

**AN ALTERNATIVE AUSTRALIAN TRUSTS ACT:
ENHANCING AUSTRALIA'S CAPACITY TO GROW AND EXPORT FINANCIAL SERVICES**

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Submission to the Productivity Commission's Inquiry into Services Exports

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INFORMATION REQUEST

*The Productivity Commission (**Commission**) seeks further information on the potential costs and benefits of trust law reform, in particular:*

- *What would be the potential effect of trust law reform on the domestic and export markets for traditional trustee services; and*
- *Is a new Commonwealth Trusts Act required, and if so should it replace or operate alongside the existing state and territory based Trustee Acts? What lessons can be learned from trust law in other jurisdictions, such as New Zealand?*

EXECUTIVE SUMMARY

In May and September 2014, as the joint authors of two submissions to the Australian Government's Financial System Inquiry (under the auspices of the Financial Services Council and the University of Sydney), we proposed the enactment of an Alternative Australian Trusts Act (Cth) (**AATA**).¹ We developed this trust law reform proposal with two objectives in mind – to solve the plethora of legal issues that had arisen in the last two decades in the application of ancient trust law to the modern commercial trust in widespread use in Australia today, and to remove an unnecessary impediment to Australia's wealth management industry playing a larger role in exporting trustee services to the Asia Pacific (**APAC**) region.

In this submission, we seek to demonstrate that an AATA would be a valuable reform measure which:

- Would benefit the domestic trust market in Australia by addressing the long-running and significant problems associated with the application of outdated trust law principles to modern commercial trusts; and

¹ David Chaikin and Eve Brown, *Global Competitiveness and Exporting Financial Services: A Proposal for an Alternative Australian Trusts Act*, May 2014, available at <http://fsi.gov.au/files/2014/05/FSC_appendix_AATA_report.pdf> (Chaikin and Brown: Report No 1 of 2014). David Chaikin and Eve Brown, *An Alternative Australian Trusts Act: Empirical and Implementation Perspectives*, September 2014:2, available at <http://fsi.gov.au/files/2014/09/FSC_Chapter_4_Attachment_C.pdf> (Chaikin and Brown, Report No 2 of 2014).

- Would grow Australia's trust services exports to APAC by making Australia a more attractive domicile for international trust users.

The necessity for Commonwealth legislation arises from the failure of state and territory governments to enact trust law reform, so as to modernise trust law generally, and to cure the current legal and policy vacuum in the governance of commercial trusts. A Commonwealth law would also ensure consistency from state to state, and across domestic and foreign trust users. Our legal analysis confirms that an AATA would be constitutionally valid, because all AATA trusts would require the appointment of a corporate trustee, thereby enlivening the corporations' power under section 51(xx) of the Commonwealth Constitution. If enacted by the Commonwealth Government, the AATA would exist alongside the common law and the state and territory trustee Acts. Trust users could choose to opt into the AATA regime if desired. Over time, we expect that trust users will prefer the modern law and will opt to establish their trusts as AATA trusts. If this occurs, the common and state-based trust laws will become less relevant and operate in a limited sphere.

Given the constitutional power of the Commonwealth to pass a law such as the AATA, there would be no requirement for state and territory government involvement in the process, or for approval by the Council of Australian Governments. The cost of developing and implementing the AATA would therefore be comparable to costs associated with enacting other Federal legislation.

AATA AND THE DOMESTIC COMMERCIAL (COLLECTIVE INVESTMENT) TRUSTS MARKETS

Trust law reform is critical for both personal trusts in the private wealth management sector, and commercial trusts, including passive and active collective investment vehicles, such as managed investment schemes (**MIS**). A distinction can be drawn between superannuation trusts, which are compulsory collective investment schemes, governed by a form of codified trust law under the *Superannuation Industry (Supervision) Act 2006 (SIS Act)*, and MIS, which are voluntary collective investment trusts, governed by general trust law. Chapter 5C of the *Corporations Act 2001 (Cth) (Corporations Act)* (the legislation specific to MIS) is a registration and licensing regime for the trustee/responsible entity (**RE**) of MIS. Whereas it would make economic and legal sense to carve out superannuation trusts from the proposed legislative reform of trust law, it would be counterproductive to exclude MIS from such reforms, for the reasons set out below.

In this submission we use the terms 'commercial trust' and 'personal trust.' A commercial trust is intended to capture all forms of collective investment trusts. These predominantly include MIS, which are a collective investment vehicle structured as trusts. MIS are registered under the *Corporations Act*. A collective investment trust must be registered as a MIS if the investors are retail clients, however for ease of administration and to ensure flexibility many wholesale collective investment trusts are also registered as MIS. Other jurisdictions in the world, specifically those that have developed under a civil system of law, have other forms of collective investment vehicles such as Undertakings for Collective Investments in Transferable Securities (**UCITS**), which are heavily used in Luxemburg and Ireland (these will be discussed more fully below). All nations that have established themselves as major global financial centres recognise trust, corporate and other (contractual) structures used to facilitate collective investment.

Personal trusts refer to the variety of traditional trusts that can be established by an individual settlor, who, unlike the investor in a collective investment trust, is separate and distinct from the beneficiaries. It is not intended to exclude trusts settled by settlors during their lifetime (inter vivos) from the category of personal trusts, however it should be noted that this category is largely dominated by post-mortem trusts, i.e. trusts established by will (which can include charitable trusts).

All trusts in Australia are governed by trust law; that is, common, judge-made law which is partially augmented by state and territory trustee legislation. This includes commercial/MIS and personal trusts. When things go wrong with MIS and disputes require resolution, they are settled by the state Supreme Courts applying ancient principles of trust law that have barely changed over centuries, and which were developed in the personal/family context, rather than a commercial context.

The most frequent example of where there have been difficulties in applying trust law to MIS is in circumstances where a MIS becomes insolvent. There is no codified legal regime, as there is for corporations, to determine the proper allocation of risk, or the order of rights between the stakeholders involved in a MIS.² This issue is not addressed by general trust law because trust law developed in the personal context and personal trusts cannot become insolvent, because they do not trade and they do not have creditors. The assets of a personal trust can be dissipated, but the concept of insolvency – an inability to pay debts as and when they fall due – does not apply to personal trusts, which are not used as quasi-corporate vehicles. Other company-like features that are absent for stakeholders in MIS include unitholder remedies, such as the oppression remedy available to shareholders of companies, and the lack of a foundational legal position that affords limited liability to unitholders.³

MIS are used as quasi-corporations (trading trusts), in addition to their use as passive collective investment vehicles. In Australia, trusts in this corporatized form pre-date the limited liability company and have not only survived its evolution, but have thrived in spite of it.⁴ The trust has prospered as a competitive form of business association because it is a flexible device which offer tax pass-through to the underlying beneficiaries. Trusts as trading businesses in Australia are far larger in number than in other common law jurisdictions, such as the United Kingdom.⁵ The annual taxation statistics issued by the ATO indicate that for the year 2012-2013 there were 780,105 trusts in various industries in Australia, compared with 850,000 companies that lodged tax returns.⁶ Although the economic advantages of using trusts for commercial endeavours are counterbalanced by the risks associated with an entity that has no separate legal personality, and which is governed by a legal framework not postulated on facilitating entrepreneurial activity,⁷ the statistics show that the trust has won out in its contest with the limited liability company in Australia.

There is an enormous body of literature, several dedicated academic commentators, and an overabundance of court decisions in the area of trust law's awkward interaction with commercial trusts.⁸ Since 1988 there has been no less than 11 Commonwealth/state Government commissioned

² Nuncio D'Angelo, *The Trust as a Surrogate Company: The Challenge of Insolvency* (2014) 8 J Eq 299, 303-304

³ Victorian Law Reform Commission, *Trading Trusts – Oppression Remedies*, Consultation Paper, June 2014.

⁴ Nuncio D'Angelo, *Commercial Trusts*, LexisNexis Butterworths, 2014, xxi.

⁵ See for example, the Revenue and Customs KAI Person Tax, *Trust Statistics*, 30 January 2015. According to the UK Revenue and Customs office the number of trusts making self-assessment returns was 160,500 in 2012-13, with reported total income of £1,985 billion.

⁶ See ATO, *Taxation statistics 2012–13 Trusts: Selected items, by industry, 2012–13 income year*, available at https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-statistics/Taxation-statistics3/?anchor=trt_detailed#trt_detailed

⁷ Nuncio D'Angelo, *Commercial Trusts*, LexisNexis Butterworths, 2014, 3.

⁸ See for example: *Korda v Australian Executor Trustees (SA) Ltd* [2015] HCA 6; *Wellington Capital Ltd v Australian Securities and Investments Commission* [2014] HCA 43; *Huntley Management Ltd v Timbercorp Securities Ltd* (2010) 187 FCR 151; *Huntley Management Ltd v Australian Olives Ltd* (2010) 186 FCR 430; *Saker, Re Great Southern Managers Australia Ltd* (2010) 190 FCR 501; *Treecorp Australia Ltd (in liq) v Dwyer* (2009) 175 FCR 373; Nuncio D'Angelo, *Commercial Trusts*, LexisNexis Butterworths, 2014; Pamela, Hanrahan, *The Responsible Entity as Trustee*, in Ian M Ramsay (ed), *Key Developments in Corporate law and Trust Law* (LexisNexis Butterworths, 2002); Reginald Barrett, *Insolvency of Registered Managed Investment Schemes*

reviews of the law of trusts and its application in Australia.⁹ Despite these reviews, which have all delivered reports that include long lists of recommended reforms, trust law has remained relatively static in Australia for almost a century. The only significant changes to the law have been achieved slowly and laboriously through the decisions of judges who are continuously grappling with the restraints of a law that is no longer fit for purpose.

The cost to retail consumers of the use of MIS/trusts as business vehicles has been significant. In the last 15 years many RE companies have gone into liquidation, including Great Southern, Timbercorp, Environinvest, Gunns Plantations, Storm Financial, and Trio Capital. These collapses have resulted in billion dollar losses for domestic retail investors. There is little doubt that the risks of investing in a MIS are significantly heightened by the mostly unwritten regulatory regime that applies to them and the lack of any formal insolvency regime to fairly allocate risk between the parties involved.

The case law, commentary and government commissioned reviews provide strong support for the reform of trust law so as to improve the outcomes for domestic investment trust users. To codify trust law and to carve out commercial trusts from the application of the new law would be an opportunity missed, and would result in regulatory arbitrage that could disadvantage the collective investment market in Australia. We therefore consider that an AATA must be wide enough to encompass both commercial and personal trusts, and be equal in its application to both foreign and domestic trust users.

*TRUST LAW REFORM IS CRITICAL FOR THE DOMESTIC AUSTRALIAN
MARKET AND COULD SAVE RETAIL INVESTORS BILLIONS OF DOLLARS IN
LOSSES FROM FURTHER FAILED MANAGED INVESTMENT SCHEMES*

(Paper presented at the Banking and Financial Services Law Association Annual Conference Queenstown, New Zealand, July 2008); Vince Battaglia, *The Liability of Members of Managed Investment Schemes in Australia: An Unresolved Issue* (2009) 23 *Australian Journal of Corporate Law* 122; Christine Brown and others, *Managed Investment Scheme Regulation: Lessons from the Great Southern Failure* (2010) 2 *FINSIA Journal of Applied Finance* 20; Harold Ford, *Trading Trusts and Creditors' Rights* (1981) 13 *Melbourne University Law Review* 1.

⁹ Queensland Law Reform Commission, *A Report of the Law Reform Commission on the Law Relating to Trusts, Trustees, Settled Land and Charities* (Queensland Law Reform Commission 8, 1971); Australian Law Reform Commission and Companies and Securities Advisory Committee Report, *Collective Investments: Other People's Money*, (Report No. 65 1993); Companies and Securities Advisory Committee, *Report to the Minister for Financial Services and Regulation on Liability of Members of Managed Investment Schemes*, (2000); Report to the Australian Government, *'Review of the Managed Investments Act 1998* (2001); *Australian Government Review of Non-Forestry Managed Investment Schemes – Issues Paper and Final Report* (2008); Parliamentary Joint Committee on Corporations and Financial Services Report, *Inquiry on Aspects of Agribusiness Managed Investment Schemes* (2009); Corporations and Markets Advisory Committee, *Managed Investment Schemes*, Discussion Paper (June 2011) and Final Report (July 2012); Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into the Collapse of Trio Capital* (2012); Queensland Law Reform Commission, *A Review of the Trusts Act 1973 (Qld)*, Discussion Paper No. 70 2012 and Interim Report No. 71 2013; Corporations and Markets Advisory Committee, Discussion Paper on *The Establishment and Operation of Managed Investment Schemes*, (March 2014); Victorian Law Reform Commission, *Trading Trusts – Oppression Remedies*, Consultation Paper (June 2014) and Final Report (May 2015).

AATA AS A FACILITATOR OF SERVICES EXPORTS: PERSONAL TRUSTS

The increase in High Net Worth Individuals (**HNWIs**) and Ultra High Net Worth Individuals (**UHNWIs**) and families in the APAC region is well documented. It is not only HNWIs that are a potential market for Australia's financial services. According to the Economist Intelligence Unit, "New Wealth Builders" - households with financial assets of \$100,000 to \$2 million – constitute "the world's fastest growing and broadest wealth segment" with assets of \$88 trillion (from 267 million households) in 2014 and moving towards \$145 trillion (from 403 million households) by 2020.¹⁰ The APAC region growth of New Wealth Builders (**NWB**) is 10.1%, with significant projected growth in India, Indonesia, Vietnam, Thailand and the Philippines. China is projected to have NWB wealth assets of \$53 trillion by 2020, up from \$23 trillion in 2014, compared with \$27 trillion in the United States by 2020.

Australia's lacklustre performance in attractive foreign investors from these groups, as well as from Asia's middle class, is illustrated by the statistics: "A mere 3.4% of those (Australian management) funds are sourced from foreign investors, compared to Singapore (80%), Hong Kong (70%) and the United Kingdom (40%)".¹¹ The private wealth management industry in Australia should increase its capacity to capture a greater share of the vast increases in world-wide wealth, especially in the APAC region. In 2014 the APAC region overtook North America as the region with the highest number of HNWIs (4.6 million out of 14.6 million world-wide), with APAC wealth of US\$15.8 trillion out of total wealth of US\$56.4 trillion. What is most significant is the trend line whereby the growth projections of HNWIs and UHNWIs in the APAC region are the highest in the world, with HNWIs growth averaging 9% per year.¹²

One question that we have sought to address is whether and to what extent will reform of trust law in Australia, such as through the proposed AATA, enhance Australia's capacity to grow and export its personal trust services business. We have examined reforms in trust law and carried out interviews in Singapore and Hong Kong with a view to answering this question.¹³

According to trust law practitioners in Singapore, amendments to Singapore's trust legislation not only altered the perception of Singapore as an overly conservative trust law economy, but also fortified Singapore's reputation as a sophisticated wealth management centre.¹⁴ Although it is difficult to pinpoint the actual impact of trust law reform in Singapore, both government officials and the trust industry consider that specific reforms, which were aimed at enhancing Singapore's attractiveness as a trust law domicile, have been effective. It is noteworthy that Singapore has

¹⁰ Economist Intelligence Unit (2014), *Spotlight on the New Wealth Builders*, 4, 7, 13.

¹¹ See David Chaikin and Eve Brown, *An Alternative Australian Trusts Act*, Paper presented at the Modern Studies in the Law of Trusts and Wealth Management: Theory and Practice Conference organised by The School of Law, Singapore Management University, York Law School & the Singapore Academy of Law, 30-31st July 2015, Singapore.

¹² See Boston Consulting Group, *Global Wealth 2015: Winning the Growth Game*, 12 June 2015, available at <<https://www.bcgperspectives.com>>.

¹³ See Chaikin and Brown: Report No 1 of 2014 and Chaikin and Brown, Report No 2 of 2014.

¹⁴ Chaikin and Brown, Report No 2 of 2014, 4.

enjoyed a spectacular growth in its asset management industry, from S\$343.3 billion in 2002 to S\$1.63 trillion in 2011.¹⁵

In the case of Hong Kong, there has also been a significant expansion of its asset management business, from HK\$1,491 billion in 2002 to HK\$8,246 billion in 2012.¹⁶ Although Hong Kong's trust law reforms in 2013 cannot be said to have been responsible for the spectacular increase in the asset management business, the trust services industry believe that without such reforms, Hong Kong would have risked losing its competitive position vis-a-vis Singapore.

It is thus too early to measure the precise economic effect of trust law reform, albeit that market participants believe that trust law reform is essential to the competitiveness of the financial services sector.¹⁷ Singapore benefited from amending its trust laws before Hong Kong, but was criticised for not taking its trust law reform far enough (for example, it did not permit non-charitable purpose trusts).¹⁸ Hong Kong did not copy all of the Singaporean reforms, in particular it did not provide any licensing/regulation of business trusts, albeit that this was favoured by the trust services industry.¹⁹ Although regulation of trusts is likely to enhance the reputation of the industry, the critical issue is whether the legislature will provide for a "soft touch" licensing regime as in Singapore, or whether it will adopt a "heavy handed approach", thereby undermining competitiveness.²⁰ In our opinion, the Singapore system of registration of business trusts²¹ has much to commend Australia; there would also be collateral advantages in terms of transparency of information, which would benefit investors, creditors and regulators.

The specific content of any modernised or codified trust legislation in Australia should address the demands and needs of the export market for trusts in our region²². The civil law systems of continental Europe have been adopted by many of Australia's major trading partners in the APAC region, including China, Taiwan, Japan and South Korea.²³ The concept of an Anglo-American trust is historically alien to these jurisdictions, with the consequence that a number of features of Australia's common trust law are unacceptable to settlors/investors who wish to use trust structures to protect and manage their wealth. These include the orthodox tradition whereby once a wealthy settlor transfers his/her property into a trust, he/she should have no further involvement with the trust. It is a major deterrent to wealthy individuals in countries such as China that they would be compelled to not only part with title to their property but also to have no residual dispositive or administrative powers in respect of orthodox trusts.²⁴

¹⁵ Chaikin and Brown, Report No 2 of 2014, 23.

¹⁶ Chaikin and Brown, Report No 2 of 2014, 26.

¹⁷ See discussion of the impact of trust law reform in Chaikin and Brown, Report No 2 of 2014, 4-6.

¹⁸ Chaikin and Brown, Report No 1 of 2014, 23-4.

¹⁹ Chaikin and Brown, Report No 2 of 2014, 12.

²⁰ Chaikin and Brown, Report No 2 of 2014, 12.

²¹ Chaikin and Brown, Report No 2 of 2014, 7-8.

²² See Society of Trust and Estate Practitioners and Spence and Johnson, *The Future of Asian Trust and Estate Practice*, 2011), available at <http://www.step.org/sites/default/files/Comms/reports/STEP_Asia_5_Futures.pdf>, and Chaikin and Brown, Report No 1 of 2014, 6.

²³ See Lusina Ho and Rebecca Lee (eds), *Trust Law in Asian Civil Law Jurisdictions: A Comparative Analysis*, 2013, Cambridge University Press.

²⁴ See Lusina Ho, *Settlor's Reserved Trusts*, Presentation to the Modern Studies in the Law of Trusts and Wealth Management: Theory and Practice Conference, Singapore Academy of Law, July 30th, 2015, and Lusina Ho, *China: Trust Law and Practice since 2001* (2010) 16 *Trusts & Trustees* 124, 126-27 and also Adam S Hofri-

As we have noted in our first report “research suggests that a settlor’s desire to maintain autonomy over his/her assets, even after death, and to ensure the protection and growth of those assets, is now a critical objective that will directly bear on a settlor’s choice of trust domicile.”²⁵ Indeed, a significant factor influencing the investment decisions of HNWI and UHNWI and families in the APAC region is the level of confidence that they repose in their professional advisors. There has been a reluctance on the part of these wealth accumulators to use common law trusts which require them to give up powers of control over the operation of trusts, including investment decisions made by professional trustees. This obstacle to the use and attractiveness of trusts has been dealt with in jurisdictions such as Hong Kong and Singapore which have reformed their trusts law so as to give considerable reserve powers to settlors of trusts.²⁶ For example, a trust in Singapore is not regarded as invalid merely because it has reserved the following powers to the settlor - power to remove/replace trustee, power to appoint capital/income to any person, power to add/exclude beneficiaries, power to invest trust funds, power to veto decisions of the trustee, and power to revoke the trust in full or part.²⁷ Without specific legislation permitting such reserve powers to allow settlors some control over the property the subject of the trusts, there are real risks that the trust may be treated by the courts as invalid.²⁸

Thus one major lesson to be learned from the revision of trust laws in Singapore and Hong Kong is that unless Australia modernises its trust law, it will be handicapped from attracting wealthy settlors from civil law jurisdictions in the APAC region. The absence of codified reserve powers for settlors under Australia’s current trust law makes Australia uncompetitive. It is likely that HNWI and UHNWI in the APAC region who cannot secure some element of control over the operation of the trust will reject Australia as a trust law domicile and will take their trust business to a competing jurisdiction. It is noteworthy that both Singapore and Hong Kong have revised their trust laws so as to attract such settlors, while at the same time maintaining the core features of the Anglo-American trust.

We discuss further below some specific aspects of trust law that should be modified so as to enhance Australia’s capacity to export financial services. Our main point is that APAC settlors of private trusts require certain trust features that are now available in competing jurisdictions. For example, Singaporean legislation expressly recognises offshore trusts, subject only to public policy considerations²⁹. Consequently, unless the Australia legal position is clarified through legislation, Singapore and other jurisdictions will have a competitive advantage over Australia in respect of trust services business.

We have discussed in our previous reports the advantages and disadvantages of modernising and codifying trust law. We have further discussed this issue in our summary paper to the Singapore conference on *Modern Studies in the Law of Trusts and Wealth Management: Theory and Practice*, a copy of which we are attaching at Appendix A. We emphasise that a significant advantage in modernising and codifying trust law is that it provides legal advisors in both common law and civil law jurisdictions with greater clarity as to the content of the law. For example, a legal advisor to a

Winogradow, *Shapeless Trusts and Settlor Title Retention: As Asian Morality Play*, February 13, 2012, available at SSRN:< <http://ssrn.com/abstract=2004485>>.

²⁵ Chaikin and Brown, Report No 1 of 2014, 6.

²⁶ See Chaikin and Brown, Report No 2 of 2014, 6-7.

²⁷ See Section 90(5) of *Singapore Trusts Act* and section 41 X of *Hong Kong Trusts Ordinance*.

²⁸ See Chaikin and Brown, Report No 1 of 2014, 29, and Chaikin and Brown: Report No 2 of 2014, 6-7.

²⁹ See Chaikin and Brown, Report No 1 of 2014, 24.

wealthy family head/potential settlor in China, would be able to explain what specific powers the settlor would have over the property assets held under an Australian trust.

TRUST LAW REFORM WILL ATTRACT HNWIS AND UHNWIS TO SETTLE AUSTRALIAN TRUSTS AND WILL ENHANCE AUSTRALIA'S REPUTATION AS A SOPHISTICATED WEALTH MANAGEMENT CENTRE IN THE REGION

AATA AS A FACILITATOR OF SERVICES EXPORTS: COMMERCIAL (COLLECTIVE INVESTMENT) TRUSTS

Policy settings unnecessarily impede the Australian financial sector in playing a greater role in exporting funds management services. Broadly, the impediments include taxation policy and legal infrastructure. The AATA proposal seeks to address the latter - the barriers to trust services exports that exist as a result of outdated and uncoded trust law.

The funds management industry in Australia is dominated by both corporate and trust structures. The corporate collective investment vehicle is in the form of the Listed Investment Company (**LIC**), while the trust structures for collective investment include MIS and other infrastructure funds. LICs are attractive for domestic investors who can access the benefits of franking credits, attached to dividends distributed by the LIC, and capital gains tax (**CGT**) discounts where the dividend includes a gain component. Foreign investors are unlikely to be attracted to LICs as they are not able to access these same benefits, due to their non-resident status.³⁰ MIS are generally favoured by both domestic and non-resident investors alike because the trust structure offers tax flow-through to the underlying investor.

The Government has recently introduced, or announced its intention to introduce, a range of measures to deal with impediments to services exports that arise from both taxation policy and inadequate legal infrastructure. An Investment Manager Regime (**IMR**) and changes to the withholding tax rules for Managed Investment Trusts (**MIT**) have been enacted, and a proposal for a new Collective Investment Vehicle (**CIV**) regime has been announced.³¹ The IMR and MIT withholding tax rules will improve the taxation outcomes for foreign investors in widely held, passive investment trusts. The CIV regime will create an alternative (non-trust) collective investment vehicle, with the benefit of tax flow-through status.

There is a demand for alternative collective investment vehicles that are not trusts because as mentioned above, the concept of a common law trust with duality or split ownership of assets between the legal owner and the beneficial owner, is a foreign concept to those domiciled in civil law jurisdictions. Trust law is not a traditional feature of civil law society and is generally not understood by individuals from civil law countries.³² This issue was originally flagged in the report by the Australian Financial Centre Forum, "Building on our Strengths" (**Johnson Report**), which noted that many potential non-resident investors in Australian funds, particularly those in the APAC region, are not in common law jurisdictions, and neither they nor their investment advisors are familiar or comfortable with common law trust structures.³³ However, in its review of the tax arrangements

³⁰ Board of Taxation, *Review of Tax Arrangements applying to Collective Investment Vehicles - A report to the Assistant Treasurer*, June 2015, Final Report.

³¹ Assistant Treasurer, The Hon Josh Frydenberg MP, Speech: Financial Services Council and BT Financial Group Breakfast, 15 April 2015.

³² Although there is now trust legislation in a number of civil law countries, they do not generally recognise or fail to expressly incorporate the common law concept of duality of ownership of assets. See Lionel Smith (ed), *The Worlds of the Trust*, Cambridge University Press, 2013.

³³ Australian Financial Centre Forum, *Building on Our Strengths: Report by the Australian Financial Centre Forum*, November 2009, 62.

applying to collective investment vehicles, the Board of Taxation noted that a number of civil law countries in APAC, such as Japan, South Korea and most recently China, have adopted the use of trusts to enhance their financial markets, and there is certainly the potential for collective trust vehicles to become more attractive for non-resident investors in the region.³⁴ In addition, India, which is fastest growing economy in APAC, is a common law country.

Another reason why investors in APAC might prefer to invest in CIVs domiciled outside Australia is because often these have the benefit of a recognised and codified regulatory regime. UCITS for example, are governed by a written legislative instrument (Directive 2014/91/EU) which coordinates the laws, regulations and administrative provisions that apply to these collective investment structures.

The lack of a codified trust law in Australia exacerbates the issues associated with civil law-domiciled investors, because trust law is not readily available to non-experts. Advisers to these investors find it difficult, if not impossible, to explain to their clients the law and the risks associated with collective investment trust structures in Australia. A modernised trust law, such as the AATA, could be linked to the IMR and MIT regimes; the regimes would complement each other and would in combination significantly reduce the current tax and legal infrastructure-related obstacles to funds management services exports. Linking the AATA to the IMR and MIT regimes would also provide an opportunity for the Government to consider tax policy in relation to a broader range of foreign investment i.e. not just investment through widely held passive unit trusts.

The proposals for an AATA and for a CIV regime are not conflicting or competing propositions. Common law jurisdictions in APAC that have moved to recognise UCITS, such as Hong Kong and Singapore, have not abolished collective investment vehicles that are trusts.³⁵ They have simply moved to recognise other structures alongside trusts, which sometimes are more appealing to investors from civil law jurisdictions. Notably, Hong Kong and Singapore have thought it necessary and beneficial to modernise and codify trust law despite having introduced UCITS to their financial markets.

The Australian Government has not indicated that the introduction of a UCITS-type CIV regime would result in the abolition of MIS or other collective investment vehicles structured as trusts. In fact, as noted in the Productivity Commission's (**Commission**) Draft Report, the Australian Government is negotiating a number of measures to address restrictions to the cross-border marketing of MIS, including two mutual recognition agreements (**MRAs**) and the Asia Region Funds Passport (**ARFP**). These measures seek to remove unnecessary restrictions on the operation of foreign MIS in participating jurisdictions by streamlining the licensing and registration requirements across the jurisdictions.

The question for Australia in relation to the AATA and CIV regime proposals, if there is a question at all, is whether one proposal should take priority over the other, or whether both proposals should be pursued concurrently. If a CIV regime is fully implemented in Australia, it is unlikely that investors from common law jurisdictions will start to use these structures in lieu of trusts. However, there is a real question as to whether civil law domiciled investors would still require a CIV regime, at least to the same extent, were trust law to be modernised and codified and made accessible to their advisers.

³⁴ Lusina Ho, 'The Reception of Trust in Asia: Emerging Asian Principles of Trusts,' *Singapore Journal of Legal Studies*, December 2004.

³⁵ See the *Business Trusts Act 2004*, Singapore.

ABS data reveals that at December 2013, \$80.7 billion in funds managed by Australian fund managers were sourced from overseas. Funds flowing specifically into Australian MITs from offshore have doubled from \$20.3 billion in January 2010 to \$40.4 billion at December 2013, and 55% of these were sourced from the APAC region.³⁶ In the 2012-2013 financial year, \$434 million was added to the Australian economy from foreign fund flows.³⁷ This shows that funds management through Australian trusts/MIS is a substantial and growing export industry. However, the proportion of funds sourced from offshore represents less than 4% of the \$2.4 trillion in assets managed in Australia.³⁸ This compares unfavourably with both Singapore and Hong Kong, where 80% and 70% of funds respectively, are sourced from foreign jurisdictions.³⁹

In its report on the economic impact of increasing Australian funds management exports, Deloitte Access Economics estimates that if Australia doubled its annual funds management export revenue by the financial year ending 2030, this would increase GDP by approximately \$330 million per annum.⁴⁰ Growth in foreign funds under management will generate fees and profit for Australian financial firms, employment for Australian residents, and company tax revenue for the Government.

The free trade agreements with Japan, Korea and China provide an opportunity to build on existing flows of funds from these countries and an incentive to settle other bilateral trade agreements with emerging economies in the region, such as India. There is the potential for exponential growth in financial services exports if Australia adopts a multi-faceted reform package; one which encourages offshore investors to choose Australia as their trust domicile.

Bilateral trade agreements, the ARFP and tax reform measures are a step in the right direction and modernising and codifying trust law would round off the Government's reform package, ensuring that Australia is best placed to compete as a financial centre in the region. APAC investors are seeking greater certainty and reduced risk. The AATA would attract foreign investors wanting to access Australian MIS without the risk associated with an un-codified law, and the need for heavy reliance on expert advisers and document drafters.

As noted by the Commission's Draft Report in relation to the ARFP, Australian financial firms will be competing with providers in ARFP jurisdictions that have more favourable tax arrangements, particularly lower rates of withholding tax for international investors. The AATA could offset some of the taxation advantages held by other passport participant countries that do not have any similar robust and modern legal infrastructure. In this sense, the AATA is not only necessary for Australia to continue to grow its funds management exports, but has the potential to accelerate that growth, in

the same way that trust law reform accelerated the growth of financial services exports in Singapore and Hong Kong.

³⁶ Financial Services Council and Perpetual, *Australian Investment Managers Cross-Border Flows Report*, 2014.

³⁷ Deloitte Access Economics, *The economic impact of increasing Australian funds management exports*, 2014.

³⁸ ABS 5655.0, *Managed Funds Australia June 2014*, Table 1 Summary Managed Funds Industry.

³⁹ See David Chaikin and Eve Brown, *An Alternative Australian Trusts Act*, Paper presented at the Modern Studies in the Law of Trusts and Wealth Management: Theory and Practice Conference organised by The School of Law, Singapore Management University, York Law School & Singapore Academy of Law, 30-31st July 2015, Singapore.

⁴⁰ Australian Bureau of Statistics 5655.0, *Managed Funds Australia June 2014*, Table 1 Summary Managed Funds Industry, available at <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/5655.0Jun%202014?OpenDocument>.

**AN AATA WILL GROW AUSTRALIA'S FOREIGN FUNDS UNDER MANAGEMENT,
GENERATE FEES AND PROFITS FOR AUSTRALIAN FINANCIAL FIRMS,
EMPLOYEMENT FOR AUSTRALIANS AND TAX REVENUE FOR THE GOVERNMENT**

AATA WOULD OPERATE ALONGSIDE THE COMMON LAW AND STATE/TERRITORY TRUSTEE ACTS

The AATA is proposed as an alternative system of law. It would operate alongside the existing common and state-based laws as an opt-in regime, requiring deliberate selection. All AATA trusts, both personal and commercial, would require a corporate trustee. This feature of the AATA trust will provide the Commonwealth with the power to legislate in an area that was traditionally the domain of the states. Section 51(xx) of the Commonwealth Constitution confers power on the Commonwealth Parliament to enact legislation with respect to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth' (**constitutional corporations**). The majority decision of the High Court in the *Work Choices Case* confirmed that the corporations' power extends to the regulation of the activities, functions, relationships and business of a constitutional corporation.⁴¹ Acting as the trustee of an AATA trust would be part of the function and business of the licensed corporate trustee, and on this basis, the Federal Government would have the power to regulate AATA trustees and trusts. Further support for an AATA might also be found in section 51(i) of the Commonwealth Constitution, which grants the Commonwealth power to make laws with respect to trade with other countries and between the states.

The key consideration underpinning the AATA was how to achieve trust law reform in an efficient and consistent manner. Australia's difficulties with law reform at the state level were foremost in our thinking. The AATA represents a trust law reform option that does not require the input or cooperation of the states. Current common and state-based trust laws apply to all trusts, regardless of whether the trustee is a corporation or an individual acting gratuitously. An AATA trust must be administered by a constitutional corporation, thereby enlivening the Commonwealth's power to regulate the business activities of the AATA trustee.

The AATA is envisaged to include at least two chapters – one setting out a trust law regime for personal trusts and another setting out a trust law regime for commercial trusts, including MIS and wholesale investor collective trust structures. We propose that an expert commission of inquiry be established, not dissimilar to the Johnson Report recommendation for a Financial Centre Task Force, to consider the content of each chapter. The personal trusts chapter would modernise and codify trust law in the personal trust area and address many of the antiquated principles of common law that are no longer relevant or desirable to settlors. The commercial trusts chapter would similarly modernise and codify trust law in the passive and active collective investment area. The new law would include appropriate and fit for purpose trust law provisions, such as the trustee's right of indemnity and limitation on liability, and would remove traditional trust law concepts that have no useful application to commercial investment trusts. Insolvency could be dealt with, mandatory covenants could be set out, and model deeds for various arrangements such as wholesale trusts, debt capital trusts and MIS could be incorporated into the legislation. Model clauses have existed in companies legislation since the 19th Century in England and have proved to be invaluable. Similarly model clauses in trust legislation would be drafted by experts and would reduce the significant drafting costs for investors.

⁴¹ *State of New South Wales v Commonwealth of Australia* (2006) 229 CLR 1 (*Work Choices Case*).

It would be possible to consider relevant policy, such as the distinction between retail and wholesale investors and the combined trustee-manager role of the RE, and determine whether these are still necessary in the context of a comprehensive trust law. If desired, a system of registration for AATA trusts could be established to promote transparency and ease of monitoring by regulators. The AATA could be enacted as a new part to the *Corporations Act*, or as a stand-alone regime.

The cost of enacting an AATA would be comparable to the cost of enacting similar Commonwealth legislation, such as the *Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill*, the IMR or the SIS Act. The state supreme courts would remain the adjudicative bodies for disputes that arise in connection with the new AATA regime, although we expect the AATA to reduce trust law litigation, as the rights and obligations of stakeholders would be clear and no longer exclusively determined by the negotiation process and the skill of the trust document drafters.

In our previous research reports, we identified the need for political leadership and commitment to the AATA reform. We noted that in the absence of any strong political leadership in the field, Hong Kong's trust law reform was almost entirely an industry led initiative, which no doubt contributed to the significant time taken to achieve the reforms. As mentioned above, there have been countless reviews of trust law in Australia, undertaken by various state and Commonwealth review bodies. None of these has resulted in any changes to the law of trusts, primarily because of a lack of political will, associated with trust law's technicality and limited public profile. However, trust law reform is an area that is non-contentious politically, and could be undertaken as a bi-partisan project. As a politically neutral measure, the AATA has immense potential to provide a cost effective reform measure to improve the domestic market and boost exports to APAC.⁴²

WHAT LESSONS CAN BE LEARNED FROM TRUST LAW IN OTHER JURISDICTIONS SUCH AS NEW ZEALAND?

We have carried out a review and an empirical analysis of trust law reform in our two reports on the proposed *Alternative Australian Trusts Act* (both of which were submitted to the Financial Systems Inquiry in 2014). We have had a further opportunity to discuss this proposal with the world's leading trust law academics and practitioners at the first *Modern Studies in the Law of Trusts and Wealth Management: Theory and Practice* conference, sponsored by the Singapore Academy of Law, in July 2015.⁴³ We draw from our reports and discussions in summarising some of the lessons to be learned from trust law reform in other jurisdictions.

Nearly every major developed common law nation in the world has moved to modernise and codify trust law, including the United Kingdom, United States, Hong Kong, Singapore, Ireland and New Zealand. Some countries have enacted new or amending legislation following a law reform commission report (eg United Kingdom), while other federation economies have enacted model legislation that has been adopted at the state level (eg United States). Whereas reform of trust law in Singapore was driven by the government which had a vision of Singapore as the leading financial services centre in APAC, the modernisation of trust law in Hong Kong was driven by the legal and business community, concerned about HK's competitiveness as a regional financial centre. Similarly, modernisation of English trust law was motivated by the critical importance of "maintaining London's status as a leading international financial centre".⁴⁴

⁴² See Chaikin and Brown, Report No 2 of 2014, 15

⁴³ See conference website at <http://www.sal.org.sg/conference/Trusts2015/default.htm>

⁴⁴ Chaikin and Brown, Report No 1 of 2014, 14.

This leads to our first lesson on the export of financial services. Modernisation of trust law is vital for those jurisdictions that wish to compete as international or regional financial centres and/or increase their exports of trust business. Almost every developed and emerging common law nation in the world has at least modernised, if not codified, its trust law. Australia is competing with many of these jurisdictions to attract APAC investors, so that the failure of Australia to reform its trust law places it at a competitive disadvantage.⁴⁵ Given that trust law reform at the state and territory levels of government in Australia has been an abject failure, it is likely that Australia's competitive position will further deteriorate unless the federal government takes positive action on behalf of the federation. Without trust law reform Australia will miss an economic opportunity to increase the demand for trusts in both the export market and domestic market.⁴⁶ The proposed AATA provides a constitutional pathway to reform of trust law in Australia by providing a feasible and attractive option for foreign and domestic investors.

Many lessons can be learned from studying the expert submissions and recommendations on trust law reform in more than 20 jurisdictions, including Singapore, Hong Kong and New Zealand. There is a rich vein of reform literature with a huge array of possible trust law reform measures which Australia could consider. We have analysed the laws of international trust model jurisdictions, carried out case studies of trust law reform in Singapore and Hong Kong, and provided a comparative gap analysis of trust law in the Australian states and territories, Hong Kong, Singapore and New Zealand (Appendix B)⁴⁷. Our study is not complete and we would expect that the proposed Australian trust law reform expert commission would utilise a more comprehensive jurisdictional analysis to inform its deliberations and reports on trust law reform.

We have in another section of this submission considered some trust law issues that affect Australia's capacity to increase its export of trust services, and which other jurisdictions have dealt with through legislative reform. For example, Singapore has enacted a system of registration of business trusts which has enhanced the reputation of the trust industry in Singapore. Another example which Australia can learn from, is that both Singapore and Hong Kong have empowered settlors/investors in private trusts by providing for residual dispositive or administrative powers. The latter statutory reform is consistent with the changing profile of HNWIs and UHNWIs in the APAC region, who are self-made entrepreneurs who wish to protect their wealth against a variety of risks.

Another lesson from trust law reform is the tendency of legislatures to take an incomplete approach to reform. This is illustrated by the ancient rule against perpetuities which prevents assets in a trust from being locked away for an indefinite period of time.⁴⁸ That the rule has lost its original purpose is recognised in most common law jurisdictions. Yet despite the fact that the rule is obsolete, it has merely been modified in most common law jurisdictions, including the states and territories of Australia (except South Australia), Singapore and most likely New Zealand.⁴⁹ In contrast, the rule has been abolished in many offshore common law jurisdictions in the Caribbean and the Pacific, as well as recently in Hong Kong.⁵⁰ That the State of South Australia has abolished the rule against perpetuities without any discernible adverse effect shows that further reform of this rule is needed.

⁴⁵ Chaikin and Brown, Report No 1 of 2014, 14-6.

⁴⁶ See Chaikin and Brown, Report No 1 of 2014, 17-9.

⁴⁷ See Chaikin and Brown, Report No 1 of 2014, 20-29, 32-34 and Chaikin and Brown, Report No 2 of 2014, 1-12.

⁴⁸ Chaikin and Brown, Report No 1 of 2014, 8.

⁴⁹ See Chaikin and Brown, Report No 1 of 2014, 32.

⁵⁰ See Chaikin and Brown, Report No 1 of 2014, 8.

There are many other trust law issues that will need to be addressed in any codified trust law which time does not permit to be analysed here. Some of the issues that we have discussed in our previous reports including the regulation of business trusts and the recognition of offshore trusts. There are also technical trust law issues that we briefly considered in our reports such as the rule in *Saunders v Vautier*, enhanced trustees default provisions, and firewall provision against forced heirship rules. All of these matters would need to be addressed by an expert trust law reform commission in Australia. Such a commission should not view itself as merely engaged in a balancing act between different stakeholders in trust law reform, since this is likely to lead to extremely modest reform and an overly conservative approach. Rather the committee should be mandated to modernise and codify trust law with a high commercial focus that will enhance economic opportunities for the Australian trust industry.

We are mindful that trust law reform should be complemented by tax law reform if the full range of economic benefits are to be achieved. The IMR and MIT withholding tax changes are a step in the right direction. We note that when Singapore changed its trust law, it also simultaneously amended its tax laws to “create new tax incentives for non-resident investors and foreign beneficiaries under a simplified tax regime”.⁵¹ New Zealand, which has not yet enacted trust law reforms pursuant to its recent Law Reform Commission report⁵², receives much greater trust business from APAC than Australia because of its favourable tax system for foreign investors.⁵³

⁵¹ Chaikin and Brown, Report No 2 of 2014, 4. For discussion of the relationship of tax reform and the AATA, see Chaikin and Brown, Report No 2 of 2014, 19.

⁵² New Zealand Law Reform Commission, *Review of the Law of Trusts: A Trusts Act for New Zealand* (R130), September 2013, available at <http://www.lawcom.govt.nz/our-projects/law-trusts>.

⁵³ Chaikin and Brown, Report No 1 of 2014, 16, 26-7.

Appendix A

An Alternative Australian Trusts Act (AATA)

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Eve Brown, Executive Manager, Office of the Superannuation Trustee, Suncorp Group

Modern Studies in the Law of Trusts and Wealth Management Conference: Theory and Practice

Organised by the School of Law, Singapore Management University, University of York and the Singapore Academy of Law, 30-31 July 2015, Supreme Court Building, Singapore

There is intense international and regional competition for managing the vast increases in wealth, especially in the Asia/Pacific region. It is not only Ultra High Net Worth families that will be the source of this increased wealth, but also the more than 3 billion people that will be joining Asia's middle class by 2030.¹ There is a debate among scholars concerning the role of law and legal institutions in facilitating economic growth, including exports of financial services as part of the wealth management industry.² In 2007 the Chief Justice of Singapore raised the important question "Does Trust Legislation Really Matter to Wealth Management?", pointing out that while international trust lawyers focus on the comparative attractiveness of trust jurisdictions, private bankers are more concerned with the legitimacy of the funds they are managing, rather than the underlying trust law governing those funds.³ This is not to say that trust law is not important, but rather that it is a building block of the legal infrastructure of an international and offshore financial centre.

Our conference presentation does not seek to address the theoretical issues concerning trust law, but advocates an unashamedly practical proposal for an alternative trust law regime in Australia. It summarises our two-part submission to the Australian Government's (Government) Financial System Inquiry, which we are attaching for delegates' consideration (APPENDIX A, AATA Report). The proposal is presented against the backdrop of Australia's dwindling position as a major financial centre in the Asia Pacific (APAC) region, despite overall exports growth of 4% per annum in the last four years, and the Government's commitment to prioritise trade reform efforts for the financial

¹ Hon Josh Frydenberg MP, Asian economies hungry for enhanced solutions, *Australian Financial Review*, 10 June 2015. Available at < <http://www.joshfrydenberg.com.au/guest/opinionDetails.aspx?id=182>>.

² The scholarly debate underlies the macro factors influencing growth, see Australian Treasury, "Productivity Commission review into barriers to growth in Australian services exports" Joint media release with the Hon Andrew Robb AO MP Minister for Trade and Investment, 4 March 2015. Available at < <http://jbh.ministers.treasury.gov.au/media-release/013-2015/>>.

³ Chief Justice Chan Sek Keong, "Trusts: The Legal Environment in Singapore", Keynote Address, Society of Trust and Estate Practitioners (STEP) Asia Conference: "Wealth Management in Asia Pacific – Building on Our Strengths", Singapore, 7 October 2007. Available at < <https://www.supremecourt.gov.sg/default.aspx?pgid=2161>>.

services sector, which should facilitate market opening in global services trade.⁴ The statistics are revealing. While Australia has the fourth largest pool of funds under management, with over \$2 trillion in superannuation, a mere 3.4% of those funds are sourced from foreign investors, compared to Singapore (80%), Hong Kong (70%) and the United Kingdom (40%).⁵

The aspirational notion of Australia as a major regional financial services hub, envisaged by Mark Johnson in his 2009 Government commissioned report (the Johnson Report), is thinning against competition from Singapore, Hong Kong and other powerhouse economies in APAC. Johnson's key recommendation, the Asia Region Funds Passport (ARFP), is in its final stages of development, with a pilot program due to commence in January 2016 with Australia, New Zealand, South Korea, Thailand, Singapore, the Philippines, and possibly even Japan participating.⁶ A complementary development is the recent Australian federal legislation for an investment manager regime which aims to address regulatory barriers, predominantly tax settings, to foreign investment in Australia through trust structures.⁷

Although both these reforms are welcome, the AATA Report presents evidence which supports the idea that, while still important, taxation considerations are not the sole, or even the principal, concern of APAC investors in choosing a domicile for trusts.⁸ Other factors such as asset protection, and especially settlor autonomy are critical to trust users. Through empirical study and field research, the AATA Report considers the trust law reform measures that have been adopted elsewhere in APAC, how these have sought to bolster settlor autonomy and facilitate asset protection, and how fruitful they have been in attracting private wealth across the globe. While many economies, both large and small, outside of APAC have also modernised and codified their trust law, the focus of the AATA Report was on APAC. The success of Singapore and Hong Kong in modernising trust law and making their economies a first class domicile for the establishment and administration of trusts in the region is evident in their comparative positions as two of the most attractive financial centres, worldwide.⁹

The idea of a new codified federal trust legislation in Australia as an alternative to the existing common law is likely to face several difficulties. The opponents of trust law reform in Australia argue that the Federation of states and territories would make reform difficult, if not impossible. They suggest that codification of the common law is too rigid an approach, will leave gaps in the law, and will make ongoing reform a complex and time consuming exercise. Other commentators believe that a modern and flexible trust law regime will promote secrecy and tax avoidance, which may in turn attract disapproval of Australia on the world stage. Some even suggest that Australia's focus should be on the development and promotion of collective investment vehicles other than trusts, to

⁴ The Global Financial Centres Index produced by Z/Yen, which benchmarks the attractiveness of financial centres across the globe, has published Sydney's fall in ranking of a staggering 10 places over the six years from 2007, when it was ranked 9th, to 2012, where it was ranked 19th.

⁵ Hon Josh Frydenberg, above no 1.

⁶ The AFRF aims to provide a "multilaterally agreed framework to facilitate the cross border marketing of managed funds across participating economies in the Asia region." See Draft rules and operational arrangements for the passport which were released on 27 February 2015. See website of the ARFP at <<http://fundspassport.apec.org/>>

⁷ See Tax and Superannuation Laws Amendment (2015 Measures No.1) Bill 2015, Chapter 7.

⁸ The Society of Trust and Estate Practitioners (STEP), "The Future of Asian Trust and Estate Practice" (STEP, 2011:10) (identified three drivers of wealth planning in Asia - asset protection, succession planning and taxation, in that order. Available at <https://www.step.org/sites/default/files/Comms/reports/STEP_Asia_5_Futures.pdf>

⁹ See the discussion in the AAAT report.

accommodate non-common law countries' participation in the financial markets. It appears that not many scholars, if any, in this field, have considered the wide-ranging benefits that could flow from making the Australian trust a modern, user-friendly and fit for purpose investment, and even trading, vehicle.

The AATA concept has been specifically designed with Australia's federal system of government in mind. In formulating the proposal it was critical to consider the constitutional feasibility of it and also Australia's less than successful track record with state/territory adoption of model (Federal) laws.¹⁰ Although not explicit in the AATA Report, the designers of the AATA believe that it is a viable reform concept that is constitutionally sound.¹¹

A trust established or administered under the AATA would require a corporate trustee, thereby enlivening the corporations power in section 50(xx) of the Commonwealth Constitution. The AATA would also be an opt-in, genuine alternative regime. Trust users of personal, collective investment, foreign and loan capital markets trusts would choose whether to opt-in to the AATA, or alternatively, to establish and administer their trust under the common law, where that options remains possible (for example, for managed investment trusts where the investors are all wholesale). Over time, a dominant regime is likely to emerge, and the other likely to fall away, except for small players in the wealth management industry.

The critics of codification of trust law argue generally that it is too rigid a form of law, not able to keep up with a rapidly changing environment. However, the Australian trust law experience with its plethora of legislation and regulation, all overlaid by the common law, has manifest that exact problem – Australia was the first, and until recently, the only economy with active trading trusts, despite not having any formal regime for dealing with the insolvency issues that affect such trusts or any balanced policy of risk allocation between the trustee, the beneficiaries and the trust creditors. Trust law in Australia has failed to keep up with commerce.¹² The immeasurable benefit to Australia in considering modernisation and codification of trust law is that it has so many and varied economies that have already taken this path, from which to learn from. The US even provides an example of another federal economy that has successfully turned trust law into statute law, which is almost consistent across all 50 states.

Similarly, while critics of a new, more flexible trust law which would attract trust users to Australia, point to the risks associated with secrecy and tax avoidance schemes, these risks don't appear to have been adequately addressed by the current common law regime, and commentators have not considered the potential for legislation to improve the transparency of trusts. A trust registration system, along with the licensing of the corporate trustees of AATA trusts could improve the visibility

¹⁰ For example, a co-operative scheme between the Commonwealth (federal government) and the 6 States in relation to the regulation of companies existed from 1982 to 1990; however, it had significant problems, such as "lack of uniform administration (and) "lack of accountability and duplication of functions". See Ian Ramsay, *Challenges to Australia's Federal Corporate Laws*, 2009, University of Melbourne Law School, Centre for Corporate Law and Securities Regulation, Research Paper, p 1. Available at <<https://www.law.unimelb.edu.au/files/dmfile/hoffman1.pdf>>.

¹¹ See *New South Wales & Ors v Commonwealth* (2006) 229 CLR 1 ('WorkChoices Case').

¹² See for example, Nuncio D'Angelo, *Commercial Trusts*, 2014, Lexis-Nexis. Compare with M Scott Donald, Book Review of Nuncio D'Angelo's *Commercial Trusts*, (2015) 37 *Sydney Law Review* 155. Available at <http://sydney.edu.au/law/slr/slr_37/slr37_1/SLRv37n1Donald.pdf>

of trusts and the “fair taxation” of their benefactors, and might even bolster Australia’s standing at international fora such as the OECD and APEC. Corporate trustees could act as gatekeepers of the financial regulatory regime, assisting the regulators to fulfil their monitoring role. In addition, if the hypothesis that sits behind the AATA Report is correct – that APAC investors and trust users are no longer predominantly motivated by taxation outcomes in selecting a domicile for their trust – it does not follow that modernisation and codification of an outdated regime will attract less desirable trust users. Australia has a well-developed rule of law, a reliable court system and most importantly, a highly skilled financial labour market. It is critical for Australia to find a way to capitalise on these strengths and trust law reform is one avenue to achieve this.

While there is definitely some merit in a policy position which seeks to attract foreign capital through the legal recognition of collective investment vehicles that are not trusts, this beggars the question – would this really be necessary if trust law were not only modernised but also made more accessible to non-experts and foreigners? If Australia’s trust law was clear and certain, user-friendly and free from regulatory arbitrage, this may be sufficient to put foreign trust users, even those domiciled in civil law jurisdictions, at ease in their dealings in financial products through trust structures.

It is proposed that Australia should set up a committee of trust law and financial regulation experts to develop an Alternative Australian Trusts Act (Cth), and that this should be developed through consultation with the wealth management industry and other relevant stakeholders. It remains to be seen whether there is sufficient political will or industry motivation in Australia to drive this technically complex, but politically uncontentious trust law reform idea.

Sydney, July 3, 2015