

‘The Intimate Connection of Trust and Corporation’

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

By

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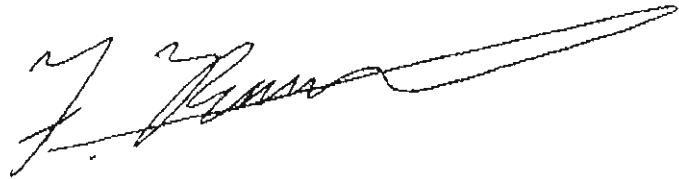
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A handwritten signature in black ink, appearing to read 'F. Ranero', with a long, sweeping horizontal stroke extending to the right.

Franz J Ranero

Abstract

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

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

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

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

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Table of Contents

Abbreviations	v
1. Introduction	1
1.1 Scope	1
1.2 Justification	1
1.3 Methodology	3
1.4 Themes	4
 <i>Part A - The Scheme and the Scheme Constitution</i> 	
2. From Deed of Settlement to Constitution: An Historical Perspective	8
2.1 The Trust in the Development of the Company	9
2.2 The Historical Development of the Managed Investment Scheme	12
3. The Managed Investment Scheme	26
3.1 Rights Derived from Statute	26
3.2 Rights Derived from Contract	31
3.3 Rights Derived from Equity	37
3.4 Amendments to the Scheme Constitution	47
 <i>Part B - Amendments by the Responsible Entity</i> 	
4. The Power to Amend the Scheme Constitution	49
4.1 The Source of the Power	49
4.2 Interpretation of the Power	52
4.3 Restraints on the Power	59
5. Equitable Restraint on the Power	78
5.1 Duty to Act for a Proper Purpose	79
5.2 Failure of Substratum	98
5.3 Duty to Act in the Best Interests of Members	109
5.4 Ratification and Exclusion	126
6. Selected Amendments to the Scheme Constitution	130
6.1 Changing the Investment Powers	130
6.2 Removal of Withdrawal Rights	135
6.3 Exclusion of Self-Dealing Rule	138
 <i>Part C - Amendments by Scheme Members</i> 	
7. The Power to Amend the Scheme Constitution	142
7.1 The Source of the Power	142
7.2 Restraints on the Power	147
8. Equitable Restraint on the Power	154
8.1 Fraud on the Minority in Company Law	154
8.2 Application of Fraud on the Minority to Managed Investment Schemes	164
9. Selected Amendments to the Scheme Constitution	174
9.1 Introduction of a Compulsory Acquisition Clause	174
9.2 Removal of Exclusion of Members' Liability	181
9.3 Amendments Affecting the Responsible Entity	185
10. Comparison with the Company Shareholder	188
10.1 The Company Constitution	189
10.2 Amendments to the Company Constitution	192
11. Conclusions	202
Bibliography	206

Abbreviations

ALRC/CSAC	Australian Law Reform Commission & Companies and Securities Advisory Commission
ALRC/CSAC Vol 1	Australian Law Reform Commission & Companies and Securities Advisory Commission, <i>Collective Investments: Other People's Money</i> , Volume 1, Report No 65, June 1993
ALRC/CSAC Vol 2	Australian Law Reform Commission & Companies and Securities Advisory Commission, <i>Collective Investments: Other People's Money</i> , Volume 2, Report No 65, June 1993
ASIC	The Australian Securities and Investment Commission
ASX	The Australian Stock Exchange Limited
CLERB	<i>Corporate Law Economic Reform Bill</i> 1998 (Cth)
MIA	<i>Managed Investments Act</i> 1998 (Cth)
The Act	<i>Corporations Law</i> (Cth)

Unless otherwise stated, all references to statutory provisions are references to provisions of the *Corporations Law*.

The law is stated as at 19 April 1999.