight to Sin’s argument of the existence of a contractual relationship between the unitholder and the trustee, Sin, Legal Nature of the Unit Trust, above n 5.
210 (1939) 61 CLR 457 (High Court of Australia). By drawing on Peters’, Malcolm CJ implicitly relied upon the equitable principles discussed in Peters’, in which Dixon J noted that the power to alter the company's constitution is sourced from the powers that were originally conferred on majorities under the deeds of settlement that governed the relationship between the members of the company, and that therefore abuse of such powers came under the jurisdiction of courts of equity. Cited in Stefan Lo, ‘The Continuing Role of Equity in Restraining Majority Shareholder Power’ (2004) 16 Australian Journal of Corporations Law 96.
In my opinion all of the propositions [outlined in Peters’], apart from the first which relates to the statutory power, apply equally to a trust deed for a unit trust as they did to a deed of settlement of the kind under which limited companies were once established.211

Importantly, Malcolm CJ’s willingness to apply CL principles (based on Peters’), included the application of traditional CL grounds for invalidating oppressive conduct in this UT case.212 In finding against the aggrieved unitholder, Malcolm CJ cited Kennedy J in concluding that ‘[t]his was not, therefore, a case of a majority oppressing a minority.’213 Apparently, Malcolm CJ was of the view that had oppression been proven, the unitholder would have been entitled to relief.

Malcolm CJ’s decision draws strong parallels between UT and CL principles. By liberally applying CL concepts to a case involving a UT, the unitholder plaintiff was not materially disadvantaged by virtue of being a unitholder rather than a shareholder.214 Were Malcolm CJ’s approach to have been adopted unquestionably in subsequent cases, the proposal that CAORs should be applied to UTs may

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211 Gra-Ham (1989) 1 WAR 65, 81 (Malcolm CJ). Pidgeon J concurred regarding the applicability of CL principles. He stated: ‘The power to modify the deed is contained within the deed itself and the question arises whether there are any restrictions at law in exercising this power. I would agree that one would look to the company cases and the building society cases to determine what restrictions there may be.’ Ibid 91.

212 See Peters’ (1939) 61 CLR 457, 506, which considered majority action via ‘fraud’ on the minority. In Gra-Ham, the conduct of the majority was variously being described by the applicant as ‘fraudulent’ or involving an ‘abuse of powers’ or ‘oppression’. Malcolm CJ did not see a need to delve into the equitable principles expressed in Peters’, rather he merely relied upon the discussion in Peters’ to provide the implicit legal context. This approach is consistent with CL cases. As Lo wrote: ‘The courts, when applying the tests restricting the power to alter the constitution, have not always discussed the conceptual basis for the restriction but have simply cited the “bona fide” test from Allen v Gold Reefs. However, the cases which have alluded to the principles underlying the tests support the view that the doctrine of fraud on a power forms the basis for the tests.’ Lo, above n 210.

213 Malcolm CJ stated:

The good faith of the trustee and of the manager cannot be called in question in these proceedings, the facts set out in the affidavits providing no evidence of any lack of good faith on their parts. Furthermore, those who had requested on or before 7 November 1987 the repurchase of their units, constituted a majority of the unitholders and, had they all voted against them, they could have easily defeated the proposals put to the meeting of unitholders. This was not, therefore, a case of a majority oppressing a minority.


214 Indeed, Spavold cited Gra-Ham in concluding that: ‘[t]he power of the shareholders to amend the constituting documents of the company and the power of the unitholders to amend the trust deed are identical.’ Spavold noted further:

The only difference is that the majority required to amend a company’s memorandum and articles is determined by statute to be the holders of 75% of the value of the company’s shares. Conversely, the majority required to amend the trust deed is determined by the trust deed. Most trust deeds only required an ordinary resolution.

Spavold, above n 12, 257-8. Subsequent to Spavold’s article (published in 1991), as noted in chapter 2.3.3, a provision under Ch 5C of the CA has been enacted that mirrors CL provisions relating to the ability of unitholders to modify or repeal and replace the trust instrument by meeting and passing a special resolution which has been passed by at least 75% of the votes cast by members entitled to vote on the resolution. See CA s 601GC (a).
arguably lose some of its force, as unitholders would have had access to some of the same CL oppression rights under general law as shareholders, such as the CL principle of fraud on the minority.\textsuperscript{215}

However, Malcolm CJ’s approach has not been universally adopted. For example, \textit{Cachia\textsuperscript{216}} is a pivotal case in that Hely J rejected the concept that fraud on the minority (the general law equivalent to CL oppression principles) may be applied to unitholders.\textsuperscript{217} The case dealt with a restructure and merger of two Public UTs, which was challenged by a minority unitholder who argued his units were being unfairly appropriated. He sought to apply the general law oppression principles that had been outlined in the seminal CL oppression case of \textit{Gambotto}.\textsuperscript{218} In response to the plaintiff’s claim, Hely J provided a far-reaching conclusion as to the application of CL doctrines to UTs that starkly contrasted to the comments of Malcolm CJ in \textit{Gra-Ham} and other cases:\textsuperscript{219}

While in a commercial sense, ownership of units in a trust may be similar to ownership of shares in a company, in a legal sense there is a fundamental difference between a unit held under a trust deed such as the present and a share in a company [\textit{Charles v FCT}]. \textit{Gambotto} was a case concerning Company Law, and Company Law principles, particularly oppression and fraud on the minority, although there was some exposition of the general principles as to fraud on a power. The present is a trust case in which Company Law principles such as fraud on the minority play no part: see Jacobs’ Law of Trusts in Australia, 6th ed, at para

\begin{itemize}
  \item \textsuperscript{215} See discussion on fraud on the minority below at chapter 4.4.
  \item \textsuperscript{216} (2000) 170 ALR 6.
  \item \textsuperscript{217} In this Federal Court case, unitholders of the two UTs were to have their units redeemed and reissued in the new listed vehicle. In a similar vein to the \textit{Gra-Ham} case, the plaintiff had requested redemption prior to the proposed merger, but the redemption had not been processed by the trustee due to legislation that had been enacted to stop the global run on unitholder redemptions from property trusts at the time (which was resulting in a serious financial property meltdown). Legislation under the \textit{CA} dealt with registered MISs such as the two Public UTs in question, and prohibited redemptions being processed for a period, unless the trustee determined via a special resolution of unitholders that redemptions could be allowed. Upon organising the listing and merger, the unitholders passed the relevant special resolutions to allow the required redemptions to take place to facilitate the merger and listing. The plaintiff did not want to be party to the restructure, as this would result in the loss of the pre-CGT status on the units, with adverse tax consequences. The plaintiff therefore brought an action requesting his original redemption to take place (for cash) so that he was not subjected to the merger, listing and reissuing of units in the merged listed vehicle. The plaintiff argued a range of breaches, including breach of trust, misrepresentation, fraud on the power, fraud on the minority and unfair appropriation of units. The plaintiff failed on all points.
  \item \textsuperscript{218} (1995) 182 CLR 432. See discussion on \textit{Gambotto} in this thesis at chapter 4.4.2.
  \item \textsuperscript{219} For example, \textit{Cachia} (2000) 170 ALR 684.
\end{itemize}
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316. The reference by Hely J to Jacobs’ Law of Trusts relates to the publication’s unambiguous conclusion regarding the disadvantages of UTs:

[W]hile legislation is continually moving towards the greater protection of unitholders, many doctrines (such as the doctrine of fraud on a minority) obviously applicable to companies have no counterpart in the law of unit trusts; and many specific provisions imposed by company legislation for the protection of shareholders in a company do not apply to unit trusts.

While Hely J’s statement was clear in rejecting the application of CL principles (such as common law oppression in the form of fraud on the minority) to UTs, subsequent cases have debated the correctness of this position. For example, in Arakella v Paton (‘Arakella’), Austin J commented on Hely J’s position in Cachia:

It was also contended by counsel for the Trustee that the Gambotto principles are confined to companies and are incapable of applying where the trust instrument for a unit trust is amended by resolution of the unitholders. The argument is based on some obiter remarks by Hely J in Cachia v Westpac Financial Services Ltd. The critical question is whether to characterise the Gambotto principles, as Hely J did, purely as an emanation of Company Law … or to treat them as an outworking of the general doctrine of fraud on a power …

Austin J challenges the notion that it is possible to disassociate clearly the equitable based principles outlined in CL cases such as Gambotto (which ultimately sourced its decision in the equitable construction of fraud on the power) as opposed to strictly CL principles. The implication is that Hely J’s rejection of the application of CL principles to UTs was artificial.

220 Charles v FCT (1954) 90 CLR 590; Cachia, ibid 86.
221 In discussing the advantages and disadvantages of using UTs.
222 Meagher and Gummow, above n 4, [316].
223 Ramsay and Saunders, above n 161.
224 (2004) 60 NSWLR 334. See case facts summary in Appendix A.
226 Indeed, it is submitted that it is difficult to identify any strictly CL principles that are independent of any equitable roots.
In contrast, in *Re Australand Holdings Ltd* (‘*Re Australand*’)\(^{227}\) Barrett J cited the discussion in *Cachia*:

In *Cachia v Westpac Financial Services Ltd*, Hely J saw the principle [in *Gambotto*] as a principle of Company Law and expressed the view that it does not extend to interests under a unit trust. That may well be a correct analysis, given that the majority judgment in the High Court [in *Gambotto*] confines its analysis to principles derived from Company Law cases … \(^{228}\)

While Barrett J does not support Hely J outright, his Honour does seem to lean towards Hely J’s conclusions on whether CL principles such as those articulated in *Gambotto* apply directly to UTs.\(^{229}\) In any event, Barrett J did not see the need to make a final determination on the topic; given in his Honour’s view, *Gambotto* was not applicable to the case.\(^{230}\) The position was discussed but similarly left in a state of uncertainty following subsequent cases: *Re Abacus* (2005)\(^{231}\) and the

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\(^{227}\) (2005) 54 ACSR 687. This case was heard before Barrett J in the Supreme Court of NSW. It involved a proposed merger scheme in which shares of Australand Holdings Ltd (‘AHL’) and units of MIS Australand Property Trust (‘APT’), which had previously been stapled together as tradeable commodities, would be further stapled to units in two other Australand MISs. If the existing unitholders of those trusts passed the resolutions necessary to cause those trusts to participate in the merger, their pre-existing units would be redeemed using funds raised under the merger proposal. As part of the proposal, Australand Wholesale Investment Ltd (‘AWIL’), as the RE, would be obliged to require pre-existing unitholders to submit their units for redemption compulsorily in return for a specified cash price. AHL sought an order to convene a meeting of its ordinary shareholders (who were also unitholders pursuant to the stapled securities) to consider the proposed scheme of arrangement. Responsible entities of the MISs also sought advice as to whether they were justified in convening meetings of their members to consider the relevant resolutions. Given the fact that the matters involved shares and units, the orders were sought both under s411(1) of the CA and s63 of the *Trustee Act 1925* (NSW). The proposed restructure was not contested, but the trustees sought court approval given it would involve compulsory acquisition of shares and units. While the court approved the orders sought by the plaintiffs, in considering the applications the court also considered whether *Gambotto* principles were applicable, given the fact that the restructure involved compulsory acquisitions of units and shares.

\(^{228}\) *Cachia* (2000) 170 ALR 65 (Hely J); *Re Australand* (2005) 54 ACSR 687 at 690 (Barrett J).

\(^{229}\) *Gambotto* (1995) 182 CLR 432.

\(^{230}\) Ibid.

\(^{231}\) *Re Abacus Funds Management Ltd* (2005) 24 ACLC 211 (‘*Re Abacus (2005)*’). As in *Re Australand, Re Abacus* (2005) was not a contested hearing. It involved an application by the plaintiff for orders by way of judicial advice as to whether the plaintiff was justified in implementing a proposal to further staple investments. The plaintiff was the trustee of two registered MISs and proposed stapling together units in each trust. The plaintiff claimed that the further stapling of securities was necessary to overcome constraints of the regulatory regime governing the principal business carried on by investment schemes. There was overwhelming support for the proposal expressed by affected persons at a number of member meetings, but the trustee sought court endorsement given the transactions would be applied against all unitholders, including foreign unitholders who would be forced to sell resultant stapled securities because of contravention of the laws in their respective of foreign countries. The trustees sought to exercise their powers under s 601GC to amend the relevant constitutions to facilitate the restructure. Campbell J in the first proceeding and Barrett J in a related proceeding supported the comments of Austin J in *Arakella*. Nevertheless, as with Barrett J in *Re Australand*, Campbell J infers that such a position could be open to challenge, although there was no need to rule on this point in *Re Abacus* (2005) given *Gambotto* did not apply. Campbell J commented: ‘For the purpose of today’s
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related *Re Abacus* (2006) case.\(^{232}\) These cases are dealt with further in chapter 4.4.3, which discusses the applicability of fraud on the minority to UTs in detail.

While Hely J’s conclusion that common law doctrines such as fraud on the minority do not apply to cases involving UTs was challenged in subsequent cases, his Honour’s position has not been overtly rejected. Therefore, when determining the topic of this chapter, consideration was given to whether it is appropriate to import CL principles in determining cases dealing with unitholder rights.

While it is difficult to articulate the parameters of CL that are inapplicable to UTs, reticence to disregard Hely J’s distinction in certain cases is evident, leaving UTs in a peculiarly indeterminate legal state. Increasingly, there is acknowledgement by some in the judiciary that the law relating to UTs can and should evolve to align the rights of unitholders more closely with shareholders.\(^{233}\)

As detailed above, while courts have the power to evolve on such matters, they struggle to clarify definitively the extent to which general law allows CL principles to be applied to UTs (and trusts generally). It is submitted that parliamentary intervention is necessary to remove this ambiguity (with respect to CAORs in particular). As Ford et al comment: ‘Although unit trusts resemble companies in function, they and all other trusts are fundamentally different under basic law. That is not to say that a legislature cannot pass legislation blurring the distinctions.’\(^{234}\)

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\(^{232}\) (2006) 24 ACLC 319. This was heard before Barrett J (who had also heard *Re Australand*). Barrett J noted the fact that there was an element of potential abuse against the foreign unitholders in *Re Abacus* (2006) that provided a slight distinction from *Re Australand*, and therefore required further consideration of the application of *Gambotto*. Barrett J’s conclusion was largely based on the fact that none of the foreign unitholders had sought to appear or contest the restructure, and that *Gambotto* still did not apply to *Re Abacus* (2006) 24 ACLC 319.

\(^{233}\) See, for example, Young J’s comments in *Metro Motor Inns Hotels and Motels Pty Ltd v Strathaven Holdings Pty Ltd* (2000) NSWSC 1004 (13 October 2000) (‘*Metro Motors*’) [10-14] that the laws of trusts have the capacity to develop to address the commercial context in which they operate. Young J’s comments are interesting given his Honour’s position in *Kizquari* cited below, where the application of CAORs to UTs was rejected.

As discussed, legislative intervention has extended the jurisdiction of the CA to UTs. Thus, it is important to understand the specific application of the CA to UTs in considering how unitholder rights are dealt with under the CA. In particular, what precedent is there for extending the application of the CA further to cover CAORs to the extent this is justified?

3.3 The Corporations Act and the Role of the Corporate Trustee

As discussed in chapter 3.4, Public UTs are covered by the MIS provisions of the CA. In contrast, Private UTs (which are more commonly subject to oppression) do not require registration under the CA, and remain largely outside the jurisdiction of the CA. While Private UTs are not directly covered by the CA, one major caveat to this generalisation is where the UT involves a CT, which is almost always the case. To understand the application of CL to UTs, the common use of CTs in UT structures is an important consideration, as the CT provides a link between the jurisdiction of the CA and UTs (given the CA’s jurisdiction over the trustee of the UT). As highlighted in chapter 3.2, there continues to be a substantial degree of uncertainty and debate over the relevance of CL principles to cases involving UTs. Yet clearly, there is no question that CL generally, or the CA specifically, applies to the CT. Thus, the implications of this require careful consideration.

Firstly, when considering the application of the provisions of the CA to UTs via the CT, one must determine whether the relevant provisions of the CA are being applied to issues relating to the UT itself, or rather to issues regarding the CT. Where the issue relates to the CT, it must then be determined who has standing to...

235 Note that there is prohibition against operating an illegal association under s 115 of the CA, so to the extent that Private UTs breach this rule, they may be in breach of the CA. Jorgenson, above n 196. Similarly, Private UTs may be required to register as an MIS (see chapter 3.4).
236 Subject to the expanded operation of the oppression provisions to CTs following Vigliaroni [2009] VSC 428 (29 September 2009). See chapter 6.6 for a detailed outline of this case.
237 One of many examples where the application of the CA was used to deal with a dispute between stakeholders in a UT was the case of Nibaldi v R M Fitzroy & Associates Pty Ltd and Ors (1996) 23 ACSR 330. The case involved a UT that operated a real estate agency in which one of the principals (all of whom were unitholder/shareholder/directors) was found to have accepted a secret commission. The result under the relevant unitholder agreements was that the principal could be removed as a director and have his units bought out at a reasonable valuation. While the case involved a UT, the issue for consideration by the court dealt only with the validity of the removal of the principal as a director under the relevant agreements when considered in the context of the CA (the removal of a director being a typical CL issue).
238 For example, see chapters 4.3.4, 4.3 and 5.3.
enforce their rights under the CA. Central to consideration of the ability to take action under the CA in relation to a CT is determining whether the applicant has standing in the role as shareholder. Where a unitholder is also a shareholder, he/she will prima facie have standing to take action under the CA to the extent that the action applies to any relevant breaches by the CT or its officers pursuant to the CA. Indeed, it is not uncommon for a disgruntled unitholder/shareholder to take parallel action under various headings of the law, including trust law and the CA. Distinguishing between the capacity of shareholder versus unitholder in many cases is confusing, especially where there are multiple actions against multiple parties.

Where the unitholder is not also a shareholder, it is far more difficult to establish standing under the CA. This is commonly the case in Public UTs but also

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239 It is important the proper procedures are followed in bringing an action. See, for example, chapter 4.3.2 on the issue of standing to bring derivative action, discussed in Cope v Butcher (1996) 20 ACSR 37 (‘Cope v Butcher’) where Johnston AM found that:

the plaintiff has not pleaded his inability to persuade the shareholders in a general meeting to resolve to sue the directors. Before it can be established that a derivative action lies, it must be established that normal company procedures have failed to achieve the justice sought to be achieved by the derivative action, although, in the circumstances of the present case, I cannot imagine what could have been achieved by following the normal company procedures.

240 In Private UTs, it is common for unitholders to receive a proportional shareholding in the company, but this is not the case in Public UTs.

241 See for example, Corumo Holdings Pty Ltd v C Itoh Ltd (1991) 5 ACSR 720, involving an action by a unitholder/shareholder against the directors of a CT in a Private UT. This case dealt with the question of whether loans to a unitholder were a breach of prohibition of a company providing financial accommodation to directors pursuant to the Companies Act (1981) (Companies (NSW) Code) s 230. Rogers CJ held that the agreement was not affected by illegality and s 230 had not been breached, noting the technical nature of the alleged breach as being insufficient to allow the plaintiff a loophole to invalidate the guarantees. Interestingly, the case goes into detail about the operation of s 230, but there is no discussion as to whether there are any issues in applying the section in the case of a UT.

242 For example, see Porch v Geelong School Supplies Pty Ltd [2007] FCA 857 (‘Porch v Geelong’). In this case, the infringed shareholder/unitholder alleged that the directors of the trustee of the UT had misused confidential business information used in the business operated by the UT. The infringed unitholder/shareholder undertook parallel actions against the trustee and its directors in the separate capacity of shareholder under the CA, and as beneficiary under trust law. As Finkelstein noted:

One of the actions, which I might describe as a parallel proceeding, is brought by Landmark against substantially the same defendants as in the principal action … One difference between that action and the principal action is the capacity in which Landmark sues. In the parallel proceeding it sues in its own right [ie as a shareholder]. In the principal action it sues as beneficiary of the GSS unit trust and is making claims that would ordinarily be brought by the trustee [against its directors]. It is common ground, however, that in certain circumstances, arguably such as exist here, a beneficiary of a trust is entitled to sue in his own name to recover trust property or damages for breach of trust … There is, however, one important difference between the two actions. The difference is that in the principal action GSS makes claims against the defendants that cannot be maintained by Landmark. The claims are for the breach by its officers of their duties of office, both under the Corporations Act (in particular ss 180 and 181) and at common law. On no view could Landmark [in the capacity as beneficiary] pursue these claims.

sometimes in Private UTs.\textsuperscript{243} This forces unitholders to seek remedies under trust law, or occasionally pursuant to CL principles—both with limited success.\textsuperscript{244} Even when a unitholder is able to establish standing (invariably by being both a unitholder and shareholder), given that CTs do not own the assets of the trust beneficially, the ability for the courts to provide CA relief that takes into account the value of the trust assets is highly debatable.\textsuperscript{245} This issue has given rise to a significant number of cases, as discussed in chapter 6.2.

In considering the application of the CA to cases involving UTs, the implications of the CT are of pivotal importance. This has been demonstrated in recent cases that have, pursuant to s 53AD of the CA, referred to the ‘business affairs of a trust’ when considering the conduct of the CT to justify the application of the CA to UT cases. The interpretation of s 53AD itself has become the focus of judicial debate, such as in Vigliaroni and subsequent cases. Given its relevance to CAORs and s 53AD’s importance to the contentions of this thesis, it is discussed in detail in subsequent chapters, in particular chapter 6.6.

\section*{3.4 Managed Investment Schemes Under Chapter 5C of the \textit{Corporations Act}}

To understand the application of the CA to UTs, it is pivotal to acknowledge the direct jurisdiction of the CA over Public UTs. Public UTs play a diverse and powerful role within Australia’s investment industry.\textsuperscript{246} Where units are offered as investments to the public via a Public UT, there are a range of CA provisions that

\textsuperscript{243} For example, in \textit{Koko Black} at [101] (Hargrave J), where the oppressed unitholders did not receive any shareholding in the trustee vehicle. The fact that the oppressed unitholders did not demand to receive shares in the trustee vehicle was consistent with their lack of general due diligence and care taken in approaching their investment in the UT. The judge criticised their lack of care in not reading the unitholders’ agreement when receiving their investment, and seemed reluctant to provide relief to them in such circumstances.

\textsuperscript{244} See Hely J in \textit{Cachia} discussed below at chapter 4.4.1.

\textsuperscript{245} See Kizquari discussed below at chapter 6.4.

\textsuperscript{246} The recent CAMAC Discussion Paper noted:

MISs are a means of pooling, or using in a common enterprise funds, commonly in listed real property and infrastructure schemes, unlisted property trusts and syndicates, and mortgage funds, cash, bonds, equity and multi-sector managed funds, timeshare, horse breeding or racing, serviced strata and film schemes and various agribusinesses, including forestry. Some MISs are principally investment vehicles, while others are enterprises in their own right. The managed funds industry, which includes various types of MISs, forms a substantial part of the Australian economy. For instance, listed MISs with a capitalisation of $116 billion constitutes 8% of the total market capitalisation of securities listed on the ASX market. Some 80% of investment-grade commercial real estate, comprising office buildings, shopping centres and industrial facilities, are held in MISs. Most major infrastructure projects that use the public-private partnership (PPP) model utilise MISs.

CAMAC, ‘Managed Investment Schemes’ (Discussion Paper) above n 175, 2.
may apply, the most important of which relates to Ch 5C dealing with MISs. 247 Beyond the provisions dealing with MISs, fundraising activities and some other minor references, the CA does not have direct jurisdiction over UTs. 248 Pursuant to Ch 5C of the CA, Public UTs are required to be registered as MISs. 249 Despite the fact that Ch 5C was instrumental in making the CA Public UT ‘friendly’ 250 by extending its jurisdiction to include them, the integration was not complete across all provisions, thus the role of CL for MISs has remained unclear in certain circumstances. 251 Accordingly, a review of the law relating to MISs is important for two reasons. Firstly, to ascertain whether reform is needed to extend the CAORs to Public UTs. Secondly, to consider the issues faced by legislators in attempting to superimpose the CA over UTs, as is submitted with respect to CAORs. 252 Ch 5C prescribes a range of structural requirements that strictly regulate Public UTs (and the RE that operates the MIS) in a manner similar to a public company. 253 Where an MIS is in breach of its obligations, an application can be made to ASIC under Ch 5C to have the MIS wound up. 254

247 Including the following provisions summarised by Ford:

Ch 5C: requiring registration with ASIC and regulating the trust as a managed investment scheme; Ch 6D: which regulates fundraising under the supervision of ASIC; and Ch 2M: requiring standards of financial reporting as a registered scheme and disclosure under the continuous disclosure regime applicable to trusts listed on a stock exchange and certain unlisted trusts in respect of which a prospectus has been issued. If an issue of debentures by a body is within Ch 6D regulating fundraising, the body must enter into a debenture trust deed that complies with Ch 2L. Some other provisions of the Corporations Act touch trusts incidentally. Examples are found in Ch 2E regulating the giving of benefits by public companies to directors and other related parties. Trustees of trusts controlled by directors can be related parties affected by that legislation.

248 Some of the references in the CA may suggest otherwise, such as the inclusion of ‘units’ within the CA definition of ‘securities’ under s 9. However, upon thorough analysis it becomes clear that the application to UTs is generally very limited.

249 The Public UT is the typical form of entity that falls under the MIS regime, although not every MIS is a trust. Nevertheless, the vast majority if MISs are Public UTs; both terms are therefore used interchangeably in this thesis (consistent with other publications).

250 The attempts within the various provisions of Ch 5C to make Public UTs ‘CL’ friendly includes requirements such as the scheme be embodied in a ‘constitution’ that replaces the trust deed as the operative constituent document, and that it be a document containing provisions required under s 601GA. Echoing the ‘statutory contract’ of companies, the constitution must be a document that is legally enforceable as between the members and the Responsible Entity (‘RE’) (s 601GB), and is registered with ASIC. As discussed, this contractual element is a shift from the traditional rejection of the idea that the relationship is contractual in nature.


252 As illustrated in this thesis, it is clear the interaction between the CA and trust law principles remains a confusing and somewhat uneasy marriage when applied to Public UTs.

253 The key elements of the regulatory requirements include: provisions for fundraising by MISs to be regulated by the prospectus provisions of the CA; the RE operating the scheme must be a public company holding an Australian financial services licence issued by ASIC; special standards imposed on the RE (and policed by ASIC); prescribed contents of the ‘constitution’ for a registered scheme; decisions on certain material matters are to be made by meetings of
made for its winding up. In considering an application for winding up the scheme,\textsuperscript{254} the court will consider factors such as the protection of investors and the public interest in preventing breaches of the \textit{CA}.\textsuperscript{255} This is in addition to the factors governing the ‘just and equitable’ grounds for winding up provided for companies by s 461(1)(k).\textsuperscript{256}

By definition, Private UTs do not generally fall within the registration requirements of Ch 5C\textsuperscript{257} and are therefore not subject to the regulatory governance and compliance rigours that apply to Public UTs. Only entities deemed a ‘scheme’ pursuant to s 9\textsuperscript{258} that have more than 20 members are required to register;\textsuperscript{259} failure to do so is a breach of the \textit{CA}.\textsuperscript{260} Importantly, a UT is not a scheme for the purpose of s 9 if the investors have day-to-day control. To determine whether investors have day-to-day control over the operation of the scheme, one must consider factual control as distinct from the legal right to

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\textsuperscript{254} The application of the ‘winding up’ process (traditionally associated with companies) to trusts has caused a number of issues and is discussed further in this thesis.

\textsuperscript{255} See, for example, \textit{Australian Securities and Investments Commission v Chase Capital Management Pty Ltd} (2001) 36 ACSR 778; \textit{Australian Securities and Investments Commission v ABC Fund Managers} (2001) 39 ACSR 443; \textit{Australian Securities and Investments Commission v Knightsbridge Managed Funds Ltd} [2001] WASC 339.

\textsuperscript{256} Ford and Lee, \textit{Principles of the law of trusts}, above n 36 at [1.9690].

\textsuperscript{257} However, given the complexity of UT structures used in various enterprises, there is a danger that certain private multiple enterprise structures involving UTs could inadvertently trigger the requirements. Ron Jorgensen refers to large professional practices in which a group of professionals (eg doctors) have entered into a quasi-partnership and established a UT as part of their business structure. See Jorgenson, above n 196.

\textsuperscript{258} A ‘managed investment scheme’ must be registered only if it has more than 20 members, or is promoted in relation to other schemes with more than 20 members. Pursuant to s 601ED(1) of the \textit{CA}.

\textsuperscript{260} Where a trustee operates an MIS that should have been registered, the trustee is in breach of s 601ED(5) and commits an offence under s 1311 of the \textit{CA}. Failure to register does not mean that the legal or equitable rights that are part of the unregistered scheme will be legally unenforceable, although the contract between the investor and trustee/promoter is voidable at the option of the investor (s 601MB(1)). See \textit{Re York Street Mezzanine Pty Ltd (in ltp)} (2007) 162 FCR 358. Where a scheme has failed to register in breach of its obligations, an application can be made by either ASIC, the trustee, or an interest holder to have the scheme wound up by the court (s 601EE.2).
control (via voting rights etc.). Investors are deemed to have day-to-day control over the operation of the scheme only if:

- the investors ‘as a whole participate in making the routine, ordinary, everyday business decisions relating to its management’; and

- the investors ‘as a whole are bound by the decisions which are made’.

The exclusion of UTs from the MIS regime where investors have day-to-day control effectively ensures that Private UTs remain outside the jurisdiction of the CA.

S 601FC(1) outlines the obligations of the RE in exercising its powers and carrying out its duties, and effectively codifies a number of the equitable fiduciary duties imposed on trustees generally (as detailed below). Acknowledging potential confusion regarding the duties owed to shareholders that are not the investor unitholders, s 601FC(3) provides that these duties override any conflicting duty an officer or employee of the RE has to the company. An RE who contravenes these duties and any person involved in an RE’s contravention is in breach of the CA. In light of the fact that REs are themselves companies (ie akin to CTs), the officers of REs are also subject to duties that

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261 Ford and Lee, Principles of the law of trusts, above n 36, [1.9610].
262 Burton v Arcus [2006] WASCA 71 [79]-[80].
263 The RE of a registered scheme must:
(a) act honestly; (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the responsible entity's position; (c) act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, give priority to the members' interests; (d) treat the members who hold interests of the same class equally and members who hold interests of different classes fairly; (e) not make use of information acquired through being the responsible entity in order to: (i) gain an improper advantage for itself or another person; or (ii) cause detriment to the members of the scheme; (f) ensure that the scheme's constitution meets the requirements of ss 601GA and 601GB; (g) ensure that the scheme's compliance plan meets the requirements of s 601HA; (h) comply with the scheme's compliance plan; (i) ensure that scheme property is: (i) clearly identified as scheme property; and (ii) held separate from property of the responsible entity and property of any other scheme; (j) ensure that the scheme property is valued at regular intervals appropriate to the nature of the property; (k) ensure that all payments out of the scheme property are made in accordance with the scheme's constitution and this Act; (l) report to ASIC any breach of this Act that: (i) relates to the scheme; and (ii) has had, or is likely to have, a materially adverse effect on the interests of members; as soon as practicable after it becomes aware of the breach; and (m) carry out or comply with any other duty, not inconsistent with this Act, that is conferred on the responsible entity by the scheme's constitution.

See s 601FC(1).
264 For example, ss 601FC(1) (a), (c), (d), (e), (i), (k) and (m).
265 Under Part 2D.1, ie to the company that is the RE.
266 See s 601FC(5), which is a corporation/scheme civil penalty provision (see s 1317E). This means REs can be subjected to a $200,000 civil penalty and can be liable to the scheme for any loss or damage suffered due to the contravention. If the contravention is intentional or reckless, it is a criminal offence (s 601FC(6)) carrying a fine of 2,000 penalty units and/or 5 years jail for individuals and 10,000 penalty units for bodies corporate.
267 Pursuant to s 601FD, an officer of the RE of a registered scheme must:
broadly mirror those of a company officer.\textsuperscript{268} Thus, contraventions by RE officers are akin to a breach of company officers’ duties under the \textit{CA}.\textsuperscript{269} It is important to note that these provisions introduced rights to unitholders to take action against not only the trustee, but also the directors and officers of the trustee in the form of ‘derivative action’ by unitholders in Private UTs. This provided a substantive improvement in the empowerment of unitholders in Public UTs.\textsuperscript{270}

Another area where Ch 5C aligns the rights of unitholders to those of shareholders is with respect to the power of the majority, which is likewise a central cause of oppression cases.\textsuperscript{271} A provision under Ch 5C mirroring CL provisions relates to the ability of unitholders to modify or repeal and replace the trust instrument by a meeting and a special resolution that has been passed by at least 75\% of the votes cast by members entitled to vote on the resolution.\textsuperscript{272} Interestingly, Ch 5C provides additional unilateral power to the RE to amend the constitution, ‘if the RE reasonably considers the change will not adversely affect members’ rights.’\textsuperscript{273} The inclusion of these provisions illustrates the manner in which the \textit{CA} can deal with circumstances that have the potential for oppression to arise (for example, the forced variation of unitholders’ rights).\textsuperscript{274}

In \textit{ING Funds Management Limited v ANZ Nominees Ltd}\textsuperscript{275} (‘\textit{ING v ANZ}’) pursuant to s 601 in Ch 5C, Justice Barrett dealt with the validity of such an

\begin{itemize}
\item[(a)] act honestly;
\item[(b)] exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position;
\item[(c)] act in the best interests of the members and, if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members' interests;
\item[(d)] not make use of information acquired through being an officer of the responsible entity in order to: (i) gain an improper advantage for the officer or another person; or (ii) cause detriment to the members of the scheme;
\item[(e)] not make improper use of their position as an officer to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme; and
\item[(f)] take all steps that a reasonable person would take, if they were in the officer's position, to ensure that the responsible entity complies with: (i) this Act; (ii) any conditions imposed on the responsible entity's Australian financial services licence; (iii) the scheme's constitution; and (iv) the scheme's compliance plan.
\end{itemize}

\textsuperscript{268} As the duties of an officer of a company under ss 180-184 in Part 2D.1 of the \textit{CA}. However, s 601FD(2) provides that a duty of an officer of the RE under s 601FD(1) overrides any conflicting duty the officer has to the RE under Part 2D.1.

\textsuperscript{269} Any officer of an RE who contravenes these duties contravenes s 601FD(3), which is a corporation/scheme civil penalty provision (see s 1317E). Again, this means the officer can be subjected to a $200,000 penalty and can be liable to the scheme for any loss or damage suffered as a result of the contravention. If the contravention is intentional or reckless, then that is a criminal offence (s 601FD(4)) carrying a fine of 2,000 penalty units and/or 5 years’ jail.

\textsuperscript{270} Derivative action is discussed in chapter 4.3.2.

\textsuperscript{271} See discussion in chapter 4.4.2.

\textsuperscript{272} Section 601GC(a). This provision mirrors the voting rights of shareholders who have special powers to pass resolutions when a ‘special majority’ of 75\% supports the resolution.

\textsuperscript{273} Section 601GC(1)(b).

\textsuperscript{274} For example, in \textit{Gra-Ham} (1989) 1 WAR 65.

\textsuperscript{275} [2009] NSW SC 243.
amendment to the constitutions of two MISs operated by ING. 276 Barrett J provided the formula required for exercising the RE’s right to amend the constitutions by:

• identifying members’ rights;

• undertaking a comparison of members’ rights before the modification with the changes to rights that would exist after the modification; and

• reasonably considering whether there would be any adverse effect on the members’ rights.277

In applying Barrett J’s approach, subsequent cases involving applications by REs required the courts to consider broadly how to define ‘member’s rights.’ 278 In Premium Income Fund Action Group Incorporated279 (‘Premium Income Fund’), Gordon J rejected the application of the RE to amend the constitution and held that ‘members’ rights’280 are extremely broad and essentially encompass all powers, rights and obligations contained in the scheme’s constitution.281 In contrast, Justice Barrett in Centro Retail Limited and Centro MCS Manager Limited in its capacity as Responsible Entity of the Centro Retail Trust

276 Pursuant to s 601. The matter concerned two separate proceedings commenced by the ING as plaintiff (in its capacity as RE of two registered MISs), involving a dispute between ING and certain representative members of the two schemes as to the effectiveness of actions taken by ING to freeze the redemption rights of members in the schemes. ING proceeded to take the relevant steps in effecting the amendments via Board resolutions, although not all documents were executed effectively. The proceedings dealt with questions of whether the relevant deeds and documents had been effected properly, and whether the condition under s 601GC(1)(b) that ‘the RE reasonably considers the change will not adversely affect members’ rights’ had been satisfied. McCollough Robertson Lawyers, Watershed decision relating to responsible entity’s power to amend constitution (19 July 2011) McCollough Robertson Lawyers <http://www.mccullough.com.au/icms_docs/100183_Watershed_decision_relating_to_responsible_entities_power_to_amendconstitution.pdf>.

277 Ibid.

278 As noted by Justin Gross and David Walter in relation to Barrett J’s decision in ING v ANZ: In exercising any amending power, a responsible entity should consider both unitholders’ rights and unitholders’ interests. While it may be appropriate to amend a scheme’s constitution on the basis that the amendment is, commercially, in the best interests of unitholders, that amendment must also not adversely affect unitholders’ legal rights under the constitution. Accordingly, a robust analysis of both the commercial and legal effects of a proposed amendment will be necessary. Justin Gross and David Walter, ‘Do the Right Thing–Amending the Constitution of a Registered Managed Investment Scheme’ (2009) 25(1) Australian Banking and Finance Law Bulletin, 184.


280 Gordon J noted that members’ rights for the purpose of s 601GC(1)(b) are the contractual and equitable rights conferred on unitholders by the constitution.

281 The broad approach taken by Justice Gordon in defining ‘member’s rights’ stopped the attempt by the RE to change the pricing mechanism and timing of units prescribed under the constitution. McCollough Robertson Lawyers, above n 276.
Chapter 3: Application of Corporate Law to Unit Trusts

(‘Centro’) took a narrower view of unitholders’ rights. Given the narrow interpretation of members’ rights in Centro and the broader interpretation in Premium Income Fund are both decisions by single judges in the Supreme Court of NSW and the Federal Court respectively, neither is inherently superior, therefore the correct approach has yet to be established.

While the s 601GC cases have not dealt directly with ‘oppressive conduct’ (which is rare in cases of Public UTs), they nevertheless provide insight into the approach taken by courts in defining unitholder rights in MISs pursuant to shareholder concepts. It also highlights the type of balanced protection afforded to investors in Public MISs by ensuring the RE (trustee) is able to implement structural changes that are in the best interests of the majority of unitholders, without doing so in a manner that would be unjustifiably unfair to a minority. Consequently, this provides an example of the ability of the CA to legislate effective protections to minority unitholders (albeit only in Public UTs), similar to the proposal in this thesis for broadening the CAORs to include protection for unitholders.

3.5 Listed Public Unit Trusts, the ASX Listing Rules and the Corporations Act

Where a Public UT is listed on the ASX, in addition to complying with the requirements of Ch 5C, it must also comply with the ASX Listing Rules and the Corporations Act. Generally, all Listed Property Trusts must comply with ASX Listing Rules, the CA, and Income Tax Assessment Act 1936. In order to protect investors, Australian laws require a minimum level of disclosure of information. There are some listed property trusts whose level of disclosure is regarded as strong. This is because there are investor protection controls already in place, such as the ASX Listing Rules and the Corporations Act. The Listed Property Trust’s mix of restrictions and flexible characteristics has allowed for steady growth in the last decade. A co-regulatory framework exists because the government deems that it is beneficial for a portion of the Australian Listed Property Trust regulatory framework to be undertaken by the ASX, essentially through its Listing Rules. All Listed Property Trusts are required to satisfy the listing requirements of the ASX and are supervised.
relevant CA provisions dealing with listed vehicles. Relevant ASX listed UT is statutorily subjected to relevant ASX and CA provisions, the ASX will also require the UT to ensure there is no inconsistency between these obligations and those stipulated under the trust deed before approving a listing.

In addition to the ASX rules, the CA likewise attempts to ensure that listed MISs are regulated in the same manner as listed companies. For example, s 604 has on an ongoing basis. Supervision by the ASX allows investors access to detailed information about these investments.


288 As per Listing Rule 19.11(B): ‘The listing rules apply to the responsible entity of a trust so that the responsible entity has an obligation to ensure that the trust complies with the listing rules.’ Note the ability of the court to enforce ASX Listing Rules derives both from the contract between a listed entity and the ASX, and from the statutory recognition given to the rules of the exchange under the CA. Section 777 of the CA gives the court statutory power to give directions on compliance with, or enforcement of, the Listing Rules of a securities exchange upon application by ASIC, the Securities Exchange, or a person aggrieved by the failure to comply with the Listing Rules. See <http://www.asx.com.au/regulation/rules/asx-listing-rules.htm>.


The covenants applicable to listed unit trusts were supplemented by a number of other covenants to be found in the ASX Listing Rules: see LR 13.1–13.6. The enforceability of the ASX Listing Rules rests upon s 777 of the Corporations Law but as a practical matter, the ASX will not list a unit trust unless it is proven to its satisfaction that the Listing Rule covenants have been incorporated into the unit trust deed.

Ford, Austin and Ramsay, above n 234, ch 22.489 (citations omitted). Ford’s reference to s 777 appears to be a reference to the old Corporations Act No 109 (1989) (Cth), with the relevant section under the CA being s 798C. It should also be noted that Listing Rule 13 (which provided a more detailed prescription of requirements for a listed trust) was deleted in 2001, and replaced with a simply worded requirement in Listing Rule 19.11(B) <http://www.austlii.edu.au/au/legis/cth/num_act/ca1989172/s777.html>.

290 For example, the recent CAMAC discussion paper on MISs noted: ‘The RE of a listed MIS is under a continuing obligation to notify the market of any material price-sensitive information concerning the scheme that is known to the RE but is not generally available.’ See Chapter 6CA Continuous disclosure. Specific reference to the obligation of the RE is found in s 674(3) See also s 604, Takeovers Panel Guidance Note 15: Trust Scheme Mergers. For example, the continual disclosure, takeover and compulsory acquisition provisions in Chapters 6, 6A and 6B of the CA apply to the acquisition of interests in listed MISs. See CAMAC, ‘Managed Investment Schemes’ (Discussion Paper), above n 175, 23.

291 As an example of how this has been drafted with respect to the takeover provisions, s 604 of the CA states:

(1) This Chapter applies to the acquisition of relevant interests in the interests in a registered scheme that is also listed as if:
   (a) the scheme were a listed company; and
   (b) interests in the scheme were shares in the company; and
   (c) voting interests in the scheme were voting shares in the company; and
   (d) a meeting of the members of the scheme were a general meeting of the company; and
   (e) the obligations and powers that are imposed or conferred on the company were imposed or conferred on the responsible entity; and
   (f) the directors of the responsible entity were the directors of the company; and
   (g) the appointment of a responsible entity for the scheme were the election of a director of the company; and
the effect of ensuring that an investor in a listed MIS has the same rights and protections in relation to a takeover as a shareholder in a listed company.292 This section provides a valuable example of the type of broad flexibility that can be drafted into the CA in extending CL principles to UTs and could thus be used as a model for extending the CAORs to UTs.

The application of takeover provisions to Public UTs is a relatively recent introduction.293 As Ford et al commented in response to the AF & ME294 case:

Clearly, the law with respect to the acquisition of a controlling unitholding was unsatisfactory. At best the takeover provisions of a trust deed took effect contractually as between trustee, manager and unitholders, or took effect in equity to the extent that they relate to the proprietary interests of unitholders. Under such a regime, the court’s powers of enforcement of the provisions were necessarily more limited than the broad statutory powers conferred by Ch 6, and there was no public regulator in a position to ensure that the conduct of the parties was acceptable.295

Ford et al note that ‘[t]he extension of Chapter 6 to listed MISs has created some complications for the drafters of the legislation.’296 It has been necessary to make a number of incidental amendments to other parts of the CA to ensure

(h) the scheme's constitution was the company's constitution.


292 Until 13 March 2000, Australian takeover law did not apply to a takeover bid for a listed or unlisted UT.
293 See Ford, Austin and Ramsay, above n 234, ch 23.142 re takeover of listed MISs.
294 (1994) 14 ACSR 499. While trust deeds of listed UTs generally attempted to mirror the company takeover provisions, these provisions were effectively suspended if the trust was listed pursuant to LR 15.14. For example, in AF & ME, a bidder moved from just under 20% of the units of the listed target trust to 51% in a very short time by making anonymous offers to selected institutional holders, with small investors unaware that a transfer of control was taking place. The trust deed contained provisions modelled on the takeover provisions of the former CL, but these provisions could not be enforced because to do so would be contrary to the listing rule. Accordingly, Heerey J determined that the bidder's acquisition was lawful. Note that in Rural & Agricultural Management Ltd v West Merchant Bank Ltd (1995) 14 ACLC 11, the circumstances were similar but Young J granted injunctions restraining an acquisition in excess of the 20% threshold. Ibid.
295 Ibid.
296 One potential trap is that while the directors of the RE are generally equated with the directors of the company, it is the appointment of the RE rather than the appointment of any directors to it that is the relevant event under s 604. Ibid.
consistency. Generally, however, the mechanism has proved reasonably effective, with a number of listed MIS takeovers over a number of years working in line with the listed company takeover regime.

Following Gambotto, the legislature determined that the rights of the majority to acquire minorities compulsorily in appropriate circumstances needed to be protected. With respect to compulsory acquisitions, the CA similarly applies CL principles to listed MISs and was implemented for the same reasons that parliament deemed necessary for listed companies following Gambotto. In extending the provisions to entities other than companies in respect of the chapter dealing with compulsory acquisitions, s 660A states:

This Chapter extends to some listed bodies that are not companies: This Chapter extends to the acquisition of securities of listed bodies that are not companies but are incorporated or formed in Australia in the same way as it applies to the acquisition of securities of companies.

The cases involving the compulsory acquisition of units in listed UTs are interesting in that they highlight the relatively seamless manner in which the CA is able to apply CL principles (such as those raised in Gambotto) to UTs. Those sections of the CA that extended the jurisdiction to listed UTs were drafted simply

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297 See, for example, s 12 of the CA.
298 See, for example, the Takeover Panel’s intervention in Re Multiplex Prime Property Fund 01 and 02 (2009) 74 ACSR 248.
299 An example of the operation of the compulsory acquisition provisions to listed trusts was the case of Capricorn Diamonds Investments Pty Ltd v Catto (2002) 5 VR 61 (‘Capricorn’). The case involved application for approval of a compulsory acquisition notice pursuant to s 664F(1) of the CA. The plaintiff held over 90% of units in company, and made an offer to acquire the remaining minority units compulsorily at $2 per unit (which was 78c above the highest valuation in range of values for units determined by independent expert). The minority unitholders opposed the application to the court principally on the basis that the offer made for the units did not give fair value. Accordingly, the plaintiff sought court approval of terms set out in its notice for compulsory acquisition of units. The court was required to consider whether the offer made for the units gave fair value, and found in the plaintiff’s favour.
300 Section 660A.
301 In Capricorn, Warren J dealt with the various issues raised by applying relevant precedent cases involving compulsory acquisition of minority shareholders (ie addressing the question of whether fair value was offered). The relevant principles outlined in Gambotto were discussed and dealt with in light of subsequent relevant cases such as Kelly-Springfield Australia Pty Ltd v Green (2002) 167 FLR 1 without any consideration of the fact that the case dealt with a UT (as in Cachia, for example). The effect of s 660A was to empower the court to address the issues thoroughly on the basis that the unitholders shared identical rights to shareholders. Warren J only raised the fact that the case involved a UT in his comments in his judgment regarding the effect of the distributions on debt in a UT, and the consequential impact on unit price. On this, Warren J cited Charles v FCT and noted that ‘whereas a share comprises separate property from the debt that arises when a dividend is declared, the distinction does not exist in the case of a unit trust of the Charles v FCT type.’ Capricorn (2002) 5 VR 61, [96]. Notably, this was not a core issue in the proceedings.
and clearly, and it is submitted they provide important precedents in considering the type of amendments that would be required should CAORs be extended to UTs.

With this in mind, it is important to note there are no express provisions in the CA applying CAORs to MISs but the examples above illustrate the ease with which such an extension could be enacted. Nevertheless, oppression is rarely exhibited in a public vehicle, and any effective extension of the CAORs to address oppression in UTs would need to extend to all UTs including Private UTs, which to date have not been directly regulated by the CA.

3.6 Reforming Managed Investment Schemes—Converting a Public Unit Trust into a Quasi-Company

While the inclusion of UTs in the form of MISs under the jurisdiction of the CA has been largely successful, the integration of Public UTs into the CA has resulted in a variety of issues arising from the differences between UTs and companies. Were CAOR provisions to be extended to UTs—as submitted herein—it is instructive to explore the integration concerns faced by Public UTs in order to understand the types of issues that may be encountered should these extensions occur.

One of the areas in which discussion has taken place on the need for reform relates to the challenges in restructuring or winding up MISs. As explored earlier in chapter 3.4, the ‘winding up’ concept is essentially a CL principle designed specifically to deal with the nature and structure of companies or partnerships, which are quite different to trusts. While the court may be guided by analogies to the winding up of companies or partnerships, problems arise when applying CA remedies to MISs similar to those that occur when applying them to trusts. For example, s 477(2)(a) empowers a liquidator to bring or defend proceedings on behalf of a company, which is of course inappropriate for a trust that is in itself not a legal entity. Chapter 5C has attempted to superimpose the winding up

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302 See Young J in Horwath Corporate Pty Ltd v Huie (1999) 32 ACSR 413, [10] (‘Horwath v Huie’).
304 Ford suggests that in such a case the court may need to make an order empowering the liquidator to proceed in the liquidator’s name as liquidator of the scheme. See Hamilton v Piggott Wood & Baker [2003] FCA 1055; Australian Securities and Investments Commission v Primelife
mechanism over MISs with a degree of success, although their inherent structural differences to companies has increasingly been highlighted by a number of high profile MIS collapses over recent years, illustrating the requirement for further reform. Accordingly, the Commonwealth Government briefed CAMAC with the project of reviewing the MIS regime to identify areas requiring reform. CAMAC’s June 2011 Discussion Paper noted:

The problems that have arisen in recent years in part reflect difficulties experienced in particular commercial sectors, or with particular MIS structures. However, they also point to a wider need to review the MIS legislative framework under Chapter 5C of the Corporations Act, to make it workable and relevant to current investment and entrepreneurial arrangements, taking into account developments in practice since the present legislation was introduced over a decade ago.

Pursuant to the Commonwealth Government’s Terms of Reference, the 2011 CAMAC Discussion Paper raised a number of issues that relate to the fact that

_Corp Ltd_ (2006) 58 ACSR 447. See also _Re GDK Financial Solutions Pty Ltd_ (2006) 236 ALR 699, [39] (‘_Re GDK_’). Similarly, the attempt in _Re GDK_ to make an order that the liquidator of a scheme have all the powers given by s 477 of the _CA_ (as if the scheme were a company) was held to be inappropriate. Ibid.

A court is empowered to make any orders it considers appropriate for the winding up of the scheme. See s 601EE(2), for example, by providing a receiver certain powers given by the _CA_ to liquidators of companies. Ibid [1.9690] See, for example, _Australian Securities and Investments Commission v Cross_ [2007] QSC 185. Ford & Lees’ _Law of Trusts_ noted that Ch 5C includes dedicated provisions dealing with the winding up of an MIS as distinct from a CT of a scheme, ‘as a scheme does not automatically attract provisions of the _CA_ that apply in the winding up of companies.’ Ford, H A J and W A Lee, _Principles of the Law of Trusts_ (Online Edition), above n 34, [1.9690].

As recent cases have highlighted, an appointment of a liquidator for the winding up of a scheme is not the same as an appointment of a liquidator to wind up a company. Nor does it carry with it the statutory consequences that follow the appointment of a liquidator to a company. Ibid. If the court appoints a liquidator of a scheme, or a receiver, or a receiver and manager in relation to a scheme, the appointee will have the status of being an officer of the court. See _Australian Securities and Investments Commission v Tasman Investment Management Ltd_ (2006) 202 FLR 343.

In November 2010, when briefing CAMAC to undertake a review of the MIS regime following a number of high profile collapses of MISs over recent years, Parliamentary Secretary to the Treasurer, the Hon David Bradbury MP noted:

While the corporate insolvency provisions in the Corporations Act provide creditors and directors with certainty about their rights and obligations, the Corporations Act sets out very few specialised rules regarding the administration of insolvent trusts or trustees. Instead, the administrations of such are determined by a mix of legislation, common law, and equitable principles. The lack of clarity has led liquidators to resort often to the court in order to obtain advice about the legality of future actions. It is therefore not clear whether the legislative arrangements contained in the Corporations Act are adequate to maintain the confident participation of retail investors in MIS because of deficiencies in the way the Act deals with: resolving the consequence, for otherwise viable schemes, of the insolvency of their RE; and what is to occur when the RE is insolvent and the Scheme itself has failed.

_CAMAC, ‘Managed Investment Schemes’ (Discussion Paper), above n 175, 2._

_Ibid._

_Ibid Appendix._

_Ibid._
MISs are only partially dealt with under the *CA* pursuant to Ch 5C. Upon reading the paper, it is apparent that the MIS regime under the *CA* could be deemed to be, to use a crude analogy, ‘half-pregnant’; the introduction of the regulation of Public UTs under the *CA* has effectively left a number of areas in a state of limbo. In particular, the 2011 CAMAC Discussion Paper identified specific concerns relating to the winding up and liquidation of solvent and insolvent trusts, including the challenges of restructuring where winding up is not the preferred option. For example, the paper noted in relation to seeking a court ordered winding up: ‘In contrast with the winding up of a company [Section 459P], there is no express ground for the court to direct the winding up of an MIS on the basis that it is insolvent.’\(^{311}\) The paper also highlighted that in many cases, the processes are determined by trust law and the relevant trust deed provisions, rather than CL.\(^{312}\)

In each case of disparity, the paper recommended that the *CA* be amended to bring the MISs into line with the CL approach for winding up\(^ {313}\) and restructuring.\(^ {314}\) The paper also recommended amendments to enshrine limited liability to unitholders (which had been recommended previously but never enacted),\(^ {315}\) and a raft of

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\(^{311}\) Ibid 91.

\(^{312}\) For example, in commenting on the winding up process for an MIS:

*The legislation does not regulate the process by which an RE winds up a scheme. This is left to the scheme constitution and any general law and trust principles. This lack of legislative direction raises the question whether, or in what respects, a more regulated liquidation procedure may be necessary to protect the interests of members. A possible precedent, if some legislative initiative is warranted, is the members’ voluntary winding up procedure for companies (Part 5.5 Divs 2 and 4).*

Ibid 95.

\(^{313}\) For example, with respect to the voluntary administration of MISs, the Discussion Paper noted:

*The overall purpose of the VA procedure for a company under Part 5.3A of the Corporations Act is to impose a moratorium on any actions or proceedings concerning the company to allow an opportunity for an independent party (the administrator) to assess the potential viability of the company, with a view to advising creditors whether it would be in their interests: to enter into a deed of company arrangement (DOCA) that would allow the company to continue to operate, rather than be wound up; to have the company wound up; for the administration to end, with the company continuing as before.*

A similar process could be adopted for the VA of an MIS.

Ibid 75.

\(^{314}\) In relation to the ability to restructure where winding up is not appropriate, the Discussion Paper stated:

*A reorganization or change of control of a company may be achieved through a scheme of arrangement under Part 5.1 of the Corporations Act. These provisions do not apply to managed investments schemes. Instead, changes of control or other reorganizations of managed investment schemes have tended to proceed through ‘trust scheme’ arrangements… in these arrangements of the judicial and other procedural protections applicable to corporate schemes of arrangement, though the proponents of a trust scheme may choose to seek judicial direction or advice on its implementation. The CAMAC report Members’ schemes of arrangement (2009) recommended the extension of the scheme of arrangement provisions to listed and unlisted MISs.*

Ibid 18.

\(^{315}\) See discussion in chapter 2.4.3.
other reforms for the MIS regime to provide a more effective and efficient regulatory system.\footnote{CAMAC, ‘Managed Investment Schemes’ (Report), above n 129.}

In August 2012, CAMAC released its final report.\footnote{Ibid 91.} The most striking recommendation in the final 2012 report is the proposal to implement the ‘Separate Legal Entity’ (‘SLE’) regime to MISs. As the report summarised, the SLE approach to the legal framework for schemes is based on making the MIS—as an SLE—the principal to agreements forming part of the scheme and the holder of legal title to scheme property (rather than the RE). This approach would simplify the regulatory structure for schemes and overcome some key problems that have arisen in practice.

The 2012 report stated that under the SLE Proposal, ‘each individual scheme would be given the status of a separate legal entity, distinct from its RE or the scheme members,’ (emphasis added) for the following limited purposes:\footnote{Ibid 57.}

- to own scheme property;\footnote{CAMAC, ‘Managed Investment Schemes’ (Report), stated: The MIS would hold legal title to all scheme property. In doing so, the MIS would not be acting as a trustee for scheme members (who instead would hold residual rights to scheme property, similar to shareholders, in the event of the scheme being wound up). This would represent a change from the current legal position, whereby the RE holds legal title to scheme property, on trust for scheme members. This change would ensure that scheme property is fully separate from the personal assets of the RE or the property of any other scheme operated by the RE. \textit{Ibid} 47.}319
- to enter into agreements;\footnote{The Report stated: ‘In operating a scheme, the RE would enter into agreements as agent of the MIS, which would be the principal. This would represent a change from the current legal position whereby the RE, in operating a scheme, enters into agreements as principal.’ \textit{Ibid}.}320 and
- to sue or be sued.\footnote{The Report stated: The MIS, acting through the RE as its agent, could sue or be sued in its own right. Counterparties to agreements entered into by the MIS through the disclosed agency of the RE would have direct rights against all scheme property, legal title to which is held by the MIS. This would represent a change from the current legal position whereby counterparties have only an indirect subrogation remedy against scheme property … \textit{Ibid}.}321

The reform will attempt to address this core issue by fundamentally changing the nature of the UT to achieve a degree of ‘legal personality’ similar to what is statutorily provided to companies. This will bring the Public UT one step closer to
Chapter 3: Application of Corporate Law to Unit Trusts

becoming a quasi-company under the CA and provides a powerful example of the extent to which parliament is being advised to move towards achieving more alignment between the rights of unitholders in Public UTs and shareholders. The proposed SLE reform would provide a significant advance in aligning the rights of unitholders in MISs to those of shareholders by effectively transforming a trust into a separate entity for the purposes of the CA. However, it is important to note that the report is resoundingly silent on the rights of Private UTs, which it is submitted deserve similar protection under the CA.

While the rights of unitholders in MISs are now more closely aligned with shareholder rights, areas remain in the CA where shareholders continue to enjoy rights that are not extended to unitholders in MISs, for example the right to CAORs. Nor do unitholders enjoy such protection under trust or common law principles, and are thereby less protected than shareholders. CAORs have not been extended to MISs, nor have they been raised in the detailed CAMAC reviews on MISs in recent years. This is perhaps understandable given the fact that oppression cases occur less frequently with public companies (given the stricter regulatory framework and public scrutiny), and for that matter, occur less frequently with Public UTs in comparison to private companies and Private UTs (where there is less regulation and public scrutiny). Nevertheless, as the cases discussed in this thesis highlight, oppressive conduct can and does arise in relation to Public UTs (as with public companies). While the obligations on relevant parties under Ch 5C provide a high degree of protection to unitholders of Public UTs, the important question remains whether extending CAORs to Public UTs is of value.

Further, while unitholder rights in Public UTs under the MIS or listed regime are more closely aligned with shareholder rights as discussed above, CAMAC’s proposal to introduce SLE reforms has taken unitholder rights a significant step closer to shareholder rights in Public UTs. For other unitholders, however, the inequities with shareholder rights remain significant, leaving most unitholders

322 Discussed in chapter 4.4.
323 See Ford, Austin and Ramsay, above n 36, ch 11.435. The reasons for the lesser frequency of cases involving oppressive conduct in Public UTs compared to Private UTs is discussed further in chapter 5.
324 See discussion of cases in chapter 4.4.
325 See chapter 3.4.
326 See discussion in chapter 3.6.
without the framework of protection that shareholders enjoy, as exemplified by the lack of protection in the context of oppression.

3.7 Conclusions of Chapter 3

In order to explore the contention that CAORs should be extended to UTs, this chapter considered the manner in which CL generally—and the CA specifically—currently interacts with UTs so as to understand the context in which the CL changes proposed in this thesis would occur. In summary:

- There is a degree of debate and uncertainty as to how CL principles should be applied to UTs, which could be clarified by legislative intervention. 327

- The CA has indirect jurisdiction over most UTs via the CT, although the indirect nature of the relationship between the CA and the UT creates a number of complexities 328 and leaves unitholders who are not shareholders in the CT 329 largely unprotected. Legislative intervention would overcome these issues if intervention were merited.

- The integration of Public UTs via the MIS regime has proven that UTs are capable of being governed via the CA, effectively providing unitholders with protection they would not otherwise enjoy. However, the structural differences between UTs and companies give rise to a number of issues to be addressed in incorporating UTs into the CA framework. This needs to be considered when assessing the compatibility of CAORs to UTs.

- In response to the identification of these issues, CAMAC has recommended a range of further far-reaching reforms that would effectively convert Public UTs into quasi-public companies, highlighting the fact that any historical perspectives on separating the regulation of UTs and companies is increasingly outdated.

- Although Private UTs are not dealt with under the MIS regime, the direction of Public UT regulation adds weight to the argument that all UTs should enjoy the protection of relevant CA provisions such as CAORs.

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327 As proposed in this thesis via the amendments suggested in chapter 7.3.
328 For example, with respect to establishing proper standing by the aggrieved stakeholder.
329 As is the case in most Public UTs.
While the preceding chapters have established the broad historical, structural and CL context in which UTs are framed, the following chapter focusses on the existing rights of unitholders in dealing with circumstances of oppression pursuant to traditional trust law principles.
Chapter 4: Trustee Obligations and Unitholder Rights

Without Corporations Act Oppression Remedies

4.1 Introduction

To strengthen the validity of the contention that CAORs should be extended to UTs and corroborate the need for such reform, it is essential to substantiate that a deficiency exists in the current rights pertaining to unitholders when dealing with oppressive conduct. In order to assess the theory, this chapter outlines the relevant general law and statutory legal framework relating to unitholder rights under circumstances of oppression, and compares the status of unitholders to that of shareholders.

4.2 Trustee Obligations

4.2.1 Trustee Obligations Under Trust Law

As a rule, the most basic obligations of a trustee relate to its role as a fiduciary on behalf of the beneficiaries of a trust.330 The relationship between trustee and beneficiary is described as ‘a fiduciary capacity of the highest order.’331 In other words, it is the archetypal fiduciary relationship.332 The critical feature is that a fiduciary undertakes to act in the interest of the beneficiaries. A trustee’s primary and overriding duty is to obey the terms of the trust as expressed in the trust instrument.333 The trust instrument is the trustee’s ‘charter’; any deviation from this charter renders the trustee liable for breach of trust.334 Beyond the trust deed, the rights and obligations of trustees are prescribed principally by general law, which importantly in the context of this thesis can usually be excluded by contrary

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330 A fiduciary relationship is often referred to as a relationship of trust, confidence, or confidential relations.
331 Per Hansen J in Re Permanent Trustee Australia Ltd (1997) 137 FLR 190 at 190.
332 Woodson (Sales) Pty Ltd v Woodson (Aust) Pty Ltd (1996) 7 BPR 14, 705-6. The seminal case establishing the fiduciary nature of the trustee’s role is Keech v Sandford (1726) 25 ER 223 in which the trustee of a lease renewed the lease in his own name where the lessor had refused to renew the lease to the trust. See Dal Pont and Chalmers, above n 7, 96.
333 Irrespective of how seemingly insignificant such terms may appear. See T G Feerick, ‘The Nature of Trusts and Classification’ (Lecture delivered at the School of Law, University of Western Sydney, Campbelltown, 2003).
334 Dal Pont and Chalmers, above n 7, 617.
provisions in the trust instrument. The result is that where a trust deed prescribes broad discretionary powers to a trustee in dealing with beneficiary entitlements, it is extremely difficult for beneficiaries to challenge the exercise of such powers. This characteristic is fundamental in understanding the difference between shareholder and unitholder rights in the context of oppression.

In addition to the general fiduciary obligations of the trustees (including the overarching obligation of trustees to act in the interests of the beneficiaries), trustees are obligated to adhere to a list of specific equitable duties. In considering the circumstances in which oppression arises, many of these specific equitable rules may apply to the trustee in protecting against claims of oppressive conduct against a unitholder. For example, trustees are subject to the ‘fair dealing rule’ when arranging for the purchase of a beneficiary’s interest. Cases of oppression often arise in ‘compulsory acquisition’ scenarios, and the fair dealing rule can therefore provide unitholders with some protection in such circumstances.

Another example of the relevance of trustee duties to cases of unitholder oppression is under the trustee’s duty to act impartially, which means that the trustee must not act in such a way as to favour one class of beneficiaries at the expense of another. The duty is likened to that of a director’s duty not to act

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335 Ibid.
336 The limited circumstances in which trustee obligations cannot be excluded by the trust deed are discussed below in Wilden Pty Ltd v Green [2009] WASCA 38 (16 February 2009) (‘Wilden’) and MJ Jacometti Pty Ltd v Boomaaroo Nurseries & Wholesale Supplies Pty Ltd [2011] VSC 612 (‘Jacometti’), see chapters 4.3.4 and 4.4.1.
337 These duties include the obligations: to obey the terms of trust; duty to account for receipts and payments; duty to provide beneficiaries with relevant information; duty to avoid actual or potential conflicts (between duties and between personal interests and interests of the beneficiaries); duty not to purchase trust property; duty to deal ‘fairly’ with beneficiaries; duty to act impartially as between beneficiaries; duty to transfer trust property to those who are absolutely entitled; duty to invest the trust fund; and duty to act personally and, if more than one, unanimously. See Dal Pont and Chalmers, above n 7, 617.
338 Ibid 625. In such circumstances, the transaction is voidable at the instance of the beneficiary unless trustee proves conclusively a) full disclosure; b) no advantage by virtue of trusteeship; c) arm’s length dealing; d) full value paid; e) beneficiary is of full capacity/age; and f) transaction not fraudulent in any way. See Edmunds v Pickering (1999) 75 SASR 407, 558-9 (Lander J); Clay v Clay (2001) 202 CLR 410, 434.
339 The application of this rule to cases of oppression where the oppressed unitholder has its interest acquired needs to be considered in light of the commercial context in which the UT operates. Attention must also be paid to the relevant provisions in the trust deed or unitholders agreement. See the case of a property partnership Trinkler v Beale (2009) 72 NSWLR 365; [2009] NSWCA 30.
340 See discussion on Wilden and Jacometti in chapter 4.4.1.
Chapter 4: Trustee Obligations and Unitholder Rights without Corporations Act

Oppression Remedies

partially by favouring one group of shareholders over another. Similarly, the trustee’s obligation to protect trust assets for beneficiaries could be applied in cases of oppressive conduct in UTs. While these equitable trustee obligations are quite extensive and may provide protection to unitholders against oppressive conduct in certain circumstances, they are generally subordinated to the terms of the trust deed upon which trustees rely when taking the type of action an aggrieved unitholder alleges is oppressive. Indeed, cases of oppression (whether involving companies or UTs) commonly involve actions which are prescribed and sanctioned by the terms of the constituent documents. It is submitted that in such circumstances, CAORs provide relief to shareholders that is arguably not available to unitholders

As discussed further in chapter 4.3, where the oppression is not committed by the trustee but rather by a fellow unitholder, the oppressed unitholder’s options for relief are further limited unless there are grounds to compel the trustee to act pursuant to the trustee’s obligations.

It is worth noting that comparisons are often made between the duties owed by trustees with those of directors. In fact, the obligations of a trustee are stricter, and the degree of care and responsibility required of trustees in exercising their decision-making powers is more conservative. In R v International Vending

342 See Whitehouse v Carlton Hotel Pty Ltd (1987) 162 CLR 285, 289 (Mason, Deane and Dawson JJ). While the duty of impartiality does not fetter a trustee’s broad discretion to select beneficiaries when dealing with discretionary trusts (Dal Pont and Chalmers, above n 7, 636), the duty is certainly applicable to cases dealing with UTs where prima facie each unitholder is to be treated equally (see also Wilden).

343 Mavromatis v Haspaz Pty Ltd (1993) 10 ACSR 473. The case dealt with the question of whether unitholders of a UT being wound up by a third party (an aggrieved former employee seeking payment who was likewise a shareholder in the CT but not a unitholder) can procure that the trust distribute trust assets to help fund litigation fighting against the liquidation of UTs being sought by the third party. The aggrieved ex-employee/shareholder applied for relief against oppression under s 260 (the predecessor to the current oppression remedy s 232) on the basis that the trustees’ actions were oppressive against the interests of the aggrieved shareholder. The aggrieved shareholder also attempted to stop the unitholders from vesting all the assets in them under trust law. Davies J held, dismissing the motion (with costs) on the grounds that the aggrieved party could not rely on s 260 of the Corporations Law (now CAORs) to prevent the CT from adhering to the request of the unitholders to distribute funds, to fight action by a third party for winding up on the basis that the trustee was merely exercising its proper duties as trustee, which implicitly rated ahead of any other duties the aggrieved shareholder asserted. The case highlighted the tension between the role of the trustee owing a duty to the unitholders, and the role of the company owing a duty to shareholders.

344 This is explored in detail in the following chapters.

345 In contrast to the remedies available to oppressed shareholders against oppressing shareholders under the CAORs.
Chapter 4: Trustee Obligations and Unitholder Rights without *Corporations Act* Oppression Remedies

*Machines Pty Ltd* (‘*International Vending Machines*’), 346 it was held that a trustee is ordinarily obliged to keep the property of a trust safe while a director is required to supervise the management of the company’s business in light of their position in commerce. 347 The stricter standard required of trustees is a consequence of the direct beneficial interest that beneficiaries have in the assets of the trust, as distinct from the interest of shareholders, which is limited to the shares. 348 There is a greater tolerance of entrepreneurial risk-taking by company directors in comparison to trustees. As the NSW Court of Appeal stated: ‘While the duty of a trustee is to exercise a degree of restraint and conservatism and investment judgments, the duty of a director may be to display entrepreneurial flair and accept commercial risks to produce a sufficient return to the investor.’ 349

While this distinction was appropriate for the traditional concept of a trust, modern commercial trusts as exemplified by UTs now operate in essentially an identical context to companies. 350 Although traditional notions of trustee obligations are still applicable to modern commercial trusts (albeit with a degree of increased commercial flexibility), 351 trustee law may need to accommodate the commercial nature of modern trading trusts as exemplified by Private UTs, by formally rephrasing the duties of trustees in UTs (and possibly other trading trusts) to be closer to those of directors. 352 Although this issue is related to the

350 As Tehani Goonetilleke noted:

Gone are the days when trusts were merely designed to preserve the family wealth and to facilitate gratuitous transfers to children, in a structure that also provided some tax benefits. In modern times, the basic trust structure has evolved to become a popular commercial vehicle for investment and financing purposes. This is not only attributable to its ability to be flexible in design, making it both adaptable and versatile, but also its ability to be structured to meet the demands and requirements of use as a tool for commerce.

Tehani Goonetilleke, above n 114.

351 Goonetilleke also commented:

Despite the transformation of the traditional role of trusts into commercial structures and vehicles for investment, the general law’s approach governing the conduct of the trustee and protecting the interests of the beneficial owners of the trust property still prevails. In particular, the golden rule in equity, that the foremost duty owed by a trustee is to act in the best interests of the beneficiaries, is just as relevant and applicable today in modern commercial trusts as it was when trusts were not such complex structures. Neither has its significance been lost on legislatures, which have codified the very message in statutes, in various forms. However, in its apparent simplicity, this duty can be misunderstood if it is inaccurately viewed as a duty that operates in isolation.

Ibid.

352 The distinction outlined in *International Vending Machines* (ie that a trustee is ordinarily obliged to keep the property of the trust safe whilst a director is required to supervise the management of the company’s business in light of their position in commerce) cannot be
Chapter 4: Trustee Obligations and Unitholder Rights without Corporations Act Oppression Remedies

broad topic of trustees’ duties within the CL context, it is beyond the scope of this thesis but is an area worthy of further research.\textsuperscript{353}

4.2.2 The Trustee Acts

In addition to the equitable duties imposed on trustees, the provisions of the respective state Trustee Acts also apply.\textsuperscript{354} These Acts prescribe the powers and duties of trustees\textsuperscript{355} and formalise many of the equitable and common law principles governing the rights and responsibilities of trustees, including many of the fiduciary obligations outlined above.\textsuperscript{356}

As with equitable obligations, to a large extent the Trustee Acts are generally subordinate to the provisions of a UT deed, which commonly determines in great detail the rights and obligations of the trustee (in addition to unitholders) in terms that are more consistent with the commercial context in which such UTs operate. While the application of the Trustee Acts may assist unitholders to the extent they

\begin{itemize}
  \item maintained in the context of a modern trading UT, which is mandated by the investors to operate with the identical ‘entrepreneurial flair and accept commercial risks’ that company directors are able to exercise under the ‘business judgement rule.’ Unitholders invest capital for the same commercial motives as shareholders, therefore legal expectations of trustees in such circumstances should mirror those of directors. As Sin noted:
  \begin{quote}
    In the UT, the trust corpus consists of moneys belonging to the beneficiaries themselves. They are contributed by the unitholders for the purpose of investment, and investment by nature is the use of capital for the purpose of gain, whether such gain is in the form of capital appreciation or income. In substance, unitholders are contributors of capital and the trust corpus has a function no different from share capital of a company.
  \end{quote}
  Sin, Legal Nature of the Unit Trust, above n 5, 61 and also at 96.
\end{itemize}

\textsuperscript{353} Within the oppression context, if the rights of unitholders are to be incorporated within the jurisdiction of CAORS, consideration should also be given to a similar recognition that trustees of UTs which operate in the commercial world should be held to the standard required of directors (rather than the historically stricter standard applied to trustees). While the rights of directors in CTs of commercial UTs are normally addressed adequately within the trust deed and often the liability clauses provide a significant level of protection to the trustee and its directors, the relevant Trustee Acts should nevertheless be reviewed to ensure they address the commercial circumstances in which a substantial proportion of directors of CTs operate. Such reform could be explored as part of a broader review of the regulation of UTs generally. There are a range of considerations that need to be addressed in exploring the concept that trustee duties in UTs and other trading trusts are aligned with the duties of directors in companies, including determining which types of trustees should be dealt with, and what legislative instruments (eg Trustee Acts, CA or others) should be used to implement such a change. Given that the focus of this thesis is the issue of oppression, a detailed discussion of possible changes to trustee obligations in trading trusts is not included herein, but could be explored as part of a broader review of the laws relating to trading trusts.

\textsuperscript{354} For example, Trustee Act 1958 (Vic).

\textsuperscript{355} The Trustee Act 1958 (Vic) deals with topics such as matters to which a trustee must have regard in exercising power of investment (eg s 8), powers of trustee in relation to investments, loans, encumbering trust assets, power of sale, etc, (eg s 9), and right of trustee to be indemnified out of trust assets (eg s 36).

\textsuperscript{356} For example, the Acts require that when the trustee invests trust moneys it must ‘exercise the care, diligence and skill that a prudent person would exercise in managing the affairs of other persons.’ See Trustee Act 1958 (Vic) s 6(b).
are not inconsistent with the terms of the relevant trust deeds, in practice, these obligations are rarely cited in cases of unitholder oppression such as those reviewed in this thesis (given the conduct is seldom a breach of an express provision under the Acts). 357 Notwithstanding, the Trustee Acts are important in prescribing the powers of the courts to deal with disputes involving UTs. For example, they provide for the power of a court to take action against trustees, for breaches of duty of care or misconduct, and a raft of broader powers such as the ability to appoint new trustees,358 make vesting orders359 or to vary trusts.360

Importantly, for the purposes of providing relief against oppression, the powers under the Trustee Acts do not appear to allow the court to order an appropriation by one unitholder of another unitholder’s interest in the trust. Whether there is implicit scope under the Trustee Acts to do so in all applicable circumstances is unclear.361 The inability of Trustee Acts to provide such assistance is problematic, as often a buyout of units is sought to relieve the oppression.362

One area of particular relevance to this thesis is a number of UT cases arising from applications363 by trustees seeking court endorsement to restructure UTs (for bona fide reasons).364 A trustee is entitled to apply to the court for an opinion, advice or direction on any question regarding the management or administration of trust property or interpretation of the trust deed, or to seek an opinion of the court in relation to advantageous dealings.365 Importantly, the court may authorise a trustee to take actions that are not within the terms of the trust deed,366 or to

357 Exceptions included cases where the remedy sought was available under the broad powers granted to courts in the Trustee Acts (eg changing the trustee in *Wilden*).
358 Section 48. See *Wilden*.
359 Section 51.
360 *Trustee Act 1958* (Vic) s 63A.
363 Often these hearings are uncontested. See, for example, *Arakella* and *Re Australand*.
364 The trustees seek this endorsement to avoid any future potential claims that the trustee had acted incorrectly. See for example *Arakella* discussed below at chapter 4.4.2.
366 Section 63 of the *Trustee Act 1958* (Vic). For example, in *Koko Black Appeal* [2008] VSCA 86; 66 ACSR 325, Dodds-Streeton JJA mentions in obiter that the applicants (who asserted they had been subjected to fraud on the minority pursuant to a compulsory acquisition provision in the trust deed) could have applied to the court to have the trust deed varied (presumably under s 63 of the *Trustee Act*) but had not sought that relief.
Chapter 4: Trustee Obligations and Unitholder Rights without Corporations Act

Oppression Remedies

ratify a breach of trust by the trustees (where deemed appropriate). 367 The cases dealing with these applications are important, as they explore under what circumstances it is permissible to affect the rights of unitholders—a common feature of oppression cases.368

In Arakella,369 Austin J noted that where the court was comfortable that a proposed action is fair and expedient, the court’s powers under the Acts to implement changes to trusts should be applied broadly.370 Arakella dealt with an application by a trustee to a court requesting that the court exercise its powers under s 81 to restructure a UT.371 Austin J noted that s 81 could be used to ‘authorise a fundamental reorganisation of the trust,’ including giving effect to a proposal that would ‘involve divesting the present unitholders of their units, and vesting all units in a corporate entity in which the present unitholders will be the shareholders.’372 Nevertheless, Einstein J subsequently cautioned against Austin J’s approach where there was any chance of adversely affecting a beneficiary’s rights.373 As Einstein J commented regarding the court’s power to endorse a variation of a UT:

367 Under s 75 of the Trustee Act 1963 (WA). See Wilden, where the trustee unsuccessfully sought to have its actions ratified by the court.
368 See, for example, Gambotto.
369 (2004) 60 NSWLR 334, discussed below at chapter 4.4.2.
370 Austin J stated:

These authorities indicate the general approach that the Court should take to the construction of s 81. The Court should resolve any ambiguity in the meaning of s 81 by adopting a construction that reflects the breadth of the Court's jurisdiction. The Court should not construe the section as subject to any fetters or limitations beyond what is clearly imported by the statutory language. One approaches the central question in this case, namely whether the Court is capable of forming the opinion that the proposed transaction is expedient in the management or administration of any property vested in the trustees, in that light.

371 The Trustee Act 1925 (NSW), s 81(1), provides:

(1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or disposition, or any purchase, investment, acquisition, expenditure, or transaction, is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the instrument, if any, creating the trust, or by law, the Court:

(a) may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, including adjustment of the respective rights of the beneficiaries, as the Court may think it, and

(b) may direct in what manner any money authorised to be expended and the costs of any transaction, are to be paid or borne as between capital and income.

373 In Westfield Qld No. 1 Pty Ltd v Lend Lease Real Estate Investments Ltd [2008] NSWSC 516 (‘Westfield Qld’), an applicant requested that the court use s 81 to order a trustee to wind up a trust. Einstein J distinguished Arakella from Westfield by noting that the ‘Court [in Arakella] found it necessary to affect a “fundamental reorganisation of the trust” in order to better achieve its objectives. This is quite different to what is being sought here, which is an order that would end the trust and permanently dissolve the relationships between the parties.’ At [62] (Einstein J).
The aim of the jurisdiction is not to permit the substantive alteration of the trust or its termination, but to give the trustees power to administer the trust in a more satisfactory and effective way... whilst the section can effect an adjustment of the rights of beneficiaries, such adjustment may only be incidental or consequential...

In order to come within the section, the court must form the opinion that a transaction is expedient in the management or administration of property vested in trustees... [T]he Court must be satisfied that the transaction is expedient, not for the benefit of one beneficiary only, but for the benefit of the whole trust.374

Prima facie, Einstein J’s comments reflect a degree of protection afforded to beneficiaries in considering applications under s 81 (or its equivalent in other states), as the court is charged with preventing changes to trusts that adversely affect beneficiary rights. In practice however, these mechanisms are of limited value within the context of oppression, as s 81 (or its equivalent in other states) is only utilised in applications seeking to endorse conduct that is not allowed by the trust deed. In most oppression cases, it is the provisions of the trust deeds themselves that facilitate the ‘oppressive conduct,’ and in such circumstances, s 81 and its equivalents have no application.

While the Trustee Acts do not currently provide specific relief against oppression, of particular significance to the contention of this thesis is the fact that, as noted above,375 the VLRC was provided with terms of reference by the Attorney-General in September 2013 to explore the topic of ‘Trading trusts—oppression remedies’.376 Indeed, it may be inferred by the move of the Attorney-General to review the law in this area that the Attorney-General had formed the view that oppressed beneficiaries of trading trusts (including UTs) are not adequately protected under current laws. While the report is not due until February 2015, it is quite possible it will recommend amendments to the Trustee Acts to provide for relief against oppression as provided under the CAORs and were that to occur, the...
legislature may adopt the recommendation. As discussed in chapter 7.5, while this thesis contends that amendments to include protections for unitholders under the CA would be preferable in light of the CA’s well-established framework under the CAORs and CL issues generally, it is also submitted that amendments to the Trustee Acts may be a valuable alternative for addressing the issues faced by oppressed unitholders.

4.3 Unitholder Rights and Remedies

4.3.1 Unitholder Rights Generally

There are no general unitholder rights against oppressive conduct as enjoyed by shareholders under the CAORs. Therefore, an exploration of the topic requires an analysis of other relevant unitholder rights that may otherwise provide substantive relief in circumstances of oppression.

Defining unitholder rights generally is more complicated than framing shareholder rights. Unitholder rights are largely a function of trustee obligations as outlined above, being the right of beneficiaries such as unitholders to seek remedies in the event of a breach by the trustee. Trustees ‘exist for the benefit of the beneficiaries, and for that alone,’ and beneficiaries such as unitholders have

377 The significance and potential impact of the VLRC’s commissioned work on the topic is discussed further in chapter 7.

378 In contrast to shareholder rights, Young J in Eagle Star Trustees Ltd v Heine Management Ltd (1990) 3 ACSR 232 introduced the difficulties faced by determining the nature and definition of unitholder’s rights:

It is a matter of great debate as to what is meant by ‘rights of unitholders’. I have already indicated the great complexities there are in working out what the word ‘rights’ means. There is also a problem in working out what ‘unitholders’ means. There is no doubt that ‘unitholder’ means a person who is the registered holder of a unit, but does the term in the covenant mean a right which an individual unitholder has, the right of a typical hypothetical average unitholder, the right that is possessed by the majority of unitholders, the right that is possessed by all unitholders, the right in respect of the internal administration of the trust, the right to sue somebody externally for the trust or what otherwise?


379 For example, the claim by an aggrieved unitholder (Green) in Wilden that the trustee had breached its fundamental obligations under trust law by not acting impartially in dealing with Green as opposed to the other unitholders. Hasluck J found in Green’s favour, which was upheld on appeal, Wilden [2009] WASCA 38 [148] (McLure JA). Interestingly, in the context of oppression this argument was not raised in any of the other cases reviewed. Given the success of the argument in Wilden, perhaps a claim for breach of trust based on partiality could be applied more commonly in other claims, although it is acknowledged that a claim on this ground will only be applicable in specific relevant circumstances (eg where a trustee provides opportunities to certain unitholders over others).

380 Parcell v Deputy Federal Commissioner of Taxation (1920) 28 CLR 77.
a range of personal remedies available to them should a trustee default in performing the trustee duties outlined above. 381

Where a breach of trust has occurred, beneficiaries can sue the trustee personally, 382 and the trustee is liable to restore the trust estate to the same position it would have been in had no breach been committed. 383 In addition, beneficiaries have a range of other remedies available such as injunctions, administration action and the appointment of receivers. 384 Often in such cases, a court will grant a change in trustee (from the ‘offending trustee’ to a court appointed trustee). 385 Spavold commented:

‘in these ways, the beneficiary will receive protection from breaches by the trustee and the beneficiary can exercise some indirect control over the management of the unit trust. However, the beneficiary must convince the court that any interference is warranted. The individual unitholder must rely on the court for protection.’ 386

As unitholders enjoy a beneficial right to the assets of the trust (in contrast to shareholders), in some cases this right results in certain enhanced protections afforded to unitholders compared to shareholders—most notably with respect to the fact that trustee duties require a stricter duty of care. 387 Other examples include the fact that unitholders may have a caveatable interest in trust property where shareholders do not. 388 Similarly, unitholders are advantaged with respect to access to trust information. 389 Beneficiaries have an actual interest in the information, given the information is an asset of the trust. 390 By contrast, shareholders’ right to

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381 Dal Pont and Chalmers, above n 7, 416.
382 Commonly in the form of compensation and account of profits, ibid 747.
383 Target Holdings Ltd v Redferns [1995] 3 All ER 785, 793 (Lord Browne-Wilkinson).
384 Dal Pont and Chalmers, above n 7, 757.
386 Spavold, above n 12, 263.
387 See See International Vending Machines [1962] 1 NSWR 148). As discussed in chapter 4.2.1, this thesis proposes that trustee duties in UTs and other trading trusts should be aligned with directors’ duties.
388 See for example Meng v Pan [2006] NSWSC 774, White J held: ‘It is plain that the matters relied upon by the plaintiff as giving rise to an equitable interest in the land do not do so. At best, the plaintiff is a shareholder in the company that owns the land. It is trite that a shareholder does not have an equitable interest in the property of the company. No caveatable interest is shown.’
389 See more on the beneficiaries’ right to information in J C Campbell, ‘Access by Trust Beneficiaries to Trustees’ Documents Information and Reasons’ (Paper presented at the NSW Supreme Court Judges’ Conference, Bathurst, 23 August 2008).
390 Beneficiaries are entitled to information regarding the trust property to be furnished fully and not reluctantly by the trustee. See Kelly v Bruce [1907] SALR 174; Morris v Morris (1993) 9 WAR 150, 152-3, Waterhouse v Waterhouse (1998) 46 NSWLR 449, 494. Some judges have described this right as proprietary in nature such as Lord Wrenbury (O’Rourke v Darshire [1920] AC 581, 626). As Dal Pont and Chalmers comment:
Chapter 4: Trustee Obligations and Unitholder Rights without *Corporations Act* Oppression

Remedies

information pursuant to s 247A of the *CA* is more limited. In some cases, the right of the unitholder to information has been likened to those enjoyed by directors, which clearly is greater than the rights proffered to shareholders. Accordingly, in cases where unitholders were also shareholders in the trustee vehicle (and they therefore had the option of accessing information via either trust law or CL), unitholders have sometimes achieved greater access pursuant to their trust law rights.

Notwithstanding unitholders arguably enjoy superior protection in these limited cases, the areas where shareholders enjoy greater rights to those of unitholders are far broader and substantive, including the benefits of the *CA*—a statutory instrument purpose built to provide adequate protection to shareholder investors in the corporate commercial environment in which they participate. These assertions are outlined in further detail in this chapter.

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If the plaintiff is right in saying that he is a beneficiary … he has the right to access to the documents which he desires to inspect upon what has been called in the judgements in this case a proprietary right. The beneficiary is entitled to see all trust documents because they are trust documents and because he is a beneficiary. They are in this sense his own. Action or no action, he is entitled to access to them.

Dal Pont and Chalmers, above n 7, 620. See also debate generated by *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709.


392 See for example, *Deluge Holdings Pty Ltd v Bowlay* (1991) 6 ACSR 36. In that case, there was an application for interlocutory relief in an action arising out of two claims for inspection. The first was by a director of the company to inspect the company’s accounting records; the second was by a unitholder in a UT of which the company was trustee, to inspect the books and records of the business run by the company and of the UT. The applicant director (the second plaintiff) relied upon both common law and s 289(9) of the *Corporations Law*. The applicant unitholder (the first plaintiff) relied upon a deed, the relevant clause of which was in the following terms: ‘Any unitholder may inspect the books, records and operations of the business and the unit trust at any time and take copies thereof …’ Murray J held, granting the relief sought in respect of each plaintiff, that a company has a mandatory obligation under the provisions of s 289(9) to make its accounting records available for inspection by a director of the company, and clause 11.2 of the deed provided to the unitholder of this particular business operation and trust a substantially similar right of inspection to that which the law provided for a director of a company.

393 *McNeill v Hearing & Balance* [2007] NSWSC 942. This case involved inspection of documents and records relating to an audiology clinic operated by a Private UT. McNeill sought to inspect records relating to the sale of the business by the trustee to a related party. McNeill, as shareholder in the trustee company, sought to access information pursuant to s 247A of the *CA*, and her company (as unitholder of the UT) sought to access information via equitable principles and the rights of beneficiaries. See at [35] Hammerschlag J.

394 As demonstrated with respect to CAORs in chapter 5.

395 In contrast to the development of trust law, which was not designed specifically to deal with the corporate commercial context.
4.3.2 Unitholder Rights Against Directors of Corporate Trustees and Derivative Action

An important consideration in making an informed comparison of unitholders’ rights vis-à-vis shareholders’ rights is to recognise the ability of unitholders to hold directors of CTs to account. With companies, a director’s first obligation is not to the shareholders, but to the company as a whole. In contrast, the property vested in trustees is vested for the benefit of members of the trust, creating an obligation owed by the trustee to the beneficiary. As trustees of UTs are almost exclusively CTs, consideration of the relationship between directors of the CT and the beneficiaries is required. Johnston AM held that ‘the directors of a company owe a fiduciary duty to the company and not to the individual shareholders. By the same reasoning, the directors of a trustee company owe no duty to unitholders of a unit trust solely because of their holding directorships of the trustee company.’

While shareholders are not owed direct duties by directors, with respect to companies there are well-established principles dealing with the ability for shareholders to use derivative action mechanisms, to hold directors accountable in circumstances where the company is unable to do so. Where a director of a CT has acted in a manner that breached the rights of unitholders and the unitholders are unable to seek redress via other mechanisms, consideration should be given to whether the unitholders deserve access to similar rights as shareholders to take derivative action against the director of the CT, pursuant to Part 2F.1A (ss 236–242) of the CA. Under the current provisions of s 236, unitholders do not prima facie have standing to take derivative action.

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396 As Galbally and Bajhau noted:

It must be remembered that a company is a separate legal entity and the director's duties are to act in the best interests of the company. By comparison, the duties of a trustee are to act in the best interests of the beneficiary and more particularly, in the case of trustees who are charged with the responsibility of maintaining a superannuation fund [ie UT]. Such trustees are solely responsible to act in the interests of the members.

Galbally and Bajhau, above n 347.

397 Known as ‘cestui que trust’. In comparison, the property of a company remains the property of a company and does not vest in a director. Ibid.


399 See Part 2F.1A of the CA re proceeding on behalf of a company by members and others.

400 See for example, Williamson v Beere May & Meyer [2011] WASC 105.

401 Interestingly, the original draft legislation for derivative action under the CA allowed a broader group, including creditors, to bring such actions but the final legislation restricted the categories to shareholders. Nance Frawley, ‘The Cost of Bringing a Statutory Derivative Action in Australia—
Therefore, where unitholders wish to take action against the directors of a CT for a breach of trust, they are faced with a serious legal challenge given that ‘derivative action’ is a CL principle pursuant to which shareholders (but not beneficiaries) have standing to take action against directors. While trust law has established that beneficiaries may take action against third parties where the trustee fails to do so,\(^{402}\) which some judges refer to as ‘derivative action’,\(^{403}\) the ability of beneficiaries to lift the ‘corporate veil’ and take action against the directors of a CT is less clear.\(^{404}\)

Exemplifying the complexities of establishing standing for unitholders, Finkelstein J in *Porch v Geelong*\(^{405}\) dealt with an action by a unitholder seeking to access the derivative action process against directors of a CT. His Honour concluded: ‘The [CT] claims are for the breach by its officers of their duties of

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\(^{402}\) Unitholders may have access to a form of ‘derivative action’ against third parties (as distinct from the trustee directors) see *Lidden v Composite Buyers Ltd* (1996) 139 ALR 549 (‘*Lidden*’). The case addressed the question of whether unitholders had the right to take action directly against a third party when the trustee of the UT refused to do so. As *Jacobs’ Law of Trusts in Australia* explained:

where a trustee refuses to institute proceedings against a debtor or to recover trust property, the beneficiary may wish to institute proceedings himself, either in his own name or in the name of the trustee. The rule here is that a beneficiary may sue in his own name only where the relief sought is in the equitable jurisdiction of the court and even then only where the circumstances are exceptional. If they are not exceptional or if the proposed action is to be commenced in the common law jurisdiction, the beneficiary’s remedy is to sue the trustee for the execution of the trust and then apply for the appointment of a receiver and for leave to sue in the name of the trustee or of the receiver. Meagher and Gummow, above n 4. Finn J considered *Hayim v Citibank NA* [1987] 1 AC 730; *Vandepitte v Preferred Accident Insurance Corp of New York* [1933] AC 70. His Honour concluded that, provided the ‘exceptional’ circumstances requirements were met, it was not necessary in a Judicature Act system that the relief that is sought by the beneficiary instituting proceedings for a trust be equitable or equitable alone. See Meagher and Gummow, above n 5, [2303], cited by Finn J in *Lidden* (1996) 139 ALR 549. Further, as Dal Pont and Chalmers note:

In most circumstances, the trustees are the proper plaintiffs, and beneficiaries do not, generally speaking, have a right of action for compensation against a third party who wrongly breached an obligation owed to the trust: *Hayim v Citibank NA* [1987] AC 748; *Pearson v Commissioner of Taxation* [2001] 116 FCR 347 at 369. Failure by the trustee to sue the offending third party gives right to a right for the beneficiaries to sue the trustee. If the trustee refuses to take action, beneficiaries may bring proceedings in ‘special’ or ‘exceptional’ circumstances. *Lamru Pty Ltd v Kation Pty Ltd* (1998) 44 NSWLR 432.

Dal Pont and Chalmers, above n 7, 746.


\(^{404}\) Section 236(1)(a) of the *CA* sets out the categories of persons who may be permitted to bring proceedings on behalf of the company, or intervene in proceedings to which the company is a party. Such ‘persons’ must satisfy the court that they are either: ‘(i) a member, former member, or person entitled to be registered as a member of the company or of a related body corporate; or (ii) An officer or former officer of the company.’

\(^{405}\) [2007] FCA 857.
office, both under the Corporations Act (in particular ss 180 and 181) and at common law. On no view could Landmark [as unitholder] pursue these claims.

In Vanmarc, Mandie J indirectly left open the possibility for unitholders to obtain derivative action relief against directors of CTs if pleaded properly, although his Honour provided no further guidance on how this could be achieved. To complement the argument that unitholders should be given access to the CAORs, it is submitted that consideration should also be given to allow unitholders standing under s 236, to access derivative action in circumstances where the trustee fails to take proper action against the directors of the CT.

Alternatively, consideration could be given to providing that directors of CTs owe duties directly to unitholders. While a director of a trustee company does not ordinarily owe direct fiduciary duties to beneficiaries of a trust, there has been discourse on the obligations of directors of CTs to consider the rights of beneficiaries and whether such obligations could create direct duties in special circumstances.

Brian Dowrick and Meryl Thomas summarised three UK approaches used in attempting to establish a duty owed by a director of a CT to beneficiaries:

One view is that, if the directors breach their duty to the trust company in the course of the company exercising its powers of trust management, that breach gives rise to a ‘related’ breach of duty by the directors to the beneficiaries. Another view is that the company is a perpetual person, which only exists according to rules of law. It is not an actual person capable of acting on its own, but is controlled by its directors. A third view is that a distinction should be made between substantial and insubstantial trustee companies, with an automatic fiduciary duty arising in the matter.


Finn J stated:

It is questionable, in my view, whether this heralded development in our law is a desirable or necessary one in the trust company context. To the extent that it is advanced as a means of protecting trust beneficiaries from misuse by directors either of their company's trustee powers or of their own position vis-à-vis the trust property, it can be said that that protection can be afforded by other quite orthodox means and in a more extensive way ... Where the trustee is itself a company the requirements of care and caution are in no way diminished. And here, unlike with companies in
similar position argued by Walters J in *Hurley v BGH Nominees Pty Ltd (No 2)* (‘Hurley’).\(^{413}\) Professor Jim Corkery provided support for creating direct duties of CT directors towards beneficiaries. In substantiating the position, Professor Corkery noted that in contrast to unitholders, creditor and employee rights against directors have been protected via amendments to the *CA* to make directors personally liable for breaching the rights of these stakeholders, and therefore proposed unitholders’ rights should similarly be protected via legislative changes to the *CA*.\(^{414}\)

Notwithstanding, since *Hurley* other cases have denied that directors of CTs of Private UTs owe a duty to beneficiaries except in extreme circumstances,\(^{415}\) therefore Professor Corkery’s position has not gained momentum. This is contrasted by the duties owed by directors of an RE of an MIS under Ch 5C of the *CA*, who owe a substantive range of duties to unitholders in such Public UTs.\(^{416}\)

Given most CTs are merely ‘$2 companies’, it is important that unitholders are provided with the ability to take action against trustee directors in seeking meaningful recourse, either via derivative action or on the basis of breaches of direct duties. As illustrated in *Cope v Butcher*,\(^ {417}\) the lack of capacity to undertake

\[\text{general, these requirements have a flow-on effect into the duties and liabilities of the directors of such a company. It was early established—largely it would seem from case law on charitable and municipal corporations—that at least when, and to the extent that, directors of a trustee company are themselves ‘concerned in’ the breaches of trust of their company, they are liable to the company according to the same standard of care and caution as is expected of the company itself.}\]

\[\text{Ibid 1835.}\]

\[\text{\(^{413}\) [1982] 31 SASR 250, Walters J noted in a dictum:}\]

\[\ldots\text{ it seems to me that a director must not disregard the interests of members of his company, or the interests of beneficiaries who are not shareholders but who are entitled to receive a benefit from the company’s activities as a trustee of the relevant trust. I think it would be entirely unreal if a director were allowed to address his mind simply to the interests of the company and not to the additional consideration whether the transaction sought to be impugned was for the benefit of the shareholders or, indeed, the beneficiaries of a trust of which the company is trustee.}\]

\[\text{Ibid 506. His Honour went on to suggest that the position of beneficiaries of a trading trust should be ‘no lower’ than that of the company’s creditors in requiring the directors to take such interests into account. In considering Walter J’s comments, Professor Corkery noted that:}\]

\[\ldots\text{ it does not seem unreasonable to insist, perhaps by legislation, that the directors of trustee companies owe a duty to beneficiaries akin to the fiduciary duties owed by directors to companies. If creditors and employees of companies can argue that their interests should be taken into account by directors, so too can beneficiaries.}\]

\[\text{Ibid 1835.}\]

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\[\text{Ibid 506. His Honour went on to suggest that the position of beneficiaries of a trading trust should be ‘no lower’ than that of the company’s creditors in requiring the directors to take such interests into account. In considering Walter J’s comments, Professor Corkery noted that:}\]

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\[\text{\(^{415}\) For example, see Mandie J in *Vanmarc* discussed in chapter 6.5. See also Young CJ in *McEwen v Combined Coast Cranes Pty Ltd* (2002) 44 ACSR 244 (‘*McEwen*’) who noted: ‘The stronger view appears to be that it is only in very rare circumstances that the directors of a trustee company being agents of the company are personally liable for the defaults’; *Cope v Butcher* (1996) 20 ACSR 37; *Australian Securities Commission v AS Nominees Ltd* (1995) 62 FCR 504, 522; *Collie v Merlavo Nominees Pty Ltd* [1998] VSC 203.}\]

\[\text{\(^{416}\) See discussion in chapter 3.4.}\]

\[\text{\(^{417}\) (1996) 20 ACSR 37.}\]
direct or derivative action often denies a unitholder recourse that he would otherwise enjoy as a shareholder. Considering these arguments, a proposal to intervene legislatively to ensure that directors of CTs owe a duty to beneficiaries—or perhaps via CA derivative action provisions—has merit. The ability for oppressed unitholders to hold directors of CTs personally accountable along with obtaining relief under the CAORs would be a significant step forward in aligning unitholders’ rights more closely to those enjoyed by shareholders.

4.3.3 The Role of Contract, Good Faith and Quasi-partnerships

As discussed earlier in chapter 2.4.4, the role of contract in the structure of a UT and the relationships of the stakeholders (namely the unitholders and trustee) has been a focus of debate in recent years. Sin’s argument that an implied contract is central to the structure of a UT is persuasive, although at this stage the courts are yet to definitively acknowledge such a conclusion. Sin’s contention is not only that contract plays a role between trustee and unitholder, but also between unitholders.

Were this conclusion to be adopted by the courts, it would have important ramifications for unitholder rights. Relying on Gra-Ham (1989) 1 WAR 65, Sin commented: ‘There is no reason why, in the absence of other factors, an owner of units in the course of enjoying his property right should not be under a duty to other unitholders.’ Sin further noted that ‘[i]t was the conclusion reached by the Full Court of the Supreme Court of Western Australia in Gra-Ham Australia Pty Ltd v Perpetual Trustees WA Ltd (1989) 1 WAR 65 by relying on leading cases concerning shareholders of companies.’ Sin, Legal Nature of the Unit Trust, above n 5, 173.

Illustrating the difficulties faced by unitholders in such circumstances, in Cope v Butcher Johnston AM concluded: ‘[T]he law in this State must be that the directors of a trustee company owe no duty to unitholders of a unit trust solely because of the holding of the directorship of the trustee company. I am not satisfied that the plaintiff has pleaded sufficient material facts to establish a claim on other grounds.’ Johnston AM based his conclusions on L C B Gower, above n 209, 551-52 and Ford, Principles of Company Law, above n 391, 469, which accord with the principles encompassed in Percival v Wright [1902] 2 Ch 421 and followed by the Full Court in this case in Esplanade Developments Pty Ltd v Divine Holdings Pty Ltd [1980] WAR 151.


As Sin elaborated:
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Were the courts to formally adopt Sin’s position, unitholders may secure greater protection via the enforcement of the terms of the trust deed as a contract, including regard for any surrounding elements that may broaden the interpretation of the contract terms, in addition to the application of implied terms such as ‘good faith’. Depending on how far a court may be willing to go, there could be far-reaching implications for unitholder rights, including those dealing with oppressive conduct.

Nevertheless, as the law currently stands, Sin’s approach on the role of contract is yet to be substantially accepted and none of the UT ‘oppression’ cases reviewed dealt adequately with implied ‘good faith’ rights pursuant to contract law principles as grounds for relief. In the recent case of *Arhanghelschi*, which involved a dispute between unitholders over alleged oppressive conduct, the issue of ‘good faith’ was discussed by Ferguson J extensively in relation to the contractual rights pursuant to a unitholders’ agreement between the parties (ie an express contract). However, there was no mention of the potential for any further implicit obligations of ‘good faith’ pursuant to the equitable relationships between the unitholders beyond the unitholders’ agreement (eg under the trust deed). Whether a ‘good faith’ argument in the context of a UT dispute could have

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Since the trust in the unit trust is a creation of the contract and is also an integral part of it, it is a point where the waters of law and equity meet … [T]he dual nature of the unit trust means that contractual remedies and trust remedies may be available concurrently to the appropriate parties.

Ibid 126.

422 For example, with respect to the role of ‘good faith’ in superannuation funds (which are similar to UTs), see Andrew Stewart, ‘Good Faith in Superannuation: Where Does it End?’ (2007) 35(3) *Australian Business Law Review* 204. On good faith in contract law generally, see Robert McDougall, *The Implied Duty Of Good Faith In Australian Contract Law* (Supreme Court: Lawlink NSW, 21 February 2006) <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/l_sc.nsf/vwPrint1/SCO_mcdougall210206>. 423 UT cases generally referred to ‘good faith’ as the principle relates to the obligations of trustees in exercising their duties, rather than the contractual context. For example, Hargrave J in *Koko Black* referred to the fact that ‘there is no want of good faith in the trustee exercising the power in its absolute discretion.’ [2007] VSC 40, 31 [104]. Nevertheless, some references seem to suggest the role of good faith in a contractual sense. For example, Hely J in *Cachia* noted, ‘It may be that an amendment to a trust deed enabling the majority unitholders to expropriate the minority's units for the sole purpose of aggrandising the majority might fail for want of good faith …’ Similarly, the role of ‘good faith’ has been raised in the superannuation context. See discussion in Stewart, above n 422. On good faith in contract law generally, see McDougall, above n 422.


425 Ferguson J applied the narrow application of contractual ‘good faith’ principles outlined in *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228.
merit in the absence of a unitholders’ agreement is unclear, but such an argument may have increasing scope for success if Sin’s view gains further impetus.\textsuperscript{426}

While the role of contract and good faith in UTs remains unclear, a similar concept in the form of the ‘quasi-partnership’ has gained more credence. A quasi-partnership refers to the concept that joint participants in a business venture may have legitimate partnership-type expectations of each other notwithstanding the fact that the vehicle in which the business is conducted is not formally a legal partnership and the purported ‘legitimate expectations’ may not have been formally contracted. Essentially, a quasi-partnership suggests that irrespective of the formal designation or registration of a structure as a company, trust or otherwise, if the conception and basis of the relationship between the principals involved in the venture can be loosely described as a ‘partnership’, then the principals should enjoy equal rights as such. CAORs can provide relief to shareholders where duties are clearly owed in this situation. In the absence of CAORs however, a ‘quasi-partnership’ may provide important grounds for relief to oppressed unitholders where the offending conduct breaches a unitholder’s legitimate expectations as a quasi-partner.

The concept of a quasi-partnership was discussed at length in \textit{Ebrahimi v Westbourne Galleries Ltd} (‘\textit{Ebrahimi}’),\textsuperscript{427} wherein Lord Wilberforce spoke of the ‘equitable considerations … [of a] … personal character arising between one individual and another’ in the context of small private companies likened to quasi-partnerships.\textsuperscript{428}

\begin{footnotesize}
\begin{itemize}
  \item Sin, PhD Thesis, above n 81.
  \item [1973] AC 360.
  \item The issue in the House of Lords case of \textit{Ebrahimi} was whether the use of statutory power to remove a 40% shareholder of an owner-managed company from management participation justified a winding up order sought by the aggrieved shareholder. Lord Wilberforce held that the aggrieved shareholder was entitled to rely on legitimate expectations (as with partnerships) created beyond the terms of the constitution with reference to the use of the phrase ‘just and equitable’ in CL that: ‘The words [just and equitable] are a recognition of the fact that a limited company is more than a mere judicial entity, with personality in law of its own; that there is room in company law for recognition of the fact that behind or amongst it there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure.’ \textit{Ebrahimi} [1973] AC 360, 682-3. See also Giora Shapira, ‘“The hand that giveth is the hand that taketh away”: O’Neill v Phillips and shareholder “legitimate expectations”’ (2000) 11 \textit{Australian Journal of Corporations Law} 260. Similarly, Stefan Lo commented: the prime example of such equitable considerations relied on in the cases has been situations of exclusion from management in small companies where there may be some “legitimate expectation” of continuing involvement in management, based on some understanding. However, there is in principle no reason to restrict consideration of equitable considerations to these circumstances.
  \item Lo, above n 210.
\end{itemize}
\end{footnotesize}

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The doctrine is arguably applicable in cases of UTs where oppressed unitholders can establish such ‘legitimate expectations’. In applying the principles to a UT case exhibiting the hallmarks of an oppression action, Dodds-Streeton JJA commented on appeal in Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd (‘Koko Black Appeal’):429

_Ebrahimi_ recognised that the underlying fiduciary obligations of a partnership survived despite the adoption of a corporate form, so that breach of a fundamental understanding on which the incorporation was founded would preclude the use of a legal power to expel the minority, and instead, as with a partnership, would lead to the dissolution of the association.430

In illustrating the nexus between the principles of quasi-partnerships and the development of oppression remedies, Gioria Schapira noted:

[t]he ‘expectations’ principle was later smoothly incorporated in the statutory remedies jurisdiction and quickly became the key concept. The new regime [ie CAORs] offered relief against ‘unfair prejudice’ to shareholder interests. ‘Unfairness’ arose when ‘expectations’, underlying the relationship, were unfairly frustrated by formal use of majority power.431

Nevertheless, the concept of the ‘quasi-partnership’ outlined in _Ebrahimi_ continues to be applied in circumstances where statutory remedies (eg against oppression) are ineffective, such as cases involving unitholders claiming oppression who may not have access to the CAORs, which is discussed in chapter 4.4.3.

The concept of quasi-partnerships (or ‘legitimate expectations’) was raised with regard to UTs in the case of McEwen v Combined Coast Cranes Pty Ltd (‘McEwen’)432 by Young CJ who commented: ‘Where a company is concerned, questions of legitimate expectation (though this may be an unfortunate phrase), are entitled to be considered.’433 His Honour continued:

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430 Ibid 116 [24].
431 Shapira, above n 428.
432 (2002) 44 ACSR 244, [58]-[60].
433 See for example, Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd (1998) 28 ACSR 688 (‘Fexuto (1998)’) and, on appeal, Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd (2001) 37 ACSR 672 (‘Fexuto (2001)’).
Those legitimate expectations may be found either in an understanding reached when the enterprise was set up, or by a process of inference. However, in the case of a trust, the position is not at all clear... There is probably no reason in principle why the ‘legitimate expectation’ learning in connection with oppression in companies should not apply in the case of trusts because equity is flexible enough to deal with unconscionable conduct in any appropriate way. If conduct is unconscionable by the standards of a statute in the Corporations Act, there is a lot to be said for the proposition that it would be unconscionable as a matter of general equity.434

*Koko Black* provided further support for the application of the quasi-partnership concept to UTs.435 In the first instance, Hargrave J’s decision acknowledged the application of the quasi-partnership doctrine to a unitholder case despite rejecting the remedy sought by the plaintiff.436 While the plaintiffs sought an injunction as their remedy, Hargrave J concluded that although the doctrine applied to unitholders, the only relief available pursuant to *Ebrahimi* was a winding up on just and equitable grounds.437 On appeal, Dodds-Streeton JJA concurred with Hargrave J.438

Accordingly, the ‘quasi-partnership’ principles outlined in *Ebrahimi* may apply to UTs in cases of oppression but the application’s relevance is limited to the ‘winding up’ remedy, which is often an inappropriate remedy in oppression of unitholder cases.439 As illustrated below, the ability for unitholders to secure a

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434 (2002) 44 ACSR 244, 58. As discussed later in this thesis, Young CJ’s suggestion that unconscionable conduct in the form of oppression under CL should likewise trigger the common law threshold applicable to trusts is interesting, given Young J was responsible for a series of decisions that rejected access by unitholders to the statutory CA ORs. Combined with Hely J’s rejection of the notion that the fraud on minority doctrine was likewise available to unitholders, this has left unitholders at a material disadvantage to shareholders in cases of oppression, which adds weight to the contention that unitholders should be legislatively entitled access to CA ORs.

435 [2007] VSC 40. As explored in detail in chapter 4.5, *Koko Black* involved a dispute between unitholders where there were allegations of oppressive conduct by virtue of the majority unitholder seeking to exercise the trustee’s rights to redeem the units of the minority unitholders. This case is interesting in the sense that the minority unitholders never received shares in the CT, which was controlled 100% by the majority unitholder. Accordingly, as distinct from other UT cases dealing with statutory oppression remedies such as *Vigliaroni* (discussed below), there was no scope in *Koko Black* to seek any relief under the CA ORs given the unitholders were not shareholders. Accordingly, in looking to assert other grounds for relief, the minority unitholders raised the ‘quasi-partnership’ argument as outlined in *Ebrahimi*.

436 *Koko Black* [2007] VSC 40 [114].

437 Ibid 34 [116].


439 While the ability for a court to order the winding up of a trust is available under trust law, such an order would result in a ‘cure that is worse than the illness’ in that it often proved unwieldy and incapable of providing a fair result for the injured party. For example, see *Vigliaroni* at [56].
dissolution of a UT is available under the equitable powers of the court where a court deems it necessary on just and equitable grounds (although such a remedy is not granted lightly). Further, remedies sought in cases of oppression commonly involve a forced buyout (eg in McEwen) or some other form of relief (eg the injunctive relief sought in Koko Black). Accordingly, access by unitholders to relief pursuant to Ebrahimi is of little assistance in cases of oppression unless a ‘winding up’ is sought.

4.3.4 Dissolving Trusts or Replacing Trustees by the Court

Within the context of disputes involving unitholders, including cases of oppression, the vesting or winding up remedy is sometimes sought. In reviewing this remedy, it is important to distinguish between vesting or termination of a trust pursuant to trust law concepts and the ability to ‘wind up’ a trust pursuant to CL principles. These two concepts are sometimes confused even though they operate pursuant to different legal principles.

With respect to vesting a trust, Dal Pont and Chalmers note that a court may, in special circumstances, ‘terminate the trust, either wholly or in part, pursuant to either its inherent jurisdiction to control the administration of trusts, or an application by way of an order for the distribution of assets by way of resettlement on other trusts.’ However, a court’s jurisdiction to do so is more limited than a court’s powers to wind up a company. The Trustee Acts provide for broad powers in restructuring trusts where the courts deem it appropriate, including the ability to vest a trust, but ultimately the ability to vest a trust depends on the terms of the trust deed and beyond that, ‘[t]he power to wind up a trust lies in the

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440 Re Gaydon [2001] NSWSC 473. See discussion in chapter 4.3.4.
441 As discussed below, ‘winding up’ is technically a CL concept rather than a trust concept.
442 See, for example, Cape v Redarb Pty Ltd (Rec and Mgr Apptd) (1992) 8 ACSR 67. In that case, the UT owned a video outlet business in which the two unitholders had fallen out and although the business was solvent, the unitholders had agreed to appoint receivers and managers to sell the business. One of the unitholders had provided an offer to purchase the business that had been accepted by the receivers and managers without the other unitholder being advised. At issue before the courts was whether the purchasing unitholder and the receivers and managers had breached any duties by proceeding with the sale.
443 Dal Pont and Chalmers, above n 7, 774.
444 For example, see Re Gaydon [2001] NSWSC 473.
445 In South Australia, there may be some prospect of reliance on s 59C of the Trustee Act 1936 (SA). The Supreme Court is given power to vary or revoke a trust and to distribute the trust property in such manner as it considers just.
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beneficiaries,’ following the rule in *Saunders*. Accordingly, the court will act cautiously in ordering any vesting where the issue is in dispute between the beneficiaries. While a court ordered dissolution of a trust is available in cases of deadlock or irreconcilable breakdown between beneficiary/principals (such as circumstances of oppression as illustrated above pursuant to the principles of *Ebrahimi*), a court order will only be made against the wishes of beneficiaries in extreme circumstances. As Barrett J emphasised in *Re Gaydon*, ‘It is the duty of the Court to uphold and protect trusts, not to destroy them … in the absence of applicable statutory powers [under the *CA*], it is no business of the Court to act so as to put an end to a trust.’

The statutory remedy referred to by Barrett J is the winding up remedy under the *CA*. There is some debate as to the court’s inherent power to ‘wind up’ a trust given the basis of the winding up remedy in CL. The recent CAMAC report into MISs stated that ‘under general trust law, there is no such thing as the formal winding up of a trust. The trust simply comes to an end in certain circumstances and the property is distributed among the beneficiaries.’ Citing *Re Gaydon*, White observed in relation to the statutory right to wind up a trust ‘That the

447 See *Saunders* (1841) 49 ER 282, above n 156. Discussed in chapter 2.4.2.
448 *Re Gaydon* [2001] NSWSC 473.
449 Ibid at [30].
450 *Horwath v Huie* (1999) 32 ACSR 413. Further insights into the scope for courts to order the winding up of trusts beyond the terms of the trust deed were dealt with in the judgment of Young J (as he then was) in UT case of *Horwath v Huie*. The case dealt with a UT deed that failed to contemplate the process for winding up the UT in the event that there were losses and no profits.
451 CAMAC, ‘Managed Investment Schemes’ (Report), above n 129. Similarly, Young J described the limitation on a court’s jurisdiction in bringing a trust to an end (in contrast to winding up a company) before all equitable rights have been extinguished pursuant to the terms of the trust, stating:

> There is doubt as to whether the court can direct a winding up akin to the winding up of a company … In any event, there is a very real distinction between a corporation and a trust, in that with a corporation the property is vested in the corporation itself, but with a trust the property and the prima facie liability for the debts is vested in the trustee … One must also focus on what a winding up really is … [W]inding up or liquidation [of a company] is a process whereby assets are realised, claims are assessed and the assets cease to be assets of the corporation, the claims are satisfied, as much as they can be, and then the company dies. Putting that concept into the realm of trust law is rather difficult. … [I]t is very difficult indeed to release the equitable obligations and fiduciary duties that flow between trustees and beneficiaries, and to a more limited extent in the reverse direction. It is not feasible just to say that a trust comes to an end. One has not only got to deal with the assets and liabilities, one has also got to consider what is to happen to the equitable obligations.

Young J responded to the difficulty in ordering a winding up of a UT beyond the terms of the trust deed without the consent of all the beneficiaries in *Horwath v Huie* at [10].

court’s power to wind up is founded in statute highlights that it is not an inherent power. While the Trustee Acts provide such a statutory right, the CA does not—a point that is often misunderstood by the courts.

Additionally, courts have often confused the ability to apply winding up remedies to trusts versus companies given the complex role of CTs. Plaintiffs often seek the winding up of a trust by applying for a winding up of the CT. This approach is inherently complicated given the trust and its assets are independent of the CT. As described by French J with respect to the liquidation of a CT:

> When a company which is a trustee goes into liquidation, the company's assets remain vested in the company, including any assets which it holds on trust. The company remains the trustee of the trust, under the control of the liquidator. The trust assets must still be administered in accordance with the equitable obligations which govern the trust.

Accordingly, the winding up of the CT of a solvent trust will not directly lead to the dissolution of the trust, rather it will require the court to replace the trustee.

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453 R W White above n 446, 37.
454 Barrett J explained one reason why the CL winding up remedy had been inappropriately applied to trusts was due to the inclusion of the remedy in the MIS provisions of the CA, which had blurred the lines. See Re Gaydon in which Barrett J stated:

> Thinking of the kind which sees a [winding up] application of this kind made is fostered by the growing assimilation of certain kinds of trusts to companies. I refer, of course, to trusts governed by the provisions of the Corporations Law dealing with managed investment schemes. Part 5C.9 of the Corporations Law allows managed investment schemes to be wound up in various circumstances and creates certain powers which may be exercised by the court in relation to such a winding up. But those provisions are irrelevant here. I mention them only to emphasise that, in the absence of applicable statutory powers, it is no business of the Court to act so as to put an end to a trust.

Re Gaydon [2001] NSWSC 473 (8 June 2001) at [30]. The CL remedy of winding up on just and equitable grounds extends to Public UTs pursuant to s 601ND(1)(a) (rather than s 461(1)(k) which applies to companies). Under s 601ND(1), the court may direct the RE of a registered scheme to wind up the scheme if the court thinks that it is just and equitable to make that order. An application for such an order may be made by the RE, its directors, members of the scheme, or ASIC. See Michael Legg and Louisa Travers, ‘Oppression and Winding Up Remedies After the GFC’ (2011) 29 Companies & Securities Law Journal 101, 111. See also Re Rubicon Asset Management Ltd (2009) 74 ACSR 346, and Trio Capital Ltd (Admin Apptd) v ACT Superannuation Management Pty Ltd [2010] NSWSC 941, where Palmer J commented on the breadth of public policy grounds to wind up an MIS under s 601 at [27]. As discussed earlier, CAMAC recently highlighted how the attempted application of winding up procedures to Public UTs under the MIS regime has not been without problems given the issues in applying CL concepts to trusts, and is therefore in need of further substantive reform. See CAMAC, ‘Managed Investment Schemes’ (Discussion Paper), above n 175, 3.

455 Another example of where the existence of CTs leads to a blurring of lines between trust and corporate law.
456 In Re French Caledonia Travel Service (2002) 42 ACSR 524, 527.
457 Ibid.
In practice, it is sometimes more effective in cases of deadlock or oppressive conduct for a court simply to order the replacement of the CT with a new court appointed independent CT who will act in accordance with the court’s direction, subject of course to the terms of the trust deed. In such cases, the new CT may have the discretion to vest the trust if such a power is available under the trust deed. While this remedy does put control of the UT into the hands of an independent court appointed person who will be empowered to deal with the trust assets in the manner prescribed by the court, it may not be appropriate in many oppression type cases where ultimately the relief sought does not conclude with a winding up of the trust. As noted above, most oppression cases deal with smaller private enterprises—often involving active businesses where the principals are crucial for operating the enterprise as a going concern. In such circumstances, the change of trustees may be an impractical and inappropriate form of relief.

In light of the above, when comparing the rights of shareholders and unitholders in circumstances of oppression, the approach to winding up UTs in contrast to companies provides another potential disadvantage to unitholders. Where a winding up is appropriate in the case of oppression, the court has broad jurisdiction to make such an order. In contrast, where an oppressed unitholder seeks an order to vest the trust, the court is limited in its ability to wind up a trust where there has not been an actual breach of the trust terms, and is otherwise bound to ensure the terms of the trust deed regarding the vesting process are followed, notwithstanding the stipulated process may hinder the ability to provide the remedy sought.

Were the CA amended to include jurisdiction for CAORs over UTs as proposed in this thesis, the courts would be similarly empowered to apply the broader CL winding up remedy where appropriate in UT oppression cases. Without such

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458 For example, one of the extensive range of orders decided by Hasluck J in *Wilden* [2009] WASCA 38 (16 February 2009) in the context of alleged oppression conduct against unitholders as a result of the breaches of trust included relief sought by the aggrieved unitholder to replace Wilden Pty Ltd as the trustee of the UT with an insolvency practitioner. Ibid 31 (McLure JA).

459 Although the power to vest the trust is not always provided for in the trust deed, see *Re Gaydon* [2001] NSWSC 473.
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legislative intervention, unitholders have limited access to the winding up remedy (as provided by the *CA*).\(^{460}\)

### 4.3.5 Buyouts and Redemptions

The theme of buyouts is central to many cases of oppression where relief is sought. Relief may be sought in the form of protection against an attempted compulsory buyout by the oppressor,\(^{461}\) or an application by the oppressed party to secure relief via a court-enforced buyout.\(^{462}\) The question of buyout commonly involves a dispute over fair value.\(^{463}\) In this situation, oppression remedies are expressly available to shareholders and are similarly sought by unitholders.

One of the major structural distinctions to note between unitholdings\(^{464}\) and shareholdings is that UTs generally provide a mechanism to allow the unitholder to request redemption of the units based on a valuation methodology specified by the trust deed.\(^{465}\) While redemptions are not applicable to companies,\(^{466}\) they play a

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\(^{460}\) It is worth noting that statutory intervention may not be necessary given ‘the door has also been left open’ (Agardy, ‘Aspects of Trading Trusts’, above n 18, 24) for the extension of the CL ‘winding up’ approach to be applied to UTs pursuant to a statement by Young J in *Metro Motor Inns Hotels and Motels Pty Ltd v Strathaven Holdings Pty Ltd* (2000) NSWSC 1004 (13 October 2000) (‘*Metro Motors*’). His Honour observed the inherent power of the court to control all trustees and that equity courts are to administer practical equity (see Agardy, ‘Aspects of Trading Trusts’, ibid). With respect to an application to replace the trustees of two UTs, Young J stated that although the ability to wind up a trust is an unusual concept:

> I believe it is the duty of this Court to protect the beneficial interests in administering such trusts where there is a commercial breakdown, at least on an interlocutory basis ... it was said that the statutory power does not cover the present situation. I will assume that is correct. Whether it is or not there is always inherent power in the Court to control all trusts.

(2000) NSWSC 1004 [10-14] (Young J). See also Agardy, ‘Aspects of Trading Trusts’, ibid. Note: Young J’s comments are interesting given his Honour’s position in *Kizquari* cited in chapter 4.3.5, where the application of CAORs to UTs was rejected.


\(^{462}\) This is usually the oppressed party seeking to be bought out by the majority at a fair valuation.

\(^{463}\) For example, Young J in *Kizquari* noted ‘the plaintiffs wish to be bought out by the defendants. From what I have heard, the defendants are quite happy to buyout the plaintiffs but not at the figure that the plaintiffs wish.’ *Kizquari* 10 ACSR 606, 612.

\(^{464}\) Predominantly in Public UTs.

\(^{465}\) The redemption mechanism uses the net asset value of the fund either at a given date, or based on a rolling average, to arrive at a unit price. As discussed above, the requirements under Ch 5C require MISs to keep a required level of liquidity at all times, and empower the UT to cease accepting redemption applications where liquidity levels approach the minimum required thresholds (or otherwise in circumstances where it is in the interests of the unitholders as a whole to freeze redemptions). As highlighted in this thesis, these safeguards have developed over time to address circumstances where markets have suddenly dropped and investors have sought mass redemptions, leaving the UTs and their remaining unitholders in financially precarious situations.

\(^{466}\) The company equivalent is share buy-backs, which are more strictly regulated and were traditionally more difficult to effect (although recent corporate law changes have eased the ability to achieve this, it seems out of date). ASIC’s website states: ‘Share buy-back provisions were simplified in 1995 to make share buy-backs more accessible to Australian companies by replacing
central role in allowing unitholders to release their investment in a UT and are a common feature of Public UTs. Accordingly, they add another dimension to the circumstances in which oppression may arise in relation to UTs.467

In the Private UT case of Koko Black, Dodds-Streaton JJA upheld the right of the trustee to redeem the units of the minority against their wishes.468 Importantly, the breadth in Koko Black by which the trust deed provided the trustee (which was controlled by the majority unitholder) with rights to redeem the units, without regard for the inherent conflict of interest that existed, illustrates the wide scope for trust deeds to authorise conduct that would otherwise fundamentally be in breach of trust law and CL principles. In other words, the trustee in Koko Black did not disregard the conflict, but the conflict was authorised by the deed.469

Koko Black highlights that the basic proposition in determining the proper buyout and valuation mechanism for units is to have regard to the terms of the trust deed (or unitholders’ agreement as applicable). Without the express powers granted by mandatory procedures involving auditors, experts, advertisements and declarations with new safeguards for creditors and shareholders that focus on continuing company solvency, fairness to shareholders and disclosure of all relevant information.” Australian Securities & Investments Commission, ‘Share buy-backs’, <http://www.asic.gov.au/asic/asic.nsf/byheadline/Share+buy-backs>.

467 Such was the factual scenario in the Public UT case Gra-Ham, where the court held that the trustee was empowered to implement the amendment relating to redemptions based on the resolution approved by the majority of the unitholders, as the trustee’s actions were consistent with the terms of the trust outlined in the trust deed. In Gra-Ham, the trustee and majority unitholders resolved to change the valuation timing retrospectively on redemptions from the applicant, given the former valuation method for the UT did not account for the subsequent sudden fall in the unit price due to the 1987 share market crash. The applicant unitholder sought an injunction to stop the retrospective amendment to the valuation procedure. Malcolm CJ commented, ‘The unitholders took up their units in the knowledge that there was a power in the trust deed to change the terms upon which they held those units.’ Ibid [50].

468 (2008) 66 ACSR 325, 44. The case involved a power for trustees to redeem units from unitholders against their wishes (at a lower than desired valuation). The case dealt with the question of whether a trustee had the power to compulsorily redeem units of any unitholder at fair valuation under terms of the UT deed against the wishes of the minority unitholders. Dodds-Streeton JJA outlined the extent to which the terms of the UT deed in question provided the trustee with wide powers to exercise the right of redemption: (2008) 66 ACSR 325 at 7-8 [30]. The trust deed provided that: ‘a) the trustee could exercise the redemption without the request of a Unitholder at a price valued by the trustee (or if it determined advisable, by a qualified valuer), b) that the trustee could exercise the powers notwithstanding its relationship to a unitholder, c) that the trustee had absolute unfettered power to exercise its discretions under the trust deed, and, d) the trustee could exercise its powers notwithstanding personal interest.’

469 It was held that the trustee was justified in exercising its powers of redemption, especially given the wide parameters under which the trustee was authorised under the trust deed to operate in exercising the redemption. While the minority unitholders were unsuccessful on the fraud on the power argument, they were successful in estopping the redemption under the doctrine of estoppel.
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*CA* ORs, courts are reluctant to intervene in UT cases by departing from the mechanisms contained in the trust deed. Young J stated in *Kizquari*:\(^\text{470}\)

> …if the articles or trust deed make provision for release of the plaintiff's investment by a certain procedure, normally the plaintiff should be left to put that procedure in motion. The court may make orders ensuring that there is no unfairness in the valuation process or require improperly depleted funds to be reimbursed, but after that, there is no valid reason why the plaintiff should have any special consideration when he or she wishes to withdraw his or her investment.\(^\text{471}\)

Many trust deeds of Private UTs provide a mechanism for a buyout and valuation in the event the parties do not agree. As with private companies, the nature of the investment can be relatively illiquid and the value of the units is negatively affected by the fact that they often only account for a minority interest in a private business. While the mechanisms usually allow for an independent valuation of the units to be undertaken, this is of little use where the other unitholders are not required to purchase the units. The challenges that unitholders in Private UTs encounter in seeking to sell their units at a fair value is no different to the pitfalls faced by shareholders in private companies. The difference is that shareholders in private companies who suffer oppression are able to access *CA* ORs whereby the court can order a buyout of shares at a fair value.\(^\text{472}\)

Private UTs are not subject to the stricter levels of legal requirements that provide governance and protection to minorities in public vehicles, including MISs.\(^\text{473}\)

\(^{470}\) (1993) 10 ACSR 606. The case involved a unitholder in a Private UT seeking to have their units bought out pursuant to an order by the court under the powers stipulated in *CA* ORs.

\(^{471}\) Ibid 612-13.

\(^{472}\) The position of unitholders in Public UTs largely mirrors the position of shareholders in public companies in that listed securities (where the vehicle is listed on a stock exchange) provide a liquid market with the benefit of the open market listed valuation process. The mechanisms for compulsory acquisition in public vehicles are well developed, and provide a high degree of protection and fairness to investors about their rights and obligations in such circumstances. It is relatively rare for there to be circumstances in which a unitholder or shareholder in a listed public vehicle be subject to a forced buyout of their shares or units on terms that would prompt the aggrieved investor to seek court intervention for relief. For shareholders in public companies, the mere existence of *CA* OR provisions have further lessened the likelihood that a public company would act in a way that would warrant court intervention.

\(^{473}\) Private UTs are, by definition, more likely than Public UTs to involve: a) a small group of investors who operate beyond the public scrutiny of listed vehicles, b) terms in the trust deed or unitholders agreements that are more likely to disadvantage a minority unitholder as there are not regulatory restrictions on these terms, c) majority controlling unitholders who are in active positions of management in the underlying business, d) who have perceived or actual motivation to force out minority interests, e) interaction between the unitholders that increase the likelihood of
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particular, there is effectively no restriction on the type of terms that can be drafted into the trust deed that governs a Private UT. Moreover, implied statutory terms are generally not superimposed over Private UTs compared to the manner in which certain sections of the *CA* apply to private companies, irrespective of the terms of the constitution.\(^{474}\) To that extent, there is more scope for a trust deed of a Private UT to sanction conduct that would otherwise be deemed oppressive in the case of a private company.

While unitholders may seek relief in the form of an injunction to stop a forced acquisition or redemption,\(^{475}\) another important form of relief often pursued in Private UTs by the oppressed unitholder is a court-enforced buyout. Such a remedy is commonly sought by oppressed shareholders in private companies where, given the circumstances, it would be unfair or impractical for the parties to continue their unitholding side by side, but the winding up of the trust would further erode the value of the assets of the UT. This is often the case with private companies where the winding up of the business as part of dissolution of the parties’ interests would result in the diminution of the goodwill in the business. While the ability for a court to order the winding up of a trust is clearly available in such circumstances, such an order could result in a ‘cure that is worse than the illness’ in that it would prove unwieldy and incapable of providing a fair result for the injured party.\(^{476}\)

The powers under the Trustee Acts do not appear to allow the courts to order an appropriation by one unitholder of another unitholder’s interest in the trust. Whether there is implicit scope under the Trustee Acts to do so in all applicable circumstances is not clear.\(^{477}\) The issue was discussed by Young J in *Kizquari*,\(^{478}\) who commented on an application by a unitholder pursuant to the *CA* ORs: ‘The parties can, of course, agree to buy one another out, but a sale and purchase can only be forced by the court if there is some legal warrant for the court making

摩擦和纠纷，以及f) 大的估值差异在潜在估值方法的范围中可以被应用，并为双方在实质性不同的预期值方面提供了更大的空间。这些估值的范围。

\(^{474}\) There are some trustee investment duties under the *CA* that cannot be written out.

\(^{475}\) As the cases of *Gra-Ham* and *Koko Black* illustrate.

\(^{476}\) For example, see *Vigliaroni* at [56] and chapter 6.6.

\(^{477}\) See *Arakella* (2004) 60 NSWLR 334.

\(^{478}\) (1993) 10 ACSR 606. The case involved a unitholder in a Private UT seeking to have their units bought out pursuant to an order by the court under the powers stipulated in *CA* ORs.
such an order,\footnote{Ibid at 612. Young J continued: It is not really a function of \textsection 260 of the Corporations Law [the \textit{CAORs}] to enable people to release their capital from ventures where their co-venturers have displeased them. In most situations where people have agreed to contribute funds for a venture there is no right to have the funds released before the venture is fulfilled. The law has allowed exceptions in extreme cases such as where the substratum of the venture has gone or where there has been oppression by those controlling the venture. It must be realised however that these are exceptional cases. Even in cases of oppression, it does not follow that the court will consider it appropriate to release the plaintiff's funds from the venture.} implying that the courts do not have inherent power to order a buyout.

Young J also pointed out that ‘Where the venture is protected by a unit trust device superimposed on a company structure the plaintiff's task will be harder again.’ If there are documented procedures relating to release of the plaintiff's investment, the onus is generally on the plaintiff to action that procedure. While the court will endeavour to ensure the plaintiff is treated fairly, they are not prima facie required to treat him/her any differently if he/she wishes to withdraw from the investment.\footnote{Ibid. As discussed at length in chapter 6.4, Young J also concluded that \textit{CAORs} cannot apply to providing relief in relation to a unitholder in a UT. His Honour continued: Miss Needham, for the plaintiffs, submits that her clients are entitled to remedies under \textsection 260 of the Corporations Law on the facts as I have found them. She says that there has been oppression proved, winding up is not a suitable remedy, and accordingly there should be a compulsory purchase of shares … This sort of problem, as far as I am aware, has not come before the court in an acute form though there have been passing references to it in some of the authorities.} His Honour concluded, ‘there is no reason why the plaintiffs should be able to escape from their contractual obligations to go through a certain procedure if it is desirous of disposing of their units in the trust merely because of what has occurred.’\footnote{Ibid 613.}

Inherent in Young J’s findings is the theme developed throughout this thesis—that the rights and obligations of unitholders are stipulated within the terms of the trust deed and pursuant to trust law, but no further. Unlike an investor who has chosen to invest in a company—thereby enjoying the protection of the \textit{CA}—an investor in a UT has chosen to invest in a trust that is governed by the terms of the trust deed. Young J emphasises the reluctance or inability of the courts to intervene unless there has been a breach of the terms of the trust deed, despite the fact that a unitholder may be subject to the type of conduct for which a shareholder would receive relief pursuant to the \textit{CAORs}.\footnote{Young J’s position in \textit{Kizquari} was rejected by Davies J in \textit{Vigliaroni} who allowed the buyout of units under the \textit{CAORs} (although the decision was premised on the controversial finding that...}
While the courts have a selection of remedies to aid beneficiaries, it appears that the ordering of a buyout of units beyond the *CA* is unavailable unless the right is stipulated in the terms of the trust. Where a dispute results in the inability of unitholders to continue a quasi-partnership, the only other viable resource open to oppressed unitholders is to seek an order for the vesting of the trust, which is not always an appropriate remedy.

### 4.4 Equitable Fraud on the Power and Fraud on the Minority

Beyond the *CA*ORs, the most important general CL principles to note in considering their applicability to oppressed unitholders are the doctrines of fraud on the power and fraud on the minority. *CA*ORs are sourced from these equitable doctrines and mirror many of the same legal principles exhibited by actions under the *CA*ORs, as discussed further in this chapter. To that extent, these doctrines require close analysis in considering the contention that oppressed unitholders will continue to be disadvantaged without the extension of the *CA*ORs to protect them. If unitholders were protected under the doctrines of fraud on the power or fraud on the minority, potentially reforms to the *CA*ORs would be unnecessary. Yet the following discussion strongly suggests that this is not the case.

#### 4.4.1 Fraud on the Power and Exemption Clauses

The doctrine of fraud on the power was the equitable source for the *CA*ORs and provides a potential equitable framework to protect unitholders against oppressive conduct by trustees. Simply put, ‘there is fraud on a power when the power has been used for a purpose outside the scope originally envisaged when the power

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*C*AO*Rs can be applied to UTs). Interestingly, Vigliaroni explored the possibility that the winding up remedies under s 467 of the *CA* could also potentially be used to enforce a buyout of units. While the balance of the decision was decided under s 233 given the apparent flexibility in ordering an enforced buyout, Monichino noted with respect to s 467 that:

[section 467(1)(c) also confers upon the court power to order that units in a unit trust be bought out by another unitholder. Section 467(1)(c) confers upon the court a very broad discretion to make ‘any interim or other order that it thinks fit’ on the hearing of a winding up application, including a winding up application brought by a shareholder on the just and equitable ground contained in s 461(1)(k). Section 467(1)(c) may well offer an attractive avenue where it is difficult to establish oppression for the purposes of s 232.


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483 Including the ability to change trustees, grant injunctions preventing breaches of trust, altering the trust deed terms where appropriate, or ordering compensation for breaches of trust.
Chapter 4: Trustee Obligations and Unitholder Rights without \textit{Corporations Act} \\ \textbf{Oppression} \\ Remedies

was conferred.'\textsuperscript{484} The model was developed by equity to restrain actions constituting abuse of power\textsuperscript{485} on the basis that ‘a person having a power, must execute it bona fide for the end designed, otherwise it is corrupt and void,’\textsuperscript{486} so that any power under a trust may only be exercised for the purpose for which it is given.\textsuperscript{487} Fraud in this context does not necessarily imply dishonest or immoral conduct (ie tortious fraud),\textsuperscript{488} rather it means ‘the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power.’\textsuperscript{489} Commonly, a claim of fraud on the power relates to allegations that a trustee has purported to use a trustee power to provide a benefit from the trust to someone who is beyond the intended objects of the trust. Fraud on the power can occur where a trustee exercises an existing trustee power contained in the trust deed in an inappropriate manner,\textsuperscript{490} or similarly uses a trustee’s power of amendment to alter the terms of the trust for a foreign

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\textsuperscript{484} Lo, above n 210. \\
\textsuperscript{485} Ibid. \\
\textsuperscript{486} Aleyn v Belchier (1758) 28 ER 634, 637. \\
\textsuperscript{487} As described in \textit{Duke of Portland v Topham} (1864) 11 HL Cas 32 at 54, the donee of the power: \\
shall, at the time of exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view as to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power. \\
See also A H Slater QC, ‘Amendment of Trust Instruments’ (2009) \textit{Society of Trust and Estate Practitioners} <\texttt{http://www.step.org/amendment-trust-instruments}>. Slater noted that an action by a trustee ‘which breaches this constraint—for example, one undertaken with the purpose of securing that the benefit of the trust fund or part of it will endure to someone beyond the class of beneficiaries—will be ineffective.’ Ibid. \\
\textsuperscript{488} In \textit{Vatcher v Paull} [1915] AC 372 (‘\textit{Vatcher v Paull}’) at 378, Lord Parker stated: ‘The term fraud in connection with frauds on a power does not necessarily denote any conduct ... amounting to fraud in the common law meaning of the term or any conduct which could be properly termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power.’ See also \textit{Nocton v Lord Ashburton} [1914] AC 932 (Viscount Haldane LJ) cited by Lo, above n 210. \\
\textsuperscript{489} \textit{Vatcher v Paull}, 378. The distinction between tortious fraud and equitable fraud has been the subject of judicial confusion in some UT cases. See \textit{Wilden} [2009] WASCA 38 (16 February 2009) discussed below. \\
\textsuperscript{490} As examples of what may be considered the exercise of a power for improper purpose, Higgins J in \textit{Commonwealth & the Central Wool Committee v Colonial Combing, Spinning & Weaving Co Ltd} (1922) 31 CLR 421 (14 December 1922) (‘\textit{Commonwealth v Colonial Combing}’) Higgins J stated (at 470) the following examples: \\
An executor having power to dispose of a church preferment cannot bargain for an advantage to himself (\textit{Richardson v. Chapman} [1760] EngR 694; (1760) 7 Bro. Parl. Cas., 318,); a municipal corporation, trustee for a school, cannot grant a lease containing a covenant that the lessee shall grind his corn at the corporation mill (\textit{Attorney-General v. Stamford} (1747) 2 Swans., app., 591,); trustees for a school cannot lease to one of the trustees (\textit{Attorney-General v. Dixie} (1805(13 Ves. 519); governors of a school cannot lease to one of the governors (\textit{Attorney-General v. Earl of Clarendon} (1810) 17 Ves. 491,); a parent with a power to appoint among children cannot bargain with a child for purchase of a share appointed (\textit{Cuninghame v. Anstruther} (1872) L.R. 2 H.L. (Sc.), 223,); a parent with such a power cannot appoint money to a daughter to meet his burial expenses (\textit{Hay v. Watkins} (1843) 3 Dr. & War., 339,); a tenant for life having statutory power to lease cannot lease to a trustee for himself (\textit{Boyce v. Edbrooke} (1903) 1 Ch., 836). \\
\end{flushright}
Fraud on the power is a breach of trust for which aggrieved unitholders are able to seek remedies that commonly include declarations, injunctions, rescission or restitution. Within the context of oppressive conduct in UTs, such remedies are therefore of potential value in assisting oppressed unitholders. Importantly, the traditional doctrine of fraud on the power in a trust context will generally only provide relief to a unitholder against the trustee rather than against fellow unitholders.

Fraud on the power can be broadly applied beyond merely trust or fiduciary relationships, allowing the doctrine to be used as a potential remedy in a wide variety of circumstances. The fact the principle applies to non-fiduciary relationships can render it useful in cases where a derivative action is difficult to establish. For example, when a unitholder wishes to take action against a director of a CT and the aggrieved unitholder is unable to prove standing under the derivative action provisions of the \textit{CA}, the principle may be explored notwithstanding there is no direct fiduciary obligation owed. Within the context of oppression of shareholders, the doctrine has become largely redundant with respect to cases involving companies, given the development of the \textit{CA}ORs and the derivative action processes available to shareholders.

\footnote{See for example, \textit{Kearns v Hill} (1990) 21 NSWLR 107; \textit{Cachia} (2000) 170 ALR 65 at [68]-[76]. Millet J stated in \textit{Re Courage Group's Pension Schemes v Imperial Brewing and Leisure Ltd} [1987] 1 All ER at 537 in relation to a power of amendment for a pension fund: The next question is whether the plaintiffs are entitled if so minded, to join in executing the amending deeds. They may do so only if the proposed amendments are within the power to amend the trust deed and rules, and can be properly made. They must not infringe the provisos to the rule-amending power, particularly the express prohibition in all three schemes against altering the main purpose of the schemes, namely the provision of pensions on retirement, since it would be implicit anyway. It is trite law that a power can only be exercised for the purpose for which it is conferred, and not for any extraneous or ulterior purpose. The rule-amending power is conferred for the purpose of promoting the purpose of the scheme, not altering them.}

\footnote{While remedies for fraud on the power are broad, the remedies available under the \textit{CA}ORs have been drafted specifically to address the wide range of circumstances in which oppression arises, and tailored remedies to deal with the oppression effectively, as described in chapter 5.}

\footnote{Where the trustee is guilty of misusing its trust power.}

\footnote{As discussed earlier in chapter 2.4.4, they are not traditionally considered to have powers or obligations to exercise.}

\footnote{While the doctrine was formed originally with relation to powers of trustees, it has applied beyond simply trust relationships, \textit{Commonwealth v Colonial Combing}, 471 (Higgins J), and indeed beyond fiduciary relationships, see Lo, above n 210. Austin J in \textit{LGSS Pty Ltd v Egan} (Unreported, Supreme Court of NSW, 4 December 2002) noted that in the case of non-fiduciaries, the doctrine ‘authorises intervention where the power is exercised in bad faith or for purposes foreign to the power’ at [106]–[109].}

\footnote{As described in chapter 4.3.2.}
Given the limitations unitholders face pursuing CAORs for claims of oppression, some have sought relief under the doctrine of fraud on the power (where there is no argument as to its applicability given the doctrine evolved within the context of trust law). Most claims of oppression relate to circumstances where the alleged infringer has acted in accordance with the strict terms of the empowering document (e.g., the trust deed) but in a manner that the aggrieved party deems oppressive. In such circumstances, the doctrine of fraud on the power seems well placed to provide relief.

One drawback of the doctrine of fraud on the power, however, is that it has a far narrower scope for application than CAORs. UT cases involving allegations of fraud on the power draw a fine line between whether trustees may be in breach of their obligations even though they adhered to the terms of the trust (either as originally drafted, or alternatively as amendments pursuant to powers of amendment granted to the trustee). The courts have taken a very conservative approach to applying the doctrine of fraud on the power in such circumstances, placing a high threshold for aggrieved unitholders to establish that a power has been exercised for an improper purpose beyond the scope intended by the donor of the power. In cases where a power of amendment has been exercised by the trustee, the courts require the unitholder to establish that the trustee’s actions have eroded the ‘substratum’ of the UT. This argument is essentially that changes should not be allowed to the substratum or original purpose of the UT (in other words, the raison d’être for the creation of the trust). Accordingly, even when the trustee’s actions were in conflict with what may otherwise be considered a breach of a trustee obligation (pursuant to general concepts of trustee duties), beneficiaries will nevertheless have limited scope to secure relief where the

497 See discussion in chapter 6.
498 E.g., Koko Black.
499 If the trustee acted inconsistently with the trust deed, the beneficiaries would have a clear action for breach of trust.
500 For example, an attempt by the trustee to amend the UT deed (or ‘constitution’ in the case of an MIS) (see Centro [2011] NSWSC 1175), to seek a compulsory redemption (see Koko Black) or buyout of units against the wishes of the minority unitholder. See Jacometti [2011] VSC 612.
501 Or the fraud on the minority doctrine from which the CAORs developed.
502 See Franz Ranero, ‘Failure of Substratum in Commercial Trusts’ (1999) 18(1) University of Tasmania Law Review, 126-145, available at <http://search.informit.com.au/documentSummary;dn=200009814;res=IELAPA>. As Slater commented: ‘In the case of instruments establishing trust funds for a clear and relatively limited purpose—the most common instances being superannuation funds and public investment funds—the power of amendment is likely to be read as not authorising an amendment which subverts or destroys the purpose or “substratum” of the fund.’ Slater, above n 487. See also Lock v Westpac Banking Corporation (1991) 25 NSWLR 593.
actions are authorised by the trust deed, or alternatively where the trustees have the benefit of an exemption clause excluding them from liability for a breach.

As Millet LJ in *Armitage v Nurse* (‘*Armitage*’) illustrated:

I accept the submission made on behalf of [the beneficiary] that there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts. But I do not accept the further submission that these core obligations include the duties of skill and care, prudence and diligence. The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts, but in my opinion it is sufficient.503

While unitholders prima facie enjoy a broad range of rights under equity and trust law,504 the vast majority of UT deeds provide extremely wide powers to the trustees and similarly encompass exclusion of liability clauses held to be broadly enforceable in cases such as *Armitage*. Accordingly, the application of fraud on the power has been narrowly applied in UT cases.505

*Cachia* was one of the seminal UT cases in which fraud on the power was raised as grounds for relief by a unitholder.506 *Cachia* was similar to a number of other Public UT cases507 where a minority unitholder sought relief against an amendment by the trustee of the terms of the trust pursuant to a special vote by unitholders. He argued (inter alia) that the proposed amendment was a fraud on the power given the amendment was for an improper purpose to aggrandise certain unitholders over others, and therefore the proposed amendment allegedly undermined the substratum of the trust.508 Hely J found against the unitholder in relation to the alleged fraud on the power on the basis that there was no lack of bona fides or aggrandisement by the majority,509 notwithstanding the rights of the

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504 For a discussion of the obligations of a trustee to exercise its powers (including discretionary powers) see White, above n 446.
505 The application of fraud on the power was discussed in the superannuation case of *Lock v Westpac Banking Corporation* (1991) 25 NSWLR 593. As noted above, a superannuation fund is similar to a UT.
507 See also *Gra-Ham*.
508 These cases are detailed in chapter 6.
509 A reference to *Gambotto*.
minority were materially affected (by retrospectively amending the right of the unitholder to redeem his units when the unit price was substantially higher). In relation to the claim that the amendment undermined the substratum of the trust, Hely J noted, ‘a fundamental reorganisation of the Trust does not of itself necessarily involve destruction of the substratum of the Trust.’

The decision in Cachia reflects the narrow application of the doctrine of fraud on the power illustrated in a number of Public UT cases, and the difficulty unitholders face in substantiating an argument on this basis where the trustee is acting in accordance with the terms of the trust.

The narrow interpretation of fraud on the power was also contemplated in the Private UT case of Koko Black. In that case, minority unitholders argued against a forced redemption by the trustee on the basis that ‘the exercise of the power was not bona fide for a proper purpose, but rather, for the impermissible purpose of aggrandising the interests of … [the majority unitholder], contrary to principles of Gambotto v WCP Ltd.’ The minority unitholders failed on that argument, both in the first instance and again on appeal, given the series of precedents that endorsed the exercise of powers by trustees where they were exercised strictly in accordance with the trust terms.

510 Hely J stated:

The equitable doctrine of ‘fraud on the power’ requires that a power, including an amendment power, reserved in a trust must not be exercised for a purpose, or with an intention beyond the scope of or not justified by the instrument creating the power. The same principle applies to the exercise of a statutory power. In each case, the power has to be exercised bona fide, for the purpose for which it is given. It may be that an amendment to a trust deed enabling the majority unitholders to expropriate the minority's units for the sole purpose of aggrandising the majority might fail for want of good faith, or because it would be beyond the scope of the enabling power. That is, however, not the case here. There is no expropriation of any property of the minority by the majority; to the aggrandisement of the majority. Rather, the majority voted in favour of a merger of the two property trusts such that the interests of all unitholders in the Growth Trust were redeemed by the issue of units in the Property Trust. The provisions introduced by the amendments were not directed against only some of the unitholders. They affected all unitholders equally, and in the same way. There is no want of bona fides associated with the making of the amendments. Even though the amendments effected a fundamental restructuring of the unitholders' rights, for the reasons already given, I do not think that the power to amend was exercised for a purpose or with an intention beyond the scope of the power.


512 The decision is reflected in later decisions dealing with Public UTs registered under Ch 5C such as in Premium Income Fund Action Group Inc v Wellington Capital Ltd [2011] FCA 698; also Centro [2011] NSWSC 1175, and other UT cases such as Arakella (2004) 60 NSWLR 334.


514 On appeal, acknowledging that the trustee had exercised the powers contained in the trust deed prescribing the redemption process, and given the series of previous decisions relating to fraud on the power that were reluctant to grant relief when the trustee had acted in accordance with the terms of the trust deed, the minority unitholders sought to argue that the court should consider the doctrine of fraud on the power based not only on the terms of the trust deed, but also on extraneous
The UT case of *Wilden*\(^{515}\) also illustrated the significant extent by which trust deeds are capable of authorising actions that would otherwise be considered equitable fraud on the power, and absolving trustee responsibility in the event that fraud on the power is alleged (especially where the trust deed includes limitation of liability clauses commonly found in modern trust deeds). Of relevance is that among the grounds used to mount its claims, the plaintiff (Green, an aggrieved unitholder) relied on *Armitage* in arguing that the defendant trustee and two principals had acted fraudulently and in bad faith.\(^{516}\) The defendants attempted to rely on a limitation of liability clause to reject the breaches. While Hasluck J found in Green’s favour, on appeal it was held that Hasluck J had confused the actions of the trustee as actual fraud rather than equitable fraud,\(^{517}\) and as the materials, which established a broader set of restrictions on the trustees powers (namely that the unitholders were legitimately entitled to an expectation of a long term investment). Interestingly, Dodds-Streeton JJA left open the ability to include extraneous materials (eg business plans, or investment materials) in determining the manner in which the trustees’ powers must be exercised.

\(^{515}\) *Wilden* [2009] WASCA 38 (16 February 2009) (Court of Appeal). The dispute in *Wilden* involved a long series of cases and applications for interlocutory relief, leading to a series of judgements at trial and on appeal, which provide an extremely complex and lengthy set of decisions relating to the underlying dispute (the primary judgement in Hasluck J’s numerous decisions is over 100 pages in length). The matter was heard in various hearings in the first instance before Hasluck J and then on appeal before McLure, Pullin JJA and Newnes AJA in the Supreme Court of Western Australia Court of Appeal. The disputes related to four principals who invested in and managed three UTs that owned three shopping centres. When one of the UTs experienced severe financial difficulty in the late 1980s, the trustee (Wilden Pty Ltd) and two of the principals (Mr Chesson and Mr Denboer) were briefed with finding urgent additional funds on a heavily discounted unit valuation if necessary. The two principals eventually offered to provide the necessary funds themselves and were issued with the discounted units, as well as options for further discounted units based on resolutions passed by the directors of the trustee. Unbeknown to Green (the aggrieved unitholder in the proceedings), the two principals had sourced their funds for the investment in the distressed UT via the redemption of units in one of the other UTs (which funded the redemption via bank finance they arranged). Upon Green becoming aware of the sources of funding, Green claimed a range of breaches against the two other principals and the trustee. Further claims and cross-claims related to the valuation procedure arranged by the trustee upon Green seeking its units to be redeemed—whereby Green claimed the trustee orchestrated a flawed valuation process that resulted in a low valuation. The trustee sought to have any alleged breaches endorsed by the court pursuant to s 75 of the *Trustee Act 1963* (WA). Finally, the dispute also related to the claim by the trustee against Green for the repayment of loan accounts, which Green refused to repay. After a number of proceedings, eventually Hasluck J upheld the Green parties’ claims to which the trustee and Chesson parties appealed successfully.

\(^{516}\) *Armitage* [1998] Ch 241, 253-4. As noted above, in *Armitage*, Millett LJ stated that there is an ‘irreducible core of obligations’ owed by a trustee that constitute the minimum necessary to give substance to a trust, because ‘if the beneficiaries have no rights enforceable against the trustees there are no trusts.’ That ‘irreducible core’ is said to consist of ‘[t]he duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries.’ See White, above n 446.

\(^{517}\) *Wilden* [2009] WASCA 38 (16 February 2009); McLure J at [162] stated: The trial judge erred in concluding that any failure to comply with an obligation enforced by a court of equity constitutes bad faith. Bad faith connotes conscious wrongdoing that is knowingly or recklessly inconsistent with the interests of the beneficiaries. Further, the words ‘conscious fraudulent bad faith’ in cl 13.4 are intended to be conjunctive not disjunctive. The clear but clumsily stated intention is that there only be liability for actual fraud not its equitable equivalent. Actual fraud in this context means dishonesty or bad faith.
conduct of the trustee was consistent with the terms of the trust deed, the appeal court found against Green (notwithstanding the defendants’ conduct may otherwise have been considered ‘equitable fraud’). Referring to the decision in Armitage, McLure JA concluded, ‘Equitable fraud is not part of the irreducible core of obligations identified in Armitage.’ McLure JA stated further, ‘A trustee’s prescriptive duties include the duty to perform and adhere to the terms of the trust.’

The effectiveness of an exemption clause in absolving alleged fraud on the power was also dealt with in the recent Private UT case of MJ Jacometti Pty Ltd v Boomaroo Nurseries & Wholesale Supplies Pty Ltd (‘Jacometti’). One of the issues discussed related to a clause in the trust deed that protected the trustee from any liability for ‘any breach of duty or trust whatsoever unless it shall be proved to have been committed made or omitted in personal conscious fraudulent bad faith by the Trustee charged to be so liable.’

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518 This issue was also discussed in the next case of Jacometti, as noted below.
520 Ibid.
521 [2011] VSC 612. This recent case was heard before Habersberger J in the Supreme Court of Victoria. The case involved a dispute between three brothers who were principals in a successful wholesale vegetable nursery operated via a UT in which each principal owned the units via a family trust. The relationship between the brothers deteriorated, and one of the brothers (associated with the plaintiff unitholder) offered (orally at a meeting) to sell his units at a price of $8 million (and no less), which was rejected by the other unitholders as too high a price. Under the trust deed, the buyout mechanism provided that where a unitholder offered to sell its units, and the offer price was rejected by the other unitholders, the trustee could engage an independent valuation that would then be binding on the seller if the purchaser agreed to the independent valuation. The trustee, which was controlled by the other two brothers, exercised its rights under the trust deed by engaging an independent valuer to value the units (valued at $7.3 million), and arranging for the transfer of the plaintiff’s units to the other unitholders. The plaintiff sought an injunction preventing the transfer, and the defendant (which was the trustee), sought that the matter be summarily dismissed because the trustee was merely acting within its rights under the trust deed. The main discussion revolved around whether to summarily to dismiss the case. Upon Habersberger J rejecting the application by the defendant to summarily dismiss the matter, his Honour ordered the matter to proceed to trial at a future hearing. The matter settled on the first day of the trial, therefore unfortunately the issues relevant to this thesis were not discussed in detail. In arguing against the summary judgment, counsel for the plaintiff nevertheless raised some of the primary grounds for seeking the injunction. Of those grounds, the plaintiff did not claim oppression under s 232 or fraud on the minority.
522 Ibid [40]. As in *Wilden*, the parties used *Armitage* to argue whether the phrase in the trust deed of ‘fraudulent bad faith’ was intended to be interpreted as actual fraud and bad faith as the defendant argued, or to include ‘both constructive and equitable fraud and to include the exercise of a power to benefit one beneficiary over another or to benefit a third party,’ as contended by the plaintiffs. (*Jacometti* [2011] VSC 612 at [46] citing *Armitage* [1998] Ch 241). The defendants’ counsel cited Millett J’s conclusion in *Armitage* on the effect of a clause limiting the liability of a trustee that ‘In my judgment clause 15 [the limitation of liability clause] exempts the trustee from liability for loss or damage to the trust property no matter how indolent, imprudent, lacking in
In *Jacometti*, in which the defendant sought a summary dismissal of the plaintiff’s action, Habersberger J noted the plaintiff’s counsel had submitted that the defendant trustee was seeking to rely on the limitation of liability clause in the trust deed ‘to justify what it proposed to do,’ which according to *Armitage* the defendant ‘could not do.’523 The defendant had argued that in light of the exclusion clause, the plaintiff’s case should have been summarily dismissed, as the defendant had no case to answer. Habersberger J concluded that there were in fact sufficient grounds to reject the application for summary dismissal, illustrating that although the scope for exclusion clauses to protect trustees against claims of fraud on the power is extensive, it is not absolute. To that extent, the case law provides a thin element of protection to unitholders in circumstances where a trustee attempts to rely on an exclusion clause to reject liability with respect to actions that breach the most basic irreducible obligations outlined in *Armitage*. However, it is submitted that such protection is substantially less for unitholders than shareholders in such circumstances are afforded under the CAORs.

In summary, *Jacometti* confirms the view that trustees avoid liability for breach of trust or fraud on the power provided they satisfactorily act in accordance with the strict terms of the trust,524 while noting that an action by a trustee that breaches the irreducible core of obligations owed to beneficiaries (of honesty and good faith) will be voidable. These cases highlight the tension between the fundamental rights of beneficiaries under trust law and the broad rights that trustees are empowered with pursuant to most trust deeds. They also illustrate the complexity in considering when to provide relief pursuant to the doctrine of fraud on the power, especially where the actions of the trustee have commonly been sanctioned by the terms of the trust deed.525 In addition, the case law highlights that fraud on the power is difficult to prove where the trustee has adhered to the terms of the trust and exclusion or indemnity clauses may further insulate trustees from claims (although such protection will not be absolute where an ‘irreducible obligation’ is the source of the claim). Finally, the cases illustrate that even where fraud on the power is established, the remedy available to the court is limited to deeming the

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524 For example, Hely J in *Cachia* and Hargrave J in *Koko Black*.
525 For a broader discussion on the doctrine of fraud on the power, see D M Maclean, *Trusts and Powers* (Law Book Co, 1989).
exercise of the power ineffective—and does not empower the court to assist aggrieved unitholders in applying the broader range of remedies otherwise available to shareholders under the CAORs (eg enforced buyouts). Accordingly, the doctrine of fraud on the power has limited value in assisting oppressed unitholders compared to the remedies available under the CAORs.

4.4.2 Fraud on the Minority Generally and ‘Gambotto’

The equitable concept of fraud (or oppression) on the minority was based on the doctrine of fraud on the power and evolved into the statutory CAORs. As discussed further, given its central role under general law in dealing with cases of oppression, the application of fraud on the minority to UT cases is pivotal to the main contention of this thesis.

Fraud on the minority is a drawback of providing power to the majority, and the doctrine providing relief against fraud on the minority is an important limitation on the general CL principle of majority rule. Given unitholders’ interests are ‘securitised’ akin to shares, the ability for the majority to rule is unique to UTs in the world of trusts. The evolution of the UT included a mirroring of the voting rights of shareholders. The decision-making structure was a departure from the

526 Ford, Austin and Ramsay, above n 234, ch 11.050. Ford et al noted: ‘The juridical basis of the law of fraud on the minority lies in the doctrine of fraud on a power. This broad doctrine, which was developed in courts of equity, applies to many types of powers. For example, in the law of property it applies to anyone who has power to distribute property among a class of persons.’ Ibid at ch 11.030. As with fraud on the power, ‘fraud’ does not mean ‘dishonesty’, but an action beyond the implied scope of a conferred power. See Vatcher v Paull [1915] AC 372, 378 (Lord Parker). The doctrine similarly provides that any such power has an implicit obligation not to use it for an ulterior purpose.

527 Spavold explained the concept of majority rules in companies as follows: ‘Majority rule gives the power to oversee management primarily to the majority. They elect the board of directors and … they can remove directors by ordinary resolution. Further, by amending the articles of association, they can directly control management.’ Spavold, above n 12, 264.

528 In explaining the restrictions on minorities challenging majority rule, Mellish LJ stated in MacDougall v Gardiner (1875) 1 Ch D 13, 25:

If the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly … there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes. (See also Mozley v Alston (1847) 1 Ph 790 for the original formulation of this component of the rule). For discussion on the majority rule concept, see Matthew Berkahn, ‘The Derivative Action in Australia and New Zealand: Will the Statutory Provisions Improve Shareholders’ Enforcement Rights?’ (1998) 10(1) Bond Law Review 5 at <http://epublications.bond.edu.au/blr/vol10/iss1/5>.

529 The UT decision-making mechanism is somewhat incongruous with the original decision-making process for traditional trusts, in that the trustees were the ones empowered to make decisions on behalf and for the benefit of the beneficiaries (rather than the beneficiaries themselves) within the strict parameters of the trust deed and pursuant to their fiduciary duties.
traditional decision-making and governance structures of trusts.\textsuperscript{530} Along with voting rights came the power that majority unitholders wielded, and the inherent risk for abuse by majority voting power.\textsuperscript{531} According to CL principles, a majority vote may be invalid despite compliance with a company’s constitution, even if the constitution contains nothing to limit the power of the majority of members.\textsuperscript{532} Where it can be shown that the majority voted for a purpose outside an implied range of purposes for which the power to vote was conferred, the court may intervene under the equitable principle of fraud on the minority.

A common application of fraud on the minority relates to circumstances where it would invalidate an attempt by a majority from exercising their voting power as ‘a means of securing some personal or particular gain, whether pecuniary or otherwise, which does not fairly arise out of the subjects dealt with by the power and is outside and even inconsistent with the contemplated objects of the power.'\textsuperscript{533} Importantly, pursuant to general law tradition, fraud on the minority will only be proven in extreme circumstances and the courts are reticent to undermine the bona fide rights of the majority in controlling companies. In the company oppression case of Shelton v National Roads and Motorist's Association (‘Shelton’),\textsuperscript{534} Tamberlin J noted that:

\begin{itemize}
  \item Sin described the structural legal nature of the decision making mechanism in UTs as follows:
    \begin{quote}
      It has been concluded that unitholders cannot be characterized as partners. Actions done and decisions made by them through meetings can be regarded as the acts of owners of the rights constituted by the units. They are analogous to assets by beneficiaries of trusts. Of course, as in companies, in order for actions to be taken by a large aggregate of individuals, meetings and rules for majority decisions are necessary. Voting rights simply are parts of the rights constituting units. Once the majority in a meeting is given the power to mind the minority, there emerges the tension between voting powers as property rights and the notion of fairness in the exercise of those powers. The starting point is that when unitholders vote in unitholders’ meeting, they vote in respect of their units, which are their property, and the right to vote is attached to a unit as an incident of property to be enjoyed by its owner.
    \end{quote}
  \item Sin, \textit{Legal Nature of the Unit Trust}, above n 5, 173.
  \item Many of the UT cases cited as examples in this thesis where a unitholder has sought relief against oppressive conduct include circumstances where the majority controlling unitholders acted against the wishes of the minority unitholders. Public UT cases such as Gra-Ham (cited in chapter 2.4.4 in relation to the role of contract law) involved an application by a unitholder seeking relief against a decision by the majority unitholders to retrospectively change the valuation mechanism under the trust deed. The UT deed provided the majority with the power to amend the terms of the trust deed, and bind all unitholders to the amended terms. Similar examples of the use of majority unitholders’ power are found in AF & ME (1994) 14 ACSR 499 and Cachia (2000) 170 ALR 65, where minority unitholders brought actions against the majority unitholder to stop it from being able to wield its power to ratify certain actions. These cases mirror the classic oppression cases dealing with companies (where commonly the majority shareholders seek to wield their majority power against the minority).
  \item Ford, Austin and Ramsay, above n 234, ch 11.030.
  \item Peters’ (1939) 61 CLR 457, 511 (Dixon J) quoted in ibid.
  \item (2004) 51 ACSR 278.
\end{itemize}
[oppression] is not established simply by showing that the majority are in control of the company, or that the applicant is consistently out-voted, or that the majority have made some questionable decisions from a business point of view. The mere disadvantage of being in a minority does not in itself constitute oppression. Disagreement with the decision by a majority of shareholders and directors on the part of a minority shareholder does not entitle that shareholder to relief.535

Accordingly, the doctrine of ‘fraud on the minority’ that developed into the oppression remedies under the CA (CAORs) requires a relatively high threshold to be established before the courts will intervene on behalf of the minority.536

The Gambotto case was the high watermark for fraud on the minority.537 In addition to its importance as a seminal case in determining the law of oppression generally, as unitholders do not prima facie have direct rights under the statutory CAORs,538 Gambotto has special relevance to this thesis given that the case was ultimately determined based on the general law doctrine of fraud on the minority rather than the statutory CAORs.539 Gambotto is therefore useful to appreciate how fraud on the minority principles operate—to the extent that the doctrine can be

535 Ibid 285 [24].
536 Spavold described the precarious position of the minority:
At common law, the shareholder had to depend on the actions of the general meeting of shareholders to provide him with protection from management. If the majority shareholders chose not to act, he had no remedy unless he could commence a derivative action. As Mellish LJ stated in MacDougall v Gardiner (1875): ‘… there can be no use in having a litigation about it the ultimate end of which is only that a meeting has to be called and then ultimately the majority gets it wishes. It is not better that the rule should be adhered to that if it is a thing which the majority are masters of the majority in substance shall be entitled to have their will followed? If it is a matter of that nature it only comes to this that the majority are the only persons who can complain that a thing which they are entitled to do has been done irregularly …’

MacDougall v Gardiner (1875) 1 Ch D 13, 25 cited in Spavold, above n 12, 263.
537 (1995) 182 CLR 432. The case involved a listed public company (WCP) in which 99.6% of the shares were owned by one corporate shareholder (IEL). These shares were valued at $1.75. IEL wished to convert WCP into a wholly owned subsidiary. Compulsory acquisition provisions of the CA were inapplicable at the time. Shareholders at a general meeting passed a resolution amending WCP’s constitution to permit compulsory acquisition of minority shares (valued at $1.80) by a person entitled to 90% or more of the shares in WCP (which would have led to tax savings for IEL of $4 million). IEL did not vote at the general meeting (as an interested party) and Gambotto did not attend the meeting. The resolution was passed by 100% of the shareholders present and entitled to vote (special majority). Gambotto claimed that the amendment was invalid. In Gambotto, the High Court considered whether: i) a resolution passed by the majority to amend the company’s constitution to acquire compulsorily the shares of the minority was invalid; and ii) a conflict of interest could arise following other amendments to the constitution by the majority, not involving the compulsory acquisition of shares.
538 Note that chapter 6 discusses the question of whether the CAORs can provide relief to unitholders.
539 As noted below, it is unclear why the case was not pleaded and decided based on the statutory CAORs of s 260; rather it was based on the common law fraud on the minority doctrine. It is submitted that as s 260 was a relatively recent provision, the parties (and the court) possibly relied on the traditional action of fraud on the minority to deal with the issues.
applied—in UT cases. As discussed earlier in chapter 3.2 and below, applying the principles in *Gambotto* to UT cases has been the subject of debate.

*Gambotto* involved a majority shareholder resolution to amend the constitution of a listed company to enable the minority’s shares to be compulsorily appropriated. In overturning the decision on appeal, the majority of the High Court found that the amendment to enable the compulsory acquisition of the minority’s shares was a fraud on the minority (under common law rather than the statutory *CA* ORs). Given the historically narrow scope for minority shareholders to secure relief in anything other than extreme circumstances, the decision of the High Court was seen by many as widening the rights of minority shareholders. Ramsay and Saunders described the decision as ‘one of the most controversial corporate law judgments in Australian legal history.’

The wider application of the common law doctrine of fraud on the minority found in *Gambotto* eventually prompted parliament to curtail some of these extended rights by legislating the compulsory acquisition provisions in the *CA*. While this decision was based on the general law doctrine and not (statutory) *CA* ORs, the language used indicated a blurring of the two sources of law. Ford et al referred

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540 The applicability of the doctrine of fraud on the minority to cases involving UTs is discussed below.

541 The majority held that Gambotto’s continued shareholding did not put WCP’s business at risk and that Gambotto had not acted to WCP’s detriment. The taxation benefits derived from WCP becoming a wholly owned subsidiary of IEL did not constitute a proper purpose (for expropriation). The minority held that it was a legitimate business objective for expropriation, and the consideration for expropriation may have been a fair price but the company failed to make full disclosure of all matters in relation to the expropriation.

542 Ramsay and Saunders highlighted the significance of *Gambotto* as follows:

> The decision of the High Court of Australia in *Gambotto v WCP Ltd* was both controversial and widely debated. Some saw the decision as radically altering the balance of power in corporate law by granting minority shareholders extensive new powers to prevent the compulsory acquisition of their shares and thereby impeding commercial transactions that would benefit companies ... The decision had the potential to have a significant influence on Australian corporate law and the way corporate transactions involving compulsory share acquisitions are conducted. In particular, Gambotto was considered in more than 50 subsequent judgments giving many judges the opportunity to extend the Gambotto principles into new areas ... the responses to Gambotto were largely negative. Initial commentary in the media and subsequent academic commentary was mostly critical. Almost uniformly, courts decided that the principles should not be extended. Parliament responded by enacting new provisions in the corporations legislation facilitating the compulsory acquisition of shares and limiting the application of Gambotto.

Ramsay and Saunders, above n 161 at 1.

543 Ibid.

544 Vanessa Mitchell, ‘The High Court and Minority Shareholders’ (1995) *Bond Law Review* 7(2) 4 [http://epublications.bond.edu.au/blr/vol7/iss2/4/]. See also Saul Fridman, ‘WCP Ltd v Gambotto: an Opportunity for the High Court to set some Corporate Law Norms’ (1993) *Federal Law Review* 22, 206. Fridman commented that it was ‘unfortunate that, both in the lower courts and in the High Court, the parties seemingly restricted their argument to the common law and did not invoke the
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Remedies

to an “uneasy relationship and overlap between the two bodies of law,” necessitating an analysis of both statutory and common law remedies. Nevertheless, the relevance of fraud on the minority to shareholder cases has diminished over time as the CAORs attained prominence. While the need for oppressed shareholders to seek relief under fraud on the minority has substantially diminished in light of accessibility to CAORs, the relevance of the doctrine to oppressed unitholders—who prima facie do not have the same standing to access CAORs—is potentially far-reaching.

4.4.3 Application of Fraud on the Minority to Unitholders

In the event that fraud on the minority applied to unitholders, the question of extending the CAORs to cover UTs could be largely unwarranted, as arguably unitholders would not be materially disadvantaged compared to their shareholder counterparts (given that CAOR actions provide broad powers to the court under s 235 as discussed in chapter 5.5, and are therefore preferable to the alternative of fraud on the minority). Unfortunately, the application of fraud on the minority has been subject to substantive debate and uncertainty, therefore access to such relief by unitholders remains unclear.

provisions of s 260 of the Corporations Law. This was despite the fact that the trial judge characterised the actions of the majority shareholder as “oppressive”.

545 Ford, Austin and Ramsay, above n 234, ch 11.027.

546 Therefore, the tension between the two bodies of law dealing with minority shareholder rights has become less of a concern. Australian cases on shareholder oppression in recent years have been adequately dealt with pursuant to the CAORs, without relying on the common law doctrine. See, for example, the High Court case of Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304 (‘Backoffice Appeal’).

547 Accordingly, fraud on the minority as expressed by the High Court in Gambotto has not gained much further application. Indeed, Ramsay and Saunders comment in relation to the general law principles outlined in Gambotto:

In subsequent judgments, courts have, almost uniformly, refused to extend the principles in Gambotto to other situations with the result that the principles have largely been confined to the factual situation that was before the High Court in Gambotto.

Ramsay and Saunders, above n 161.

548 The development of the doctrine of fraud on the minority was in response to the basic principles of ‘majority rule’, which confirms the legitimate rights of majority shareholders to use their majority power within the context of the company structure within certain limits. In light of the inherent structural differences between UTs and companies, in 1990 Spavold noted in relation to the application of the CL concept of ‘majority rule’ to UTs that:

Some question exists as to whether majority control and the position taken by the court in MacDougall v Gardiner [which outlined the limitations on minorities to challenge the majority] also applies to unit trusts (Citing Ford HAJ at 407). These may be applicable to breaches of rights that are given only under the trust instrument. Such rights must be subject to the terms on which they are given.

Spavold, above n 12, 264. Effectively, Spavold was highlighting the distinction between unitholder and shareholder rights in that the rights of unitholders are fundamentally determined by
In considering the application of this CL doctrine to cases involving unitholders, it is important to consider a potential structural distinction between UTs and companies that may have relevance to whether fraud on the minority can be applied. Unlike directors, shareholders holding majority control do not stand in a fiduciary position to the company or to minority shareholders. Accordingly, Ford et al note that a member, unlike a director, does not per se have to be concerned about conflict of interest and duty, and may vote to advance his or her own interest. Nevertheless, if the majority passes a resolution that a reasonable person would not determine to be within the scope of the majority’s power (having regard to the contemplated purposes of the company), the resolution is still liable to be declared void by a court pursuant to fraud on the minority. Enforcing legal obligations between shareholders in a company is facilitated via the existence of the statutory contract that governs shareholders. The question is whether the application of fraud on the minority is applicable to UTs in cases given the role of contract that applies to companies has traditionally been rejected with respect to UTs. Without a contractual relationship between unitholders, it is more difficult to establish a conceptual application of this doctrine given the lack of a framework of obligations by majority unitholders towards the minority. Nevertheless, commentators such as Sin have advocated to the contrary in recent years, paving the way for minority unitholders to argue that the majority owes them duties regardless.

As discussed in chapter 3.2, the early UT case of *Gra-Ham* supported the view that courts could draw upon CL principles when dealing with UT cases. By the terms of the trust deed (in contrast to shareholders who enjoy the superimposed statutory protection of CAORS). Nevertheless, Spavold noted that in extreme cases ‘it is doubtful that the court would permit a trust instrument to oust its inherent jurisdiction to oversee the administration of trusts or to compensate beneficiaries for losses resulting from a breach of a duty placed on the trustee at common law or under statute.’ Ibid.

549 Nor do they exercise any of their powers in a fiduciary character. Dixon J said in *Peters’* (1939) 61 CLR 457: ‘The power of alteration is not fiduciary. The shareholders are not trustees for one another, and, unlike directors, they occupy no fiduciary position and are under no fiduciary duties. They vote in respect of their shares, which are property and the right to vote is attached to the share itself as an incident of property to be enjoyed and exercised for the owner’s personal advantage.’ *Peters’* (1939) 61 CLR 457 at 504.

550 Ford, Austin and Ramsay, above n 234, ch 11.030.

551 The case dealt with the ability to change the valuation process retrospectively.

552 Given their common equitable heritage in the deed of settlement company, as discussed in chapter 3.2. As Malcolm CJ commented in *Gra-Ham*:

‘[I]n *Peters’ American Delicacy Co Ltd v Heath* (1939) 61 CLR 457 at 502, Dixon J observed that “the power of altering articles of association now conferred by statute had its analogue, if not its source, in clauses found in deeds of settlement by which a specific majority of the members of
contrast, Hely J in *Cachia* held that fraud on the minority was inapplicable to UTs in light of the fundamental differences between the nature of a trust and a registered company. In *Cachia*, the applicant unitholder argued that the principles outlined in *Gambotto* (ie grounds for relief against fraud on the minority) should apply to the applicant’s position, notwithstanding that *Gambotto* dealt with a shareholder in a company, not a unitholder. In response, Hely J concluded:

The rights and obligations of the trustee, the manager and unitholders are not to be determined by reference to Company Law principles, but rather by the terms of the trust deed, and the law of trusts. The law of trusts includes the equitable doctrine of fraud on the power and I have already held that the restructuring of the unit trust, by the adoption of provisions applicable to all unitholders in response to external circumstances, was not outside the scope of the enabling powers, nor was it a fraud on the power. As earlier indicated, there was no expropriation by the majority of the minority's units. In those circumstances, it seems to me that *Gambotto* has nothing further to say on the issue of the validity of the amendments to the trust deed.

Hely J’s conclusion (that fraud on the minority was a CL principle and as such did not apply to UTs) provided a serious challenge to unitholders seeking relief.
against oppression. Hely J’s view was that rights and principles that have
developed in relation to shareholders cannot be simply imputed into the rights of
trust beneficiaries such as unitholders.\textsuperscript{557} In particular, Hely J’s position indicates
that shareholders enjoy a specific type of protection against oppression that should
not automatically be extended to stakeholders in other structures such as UTs.
Hely J suggests that a unitholder is essentially a beneficiary of a trust, which is
ture as the law stands and the terms by which the beneficiary enjoys its rights are
strictly contained in the trust deed, or otherwise in the general principles of trust
law. Hely J’s conclusions serve to reinforce the findings of this thesis—that it is
far more difficult for a unitholder to secure grounds for relief under trust law in
circumstances of oppressive conduct where the terms of the trust deed are being
strictly adhered to (in comparison to a shareholder obtaining relief under the
\textit{CAORs}).

The view taken by Hely J regarding the limited application of fraud on the
minority principles to trusts (per \textit{Gambotto}) was supported by Young CJ in \textit{King
Network Group Pty Ltd v Club of the Clubs Pty Ltd},\textsuperscript{558} notwithstanding that Young
J in \textit{McEwen} had stated, ‘If conduct is unconscionable by the standards of a
statute in the \textit{CA}, there is a lot to be said for the proposition that it would be
unconscionable as a matter of general equity.’\textsuperscript{559} Uncertainty regarding the
application of fraud on minority (as prescribed in \textit{Gambotto}) has continued to be a
focus of discussion in cases relating to trusts. For example, in \textit{Arakella}\textsuperscript{560} Austin J

\textsuperscript{557} Similarly, in an article on the importance of well-drafted unitholder agreements, Simon Tait
warned ‘that the rights and obligations of the trustee and the unitholders are determined by the
terms of the trust and the law of trusts, not by reference to Company Law principles. This means
that Company Law principles such as oppression and fraud on the minority play no part in relation
to UTs.’ Simon Tait, above n 70.

\textsuperscript{558} (2008) 69 ACSR 172, [257].

\textsuperscript{559} \textit{McEwen} (2002) 44 ACSR 244, 58. See, for example, the remarks of Spigelman CJ in \textit{Fexuto
(2001)}, 679. In explaining the two apparently contradictory positions, it is fair to conclude that
Young J’s reference to ‘unconscionability’ related to principles that were common to trusts and
companies but unrelated to fraud on the minority.

\textsuperscript{560} For example, in \textit{Arakella} [2004] NSWSC 13. Austin J explained that:

\hspace{1cm} It was also contended by counsel for the Trustee that the \textit{Gambotto} principles are confined to
companies and are incapable of applying where the trust instrument for a unit trust is amended by
resolution of the unitholders. The argument is based on some \textit{obiter} remarks by Hely J in \textit{Cachia v
Westpac Financial Services Ltd} (at 591, and especially at 593). The critical question is whether to
characterise the \textit{Gambotto} principles, as Hely J did, purely as an emanation of Company Law,
notwithstanding that the ‘company law’ formulation of fraud on the minority in the English cases was
expressly rejected by the High Court (at 444) in favour of Dixon J’s equitable formulation in \textit{Peters’ v
Heath} (at 511) (and note \textit{Houghton v Immer (No 155) Pty Ltd} (1997) 44 NSWLR 46, 53) or to treat
them as an outworking of the general doctrine of fraud on a power, specially arising in cases where a
majority has exercised a constitutional power to impose its will on the minority, applicable in
principle to any ownership structure where membership gives rise to valuable proprietary rights.

\textit{[2004] NSWSC 13, [127].}
questioned Hely’s outright rejection of the application of fraud on the minority to UT cases given that Gambotto’s fraud on the minority had equitable origins.

Unfortunately, Austin J did not provide a final view on the topic and his Honour’s comments left the issue in a state of ambiguity. Barrett J in the Public UT case of Re Australand subsequently considered the application of Gambotto pursuant to Cachia (and Austin J’s view in Arakella). While recognising the law was unclear, Barrett J conveniently concluded that the matter did not require a determination at that stage of the Re Australand proceedings.

In Re Abacus (2005), Campbell J appeared to affirm Hely J’s stance in Cachia, whereas Barrett J in a related Abacus case was equivocal on the position of supporting Hely J in Cachia, commenting that even if Gambotto were applicable to UT cases, the Gambotto principles would not have changed his Honour’s decision to grant the orders in Re Abacus (2005). Leaving the position open, Barrett J concluded, ‘The applicability of the Gambotto principles may need to be given more extensive consideration when and if the second application for

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561 (2005) 54 ACSR 687.
562 As to the inapplicability of CL principles to UT cases.
564 Barrett J commented:

This matter was the subject of comprehensive analysis by Austin J in Arakella Pty Ltd v Paton (2004) 60 NSWLR 334; [2004] NSWSC 13. Based on that analysis, there are two factors about the present case which indicate the inapplicability of the Gambotto principle. The first point of importance is that there is no discrimination in this case. It is not a case of a pre-existing and distinct majority using its power to dispense with or dispossess a minority … The second reason for thinking that Gambotto's case raises no issue of difficulty in the present case is that the mechanisms in this particular instance include a second and subsequent approach to the court by the responsible entity of AWPT4 and AWPT5 for judicial advice … The forum created by the second application for judicial advice can, in my opinion, be seen to represent a sufficient analogy with the safeguards in Company Law to which the majority referred in Gambotto. It is, of course, not necessary to come to any final and concluded view on these Gambotto matters at this stage. All that need be seen is that the proposal as it effects AWPT4 and AWPT5 is sufficiently cogent and unexceptionable to allow it to go to the meetings of the members of those trusts for decision. If, in the fullness of time, any of them were to come to a view that some form of oppression of the general kind with which the Gambotto principles are concerned were at work, then the second application for judicial advice would represent an opportunity for that matter to be aired; and the court would expect the responsible entity to acquiesce in any reformulation or extension of the proceeding that was necessary to ensure that the form was fully available to any member wishing to take advantage of it. At this stage the matter is sufficiently clear on an ex parte application and on a prima facie basis to enable me to say that the Gambotto considerations should not be regarded as an obstacle preventing the matter going to the members of AWPT4 and AWPT5 for consideration and decision.

Re Australand 54 ACSR 687, 690 (Barrett J).
565 (2006) 24 ACLC 211 at [21].
566 As Campbell J in Re Abacus (2006) stated:

In Cachia v Westpac Financial Services Ltd (2000) 170 ALR 65; 33 ACSR 572, Hely J took the view that the principles in Gambotto v WCP Ltd (1995) 182 CLR 432 did not extend to interests under a UT. That principle is one whereby it can be an abuse of the statutory power to alter the constitution of a company if the power is exercised in a way which allows a majority shareholder to compel the sale of the shares of the minority, so as to leave the majority shareholder with a total control of the company that it would not otherwise have had.

Ibid.
judicial advice is made. 567 These cases illustrate that following Cachia, which denied the application of the doctrine of fraud on the minority to UTs, the courts have neither explicitly supported nor rejected Hely J’s position, leaving unitholders’ rights and the application of the doctrine of fraud on the minority in a state of uncertainty. 568

It is worth noting that in all of the cases referred to above (considering fraud of the minority in the context of UTs) were Public UTs, which operate under the umbrella of the CA via the MIS regime. Given the influence of the CA to Public UTs and the fact that CAORs are not applicable to MISs, the courts struggled to agree whether this CL principle could apply to Public UTs. Conversely, none of the Private UT cases dealing with alleged oppression sought access to fraud on the minority, electing to seek relief under the CAORs (based on the argument that the statutory provisions of the CA approved the provision of relief in such circumstances) 569 It is reasonable to infer that the fact Private UTs are so removed from the umbrella of CL serves to compound the difficulties unitholders face in applying fraud on the minority to a Private UT.

In summary, the access (or lack thereof) available to unitholders (whether in Private or Public UTs) with respect to the doctrine of fraud on the minority is also pivotal to the contentions outlined in this thesis. Were unitholders to have similar access to shareholders to this general law doctrine, which substantially mirrors the relief available under the CAORs, there would be less need to extend the jurisdiction of the CAORs to unitholders. 570 Conversely, it is submitted that unitholders’ rights to protection pursuant to fraud on the minority is precarious at best, and likely unattainable in light of Hely J’s position in Cachia. As such, a

567 Ibid [23] (Barrett J).
568 Ramsay and Saunders concluded:
Campbell J and Barrett J in the Re Abacus Funds Management Ltd decisions also questioned whether the Gambotto principles applied to unit trusts, but Their Honours did not finally decide that question as there was no discrimination between members and sufficient safeguards existed. Therefore, the Gambotto principles did not apply. Accordingly, although the question has not been conclusively decided, the courts have exhibited a reluctance to apply Gambotto to trust structures. This is significant given the growth of the managed funds industry as a vehicle for investment, as many managed investment schemes are structured as unit trusts.
Ramsay and Saunders, above n 161.
569 See discussion in chapter 6.
570 Nevertheless, the CAORs provide better protection, as the statutory CAORs allow greater remedial options than those available under the doctrine of fraud on the minority given the expansive powers of the court outlined under s 233.
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The proposed extension of the CAORs to UTs is warranted to provide relief not available to unitholders under fraud on the minority.

4.5 Case Study: ‘Koko Black’—Example of a Private Unit Trust Oppression Case Where *Corporations Act* Oppression Remedies not Applied For

*Koko Black* presents an important case study as it demonstrates the options available outlined earlier in this chapter for unitholders in Private UTs where CAORs were not sought.\(^{571}\)

The case dealt with the question of whether a trustee had power to redeem units of any unitholder compulsorily at fair valuation under the terms of a UT deed against the wishes of the minority unitholders.\(^{572}\) In the first instance, the minority...

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\(^{571}\) The case is uncommon in that due to an oversight, the plaintiff unitholders did not also receive shares in the trustee vehicle, notwithstanding that the vehicle was a Private UT (unitholders are usually issued with shares in the trustee vehicle as a safeguard). *Koko Black* [2007] VSC 40, [23]–[27] (Hargrave J). The case also provides a good example of the practice by which Private UTs are established in new ventures between quasi-partners, with little thought given to the impact of the structure on the rights and obligations of the parties beyond the tax benefits associated with UTs. Ibid [17]–[18] (Hargrave J). As is often the case, the investors had little appreciation of the distinction between a UT and a company and largely assumed the venture operated as a company (for example, by referring to ‘shares’ instead of ‘units’, ibid [41] (Hargrave J), and a ‘shareholders’ agreement’ instead of a ‘unitholders’ agreement’, ibid [37] (Hargrave J)).

\(^{572}\) The plaintiffs were minority unitholders in the Koko Black Unit Trust. The defendant, Koko Black Pty Ltd, was the trustee of the UT and the second respondent, Mr Shane Hills, was the sole director of the trustee and indirectly owned all the shares in the trustee. Hills also owned, directly or indirectly, the majority of units. Hills operated the business on a day-to-day basis and was the driving force behind its growth and success. For the most part, the minority unitholders were passive investors and upon the creation of the structure, none of the unitholders had any substantive awareness of (or interest in) the terms of the trust deed. Nor did they comprehend the ramifications of establishing a UT compared to a company to operate the business—which was noted by the judges in the relevant proceedings. In December 2002, Hills sent a draft proposal to the potential investors regarding investment in a new business in which they would become minority unitholders. The draft proposal and subsequent drafts indicated an intention to expand the business over time and that the investment would be for the long term. The minority unitholders proceeded to invest in the business over the coming years and were issued units in the UT. Units were also issued for no consideration, in the expectation that the minority unitholders would assist the business in an advisory capacity. It was intended that the minority unitholders would be issued shares in the trustee, but this never occurred. Over a number of years, the parties also discussed the creation of a ‘shareholders’ agreement’ (ie a unitholders’ agreement) although such an agreement was also never settled. Most importantly, while none of the stakeholders had read the trust deed, the deed nevertheless included a clause 7.2, which permitted the trustee to redeem any units compulsorily at an independent valuation. As the business grew, Mr Hills took on more responsibility (and liability via personal guarantees to banks and landlords). Friction arose between Mr Hills and the minority unitholders in relation to Mr Hills’ view that the minority unitholders had failed to assist the business in any meaningful way and their unitholdings were disproportionate to the value that they provided in comparison to Mr Hills’ contribution. After an extended period of time, it appears that Mr Hills stumbled upon the trustee’s right to redeem and in February 2007, after obtaining an independent valuation of the units (which afforded the minority...
unitholders brought an action before Hargrave J in the Victorian Supreme Court seeking an injunction stopping the trustee from exercising the right of redemption under the trust deed on the grounds that they were led to believe their investment was long-term and therefore an injunction should be granted on the basis that the proposed redemption:

• was a fraud on the power by the trustee;

• should be estopped under an equitable estoppel given the minority unitholders had been enticed to invest on the promise of a long-term investment;

• was in breach of the minority unitholders’ rights as a quasi-partnership (per Ebrahimi); and

• was a breach of trust.

Hargrave J rejected the plaintiffs’ application for an injunction on all the abovementioned grounds. On appeal, the plaintiffs succeeded in obtaining the injunction on the grounds of estoppel (but appeared to fail on the other grounds).573

In relation to fraud on the power, it was submitted on behalf of the plaintiffs in Koko Black574 that the equitable doctrine of fraud on the power was correctly summarised by Hely J in Cachia.575 Hargrave J acknowledged the application of Hely J’s position in Cachia (that to prove fraud on the power, the actions had to undermine the purpose of the trust and lack good faith and bona fides in aggrandising the position of the majority against the interests of the whole). Hargrave J concluded that the minority unitholders had failed to establish that the trustee’s actions had satisfied these tests, so the fraud on the power action failed.

Hargrave J noted that the trust deed itself provided ‘the powers and discretions of the trustee are absolute and unfettered, and may be exercised by the trustee notwithstanding any direct or indirect interest of a director or shareholder of the

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574 [2007] VSC 40 (23 August 2007) [101] (Hargrave J during argument).
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This effectively defined the supremely broad discretion of the trustee in exercising its powers and in choosing to redeem the units.577

The plaintiffs claimed that the redemption involved the impermissible purpose of aggrandising the majority interests of the majority,578 relying on the High Court decision of Mason CJ, Brennan, Deane and Dawson JJ in *Gambotto*.579 In response, Hargrave J questioned the application of *Gambotto* to UT cases (referring to the discussion in *Cachia* and *Arakella*),580 and in any event distinguished *Gambotto* from the facts in *Koko Black*,581 concluding:

The principles in Gambotto are directed to the exercise of a power to amend the company’s constitution, or, if applicable, the relevant trust deed, so as to confer a power of compulsory redemption or expropriation. They have no relevance to this case.582

Hargrave J’s position reinforces the argument posed throughout this thesis: when considering equitable principles such as fraud on the power, the courts place great emphasis on the powers expressed in the wording of the trust deed. They will not accede to a claim that seeks relief where the trustee has acted in accordance with the wording of the trust deed, except in extreme cases.

Importantly, the aggrieved unitholders did not raise fraud on the minority as a basis for relief, apparently in acceptance of Hely J’s position on the subject (that the doctrine cannot be applied to UTs). The fact that the aggrieved unitholders did not raise fraud on the minority illustrates the reality that Hely J’s position has

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576 *Koko Black* [2007] VSC 40 (23 August 2007) [103] (Hargrave J).
577 ‘[T]here is no want of good faith in the trustee exercising the power in its absolute discretion.’ Ibid [104] (Hargrave J).
578 Ibid [105] (Hargrave J).
580 By stating: ‘Assuming, for the purposes of argument, that the principles stated in *Gambotto* are applicable to the exercise of a discretionary power contained in a UT deed …’ *Koko Black* [2007] VSC 40 (23 August 2007) [105].
581 Hargrave stated:

It is clear from this passage that aggrandisement of the majority in accordance with a power contained in a company's constitution at the time of its incorporation is valid. In this case, the UT deed is the equivalent of a company's constitution at the time of its incorporation. The principles in *Gambotto* are directed to the exercise of a power to amend the company's constitution, or, if applicable, the relevant trust deed, so as to confer a power of compulsory redemption or expropriation. They have no relevance to this case.

Ibid [106].
582 Ibid [107]. On appeal, Ashley and Dodds-Streeton JJA and Forrest AJA criticised the Appellant’s arguments and seemed to accept Hargrave J’s decision, although their Honours did not make a finding directly in relation to fraud on the power (given that they determined grounds for estoppel had been established). *Koko Black Appeal*, 22 [105].
undermined the strength of such an application (especially in cases involving Private UTs), leaving unitholders without the most useful equitable tool to address oppression beyond the CAORs.

The plaintiffs also claimed that they were entitled to enjoy the rights and expectations (to a long standing investment) as put forward by Mr Hills in creating the venture, and were therefore able to rely upon the doctrine of ‘quasi-partnerships’ as outlined earlier in *Ebrahimi*. Hargrave J rejected their application on the basis that the plaintiffs sought the remedy of an injunction, noting that the only remedy available pursuant to *Ebrahimi* was the winding up of the venture. On appeal, the plaintiffs acknowledged that their claim under the doctrine of quasi-partnership was novel. Dodds-Streton JJA provided a detailed analysis of the concept of ‘quasi-partnership’ pursuant to *Ebrahimi*, but ultimately affirmed the position of Hargrave J in determining that: ‘As his Honour found, the invocation of *Ebrahimi* (or the partnership principles which informed it) was inapposite where, as in the present case, the dissolution of the parties’ association was not sought.’

The decisions in *Koko Black* on the topic of ‘quasi-partnership’ are an important illustration of the limited remedies available to unitholders in cases of potential oppressive conduct under trust and general law principles.

The final claim by the plaintiffs in this case of relevance to this thesis was seeking the injunctive intervention in relation to alleged breaches of trust by the trustee with respect to the duty to act impartially, and the prohibition against

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583 *Koko Black* [2007] VSC 40 (23 August 2007) [117].
584 *Koko Black Appeal*, 22 [109].
585 Ibid 25 [122].
586 The concept of ‘quasi-partnership’ may have otherwise provided fertile ground to expand the potential legal foundations available to unitholders in obtaining protection in cases of oppression. Ultimately, however, the limitation of relief being restricted to the winding up of the venture provides little assistance over and above the ‘winding up on just and equitable grounds’ action and is of no help where a buyout or other remedy is sought. As discussed in chapter 6, in *Drapac* [2012] VSC 156 (26 April 2012), Ferguson J did not challenge the references to the doctrine of quasi-partnership in a buyout application under the CAORs, although it is submitted that without CAORs, the doctrine of quasi-partnership is unable to provide relief beyond a winding up of the UT.
587 As Hargrave J described:

Finally, it was submitted on behalf of the plaintiffs that, in all the circumstances of the case, the issue of the redemption notices constituted a breach of trust … [I]t was submitted that the trustee was under a general duty to act in the best interests of all beneficiaries and not just a select few. Reliance was placed upon the statement by Sir Robert Megarry V-C in *Cowan v Scargill* that:
aggrandisement at the expense of the beneficiaries. In relation to these claims of breach of trust, Hargrave J concluded:

For the same reasons which I have rejected the argument based upon fraud on a power, I reject this submission. The trustee’s absolute and unfettered discretionary power to issue a redemption notice, notwithstanding any direct or indirect interest of Mr Hills as a unitholder, is expressly recognised by the unit trust deed. The exercise of that power does not constitute a breach of trust.

The decision highlights the difficulty in proving a breach of trust where the actions of the trustee have been consistent with the terms of the trust, notwithstanding the conduct may otherwise be considered oppressive pursuant to the CAORs.

While the plaintiffs in Koko Black were ultimately successful on appeal in obtaining an injunction to stop the redemption by the trustee, the grounds for injunctive relief were solely based on the estoppel argument and not on the other grounds (fraud on the power, quasi-partnership or breach of trust). Were it not for the ability of the plaintiffs to prove to the Court of Appeal that they had relied on the promise of a long-term investment, it appears the plaintiffs would have been wholly unsuccessful.

The Koko Black case is therefore important in considering the potentially different outcome had the plaintiffs had access to CAORs. CAORs provide broader scope for intervention and more flexibility in providing effective relief than is available under trust and general law principles. It is submitted that had the plaintiffs had access to CAORs, they may have had greater scope to establish the trustee’s conduct as oppressive and to obtain injunctive relief under s 233. As outlined in chapter 5, the CAORs are specifically designed to deal with oppression even

‘The starting point is the duty of trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different classes of beneficiaries.’ (Cowan v Scargill [1985] 1 Ch 270 286-7.)

Koko Black [2007] VSC 40 (23 August 2007) [117].

Note that another ground claimed by the plaintiffs for breach of trust related to the fact that the trustee did not provide a franchising analysis report to the valuer but as it has little relevance to this thesis, it is not discussed herein.

Koko Black [2007] VSC 40 (23 August 2007) [118]. The Court of Appeal concurred with Hargrave J that there is no breach of the duty of impartiality where the trustee has acted in accordance with the express terms of the trust deed, highlighting the ability for the terms of the trust deed to subordinate conflicting trustee duties.
where the oppressive conduct is sanctioned by the constitution.\footnote{That said, courts will have regard for the provisions of a company’s constitution or shareholder agreements when considering the application of the \textit{CAORs}.} Accordingly, in \textit{Koko Black} a court may have viewed the conduct of Mr Hill as oppressive under the \textit{CAORs} and applied relief. In contrast, without such overarching statutory protection in UT cases such as \textit{Koko Black}, trust law requires the courts to be guided almost exclusively by the terms of the trust deed.

\section*{4.6 Conclusions of Chapter 4}

This chapter outlined the various rights of unitholders under trust and general law in the context of oppression, and illustrated the deficiencies in protections afforded to unitholders in comparison to those enjoyed by shareholders under the \textit{CA}. Spavold acknowledged that the relief provided to shareholders under the \textit{CA} ‘may cover more situations than the fiduciary duties owed by the trustee to the unitholder beneficiaries,’\footnote{Spavold, above n 12, 265.} and stated further:

\begin{quote}
the shareholder is given additional protection through the general meeting of shareholders … Protection through direct control is not viable for unitholders. Also, any right given only by the trust deed can be limited by the trust deed. In particular, the trust deed may allow these rights to be eliminated by the majority. Of course, fundamental rights provided by the common law or by statute cannot be limited by the trust deed. The shareholder is in a different position. S 260 [ie \textit{CAORs}] provides protection from the majority.\footnote{Spavold noted: ‘If the unitholders were to attempt to obtain protection by directly controlling the trustee they could face unlimited liability and could constitute an illegal association contrary to s 112 of the Corporations Law.’ Ibid.}
\end{quote}

Spavold’s comments support the contention that unitholders are comparatively disadvantaged compared to shareholders in dealing with cases of oppression.

In discussing the notable case of \textit{Vigliaroni},\footnote{See chapter 6.} Michael Wise also echoed the submission of this thesis regarding the inadequacy of the remedies available to oppressed unitholders under trust law compared to oppressed shareholders under the \textit{CAORs},\footnote{Wise described the parallels between unitholder and shareholder circumstances:

\begin{quote}
Unit Trusts have been a favoured vehicle for unrelated parties to engage in a business enterprise in common. However, when disputes arise the remedies available are far more restricted than those
\end{quote}} specifically the central remedy of a forced buyout:

\begin{quote}
\end{quote}
In a corporation where no trust is involved, the court has ample power under ss 232 and 233 to order one party to sell its shares to the other at a value fixed by the court. Under trust law the court has no such power. There are powers available, such as that to appoint an independent trustee under s 48 of the Trustee Act 1958 (Vic) or a receiver to the trust assets to wind up the trust and distribute the proceeds, but this might not achieve a just result. It may be that the innocent party against whom oppressive conduct was perpetrated would rightly consider the sale of the trust assets to a third party to be a most unsatisfactory outcome.595

These observations summarise the conclusions outlined in this chapter, which support the thesis contention that unitholders are comparatively disadvantaged in dealing with oppressive conduct, namely that:

- While unitholders are naturally entitled to the range of rights of beneficiaries under trust law, trust terms can override general equitable duties so that oppressive conduct can be sanctioned by the trust deed (unlike company constitutions, which are unable to usurp CAORs).596

- Unitholders have far greater hurdles in seeking relief against directors of a CT, or against fellow unitholders, in comparison to oppressed shareholders.

- The recent discussion arguing the existence of contract law in UTs may eventually provide some additional protection against oppressive conduct (for example with respect to the principles of ‘good faith’) but the law is currently undeveloped.

- The doctrine of quasi-partnership may be applicable in oppression cases involving UTs but the law only provides for ‘winding up’ relief, which is often an inappropriate remedy. Indeed, the winding up remedy is not provided for companies in oppression proceedings under the Corporations Act 2001. To take an example, imagine a unit trust in which two parties hold equal numbers of units, and an equality of shareholdings and directorships in the corporate trustee. One unitholder might exclude the other from the management of the business of the trust. This is a common enough occurrence with corporations and is no less common in the case of such trusts. The obvious solution is for the parties to go their separate ways, for one of the unitholders to buy the other’s units at fair value and to transfer any shares in the CT.

595 Ibid.  
596 As pointed out to the author in discussion with Professor Elizabeth Boros, it should be noted that while a company constitution cannot usurp the oppression remedy, it is capable of reframing the content of equitable duties (eg company constitutions are routinely used for that purpose in the case of directors' conflicts of interest).
inherently open to courts dealing with UTs (resulting in confusion with CL principles) and can only be ordered in exceptional circumstances.

- There does not appear to be a general power to enforce a ‘buyout’ under applicable trust or general principles, with courts referring to the trust deed in determining mechanisms for releasing unitholders from the venture.

- The doctrine of fraud on the power is applicable to UTs but is applied narrowly when compared to CAORs, especially given the broad scope for the trust deed to authorise trustee conduct.

- There is substantial uncertainty as to whether the doctrine of fraud on the minority applies to Public UTs—and it is even less likely to be applicable to Private UTs, thus removing the most effective form of relief beyond CAORs.

These conclusions all serve to support the contention that without access to the CAORs, unitholders are substantially disadvantaged in achieving effective relief against oppressive conduct in comparison to shareholders.\textsuperscript{597} Chapter 5 considers whether CAORs may be accessible to unitholders under the current law without the need for legislative intervention.

\textsuperscript{597} It should be noted that this chapter also submitted additional conclusions regarding the proposal that trustee duties should be aligned with director's duties, and that unitholders should be provided with derivative action against directors of CTs, although these conclusions are not central to the thesis topic.
Chapter 5: Oppression Remedies Under
The Corporations Act

5.1 Introduction

This chapter reviews the provisions of the CA ORs and how they have been applied in previous oppression cases. The particular focus is on how the provisions of the CA ORs prima facie operate within the context of the CT of a UT, including whether they deal with situations involving oppression in UTs and whether unitholders have standing to apply for relief. This analysis provides the basis for chapter 6, which reviews case law dealing with the application of CA ORs to UTs.

5.2 Background to the Corporations Act Oppression Remedies

An array of shareholder protections exist s throughout the CA, including extensive regulations governing the obligations of directors to act in the interests of a company on behalf of its shareholders. In addition, CA ORs are statutory protections available under Part 2F.1 (ss 232 to 235) of the CA that enable a shareholder to bring an action when the conduct of a company has an oppressive or unfairly prejudicial effect on them, or unfairly disregards their interests.598 The grounds upon which the provisions of CA ORs can be enlivened and the breadth of powers provided to the court can deliver effective relief against oppression. Although oppression remedies are not usually applied to large companies such as those listed on the ASX, they are available in relation to public entities regardless. Oppression remedies are most commonly used in relation to closely held proprietary companies where shareholders are often involved in the management of the company.

In short, CA ORs ensure that shareholders, both minority (and in some cases majority), have a basic level of protection against the ability for company

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598 Note that although the oppression remedies are commonly sought by minority shareholders, it is also available to majority shareholders, who may be subject to oppressive conduct by the minority in certain circumstances. See Stephen Kevans, ‘Oppression of Majority Shareholders by a Minority? Gambotto v WCP Ltd’ (1996) 18(1) Sydney Law Review 110-119.
directors, other officeholders, or majority shareholders to utilise their legitimate and prescribed structural power in a manner that crosses the line of commercial fairness. By contrast, unitholders in similar circumstances are unable to enjoy the same level of protection under the laws relating to UTs.

The provisions of CAORs have been available under the relevant CL legislation in Australia since 1961,\(^ {599}\) and have been incorporated in various subsequent statutory incarnations including the current version, which is included under Part 2F.1 of the CA.\(^ {600}\) Statutory shareholder remedies (including CAORs)\(^ {601}\) are broadly framed to overcome some of the limitations associated with older equitable remedies,\(^ {602}\) including providing courts with greater flexibility in ordering remedies beyond winding up. The developments have been largely successful in achieving a more effective framework for dealing with oppression in companies, and overtaking general law shareholder remedies.\(^ {603}\) While oppression remedies were initially given a narrow application by requiring the oppressive conduct to have been ‘burdensome, harsh and wrongful,’\(^ {604}\) legislative amendment has since expanded prohibited conduct to protect more broadly against conduct deemed ‘oppressive to, unfairly prejudicial to, or unfairly discriminatory against,'
Chapter 5: Oppression Remedies Under The *Corporations Act*

...[or] contrary to the interests of the members as a whole.’

5.3 Standing to Apply for Relief (s 234)

While ss 232–233 naturally precede s 234, it is helpful to review s 234 first in order to establish who has standing to apply for CAORs. S 234 states that an application for an order under s 233 in relation to a company may be made by:

(a) a member of the company, even if the application relates to an act or omission that is against:
   (i) the member in a capacity other than as a member; or
   (ii) another member in their capacity as a member; or

... 

(c) a person whom ASIC thinks appropriate having regard to investigations it is conducting or has conducted into:
   (i) the company’s affairs; or
   (ii) matters connected with the company’s affairs.

Within the scope of this thesis, the important question is to determine who is a ‘member’ for the purposes of s 234, which involves a number of permutations.

In *Re Brightview Ltd*, it was confirmed that a nominee shareholder has standing to bring a petition under the equivalent English provisions and that the ‘interests’ of a nominee shareholder are capable of including the economic and contractual interests of the beneficial owner of the shares. It is submitted that this position reflects the plain meaning of the wording ‘in a capacity other than a member’—ie,
where the shareholder holds the shares in the capacity as trustee, the shareholder may still bring an action under s 232.

Shareholders who are also unitholders can use their role as shareholders to access relief under the CAORs to protect their interests as unitholders, provided the relief relates back to rights they enjoy as shareholders. This is discussed at length in chapter 6.2. Young J in *Kizquari*\(^{610}\) rejected the ability for a member to use its standing in this way to obtain financial compensation relating to their unitholdings.\(^{611}\) Mandie J in *Vanmarc*\(^{612}\) provided support for the view that a shareholder/unitholder may use their shareholding to seek relief under s 232 even if it also assists their unitholding—as long as the shareholder/unitholder was entitled to such relief in their capacity as shareholder. In contrast, in *Vigliaroni*\(^{613}\) Davies J was unambiguous in finding a shareholder who was also a unitholder had standing to obtain relief in relation to both their shareholding and their unitholding.

While the controversial decision in *Vigliaroni* has been a subject of debate, there is no question that a unitholder who is not also a shareholder does not currently have standing to apply for relief pursuant to CAORs. This is consistent with the case law reviewed in this thesis, whereby no cases involved oppression against a unitholder who was not a shareholder (or related to a shareholder) and the only cases involving applications by unitholders under the CAORs involved shareholder/unitholders.\(^{614}\) In short, subject to the theoretical scope for non-members to have standing under s 234(e), only shareholders have standing to apply under the CAORs.\(^{615}\)

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\(^{610}\) (1993) 10 ACSR 606. The case was heard before Young J (as he was then known) in the Supreme Court of NSW.

\(^{611}\) Ibid, 612-13.

\(^{612}\) (2000) 34 ACSR 222.

\(^{613}\) See chapter 6.2.

\(^{614}\) As discussed below, there have been cases such as *Cachia* whereby unitholders who were not shareholders brought an action under the common law equitable action of fraud on the minority (which provided the source for the statutory CAORs). These are discussed in chapters 4.4.2 and 6.7.

\(^{615}\) Technically, it is feasible that s 234(e) could facilitate a non-shareholder to have standing in light of s 53. As Michael May commented:

> ASIC has authorised someone else under s 234(e)). A wide power is given to ASIC to empower any person it thinks is appropriate to bring proceedings having regard to investigations it is conducting or has conducted into ‘the company’s affairs’—which again might pick up the various trust-related matters mentioned in s 53. However, there is no mention in s 234 of a beneficiary of a trust of which the corporation is trustee having the power to apply for an order under s 233.
5.4 Scope for Applying for Relief Under S 232

Section 232 provides that the courts grant relief where they determine that:

a. the conduct of a company’s affairs;

b. an actual or proposed act or omission by or on behalf of a company; or

c. a resolution, or proposed resolution, of members or class of members of a company;

is either,

a. contrary to the interests of the members as a whole; or

b. oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.

There has been substantial commentary on what connotes ‘oppressive conduct’, as well as judicial discussion in relation to determining conduct that would be considered ‘oppressive or unfairly prejudicial to, or unfairly discriminatory’ to shareholders under s 232. This has produced conflicting approaches to the topic. Some cases tended to take a more narrow view, whereby mere prejudice

Michael May, ‘Oppression in the context of corporate trustees’ (2013) 87 Australian Law Journal 271. In practice, the writer is not aware of any cases where a non-shareholder has applied under s 234(e) in a UT case.

Almond, above n 599.


Ramsay noted on the nature of oppression that:

the types of conduct that can be regarded as oppressive are extensive, provided the requisite unfairness is found, and include improper diversion of business opportunities, payment of excessive remuneration to a controller, failure to prosecute an action, unfairly restricting dividends, making a share issue with the dominant purpose of reducing a shareholder’s proportional stake in the company, improper exclusion from participation in management, denial of access to information, oppressive conduct of board meetings, decisions for the benefit of related companies rather than the shareholders in the company, misappropriation of company funds constituting breaches of fiduciary duty, and improper action to secure the incumbency of the board of directors.


Almond quotes the following discussion:

The authorities also are to the effect that courts should not take any narrow approach to cases under s 260 [now s 232]. The clearest statement of this is by the full Federal Court Edwards v Idaville Pty
or discrimination was not enough to trigger relief, especially where the conduct was in accordance with the constitution. As per Tamberlin J in Shelton:

[oppression] is not established simply by showing that the majority are in control of the company, or that the applicant is consistently out-voted, or that the majority have made some questionable decisions from a business point of view. The mere disadvantage of being in a minority does not in itself constitute oppression ...

Disagreement with the decision by a majority of shareholders and directors on the part of a minority shareholder does not entitle that shareholder to relief under the section.

Other decisions have highlighted a broader approach. In Backoffice Appeal French CJ stated that the language and history of the remedy indicated that it was


‘Oppressive conduct’ is to be interpreted narrowly and focusses on the nature of the conduct rather than its effect. It includes conduct which ‘lacks the degree of probity which the members are entitled to expect in the conduct of the company’s affairs’. See \textit{Re Jermyn Street Turkish Baths Ltd [1971] 1 WLR 1042 cited by Ahern Lawyers, above n 619.}

\textit{Ibid, quoted in Almond, above n 599.}


\textit{It is important when assessing corporate activities to see if there has been oppression that judges do not remain in their ivory tower. The business world is replete with individuals who quite legitimately are seeking the best for themselves. For mutual enrichment, they may enter into contractual regimes or corporate structures. They may also take on fiduciary obligations. However, subject to those obligations, they can act as they like in their own interests.}

In Fexuto (1998), Young J stated: ‘It is not oppressive for those in control of a company to insist upon the adoption of a policy on a matter of business on which there are legitimate differences of opinion: Re Broadcasting Station 2GB Pty Ltd [1964-5] NSWR 1648.’ (1998) 28 ACSR 688, 739.

\textit{Young J noted in Morgan v 45 Flers Avenue Pty Ltd that the word ‘oppression’ was no longer looked at in isolation, but needed to be considered objectively in the eyes of a commercial bystander in ascertaining if there had been unfairness in the form of conduct that was so unfair that the reasonable directors who considered the matter would not have thought the decision fair. Young J proposed that the individual elements identified in the section should be considered ‘merely as different aspects of the essential criterion, namely commercial unfairness.’ Morgan v 45 Flers Avenue Pty Ltd (1986) 10 ACLR 692, 704 (Young J).}

\textit{(2009) 238 CLR 304 at [72].}
to be read broadly, and that any imposition of limitations on the remedy by courts was ‘to be approached with caution.’ While the boundaries have moved over time, the courts are nevertheless careful to avoid broadening access to relief beyond what is reasonable. As discussed in the UK case *O'Neill v Phillips*, "The concept of fairness must be applied judicially and the content which it is given by the courts must be based on rational principles. As Warner J said in *Re J E Cade & Son Ltd*, “The court ... has a very wide discretion, but it does not sit under a palm tree”.

The wider approach adopted with respect to the application of *CAORs* has significant implications within the context of this thesis, given the comparatively narrow scope applied to other trust law actions available to unitholders such as fraud on the power as outlined in chapter 4.4. The contrast between the wider application of *CAORs* and the narrower approach applied to trust law actions illustrate the disadvantaged position that oppressed unitholders experience where they lack access to *CAORs*.

Whether unitholders are in fact able to access *CAORs* largely rests upon the pivotal question of whether a member ‘in any other capacity’ can include the member of a CT, in the capacity of a unitholder who owns units in a UT administered by the CT. Describing the complexity of combinations that need to be considered, Michael May points out:

> The extent to which a member can be affected ‘in any other capacity’ requires consideration of the possible structures involved. As a broad proposition, it can be stated that often the member will not be directly affected by the unfair administration of the trust (because often the member will often not be a beneficiary of the trust in a strict sense), yet the member will often be indirectly affected because the entity which is a beneficiary of the trust will often be related in some way to the member.

In *Vigliaroni*, Davies J inferred that the phrase ‘in any other capacity’ is evidence of the intent for s 232 to provide relief to shareholders who are also unitholders.

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626 Ibid.  
629 The phrase was introduced into *CAORs* provisions in the 1980s. See *Starr* (1991) 6 ACSR 63.  
630 May, above n 615.
and that s 232 can provide relief with respect to the unitholding (as distinct to the shareholding). In relation to unitholders, Davies J’s in Vigliaroni held that unitholder/shareholders had the right to relief under the CAORS with respect to their unitholding. The position was novel in light of a long series of cases rejecting the application of CAORS to UTs, and has received mixed reactions in subsequent cases.

It is possible that the phrase ‘in any other capacity’ may have merely intended to apply to the role of a shareholder who may be acting as trustee, but nevertheless restricted the scope of s 232 to the oppression affecting the shareholding of the member. Case law on the meaning of the phrase ‘in any other capacity’ is fairly limited. Certain cases have considered the right of director/shareholders or employee/shareholders to access rights in their ‘other capacities’. In these circumstances, the courts seem reluctant to extend the relief provided under the CAORS to these ‘other capacities’ (ie directors or employees).

With respect to interpreting s 232 in the context of UT cases, one of the other arguments used by Davies J was that parliament intended to extend the use of the words ‘affairs of the company’ to apply to UTs. Her Honour noted this is a defined phrase for the purposes of ss 232, 233 and 234 under s 53, which provides that the ‘affairs of a body corporate’ include:

631 It is common for shares in companies to be owned by trustees on behalf of trusts. This thesis contends that the phrase ‘in any other capacity’ was intended to allow trustee shareholders to fall within the protection of CAORS despite not being beneficially entitled to the shares—thus avoiding the need for the beneficiaries of the trustee shareholder to prove the oppression. Nevertheless, s 232 remains focussed on the impact of the oppression on the shareholding of the oppressed shareholder (who may be acting in another capacity) but was not intended to provide relief in relation to the impact of the oppression on other aspects, such as unitholdings, directorships, or employment arrangements. This is discussed further in chapter 6.

632 Magner, above n 21. In Starr, Justice Young stated that under the CAORS:

Although there are some dicta as to the extent of the operation of this new subsection, in Re Dernacourt Investments Pty Ltd (1990) 20 NSWLR 588 at 620; 2 ACSR 553 at 566 the ambit of the section has not been fully discussed in any reported case, so far as I am aware. So far as this instant case is concerned, it would seem to me clearly the position that if the only effect of the conduct complained about is against the plaintiff in its capacity as a franchisee, then normally the court would decline to give relief: see Re Five Minute Car Wash Service Ltd [1966] 1 WLR 745 at 751–2.

633 In the 1990 decision of the Supreme Court of New South Wales Equity Division in Re Dernacourt Investments Pty Ltd (1990) 2 ACSR 553 Justice Powell expressed the view that section 320 of the Companies (NSW) Code (1981 No 122a) (the precursor to s 232) could provide relief for members of a company oppressed in the capacity of a director or an employee.

634 In cases of employee/shareholders, the question for the court is whether there is a sufficient link between the employment and the owning of shares in the company, or whether the employment is independent of the ownership interest. Magner, above n 21. See also May, above n 615.

635 Magner, above n 21. See for example, Foody v Horewood [2007] VSCA 130, which involved an application by a shareholder in the other capacities of director/employee. Although see discussion in Re Bodaibo at chapter 6.3.

636 See chapter 6.
(a) … business, trading, transactions and dealings (… including transactions and dealings as … trustee) …

(b) in the case of a body corporate (not being an authorised trustee corporation) that is a trustee (but without limiting the generality of paragraph (a))–matters concerned with the ascertainment of the identity of the persons who are beneficiaries under the trust, their rights under the trust and any payments that they have received, or are entitled to receive, under the terms of the trust.

Previous cases had rejected the notion that s 232 applied to UTs. Davies J justified her novel acknowledgement of the relevance of s 53 by highlighting the court’s obligation against perpetuating bad law. The arguments raised by Davies J in Vigliaroni with respect to the interpretation of s 232 in the context of UT cases are discussed further.

5.5 Remedies Available Under s 233

Under Part 2F.1, the court is provided with broad powers to make appropriate orders in response to a shareholder who has suffered oppression. Where a court finds that conduct described in s 232 has taken place, s 233 specifies the wide orders that the court can make to grant relief, including an order:

(a) that the company be wound up;

(b) that the company’s existing constitution be modified or repealed;

(c) regulating the conduct of the company’s affairs in the future;

(d) for the purchase of any shares by any member or person to whom a share in the company has been transmitted by will or by operation of law;

(e) for the purchase of shares with an appropriate reduction of the company’s share capital;

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638 So broad are the powers of the court that in Re Spargos Mining NL (1990) 3 ACSR, Murray J ordered the replacement of the elected board of Spargos with a board of his own choosing.
(f) for the company to institute, prosecute, defend or discontinue specified proceedings;

(g) authorising a member, or a person to whom a share in the company has been transmitted by will or by operation of law, to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company;

(h) appointing a receiver or a receiver and manager of any or all of the company’s property;

(i) restraining a person from engaging in specified conduct or from doing a specified act; or

(j) requiring a person to do a specified act.

The wide range of remedies outlined in s 233 empower the courts with the types of orders necessary to address the variety of circumstances in which oppression occurs. In contrast to the remedies available to unitholders under trust law, which are generally limited to addressing breaches of trust by trustees, s 233 provides the courts with the ability to take action in any case deemed oppressive—not only against the company, but also against the directors, and other offending shareholders.

One of the main objectives of broad powers under the CAORs was to provide aggrieved shareholders remedies beyond an order for the winding up of the company, described as a cure that was often worse than the illness for minority oppressed shareholders. Given the consequences of winding up a company, courts will generally try avoid this course of action, particularly in circumstances where the company’s business is successful, and will seek to apply other remedies available, such as requiring the purchase of shares of the oppressed shareholder at

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639 The history giving rise to oppression remedies under Australian CL commenced with the British Cohen Committee which, in 1945, recommended amendments to the Companies Act 1929 (UK). The Committee proposed powers for the court so that, ‘if satisfied that a minority of shareholders was being oppressed and that a winding up order would not do justice to them, it could make orders including an order for the purchase by the majority of the shares of the minority.’ See Backoffice Appeal at [61].

640 In contrast, without the protection of CAORs, oppressed unitholders are often limited to the winding up remedy as discussed in chapter 4.3.4.
a fair value.\textsuperscript{641} The extensive powers under s 233 provide a broad range of remedies to relieve the oppression effectively.\textsuperscript{642}

Indeed, it is this increased flexibility in the form of buyouts that appears to be one of the major motivations for unitholders seeking access to CAORs in light of the relatively limited scope available to unitholders beyond winding up orders.

The collocation between the broad remedies and expansive scope of the CAORs afforded to shareholders in comparison to unitholders, who are presented with a far more limited scope to obtain relatively narrow forms of relief under trust law principles, provides the primary basis to propose amendments to the \textit{CA} to ensure unitholders also receive the protection of the CAORs.

Following Vigliaroni, there was debate as to whether s 233 empowers a court to make orders relieving oppression against unitholders, including making orders in relation to units in a UT, given that s 233 only allows the court to make orders ‘in

\textsuperscript{641} In \textit{Fedorovitch}, Young J commented on the ability to order a buyout that ‘[a]lthough no-one has ever voiced it, it seems to me that this essentially is the reason for the adoption of the rule that ordinarily the proper order is that the oppressor buyout the oppressed.’ For example, in \textit{Garraway v Territory Realty Pty Ltd} (2010) the primary judge found that the appropriate remedy for the oppression would be one that regulated the affairs of the company in a way that avoided further oppression or unfair conduct. The judge concluded that the least intrusive and most appropriate relief, given the relationship between the shareholders and the fact that there were only three, was for one faction to buyout the other, giving the majority the first opportunity to purchase the interest of the minority. In such circumstances, as this case illustrated, the question of valuing the shares is often a contentious and complicated process. \textit{Garraway v Territory Realty Pty Ltd} [2010] FCAFC 9. See also \textit{Cumberland Holdings Ltd v Washington H Soul Pattison & Co Ltd} (1977) 13 ALR 561 and \textit{Re Weedmans Ltd} [1974] Qd R 377. While the forced buyout may be a fair outcome in theory, it is not always feasible where the purchaser will not have sufficient funds to pay the consideration imposed. In \textit{Nassar v Innovative Precasters Group Pty Ltd} (2009) 71 ACSR 343, the purchasers lacked the financial resources to be able to do so, resulting in the companies being wound up pursuant to s 461(1)(k). The court confirmed that buyout orders under s 233 will not be made where they are futile or may be frustrated.

\textsuperscript{642} To illustrate the flexibility available to courts in providing relief, in \textit{Re Spargos Mining NL} (1990) 3 ACSR 1 at 50-1, the court went as far as ordering a new board of directors to be appointed, that the articles of the company be amended, that the board to investigate the transactions which had been complained of, and to report to the court (and the National Companies and Securities Commission) every three months on the affairs of the company and the progress of the investigations. See also \textit{Re HR Harmer Ltd} [1959] 1 WLR 62. Similarly, when a company is in liquidation, the court may also consider what remedy to apply to achieve a fair outcome where the value of the shares may have dissipated. In \textit{Backoffice [No. 1]} (2007) 61 ACSR 144, oppressive conduct was established, but by the time the trial commenced, a provisional liquidator had been appointed who had sold the whole of the undertaking of the company with the consent of both parties. Both of those steps had been taken with the concurrence of both sides of the litigation. The amount recovered on sale of the undertaking of the company was insufficient to provide any surplus value to the shareholders once all debts had been paid, resulting in the shares being worthless. In \textit{Backoffice Appeal} (2009) 238 CLR 304, the High Court stated, ‘[t]hese considerations were of critical importance in deciding what order was to be made under Part 2F.1 of the \textit{CA}. ’ The High Court held that no order should have been made in relation to the oppression proceedings other than an order to wind up the company, given that at the time of the trial the company had no business. Refer to initial proceedings \textit{Backoffice [No. 1]} (2007) 61 ACSR 144.
relation to the company’ in contrast to the use of the phrase ‘affairs of the company’ in s 232.643

5.6 Conclusion of Chapter 5

In reviewing the statutory provisions of the CAORs, this chapter provided the following insights into the application of CAORs to cases involving UTs:

- **CAORs can be applied broadly to cases of oppression and provide courts with the power to order a wide range of available remedies to address the oppression.** This provides shareholders with more protection than those available to unitholders under trust and general law sources of relief.

- Under s 234, in general, only shareholders have standing to apply for CAORs. Whether they can do so on behalf of unitholders is the subject of ongoing debate.

- Under s 232, CAORs are applicable where the ‘company’s affairs’ are conducted in a manner which is oppressive against members, including members ‘in any other capacity’. Following Vigliaroni, where the company is a trustee, s 53 of the CA states that the ‘company’s affairs’ include the affairs of the trust.

- Under s 232, there is debate as to whether an oppressed member ‘in any other capacity’ can refer to the oppression against unitholders related to shareholders in a CT.

- There is debate as to whether s 233 provides courts with the power to make orders in relation to units in UTs in light of s 233 not including the specific phrase ‘company’s affairs’ defined in s 53.

Chapter 5 has provided the platform for chapter 6, which analyses extensive case law that has given rise to the ongoing debate as to whether CAORs are capable of applying to UTs, thereby providing substantive relief to oppressed unitholders.

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643 Which phrase was defined under s 53 of the CA to refer to trusts and in contrast to the use of the phrase ‘affairs of the company’ in s 232. The merits of this argument are discussed in chapter 6.6.
Chapter 6: Corporations Act Oppression Remedies and Unitholder Case Law

6.1 Introduction

Chapters 4 and 5 outlined the rights of unitholders in the context of oppression where they do not have access to CAORs. This has illustrated the weaknesses under general and trust law that unitholders face in comparison to the rights available under the CAORs. As a result, unitholders have sought to secure relief under the CAORs in a number of cases. This chapter reviews case law that has dealt with the question of whether unitholders have access to relief under the CAORs and the complex considerations in determining the law. Fundamentally, were unitholders able to enjoy such rights, any suggested legislative amendments to extend the CAORs to UTs as proposed in this thesis would be unnecessary.

6.2 Do Corporations Act Oppression Remedies Apply to Unit Trusts? A Matter of Long Judicial Debate

The question of whether unitholders have a right to receive relief under Part 2F.1 has been a matter of significant and ongoing judicial debate, which has only served to compound the confusion around this piece of legislation.\(^{644}\) The uncertain state of the law supports the argument that unitholders are disadvantaged compared to shareholders in their ability to obtain effective relief under the CAORs, adding weight to the contention that legislative intervention in the form of an amendment to Part 2F.1 to provide unitholders with express access to the CAORs is both prudent and appropriate.

\(^{644}\) May stated: Up until 2009, there was a line of first instance decisions (starting with *Kizguari Pty Ltd v Prestoo Pty Ltd* (1993) 10 ACSR 606) which held that oppression provisions do not apply to corporate trustees. However, in *Vigliaroni v CPS Investment Holdings Pty Ltd* (2009) 74 ACSR 262, a single judge of the Victorian Supreme Court declined to follow these cases, holding that they paid insufficient regard to s 53 of the Act. Since then, *Vigliaroni* has itself been criticised on the one hand and followed on the other.

See May, above n 615.
The debate over the state of the law is complicated by a number of variables. In summarising the variables that need to be considered in understanding whether CAORs provide relief to unitholders, the following questions must be asked:

- What is the relationship between the aggrieved unitholder and the CT? For example, is the aggrieved unitholder:
  - a shareholder in the CT; or
  - related to a shareholder in the CT (via common controlling principals/directors); or
  - unrelated to any shareholders in the CT but merely a unitholder in the UT of the CT?

- What is the nature of the relief sought by the unitholder? For example, is the relief sought:
  - a buyout of units by the oppressor unitholders of the oppressed unitholder’s unitholding (or vice versa) at fair value;
  - access to information of the UT;
  - an injunction or orders preventing (or prescribing) actions by the CT (eg a forced redemption of units);
  - an injunction preventing (or prescribing) actions by other unitholders;
  - compensation from the CT for alleged breaches;
  - action against the directors of the CT for alleged breaches; or
  - the winding up of the CT and/or the UT?

Depending on any combination of each of the above scenarios, the issues for consideration by the courts in relation to whether CAORs can provide relief to unitholders will be different. Each of the cases reviewed in this chapter deal with the overarching question of whether CAORs can be applied in the context of UTs but importantly, each case needs to be carefully understood based on the relevant

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645 In Vigliaroni, the oppressed unitholder sought to buyout the oppressors’ interests.
factual scenarios before drawing any general conclusions from the relevant decisions.

To ascertain the current state of the law, the following analysis explores the development of the law categorised into four stages and relevant case studies, namely:

1) The early Re Bodaibo ‘substance over form’ view that CAORs could provide relief to unitholders.646

2) The Kizquari view that CAORs were limited to providing relief to shareholders in relation to their shareholding, to the exclusion of jurisdiction over unitholders in relation to their units. The rights of oppressed unitholders are wholly determined strictly by the terms of the trust deed.647

3) The Vanmarc view that CAORs could be used to provide relief to unitholders indirectly via a shareholding in the CT, as long as the type of relief did not break the nexus with the requirement to provide relief in relation to a shareholding.

4) The Vigliaroni view that s 53 of the CA facilitated a ‘substance over form’ approach so that CAORs were capable of providing direct relief to unitholders in relation to their unitholding.

By reviewing the progression of case law described above, this chapter illustrates the legal uncertainties that endure as to whether CAORs can apply to UTs.

6.3 The Early ‘Substance over Form’ Approach: ‘Re Bodaibo’

The decision in Re Bodaibo stood for the proposition that where oppression under s 232 was established, the courts could compensate the aggrieved parties in relation to the value of their units.

This case involved an application by a former employee/shareholder/unitholder (Mr Corp) who worked in a caravan business (operated in Bodaibo Pty Ltd as trustee for the Woodlands UT) in which he was a unitholder/shareholder. Via an

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646 (1992) 6 ACSR 509 (Supreme Court of Victoria) before Vincent J.
647 And any relevant trust law principles to the extent that they are not inconsistent with the trust deed.
entity he controlled (Mistron Pty Ltd), Mr Corp sought relief under s 260 of the CL (the precursor to s 233) against majority interests controlled by Mr Brown. Mr Corp successfully brought an action for oppression in relation to his interest in the UT via Mistron.

In obiter, Vincent J provided support for Mr Corp’s backpay being compensated as part of the CA ORs, without providing a substantive legal basis for allowing such relief to an employee who was not himself a shareholder. Vincent J appeared to accept the position that once oppression was established pursuant to s 260, the courts had almost limitless scope to provide relief in relation to any of the conduct against any person who was related to the oppressive conduct. Vincent J seemed to disregard the fact that s 260 (and its successors) specifically referred to oppression against the ‘members’ ie shareholders of a company and there did not appear to be any basis for allowing standing for non-shareholders to

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648 Ibid. The caravan business relationship between Messrs Corp and Brown began in October 1982 when the pair became interested in the prospect of developing a caravan park. The idea was pursued and in May 1983, the relevant land was purchased. Mr J Corp was a director and shareholder of the applicant, Mistron Pty Ltd (‘Mistron’) which, in turn was the holder of two of ten $1 shares in the capital of Bodaibo Pty Ltd (Bodaibo) Pty Ltd (‘Bodaibo’) and the holder of 20 of the units in the Woodlands Unit Trust (‘Woodlands’). The remainder of the units in Woodlands were held by a company called Lucridium Pty Ltd. Bodaibo, in its capacity as trustee of Woodlands, operated a business known as ‘Log Cabin Caravan Park’. Mr Corp continued to carry out a substantial part of the day-to-day work connected with the operation of the park and was engaged in full-time employment performing a range of related tasks until he was peremptorily dismissed on 1 February 1991. It would also appear that thereafter Mistron was effectively excluded from any real involvement in the functioning of Bodaibo.

649 In seeking compensation, Mr Corp asserted that he was personally owed approximately $30,000 in back pay, and that the court had the power under s 260 to provide such compensation to Mr Corp notwithstanding that this was owed to Mr Corp rather than to Mistron (the shareholder). In obiter, Vincent J commented with respect to whether s 260 could provide relief for Mr Corp’s back pay owed:

In general terms, I am attracted by the argument that the powers conferred upon the court by s 260 are extensive. The legislature has recognised that the forms and consequences of the kind of oppressive behaviours which fall within the purview of the provisions are many and has determined the remedies available to an aggrieved party should also be extensive. Whether or not they can be regarded as sufficiently broad to permit the making of the orders … [regarding Mr Corp’s back pay] is, however, a matter of argument with which it is not appropriate to deal at the present time as the claims are not properly before the court in any event.

Ibid 512. While Vincent J noted that the issue of Mr Corp’s back pay had not been properly included within the claims to be dealt with pursuant to Crockett J’s original orders (to value the shares in Bodaibo), it is instructive that Vincent J was so forthcoming in expressing his Honour’s support for allowing s 260 to provide relief for Mr Corp’s back pay. Vincent J’s obiter view was novel and broadened the scope for relief far beyond the mere rights of the oppressed shareholders in relation to their shares. While Mr Corp was associated with the shareholder (Mistron), he was not personally a shareholder. It is difficult to understand on what technical basis Vincent J could interpret s 260 to provide relief to an employee of a company who was related to an oppressed shareholder, especially given the generally narrow view on the topic outlined above. See Magner, above n 21. See for example, *Foody v Horewood* [2007] VSCA 130, which involved application by shareholder in the other capacities of director/employee.
Chapter 6: Corporations Act Oppression Remedies and Unitholder Case Law

apply for relief.650 There was earlier discussion regarding employees who also held shares personally651 but in this case, Mr Corp was not the shareholder. Clearly, Vincent J was interested in adopting a substance over form approach to applying the relief against oppression provisions.

Importantly, the dispute had come before Crockett J in the Practice Court, pursuant to which the parties to the dispute had agreed the facts and counsel for the defendant accepted that his client’s conduct amounted to oppressive conduct for the purposes of s 260.652 As a result, Crockett J had ordered that Mr Brown’s interests ‘purchase all the shares held by the applicant in the capital of Bodaibo Pty Ltd at a price to be determined by the court, ...’653 The fact that the parties had agreed that s 260 had been triggered by the defendant’s conduct removed a major threshold issue, which, it is submitted has not been properly recognised in the subsequent judicial discussion. The result of the acceptance by the defendant was that the only substantive issue to be decided by Vincent J was the value of the shares held by Mistron (and not whether CAORs could be applied).

In approaching the question of valuing Mistron’s shares, Vincent J continued with his broad approach to s 260 by stating:

The provisions contained in s 260 of the CL have been drafted in wide form in order to accommodate the almost limitless varieties of oppressive behaviour possible and the need for the court to have an appropriately extensive discretionary power to effect justice in the particular circumstances of individual cases.654

Vincent J reviewed the various submissions regarding the methodology for valuing the assets of the company and determined that a generous valuation methodology was appropriate. In valuing Mistron’s shares, Vincent J made no reference to the fact that the company (Bodaibo) owned the assets of the business as trustee for the UT (Woodlands) and valued the shares in Bodaibo as if it owned the assets beneficially (thereby effectively providing the unitholder with compensation for the value of its units, rather than merely the nominal value of

650 Other than pursuant to s 234(e) in Part 2F.1, which provides scope for ASIC to allow standing to other persons.
651 Magner, above n 21. See for example, Foody v Horewood [2007] VSCA 130, which involved application by shareholder in the other capacities of director/employee.
653 Ibid.
654 Re Bodaibo (1992) 6 ACSR 509 (Supreme Court of Victoria), 515.
Given the parties had agreed that oppression under s 260 had occurred (unlike in subsequent cases), it is apparent that Vincent J felt empowered to proceed with a broader application of the rights pursuant under that section. While Vincent J sought to provide substantive relief to a group of related parties (ie Mr Corp and Mistron) who had clearly suffered oppression by taking a ‘substance over form’ approach to applying oppression remedies under s 260, it is difficult to accept Vincent J’s decision in failing to articulate how it was technically within the court’s powers to do so. A long line of subsequent cases rejected Vincent J’s approach, and it was not until the relatively recent case of Vigliaroni that a court was able to formulate a legal justification for reaching a similar substantive conclusion.

Re Bodaibo provides an early example of the desire of the courts to provide relief to oppressed unitholders by utilising the oppression remedies under the CA. While Vincent J may have failed to provide substantive legal grounds for concluding that s 260 provided the courts with the power to provide an oppressed unitholder with relief, the decision highlighted the fact that in many cases, the issue is one of power and jurisdiction of the oppression remedies under the CA, rather than a question of fairness and equity.

Shirim Pty Ltd v Fesena Pty Ltd (‘Shirim Appeal’) was another case that ultimately exemplified a substance over form approach. Interestingly, the case

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655 In valuing Mistron’s shares in Bodaibo, Vincent J applied a valuation based upon the value of the assets owned by the Woodland Unit Trust, and imputed the value of the units of Woodland owned by Mistron into the value of the shares of Bodaibo owned by Mistron. This is despite Vincent J noting with respect to the structure of Bodaibo that: ‘Mr J Corp is a director and shareholder of the applicant, Mistron Pty Ltd (Mistron) which, in turn is the holder of two of ten, $1 shares in the capital of Bodaibo Pty Ltd (Bodaibo), and the holder of 20 of the units in the Woodlands Unit Trust (Woodlands).’ Re Bodaibo (1992) 6 ACSR 509, 510.

656 Although note Shirim discussed below, where consent orders similarly asked for a valuation based on s 232.

657 As subsequent cases were to highlight, the value of shares in a $2 trustee company such as Bilbao that does not own any other assets beneficially are therefore worth $2, and the balance sheet of Bilbao would reflect that. In contrast, the financial accounts of the UT that operates a profitable business such as Woodlands would reflect the fact that the UT is the beneficial owner of the valuable assets.

658 [2002] NSWSC 10. This case was originally heard before McLaughlin M in the Supreme Court of NSW but was later appealed and the decision reversed.

659 This case involved a claim of oppressive conduct by a minority shareholder/unitholder (Dr Smith) in a company that managed a hospital and also acted as trustee of a UT that owned the freehold land on which the hospital operated. Dr Smith alleged that he had been excluded from the management and decision making processes of the enterprises, and sought compensation for the value of his shareholding and unitholding in the entities. Although the case explored the various
was subsequent to the line of *Kizquari* decisions that rejected *Re Bodaibo*, although *Shirim Appeal* has not been cited in subsequent decisions on the issue. Similar to *Re Bodaibo*, the case is somewhat unusual in that the parties consented to the valuation and buyout of minority shares in a trading company and units in a related property UT pursuant to s 260 (the precursor to s 232) of the CL. The wording of the orders are interesting in that they expressly provided the application of s 260 of the CL to the valuation and buyout procedure of the shares and the units. While it was unclear whether the parties had given any thought as to the applicability of s 260 to the valuation and buyout of units in a UT, McLaughlin M stated that:

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**Shirim** (2000) 35 ACSR 221, 224.

The orders stated:

1. Pursuant to s 260(2) of the Corporations Law;
   - the shares of Shirim Pty Limited in Eastern Suburbs Private Hospital Pty Limited and the units of Shirim Pty Limited in the Netherleigh Unit Trust be purchased by Hapday Holdings Pty Limited and Traknew Holdings Pty Limited; and …

2. The proceedings be referred to the Master to inquire as to: …
   - the value of Shirim Pty Limited's shares and units in Eastern Suburbs Hospital Pty Limited and the Netherleigh Unit Trust at which the purchaser or purchasers under these orders shall acquire the same; …

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I also recognise that order 1(a) refers to the purchase not only of the shares of the first plaintiff in ESPH but also of the units of the first plaintiff in the Netherleigh Unit Trust, while prayer 10 in the amended summons speaks only of the purchase of shares; and, further, *that the relevant relief of which the parties have availed themselves under the provisions of s 260(2) of the Corporations Law does not in any way address itself to the purchase (whether made compulsorily or voluntarily) of units in a unit trust.*

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Ibid, 228 (emphasis added). McLaughlin did not comment further on the question of whether the oppression remedies under the *CA* should be applied to the buyout and valuation of the units other than questioning whether the parties had considered whether the parties had considered the issue.
Nevertheless, as will become apparent, the purchase of the shares and the purchase of the units are so interconnected that it would be inappropriate in the instant case to approach the exercise of inquiring as to the value of the shares and inquiring as to the value of the units other than by the application of identical principles.\textsuperscript{663}

Given the parties had agreed to the valuation of both the shares and units under s 260, McLaughlin M proceeded to provide an analysis for valuation of the units and shares based on the various methods of valuation.\textsuperscript{664} In light of the fact that the consent orders were badly worded,\textsuperscript{665} McLaughlin M ultimately found the damages to be nominal in favour of the applicant.

The decision by McLaughlin M was appealed and heard before Davies AJ in 2002.\textsuperscript{666} His Honour decided that oppressive conduct had in fact occurred (and not merely pursuant to the agreed consent orders), therefore it was appropriate to apply the principles of CAORs beyond the terms of the consent orders in determining a valuation date, which ensured the oppressed shareholder/unitholder received substantive relief.\textsuperscript{667} Davies AJ’s decision seemed to disregard the earlier challenges of applying CAORs to cases involving UTs (highlighted in Kizquari in chapter 6.4),\textsuperscript{668} and while Davies AJ did not provide any substantive discussion on the topic, his Honour appeared to take the pragmatic ‘substance over form’ position illustrated by Vincent J in Re Bodaibo.

\textsuperscript{663} Ibid.
\textsuperscript{664} Ultimately, it was concluded that each of the units and shares were valueless given the liabilities were greater than the underlying assets at the date of the orders (notwithstanding that the net assets had been worth more at the time of the oppression).
\textsuperscript{665} The ‘valuation date’ was required as the date of the consent orders—by which time the entities had become worthless, rather than the earlier date upon which the oppression occurred—at which time the units and shares had significant value.
\textsuperscript{666} Shirim [2002] NSWSC 10.
\textsuperscript{667} Davies AJ reversed the decision of the applicable date upon which valuation should be based. Her Honour held that notwithstanding the wording of the consent orders (which provided a later date for valuation), it was open to the court to consider to order compensation based on a date that would provide the oppressed party with relief in accordance with s 260 (rather than the date of the consent orders). Davies AJ concluded that oppression had occurred, and that an earlier date for valuation was applicable that provided compensation to Dr Smith in the order of $375,000. In assessing the amount, her Honour held that:

\begin{quote}
In the circumstances of the case, I can do no more than assess a figure which is fair to all parties. I consider that a figure of $250,000 would be an appropriate figure to fix as the value at which the shares and units should have been transferred, if transferred at 30 June 1996. Taking into account the passage of time and the rates of interest as reflected in Schedule J to the Supreme Court Rules, but without making any precise calculation, I assess the present value at $375,000. I would attribute one-half of that sum to the shares in Fesena, and the balance to the units in the Netherleigh Unit Trust. The shares in ESPH, a trustee company, should have a nil or nominal value.
\end{quote}

Ibid, [73].
\textsuperscript{668} Perhaps because the parties themselves had originally consented to the valuation and buyout of the units under the original consent orders.
6.4 Rejecting Unitholder Relief Under \textit{Corporations Act} Oppression Remedies: The ‘\textit{Kizquari}’ Line of Cases

The \textit{Kizquari} line of decisions stand for the proposition that the courts cannot provide relief under the \textit{CAORs} to assist unitholders. In particular, the courts cannot take into account the value of units in providing relief, even where oppression has been established against a shareholder/unitholder in a CT.

The \textit{Kizquari} case\footnote{(1993) 10 ACSR 606, 612-13.} involved an application under s 260 of the CL for relief against oppression by \textit{Kizquari Pty Ltd} (which was trustee of a family trust) controlled by Mr and Mrs Lane. The Lanes had worked in \textit{Kizquari Pty Ltd}. Via \textit{Kizquari Pty Ltd} along with two other families (the Gabbeys and the Cucitis), they invested in an ink business operated by \textit{Prestoo Pty Ltd} as trustee for the \textit{R & J Inks Trust}, which was a UT.\footnote{The Lanes retired from actively working in the business, leaving the Gabbeys and Cucitis as the remaining employees. The business continued to operate successfully, however following an AGM in 1991, it became apparent to the Lanes that the salaries being drawn by the Gabbeys and Cucitis (including their wives who were employed in order to ‘split income’) were excessive. Therefore, \textit{Kizquari} (on behalf of the Lanes) brought an action under s 260 for relief against oppression as a shareholder in \textit{Prestoo} against \textit{Prestoo} and the other unitholder/shareholder/employees. Importantly, unlike \textit{Re Bodaibo}, the plaintiffs also brought an action under breach of trust law (for reimbursement of the alleged overpayments in the form of excessive salaries to the Gabbeys/Cucitis by \textit{Prestoo}).}

Much of Young J’s decision dealt with the question of ‘reasonable remuneration’ for two of the defendant employees related to the majority shareholder/unitholders and how to assess what salaries would be considered appropriate. To that extent, Young J accepted that the salaries had been excessive and ordered that the employees reimburse the trust for the excessive amount based on trust law principles. As commonly occurs with oppression cases, the plaintiffs also sought that their shares be bought out pursuant to s 260.\footnote{As the plaintiffs claimed that winding up was not a suitable remedy and accordingly there should be a compulsory purchase of shares. Young J commented: From what I have heard, the defendants are quite happy to buyout the plaintiffs but not at the figure which the plaintiffs wish, whatever that figure is I have not been told it. The parties can, of course, agree to buy one another out, but a sale and purchase can only be forced by the court if there is some legal warrant for the court making such an order.} Unlike \textit{Re Bodaibo} (where the parties accepted there was oppressive conduct), Young J was unconvinced that the activities of the defendants were to be considered oppressive pursuant to s 260 and to the extent of any oppression, the reimbursement by the employees under the breach of trust order was sufficient to remedy the oppression.

In discussing whether the CAORs applied to the case, Young J explained in relation to the application of CAORs generally that:

It is not really a function of s 260 of the Corporations Law to enable people to release their capital from ventures where their co-venturers have displeased them. In most situations where people have agreed to contribute funds for a venture there is no right to have the funds released before the venture is fulfilled. The law has allowed exceptions in extreme cases such as where the substratum of the venture has gone or where there has been oppression by those controlling the venture. It must be realised however that these are exceptional cases. Even in cases of oppression it does not follow that the court will consider it appropriate to release the plaintiff's funds from the venture.672

With respect to the added complexities introduced when dealing specifically with UTs, Young J commented further:

Where the venture is protected by a unit trust device superimposed on a company structure the plaintiff's task will be harder again. Again, if the articles or trust deed make provision for release of the plaintiff's investment by a certain procedure, normally the plaintiff should be left to put that procedure in motion. The court may make orders ensuring that there is no unfairness in the valuation process or require improperly depleted funds to be reimbursed, but after that, there is no valid reason why the plaintiff should have any special consideration when he or she wishes to withdraw his or her investment. So far as this particular trust deed is concerned, provision is made for the situation where a person has a desire to dispose of his or her units. That process in fact has been put into place.673

Monichino noted with regard to Young J’s decision, ‘It can be seen that his Honour placed substantial emphasis on the existence of the exit mechanism in the trust deed,’674 commenting further that while these exit mechanisms were common in standard trust deeds, ‘such exit mechanisms are problematic and seldom offer a practical or desirable solution to the disgruntled unitholder.’675 Monichino recognised that it is often difficult in practice for unitholders to anticipate the full effect of exit mechanisms drafted into UT deeds given the range of outcomes that can unfold in business ventures, sometimes placing unitholders in unintended and

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672 Ibid.
673 Ibid.
674 Monichino, above n 482, 4.
675 Ibid.
unsatisfactory positions. Nevertheless, Young J expressed little empathy for unitholders in emphasising that their lot is wholly determined by the terms of the trust deed.

Effectively, Young J’s decision provided unitholders with very little scope to seek relief beyond the enforcement of the strict terms of the trust deed, which may not assist in cases of oppression. Young J’s comments were consistent with the finding of this thesis: that when dealing with UTs, the courts appear to be focussed on the narrow approach of determining that the strict provisions of the trust deed are adhered to by the trustee in managing any buyout. Beyond that, the courts are reluctant to provide broader rights and relief to unitholders/beneficiaries.

The plaintiff had argued that CAORs can be applied more broadly, referring to cases where members had received relief in respect of a variety of capacities, eg directors, employees, and trustees. The plaintiff had proceeded to rely on Vincent J’s decision in *Re Bodaibo* that CAORs could provide relief to oppressed unitholders. Young J, however, rejected Vincent J’s position:

> It would not seem that his Honour’s intention was drawn to the difficulty caused where the only business that the company carries on and the only assets it possesses are held pursuant to a trust in which it is not a beneficiary. Accordingly, I do not feel constrained to follow *Re Bodaibo Pty Ltd* on this point. No other cases have been cited by counsel as situations where one can make an order in respect of a trustee company under s 260. My view is that one cannot do so.

In addition to arguing that the oppression remedies under s 260 should not apply to trustees of UTs generally, Young J drew the fundamental conclusion that even if relief were provided to an oppressed shareholder in a trustee vehicle, the court must limit its relief to compensating the shareholder in relation to the value of the shares in the trustee, not for the value of the units in the UT. On this, Young J

676 As Young J noted:

Miss Needham [counsel for the plaintiffs] submits that s 260 is nowadays construed ‘in the widest form imaginable’ per Murray J in *Re Enterprise Goldmines NL* (1991) 3 ACSR 531 at 536; 9 ACLC 168 at 173. She submits that it is possible to apply the section where there is oppression in the capacity of a director or as an employee or as a franchisee or in the capacity of a member of a trust. She relies on dicta in *Re Dernacourt Investments Pty Ltd* (1990) 20 NSWLR 588 at 620; 2 ACSR 553 and *John J Starr (Real Estate) Pty Ltd v Robert R Andrew (Asia) Pty Ltd* (1991) 6 ACSR 63 at 66; 9 ACLC 1372 at 1375.

677 6 ACSR 509; *Kizquari* at 612.

678 6 ACSR 509; *Kizquari* at 612-613.
declared:

The only oppression is in relation to the operation of the trust. That oppression has not affected the value of the shares [in the CT] one whit. The shares in Prestoo [ie the CT] either have no value or alternatively a value of $1 being the amount paid for each share and they continue to have that value. It would be a very bold step indeed to order [the majority] to buy the plaintiffs' $1 share for a sum anything like say $189,000 on the basis that the plaintiffs thereby relinquished any interest in the trust.\textsuperscript{679}

Young J highlighted the fact that, at best, an oppressed shareholder in a CT is entitled to relief only to the extent that their shares in the CT have been adversely affected. This conclusion undermined the effectiveness of virtually any action by an oppressed shareholder/unitholder given the vast majority of trustee vehicles are capitalised with nominal share capital and own no assets beneficially. Thus, any successful claim by the oppressed shareholder/unitholder would ultimately be a hollow victory in awarding nominal compensation for the lost value of the shares in the CT. Young J’s decision clearly highlighted the disconnect between the objective of the oppression remedies under the CL to compensate a shareholder for any lost value in their shareholding in a company, with the interests of unitholders, which are exclusively the domain of trust and contract law under the relevant trust deed.

In trying to understand Young J’s position on the law, Monichino commented:

[i]t is somewhat uncertain whether \textit{Kizquari} stands for the proposition that a court has no power under the equivalent of the Corporations Law provisions to order a compulsory purchase of units in a unit trust, alternatively whether as a matter of discretion the court will not so order.\textsuperscript{680}

On this question, it does appear \textit{Kizquari} stood for the position that the courts do not have the power, given Young J’s comment, ‘No other cases have been cited by counsel as situations where one can make an order in respect of a trustee company under s 260. My view is that one cannot do so.’\textsuperscript{681} In a recent article, Michael May similarly highlighted the abstruse issue of whether the application of

\textsuperscript{679} \textit{Kizquari} at 613.
\textsuperscript{680} Monichino, above n 482.5. As discussed later, Davies J in \textit{Vigliaroni} similarly noted that Mansfield J in \textit{Ciccarello} ‘appears to have understood the question to be one of “appropriateness”, not power.’ See \textit{Vigliaroni}, [54] (Davies J).
\textsuperscript{681} (1993) 10 ACSR 606, 612-613.
CAORs to unitholders is a matter of court power or discretion. Certainly, the question is pivotal to ultimately determining whether unitholders can secure rights under the CAORs, especially in light of Vigliaroni and s 53 of the CA.\textsuperscript{682} Consideration of these questions is central to determining the current state of the law.\textsuperscript{683}

In the evolution of the relevant law, the decision in Kizquari provided the foundation for the long line of cases that upheld the basic proposition that the courts should reject the application of relief to unitholders via the CAORs. Young J made the stark comment that the oppressive conduct had no impact on the value of the shares, therefore CAORs had no application. However, oppressive conduct may have a significant impact on the value of the units—a point that Young J held was of no relevance in considering the relief that could be provided to the shareholder/unitholder pursuant to the oppression remedies under CL. While Young J in Kizquari emphasised that the trust law remedy in ordering repayment of the excessive salaries to the trust was able to provide the aggrieved unitholders with partial relief, the fact remained that the aggrieved unitholders were unable to achieve their desired remedy of a compulsory buyout of their units.

Kizquari was upheld by McKenzie J in Re Bountiful Pty Ltd (‘Re Bountiful’),\textsuperscript{684} which dealt with a buyout application for both shares in a property owning company, and units in a separate but related trading UT.\textsuperscript{685} While the valuation of shares in the company was reasonably straightforward (in the sense that it

\textsuperscript{682} May, above n 615, 275.
\textsuperscript{683} Discussed further in chapter 7.
\textsuperscript{684} Re Bountiful Pty Ltd (1994) 12 ACLC 902. This case came before Mackenzie J in the Supreme Court of Queensland. The case related to a claim for relief against oppression by a shareholder (Mr Brundell) who owned minority shares in two related companies; one (Bountiful Pty Ltd) operated the Redcliffe Hotel, the other (Kilmanock Pty Ltd ) was a trustee of the Moreton Bay Unit Trust that owned the freehold on which the hotel operated. The majority shares in these companies were held by two other shareholders: Mr Walsh and Mr Sadler. Each of these companies had five directors, being two each from Mr Walsh and Mr Sadler, and Mr Brundell. Mr Brundell had been employed to manage the Redcliffe Hotel, but was notified of his termination and replacement by associates of Walsh and Sadler pursuant to a meeting of the directors. While Mr Brundell had actions available under employment law, he applied for orders under s 260 of the CL because he alleged that certain actions of his fellow directors were oppressive or unfairly prejudicial to or unfairly discriminatory against him, or that the affairs of the company had been conducted in a manner contrary to the interests of the members as a whole. Mr Brundell sought relief via a buyout of his shares in the relevant companies. The case did not deal with the employment law issues relating to Mr Brundell’s termination.

\textsuperscript{685} McKenzie J initially held that oppression had not been established for the purposes of s 260 in relation to either entity, yet his Honour dealt with whether s 260 could be applied in the event that (on appeal) the elements of s 260 were established. McKenzie J provided comments on the valuation of the applicant’s shares in order to avoid further inconvenience if the case were remitted back to Mackenzie J from an appeal.
operated the hotel in its own right and not as trustee of a trust), McKenzie J followed *Kizquari* in determining the only relief available under the *CAORs* with respect to the UT would be in relation to the shares in the CT. He concluded, ‘If the matter were a live issue I would adopt the view of Young J in this respect. Accordingly the value of Kilmanock [as CT] is $3 of which the applicant’s share is $1.’

The *Kizquari* position was followed in *Re Polyresins Pty Ltd*. The case dealt primarily with the question of whether the controlling majority shareholder of a company was entitled to seek relief from oppressive conduct under the *CA* against minority shareholders. The relevance of the case to UTs arose as a secondary issue given there was a question as to whether a UT had been superimposed over the structure at a later date in the operation of the business. While Chesterman J

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686 Mackenzie J followed Young J by stating:

So far as Kilmanock is concerned it is a company which is the trustee for the Moreton Bay Unit Trust. Its paid up capital is $3. It was submitted on behalf of the applicant that I should take the value of the units in the trust into account in assessing the value of the applicant's share in Kilmanock. I was urged to adopt the approach taken by Vincent J in *Re Bodaibo*. The respondent submitted that I should follow the contrary decision of Young J in *Kizquari Pty Ltd v Prestoo Pty Ltd* where it was held that an order under s 260 could not be made in respect of the trustee company where the oppression had occurred in relation to the operation of the trust but had not affected the value of the shares in the trustee company. If the matter were a live issue I would adopt the view of Young J in this respect. Accordingly the value of Kilmanock is $3 of which the applicant's share is $1.

See *Re Bountiful Pty Ltd* (1994) 12 ACLC 902, 3. Mackenzie J’s obiter comment regarding valuation of shares in the trustee vehicle did not affect the result of the case. However, given Mackenzie J did not find the limbs for relief under s 260 had been satisfied, the obiter comments were important in affirming the position outlined in *Kizquari* by Young J, ie that the courts were limited to considering the nominal value of the trustee shares when providing relief to oppressed shareholder/unitholders. Mackenzie J’s support of *Kizquari* was clear and succinct, providing further momentum to the line of decisions that followed on the subject.

687 [1999] 1 Qd R 599. The matter was heard before Chesterman J in the Supreme Court of Queensland.

688 In this case, the majority shareholder had been enticed into assisting two others in the purchase of a small business (which provided adhesive glues to the timber industry) by funding the purchase and thereby becoming the major shareholder. The majority shareholder was in all ways completely passive, and relied on the other shareholders to run the business. The minority shareholders (who operated the business) did not comply with the majority shareholder’s requests for information, or transparency on the operation and management of the business, so the majority shareholder sought to be bought out under the buyout provisions (s 260) of the *CA*. Chesterman J explored at length the possibility that a majority shareholder who controlled the company by virtue of the shareholder’s majority voting rights could nevertheless be entitled to receive relief under the *CAORs*. On this, Chesterman J held that the majority passive unitholder was not entitled to such relief, as oppression cannot by definition be suffered by a majority shareholder who controls the company via majority voting rights (and therefore is able to remove the board and the executive).

689 When the company that operated the business was established, one of the parties (who was responsible for establishing the legal and accounting structure of the venture) took certain steps to apply a UT to the venture, so that the company (Polyresins Pty Ltd) would act as trustee. The other shareholders were not made aware of the existence of the UT structure, and although the accounts were kept for a few years in a manner consistent with the existence of the UT structure, the accounts were subsequently reverted to reflect that the company acted in its own capacity by the time the matter reached the courts. One of the arguments brought by the plaintiff was that he had not been made aware of the existence of the UT, and if the transfer of the assets to the UT were valid and enforceable, then that act was itself oppressive against the plaintiff.
concluded it was unlikely that the UT owned the assets of the business, his Honour nevertheless dealt with the possibility of the validity of the UT and therefore its significance to the shareholder seeking CAORs. Chesterman J upheld Kizquari, adding the clarification that courts were unable under the CAORs to deal with units directly, nor to impute their value into the valuation of the shares in the CT.690

Young CJ dealt with the issue again in McEwen.691 Importantly, the applicant claimed various forms of relief as remedies, including under ss 232 and 233 of the CA against alleged oppression and for equitable damages, but sought neither an order for the purchase of his shares and units, nor an order for winding up. On the application of ss 232 and 233, Young CJ reiterated his Honour’s previous position that CAORs cannot be applied in providing relief to unitholders.692 In referring the

690 Chesterman J stated:
If no valid trust has been constituted then, obviously, no harm has been done and the relief sought is not necessary. If the trust has been validly constituted, then the shares in the company are worth no more than their face value and it is inappropriate for the court to direct a compulsory purchase. I accept the submissions that in an application under s. 260 the court cannot deal with equitable interests conferred by a trust of which a company is trustee. Nor can it value the shares in the company by reference to the assets held on trust. See Kizquari Pty Ltd v Prestoo Pty Ltd.

Re Polyresins [1999] 1 Qd R 599, 615 (citations omitted).

691 (2002) 44 ACSR 244. The case involved a crane services contracting business that was operated by Combined Coast Cranes Pty Ltd as trustee for the Combined Coast Cranes Unit Trust. The units in the UT and shares in the trustee company were owned equally by five parties who each owned and operated cranes, and used the Combined Coast Cranes business to source work for each of the five owners. After a few years, there was a breakdown in the relationship between McEwen and the others, resulting in McEwen being removed as a director. Two of the other four owners subsequently sold their shares and units to the other two unitholder/shareholders without providing McEwen an opportunity to purchase a proportion of the sellers’ shares/units, in breach of the pre-emptive rights under the trust deed and articles of association. Finally, McEwen was told that he would no longer receive referred work from the business (in breach of what McEwen alleged was an agreement to share work equally before the enterprise was created) and was excluded from accessing the other work equipment owned by the business and from receiving reports on what work had been allocated. McEwen brought proceedings against the trustee company, each of the four other unitholders/shareholders and the other directors, alleging various irregularities in the management of the company and the trust. He complained that the pre-emption provisions contained in the articles of the company and in the trust deed had been breached, and that there was a policy of excluding him from taking a proportionate share of the contracts obtained by the trust, contrary to the understanding of the parties when the company and trust were established. The controllers of the trustee company and the trust claimed that McEwen was a disruptive influence and was in competition with the trust.

692 Young CJ stated:
It is now necessary to deal with the principle matter raised for decision, namely, the applicability of ss 232-233 of the Corporations Act on the facts of this case. At first blush, this would seem to be a plain case for the application of the section. The five entered into the deal on the basis that there would be a service company functioning in all their interests and in which they would all have an equal share, yet today the benefits of the venture are wholly devoted to the interests of Trevor and Terry. The matter is not so simply solved. The sections are directed to the conduct of a company's affairs. It is well established that where oppression has occurred in a company which holds all its assets on trust, there is no diminution in value of the plaintiff's share in the company despite the oppressions: Kizquari Pty Ltd v Prestoo Pty Ltd (1993) 10 ACSR 606; Re Polyresins Pty Ltd [1999] 1 Qd R 599; (1998) 28 ACSR 671; 145 FLR 141. In that latter case, Chesterman J said that the court could not in an application under these sections deal with equitable interests conferred by a trust of which the company is trustee: see Qd R 613; ACSR 686; FLR 156.
aggrieved applicant to the proper sources of law, his Honour suggested there was scope to consider relief under equitable or contract causes of action (despite the matter being pleaded as an oppression case under the CA). For example, as mentioned previously, Young CJ confirmed that the principles of unconscionable conduct against ‘legitimate expectations’ can apply to trusts as well as companies. In dismissing the plaintiff’s action, Young CJ ultimately concluded that the remedies sought were incompatible with the rights of the plaintiff, especially in seeking some form of equitable compensation without seeking a buyout or winding up. Young CJ surmised that the plaintiff’s proper course of action would be to ‘elect whether he will stay with or exit the company. If the latter election is made, he will need to put in place the buyout provisions to recover the current value of his investment.’ As Monichino noted about Young CJ’s decision in McEwen’s case, ‘The case illustrates that despite 10 years of case law concerning the issue of oppression of minority unitholders, the ability for a unitholder to secure relief was still difficult to achieve.’

The final case following the strict Kizquari approach was Surf Road Nominees Pty Ltd v James (‘Surf Road Nominees’). The matter involved complex issues, including the enforcement of guarantees, allegations of breach of fiduciary duties, and oppressive conduct under the CA ORs arising out of the operations of a real estate agency. On the issue of oppressive conduct, Einstein J held that although the other parties had been heavy handed, it did not constitute oppressive

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Ibid [44]-[48].  
693 In discussing these other headings of relief, Young CJ drew various relevant conclusions, including: That the oral alleged promise to share jobs was never intended to be a binding agreement and even if it had been, the agreement had been superseded by the subsequent terms of the trust deed, which were silent on the topic; the failure for the trustees to implement the preemptive rights was a breach of trust, but any loss to the plaintiff was nominal (given the units had not appreciated substantially since then); and the fact that the directors could not be personally liable directly to the unitholder for a breach of trust by the trustee (citing Hurley [1982] 31 SASR 250 and others).  
694 In chapter 4.3.2.  
695 Young CJ stated:  
There is probably no reason in principle why the ‘legitimate expectation’ learning in connection with oppression in companies should not apply in the case of trusts because equity is flexible enough to deal with unconscionable conduct in any appropriate way. If conduct is unconscionable by the standards of a statute in the Corporations Act, there is a lot to be said for the proposition that it would be unconscionable as a matter of general equity: see eg the remarks of Spigelman CJ in Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd (2001) 37 ACSR 672 at 679.  
696 Ibid [74].  
697 Monichino, above n 482.  
conduct. Einstein J noted the inapplicability of CAORs to UTs, and after citing Young CJ in McEwen and Kizquari and other authorities, Einstein J concluded:

To my mind these authorities correctly state the circumscribed reach of the sections. That being the case the claims to Corporations Act ss 232, 233 relief here pursued were simply misconceived … It seems to me that the remedy in this type of situation must ultimately rely upon relevant principles which underpin the entitlement to equitable relief where trusts are involved, complemented as necessary by relief appropriate in terms of contract law, the parties having bound themselves by the unit trust device.

Einstein J’s comment that the parties had bound themselves to the UT device highlights an underlying theme in the Kizquari decisions, which explains in part the justification for excluding the provision of relief against oppression to unitholders in circumstances where shareholders enjoy such relief. In considering the fairness of the decisions, the approach in the Kizquari cases was that unitholders have chosen their ‘lot’ with trusts and equity (within which other remedies are available) rather than under the CA and as such, ‘fairness’ was not undermined.

While such an approach provides an important policy argument against the contention of this thesis, it is important to also recognise that in each of the Kizquari line of cases (ie the cases outlined above), the courts first determined on the facts that the conduct of the defendants was not considered oppressive pursuant to the thresholds prescribed by CAORs. Only after this conclusion was reached, the courts then proceeded to state that the plaintiff’s actions also failed because CAORs could not be used to provide relief to unitholders.

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699 Surf Road Nominees [2004] NSWSC 61 at [194].
700 Einstein J stated:

On the approach which the Court as a matter of substance has taken in dealing with the suggested oppression case, it has not been necessary to treat with the juridical basis of the cause of action. There is, however, as I accept, a particular threshold problem with the claim. What one has is a venture protected by a unit trust device superimposed on a company structure. It has to be recalled that Surf Road Nominees acted at all times as trustee. There is authority for the proposition that ss 232 and 233 of the Corporations Act are inapplicable in the circumstances.

Surf Road Nominees [2004] NSWSC at [218].
701 Ibid.
702 This approach provides an important policy argument against the contention of this thesis, which is discussed further in this chapter.
703 That it is unfair to exclude unitholders from relief under the CAORs.
It is difficult to determine whether the two conclusions influenced each other, but it is instructive to know that in the minds of the judges, the withholding of relief to the unitholders pursuant to CAORs did not result in a ‘miscarriage of justice’ due to limitations on the court’s powers. By comparison, in Re Bodaibo and further cases discussed below, where the court found the conduct was oppressive by the criteria required pursuant to CAORs, the decisions did not follow Kizquari.704 While it is impossible to determine conclusively, had the factual scenario in Kizquari involved conduct that Young J found to be clearly oppressive pursuant to the principles of CAORs, it is reasonable to question whether the outcome would have been the same. Perhaps Young J and the subsequent decisions may have sought to identify the scope to broaden the reach of CAORs even in such circumstances (as occurred in the cases described below).705

6.5 Broadening the Scope for Providing Corporations Act Oppression Remedies via Shareholdings in Corporate Trustees—the ‘Vanmarc’ Approach

In contrast to the strict position held in the Kizquari cases excluding access to CAORs to unitholders, a series of cases were identified that illustrate that unitholders could seek to indirectly access certain remedies under the CAORs when the shareholder in the CT was entitled to such relief. The first such case was Vanmarc.706 The case involved two related UTs (one operated an accounting practice, the other a service trust) in which the aggrieved principal owned her units via two family trusts, but only owned shares in one of the CTs directly. Given the complicated issues facing the minority unitholder/shareholder/employee/directors seeking relief in the circumstances of oppression, the plaintiffs took a multipronged approach to obtaining relief. The plaintiffs claimed broad and unspecified breaches of ‘trustee duties’ and fiduciary duties. They sought to set up

704 Further analysis of these observations is discussed in chapter 6.5.
705 Importantly, none of the above decisions considered the application of s 53 of the CA, as highlighted in Vigliaroni.
706 (2000) 34 ACSR 222. In this case, Ms Klopsch controlled Vanmarc Pty Ltd, which was a minority unitholder in the PW Jess Unit Trust that operated (via its trustee) an accounting practice in which Klopsch was one of the principal accountants. Vanmarc was also a minority unitholder in a service trust (Brighton Dale Unit Trust) for the accounting practice. Klopsch owned minority shares in the trustee vehicles of the service trust (but not the accounting UT) and had an employment agreement with the group. Klopsch took legal action against the two other accountants (Jess and Kelly) who owned and controlled the majority balance of the shares/units, alleging oppressive conduct. The actions were brought by Vanmarc and Klopsch against the trustees of both UTs and the other directors of each trustee.
a derivative action on behalf of the two trustee companies against their directors, and to claim relief under the CAORs. On the question of derivative actions and the liability of the directors sought by the plaintiffs, Mandie J concluded that standing had not been properly substantiated, although he acknowledged the difficulties faced by unitholders. However, his Honour implicitly left open the possibility that if pleaded properly, it was possible for unitholders to obtain derivative action against directors of CTs.

In relation to the application for relief against oppression under the CA, Mandie J extensively cited Kizquari, concluding:

In the present proceeding, it is probably also the case that a combination of trust remedies and recourse to the buyout provisions of the trust deed will ultimately provide adequate relief for the plaintiffs (if any is required). It is probably also the case that the shares in the trustee companies will be found as is usual to have no value, so that an order of the kind made in Re Bodaibo Pty Ltd should not be made (even assuming that such an order is ever appropriate under s 246AA in the case of a trustee company): see too Re Bountiful Pty Ltd (1994) 12 ACLC 902 at 905.

Notwithstanding, Mandie J left the door open for the oppression remedies to be applied to cases involving UTs:

Nevertheless, I do not think that the prospect of relief under s 246AA can be ruled out in the case of a trustee company, however unlikely that prospect may be. In that regard, it must be remembered that the powers of the court under that section are

707 The relevant section at the time was the Company Law Review Act 1998 (Cth) s 246AA. In relation to the plaintiffs’ issues of standing and the derivative action claim, Mandie J summarised the defence’s arguments as follows:

The defendants’ first main submission was that it was incorrect for the plaintiffs to allege that the first two defendants, who were trustees carrying on the businesses of the practice trust and the service trust, had suffered loss as a result of the alleged breaches by Jess and Kelly as directors, fiduciaries and employees. The loss, if any, was to the trust property in which the trustees had no beneficial interest. The correct cause of action was one for breaches of trust ... The defendants’ second main submission challenged the attempt by the plaintiffs to assert a right to sue Jess and Kelly and (others of the defendants as participants) on behalf of the two trustee companies (the first and second defendants) [via a derivative action]. It was submitted that the duties allegedly broken by Jess and Kelly were owed to the companies but that the companies, being trustees, would not have sustained any loss. Further, as to derivative actions, Vanmarc was not a shareholder in the two companies and Klopsch was a shareholder only in the service trust trustee, while, as to breaches of trust, Klopsch (not being a unitholder) had no standing to sue in respect thereof ... The defendants’ third main submission was that the plaintiffs, in particular Klopsch, were not entitled to bring an oppression proceeding when the two companies (the first and second defendants) were merely trustees with no assets of their own and the alleged oppressive acts in relation to the affairs of the trusts did not affect the values of the shares in the companies ...’

708 See also chapter 4.3.2.


not confined to orders for winding up or for the compulsory sale and purchase of shares but include orders restraining a person from engaging in specified conduct or from doing a specified act and requiring a person to do a specified act.\footnote{711}{Ibid.}

While Mandie J’s overall conclusions were consistent with Young J in \textit{Kizquari} in that they confirmed the inability for \textit{CAORs} to provide relief, specifically in relation to the diminution in the value of the units (and proper recourse is pursuant to trust remedies), his Honour was unwilling to completely exclude other rights of unitholder/shareholders to seek other oppression remedies that may assist the unitholder.\footnote{712}{Almond noted: ‘In \textit{Vanmarc Holdings Pty Ltd v PW Jess & Associates Pty Ltd} (2000) (which disapproved of \textit{Re Bodaibo}) Mandie J was not prepared to strike out a pleading which claimed oppression in relation to two trust companies (predecessor s 246AA).’ Almond, above n 599, 23.}

Mandie J noted that the oppression remedies under the \textit{CA} may be activated by a shareholder/unitholder in circumstances where the shareholder is able to convince the court to utilise its potentially extensive powers to provide relief against the trustee in a manner that would assist the unitholder/shareholder. Mandie J did not elucidate on the types of relief that may assist,\footnote{713}{As an example of how Mandie J’s approach in \textit{Vanmarc} could be applied, refer to the case of \textit{Pomfret v Cumberland} (2000) 34 ACSR 614 where a defendant unitholder had cross-claimed seeking relief under s 233 for an injunction stopping the resolution to bring forward the vesting date on the grounds of oppression. The matter was heard before Bryson J in the Supreme Court of NSW. The case was in relation to a dispute between shareholder/unitholders, where a group of unitholders involved in a quasi-partnership sought to bring the vesting date forward in order to distribute assets and net off liabilities of the registered unitholders, and in particular to net off the amounts allegedly owed by the defendant unitholder/shareholder in a group of companies and UTs. The plaintiffs sought to enforce certain alleged rights against the defendant pursuant to the repayment of loans and other matters. Unfortunately, while the case had all the hallmarks of providing fertile grounds to consider the question of whether \textit{CAORs} can be applied to UTs, Bryson J provided little discussion on the topic other than alluding to the inapplicability of a winding up order to a UT under s 230. Bryson J stated: ‘As I understand it, it was an object of seeking provisional liquidation that any winding up of affairs of the trust should be carried out by a provisional liquidator and not by the company itself. I would seek to keep clear a distinction between winding up the companies and winding up the unit trust. TLG should only be wound up on a considered judgment on the claim of oppression, which as yet has not been well defined. To me it seems likely that the appointment of a provisional liquidator would precipitate the practical end of TLG’s business affairs, which I am not prepared to bring about at this stage.\textit{Pomfret v Cumberland} (2000) 34 ACSR 614, 618 at [21]. While the defendant was successful on defeating the motion brought by the plaintiffs (which related to the immediate repayment of loans), the defendant’s cross-claim under s 233 was not dealt with in these proceedings (with leave granted to the defendant to file a further statement of claim on the cross-claim). It is likely that the matter was settled before the cross-claim under s 233 was dealt with further.\textit{Vanmarc} (2000) 34 ACSR 222, 230.}} but noted broadly that the courts may restrain ‘a person from engaging in specified conduct or from doing a specified act and requiring a person to do a specified act’ with the implication that orders may be used to provide such relief where the oppressive conduct is by a trustee against a unitholder/shareholder.\footnote{714}{Vanmarc (2000) 34 ACSR 222, 230.}
Mandie J’s comments highlight the fact that the courts were alive to the potential unfairness that unitholders were not directly able to access the remedies available to shareholders. It was therefore appropriate for the courts to utilise the roles of shareholders associated with oppressed unitholders in providing forms of relief against oppression under the CA (notwithstanding the shareholdings were of nominal value). Mandie J’s comments were a step towards the conclusion later found in Vigliaroni.715 As Monichino noted, “The manner in which Mandie J dealt with the issues indicates the judicial progress had been made in the theory of dealing with the complexities of unitholder oppression actions.”716

A further case identified along the Vanmarc approach was Ciccarello, Re: Adelaide Property Development Pty Ltd v Cubelic (‘Ciccarello’).717 This case came before Mansfield J in the Federal Court pursuant to an application to appoint a receiver and manager under s 233 of the CA in providing relief to an alleged case of oppression. The case involved a breakdown of a relationship between three individuals involved in a failed property development venture (structured by way of a UT) that was in the process of being wound up, and centred on the question of who should control that process. Orders were sought by one party (Ciccarello—who claimed to be the victim of oppressive conduct by the other two parties—the Cubelics) that a receiver and manager be appointed over assets held on trust by the relevant trustee company and alternatively, that the proceeds of a property sale be held on trust by the selling real estate agent.

After addressing the question of whether the Federal Court had jurisdiction to deal with a UT, and determining that jurisdiction existed,718 Mansfield J proceeded to
discuss the application of CAORs to UTs. Mansfield J reaffirmed the *Kizquari* position:719

The preponderance of authority is to the effect that, where oppression has occurred in a company which is a bare trustee so that all its assets are held in trust, relief under s 232 and s 233 of the Corporations Act is inappropriate. Oppressive conduct by the trustee does not result in diminution in the value of the shares in the trustee company.720

Davies J in *Vigliaroni* later made the pertinent conclusion that ‘Mansfield J appears to have understood the question to be one of “appropriateness”, not power.’721

Referring to *Vanmarc*, Mansfield J nevertheless determined that it was within the power of the court to intervene in dealing with the CT based on s 232, ie to address the oppression by ordering the winding up to be controlled in a manner that assisted the oppressed unitholder.722

Mansfield J’s decision is interesting in that, on the one hand, his Honour clearly accepted the ‘preponderance of authority’ that oppression remedies under the *CA* do not apply to UTs. On the other hand, Mansfield J plainly concluded that Ciccarello had been oppressed and it would be unjust for the action to fail on the grounds that the relief sought (namely, the appointment of the receiver and manager) lacked the jurisdiction of the Federal Court to deal with UTs under the *CA*. Mansfield J therefore determined that the power to appoint a receiver and manager could be achieved (either under s 57 of the *Federal Court of Australia* Act or...)

719 Ibid [28].
720 Ibid.
722 Mansfield J stated:

It does not follow, as was suggested by counsel for the defendants, that if ultimately the only appropriate source of relief (if the plaintiffs establish an entitlement to relief) is the Trustee Act, that the [Federal] Court does not have jurisdiction to grant such relief. It is not said that the plaintiffs’ claims under the Corporations Act are contrived so as to create jurisdiction in the court. In my view, the court has jurisdiction to resolve the whole matter: see *Moorgate Tobacco Co Ltd v Phillip Morris Ltd* (1980) 145 CLR 457. That would include, if APD as trustee or the Cubelics as two of its directors are found not to have acted in accordance with their respective obligations, holding them to account in equity: *Barnes v Addy* (1874) LR 9 Ch App 244. In any event, that does not mean that the court has no interlocutory power, at this point, to appoint a receiver and manager over the trust assets of the APUT held in the name of APD. S 57 of the Federal Court of Australia Act 1976 (Cth) (the FCA Act) is one such source of power. It may also be the case that s 233 together with s 1323 of the Corporations Act may be a source of such power, especially having regard to s 233(1)(h) and *Vanmarc Holdings Pty Ltd v PW Jess and Associates Pty Ltd* (2000) 34 ACSR 222 and the remarks of Habersberger J in *Cheung v Makmur Australasia Pty Ltd* [2002] VSC 335 at [38]. I do not need to decide that question. I am satisfied that the Court is properly seized of the matter and may grant the interlocutory relief sought under s 57 of the FCA Act if a proper basis for doing so is made out.

*Ciccarello* [2008] FCA 141 [29] (emphasis added).
Consistent with the comments of Mandie J in *Vanmarc*, it is notable that Mansfield J felt empowered to consider providing relief, given that the type of relief sought was not a valuation and buyout (as in many of the cases discussed earlier) but the appointment of a receiver and manager, which appeared to be a form of relief capable of straddling both trust law and CL. Ciccarello would have almost certainly have been unsuccessful in seeking relief had he sought a valuation and buyout under s 233.

While Mansfield J was prepared to take a relatively broad approach to the application of the *CA* and the Federal Court’s jurisdiction in providing relief to a unitholder, the ability for Mansfield J to provide effective relief would have been simpler had the *CA* expressly allowed relief to be provided to unitholders under the provisions of Part 2F.1.

### 6.6 Approving the Courts’ Power to Apply Corporations Act Oppression Remedies to Unitholders Under S 53: ‘Vigliaroni’ and the Subsequent Judicial Debate

A watershed case in considering unitholders’ rights under the CAORs was *Vigliaroni*. The decision by Davies J in *Vigliaroni* juxtaposed *Kizquari* by finding that CAORs were applicable to UTs. The decision presented an evident turnaround by the courts in rejecting the traditional position established by *Kizquari*, creating a substantial degree of uncertainty around the issue of whether Part 2F.1 applies to UTs. The *Vigliaroni* case and subsequent judicial debate are of paramount importance in determining the merits of the contention that statutory reform is required in the form of amendments to the CAORs to allow relief for oppressed unitholders.

The *Vigliaroni* case involved a large successful private group (comprising both UTs and companies) predominantly involved in the concreting industry (CPS) that was primarily owned by the Vigliaroni family. Two of the Vigliaroni sons (Dominic and Ivan) were actively involved in the business, which had been

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724 The matter was heard before Davies J in the Supreme Court of Victoria.
overseen from a financial and operational point of view for many years by Mr Gargaro, the ‘trusted’ financial controller. The disputes, which were central to the proceedings, centred on the breakdown of the relationship between Gargaro and the Vigliaronis due to various activities by Gargaro to appropriate group business and assets to the exclusion of the Vigliaronis.\(^{725}\)

Among the various actions (including breach of fiduciary duties, misappropriation of property and derivative action proceedings), the Vigliaronis brought an action against Gargaro and the various relevant entities on the basis that Gargaro’s actions were oppressive. They were seeking a forced buyout of Gargaro’s interests in the group under s 232, or alternatively a winding up under s 232 or s 467(1) (on just and equitable grounds). The Vigliaronis were largely successful on all actions, including the action to apply s 232 in forcing a buyout of Gargaro’s interests (via both shares and units).

While Gargaro argued against his conduct being deemed oppressive, he accepted there was an irreconcilable breakdown in the relationship that would give grounds to the winding up of the entities under s 467(1) irrespective of the applicability of s 232. While this relief was clearly open to the Vigliaronis based on Gargaro’s own admission, the winding up of the entities was not the Vigliaronis’ preferred remedy. Davies J concurred, stating that ‘[t]here is good reason for the continuation of the CPS group. The CPS group is solvent and has approximately 170 employees. Clearly, any remedy that would bring about the dissolution of the CPS group would be an extreme measure and should be a remedy of last resort.’\(^{726}\)

It appeared to the plaintiffs that the only direct action to enforce a buyout for the Vigliaronis was via s 232,\(^{727}\) therefore the question of whether the court had the

\(^{725}\) The history of the dispute began with the creation of a number of businesses (operated via UTs) in the mid-1990s in which Gargaro was allowed to have a large equity stake (for no consideration) along with Ivan and Dominic. Over the years, Ivan and Gargaro began to gradually exclude and remove Dominic’s equity interest in the businesses, of which Dominic subsequently alleged he was not made expressly aware. Further, Gargaro began to undertake various transactions and activities that could clearly be described as being for his personal benefit (to the exclusion of the Vigliaronis), and in breach of a range of fiduciary and statutory duties (for example, establishing a group management entity in which the Vigliaronis had no equity stake, using group funds to purchase properties into entities in which the Vigliaronis had no equity stake, removing Vigliaronis as directors without their knowledge and transferring shares/units without their knowledge). The actions of Gargaro were all the worse given his role as trusted financial advisor to the owners.

\(^{726}\) Vigliaroni at [56].

\(^{727}\) While the balance of the decision was decided under s 233 given the apparent flexibility in ordering an enforced buyout, Monichino noted with respect to s 467 that:
ability to apply to s 232 to a buyout of Gargaro’s units in the relevant UTs became the central issue in the case. Gargaro argued that even if there was oppression, there was a clear precedent from Kizquari onwards to reject an application of s 232 to the present case given the entities of value in question were UTs. Rejecting Gargaro’s arguments, Davies J concluded:

I am satisfied that Ivan has made out the grounds for an order under s 233 as well as under s 467. I am satisfied that I have the power under s 233 to order a buyout of the Gargaro interests by the Vigliaroni interests, including the unit holdings and I am satisfied that this remedy should be granted under s 233.

Davies J’s conclusion was an overall rejection of the long line of decisions on the question of applicability of the CA ORs to cases involving UTs. It is important to note that Davies J (correctly, it is submitted) determined this to be a clear-cut case of extremely oppressive conduct on the part of Gargaro, which her Honour detailed at length later in the judgment. The fact that Davies J found Gargaro’s actions to be clearly oppressive, combined with the fact that the only mechanism to apply a court-enforced buyout was under s 232, is significant and cannot be underestimated, as her Honour was clearly motivated to do her utmost in providing the Vigliaronis with relief that was truly just and equitable.

Section 467(1)(c) also confers upon the court power to order that units in a unit trust be bought out by another unitholder. Section 467(1)(c) confers upon the court a very broad discretion to make ‘any interim or other order that it thinks fit’ on the hearing of a winding up application, including a winding up application brought by a shareholder on the just and equitable ground contained in s 461(1)(k). Section 467(1)(c) may well offer an attractive avenue where it is difficult to establish oppression for the purposes of s 232.

Notwithstanding Monichino’s comments, Davies J (and others) did not seem to contemplate the flexibility that may be inherent within s 467, focussing rather on the proven flexibility provided to the courts under s 233. Monichino, above n 482, 18.

Davies J summarised Gargaro’s position as follows:

Gargaro’s primary position is that no remedy should be granted under s 233 or s 467, even if oppression is found, on the basis that the settled practice in an oppression action, where the oppression has occurred in a company that is a bare trustee, is to refuse relief and the oppression proceedings should be dismissed on the basis that: (a) there is no appropriate remedy under s 233 or s 467; (b) there are buyout provisions in each of the trust deeds and the parties should use the trust process; and (c) If there was oppression, it could have been ameliorated by Ivan accepting the ‘reasonable offers’ that Gargaro made to him to purchase the Vigliaroni interests or, alternatively to sell his interests.

Vigliaroni at [57].

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Vigliaroni at [57].

As discussed further, Monichino in his article on the Vigliaroni case raised the possibility that s 467(1) could be used to effect a buyout, albeit in a more contrived manner. Ibid.

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Vigliaroni at [57].

Ibid [58].

Ibid.

Ibid [70]–[74].

As discussed below, it is important to contrast Davies J’s conclusions on the merits of Vigliaroni with the line of cases (starting with Kizquari) that found to the contrary, and where the relevant judges found no oppression, or found that the ‘oppressed’ unitholders were capable of obtaining appropriate and fair forms of relief outside of the CA.
Davies J appreciated the significance of the controversial determination, recognising the need to explain fully the reasoning for the change in legal position despite the long line of cases that affirmed the contrary. Davies J began the rationale for her Honour’s conclusion by restating the relevant sections of the CA:

The grounds for the making of an order under s 233 are contained in s 232. Relevantly, s 232 provides that:

“The court may make an order under s 233 if:
(a) the conduct of a company’s affairs;
…Is …
(e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against,
a member or members whether in that capacity or any other
capacity.”

With reference to the relevant elements of oppression under s 232, Davies J noted that relief under against oppression under s 233 will apply:

whether there has been some unfairness in the conduct of the company’s affairs affecting a member, whether as shareholder ‘or any other capacity’ [CA ss 232(e), 234]. That assessment is not to be done in a vacuum… It is not conduct at large that is caught by s 232. S 232 requires the putative conduct to be ‘conduct of a company’s affairs’. This includes, relevantly, the affairs of trustee companies as the phrase ‘affairs of a body corporate’ has a defined meaning for this purpose in s 53 of the Act. Relevantly, s 53 provides that the ‘affairs of a body corporate’ for the purposes of ss 232, 233 and 234 [of the CA] include:
(a) …business, trading, transactions and dealings (…including transactions and dealings as… trustee)…
(b) in the case of a body corporate (not being an authorised trustee corporation) that is a trustee (but without limiting the generality of paragraph (a))–matters concerned with the ascertainment of the identity of the persons who are beneficiaries under the trust, their rights under the trust and any payments that they have received, or are entitled to receive, under the terms of the trust.

S 53 is clear in its terms. The affairs of trustee companies are within the statutory meaning of ‘affairs of a body corporate’ for the purposes of s 232…

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734 Vigliaroni at [61]. 735 Ibid, [63].
735 Ibid, [63].
Pivotal to Davies J’s decision was her Honour’s observation that the phrase ‘conduct of a company’s affairs’ under s 232 is a defined phrase pursuant to s 53 under which the conduct of a company’s affairs includes the affairs of a CT in carrying out activities in the capacity as trustee and determining and enforcing the rights of the beneficiaries of any such trust. The imputing of the s 53 definition of ‘conduct of a company’s affairs’ (including affairs as trustee) into s 232 satisfied the first element of s 232 according to Davies J, providing a definitional bridge for the conduct of CTs to be included within the affairs described in s 232(a).

The next important element of Davies J’s decision was that where the oppressive conduct in the CT’s affairs was found to be ‘oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or any other capacity,’ relief will be provided, even where the oppression affects the member in the capacity of a unitholder in a UT. As Davies J explained:

…the scope of the statutory oppression remedy includes relief for conduct of the prescribed kind [CA s 233] that affects a member of the trustee company in that member’s capacity as a beneficiary of the trust of which the company is trustee [CA s 234]. In other words, the statute specifically provides for remedy under oppression provisions where the oppression relates to the operation of a trust which has a CT.

After concluding this novel application of s 232 to cases involving UTs in light of s 53, Davies J proceeded to cite at length the opposing substantial case law that developed from Young J in Kizquari onwards. In rejecting the reasoning of Young J in Kizquari and the other cases that followed Kizquari, Davies J emphasised the fact that none of the previous cases had dealt with the application of s 53, and had therefore failed to recognise the main basis upon which the CAORs could apply to UT cases. Accordingly, Davies J determined:

In my view, s 53 puts beyond any doubt that the Court’s jurisdiction and powers under the statutory oppression provisions are not circumscribed in respect of a trustee company and accordingly I conclude that I should depart from the view expressed by Young J in Kizquari and the cases which have supported that view, in

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736 CA 2001 (Cth) s 232(e).
737 Vigliaroni [2009] VSC 428 (29 September 2009) [63].
738 Ibid.
739 Ibid [68].
view of s 53.\textsuperscript{740}

In rejecting previous positions that the CAORs (and s 233 in particular) lacked jurisdiction to deal with an equitable interest in a UT (namely the units),\textsuperscript{741} Davies J argued that the phrase ‘in relation to the company’ under s 33 merely required:\textsuperscript{742}

a rational and discernible link between the remedy and the company in which the oppression has occurred. In other words, any remedy granted under s 233 must not be extraneous to achieving the object of relieving the oppression and must be appropriate to putting an end to the causes of oppression, including where the company acts as trustee and the oppression relates to the affairs of the trust. In appropriate cases the remedy may include orders dealing with the equitable interests in the trust, in my view.\textsuperscript{743}

Davies J noted that once s 233 had been triggered by satisfying the criteria, the courts had very broad powers to remedy the oppression. Her Honour also noted that the High Court in \textit{Backoffice Appeal}\textsuperscript{744} (which had been decided while the trial before her Honour was in progress) had affirmed that ss 232 and 233 were to be read broadly and that ‘[t]he imposition of judge-made limitations on their scope is to be approached with caution.’\textsuperscript{745} Apparently, Davies J believed \textit{Kizquari} to be an example of such a judge-imposed limitation.\textsuperscript{746}

Davies J’s decision was a vociferous change from the previous position of the courts. In acknowledging the seriousness of rejecting the position held in a long line of cases on the issues at hand, Davies J explained that:

\begin{quote}
    The fundamental responsibility of a court when it interprets a statute is to give effect to the legislative intention as it is expressed in the statute. It is not part of the court’s function to perpetuate error and to follow single justice authority which
\end{quote}

\textsuperscript{740}Ibid.
\textsuperscript{741}The view that Chesterman J expressed in \textit{Re Polyresins Pty Ltd}, which Young JA cited with approval in \textit{McEwen} that the equitable interests [ie the units] in the trust cannot be dealt with by the Court under s 233. Ibid.
\textsuperscript{742}Ibid.
\textsuperscript{744}(2009) 257 ALR 610.
\textsuperscript{746}See Monichino, above n 482, 18.
does not give effect to the legislative intention. Accordingly, if oppression is found, I should not decline to grant the relief sought merely to maintain a consistency of approach with the Kizquari line of authority.747

The potential impact of Davies J’s decision, while still being only a single judge decision, was to change the course of the law with respect to how UTs are dealt with under s 232. While some commentators welcomed the decision as finally providing oppressed unitholders with access under the CAORs to the necessary relief,748 the decision failed to provide a conclusive resolution to the state of the law. As Monichino749 observed:

There was no appeal from Justice Davies’ decision. Accordingly, there is presently a tension between two lines of first instance decisions. The legal position will remain unclear until we have a decision from an intermediate Court of Appeal. Litigation practitioners acting for a plaintiff (disgruntled unitholder) would be wise in the light of the uncertainty in the law to seek in the alternative to an order for a compulsory purchase of units under s 233, (alternatively s 467(1)(c)), an order that the corporate trustee be wound up and the liquidator be appointed as receiver of the trust, alternatively an order that under the relevant Trustee Act that the corporate trustee be removed and be replaced with another trustee to be appointed by the court. Appointment of a receiver, alternatively a replacement professional trustee, is, however, less than an ideal solution. Certainly, it is not a long-term solution.750

Monichino’s comments highlighted the uncertainty that prevailed following Davies J’s decision in Vigliaroni. This was not simply because her Honour’s single decision rejected a long line of previous decisions on the subject; it was also because of the potential flaws in Davies J’s argument with respect to the effect of s 53 on s 232.

748 Michael Wise authored a brief article in the Law Institute Journal of Victoria in which he described Davies J’s ‘careful judgment’ as follows: ‘This is a welcome development that appears to be both principled and intended to achieve a practical result. It permits the court, in a proper case, to provide a just result by ordering one party to sell its units in the trust to another unitholder rather than leaving the parties to pursue less flexible trust remedies dictated solely by the form of the structure they have used.’ Wise, above n 594, 56. Peter Agardy also noted that the decision: ‘clears the way for a more streamlined approach to oppression cases in which a company acts as trustee of a unit trust, so that the court can make a comprehensive order dealing with both the shares in the company and the units in the trust.’ Peter Agardy, ‘Oppression and units in a unit trust-Vigliaroni v CPS Investment Holdings-Case Note’ (February 2010) Insolvency Law Bulletin 99.
749 Monichino acted for the plaintiff and authored a substantive article on the decision by Davies J in Vigliaroni, which provided a number of insights and comments. Monichino, above n 482.
750 Ibid 19.
As Windeyer J held in _Trust Company Ltd v Noosa Venture 1 Pty Ltd ('Noosa Ventures'),_751 the argument (that s 232 refers to ‘the conduct of the company’s affairs’ as defined in s 53 to include the affairs of the company as trustee in dealing with beneficiaries rights) appear persuasive. Historically, however, there is little evidence to suggest that the oppression remedies developed over time and drafted into the CL were ever intended to be applied to the conduct of a CT in UTs, whether in Australia or overseas. It is possible that in drafting s 232, the use of the phrase ‘conduct of the company’s affairs’ was used without appreciating the full implications under s 53 that the actions of a trustee could be examined under the _CA ORs_.752 Had the intention been to allow s 53 to be applied in this way to _CA ORs_, this could have been stated more clearly in the legislation.753 Nevertheless, it is undeniable that s 53 states its purpose is to define ‘affairs of a company’ for the purposes of s 232 and to that extent, Davies J’s position on the matter is robust.754

It is submitted that greater difficulty arises from Davies J’s conclusion that the phrase in s 232, ‘a member or members whether in that capacity or any other capacity,’ empowered the court to provide relief to a shareholder in the capacity of unitholder of a UT. While the phrase ‘or any other capacity’ may be ambiguous to an extent, its intention appears to have been directed more towards providing relief under s 233 to a shareholder who holds the _shares_ as trustee,755 or alternatively, where a shareholder is also a director, employee, or has some other direct relationship to the CT that is affected via the oppression against the shareholder. However, it does not seem to provide relief to a shareholder in relation to remedying issues unrelated to the shareholder, such as units (or other assets/rights that the shareholder may hold). While there has been very limited precedent discussion on the scope under _CA ORs_ to compensate interests beyond

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751 (2010) 80 ACSR 485. This case is discussed below.
752 For a discussion on the meaning of ‘in the affairs of the company’ under s 53, see _ASC v Lucas_ (1992) 36 FCR 165 cited by Aherns Lawyers, above n 619.
753 As discussed further, Windeyer J in _Noosa Ventures_ highlights the fact that the phrase ‘in the affairs of the company’ was not repeated in s 233 when discussing the powers of the court, with the legislation merely referring to the fact that the court can make any order under this section that it considers appropriate ‘in relation to the company.’ _Noosa Ventures_ (2010) 80 ACSR 485, [103] (emphasis added). This thesis submits such an intention should be made clear in the legislation.
754 See also May, above n 615, 275.
755 As illustrated in _Re Brightview Ltd_ [2004] BCC 542 (Ch D), where it was confirmed that a nominee shareholder has standing to bring a petition under the equivalent English provisions and that the ‘interests’ of a nominee shareholder are capable of including the economic and contractual interests of the beneficial owner of the shares. See Ford, Austin and Ramsay, above n 234, ch 11.440.
the shareholding, for example, in Starr, Justice Young noted the reluctance of the courts to utilise CAORs to assist franchisees in enforcing their franchise contracts with the corporate franchisor. Indeed, Young J’s approach in the cases outlined above has generally been to direct non-shareholder rights to be enforced outside of the CAORs. There does not appear to be evidence of any precedent case law to validate Davies J’s assertion that the wording ‘in any other capacity’ was intended to open up CAORs in this manner.

Michael May similarly noted the interpretation by Davies J of ‘in any other capacity’ as potentially problematic. Citing Ford et al on the topic, who concluded that ‘any other capacity’ can only relate to other capacities that were directly connected with the share investment, May suggested that Vigliaroni went too far in applying relief in circumstances where there was no direct connection between the oppressed unitholder and the shareholders in the CT.

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756 Magner, above n 21.
757 For example, in Starr (1991) 6 ACSR 63 at 66, Justice Young stated that under the CAORs:
Although there are some dicta as to the extent of the operation of this new subsection, in Re Dernacourt Investments Pty Ltd (1990) 20 NSWLR 588 at 620; 2 ACSR 553 at 566 the ambit of the section has not been fully discussed in any reported case, so far as I am aware. So far as this instant case is concerned, it would seem to me clearly the position that if the only effect of the conduct complained about is against the plaintiff in its capacity as a franchisee, then normally the court would decline to give relief: see Re Five Minute Car Wash Service Ltd [1966] 1 WLR 745 at 751–2.
758 Ibid.
759 May quotes Ford, Austin and Ramsay as follows:
The limits of the ‘other capacities’ contemplated by s 232(e) have been explained by reference to the nature of the company and the significance that the other capacity has (aside from its connection to membership): Although it is clear that conduct which unfairly removes a member from a directorship could attract relief, it cannot be every relationship of a member to a company which demands relief. The types of relationship relevant to the section probably differ according to the size and nature of the company and whether the particular relationship in the circumstances has significance independent of the membership of the company. For example, a member employed by the company may be prejudiced in the capacity of employee. Whether the section is attracted would seem to depend on whether, in the circumstances, the employment relation was a way in which the member received a return for investment or whether the employment was independent of being a member. So, for example, where a small company is so organised that benefits are tied to being a director rather than a shareholder, a member-director who is unfairly prejudiced as director no longer has to resort to an application for winding up on the just and equitable ground, s 461(1)(k), but can ask the court to make some other more suitable order under Pt. 2F.1.16.

May stated: ‘For those reasons, it is respectfully submitted that the Vigliaroni decision was wrong on this issue. Regardless of the complexity of the corporate structures involved in a given case, oppression is a remedy that is only available to members. Where the person who has been “oppressed” is not a member and does not have any connection to a member, then there cannot be any basis for a finding of oppression.’ See May, above n 615, 277.
The decision in Vigliaroni was subsequently criticised in obiter in Noosa Ventures, which involved an application by an aggrieved unitholder in order to avoid a forced buyout pursuant to the trust deed of the venture. While there were a range of claims and cross-claims in relation to breach of contract and other disputed matters, the case included an application for relief under s 232 to protect against the forced buyout. On the application of s 232 to a CT, Windeyer J acknowledged the relevance of s 53 raised by Davies J in Vigliaroni, and although his Honour held the conduct in any event was not oppressive, he felt it appropriate to provide for the alternative if oppression was found to have occurred on appeal.

762 This matter was heard before Windeyer AJ in the Supreme Court of NSW. The matter involved a breakdown between joint venturers involved in the acquisition of the Sheraton Hotel in Noosa. The dispute was between the plaintiff Trust Company Ltd (‘TCL’), and the defendant Valad Commercial Management Ltd (‘Valad’). TCL and Valad each held 50% of the shares in Noosa Venture 1 Pty Ltd, (which was the trustee of the Noosa Venture Trust) and 50% of the units in the Noosa Venture Trust. The Noosa Venture Trust was established to facilitate a joint venture between TCL and Valad to acquire and redevelop the Sheraton Hotel in Noosa. Valad subsequently suffered financial distress and, unable to fund its part of the project, sought to trigger an automatic buyout of its units by TCL (against the wishes of TCL) pursuant to a clause in the trust deed that dictated an automatic valuation and buyout procedure. For its part, TCL (via its custodian, Ashington) sought relief against the forced buyout, and applied to the court to have Noosa Ventures wound up pursuant to s 467. In early 2009, the Valad Property Group began to suffer financial difficulties and proposed to sell down its interests in the Noosa joint venture over time. From then on, Valad refused to progress the Noosa development, resulting in a deadlock between the directors of the trustee company (the directors were appointed equally from TCL and Valad). The unitholders’ agreement between the parties provided that in the event of a deadlock, either party could offer to sell their interest in the project to the other party and that the other party must accept to purchase the interest. Valad sought to take advantage of the deadlock provisions by offering to sell its interest to TCL. TCL disputed the offer’s legitimacy. In May 2010, Ashington Capital Pty Ltd, the custodian of TCL, filed winding-up proceedings against the trustee company on ‘just and equitable’ grounds under s 461(1)(k) of the CA (the May proceedings). An application was dismissed because Ashington Capital was not a shareholder in the trustee company and therefore did not have standing to bring the application. In June 2010, Ashington Capital and TCL jointly filed new winding-up proceedings (the June proceedings). Valad brought an application seeking to have the new proceedings summarily dismissed on a number of grounds. See case summary by AllensLinklaters, ‘Winding up a trustee company as termination of the trust?’ (17 January 2011) <http://www.allens.com.au/pubs/insol/foinsoljan11_01.htm>.
763 Ironically, TCL sought the remedy under s 232 of a court enforced buyout of its units by Valad.
764 Windeyer J stated: ‘The court can make an order under s 233 of the Act if the conduct of the affairs of a company is oppressive to, unfairly prejudicial to, or unfairly discriminatory against a member. Pursuant to s 53 of the Act the affairs of a company include transactions and dealings as trustee and property held as trustee.’ Noosa Ventures (2010) 80 ACSR 485 [100].
765 Based on Windeyer J’s similar findings of fact in relation to the breach of contract claim. His Honour therefore rejected the oppression claim by TCL on that basis. Ibid.
766 Windeyer J noted that the issue at hand dealt with the units in a UT, commenting: I should add that what is sought is not only an order that [Valad] purchase the shares of [TCL] in [Noosa Ventures P/L] as could be made under s 233(j)(d) of the Act but an order that [Valad] purchase the units in the trust held by [TCL]. The shares would of course have no real value as [Noosa Ventures P/L] does not own any assets beneficially. The order sought in respect of the units could only be made if it were permitted under s 233(1)(j) of the Act or if some other order were appropriate under s 233(1). In either case to comply with s 233 any order would have to be an order
Windeyer J proceeded to cite the precedent case law based on *Kizquari*, noting (as Davies J had raised) that none of these previous cases had dealt with s 53. Windeyer J nevertheless concluded that the decision of Davies J in *Vigliaroni* was incorrect on the question of whether s 233 can apply to UTs on the basis that s 233, which provides the court with the power to provide relief, did not use the phrase ‘the affairs of the company’ defined in s 53. As Windeyer J explained:

With respect to the decision of Davies J and accepting the requirement for coherence in corporations law I find it difficult to accept that an order ‘in relation to the company’ includes an order in relation to the affairs of the company because if that were the legislative intention it would have been easy enough to insert the words ‘or the affairs of the company’ after the words ‘the company’ in the commencement part of s 233(1) of the Act. It is a question of power not scope.767

Windeyer J therefore rejected the decision in *Vigliaroni* on the basis that a court was not empowered by s 233 to force a unitholder to buy out another unitholder as ‘such an order would ... be an order in relation to the trust not to the company.’768

By rejecting Davies J in *Vigliaroni*, Windeyer J’s obiter comments inferred that the fact s 233 did not use the phrase ‘the affairs of the company’ indicated a lack of legislative intention to apply the powers under s 233 to cases involving UTs. While it is difficult to find any definitive confirmation of the intention of the legislative drafters on the point, Windeyer J seems to have been guided by the weight of the historical findings on the issue that rejected the application of CAORs to cases involving UTs. Windeyer J perforce rejected Davies J’s conclusion that the question is one of court discretion rather than power—Windeyer J’s comments clearly determined that the courts do not have the power to apply s 233 to cases involving UTs, even if ‘oppression’ is found to have occurred.

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767 Ibid [105].
768 Windeyer J stated:

It follows that if it were necessary for me to decide this question I would not have felt bound to follow the decision in Vigliaroni in preference to the earlier decisions though accepting so far as those earlier decisions are concerned that at least their judgments do not appear to have given consideration to s 53 of the Act or its predecessors in earlier Acts. Thus I would not consider it within power to make an order requiring one trust beneficiary to buyout the interest of the other trust beneficiary. Such an order would, I think, be an order in relation to the trust not to the company.
Ford et al made critical observations concerning Windeyer J’s comments in *Noosa Ventures* regarding the lack of use of the phrase ‘affairs of the company’ in s 233,\(^{769}\) noting that s 233 nevertheless lists examples of orders in s 233 including an order ‘regulating the conduct of the company’s affairs in the future’ (s 233(1)(c)),\(^{770}\) which suggests parliament may have given consideration to allowing a wide range of orders, including those dealing with units in a UT. Ford et al also highlighted the incongruity in Windeyer J’s conclusions regarding the application of s 232 compared to s 233 to UTs:

The opening words of s 53 (s 53 defines ‘affairs of a body corporate’) provide that the section applies to ss 232 and 233. A conclusion that a company’s ‘affairs’ come within s 232 but do not come within s 233 (with the exception of an order under s 233(1)(c)) might be argued to lead to a misalignment between the grounds and the orders. Given that Parliament has indicated that the grounds upon which the court may make an order under s 233 include the conduct of the company’s affairs, there is an important question whether Parliament would have intended that the orders the court can then make do not, with the exception of s 233(1)(c), include an order in relation to the affairs of the company.\(^{771}\)

While Ford et al’s persuasive statement favoured the finding of Davies J in *Vigliaroni* over Windeyer J in *Noosa Ventures*, it fell short of categorically rejecting Windeyer J’s position. Windeyer’s rationale was that the legislature may have intended for CT’s to be subject to the regime under the CA0Rs, but that the legislature did not intend for courts to be able to extend the reach of the CA0Rs to orders dealing directly with the UTs, units or their unitholders. Indeed, this is essentially the practical position concluded by Mandie J in *Vanmarc*, who endorsed the ability for CA0Rs to be used to assist unitholders indirectly, as long as the relief only directly dealt with the obligations of the CT and rights of oppressed shareholders.

\(^{769}\) Ford, Austin and Ramsay, above n 234, ch 10.435.

\(^{770}\) As Ford noted, s 233(1)(c) does refer to the ‘company’s affairs’ but not ‘affairs of the company’ as follows: ‘s 233(1) The Court can make any order under this section that it considers appropriate in relation to the company, including an order ... (c) regulating the conduct of the company's affairs in the future; ...’ Ibid. Ford et al proceed to ask: ‘Does the fact that only one of the examples of orders listed in s 233 refers to the company’s “affairs” indicate that Parliament did not intend s 233 to apply generally to the affairs of a company?’ Ibid.

\(^{771}\) Ford et al noted:

Of course, even if it is accepted that the court does generally have the power under s 233 to make an order in relation the affairs of the company, then a court may find, as a matter of discretion, that no oppression is established or even if oppression is established, that no order be made concerning the assets of the trust of which the company is trustee.

\(^{771}\) Ibid.
Aside from the technical arguments, a broader observation is that Windeyer J’s obiter comments rejecting Vigliaroni in Noosa Ventures adhered to an important trend whereby the decisions seemed to depend upon whether:

(a) the judge determined oppression had occurred (as in Vigliaroni, therefore open to the ability to apply CAORs to provide relief to unitholders); or conversely

(b) where the judge found no oppressive conduct (as in Kizquari and Noosa Ventures, in which the judge was not inclined to determine that CAORs could be applied to cases involving UTs).

Regardless, the decision in Noosa Ventures and Ford et al’s comments delivered further uncertainty on the law, which strengthens the argument for legislative intervention to clarify the point decisively, and to provide substantive and definitive justice to unitholders.

A subsequent case that dealt with the application of CAORs to UTs was Tomanovic v Global Mortgage Equity Corporation (‘Tomanovic’). This case highlighted the fact that parties and the courts continue to experience difficulty in grappling with the application of CAORs to UTs. In the first instance, Austin J found oppression had not been established, but the Court of Appeal rejected Austin J’s decision, finding the conduct of the majority shareholder/unitholder

[2011] NSWCA 104. This case involved an appeal against the decision of Austin J (in Tomanovic v Argyle HQ Pty Ltd; Tomanovic v Global Mortgage Equity Corporation Pty Ltd; Sayer v Tomanovic [2010] NSWSC 152) regarding the breakdown in the business relationship between two principals (Tomanovic and Sayer) in a business made up of multiple operating entities (including trading companies and one UT). At one point, Tomanovic and Sayer agreed to separate their business relationship on the basis that Tomanovic would receive a net payout and each would independently operate certain parts of the business. In anticipation of finalising a separation agreement (and based on unexecuted heads of agreement), Sayer’s businesses made certain payments to Tomanovic’s businesses as loans that could be converted into part of the separation payment. However, after a period the parties had not agreed on all aspects of finalising the separation, and accordingly Sayer brought an action seeking repayment of the amounts paid to Tomanovic. Tomanovic commenced proceedings seeking an order that the Sayer interests buy out the Tomanovic interests pursuant to an alleged agreement, and under the CAORs in light of conduct that Tomanovic alleged was oppressive, or alternatively that the entities be wound up under s 467. The primary issues related to whether Sayer’s actions should be considered ‘oppressive’ under s 232, including the failure of Sayer to abide by the unexecuted heads of agreement. In the first instance, Austin J found Sayer’s actions were not oppressive and highlighted the high threshold required for s 233 orders to be invoked. See Snezana Vojvodic and Monique Nymeyer, ‘Australia: Shareholder Oppression—No Divorce Where Marriage Still Commercially Viable’ (4 May 2010) Mondaq Commercial Litigation and Dispute Resolution Update <http://www.mondaq.com/australia/x/99710/Directors+Officers/Shareholder+Oppression+No+Divorce+Where+Marriage+Still+Commercially+Viable>.

Campbell JA, Macfarlan and Young JJA agreeing.
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satisfied the oppression requirements of CAORs. Consequently, a court-enforced buyout was ordered of the minority’s shares and units based on independent valuations (declining the more drastic remedy sought by the minority of a winding up order).

The appeal noted that neither the parties nor the trial judge had properly considered the ability to value units as part of the buyout. The appeal acknowledged the Kizquari line of cases and the strength of the Vigliaroni decision in light of s 53, as well as the fact that Noosa Ventures had questioned Vigliaroni. Unfortunately, it determined that given the issue had not been dealt with in the trial, nor in the arguments on appeal, the Court of Appeal was unable

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774 It must be noted that Tomanovic’s case is slightly unusual for the purposes of considering the issue, as a strong element in the decision by the Court of Appeal to apply CAORs was the existence of the unexecuted agreement between the parties to implement a buyout including the units. As Young JA commented:

The facts and circumstances of this case are, as far as my researches go, fairly unique. My researches have not disclosed a case where the parties have virtually come to an agreement to go their own separate ways, they have then taken some actions to implement that decision, but have stopped short of making a binding agreement or in consummating their decision and then the person who did indicate that he would leave the enterprise, wants to come back in and is met with resistance by his former partner.

Hence, the decision reflected aspects of estoppel and specific performance within application of the CAORs. While technically this should not affect the legal consideration of whether the court has the power to force the buyout of units under the CAORs, the fact that Sayer appeared to have agreed to the buyout as part of the unexecuted agreement, and ultimately agreed as part of consent orders, provides a particular set of circumstances that lends itself to allowing the application of CAORs to the case.

775 Pivotal to the case was the role of an unexecuted heads of agreement that had contemplated a buyout of the minority’s interests. The appeal decision provided important comments on the role of ‘legitimate expectations’ and ‘reasonable offers’ in assessing whether oppression had occurred in the context of the heads of agreement. Ibid. Elizabeth Boros, ‘NSW CA on “legitimate expectation” and relevance of a purchase offer in the context of oppression proceedings’ on Elizabeth Boros, Corporate Law (3 November 2011) <http://elizabethboros.blogspot.com.au/2011/11/nsw-ca-on-legitimate-expectation-and.html>.

776 To the extent that the buyout related in part to units in a UT, Campbell JA commented that ‘no attention was paid, at either the trial or on the argument of the appeal, to the way in which the available remedy for oppression operated in relation to the units in the 9 Argyle Street Unit Trust.’ He further noted that the buyout of shares in the CT would not deal with the assets of the trust but that ‘when the trust has at all times been an important part of the overall commercial group, failure to deal with ownership of units in the trust would result in any relief granted by the court not totally resolving the commercial relations between the parties.’ Tomanovic [2010] NSWSC 152 [300].

777 Campbell JA cited Kizquari at [302] and the other subsequent cases in relation to the question:

‘about whether the court would have power to make an order requiring buyout of the interests in the trust. Various cases (288 ALR 310 at 379; Kizquari v Prestoo Pty Ltd (1993) 10 ACSR 606; Re Bountiful Pty Ltd (1994) 12 ACLC 902; Re Polyresins Pty Ltd [1999] 1 Qd R 599; (1998) 28 ACSR 671; Surf Road Nominees [2004] NSWSC 61; McEwen (2002) 44 ACSR 244 seem to lead to the conclusion that there is no such power,’

However, he proceeded to cite Davies J in Vigliaroni regarding the impact of s 53 in extending the ambit of s 232 to cover the affairs of trustees, which provided the court with ‘power to grant relief concerning assets that a corporate trustee held on trust.’ Ibid [304], Campbell JA also noted that ‘Vigliaroni has since been questioned in Trust Company Ltd v Noosa Venture 1 Pty Ltd (2010).’ Ibid [104]-[105].
to determine the issue.\textsuperscript{778} As a result, it is difficult to decipher whether the court would have supported \textit{Vigliaroni’s} position (which is especially disappointing given Young JA was on the appeal bench).\textsuperscript{779}

In contrast, the \textit{Vigliaroni} decision was decisively supported in \textit{Wain v Drapac}.\textsuperscript{780} This case involved a classic oppression claim by two former employee executives who had received shares/units in a successful private property group (including companies and trusts) and had subsequently fallen out with the principal majority owner.\textsuperscript{781} As with \textit{Vigliaroni}, the matter involved a complex range of employment factors, directors’ duties, contract, and other issues, in addition to the s 232 oppression claim. Another similarity to the \textit{Vigliaroni} case was that the request for relief against oppression by the plaintiffs related to shares and units in various

\begin{footnotesize}
\textsuperscript{778} Acknowledging the submission from Sayer that this issue could not be dealt with given the applicants had failed to raise the matter at trial or in the appeal, Campbell JA partially acceded to Sayer’s objection, although concluded that ‘it is likely that it will still be necessary for some aspects of the dealings between the trust and other corporate entities to be investigated as part of the process of valuing the shares in GMEC and Argyle HQ.’ Ibid [304].

\textsuperscript{779} A subsequent decision relating to the general proceedings (\textit{Tomanovic v Global Mortgage Equity Corporation Pty Ltd (No 2)} (2011) 288 ALR 385) dealt with costs and finalising orders for process of valuing of the shares, but provided no further comments on the question (although it is instructive to note the claimant—possibly in recognition of the potential for the units to fall outside the valuation process—seemed to have subsequently decided to seek the winding up of the UT). The court was relieved that the majority unitholder/shareholder then appeared to have been compromised by consenting to deal with an agreed buyout process (presumably including the value of the units). Ibid [9]. While Campbell JA appeared supportive of Davies J’s analysis of s 53 in \textit{Vigliaroni’s} case, it is difficult to conclude whether CAORs were to be applied to the valuation of units in this case.

\textsuperscript{780} [2012] VSC 156 (26 April 2012). This case was recently heard before Ferguson J in the Supreme Court of Victoria. At the time of submitting this thesis, the case is under appeal.

\textsuperscript{781} The case relates to a dispute between Drapac, a successful property developer, and two former executives (Wain and Murchie) who were employed in Drapac’s property group. Over a two-year period from July 2004 to July 2006, Wain and Murchie (either directly or through companies that they controlled) were issued with shares in two companies, Endoline Pty Ltd and Drapac Management Ltd, and units in trusts that formed part of the Drapac Group. Wain held a 13.5% interest and Murchie a 3.5% interest in the relevant entities. After working harmoniously for a number of years, the relationship between Drapac, on the one hand, and Wain and Murchie on the other hand, soured to the point that Wain’s employment was terminated and Murchie resigned in 2009. Wain and Murchie sought orders under s 233 for the purchase by the Drapac entities of the shares and units they held, arguing that their treatment by Drapac and his related parties was oppressive, and therefore Wain and Murchie were entitled to seek relief under s 233 to have their shares and units bought out for fair value. Drapac’s defence argued that Drapac’s actions were justified, and counterclaimed against the plaintiffs in relation to the purchase of properties by them in conflict with their employment and directors’ fiduciary duties owed to the Drapac Group. Drapac also claimed that the shares and units issues to the plaintiffs (for no consideration) were part of an employment agreement that was conditional upon their long term employment (and performance) so that the units and shares were held by the plaintiffs as bare trustees, and Drapac asked the court to order the plaintiffs to transfer the shares and units back to the Drapac group. Ferguson J found in favour of the plaintiffs, concluded her Honour’s decision as follows:

\textit{The Wain and Murchie parties are the beneficial owners of the shares and units issued to them in relation to the Drapac Group. Taken cumulatively, the conduct of the Drapac parties was oppressive or unfairly prejudicial to them within the meaning of s 232 of the Corporations Act. As sought in the prayer for relief to the statement of claim, the Wain and Murchie parties are entitled to orders for Drapac and Briaroaks to purchase their interests at fair value.}

[2012] VSC 156 (26 April 2012) [295].
\end{footnotesize}
entities in a group (each with varying amounts of value), as distinct from the majority of other cases where the relief against oppression action was targeted at a limited number of single entities (generally comprised of a valueless CT acting for a valuable trust). Consistent with the theme identified above, in this case, Ferguson J determined oppression had occurred, and accordingly found that CAORs applied to cases involving UTs.

In determining the matter, Ferguson J first concluded on the question whether ‘oppression’ had occurred for the purposes of s 232. Following the decisions in Vigliaroni and Noosa Ventures, Ferguson J ensured that s 53 was central to the consideration of whether oppression had occurred with respect to the ‘affairs of the company’, emphasising the references to trustees, trusts and beneficiaries in s 53. In addition, as with Vigliaroni and Noosa Ventures, Ferguson J noted (pursuant to Backoffice Appeal) that ss 232 and 233 should be read broadly.

Importantly, as in other oppression cases, Ferguson J introduced the concept of a ‘quasi-partnership’, as discussed in Ebrahimi, by explaining that oppressive conduct is not simply a legal construct that evolved in the vacuum of CL statute. Rather, it draws on equitable principles based in the doctrine of legitimate expectations that arise between quasi-partners in the creation of a venture, whatever the form of the entity in which the venture takes place. In effect,

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782 For example, in Noosa Ventures (2010) 80 ACSR 485.
783 The theme identified is that where a court determined oppression (in its general law meaning) had occurred, the court found a way to apply the CAORs sought by the oppressed plaintiff. Where the court did not determine oppression had occurred, the courts had similarly determined that CAORs were unable to be applied to cases involving UTs.
784 Per Davies J in Vigliaroni.
785 Drapac [2012] VSC 156 (26 April 2012) [273].
786 (2009) 238 CLR 304.
787 Drapac [2012] VSC 156 (26 April 2012) [272].
789 The reference to quasi-partnerships by Ferguson J is important as Lord Wilberforce in Ebrahimi discussed the fact that the principles of legitimate expectations in quasi-partnerships transcend the type of structure used for the venture, whether they are companies, legal partnerships, trusts or some other structure. As Ferguson J noted:

Although the right to the relief in respect of oppressive conduct is based in statute, the courts have made it clear that equitable considerations have a role to play in determining whether the relief should be granted. This is best summarised in the following passage from Lord Wilberforce's speech in Ebrahimi v Westbourne Galleries Ltd when his Lordship was referring to the English provisions for winding up on the just and equitable ground: [A] limited company is more than a mere legal entity, with a personality in law of its own: that there is room in Company Law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The ‘just and equitable’ provision does not, as the respondents [the company] suggest, entitle one party to disregard the obligation he assumes by entering a company,
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Ferguson J’s reference to *Ebrahimi* was geared towards lending weight to the broader approach of applying CAORs to cases of oppression generally (irrespective of the structure) so that a just and equitable result could be provided to the oppressed party. In support of this approach, Ferguson J proceeded to cite a recent UK case of *Croly v Good* (‘*Croly*’)\(^790\) that suggested the principles outlined by *Ebrahimi* could be used to effect an enforced buyout by the court in an oppression case involving a company (in stark contrast to the discussion in *Koko Black*).\(^791\) While the UK case cited by Ferguson J focussed on providing relief to shareholders in companies, her Honour seemed to infer that these principles should extend to other types of ‘quasi-partnerships’ given the broad reach of equity.

The *Drapac* case dealt with a number of entities, including companies and trusts in which the minority shareholders were related, but were different parties from the unitholders. This created complexities in determining standing under the CAORs. The *Drapac* defence raised a series of arguments against the granting of relief under ss 232 and 233, including an issue of standing with respect to the fact that the oppressed parties (namely Murchie and Wain) were not beneficiaries of the units held in the Drapac Group, arguing that the nexus required pursuant to the phrase ‘a member in any other capacity’ had not been achieved.\(^792\) Further, it was argued that the trustees of the UTs themselves had not committed any acts of oppression (ie if there was oppression, it was conducted by Drapac personally) with the inference that s 232 cannot apply because there was no oppression in the ‘affairs of the company’. Finally, the defence argued that, to the extent the trustees

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\(^{790}\) [2010] EWHC 1 (Ch) (Cooke J, England and Wales Companies Court).

\(^{791}\) (2008) 66 ACSR 325. As discussed above in chapter 4.5, the *Koko Black* case held that the only remedy available under *Ebrahimi* was winding up, and therefore *Ebrahimi* had no application where a buyout was sought.

\(^{792}\) Ibid [281].
had committed any wrongs, the appropriate statutory powers to address such wrongs was pursuant to the ‘provisions of the Trustee Act 1958 (Vic) not under the oppression provisions in the Corporations Act.’793 The defence submitted that the law does not lack remedies (given the range of remedies under equity and trusts law) and that the solution for an oppressed unitholder is not to be found in the oppression provisions of the CA.

Citing Vigliaroni at length, Ferguson J rejected all these arguments, concluding that Vigliaroni provided a substantive basis to enforce a buyout where oppression had been established with respect to aggrieved parties who owned (directly or indirectly) shares and units across a group, and where a just and equitable outcome could only be achieved by taking a holistic approach to dealing with and valuing the shares and units.794 Ferguson J rejected Windeyer J’s criticism of Vigliaroni in Noosa Ventures with respect to the interpretation of s 53, arguing that a narrow interpretation would render s 232 ineffective in providing substantive relief contradictory to the apparently broad powers available to the court under s 233.795

793 Ibid [283].
794 Ferguson J stated:

The Wain and Murchie parties submitted that in accordance with the broad interpretation to be given to ss 232 and 233, those sections are intended to be beneficial provisions designed to benefit the oppressed, not to give comfort or protection to the oppressor. Counsel for the Wain and Murchie parties submitted that this is particularly so in circumstances where the corporate structure was chosen by Drapac. They submitted that an artificially technical construction of the kind urged by the Drapac parties is antithetical to the way in which the provisions ought to be approached. Those submissions have much force, particularly when regard is had to s 53 which refers to the affairs of the company as including a company's business, transactions and dealings conducted jointly with another and including transactions and dealings as trustee. In this case, that requires consideration of the business conducted by the Drapac Group. Separate legal entities with their own rights and obligations make up that group. However, it would be artificial in the extreme to classify, for example, the termination of Wain's employment as a matter only relevant to the conduct of the affairs of Drapac Consulting. Such an analysis would ignore the reality of how the business operated with the same natural persons making decisions no matter which company that they were wearing and with the employees working for the Drapac Group although employed by Drapac Consulting. There is no proper basis to restrict the interpretation of ss 232 and 233 in this narrow way.

Drapac [2012] VSC 156 (26 April 2012) [276].
795 As Ferguson J noted:

The words ‘in respect of’ have a very wide meaning. Bearing this in mind, and with respect, in my opinion Windeyer AJ's construction of the legislation is too narrow. Were that interpretation to be accepted, then in cases such as the present, where there is a complex corporate structure that is a mixture of companies and trusts but in a real sense only one business is conducted by the corporate group, the legislation would be rendered virtually useless to remedy the real harm that has been caused by the oppressive conduct. It would strike me as odd if the court could take into account oppressive or unfair conduct in the company's affairs in determining whether relief may be granted but then could not give effective relief to redress the harm caused by that conduct. That this is not intended is, I think, clear from the terms of s 233 in respect of at least one form of order for which specific provision is made. In this regard, the section provides that the court may make any order that it considers appropriate in relation to the company including an order regulating the conduct of the company's affairs in the future. As noted above, the company's affairs includes its business, transactions and dealings with others. In my view, it is clear that the legislative intent was to include the power to grant relief provided that (in the words of Davies J) there is a 'rational and discernible
At the time of submitting this thesis, the decision of Ferguson J is under appeal. While Ferguson J largely followed the thinking of Davies J in Vigliaroni, as noted above, her Honour supported this approach by introducing the ‘quasi-partnership’ concept of Ebrahimi. Also noted earlier with respect to Koko Black, the introduction of this principle into a dispute involving a UT is not unique. It is submitted that what is novel is Ferguson J’s assertion that the ‘quasi-partnership’ principle can be used as more than simply an equitable principle, but as a bridge in supporting statutory relief under the CA ORs, especially when applied to a buyout remedy (given Koko Black excluded buyouts as a remedy under Ebrahimi). As cited above, Young J in McEwen supported the idea that the principle of ‘legitimate expectations’ (which is a sub-set of ‘quasi-partnerships’) was applicable to cases involving trusts, but (unlike Ferguson J) his Honour used this as a reason for excluding the application of CA ORs to UTs.

Although Drapac is under appeal, the decision was definitive in its support for the link between the remedy and the company in which the oppression has occurred. In a complex corporate structure (such as the Drapac Group) there is such a link between the companies and the relevant trusts which together operate the business. In my opinion there is power to grant the relief sought and consideration needs now to be given to whether, as a matter of discretion, it should be given. 

Ibid [287].

796 While the case is pending an appeal, on 31 July 2013 Ferguson J handed down a subsequent judgement on the original case in relation to the valuation of the shares and units: Wain & Ors v Drapac & Ors (No. 2) [2013] VSC 381. Maintaining Ferguson J’s approach in the trial, Ferguson J held that a holistic approach should likewise be taken to valuing the shares and units with regard to the value of the Drapac group as a whole, notwithstanding that the plaintiffs had only been issued with units in selected entities. Ferguson J held that the plaintiffs had received the relevant units and shares on the basis that these securities would provide the plaintiffs with an interest in the group, and therefore the plaintiffs should be entitled to receive compensation for these securities based on a group valuation, in the interests of providing substantive relief for the oppressive conduct. Ferguson J affirmed her Honour’s conclusion that there should be no restrictions on the application of s 233 to valuing the units (in addition to the shares).

797 An important issue not completely dealt with by Ferguson J was whether the principles of ‘quasi-partnership’ could allow for remedies other than a winding up on just and equitable grounds. As per the discussion in this thesis, the decision of Dodds-Streeton JJA in Koko Black found that the only relevant remedy available under Ebrahimi was a dissolution of the venture, and therefore was not applicable to cases where other remedies (such as a buyout or redemption) were sought. While Ferguson J referred to the recent UK case of Croly [2010] EWHC 1 (Ch) as an example of a court enforced buyout within the context of a ‘quasi-partnership’, her Honour failed to highlight that in Croly, the plaintiff sought the buyout pursuant to the relevant UK statutory CA ORs (which were available given that the case involved a company, not a trust). In that case, the reason for the plaintiffs raising Ebrahimi was to establish that certain legitimate expectations had been relied upon by the plaintiffs as a result of the promises by the defendants, and these expectations had been established prior to the formation of the company. The plaintiff therefore argued that these unmet expectations should be considered in determining whether oppression had been established, as per Ebrahimi. The principles of ‘quasi-partnership’ had been raised in order to augment the basis of their oppression case under the statutory oppression remedies, not to establish the remedies available. Croly had nothing to do with UTs or overturning the premise (as found in Koko Black) that Ebrahimi on its own could not be used to force a buyout. Ferguson J did not address this point directly.

798 McEwen (2002) 44 ACSR 244 [60].
Vigliaroni approach pursuant to s 53. The Vigliaroni approach also received indirect support in the recent case of Arhanghelschi. This case was also heard before Ferguson J, which involved a dispute between radiologist partners in a radiology business conducted through a UT. A minority unitholder radiologist had been ejected from the business by the other partners (for nominal consideration) pursuant to the terms permitted by a unitholders’ agreement. Ferguson J found against the plaintiff on the basis that the majority had acted appropriately in accordance with the terms of the agreement, and were commercially justified in their actions in the circumstances. Ferguson J highlighted the existence of the unitholders’ agreement as important in distinguishing the case from the equitable rights of parties in other (quasi) partnerships where no such agreements apply, such as in Vigliaroni. Accordingly, Ferguson J rejected the plaintiff’s claim under the CAORs, noting that the conduct was not oppressive pursuant to s 232.

While Ferguson J found against the plaintiff, her Honour clearly confirmed unitholders were within the scope of the CAORs in light of s 53, which is unsurprising given Ferguson J’s decision in Drapac. Ferguson J subtly cautioned the importance of pleading the oppression case correctly by noting that the plaintiff in Arhanghelschi had pleaded the principal doctor shareholder had suffered oppression in his own capacity, rather than in the capacity of a beneficiary under the UT as required by the wording ‘a member in any other capacity’ in s 232.

The extensive case reviews above illustrate a major shift in the direction of the law pursuant to Vigliaroni and s 53, although the fact that the decision was criticised in Noosa Ventures and that Drapac is under appeal highlights the

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802 Ibid [45]-[53].
803 Ibid n 37.
804 See ibid 38 where Ferguson J stated: ‘Dr Arhanghelschi did not claim that the conduct affected him in some other capacity which might have formed the basis for relief under ss 232 and 233.’
uncertain state of the law on this topic. As Michael May recently concluded, ‘[T]he current state of the law on this issue is unsatisfactory, and it is hoped that an opportunity will soon arise for an intermediate appellate court to clarify the existing conflicting authorities.’

6.7 Determining the Current Status of Unitholders’ Rights Under the Corporations Act Oppression Remedies in Light of the Case Law

The precarious position of oppressed unitholders under trust, contract and general law principles has prompted some to explore their right to access relief under the CAORs pursuant to the cases reviewed in this chapter. Whether unitholders have access to CAORs under the current structure is clearly a pivotal question in determining whether the contentions of this thesis can be supported.

There are a number of important findings in the review of case law in this chapter. Firstly, all the cases reviewed involved a shareholder in a CT bringing an action. There have been no cases brought by unitholders who are not also shareholders or related to shareholders, and such unitholders are currently unlikely to enjoy protection in light of the standing threshold outlined by s 234(a) that requires an application under the CAORs to be made by a member. Were the decisions in Vigliaroni and Drapac to gain momentum, there is potential scope for the Australian Securities & Investments Commission (‘ASIC’) to take a broader view of unitholders seeking the court’s assistance under s 234(e). Yet such discretion has not to date been used in this manner, and given the uncertainty of the broader state of the law, it is unlikely ASIC would intervene where there was no aggrieved shareholder in the CT.

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805 May, above n 615, 279.
806 As May stated:
   A wide power is given to ASIC to empower any person it thinks is appropriate to bring proceedings having regard to investigations it is conducting or has conducted into ‘the company’s affairs’—which again might pick up the various trust-related matters mentioned in s 53. However, there is no mention in s 234 of a beneficiary of a trust of which the corporation is trustee having the power to apply for an order under s 233.
807 Given this issue of standing, it is unlikely under the current law that unitholders in a Public UT (who generally do not also hold shares in the trustee vehicles) have standing under the CAORs. In addition, it is worth noting the MIS provisions and other sections of the CA similarly do not extend CAORs to registered schemes.
Where a unitholder is also a shareholder or related to a shareholder, there is a precedent under *Vanmarc*\textsuperscript{808} for the unitholder/shareholder to secure appropriate relief in the capacity of shareholder under the *CAORs* in relation to the oppression, as long as the relief is provided with respect to the shareholding (even if it provides ancillary relief to the unitholder). For example, in cases of oppression the court may order certain injunctions ordering persons to desist from certain actions deemed oppressive to the shareholder, which would similarly benefit the unitholder.

Nevertheless, given Ferguson J’s decision in *Drapac*\textsuperscript{809} is under appeal, the critical issue of whether courts are empowered to provide *CAORs* in a manner that either compensates the unitholder for their diminution in value of their unitholding, or requires a forced buyout of units remains unclear and a matter of significant debate.

Until recently, the overwhelming weight of case law has suggested that *CAORs* could not provide relief to oppressed unitholders by dealing with the units (or their value) of the UT, pursuant to the *Kizquari* cases.\textsuperscript{810}

In contrast, Davies J determined in *Vigliaroni* (upheld by Ferguson J in *Drapac*) that s 53 of the *CA* provided the right of *CAORs* to be applied to trustee company affairs, and that the mere fact that s 53 had not been raised previously was not a justification for perpetuating bad law. There are a number of arguments where *Drapac* and *Vigliaroni* depart from the other decisions, which provided the basis for their Honour’s conclusions regarding the applicability of *CAORs* to UTs. Firstly, there is the issue of whether (in broad terms) there is a clear delineation between the application of the *CA* to cases involving companies, versus the application of trust and equitable principles to cases involving trusts.\textsuperscript{811} In contrast

\textsuperscript{808} (2000) 34 ACSR 222.
\textsuperscript{809} [2012] VSC 156 (26 April 2012).
\textsuperscript{810} See *Kizquari*. As Peter Agardy summarised in 2000 (prior to *Vigliaroni*), ‘[W]hile the courts have not completely and explicitly dismissed any possibility of assisting the unitholder in a unit trust, it is tolerably clear from the authorities that the sections apply to the affairs of the company only.’ Agardy concludes that where the trustee is the trustee of a UT, it is highly doubtful the court can assist: ‘In these situations the complaining party considers itself to be “locked in and frozen out”.’ Agardy, ‘Aspects of Trading Trusts’, above n 18, 24.
\textsuperscript{811} The conservative view of Young J in *Kizquari* is in line with the comments of Hely J in *Chan v Zacharia* (1984) 154 CLR 178 who noted: ‘The present is a trust case in which Company Law principles such as fraud on the minority play no part.’ Cited in Meagher and Gummow, above n 5, [316]. ‘The rights and obligations of the trustee, the manager and unitholders are not to be determined by reference to Company Law principles, but rather by the terms of the trust deed, and
to the position in Cachia, which rejected the application of CA principles to trusts, Drapac plainly accepted the application. Of prime importance is the interpretation and effect of s 53, which provides the statutory basis for extending the umbrella of CA over UTs. Furthermore, Ferguson J concluded that Ebrahimi provides support for the idea that a court may impose a buyout over unitholders (which was rejected in Koko Black) in light of Croly. In addition, Davies J in Vigliaroni and Ferguson J in Drapac both viewed the question of whether the court could apply CAORs to UTs as one of court discretion rather than power. The position of their Honours on all these issues provided the nexus for their conclusion that CAORs could apply to UTs. Nevertheless, as the decision in Noosa Ventures and the appeal in Drapac illustrate, Davies and Ferguson JJ’s positions remain contentious.

Michael May's recent analysis of the debate between the Kizquari and Vigliaroni positions summarised three pivotal issues upon which the law turns.\(^{812}\) The issues are based on whether the existence of the UT in relation to which a CAOR claim is made means that:

1. the alleged oppressive conduct in question is not ‘conduct of a company’s affairs’ for the purposes of s 232(a) because it is conduct of the trust’s affairs;
2. any orders made would not be made ‘in relation to the company’ for the purposes of s 233(1); and
3. the conduct in question will not meet the test of being ‘oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity’ for the purposes of s 232(e) because the conduct in question has no impact on the members of the corporation—it only affects the beneficiaries of the trust.

In relation to the first argument, May concluded that the existence of s 53 (which expressly provides that the phrase ‘company’s affairs’ includes for the purpose of

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\(^{812}\) May, above n 615, 275.
Chapter 6: Corporations Act: Oppression Remedies and Unitholder Case Law

*CAORs* the affairs of a CT in a trust and its dealings with the rights of beneficiaries) clearly establishes that s 232(a) may apply to the affairs of a CT, therefore the *Kizquari* cases had erred on this point (unsurprising given s 53 was not raised).  

In relation to the second argument, May concluded that although *Noosa Ventures* questioned whether courts are empowered to provide orders under s 233 (given the exact phrase ‘company’s affairs’ was not used, unlike in s 232), the better view is reflected in the response of Ferguson J in *Drapac*, who queried the logic of Windeyer J given the application in the wording of s 53 to each of ss 232, 233 and 234. Ferguson J argued that in light of this, Windeyer J’s basic position that the legislature did not intend to empower the courts to make orders under s 233 in cases of UTs is difficult to maintain. While it is likely that orders directed at the CT (eg ordering the CT to make a distribution to the oppressed beneficiary) seemed within the court’s powers under s 233, May noted that Windeyer J’s comments could have some merit where a court attempts to order the unitholders to take certain actions (eg via a buyout). Nevertheless, May ultimately concluded that Windeyer J’s argument in *Noosa Ventures* (rejecting the power of s 233 to allow orders dealing with a UT) was difficult.

While May’s conclusion regarding s 53’s application to s 233 has merit, the counterargument—that the power of s 233 is limited to dealing with CTs rather than the UT—should not be disregarded. Indeed, it is quite reasonable to conclude that the legislative intention of the references in s 53 to CTs was to empower the courts to deal with CTs (and their shareholders) within the context of *CAORs*—given CTs are companies, but not necessarily to deal with unitholders (especially if they are not also shareholders in the CT). On this point, it is apparent that the courts’ powers to make such orders under s 233 are ambiguous.

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813 Ibid.
814 The second argument is discussed below.
815 May, above n 615, 275.
816 Ibid.
817 In light of ‘French CJ’s reminder [in *Backoffice Appeal*] … that oppression provisions should be read broadly, and the point made by Ferguson J in *Wain v Drapac*, that s 53 is important context in construing s 233.’ May, above n 615, 275.
818 Ibid.
This uncertainty in the law is magnified when considering May’s third issue, namely how to interpret the meaning under s 232(e) of a member ‘in any other capacity’. May highlighted that in Vigliaroni, Davies J had commented with regard to one of the alleged factual examples of oppression that there had been oppression against two unitholders in a UT, but her Honour had failed to recognise that one of those supposedly oppressed unitholders was not in any way related to a shareholder in the CT and that Davies J was therefore wrong on the issue. While Vigliaroni and Drapac both contended it was necessary to take a holistic approach to the provision of relief under the CAORs where the alleged oppression occurred in a complex corporate group, it would be difficult to know how far such an approach could be sustained where, for example in a case such as Koko Black, the oppressed unitholders were not shareholders in the CT at all. May concluded in relation to the ability to establish that a unitholder is capable of being a member ‘in any other capacity’ for the purposes of s 232(e) that:

A member of a corporation who is also a beneficiary of that trust is in the best position to argue that oppression remedies are available. That argument becomes weaker as the member’s connection with the beneficial interest in the trust becomes more remote. Where the member has no immediate or subsequent beneficial interest in the property held by the first company on trust, it is difficult to see how an oppression claim relating to dealings with the trust property can be maintained.

May’s comments reflect the supposition that although s 53 provides a revelation in terms of whether CAORs can be applied to provide relief to unitholders, it is unable to comprehensively cross over the jurisdictional barrier between CAORs and the ability to deal with UTs. Accordingly, the present complex and ambiguous position lends itself to a legislative solution, as proposed herein.

819 Of the three issues listed above.
820 May stated:

It is respectfully submitted that the Vigliaroni decision was wrong on this issue. Regardless of the complexity of the corporate structures involved in a given case, oppression is a remedy that is only available to members. Where the person who has been “oppressed” is not a member and does not have any connection to a member, then there cannot be any basis for a finding of oppression.

May, above n 615, 277.
822 May, above n 615, 275.
823 Ie the CAORs can only indirectly deal with a UT and its unitholders (to the extent the company and its shareholders themselves have the power to deal with the UT and its unitholders). Insofar as such a position is correct, then there are scenarios (such as reflected in Koko Black, Vigliaroni and
In attempting to understand the opposing positions regarding the power of the CAORs to deal with UTs, one way to understand the debate is to view it as exhibiting elements of a classic ‘substance over form’ or ‘black letter law’ issue. Nevertheless, as identified in this thesis, it is submitted that an equally important way to understand the debate is via the theme identified, whereby decisions were consistently determined on the basis of whether the relevant plaintiff unitholders had in fact suffered oppression. The table in Appendix A summarises the decisions and serves to highlight this trend. These observations support the argument that where unitholders suffer oppression, as a matter of fairness and justice they should have access to the same rights enjoyed by shareholders under the CAORs.

While this is important in understanding the possible motivations behind the relevant decisions, ultimately the issue of whether CAORs can be applied to UTs remains unclear (to varying degrees depending on the structural scenario).

While the appeal in Drapac may provide further clarity on the matter, it is
unlikely to provide a conclusive outcome across all jurisdictions. While Davies J presented s 53 as the ‘silver bullet’ to solve the question of whether CA ORs can apply to UTs, closer analysis reveals this not to be the case. Notwithstanding the references in s 53 to ss 232-234 and the requirement for the courts to have regard to the plain meaning of the statutory wording, it is submitted that it is difficult to conclude positively that s 53 was actually intended to allow unitholders access to CA ORs. Section 53 deals with a range of circumstances where a body corporate’s ‘affairs’ are dealt with across the CA, and deals with a range of activities in which a body corporate may be involved. It is possible therefore

While the doctrine of precedent (see Australian Securities Commission v Marlborough Gold Mines Ltd (1993) 177 CLR 485) requires other courts to have regard for precedent decisions, it should be noted that Vigliaroni and Drapac are single judge decisions, and there is yet to be a definitive result in a higher court.

Michael Kirby summarised the rules of statutory interpretation as follows:

Amongst the most important of these principles have been:

- That where the applicable law is expressed in legislation the correct starting point for analysis is the text of the legislation and not judicial statements of the common law or even judicial elaborations of the statute;
- That the overall objective of statutory construction is to give effect to the purpose of parliament as expressed in the text of the statutory provisions; and
- That in deriving meaning from the text, so as to fulfil the purpose of parliament, it is a mistake to consider statutory words in isolation. The proper approach demands the derivation of the meaning of words from the legislative context in which those words appear. Specifically, it requires the interpreter to examine at the very least the sentence; often the paragraph; and preferably the immediately surrounding provisions (if not a wider review of the entire statutory context) to identify the meaning of the words in the context in which they are used.


As Spigelman J commented on the rule of statutory interpretation: ‘The words used may represent a compromise without consensus, so that … the decision has been left to the courts. Even more frequently, indeed almost always in cases of difficulty, the circumstances in which the statute falls to be applied were not actually contemplated by anyone.’ James Spigelman, ‘The Principle of Legality and the Clear Statement Principle’ (2005) 79 Australian Law Journal 769, 770 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1800423>.

Section 53 of the CA states: ‘Affairs of a body corporate: For the purposes of the definition of examinable affairs in section 9, section 53AA, 232, 233 or 234, paragraph 461(1)(e), section 487, subsection 1307(1) or section 1309, or of a prescribed provision of this Act, the affairs of a body corporate include:…’.

Section 53 of the CA deals with a range of activities of a body corporate including:

(a) the promotion, formation, membership, control, business, trading, transactions and dealings (whether alone or jointly with any other person or persons and including transactions and dealings as agent, bailee or trustee), property (whether held alone or jointly with any other person or persons and including property held as agent, bailee or trustee), liabilities (including liabilities owed jointly with any other persons or persons and liabilities as trustee), profits and other income, receipts, losses, outgoings and expenditure of the body; and

(b) in the case of a body corporate (not being a licensed trustee company within the meaning of Chapter 5D or the Public Trustee of a state or territory) that is a trustee (but without limiting the generality of paragraph (a))—matters concerned with the ascertainment of the identity of the persons who are beneficiaries under the trust, their rights under the trust and any payments that they have received, or are entitled to receive, under the terms of the trust; and

(c) the internal management and proceedings of the body; and

(d) any act or thing done (including any contract made and any transaction entered into) by or on behalf of the body, or to or in relation to the body or its business or property, at a time when: (i) a receiver, or a receiver and manager, is in possession of, or has control over, property of the body; or (ii) the body is under administration; or (iii) a deed of company arrangement executed by the body has not yet terminated; or (iii) a compromise or arrangement made between the body and any other person or persons is being administered; or (iv) the body is being wound up; and, without limiting the generality of the foregoing, any conduct of such a receiver or such a
that the legislative drafters did not give appropriate thought to the potential effect of including references to the activities of a trustee and the interests of beneficiaries under s 53(b) in connecting these activities to CAORs. Nevertheless, while this hypothesis may have merit, given the plain meaning of s 53 does not render the section ‘manifestly absurd or unreasonable’, the courts will be reluctant to reject outright the application to cases involving UTs.

It is clear that the wording of s 53 in facilitating the application of CAORs to UTs is clumsy at best, and does not provide lucidity or certainty as to how far rights under the CAORs may be applied to the various scenarios in which oppression may occur in cases involving UTs. The current legislative wording certainly does not appear to empower the court to provide comprehensive relief to oppressed unitholders (even if the unitholder is, or is somehow related to a shareholder). It is submitted that the CAORs should do so, but the CA as it is currently drafted does not.

For the purposes of this argument, it is not imperative to conclude formally whether either of the opposing views are correct, but merely to determine whether further legislative certainty would be worthwhile. It will be difficult for either view to prevail categorically without a substantial High Court determination.

receiver and manager, of an administrator of the body, of an administrator of such a deed of company arrangement, of a person administering such a compromise or arrangement or of a liquidator or provisional liquidator of the body; and

(c) the ownership of shares in, debentures of, and interests in a managed investment scheme made available by, the body; and

(f) the power of persons to exercise, or to control the exercise of, the rights to vote attached to shares in the body or to dispose of, or to exercise control over the disposal of, such shares; and

(g) matters concerned with the ascertainment of the persons who are or have been financially interested in the success or failure, or apparent success or failure, of the body or are or have been able to control or materially to influence the policy of the body; and

(h) the circumstances under which a person acquired or disposed of, or became entitled to acquire or dispose of, shares in, debentures of, or interests in a managed investment scheme made available by, the body; and

(j) where the body has made available interests in a managed investment scheme—any matters concerning the financial or business undertaking, scheme, common enterprise or investment contract to which the interests relate; and

(k) matters relating to or arising out of the audit of, or working papers or reports of an auditor concerning any matters referred to in a preceding paragraph.’

831 Given the range of other non-trust related activities to which a body corporate’s ‘affairs’ are deemed to include under s 53, it is possible (and indeed likely) that the legislative drafters intended other more appropriate activities to be the subject of the references to CAORs.

832 In applying the basic rules of statutory interpretation, section 15AA of the Acts Interpretations Act 1901 (Cth) states: ‘In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether the purpose or object is expressly stated in the Act or not) is to be preferred to each other interpretation.’ Section 15AA requires the courts to construe legislation, not rewrite it, and only to deviate if there is any ambiguity or a ‘manifestly absurd or unreasonable’ result. See s 15AB(1)(b).

833 Such was the critical decision in Noosa Ventures where the court felt reluctantly bound to apply s 53 to s 232 (albeit rejecting the application to s 233).
that end, the cases reviewed in this chapter have provided substantive evidence that the law remains in an untenable state of uncertainty and relative confusion, which could be remedied by legislative amendment.

6.8 Conclusions of Chapter 6

This chapter reviewed the case law dealing with the application of CAORs to UTs and the resulting state of the law, concluding as follows:

- While *Re Bodaibo* illustrated a ‘substance over form’ approach, there needs to be greater recognition that the decision supporting the application of CAORs to UTs resulted from consent orders by the parties agreeing that CAORs were applicable, therefore the classification of *Re Bodaibo* as a case that clearly supports the application of CAORs to unitholders is overstated.

- There have been numerous cases following *Kizquari* that rejected the application of CAORs to UTs and required that unitholders’ rights rely on the strict application of the trust deed. However, each of these cases found that oppressive conduct had not been established, so no ‘injustice’ was caused by rejecting the application of CAORs. Had the cases involved clearly oppressive conduct, the courts may have sought to explore avenues to apply CAORs to unitholders. Furthermore, none of these cases dealt with the references in s 53 to the application of CAORs to (among other things) trustees of CTs, therefore they failed to deal with an important consideration on the question.

- The *Vanmarc* cases illustrated a desire of the courts to broaden access to unitholders to provide justice via the shareholding in the CT without extending the jurisdiction of CAORs to deal with the UT and unitholders directly.

- The *Vigliaroni* case represented a complete change based on s 53 in the previous position under *Kizquari*. Although the decision received further single judge support in *Drapac* and *Arhanghelschi*, the correctness of the decision was questioned in *Noosa Ventures* and by various commentators. Importantly, both *Vigliaroni* and *Drapac* dealt with cases of clear
oppression, where CAORs were required in order to deliver justice to the oppressed parties.

- The full impact of Vigliaroni and Drapac is unclear until the appeal in Drapac is concluded. However, even if the appeal upholds the Vigliaroni approach to s 53, uncertainty will continue around the range of possible factual scenarios where a complex analysis is required to determine the nexus between the relevant oppressed unitholders and shareholders in the CTs. In many cases, oppressed unitholders may still be unable to access CAORs where the connection is insufficiently proven.

While the current state of the law is uncertain, the next chapter considers the scope for these issues to be addressed via the evolution of the common law, or (as this thesis proposes) pursuant to legislative intervention.
Chapter 7: Direction and Reform of the Law dealing with Oppression of Unitholders under The 
Corporations Act

7.1 Introduction

In light of the inadequate remedies available to oppressed unitholders outside of the CAORs, and the uncertainty as to whether CAORs may be applied to oppressed unitholders, this thesis argues that the law in its current state is unsatisfactory. Chapter 7 considers whether the law could develop in a manner that addresses these issues, or whether legislative reform is required and if so, in what form such reform should take under the CA. Pursuant to the proposal that amendments to the CAORs would be the most effective mechanism to address issues faced by oppressed unitholders, chapter 7.4 also considers reasons why such amendments to the CA have not occurred to date, and potential concerns in implementing such changes in the current regulatory climate. As an alternative to an amendment to the CA, chapter 7.5 also considers amendments to the Trustee Acts to provide protection to unitholders.

7.2 Possible Directions in General Law in Dealing with Oppression of Unitholders

The decisions in Vigliaroni and Drapac have clearly provided substantial grounds for the law to adopt the view that s 53 allows unitholders to obtain relief under the CAORs. While there has been some judicial\textsuperscript{834} and professional\textsuperscript{835} criticism of these decisions, in the event that the appeal in Drapac further endorses the Vigliaroni position, there will be distinct evidence of a trend towards broadening the application of CAORs to cases involving UTs pursuant to s 53. Interestingly, both Vigliaroni and Drapac are Victorian Supreme Court decisions, in contrast to the line of Kizquari cases that were all from NSW and Queensland. If the appeal in Drapac upholds Ferguson J’s decision that CAORs can be applied to providing

\textsuperscript{834} See Noosa Ventures (2010) 80 ACSR 485.
\textsuperscript{835} For example, see May, above n 615.
relief to unitholders, it will be interesting as to whether other jurisdictions, such as the NSW or Queensland Supreme Courts adopt the same approach. To date, they have been reluctant to do so.\textsuperscript{836}

Further, even if the appeal in \textit{Drapac} upholds Ferguson J’s position regarding s 53 of the \textit{CA} and other jurisdictions follow suit, not all unitholders will be able to secure relief under the \textit{CAORs}, as it appears likely a basic threshold issue will continue with respect to standing under s 234 that an action under the \textit{CAORs} must be brought by a shareholder. To that extent, in cases where unitholders are not also directly shareholders or related to shareholders in the CT, they will not enjoy the benefits of the \textit{CAORs}. While it is uncommon for Private UTs not to provide unitholders with shares in the CT, it does occur (see, for example, \textit{Koko Black}), but it is usually the case for Public UTs (unitholders in Public UTs rarely receive shares in the CT). Accordingly, the developments pursuant to \textit{Vigliaroni} and \textit{Drapac} are of limited assistance to unitholders in such circumstances.

Nonetheless, it is not only within the jurisdiction of the \textit{CAORs} that more effective relief may become available to oppressed unitholders. According to the traditional view of unitholders’ rights as a subject of trust law and equity, it is possible that equity could come to the further aid of unitholders were the law to evolve. As discussed, the narrow view of Hely J in \textit{Cachia} that the doctrine of fraud on the minority cannot apply to UTs has been questioned in recent cases.\textsuperscript{837} In considering the scope for equity and trust law to develop oppressed unitholders’ rights,\textsuperscript{838} Peter Agardy noted: ‘the door has also been left open by a statement by Young J in \textit{Metro Motor Inns Hotels and Motels Pty Ltd v Strathaven Holdings Pty Ltd}.\textsuperscript{839} His Honour observed that there is inherent power in the court to control all trustees and that Equity Courts are here to administer

\textsuperscript{836} Per \textit{Noosa Ventures} (2010) 80 ACSR 485, for example. While it is acknowledged there is an obligation for courts in each jurisdiction to strive for consistency and uniformity in the interpretation of the \textit{CA} (under the principle of comity) there is no obligation where a court determines the decision would be incorrect (see \textit{Australian Securities Commission v Marlborough Gold Mines Ltd} (1993) 177 CLR 485, 492 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ).

\textsuperscript{837} For example, by Austin J in \textit{Arakella} [2004] NSWSC 13.

\textsuperscript{838} Agardy’s comments were in reference to Mandie J’s broader position in \textit{Vanmarc} where his Honour confirmed \textit{CAORs} could be used by a shareholder notwithstanding the relief may assist them as unitholder.

\textsuperscript{839} (2000) NSWSC 1004.
Agardy was referring to Young J’s comments that:

Equity is not beyond the age of child bearing and must adjust its attitude to changing commercial scenarios. The fact that trading trusts of this nature have been growing in popularity over the last ten years has meant that equity has had to make orders of a type not known since before trading trusts ceased to be popular in about 1840 to preserve people’s rights.

Young J’s comments can be appreciated in the context of his Honour’s strict position in cases such as Kizquari and McEwen that rejected the ability to apply CAORs to UTs. Consistent with Young J’s position in these cases (that UTs are ultimately the domain of trust law and equity), in Metro Motors his Honour suggested that it is the laws of equity that can and must evolve to address the context in which modern commercial trading trusts such as UTs operate. The most important development in allowing relief for oppressed unitholders would be the ability for fraud on the minority to be applied to such cases. As noted above, while cases such as Arakella have queried Hely J’s position in Cachia, the approach has surprisingly not been raised in the primary cases dealing with CAORs (such as Kizquari and Vigliaroni). This suggests there is little scope for the doctrine to be applied to cases involving oppression of unitholders. To that extent, while Young J’s comments in Metro Motors propound the need for equity to evolve in addressing the issues facing trading trusts, such development in the law of equity will require groundbreaking decisions.

Accordingly, while it is possible for general law to build upon the Vigliaroni decision in extending the application of CAORs to UTs, and also for trust law to develop in allowing the equitable doctrine of fraud of the minority to be applied to UTs by rejecting Cachia, the conclusion is that legislative intervention would provide a clearer and more effective avenue to address the complexities inherent in the current law.

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840 Agardy, Aspects of Trading Trusts, above n 18, 23.
841 Metro Motors [2000] NSWSC 1004 (13 October 2000) [10]. Interestingly, Agardy also noted that ‘in South Australia there might be some prospect of reliance on s 59C of the Trustee Act 1936 (SA). The Supreme Court is given power to vary or revoke a trust and to distribute the trust property in such manner as it considers just.’ Ibid, 23.
842 As discussed above, it is worth emphasising that while the doctrine of fraud on the minority empowers the courts to provide relief to oppressed parties by addressing the fraud, the CAORs are nevertheless superior in providing expansive and broad statutory powers to the court, which has resulted in CAORs becoming the preferred mechanism sought by oppressed shareholders.
7.3 Possible Form of Legislative Amendment Under the 
Corporations Act

In considering the proposition that unitholders should have access to CAORs, it is important to consider how far such a legislative amendment should go in extending the jurisdiction of the CA. For example:

- Should it apply only to cases where the plaintiff has standing under the CA as a shareholder?
- Should it provide standing where the shareholder is related to the oppressed unitholders (as in Vigliaroni)?
- Should CAORs extend to cases where the oppressed unitholder is not related to a shareholder (such as in Koko Black)?
- Should the Trustee Acts be considered a more appropriate legislative instrument in assisting oppressed unitholders?

The cases reviewed identified the challenges faced by unitholders in establishing proper grounds for determining all the elements necessary under ss 232–234. Therefore, a pragmatic approach is suggested to proposing reforms under the CAORs, by including legislative changes that allow the broadest scope for oppressed unitholders to secure the types of relief that shareholders are entitled to under the CAORs. The following provides some preliminary suggestions as to the basic types of legislative changes that may be considered as part of a review.

Firstly, it would be important to provide a definition of ‘unit’ and ‘unit trust’ under s 9 of the CA (given there currently is none). Consistent with the definition submitted earlier in chapter 2.2, a general definition of ‘unit trust’ could take the

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843 Including proving that an oppressed unitholder is a protected party (under s 232), empowering a court to deal directly with a UT and its unitholders in providing effective relief (under s 233), and to allow a unitholder standing to apply for CAORs (under s 234).

844 As discussed above, the CA is a complex and lengthy piece of legislation, and any proposed reform requires a substantial analysis of the impact of such amendments with the CA and with ancillary legislation. Accordingly, substantial work would be required by the legislative drafters in finalising proposed changes to the CAORs to cover UTs. Whilst the scope of this thesis does not allow such a thorough analysis in finalising amendments, it may be of assistance to illustrate a possible form of amendments to the CA to achieve protection of unitholders under the CAORs.

845 Noting that any substantive amendments to the CA would need to pass through the thorough review and consultation process to which all legislative amendments are subjected.
A trust that has been established whereby the trustee of the trust holds property on behalf of unitholders whose units provide a substantially fixed proportional entitlement or interest.

Accordingly, ‘units’ would be defined under s 9 as ‘units in a unit trust,’ and ‘unitholders’ as ‘unitholders in a unit trust.’

While this would enable a direct referral to UTs in ss 232–234, it may be worth extending the scope to include units in UTs within the definition of ‘securities’ under the CA, thereby potentially broadening the reach of the CAORs not just to UTs, but to other ‘securities’ defined under the CA (in addition to simply shares in companies). The CA currently provides a definition under s 92 for ‘securities’ as follows:

(1) Subject to this section, securities means:

(a) debentures, stocks or bonds issued or proposed to be issued by a government; or
(b) shares in, or debentures of, a body; or
(c) interests in a managed investment scheme; or
(d) units of such shares; …

Accordingly, a possible approach may be to apply CAORs to ‘securities’ (as listed in s 92) and adding the following sub-section as 92(1)(e):

(e) units in a unit trust in which the trustee is a company.

Limiting the definition of securities to UTs that have CTs would ensure a nexus exists between the jurisdiction of the CA and the UTs under its jurisdiction (similar to utilising s 53 of the CA in Vigliaroni and Drapac to justify the nexus between the UT and the CA).

Whether all ‘securities’ as defined in a revised s 92 (eg debentures) should be included within the jurisdiction of CAORs would require careful consideration and analysis, although prima facie, it would appear that many of the arguments in
favour of extending the reach of CAORs outlined in this thesis could well apply to other types of securities. It would be useful to determine whether other types of security holders (such as debentureholders) may benefit from such reforms. Assuming that s 92’s definition of ‘securities’ was used in the manner outlined above, a further term—‘security holder’—could be defined is s 9 as ‘a holder of securities.’

Based on the use of the revised definition of ‘securities’ and ‘security holders’, the substantive provisions of the CAORs (ss 232–234) could be amended as follows.

Incorporating a new s 232(2):

SECT 232 (2)

The court may also make an order under s 233 if:

(a) the conduct of a company's affairs; or

(b) an actual or proposed act or omission by or on behalf of a company; or

(c) a resolution, or a proposed resolution of security holders or a class of security holders of a body for which the company acts as trustee or manager;

is either:

(d) contrary to the interests of the security holders as a whole; or

(e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a security holder or security holders whether in that capacity or in any other capacity.

Given Windeyer J’s observations in Noosa Ventures regarding the wording of

846 In considering this question, it is worth noting that corporate collapses or corporate bad conduct does not solely affect shareholders and unitholders, but often also debentureholders. For example, in the recent collapse of Banksia Securities, debentureholders have been subjected to the loss of their investment after the mismanagement of Banksia. Nevertheless, in considering broadening the type of securities that could be covered by CAORs, it is beyond the scope of this thesis to provide a full analysis of the ramifications of including other forms of securities under the jurisdiction of CAORs. Similarly, there are other forms of interests in property, such as partnerships or other forms of trusts (eg discretionary trusts) which arguably also deserve the protection of CAORs, although in the opinion of the writer, these interests are less analogous to shareholder interests than UTs, and therefore more difficult to include under the CA generally, or CAORs specifically.
Chapter 7: Direction and Reform of the Law Dealing with Oppression of Unitholders under The Corporations Act

s 233,\textsuperscript{847} it may be recommended that s 233 be amended as follows (amendment in bold):

Section 233–Orders the court can make

The court can make any order under this section that it considers appropriate in relation to the company or the affairs of the company, including an order …

A new sub-section 233(1)(k) would state as follows:

(k) where the oppressed party or parties are security holders under s 232(2), then any order in relation to the company necessary in the opinion of the Court to provide such relief to the security holders as the Court deems reasonable to provide relief to the oppressed unitholder or holders.

Finally, to confirm who has standing to apply for an order under s 233, a new sub-section s 234(f) (shown in bold) could be added to s 234 as follows:

Who can apply for order

An application for an order under s 233 in relation to a company may be made by:

…

(f) a security holder or a class of security holders of a body for which a company acts as trustee or manager.

The effect of the above amendments would be to remove any uncertainty as to the right of the courts to provide relief directly to oppressed unitholders. Such amendments would arguably extend the rights of oppressed unitholders beyond

\textsuperscript{847} In Noosa Ventures, his Honour criticised Davies J in Vigliaroni given s 233 (unlike s 232) does not use the phrase ‘affairs of the company’ (which is defined under s 53 as relating to CTs) when discussing the orders that can be made, but refers to orders ‘in relation to the company’. Windeyer J stated in Noosa Ventures:

With respect to the decision of Davies J and accepting the requirement for coherence in CL I find it difficult to accept that an order ‘in relation to the company’ includes an order in relation to the affairs of the company because if that were the legislative intention it would have been easy enough to insert the words ‘or the affairs of the company’ after the words ‘the company’ in the commencement part of s 233 (1) of the Act. It is a question of power not scope. It follows that if it were necessary for me to decide this question I would not have felt bound to follow the decision in Vigliaroni in preference to the earlier decisions though accepting so far as those earlier decisions are concerned that at least their judgments do not appear to have given consideration to s 53 of the Act or its predecessors in earlier Acts. Thus, I would not consider it within power to make an order requiring one trust beneficiary to buyout the interest of the other trust beneficiary. Such an order would, I think, be an order in relation to the trust not to the company.

Noosa Ventures (2010) 80 ACSR 485 [105].
those that even Vigliaroni and Drapac attempted to achieve, as they would also provide standing for oppressed unitholders to apply for direct relief under the CAORs, irrespective of whether they were also shareholders or related to shareholders (and subject only to the trustee of the UT being a CT). While it is possible that a small number of unitholders would be excluded from the CAORs where the trustee was not a CT, such cases are extremely rare and arguably such unitholders have no nexus to the CA, therefore are justifiably not covered by the protections provided by the CA.

Finally, as discussed in chapter 7.4, in considering the extension of the CA in this manner, and specifically extending its jurisdiction over Private UTs, it would be necessary to undertake a broad review of the CA to determine the most effective way to integrate Private UTs under the umbrella of the CA (in addition to the Trustee Acts). This would involve consideration of whether UTs should be registered by ASIC, pay fees to ASIC, and adhere to other requirements relevant to an entity of that nature (similar to the way relevant requirements were imposed on Public UTs under the MIS regime, which ensured that Public UTs were governed pursuant to terms consistent with the CA that govern public companies). Whether such initiatives were deemed practical or pragmatic, they would be useful in addressing some of the policy issues with providing unitholders with the same protections afforded to shareholders (such as the fact that regulatory fees paid by companies partially fund ASIC and the other relevant bodies empowered to regulate the provisions of the CA).

7.4 Considering Appropriateness of the Corporations Act to deal with Oppression of Unitholders

While the proposition that CAORs should apply to oppressed unitholders (possibly in the form outlined above) may be conceptually attractive, it is important to consider the practicality of introducing such amendments given the inherent structural and jurisdictional powers of the CA. In addition, whether these are compatible with an ability to govern UTs and unitholders under the CAORs, especially with respect to Private UTs (which are more commonly susceptible to
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cases of oppression).\(^{848}\) As discussed above, substantial legal commentary has emphasised the inherent structural differences between the nature of companies and UTs, which has been used by judges such as Hely J in Cachia and Young J in Kizquari to distance the world of CL principles from UTs. While this thesis contends that these distinctions are somewhat overstated—indeed, the substantial commonalities between companies and UTs provide a greater argument to encompass UTs (including Private UTs) into the \(CA\)—there remains the challenge of considering the technical feasibility of drafting amendments as outlined above into the provisions of \(CA\)Rs in light of the fact that beyond Ch 5C (dealing with Public UTs), there is little precedent regarding the regulation of UTs such as Private UTs within the jurisdiction of the \(CA\).

Notwithstanding the positions in Vigliaroni and Drapac, there is circumstantial evidence to suggest that the \(CA\) was not intended to have jurisdiction over trusts (including UTs).\(^{849}\) Prior to the inclusion of the MIS regime in the \(CA\), it would be reasonable to conclude that the \(CA\) has avoided dealing with UTs and trusts generally. Even the regulation of Public UTs under the MIS regime has been kept largely contained within Ch 5C. The fact that \(CA\)Rs do not expressly apply to unitholders in an MIS is indicative of the limited application of the \(CA\) to Public UTs outside of Ch 5C. Beyond the MIS provisions, the \(CA\) provides virtually no consideration of units, unitholders or UTs and as noted above, does not, for example, include ‘units’ in the definition of ‘securities’ under s 9 (other than interests in an MIS).\(^{850}\) The implication is the drafters of the \(CA\) were of the view that unregistered UTs (such as Private UTs) were not the domain of the \(CA\).\(^{851}\)


\(^{849}\) Indeed, the complexities outlined above in relation to using s 53 to apply \(CA\)Rs to unitholders illustrate some of the challenges in superimposing \(CA\)Rs over trust structures. This reiterates the argument that legislative drafters did not intend the references to trusts under s 53 to be applied pursuant to the references in s 53 to \(CA\)Rs, rather for each of these references to be applied to the multitude of other more overtly relevant sections dealt with in s 53. In reaching this hypothesis, it is possible the legislative drafters assumed that unitholder rights should naturally be excluded from the \(CA\)Rs in light of the perspective in Cachia and Kizquari, as \(CA\)Rs were traditionally considered the exclusive domain of shareholders. It is difficult to prove this hypothesis given that the writer was unable to locate the Explanatory Memorandum and other extraneous materials that explained the legislative intention behind s 53.

\(^{850}\) Section 9 refers to s 92 in defining ‘securities’, which does not refer to ‘units’ other than ‘units’ in shares and is not relevant to UTs.

\(^{851}\) Indeed, further research into the topic may require consideration of any constitutional law issues in extending \(CA\)Rs over UTs. While this issue would have been considered in the
While Vigliaroni and Drapac raise s 53 as evidence to the contrary, it is submitted a possible intention of s 53 was to cover all types of dealings of companies in assessing the application of CAORs, including in the role of a CT and shareholders in CTs (in line with Mandie J’s comments in Vanmarc), but not to provide the court with power to come to the direct aid of unitholders.852

The conclusions of this thesis are not based on the drafting of CAOR provisions in isolation, but also in the context of the overall lack of consideration of UTs under the CA. The weight of historical and traditional judicial commentary has largely reinforced the perception that the CA is not the natural legislative instrument for dealing with trusts (including UTs), which are governed by trust law principles. Legislators were willing to extend the CA to cover MISs by following the UK model for regulation of Public UTs, but apparently have been reluctant to consider extending the CA to cover UTs beyond Ch 5C. The flow on effect is that the CA has continued to limit its regulatory focus on Public UTs rather than Private UTs so that the Private UT has been left somewhat as a legal ‘orphan’.853

Arguably the status quo (Private UTs left outside the protection of the CA) may be the result of an intentional distinction maintained by the legislators between the proper jurisdictions responsible for trusts versus companies. However, it is the conclusion of this thesis that the exclusion of Private UTs is more likely a reflection of a range of historical factors relating to the development of CAORs, which have failed to accommodate the peculiar nature of the modern Australian trading UT. In drawing this conclusion, it is important to appreciate three key observations pinpointed in this thesis.

Firstly, the application of Australian UTs as a trading vehicle used in identical circumstances to private trading companies is unique to Australia and given the characteristics inherent with their private nature, Australian Private UTs have kept a very low profile. By contrast, Public UTs, which are used in a similar fashion in Australia and overseas, have received a significant profile domestically and internationally. In Australia, this prompted the adoption of the MIS provisions in Ch 5C based on the ‘global’ concept of a UT (namely the Public UT as regulated implementation of the MIS regime discussed in chapter 6, the proposed extension to all UTs, including unregistered Private UTs may trigger constitutional law issues.

852 As put forward in Vigliaroni and Drapac.
853 Sin refers to the UT as an ‘orphan’, Legal Nature of the Unit Trust, above n 6, 2.
in the UK). Secondly, the provisions under CAORs in the CA are based on UK precedents. Thirdly, cases of oppressive conduct occur overwhelmingly in private as opposed to public ventures. The Australian Private UTs in which almost all UT oppression cases occurred never received sufficient public or legal attention to prompt legislators to consider breaking with the UK based model (as UK unitholders are unlikely to suffer oppression), by extending relief against oppression to all types of unitholders (because Public UTs rarely experience this issue).

It would seem reasonable to question whether reform of the CAORs is justifiable from an economic policy viewpoint, given the issue has not caused the type of serious financial consequences that may otherwise be expected to justify legislative reform.\textsuperscript{854} Certainly, Private UT oppression cases have not had the level of economic impact experienced by the public investment trust financial disasters of the late 1980s that led to regulation of Public UTs via the MIS regime. While Private UTs may not match the economic size and impact of Public UTs, it is submitted that the understated Private UT is nevertheless an important and popular vehicle that merits the attention of the legislature; the lack of profile on the issue of oppression of unitholders in Private UTs does not take away from the basic unfairness of the current state of the law.\textsuperscript{855} Therefore, it is timely for the CA to be reviewed to accommodate the requirements of Private UTs in dealing with CL type issues such as oppression, although such proposed initiatives will need to overcome an apparent perception by the legislature (and advisory functions such as CAMAC) that the regulation of Private UTs by the CA may be too difficult to implement.\textsuperscript{856} In contrast, the legislature and CAMAC see a clear pathway and structure for expanding regulatory reform for Public UTs (where oppression is

\textsuperscript{854} It may be argued from a policy point of view that the low profile of Australian Private UTs in cases of oppression is representative of the fact that the issue is not important enough to justify legislative intervention.

\textsuperscript{855} The lack of profile given to the long line of cases including Kizquari and Vigliaroni is more a symptom of the broader conclusion that this type of vehicle (i.e., a UT in which oppression occurs) is unique to Australia. Given the UK source of the CAOR’s provisions, the peculiar requirements on issues such as oppression faced in Australia by such unitholders have unwittingly been missed by the legislature and should now be addressed.

\textsuperscript{856} An example of the unwillingness of legislators to acknowledge issues facing Private UTs is demonstrated by CAMAC’s recent report into MISs, which recommends the CA expressly limit the liability of unitholders in Public UTs, but distinguishes this protection should not extend to unitholders in Private UTs. No explanation is given as to why unitholders in Public UTs are more deserving than unitholders in Private UTs. See discussion in chapter 2.4.3 and see CAMAC, ‘Report to the Minister for Financial Services and Regulation on Liability of Members of Managed Investment Schemes’ (Report), above n 171.
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rare), and is indeed willing to expand regulation of Public UTs to new levels (in contrast to the approach to Private UTs).\textsuperscript{857} Nevertheless, the approach taken to regulating Public UTs illustrates both the capability of the legislature (and CAMAC) to take novel approaches to issues faced by UTs, and the potentially broad capacity that the CA exhibits in being able to regulate UTs.

The inclusion of provisions dealing with UTs (including Private UTs) under the CA ORs would be a major break from the historical focus on Public UTs as part of the MIS regime. Such amendments would require a thorough and complex analysis of the range of challenges that must be addressed when extending the jurisdiction of the CA to include all UTs (not only registered MISs). The CAMAC review into MISs highlighted the significant challenges in marrying CA concepts with the structure and nature of UTs; clearly, further issues would arise in attempting to overlay the CA ORs onto both Public and Private UTs given the complexity of the CA. From an economic and policy point of view, it would also be necessary to consider whether unitholders, who choose for tax and accounting reasons to avoid simple company structures, should nevertheless enjoy the benefits of the protection of the CA. Unlike UTs (other than Public UTs) companies are required to register under the CA, pay the relevant ASIC fees and adhere to the regulatory and reporting requirements of the CA. It is therefore reasonable to question whether the CA should be amended to come to the assistance of unitholders pursuant to the CA ORs.\textsuperscript{858}

Notwithstanding these issues, it is submitted that the proposed amendments to the CA ORs are both justified and achievable. The existence of the MIS regime under the CA illustrates the broad flexibility and power that the CA is able to integrate in dealing with UTs where the CA is empowered to do so by the legislature.\textsuperscript{859} The

\textsuperscript{857} It is illuminating to observe that the recent CAMAC review included potentially groundbreaking recommendations in the form of the ‘Separate Legal Entity’ proposal, which if adopted would fundamentally change the nature of registered MISs from being treated as trusts to essentially being treated as companies. See discussion in chapter 3.6 and ibid.

\textsuperscript{858} While the CA was determined to be the preferred structure for governing Public UTs, the integration of Public UTs into the CA involved the development of a range of requirements, including registration of the UT and specified terms to be satisfied by the constituent documents. This had the effect of moulding the Public UT into a structure that was compatible with the framework required by ASIC and the CA. Were the proposal under this thesis to extend the CA ORs to UTs, and Private UTs in particular, similar requirements (including registration with ASIC) may need to be similarly applied to Private UTs.

\textsuperscript{859} For example, see s 601GC as discussed in ING v ANZ, Centro and other cases. See discussion in chapter 3.4.
recent CAMAC review further illustrates a renewed willingness to broaden the scope and jurisdiction of the CA in addressing issues faced by UTs within the context of CL issues. This may indicate a new momentum for reform under the CA with respect to regulating UTs and protecting unitholders that could be utilised in overcoming the obstacles in order to implement the proposed amendments to the CA\textsuperscript{ORs} effectively.

7.5 Possible Reform Under the Trustee Acts

As an alternative to amending the CA\textsuperscript{ORs}, another possible area of legislative reform to address the disadvantages faced by oppressed unitholders would be to consider amendments to the Trustee Acts to empower courts to provide similar relief as those provided by the CA\textsuperscript{ORs}. As discussed, the Trustee Acts enjoy direct jurisdiction over trustees and could be considered an obvious choice in providing legislative relief to unitholders only experiencing oppression. Nevertheless, the Trustee Acts have been unable to keep pace with the evolution of trusts as a commercial vehicle, as the spirit and form of the provisions have focussed on addressing the more traditional historical concept of the trust represented up to the late 20\textsuperscript{th} century. This is apparent when dealing with UTs that inherently mirror the commercial context and operation of companies as vehicles for investment that are funded by issuing securities to investors. The recognition of the investment and securities nature of Public UTs was dealt with by implementing the MIS regime via the CA\textsuperscript{860} rather than their inclusion within the Trustee Acts.

It is submitted that in the context of oppression the CA, rather than the Trustee Acts, is the primary legislative instrument by which unitholders should have access to relief. The law of oppression has developed substantially within the CL context and, as Hely J argued in Cachia, the doctrine of fraud on the minority, which was the precursor to oppression principles in CL, was viewed to be an exclusively CL doctrine.\textsuperscript{861} Given the substantive development of oppression remedies under the CA\textsuperscript{ORs}, it is therefore appropriate to provide protection to oppressed unitholders primarily under the CA. That said, in light of the challenges

\textsuperscript{860} In addition, the Commonwealth Government has the power under the CA to implement a uniform Australia wide legislative change, as was necessary for the MIS regime, rather than the state based process that is fraught with jurisdictional complexities.

\textsuperscript{861} Although as discussed earlier, Cachia has come into question in recent years.
discussed in chapter 7.4 in relation to the historical reluctance for the federal legislature to regulate Private UTs under the CA, there is no certainty that federal parliament would adopt changes to the CA as recommended by this thesis. Therefore, it may be worth considering amendments to the Trustee Acts for relief against oppression as an alternative to those proposed for the CA (were the proposed amendments to the CA unsuccessful). Were there to be amendments to the Trustee Acts, there would be a potential added benefit of allowing for protection in those oppression cases where a CT was not used. Given the Trustee Acts are a state based legislative instrument, it would be necessary to engage with each state legislature to effect protection Australia wide.

It is interesting to note a similar approach with respect to providing protection against oppression across the various state based acts dealing with incorporated associations. In 2009, following earlier moves in South Australia,862 Victoria included provisions that provide protection against members of an incorporated association as part of broader reforms to the regulation of incorporated associations.863 The provisions dealing with oppressive conduct are now found in ss 68–71 of the 2012 version of this Act,864 which has remodelled the CAORs to suit the needs of members of an incorporated association. Similarly, other state jurisdictions have included protection against oppressive conduct in their relevant associations incorporations acts. While there have been a relatively limited number of cases dealing with the oppression provisions of the relevant acts, these cases illustrate the effective nature of importing and tailoring the CA principles and definitions of oppression and the provision of relief into jurisdictions dealing with other structures.865 In these cases, the courts have drawn directly on CA precedents dealing with oppression under the CAORs in considering the provision of relief to members of incorporated associations.

Similar reforms could conceivably be made to the various Trustee Acts by including protection against oppressive conduct as an alternative to any reforms to the CAORs. In considering if such reforms should be introduced to the Trustee

862 See s 61 of the Associations Incorporation Act 1985 (SA).
863 See Associations Incorporation Amendment Act 2009 (Vic).
864 Pursuant to the Associations Incorporation Reform Act 2012.
865 See for example, Farrell v Royal King's Park Tennis Club (Inc) [2006] WASC 51 (17 March 2006); St George Soccer Football Association Inc v Soccer NSW Ltd [2005] NSWSC 1288 (13 December 2005); Millar v Houghton Table Tennis & Sports Club Inc [2003] SASC 1; Popovic v Tanasijevic (No 5) (2000) 34 ACSR 1.
Acts, one issue to address would be whether such relief against oppression should be limited to beneficiary unitholders in UTs, or beneficiaries in trusts generally (given the Trustee Acts have jurisdiction over all types of trusts). Thorough analysis and consideration would be required of the impact such a reform could have over other forms of trusts, which is beyond the scope of this thesis. However, it is possible that protection against oppressive conduct not currently available under the Trustee Acts could likewise provide valuable assistance to beneficiaries under other forms of trusts (eg discretionary trusts).

Indeed, the request in September 2013 by the Victorian Attorney-General for the VLRC to prepare a report on the topic of oppression remedies for trading trusts provides a strong indication that reform under the Trustee Acts for all trading trusts may occur. While neither the VLRC nor the Attorney-General have disclosed the grounds for the review, it is likely that Vigliaroni and Drapac—both Victorian cases—have brought the issues raised in this thesis to the attention of the relevant advisors of the Attorney-General, thus prompting the investigation. This provides weight to the arguments for reform identified in this thesis, which have apparently been recognised by the Attorney-General as having potential merit. Nevertheless, the terms of reference provided by the Attorney-General also illustrate the complexity of exploring whether the issues faced by unitholders should be addressed by state legislation. As the terms of reference provide:

Sections 232 to 234 of the Corporations Act 2001 provide a range of remedies for shareholders for oppressive conduct by a corporation. The Victorian Law Reform Commission is asked to review and report on the desirability of having similar legislative remedies in Victoria to protect the rights of the beneficiaries of trading trusts who may be subject to oppressive conduct by a trustee.

In conducting the review, the Commission is to have regard to:

- whether adequate remedies for beneficiaries subject to oppressive conduct by the trustee of a trading trust are already available under Victorian statute or the common law;

- the interactions between state and Commonwealth laws, and the jurisdictional limits imposed on the Victorian Parliament;

866 VLRC, above n 376.
the interests of other parties which may be involved in, or interact with trading trusts including creditors, trustees, directors and employees.867

One observation on the wording of the terms of reference is that they refer to ‘oppressive conduct by a trustee,’ and to ‘the interests of other parties,’ but do not refer to oppression committed by, or the interests of, other unitholders.868 While the omission of any reference to other unitholders may not have been intentional, it is consistent with the difficulties noted in this thesis of identifying the scope under the Trustee Acts to impose and enforce obligations on other beneficiaries. Unfortunately, the terms of reference quoted above are short and therefore do not provide further substantive assistance on the topics researched in this thesis. Any conclusions will only be available once the report becomes available in February 2015.

7.6 Conclusions of Chapter 7

Chapter 7 concluded that while the decisions in Vigliaroni and Drapac have provided precedence for the application of CAORs in aiding oppressed unitholders, the direction of the law will be subject to whether Drapac’s decision is upheld on appeal. While an unsuccessful appeal in Drapac will provide further momentum to the position that unitholders are entitled to relief under the CAORs, even if Drapac is upheld on appeal, there are a range of complexities that would remain unclear in dealing with the rights of unitholders, especially in circumstances where the unitholder was not also a shareholder.

As an alternative, the chapter considered whether there was scope for the common law doctrine of fraud on the power to develop in order to overcome the challenges provided by Cachia so that the doctrine could be applied to cases involving oppression of unitholders. The conclusion is that this is not likely.

In addressing the problems with the current state of the law, chapter 7 proceeded to consider the merit and form of possible legislative reform, including discussion of the scope to amend the CAORs to overcome the uncertainty in the current wording to provide relief to oppressed unitholders. The chapter also discussed the

868 Ibid.
potential reasons why such amendments had not occurred in the past, and may continue to provide challenges in convincing the legislature to implement the proposed reforms. While the CAORs are the preferred means for reform (given CAORs are well established in addressing issues of oppression)—and it is submitted that the proposed amendments are achievable—this chapter nevertheless provided the alternative option of inserting relief against oppression mechanisms in the Trustee Acts. Chapter 7 concluded that these legislative amendments would be of significant benefit in overcoming the issues with the current state of the law, and that the recent commissioning of the VLRC by the Victorian Attorney-General to report on the question of trading trusts and oppressed beneficiaries’ rights provides persuasive validation of this proposal.
Chapter 8: Conclusion—the need for Legislative Amendment to the Corporations Act to assist Oppressed Unitholders

8.1 Introduction

This chapter summarises the basis for the contention of this thesis: that the CA should be amended to provide relief to unitholders under the CAORs.

8.2 The Historical, Structural and Contextual Relationship Between Companies and Unit Trusts

The historical and structural distinctions perpetuated by courts resisting both the application of CL principles to UTs generally, and in particular to applying other oppression remedies (such as fraud on the minority per Hely J in Cachia) have been discussed at length in this thesis. From early cases in the UK such as Smith v Anderson,\(^{869}\) courts have traditionally attempted to maintain clear legal boundaries between UTs and companies by sustaining perceived inherent distinctions between their nature and structure\(^{870}\) (eg with respect to mutual covenants or the role of contract, which traditionally have been raised as characteristics exclusive to companies in contrast to UTs).\(^{871}\)

Since then, many of these historical distinctions have diminished in legal significance, particularly vis-à-vis Australia’s Private UTs.\(^{872}\) For example, Sin’s innovative contention that contract plays a key role in the nature of modern UTs dispels the traditional classification that contract plays no such role.\(^{873}\) More importantly, it provides potential justification for the provision of rights and obligations between a trustee and unitholders similar to the way in which the

\(^{869}\) (1879) 15 Ch D 247. See chapter 2.3.2.

\(^{870}\) As highlighted in Kam Fan Sin, ‘Enforcing the UT Deed Amongst Unitholders’, above n 186. The distinction between companies and UTs was made so as not to offend illegal association rule.

\(^{871}\) Such as the lack of any mutual covenants, or the strictly passive involvement of investors.

\(^{872}\) For example, as discussed in chapter 2.4.4, UTs may involve contract as part of their nature, and active participation of unitholders in the decision making of the UTs.

\(^{873}\) Sin’s conclusion was not limited to cases where unitholders agreements were in place, but in all UTs (even where there was no unitholders’ agreement), as Sin contended that contract was an inherent feature in the nature of a UT.
statutory contract does for a company and its shareholders (including with respect to rights and obligations a propos oppressive conduct).  The modern Australian UT has developed attributes and applications similar to a modern company (for example as a private trading vehicle) not mirrored elsewhere. As investors, Australian unitholders (and especially in Private UTs) experience similar circumstances to shareholders in companies and are just as likely to suffer oppression. Therefore, the view that unitholders should be locked out of CL type remedies such as CAORs based on perceived distinctions is no longer appropriate within the Australian context.

Rather than focussing on such perceptions, it is more important to recognise the common historical genesis of companies and UTs that supports the concept of the UT as effectively an unregistered company, particularly in terms of the applicability of CL principles to UTs. As this thesis has established, UTs and companies are fundamentally connected by a common ancestry and cross-pollination of equitable and CL principles. The close relationship between UTs and companies is well documented, providing an important framework for justifying the process of introducing UTs into the jurisdiction of the CA generally and more specifically, into the CAORs. While the inclusion of UTs within the jurisdiction of the CA has been partially recognised by the inclusion of Public UTs under Ch 5C of the CA, it is submitted there is little justification for not extending the jurisdiction to include the protection of both Private and Public UTs under other provisions, such as CAORs. Indeed, the references in s 53 to CAORs underscores how close the legislative intention has come to controlling UTs under

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874 Note that Sin’s conclusion concerning the existence of contract in UT goes beyond circumstances where there is an unitholders’ agreement entered into by all the unitholders with mutual covenants (such as in Arhanghelschi) and suggests the existence of contract is merely pursuant to the basic trust deed structure where unitholders do not formally contract with other unitholders.

875 As noted in chapter 2.4.1, the traditional definition of a UT is more applicable to Public UTs, but does not represent all UTs in Australia, more specifically not Private UTs.

876 Pursuant to s 115, where there are less than 20 unitholders, registration is not required. Arguably, the existence of contract may result in certain UTs with more than 20 members being in breach of the prohibition against forming an illegal association pursuant to s 115 of the CA. The issue is discussed at length in Sin, ‘Enforcing the UT Deed Amongst Unitholders’ above n 186, 116 and Jorgenson, above n 196. As Smith v Anderson (1880) 15 Ch D 247 and the other cases dealing with ‘illegal associations’ illustrate, the existence of s 115 and its predecessors highlight the historical intention by the legislation to require certain associations that engage in commercial activity of a required scale to be registered as a company so that, among other things, stakeholders/investors in such enterprises receive the benefit and protection provided by CL, such as the provisions granting relief against oppressive conduct.

877 As outlined in chapter 2.
The reluctance to extend further CA provisions generally, and CAORs in particular to UTs appears to have been in the main unintentional. Rather, it is likely that the current legislative ambiguity around CAORs is largely due to a lack of appreciation by Australian legislators of the unique existence of Private UTs in Australia as a private trading vehicle. Australian legislators have seemingly viewed UTs through the lens of the international perspective of UTs as Public UTs where oppression has not been as great an issue, and have therefore focussed on UK sourced legislation specifically geared towards reforming Public UTs in light of the global profile that Public UTs have attained. Conversely, Australian trading UTs such as Private UTs in which oppression issues commonly arise have lacked the profile that has driven reform under MIS legislation. The lower regulatory profile of Australian trading UTs (such as Private UTs) has resulted in a legal inertia that has historically prevented further reforms to extend the application of the CA over UTs in other areas that affect them, including CAORs. It is submitted that the reluctance by legislators to engage in regulatory reform under the CA to deal with issues faced by Private UTs (such as oppression) is no longer justified. Nevertheless, careful consideration must be given to the practicality and complexity of bringing Private UTs into the jurisdiction of the CA under the CAORs. Conclusions in relation to these issues are discussed below in chapter 8.6.

8.3 Inadequacy of Current Legal Protections Outside of Corporations Act Oppression Remedies

The research for this thesis resulted in the critical conclusion that oppressed unitholders are disadvantaged (in comparison to their shareholder counterparts) given the inadequacy of their trust and common law rights and remedies when
contrasted with shareholder rights under the CAORs. As outlined throughout, the rights of unitholders have traditionally been determined according to a matrix of common law, trust law and equitable principles, with contract law increasingly playing a role in recent years.\textsuperscript{881} Unitholders in Public UTs also enjoy protection under Ch 5C of the CA and in recent years, Vigliaroni and Drapac have argued that unitholders should also enjoy protection under the CAORs, although this position is subject to ongoing debate.\textsuperscript{882}

The analysis of oppressed unitholder rights based on trust law principles revealed that, whereas shareholders have access to relief under the CAORs, there is no tailored principle specifically targeted to provide relief to unitholders in circumstances of oppression. While there are general equitable principles that may overlap with oppression principles (such as the trustee obligations to act impartially, the prohibition on fraud on the power, or trustee’s general fiduciary obligations to unitholders), there is no explicit relief against oppressive conduct. This is particularly important in the context of many shareholder oppression cases whereby the actions of the oppressor are often technically sanctioned by the constitution (eg under compulsory acquisition provisions as in Gambotto) and similarly not in direct breach of any other laws (other than the CAORs), but where the actions are nevertheless proven to be oppressive, the shareholder receives relief. Without similar rights under trust law in such circumstances, oppressed unitholders are substantially limited in their ability to achieve relief. Indeed, one of the themes identified in this thesis was the overwhelming approach of judges to find the primary determinant of unitholder rights was dictated by the terms of the trust deed, with very limited accommodation provided beyond such terms.\textsuperscript{883}

The only scope for relief that appears comparable arises under the equitable doctrine of fraud on the power, which indeed provided the historical source for the CAORs. Yet cases such as Cachia illustrate the courts are extremely reluctant to override the express powers under the trust deed by granting relief in such circumstances, and will only do so where it is clear that the substratum that is

\textsuperscript{881} See in particular Sin, Legal Nature of the Unit Trust, above n 6.
\textsuperscript{882} Even if Vigliaroni is upheld in the Drapac appeal, it is unlikely that such a position would assist in cases such as Koko Black where the oppressed unitholders had no nexus to an oppressed shareholder in the CT.
\textsuperscript{883} For example, see Koko Black Appeal.
fundamental to the creation and purpose of the trust has been undermined.\textsuperscript{884} It is submitted that the threshold of proof oppressed unitholders are required to achieve under the doctrine of fraud on the power is significantly higher than that required pursuant to CAORs.\textsuperscript{885}

Importantly, while the doctrine of fraud on the minority (as discussed in Gambotto) has been raised in relation to UTs, Hely J in Cachia was explicit in rejecting its application to UTs on the basis that the doctrine is exclusively a CL principle.\textsuperscript{886} Although subsequent cases such as Arakella questioned Hely J’s conclusions,\textsuperscript{887} a definitive position has not been established.\textsuperscript{888} While the law is unclear, it is interesting that none of the cases reviewed in this thesis that involved UTs in which CAORs were raised included alternative actions under the doctrine of fraud on the minority. This indicates an apparent lack of confidence in the ability of oppressed unitholders in UT cases to apply the equitable doctrine of fraud on the minority successfully.

Similarly, the state based Trustee Acts have direct jurisdiction over trusts generally, including UTs. In mirroring the trust law position, the courts are provided with broad powers to enforce general trust law principles and the terms of the trust deed,\textsuperscript{889} but there is no scope to provide relief against oppressive conduct. While the Trustee Acts provide legislative mechanisms to enforce unitholder rights generally, they add little to the common and equitable law position outlined above (especially where the conduct in question is not inconsistent with the terms of the trust deed). Nonetheless, these legislative instruments may provide scope for direct reform by incorporating provisions that provide protection against oppressive conduct\textsuperscript{890} as an alternative to the amendments to CAORs as proposed herein.\textsuperscript{891}

The lack of protections against oppressive conduct create a number of additional

\textsuperscript{884} See, for example, Jacometti [2011] VSC 612.
\textsuperscript{885} It is instructive to note that no cases dealing with the application of CAORs to UTs reviewed in this thesis argued fraud on the power in the alternative.
\textsuperscript{886} (2000) 170 ALR 65 [85]–[89].
\textsuperscript{887} Austin J in Arakella, and Barrett J in Re Abacus (2006) suggested that equitable (rather than statutory) fraud on the minority or oppression principles discussed in Gambotto applied to UTs, and questioned Hely J in Cachia.
\textsuperscript{888} See discussion in chapter 4.4.2.
\textsuperscript{889} For example, Trustee Act 1958 (Vic) s 63. For a discussion on the scope for application of s 63 see Westfield Qld [2008] NSWSC 516.
\textsuperscript{890} As included in certain Associations Incorporation Acts, discussed in chapter 7.5.
\textsuperscript{891} Discussed further in chapter 8.5.
complexities, even when the oppressed unitholder is able to substantiate another legal ground of recourse (eg breach of trust), as the remedies available to unitholders are often not ‘fit for purpose’ when dealing with oppressive conduct. For example, the Trustee Acts and trust law generally deals with the obligations of trustees, but has limited reach when imposing obligations on beneficiaries beyond the terms of the trust deed. This is particularly problematic in cases of oppressive conduct where commonly the majority unitholder is the principal offender.

An extension of this issue is the difficulty under trust law in imposing a forced buyout of one unitholder against another, which is often the most suitable remedy (eg where the alternative remedy of dissolving the trust would adversely affect the value of the UT). The buyout remedy is a central feature of CAORs and provides a valuable tool in releasing oppressed unitholders from the venture at fair value. Unlike CAORs, however, there is no express right for the courts to order a buyout of units under either the Trustee Acts or other trust law principles. Given the heavy emphasis by the courts on the terms of the trust deed in determining the rights and obligations of unitholders, the courts have taken the view that there should be no right for a unitholder to have its capital released unless the trust deed allows this to take place. Indeed, it appeared from the cases reviewed in chapter 4.3.5 that the lack of a buyout remedy under trust law is a major driver for oppressed unitholders seeking to access CAORs—the buyout remedy under the CAORs was sought in the majority of unitholder oppression

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892 For example, see comments by Davies J in Vigliaroni [2009] VSC 428 (29 September 2009) [56].
893 The buyout mechanisms have been variously described by the courts as follows:

Essentially, however, the aim is still to permit the minority to free its capital, even though it has locked its capital into a venture. The reason for this is that it is unfair that the capital should continue to be locked up if the circumstances are indicative of oppression. Accordingly, the prime thrust of the section is either to make the venture work so that the capital is properly employed, or to allow the capital to be removed. It is not for punishment or compensation or for taking the profit that ought to have been made had the venture been successful. 


Although no-one has ever voiced it, it seems to me that this essentially is the reason for the adoption of the rule that ordinarily the proper order is that the oppressor buyout the oppressed. This is in line with the policy that if a reasonable offer is made to buyout the oppressed the petition will be struck out because all the minority can really insist on is either the venture should proceed in accordance with what was understood or that he or she should get back the capital invested.


894 The Trustee Acts provide scope for broader powers to be conferred on the courts, eg Trustee Act 1958 (Vic) s 63. For a discussion on the scope for application of s 63 see Westfield Qld [2008] NSWSC 516. The powers under the Trustee Acts do not appear to allow the courts to order an appropriation by one unitholder of another unitholder’s interest in the trust. Whether there is implicit scope under the Trustee Acts to do so in all applicable circumstances is not clear. See Trustee Act 1925 (NSW) s 81 in Arakella (2004) 60 NSWLR 334.
895 See for example Koko Black and Kizquari.
Without access to a buyout remedy, the only major remedial tool available under trust law in cases where the oppressive conduct results in an irreparable relationship breakdown between unitholders is the ‘winding up’ (or dissolution) of the UT. As noted earlier in chapter 3.6, the concept of ‘winding up’ is technically a CL principle and process, as recognised in the recent CAMAC review of MISs, with the dissolution or termination of a trust being subject to a different set of principles and processes. While courts often gloss over the distinctions, closer analysis shows the dissolution of a trust must occur in accordance with the strict terms of the trust and a court may only order dissolution on other terms in extreme circumstances. This indicates a higher threshold being required to justify the vesting of a trust than the winding up of a company, so that even when oppressed unitholders seek this remedy, they are potentially disadvantaged compared to oppressed shareholders.

While oppressed unitholders face great difficulty in seeking recourse against oppressive co-unitholders, they encounter a further complication in seeking to take action against directors of the CT, even where the CT is shown to have breached its obligations under trust law principles. Unlike under the CA, there is no clear ‘derivative action’ mechanism for unitholders to take action against directors of a CT for breaches of duties. While action against directors may be possible in certain circumstances, the process is far more complicated in the absence of a clear derivative action mechanism. This provides any rogue director of a CT with less accountability to unitholders and creates an additional disadvantage experienced by oppressed unitholders compared to shareholders.

While reforms have been discussed in areas such as superannuation regulation to ensure directors have direct obligations to members and directors of trustees of

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896 As noted in this thesis, ‘winding up’ is a CL concept, although it has been liberally applied to explain the vesting or termination of UTs given the close association with companies, and the existence in almost all UTs of a CT, which is subject to the winding up provisions under the CA.
897 CAMAC, ‘Managed Investment Schemes’ (Report), above n 129. See discussion in chapter 3.6.
898 A number of reforms have been provided by CAMAC to better integrate and streamline winding up processes for MISs, among other important proposed reforms.
899 See for example Young J in Horwath v Huie (1999) 32 ACSR 413 and discussion in chapter 4.3.4.
900 See discussion in chapter 4.3.2.
901 See comments by Mandie J in Vanmarc in chapter 4.3.2.
902 In the recent Super System Review conducted by the Federal Government delivered in June 2011, the issue of whether directors of CTs owe a duty to beneficiaries of a trust was dealt with in
MISs are personally responsible under the CA, there is no similar provision for other UTs such as Private UTs. It is submitted that the personal liability of directors of CTs in UTs should also be reviewed as part of the proposed reforms to the CA. ORs.

The thesis observed that the duties of trustees are arguably stricter than those of directors. The stricter obligations of trustees promulgates a broader conclusion that in some cases unitholders in fact hold a stronger position than shareholders, flowing from the fact that the core of a UT’s anatomy is a trust. As noted, a trustee’s primary responsibility in adhering to the terms of the trust is to protect the interests of the trust beneficiaries, which provides unitholders with strict trust law and fiduciary obligations. The courts take a harsh view of trustees that breach their duties, ensuring that beneficiaries such as unitholders are compensated. Unlike shareholders in companies, unitholders have a direct beneficial interest in the assets of a UT, which provides them with arguably greater rights than shareholders in areas such as access to trust information, the right to a caveatable interest in trust property and rights to trust property upon dissolution of the trust.

the context of superannuation funds, which are a form of fixed UT. The report included in principle support for heightened trustee duties and a recommendation to create a new statutory office of ‘trustee-director’, intended to consolidate all statutory duties applying to the directors of CTs. See Super System Review Organisation, ‘Review of the Governance, Efficiency, Structure and Operation of Australia’s Superannuation System’, above n 419. See also Governance Working Group Issues Paper on Trustee and Director Duties March 2011, ibid.

903 The topic of director versus trustee duties is further complicated by the distinctions between the two areas of law (ie considering the different obligations of trustees versus directors), given the duties of trustees are arguably stricter than those of directors. The lower standard required of directors is partially due to the recognition under the CA (via the business judgement rules under Section 180 of the CA) of the commercial context in which directors must operate and the need for directors to have a degree of entrepreneurial licence in the quest of providing shareholders with profits. In contrast, the obligations of the trustees are fundamentally grounded in the historical role of the trustee as the quintessential fiduciary charged with protecting trust assets on behalf of beneficiaries. While this distinction does not provide further weight to the argument that unitholders are disadvantaged compared to shareholders (rather the contrary, given the stricter standards that trustees must adhere to), it is submitted that UT reforms under the CA should also include a review of trustee obligations to align them with directors’ duties given the commercial context in which UTs operate. Further research would be required on this topic to determine the most appropriate position.

904 As discussed in chapter 2.4.4, Sin argued that UTs are actually based on contract law foundations rather than trusts. Sin, The Legal Nature of the Unit Trust, above n 5.

905 Spavold argued that the power of the majority to do things against the terms of the trust or to amend the trust to achieve those ends is more restricted than majority shareholders in companies, given the underlying nature of a UT as a trust. Therefore, there is arguably greater protection to unitholders, and therefore less need for oppression remedies. See Spavold, above n 12.

906 See discussion in chapter 4.3.1 and in J C Campbell, above n 436.
Notwithstanding the rights that unitholders enjoy in the broad sense, the fact remains they are ultimately disadvantaged compared to shareholders in dealing with the principal issue of oppressive conduct. In most UT trust deeds, trustees are authorised with a wide range of powers that largely erode the trust law rights of unitholders and as noted, courts are extremely reluctant to provide rights to unitholders beyond the strict terms of the trust deed. In contrast, shareholders enjoy an overarching protection against oppressive conduct beyond the terms of the constitution under the CAORs. In understanding the different approaches, it is important to recognise the theoretical difference between a corporation, which only exists as a result of a concession from the legislature and so is governed by mandatory statutory provisions, and a trust, which is an entirely private law creation. As such, the ability for the CA to override the constituent documents creating companies is greater than a court’s ability to do so in the case of trusts.

The law of trusts may well evolve to come to the aid of oppressed unitholders. For example, by establishing that unitholders are entitled to claim equitable rights under the doctrine of fraud on the minority, by a broader interpretation of the application of the powers under the Trustee Acts, or by extending the relief available under Ebrahimi’s quasi-partnership principles to forced buyouts. Notwithstanding, it is submitted that the likelihood of such developments occurring in a way that would address the disadvantages experienced by oppressed unitholders is remote. Within the context of these issues, the conclusion is that the laws applicable in circumstances of oppression against unitholders (especially with respect to Private UTs where oppression is more common) are substantially inadequate in their ability to provide material relief, thereby warranting the extension of the CAORs to protect oppressed unitholders.

While there has been no discussion at a federal level for the CAORs to be amended, the fact that the VLRC was commissioned by the Victorian Attorney-General to look into the broad topic of whether state based legislation should be amended (to mirror the CAORs for the benefit of oppressed beneficiaries in

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907 This distinction was highlighted to the author in a discussion with Professor Elizabeth Boros.

908 For discussion on the scope under the Trustee Acts of the courts’ powers (under s 63 in Victoria or s 82 in NSW) in terms of ordering a restructure of a UT (eg dissolution versus a forced buyout), see Einstein J Westfield Qld [2008] NSWSC 516 [62] and Einstein J’s comments in Arakella (2004) 60 NSWR 334. See also discussion in chapter 4.2.2.

909 As Ferguson J suggested in Drapac.
trading trusts) is instructive, and provides weight to the argument that legislative reform is required to address the deficiencies in the current law.

8.4 Confusion as to Applicability of Corporations Act Oppression Remedies to Unit Trusts

This thesis is based on the proposition that CAORs be amended to protect unitholders, not only on the contention that the current rights and remedies available to oppressed unitholders outside of the CAORs are deficient (especially in comparison to shareholders), but also that unitholders are not covered by the CAORs as currently drafted. The cases reviewed explored the issue from a variety of angles to arrive at this conclusion. Clearly, following the decisions in Vigliaroni, Noosa Ventures and Drapac, the law is in a state of flux and given the complexity of structural permutations that may arise in dealing with the question, it is submitted that the uncertainty will not be allayed in the near future.

While it is argued that Vigliaroni and Drapac were incorrect on the grounds outlined in chapter 6.6,\textsuperscript{910} it is also submitted that whether Vigliaroni and Drapac were, on balance, correct or not, there is clearly a degree of confusion and uncertainty as to the correct interpretation of s 53 and the CAORs. While Davies J and Ferguson J each determined what they believed to be the better view on the issue, the writer respectfully suggests that their Honours would likewise acknowledge that uncertainty remains in the wording of the CAORs with respect to its jurisdiction over UTs. Admittedly, if Ferguson J’s decision is upheld on

\begin{footnote}{910}{For the reasons outlined in Noosa Ventures. It is also submitted the correct meaning of a member ‘in any other capacity’ was not intended by the legislative drafters to apply to a shareholder/unitholder in its capacity of unitholder (whereby CAORs can deal with the oppression of the unitholder against its unitholder). Rather, it appears more likely the meaning of the phrase ‘any other capacity’ was meant to refer to a shareholder acting (for example) in the capacity of trustee, or possibly where the oppressed shareholder was also a director or employee. Nevertheless, it is with respect to the shareholder (and its shareholding) that CAORs are intended to provide relief, rather than coming to the aid of a shareholder in the capacity of owning units in a UT, as Vigliaroni contended. In contrast, it is difficult to accept that s 53 can be used to apply CAORs in assisting an oppressed unitholder independent from any shareholding. It is contended that unitholders should be granted rights under the CAORs, but under the current wording of the CA, the courts are not empowered to do so under the relevant circumstances discussed. As discussed above, an analysis of cases shows that where the courts have determined that oppression has been found to have been suffered by unitholders (such as in Re Bodaibo, Kizquari and Drapac), the courts have sought to provide unitholders with relief under the CAORs. Conversely, those cases such as Kizquari that found against unitholder rights under the CAORs held in each case that there was no oppression on the facts in any event. The inference is that courts are attempting to overcome the ambiguity in the legislation in order to provide justice to oppressed unitholders, although there are differing opinions as to whether the courts in fact have the power to do so.}

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appeal, this could solidify the proposition that CAORs have jurisdiction to come to the aid of unitholders and were that to occur, the proposed amendment to the CAORs would be of less value. Nevertheless, given the inherent ambiguity in the wording of the CAORs and s 53, it is difficult to see in the near future how the courts will be able to adopt a position that provides categorical certainty across the range of situations where unitholders are oppressed, in which case the proposed amendment would be of assistance.911

Complete certainty without legislative intervention will be difficult considering the range of possible scenarios and complexities oppressed unitholders face in proving a direct nexus with shareholdings in the CT.912 For example, it is unclear whether Davies J in Viglarioni would grant relief in the case of Koko Black.913 It is submitted that Drapac and Vigliaroni did not address this issue adequately given the obstacles that have been highlighted in previous cases.914 Further, where there is a complex structure of companies and UTs in a group,915 there are significant challenges in considering how to apply relief (including the valuation of the buyout of shares/units) where the oppressive conduct may only have been directed at certain entities.916 When dealing with structures involving trusts, given the tax and accounting treatment of trusts, it is an extremely complex task to determine the true and fair valuations applicable.917 Given the ambiguity in the wording of the CAORs and s 53 of the CA, there is a fundamental lack of clarity on how to address these issues. It is submitted that irrespective of whether Ferguson J’s

911 For the reasons outlined earlier, it is also possible that Ferguson J’s decision will be reversed, thus adding to the confusion. Even if the appellant is unsuccessful and Ferguson J’s decision is upheld, it is submitted that Vigliaroni/Drapac may continue to receive resistance in the short term in other jurisdictions (such as NSW) where the weight of decisions have historically rejected the proposition. Whilst it is acknowledged that there is an obligation for courts in each jurisdiction to strive for consistency and uniformity in the interpretation of the CA (under the principle of comity) there is no obligation where a court determines the decision would be incorrect (see Australian Securities Commission v Marlborough Gold Mines Ltd (1993) 177 CLR 485, 492 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ).

912 Such as the issue of standing of the applicant where the shareholder is not the same person as the unitholder, ie whereby the oppressive conduct adversely affects the unitholder who may be related to the shareholder, but is not itself the shareholder. See, for example, Vanmarc.

913 It appears clear that where the oppressed unitholder is not related in any form to a shareholder (such as in Koko Black), no view supports the application of CAORs in those circumstances.

914 Ferguson J merely contended that a holistic approach was required when looking at a corporate group in which it would be artificial to distinguish between the various related parties. See Ferguson J’s comments in Drapac [2012] VSC 156 (26 April 2012) [276].

915 Such as was the case in Vigliaroni and Drapac.

916 See for example, Drapac.

917 In both Vigliaroni and Drapac, the respective judges determined to take an approach that looked at the relevant corporate groups as a whole in providing a valuation of the relevant units/shares being bought out, although it should be noted that Drapac is currently requiring further court deliberations to determine an outcome.
decision in Drapac is upheld, there is a need to provide more legislative lucidity and guidance in determining how CAORs should be applied to UTs given these issues.

8.5 **Scope to Address the Predicament of Oppressed Unitholders via Non-Statutory and Statutory Developments**

While the legal issues faced by oppressed unitholders as outlined above\(^{918}\) place them in an unsatisfactory position in comparison to oppressed shareholders, it is feasible that the general law may develop in a manner that improves their predicament. For example, were the appeal in Drapac upheld and further decisions follow suit, greater certainty would occur regarding the applicability of s 53 to oppressed unitholders. Other possible developments could include the determination by courts that unitholders have access to relief against fraud on the minority, or that the remedy of enforced buyouts should be available to quasi-partners under the principles of Ebrahimi. Were these developments to take place, then oppressed unitholders would have far greater protection and arguably, the need for legislative intervention would be diminished.

Nevertheless, as argued in chapter 7 the likelihood in the near future of any of such developments occurring in a manner that conclusively settles the law in these areas is remote. It is therefore maintained that legislative intervention provides the most direct solution to address the status of oppressed unitholders. Given the targeted manner in which CAORs have been carefully developed to address cases of oppression effectively, it is submitted that the preferred legislative instrument for achieving effective relief for oppressed unitholders is the CA.

While chapter 7.3 suggested the form of some potential amendments to the CAORs in providing an idea of how the amendments could be framed, it is also important to recognise that any such amendments to the CA will attempt to regulate UTs—and Private UTs in particular—in a manner that has no apparent precedent either in Australia, or internationally. Accordingly, the proposed

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\(^{918}\) Most notably, as a result of the inadequate protections they experience under trust law and the uncertainty with respect to whether oppressed unitholders have access to the CAORs following Vigliaroni.
Chapter 8: Conclusion—the need for Legislative Amendment to the *Corporations Act* to assist Oppressed Unitholders

initiative will need to address two major hurdles.

Firstly, any initiative to extend the jurisdiction of the CAORs to UTs, and Private UTs in particular, will need to overcome the historical reasons as to why such amendments have not previously been sought or adopted. It is possible that these reasons may include substantive justifications, including policy considerations on whether unitholders in Private UTs ought to enjoy the protection of the CAORs when they have intentionally chosen not to invest via a registered company. Indeed, it may be asked whether the topic of oppressed unitholders in Private UTs is of such importance to justify legislative intervention given the lack of profile and economic impact these issues seem to have engendered in the public forum to date.

Secondly, legislators will need to consider carefully the complexities of regulating unregistered Private UTs under the *CA*, notwithstanding that prima facie, the *CA* does not currently have direct jurisdiction to deal with such unregistered UTs. As the recent CAMAC reports highlighted, the regulation of Public UTs under the *CA* continues to pose a range of problems given the structural distinctions between UTs and companies, notwithstanding the regulatory regime for MISs has been in operation both in Australia and overseas for over 20 years.919

With regard to the first hurdle, it is submitted that these policy arguments do not outweigh the reality that the issues faced by oppressed unitholders in Australia are material both in terms of the unfairness experienced by the oppressed unitholders, and the significant number of potentially affected stakeholders given the continued popularity of Private UTs in Australia.920 Further, it is argued that rather than any substantive policy considerations, a more likely explanation as to why there has not previously been an initiative to extend the protection of the CAORs to oppressed unitholders is simply because the Australian regulatory regime of UTs has been based on overseas models (where Private UTs and the oppression issues that almost exclusively occur in them are uncommon). Without the higher profile that Public UTs enjoy, the legitimate concerns experienced by oppressed

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919 See CAMAC, ‘Report to the Minister for Financial Services and Regulation on Liability of Members of Managed Investment Schemes’, above n 171.
920 Further, it is submitted that any consideration of the proposed amendments should also contemplate the merits of ancillary initiatives such as registration processes for UTs regulated under the CAORs (or other provisions of the *CA* where appropriate) to address such policy concerns.
unitholders in Private UTs have unfortunately failed to gain the attention of legislators and their advisors. Nevertheless, the unsatisfactory legal status of oppressed unitholders has gained more prominence in recent years in light of cases such as Vigliaroni, prompting increased attention on the issue—as exemplified by the initiative by the Victorian Attorney-General to request the VLRC to review the broader question of oppression of beneficiaries.

In respect of the second hurdle, it is argued that notwithstanding the potential complexities in attempting to bring UTs further under the jurisdiction of the CA pursuant to the CAORs,921 the proposed reforms are both justified and capable of implementation. While CAMAC has highlighted the complexities of regulating UTs pursuant to the CA, CAMAC has also pointed to the flexibility and capacity of the CA to be adapted to address such issues. Accordingly, while care will be required in reviewing the manner of incorporating Private UTs into the protection of the CAORs, the conclusion of this thesis is that such issues should not prevent the effective implementation of the proposed amendments.

Nevertheless, to the extent that the proposed reforms to the CA are unable to be achieved (either because the proposed reforms prove unworkable, or the federal legislature lack the appetite to pursue such reforms), an alternative consideration should be given to amending the Trustee Acts922 to provide protection to oppressed unitholders, as is the focus of the VLRC review mentioned above.923 Indeed, despite the conclusion that the CAORs are the preferred platform for providing protection to oppressed unitholders, the Trustee Acts may arguably be considered a more natural legislative home for further regulation of UTs, and provide a less cumbersome political pathway to achieve reform for oppressed unitholders.

Ultimately, the basis of the conclusion of this thesis—that the CA is the preferred option for regulating against oppression of unitholders—is a result of the broader conclusion that UTs have become far closer in their nature and operation to companies than previously contemplated, and further away from the traditional

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921 As highlighted by the results of CAMAC’s recent reviews of MISs, the regulation of UTs under the CA continues to raise issues given the structural and legal distinctions between UTs and companies.

922 Either as an alternative, or in addition to CAOR reforms.

923 Such amendments to the Trustee Acts would not be subject to the policy arguments against providing unitholders with benefits under the CA notwithstanding that Private UTs are not registered under the CA, nor pay the relevant fees to ASIC that partially funds the regulatory framework of the CA.
Chapter 8: Conclusion—the need for Legislative Amendment to the
Corporations Act to assist Oppressed Unitholders

8.6 Summary of Chapter 8 and Conclusions of this Thesis

Accordingly, this thesis concludes that the CAORs should be amended to provide the courts with express powers in ordering relief to oppressed unitholders where (as is nearly always the case) there is a CT. Such an amendment would address the fact that UTs operate in a virtually identical manner to companies in Australia and unitholders deserve the same protections against oppressive conduct as shareholders. While there has been historical resistance to removing the legal barriers against unitholders’ access to rights under the CA in areas such as oppression, such resistance is no longer warranted, and the decisions in Vigliaroni and Drapac illustrate judicial openness to utilising CAORs for relieving oppressed unitholders. The continued broadening of the CA’s jurisdiction over Public UTs proves the ability of the CA to develop in a way that effectively deals with UTs, illustrating the flexibility that could be applied to CAORs to provide substantive relief to oppressed unitholders. While Vigliaroni and Drapac argue that unitholders already have such rights under CAORs, it is suggested that the power of the courts to enforce such rights remains ambiguous, therefore specific legislative clarification is required in order to provide a more effective and complete framework for application.

While amending the CAORs is identified as the most effective way to address the deficiencies experienced by oppressed unitholders, given the complexities in dealing with unregistered UTs under the CA, a review of the Trustee Acts is also recommended as an alternative to address oppression issues, with the possible integration of provisions that mirror CAORs. Indeed, the process of reviewing the state based law has begun pursuant to the commissioning of the VLRC report into remedies for oppressed beneficiaries in trading trusts by the Victorian Attorney-General.925

It is also concluded that other incidental reforms should be considered, including

924 Indeed, this conclusion has been accepted for a long time with respect to Public UTs, prompting the inclusion of the MIS provisions in the CA rather than the Trustee Acts.
925 VLRC, above n 376.
reforms that more closely align the duties of trustees and directors of CTs, providing more streamlined mechanisms for ‘derivative actions’ by unitholders against directors of CTs. In addition, there may be other areas of reform worthy of consideration; a more thorough review of the potential role of the CA in providing broad jurisdiction over UTs (even beyond CAORs and the MIS regime) would be required to form such conclusions.

This thesis has focussed on proposed reforms to deal with oppression involving UTs. The implementation of such reforms to the CA (or indeed the Trustee Acts) would undoubtedly assist in ultimately addressing a serious issue that has left unitholders in an unfair position compared to shareholders for decades, and continues to cause uncertainty despite recent judicial consideration. Borrowing Davies J’s terminology in Vigliaroni, it is the fundamental responsibility of the legislature not to ‘perpetuate’ unfairness in the law, for example, the type experienced by oppressed unitholders. Accordingly, if oppression is found to have occurred against unitholders, the law should not be forced to decline relief merely due to the outdated nature of the provisions of the CAORs. It is therefore timely for the legislature to take action in the form of the amendments proposed in this thesis, to address the deficiencies and to provide lucidity, certainty and trust in the law.

926 Indeed, while this thesis focusses on UTs, there may be scope for research into the need for similar reforms for other structures, such as other forms of trusts or in the law of partnerships and joint ventures.
927 As the recent CAMAC review into MISs illustrates, the regulation of UTs by the CA is a complex matter that continues to prompt the need for further reform in overcoming the issues raised by the differences between companies and UTs. As noted, the most recent radical proposal from CAMAC was the ‘Separate Legal Entity’ proposal that effectively would treat trusts as an SLE akin to a company. Such a reform would be groundbreaking. Interestingly, as a parallel, there have been initiatives in the past to reform the taxation structure so that trusts would be taxed like companies (‘entity taxation’), although one of the major hurdles to such reforms has been the complexity in implementing such a novel change.
929 Davies J stated: ‘It is not part of the court’s function to perpetuate error and to follow single justice authority which does not give effect to the legislative intention.’ Ibid [69].

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Studies, Auckland & Wellington, 21 & 24 May 2010)
# Appendix A: Summary of Decisions Dealing with the Application of CAORs to Unit Trusts

<table>
<thead>
<tr>
<th>Year</th>
<th>Case name (industry)</th>
<th>Judge/Court</th>
<th>Conduct deemed oppressive?</th>
<th>Did CAORs apply?</th>
<th>Comments</th>
</tr>
</thead>
</table>
| 1992 | *Re Bodaibo* (caravan) | Vincent J/NSWSC | Yes | Yes | - Oppression accepted by both parties.  
- Question was valuation of units under the CAORs. |
| 1993 | *Kizquari* (ink) | Young J/NSWSC | No | No | - Narrow application of the CAORs.  
- Unitholder had other remedies available for breach of trust.  
- Buyout only available pursuant to procedures under trust deed.  
- CAORs only available to assist buyout of $1 share capital in trustee. |
<p>| 1994 | <em>Re Bountiful</em> (hotel) | McKenzie J/QSC | No | No | - Followed Young J in <em>Kizquari</em>. |</p>
<table>
<thead>
<tr>
<th>Year</th>
<th>Case name (industry)</th>
<th>Judge/Court</th>
<th>Conduct deemed oppressive?</th>
<th>Did CAORs apply?</th>
<th>Comments</th>
</tr>
</thead>
</table>
| 1999 | Re Polyresins (industrial glue) | Chesterman J/QSC | No | No | - Held that majority shareholders cannot by definition suffer oppression.  
- The existence of the UT was unclear, so case dealt only peripherally with application of CAORs to UTs.  |
| 2000 | Vanmarc (accounting) | Mandie J/VSC | Not determined | No* | - CAORs not available to grant valuation and buyout of units, *but Mandie J left open scope for other appropriate remedies under the CAORs to be available given broad scope of CAORs. |
### Appendix A: Summary of Decisions Dealing with the Application of CAORs to Unit Trusts

<table>
<thead>
<tr>
<th>Year</th>
<th>Case name (industry)</th>
<th>Judge/Court</th>
<th>Conduct deemed oppressive?</th>
<th>Did CAORs apply?</th>
<th>Comments</th>
</tr>
</thead>
</table>
| 2000 | *Pomfret* (marketing) | Bryson J/NSWSC | Not determined             | Not determined  | - Unitholder sought interlocutory injunction stopping early vesting of UT and cross-claimed under s 233.  
- Unitholder successful in securing injunction and cross-claim settled before proceeding to trial, so no determination on s 233 application to UT. |
<p>| 2002 | <em>McEwen</em> (crane hire) | Young CJ/NSWSC | No                        | No              | - Oppression is a <em>CA</em> argument. The minority unitholder may have suffered a breach of trust, but that is not remedied by CAORs. |</p>
<table>
<thead>
<tr>
<th>Year</th>
<th>Case name (industry)</th>
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<th>Conduct deemed oppressive?</th>
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<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>Shirim (hospital)</td>
<td>Davies AJ/FCA</td>
<td>Yes</td>
<td>Yes**</td>
<td>- **The parties had agreed to consent orders for the units and shares to be valued under the CAORs. At first trial, McLaughlin noted it unusual to use s 232 to value units, but Davies AJ did not question the point.</td>
</tr>
<tr>
<td>2004</td>
<td>Surf Road (real estate)</td>
<td>Einstein J/NSWSC</td>
<td>No</td>
<td>No</td>
<td>- Followed Kizquari.</td>
</tr>
<tr>
<td>2008</td>
<td>Ciccarello (property development)</td>
<td>Mansfield J/FCA</td>
<td>Yes</td>
<td>Yes***</td>
<td>- Relief sought was appointment of receiver to trust. Various powers of court to do so. - ***Mansfield suggested s 233 could be used to appoint manager over UT in conjunction with s 1323, although matter not determined.</td>
</tr>
<tr>
<td>Year</td>
<td>Case name</td>
<td>Judge/Court</td>
<td>Conduct deemed oppressive?</td>
<td>Did CAORs apply?</td>
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<tr>
<td>2009</td>
<td>Vigliaroni</td>
<td>Davies J/VSC</td>
<td>Yes</td>
<td>Yes</td>
<td>- New approach based on s 53 definition of ‘affairs of the company,’ reversed Kizquari.</td>
</tr>
<tr>
<td></td>
<td>(cement business)</td>
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<tr>
<td>2010</td>
<td>Noosa Ventures</td>
<td>Windeyer J/NSWSC</td>
<td>No</td>
<td>No</td>
<td>- Reversed Vigliaroni.</td>
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<tr>
<td></td>
<td>(Sheraton)</td>
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<tr>
<td>2011</td>
<td>Tomanovic</td>
<td>Campbell JA, Macfarlan and Young JJA/NSWCA</td>
<td>Yes</td>
<td>Yes****</td>
<td>- Court was inconclusive as to whether CAORs should be applied to UTs, but suggested that UTs should be considered in valuing the shares when applying the buyout order granted.</td>
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<tr>
<td>2012</td>
<td>Drapac</td>
<td>Ferguson J/VSC</td>
<td>Yes</td>
<td>Yes</td>
<td>- Approved Vigliaroni.</td>
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<td>- Appeal pending.</td>
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<td>- Note that Ferguson J also supported this position in Arhanghelschi.</td>
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