Global Competitiveness and Exporting Financial Services:

A proposal for an Alternative Australian Trusts Act

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The University of Sydney Business School and the Financial Services Council

Contents

Executive Summary

1. In this report, the Financial Services Council and Dr David Chaikin of The University of Sydney Business School recommend the enactment of an Alternative Australian Trusts Act (Cth) (AATA).
2. This report makes the case for modernisation of Australia's trust law against the backdrop of significant changes in the trust law of Singapore and Hong Kong, which have been designed to enhance their competitiveness as international financial centres.
3. A later report will explain in more detail how a new AATA could modernise and codify an alternative trust law regime, and provide settlors of personal trusts, investors in collective schemes and loan capital trust lenders with a choice of substantive trust law. It will propose that the new AATA override the parts of the general law that are obsolete, convoluted and problematic; codify, in a principles-based manner, other parts of the general law; and provide new, fit for purpose provisions that would make the new regime appealing to both domestic and non-resident users.
4. The underlying purpose of the proposed new AATA will be to boost Australia's (trustee, wealth management and private banking) financial services sector. As such, financial services institutions will have an essential role to play as the licensed trustee entity in the new AATA.

1 Introduction

Australia is an open economy focused on international trade, though in recent times, as a result of the decline of manufacturing and the mining industry, trade in services and the services sector more broadly has become incredibly important to Australia's economy. The services sector in Australia represents 70% of Australia's GDP, employs 4/5 Australian workers and has exports that have grown by approximately 4% per annum over the last four years (Australian Government, 2013).

The Commonwealth Government has stated that the financial services sector is one of Australia's priority sectors in terms of trade reform efforts to facilitate market opening in global services trade; however, the concept of Australia as a financial services hub, envisaged by Mark Johnson in his 2009 Government commissioned report (Johnson Report), is thinning against competition from other Asia Pacific economies, such as Singapore and Hong Kong.

The respected Global Financial Centres Index, produced by Z/Yen, which benchmarks the attractiveness – in absolute and dynamic terms – of financial centres across the globe, indicates that the performance of Australia's major cities, in comparison with other financial centres in the region, is declining sharply (Z/Yen, 2013). Sydney's ranking has fallen a staggering 10 places over the six years from 2007, when it was ranked 9th, to 2012, where it was ranked 19th. This is despite the general improvement in ratings of most other Asia Pacific economies, in particular Singapore, which experienced one of the strongest rises in the region over the last financial year. Although Sydney has improved its rankings in 2013 to 15th, there is little optimism that Sydney will become a more significant financial centre, unlike its regional competitors of Singapore, Hong Kong, Shanghai, Beijing or Seoul (Ibid: 14)

One explanation for Australia's poor performance in comparison to its regional neighbours is its slow response to market developments and its incomplete implementation of the Johnson Report recommendations, which were formulated to promote Australia as a financial services hub. While there has been some progress toward achieving two of the key Johnson recommendations – the regional funds passport and a simplified retail corporate bond regime – as this research will show, the basic infrastructure required to facilitate these 'big picture' proposals and to promote Australia as a financial services centre, is lacking.

Australia's centuries old trust law is the foundation upon which a multitude of private wealth and debt and equity capital market arrangements rely. The substantive trust law is primarily common or judge made law that dates back to feudal English law and which was never envisaged to apply in a commercial context; it is out-dated, disparate, convoluted and no longer fit for purpose.

A number of our regional common law neighbours have already recognised that general trust law is a constraint on the development and promotion of their trustee services industries and have reviewed and moved to amend their trust law. Some have moved to codify a uniform and modernised trust law, not dissimilar to Australia's approach in respect of company law.

The proposal presented in this research report is that Australia should enact an *Alternative Australian Trusts Act* (Cth), as a modernised, generally principles based, trust law code that accommodates the unique use of trust structures in Australia, properly serves the domestic Australian market and provides better scope for export of Australia's trust services industry.

2 The Case for Modernisation of Trust Law

2.1 Deficiencies with Substantive Trust Law Principles

At least in respect of company law, most common law economies recognise that institutional infrastructure plays a critical role in an economy's competitive advantage (Plender, 2002: 1.2). Differences in law can present barriers to trade based on the cost of complying with multiple legal systems and the associated risk and unpredictability. Given the extensive and unique use of trust structures in Australia, both for capital raising and asset management purposes, it is surprising that there has been little interest in the role that trust law can and does plan in Australia's competitive economy. This is so, even in light of the significant increase in cross border flows over several decades and the fact that Australian funds management is a substantial and growing export industry (Financial Services Council and The Trust Company 2013: 4-5).

The case for enacting an alternative trust law regime in Australia is two-fold. First, it is clear and undisputed that English trust law developed in the family context, to enable individuals to protect and transfer their wealth to their family or for the benefit of charitable purposes (Hayton, 2002: 2.3). It was never intended to be used in respect of large scale commercial transactions such as pension schemes, unit trusts, securitisation or debt restructuring arrangements, although it has in many common law economies been adapted to suit and promote these commercial purposes.

The second half of the twentieth century has seen a major shift of trust assets away from family or personal trusts and into commercial trusts for the benefit of industrialists, traders and financiers (Ibid: 3.7.1). It is now estimated that only 10% of all trust assets by value are held in family or personal trusts, with the balance being held in some form of commercial trust arrangement. Despite the fact that the trust has by far outgrown its family origins both the courts and Parliaments in Australia have declined to adequately develop trust law to suit commerce (D'Angelo, 2013: 15). One might argue that Australia's federal system of Government has posed some difficulties, but other economies with similar systems, such as the United States, have not been held back in implementing uniform or model trust laws.

The application of ancient and personal trust law principles to modern commercial trust arrangements often leads to unwelcome and unintended results. Therefore, the first case for enacting an alternative trust law regime is to specifically address these recognised problems which make Australian commercial trusts less desirable when compared with trusts established in other Asia Pacific jurisdictions that do not have the same legal issues. The critical problems associated with the application of general trust law principles to the common commercial trust arrangements used in Australia are illustrated in section 2.2 of this report. The remainder of this section will concentrate on the inherent problems associated with current trust law principles, aside from their application to commercial arrangements.

The other, no less important, case for enacting an alternative trust law regime focuses on addressing changing customer needs. That is, the changing needs of both resident and non-resident users of trustee services. Changing customer needs were a feature of the last financial system inquiry, the Wallis Review, which noted that changes in demographics and to workforce patterns, in particular, were contributing to a 'reshaping of the financial services landscape' (Australian Government, 1997: Chapter 1, 77). Similarly, we expect submissions to the Murray inquiry will highlight a number of areas in which the wants and needs of financial services users have dramatically changed in the 15 years since the Wallis Review and which are continuing to evolve rapidly.

There are three key areas of change that are having an effect on Australia's trust services industry and Australia's desirability as a domicile for trusts:

1. The financial literacy and financial awareness of individuals, both in Australia and elsewhere, is increasing. Individuals are more aware than ever before of the range of financial products and services available to them in a given market.
2. The developing economies of China and India have brought about a surge in high net worth and ultra-high net worth individuals who are looking to invest their wealth through flexible, purpose built structures.

3. The continued integration of financial markets means that the average financial services consumer is not restricted to the home market when investing or seeking to transfer wealth and can easily avoid the unfavourable features of the financial system of which they are resident by setting up structures that are offshore (Ibid: Chapter 3, 119).

In light of these changing customer needs, it is also worth flagging that tax considerations are no longer the sole or primary motivation in selecting a trust domicile. A 2011 report, produced by The Society of Trust and Estate Practitioners (STEP), titled 'The Future of Asian Trust and Estate Practice', identified that the three drivers of wealth planning in Asia were asset protection, succession planning and taxation, in that order (STEP, 2011:10). Similarly, data published by Europe Economics showed that in the United Kingdom (UK) the predominant reason for the use of a trust over some alternative vehicles was often flexibility or the security provided by a separate fund, rather than taxation (Europe Economics, 2002: 24). While taxation still featured in the top three trust related concerns of Asian and UK clients, both pieces of research suggest that the common perception of trusts as purely a tax avoidance vehicle is misconceived; while trusts are still used to achieve certain tax objectives there are now other reasons for creating trusts that are more significant. The paradigm shift away from trusts as a means to achieve secrecy and to avoid tax, toward trusts as a vehicle to ensure settlor control and asset protection, is discussed in more detail in a later section of this report. For the purpose of this research and to better explain the case for change based on changing customer needs, we collate the aims of flexibility, wealth planning and other related ends into one broad objective termed 'settlor autonomy.' In addition, we collectively refer to security of trust property considerations, such as the separate fund point, as 'asset protection.'

This 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. Further, as outlined above, where the trust laws that apply in the country or city-State of residence of the settlor cannot meet this objective, settlors that are financially savvy or high net worth individuals, who appreciate their ability to access other neighbouring financial markets, will take their trust business offshore.

Australian trust law has been developed by judges who have, through decisions and the application of precedent, established the general body of substantive trust law that exists in Australia today. They have been influenced and guided in this process by the public policy considerations of the time and Parliament has not so far interfered materially with this approach, even in cases where the original policy consideration no longer exists or has changed dramatically.

A good example of this is the development of family provision laws, through the courts in the first instance, and then later by legislative endorsement. Family provision laws are based on the moral position that a testator, upon death, should provide for the maintenance and upkeep of his/her dependants before making other gifts from the estate. Over time the categories of persons who are eligible to make a claim on an estate have expanded from just the testator's spouse and children to de facto spouses, stepchildren and adopted children, grandchildren and parents (Hannah and McGregor-Lownes, 2008: 3). These laws were first introduced in New Zealand in 1900 and were soon after picked up in similar form by Australia and Canada, and to a lesser extent, the UK, on public policy grounds (Ibid: 3). Singapore too enacted laws that provided for testator family maintenance, though did not go as far as New Zealand or Australia in terms of the range of people who could make a claim on an estate or the amount that could be claimed (Theng, 2012). It is interesting to note that Honk Kong has recently modernised and codified its trust law and has included firewall-type provisions that insulate the assets of trusts established under Hong Kong law from unfavourable inheritance laws in the foreign settlor's place of residence/domicile.

It is beyond the scope of this research to provide extensive illustrations of where the general law may not be conducive to the new objectives of settlors in respect of autonomy and asset protection. This would be an appropriate exercise to undertake in consultation with the trustee services industry and the broader public, should the Government decide to review Australian trust law. Further, it is not possible to provide the historical, public policy context behind a range of current trust law principles. However, some brief examples are provided, which underline the divergence of Australian trust law's alignment with the current needs and wants of financially literate and high net worth settlors.

The rule in Saunders v Vautier

Saunders v Vautier ((1841) EWHC Ch J 82) established an equitable rule, that if all the beneficiaries of a trust are *sui juris* (of age and full capacity) and between them are entitled to the whole of the trust fund, they may agree to bring the trust to an end and force the transfer of the trust property to them, irrespective of the wishes of the settlor (Parker and Mellows, 1998: 637). The case was decided in England in 1841 on the premise that a trust in equity is equivalent to a gift under the common law, and as a general principle, once a trust is created, the settlor no longer has any control over the trust property or what the beneficiaries choose to do with that property (Ibid: 637).

Unlike the US, which has not adopted the rule as part of its general body of trust law, Australia has adopted, and developed through precedent, the principle in *Saunders v Vautier* and has further extended the rule to the charitable beneficiaries of charitable purpose trusts (*Congregational Union of NSW v Thistlewaite* (1952) 87 CLR 375).

The rule clearly ignores the wants and needs of settlors, who have made a conscious and informed decision to create a trust, rather than providing an outright gift to the objects of the trust. The rule has been abolished or modified in certain Asia Pacific economies and in respect of certain types of trust structures, such as Singaporean Real Estate Investment Trusts.

In light of these regional developments and the changing focus of settlors on maintaining autonomy and ensuring the protection of assets, it is time to have a discussion in Australia about whether the 1841 principle should continue to apply by operation of the general law, despite a settlor's desire to exclude it.

The rule against perpetuities

Similarly, the rule against perpetuities is an ancient English trust law principle that in its original form prevented assets from being locked away in a trust for more than 21 years from the death of the last life that was in being at the time the trust was established. The rule takes its current form from the decision in the *Duke of Norfolk's Case* in 1682 (Queensland Law Reform Commission, 1971: 2). The basis of the principle is that land and other property should not be rendered inalienable and should be kept in circulation among the members of a society (Parker and Mellows, 1998: 220); in 1682 there was concern among the broader public that the entire wealth of the nation could, through the use of trusts, become concentrated in just o few hands.

The rule has recently been abolished in Hong Kong on the basis that most land holdings in the city are leasehold (Hong Kong Parliament, 2013: 7033). It has also been abolished in the Australian State of South Australia (s 61 of the *Law of Property Act 1936* (SA)), and modified in its application by statute in all of the remaining States and Territories and in Singapore (s 89 of the *Trustees Act 2004* (Singapore) and s 32 of the *Civil Law Act 1999* (Singapore)) and likely New Zealand, in the near future (New Zealand Law Reform Commission, 2013: Part 1, 65).

Similarly, the time has come to consider the utility of the rule against perpetuities in the Australian context and against the backdrop that is the approach adopted by our Asia Pacific neighbours.

There are a range of trust law principles that could be considered as part of a broader review of the state of trust law in Australia, from the perspective of changing customer needs. A gap analysis at Appendix A sets out how a range of critical trust law principles apply, and even if they apply at all, in Australia, Hong Kong, Singapore and New Zealand. These cornerstones of the general body of English trust law would be a good place to start in any consideration of the question – whether to modernise and codify an alternative trust law regime in Australia.

2.2. Trust Law's Interaction with Legislation and Commerce

There is a range of factors that in combination render Australian trust law uncertain and make Australia less appealing as a domicile for trusts or trust assets. Because Australia is a federation, the substantive law of trusts has been developed over time by equity judges in the States and Territories (State/s), which has on some occasions led to fragmented and disparate outcomes. Further, the law has not developed with commercial (collective equity and debt) trust arrangements in mind; the result of which is serious mismatch between the purpose of commercial trust structures and the law that regulates them. This problem is compounded because substantive trust law is predominantly not statutory and thus is not readily accessible by non-experts (D'Angelo, 2011). In addition, trust law is not enforced by the executive Government like company law but rather by the courts, which cannot act on their own initiative and exercise discretion when granting remedies for breach of trust (Ibid).

State Trustee/Trusts Acts

The general law is supplemented by Commonwealth and State legislation that primarily focuses on facilitating the administration of trusts and the (financial services) licensing of the trustee. For example, the State Trustee/Trusts Acts (Trustee Acts) seek to eliminate the negative effects of poor drafting and to extend court powers to deal with trust issues beyond the inherent jurisdiction; however, they tend not to codify substantive trust law principles, such as the scope of trustee powers and duties.

The State Trustee Acts are old Acts, that with the exception of Queensland, have not been reviewed or amended in many decades. As noted by the Queensland Law Reform Commission (QLRC) in its 2013 review of the *Trusts Act 1973* (Qld), the bulk of the provisions in the Queensland Act originated from English Trustee Acts from the mid 1800s and have remained relatively unchanged since that time. The QLRC has recommended that almost 30 of the current provisions in the Queensland Act should be repealed, on the basis that they are now obsolete or no longer appropriate in modern Trustee legislation. In addition, the State Trustee Acts, like the general law, diverge in certain key areas and this results in a degree of regulatory arbitrage across the States.

Key problems:

- Provisions are excessively complex and may result in little benefit.
- Provisions are often out dated and obsolete.
- Provisions are not always consistent across the States, for example the rule against perpetuities and excessive accumulation of income has been abolished in the State of South Australia and has varying applications across the remaining States due to various legislative provisions (see Appendix A).

Licensed Trustee Companies

When personal or traditional trusts (not commercial trust arrangements) are administered or managed by a professional trustee that is a licensed trustee company, another layer of Commonwealth regulation applies. Chapter 5D of *the Corporations Act 2001* (Cth) (the Act) provides a licensing regime for trustee companies that are listed on a schedule to the Corporations Regulations. The purpose of the Chapter 5D regime was to streamline the licensing and associated compliance costs for national trustee companies that operate across several States. The chapter regulates the trustee entity through licensing conditions such as net tangible assets, insurance and disclosure requirements, and in some cases prescriptively regulates the fees that may be charged by the trustee entity to its traditional clients.

However, the chapter does not regulate the activity of delivering a traditional trustee service to retail clients, nor does it provide for any substantive trust law principles, which are covered by the general law and to a limited degree, the State Trustee Acts.

Key problem:

- Unlike other financial licensing regimes, Chapter 5D does not expressly prohibit unlicensed entities from offering traditional/personal trustee services as part of a commercial enterprise. This means that an entity without the same financial backing, insurance or conduct obligations as those that apply to licensed trustee companies, can still offer the same or similar trustee services to retail clients. This creates an un-level or unequal playing field between licensed trustee companies and unlicensed providers of these services and leaves retail consumers exposed to significant risk.

Managed Investment Schemes

There are also Commonwealth laws that regulate the administrative aspects of certain commercial trust arrangements. Chapter 5C of the *Corporations Act 2001* (Cth) regulates collective investment schemes, termed Managed Investment Schemes (MIS) under the Act. MISs involve the raising and pooling of equity capital, from groups of arms length retail investors, where the trust assets can be applied toward risk-taking enterprise (D'Angelo, 2013:11). The underlying purpose of the Chapter 5C regime is to regulate MISs where the members of the scheme are unsophisticated investors, in need of legislative protection. The legislation seeks to achieve a level of investor protection by requiring:

- A single scheme manager (Responsible Entity), which is a public listed trustee company with an Australian financial services licence which owes a range of fiduciary and statutory duties to the investors.
- The Responsible Entity to adhere to a statutory duty of care and diligence in respect of its operation of the scheme.
- The licensing of the Responsible Entity and correspondingly its compliance with the conditions of licensing, such as the holding of sufficient capital backing and insurance.
- Various other protective administrative features of the scheme, such as the requirement for a compliance committee and provision for the removal and replacement of the Responsible Entity.

Critically though, Chapter 5C explicitly states that the Responsible Entity of a MIS holds scheme property on trust for scheme members (s 601FC(2) of the *Corporations Act 2001* (Cth)). This means that in all areas where the Act is silent or not exhaustively conclusive, the general trust law will apply. It is likely that this provision was included so as to make clear that the assets of the scheme are not available to satisfy the claims of the Responsible Entity's creditors where the Responsible Entity becomes insolvent. However, this provision then becomes problematic for creditors who have contracted with the Responsible Entity for scheme purposes and results in improper allocation of risk across the relevant parties and improper insolvency outcomes.

There are also several features of Australia's collective investment regime that do not align with the International Organisation of Securities Commissions (IOSCO) principles on the regulation of collective/managed investment schemes. One of the key areas of Australian departure from the IOSCO standards is the scope of the role of the Responsible Entity and the scheme custodian (Moodie and Ramsay, 2003). The IOSCO principles require scheme assets to be kept separate from the operator of the scheme and that this should be achieved by appointing a custodian that is functionally independent from the operator and who must always act in the best interests of investors (Ibid: 46). Under the Australian regime, even where an independent custodian is appointed to hold scheme assets, it generally does so under a bare trustee arrangement with the Responsible Entity. It is presumed that the Responsible Entity owes the fiduciary duty to the investors and the custodian merely acts on the Responsible Entity's directions. However, it is possible that under the general law the custodian also owes a fiduciary duty to the scheme members, and the lack of (statutory) regulation of the custodian in this regard, could potentially give rise to complicated and irreconcilable fiduciary duties (Ibid). This should not be described as a key problem with the 5C regime but is another example of how the application of general trust law principles can result in uncertain and potentially undesirable outcomes.

Key problems:

- Chapter 5C does not include provisions for dealing with scheme insolvency, such as the voluntary administration or scheme of arrangement provisions for dealing with insolvent companies under the Act. As a result, schemes that become insolvent are dealt with according to the general law of trusts. Because trusts do not have separate legal entity status all debts incurred by a trustee in respect of the trust are personal to the trustee. Under the general trust law, a trustee has a right to indemnity out of the trust assets. Unsecured creditors do not have direct access to the trust assets through a legislated scheme; rather, they have indirect access through the trustee's right of indemnity. This indirect access is via an equitable remedy of subrogation, conditional on (i) whether the debt was property incurred by the trustee and (ii) whether the accounts as between the trustee and the beneficiary/ies are clear (the 'clear accounts rule'). A creditor has no knowledge or control over the latter, but despite this, an unsecured creditor's claim can be defeated by such conduct of the trustee. In addition, the defeating of the claims of unsecured creditors by operation of the 'clear accounts rule' may lead to a windfall profit for beneficiaries, which is also an inappropriate insolvency outcome (D'Angelo, 2013: 19-25).
- The unitholders in a MIS do not have limited liability in respect of the debts that the Responsible Entity incurs on behalf of the scheme. In situations where the scheme becomes illiquid and the Responsible Entity is also insolvent there is the potential for creditors of the Responsible Entity (who contracted with the Responsible Entity for scheme purposes) to pursue the personal wealth of unitholders as their liability is not limited to the equity capital they invested in the scheme. This places unitholders at a disadvantage when compared with shareholders in a company (Ibid: 27).

Debt Capital Market Arrangements

Trust structures are also used to facilitate debt capital raisings by companies, other than approved deposit taking institutions, from retail lenders. A debenture is a chose in action that includes an undertaking by the company that issues the debenture (the issuer), to repay as a debt, money deposited with or lent to the issuer. Issues of debentures are regulated by Chapter 2L of the *Corporations Act 2001* (Cth), though again only in an administrative and not a substantive sense. Chapter 2L requires a body that intends to raise debt capital by issuing debentures to retail lenders to first enter into a trust deed and appoint a trustee.

In line with the Johnson Report recommendation - that Australia should seek to implement a simplified corporate bond regime - the Australian Government introduced the *Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2013* (the Bill). A corporate bond is defined to be a debenture for the purpose of Chapter 2L of the Act. The Bill seeks to address some of the legislative/administrative problems that were thought to effect in a negative way the popularity of bonds as a fundraising mechanism in Australia. These included the requirement to issue a full prospectus and the personal liability of directors for the content of prospectuses. However, the debate on the Johnson recommendation and Australia's lacking liquid corporate bond market has so far omitted to include any reference to the general trust law problems that have also dogged the market.

Like Chapter 5C, the 2L regime sets out some of the duties of the trustee but is broadly silent, or non-exhaustive in a conclusive sense, on a range of substantive trust law principles, thereby leaving these matters to be determined by the general law of trusts.

Problems with the application of the general law of trusts to these types of arrangements were initially raised in submissions made to the Campbell Review in 1981. Some submissions suggested that the role of trustee securities should be reconsidered as trust deeds are of little use in protecting investors (Australian Government, 1981: 393). Decades later and after the collapse of several large finance company issuers of debentures, the same trust law problems remain.

Key problems:

- The issuer of the debentures is a separate commercial entity to the trustee. When an issuer becomes insolvent and is unable to meet its obligation to repay the debenture holders, there is often confusion and debate as to who should bear responsibility for the debenture holders' losses – the issuer or the trustee. There is to date a lack of judicial interpretation of the extent of the trustee's role in fulfilling its obligations under Chapter 2L of the Act.
- The debenture trustee frequently has to apply to a court to enforce its security rights on behalf of debenture holders where the issuer (over whose assets the trustee has security) won't consent to the enforcement of the trustee's security. In the normal case, because the trustee does not hold any of the issuer's or the debenture holders' funds, it will have no choice but to bring the court action at its own expense and to rely on its right of indemnity under the general trust law, via the reimbursement limb, to be made whole. There is significant risk and uncertainty associated with this course of action for the trustee and indirectly for the debenture holders.

Corporate Trustees and Securitisation

Prior to the Global Financial Crisis, Australia had one of the highest growth rates in securitisation, reaching $160 billion in outstanding assets at June 2004 (Baily, 2004). As the Australian Securities and Investment Commission has noted, the future 'recovery of the Australian securitisation market relies heavily on the return of offshore investors' which will depend on the competitiveness of the Australian market compared to other countries (Tanzer, 2013). Australia's competitive position depends on the investment attractiveness of financial products offered through the securitisation process, which in turn will be influenced by the legal efficacy of the investment and the effectiveness of regulation.

It is an essential feature of a securitisation programme that the securities offered to investors are issued by a 'bankruptcy-remote special purpose vehicle' (SPV) which will also own the assets that provide the security. The SPV may take various legal forms, such as a limited liability company or a trust with a corporate trustee (Tavakoli, 2008: 18-9). It is noteworthy that in Australia the majority of securitisation programmes use trust structures.

Typically securitisation in Australia will entail the appointment of a trustee who will 'act as the owner of the underlying assets and as the issuer of the debt securities' (Cox, 2008: 230). There are a number of advantages in using trust structures in securitisation, such as the familiarity of the market with trusts, the 'flexibility of the trust instrument' and the fact that a trust is a 'pass through vehicle for tax purposes'(Robbé, 2008: 16). The efficiency of the trust structure is ensured by the appointment of a manager who takes day-to-day responsibility for the management of the trust and the assets. However, there is added complexity and cost because despite the role of the manager, the trustee as legal owner of the assets is obliged to become 'involved in each act involving the assets and liabilities of the trust' (Cox, 2008: 231).

The most significant document in securitisation is the trust deed which is a very detailed document setting out the relationship between various parties, including the trustee, the secured creditors and the special purpose vehicle/issuer (Robbé, 2008:41). The trust deed sets out with a high degree of specificity and completeness the duties and obligations of the trustees, as well as the scope of indemnities and exclusion clauses. The legal duties of trustees as stated in the trust documentation are different from the traditional role of fiduciary trustees in private trust arrangements in that, prior to a default, they are largely ministerial or administrative in character (Schwarcz, 2012: 816).

Australian lawyers have been innovative in negotiating and drafting complex trust documentation to deal with legal problems arising from the interaction of property, insolvency and trust law and the commercial demands of the securitisation programme. To a large extent, the drafters of trust agreements in securitisation programmes have relied on the fact that trust legislation sets out default provisions, rather than proscriptive obligations which apply to all trustees.

In the debates surrounding the English and the Hong Kong revisions of trust law, a significant issue was the impact of a new trust law on commercial trusts operating in the capital markets. It was emphasised in one submission to the Hong Kong review that policy matters relevant to private trust settlements may be 'inappropriate …to the operation of trusts in international capital markets, and vice versa' (Honk Kong Legislative Council, 2013:10). Another submission suggested that it would be unfortunate if any new statutory trust regime displaced well established practices in the capital markets, or overrode the 'detailed and often highly negotiated trust instrument' (Ibid: 10). The English trust law reforms have been sensitive to the views of capital markets practitioners because of the importance of maintaining London's position as a leading global financial centre. For example, although the revised English trust legislation enacted a statutory duty of care for trustees, this is a default provision in that the trust instrument may exclude the statutory duty. Indeed, after the enactment of the English *Trustees Act 2000* it became common practice for professional trustees in England to exclude or modify their statutory trust obligation, and to incorporate in the trust deed the general law duty which is considered more certain and well known (Ibid: 26, 56).

Consequently, a revision of Australia's trust laws should be sensitive to the market practices that have been developed in relation to the commercial uses of trust. It will be important that any new legislation satisfies the needs of both private and commercial trust arrangements. It is also important that the law provides sufficient protection to all stakeholders, without unnecessarily interfering with effective and efficient trust arrangements.

2.3 Competition and Trust Law Reform

The case for trust law reform is also supported by examining the laws and policies of financial centres which are competitors to Australia. In this section we will trace how competition between global and regional financial centres has influenced the development of trust law. For comparative purposes, a more detailed treatment of the precise changes in trust law in international trust jurisdictions, Singapore and Hong Kong, is found in Part 4 of this report.

One factor that has contributed to the modernisation of English trust law has been the importance of maintaining London's status as a leading international financial centre. As Professor John Plender pointed out in *Trust Law and Competitive Advantage in International Financial Markets*, trust law provides 'significant advantages to the British financial system', compared to legal structures in the Continental financial system (Plender, 2002: 1.2). These advantages include the versatility and creativity in which the trust concept may be employed for private and commercial purposes, and the protection that it provides to investors through segregated accounts which are immune from creditor's claims against the trustee, who is the legal owner of the assets.

In 1999 the English Law Reform Commission presented a major report on modernising the English law of trusts that formed the basis for subsequent amendments to English trust legislation. The English *Trustees Act 2000* covered a range of matters, but mainly focused on the rights and duties of trustees. The new law sought to improve the flexibility of the trust by taking into account modern commercial practices while at the same time ensuring high standards of trusteeship. What is remarkable is that the amended English trust legislation copied many of the trust law statutory innovations typically found in offshore jurisdictions, such as a general power of investment, general power of appointing agents, a power to insure against loss or damage by any event, and the right of trustees to receive remuneration. The new English law did not adopt some key offshore trust jurisdictional doctrines, such as non-charitable purpose trusts, but the English amendments did impose a statutory duty of care on trustees, in contrast to offshore jurisdictions, such as Cayman Island and British Virgin Islands where there is no such statutory duty.

Faced with a decline in traditional financial services at the beginning of the 21st Century, the Singaporean Government carried out a major study which identified new engines of growth in ‘sunrise’ sectors of the banking and finance industry. In 2002 in a report on Singapore’s financial services industry, the Economic Review Committee recommended that Singapore develop distinct niches or competencies in wealth management, global processing, and risk management (Singapore Government, 2002). The Committee concluded that Singapore should aim to become a ‘regional leader in wealth management’ by modernising its trust law (for example, ‘enabling institutional investors to undertake alternative investments’) developing trustee and custody services, and creating a regulatory framework for trust companies (Ibid: 32-33). Subsequently, in 2003 the Singaporean Academy of Law produced a report on trust law reform, which was heavily influenced by the work carried out by the Law Reform Commission of England. In 2004 Singapore amended its *Trustees Act*, in 2005 revised its *Trust Companies Act* so as to reform its regulatory scheme applying to trust companies, and in 2006 gave the Monetary Authority of Singapore (MAS) responsibility for regulating the trust industry.

The enactment of a revised *Trustee Act* in Singapore in 2004 led to calls by the trust industry in Hong Kong in 2005 for a modernisation of its laws. The chairwoman of the Society of Trust and Estate Practitioners of Hong Kong expressed concern that Singapore’s new trust laws posed a threat to Hong Kong’s position as a major trust centre (Jimenez, 2005). In particular, it was argued that certain principles of HK trust law were clearly out of date, such as the rule against perpetuities. Despite calls for speedy change, it was only in 2008 that Hong Kong commenced a trust law reform exercise, and after a lengthy consultation, the Hong Kong Legislative Council enacted amendments to its trust laws (the *Trustee Ordinance 1934* and the *Perpetuities and Accumulations Ordinance 1970*) in the *Trust Law (Amendment) Bill* of 2013. Many of the provisions in this Bill were modelled on amendments to the English and Singaporean trust law. An area in which Hong Kong did not copy the Singaporean legislation was the introduction of a regulatory regime applying to personal trust companies. One intriguing question is why Hong Kong’s revised trust laws were rather conservative, with few innovations, and appeared to be a ‘a catch up (exercise) to other trust jurisdictions’ (Hong Kong General Chamber of Commerce, 2013). This raises the further empirical question as to what extent has the changes in Hong Kong’s trust laws resulted in new trust business.

In assessing the competitive dynamics between various financial centres, it is useful to consider the extent to which trusts formed in one jurisdiction are administered in another jurisdiction. For example, offshore financial centres such as the British Virgin Island, the Cayman Islands, Jersey and Guernsey have 'favoured marketing directly into Hong Kong because of the perception that Hong Kong was complementary rather than competitive' in trust business (Hinkley, 2013). That is, when advisors were setting up trusts in offshore financial centres, they frequently placed the administration of trusts in Hong Kong, and other 'mid-shore jurisdictions', such as Singapore and New Zealand. On the other hand, according to the Hong Kong government, 'the laws of Cayman Islands and British Virgin Islands are more commonly adopted as the governing law for trusts created in Hong Kong' (Hong Kong Government, 2009). The puzzling question is why none of the wealth management companies or legal or financial commentators consider Australia as an alternative jurisdiction for the provision of personal trust services for foreign companies or foreign residents.

Given the limitations on scope, this report does not examine legislative developments in trust law in other financial centres. However, it is worth mentioning that trust law has been the subject of reports by the Irish Law Reform Commission in 2008, and the New Zealand Law Reform Commission (NZLRC) in 2002 and 2013. The key recommendations of the NZLRC, in respect of certain areas of trust law, are noted for comparative purposes in Appendix A. Further, this report does not consider the influential *United States Restatement (Third) of Trusts*, the *Uniform Prudent Investor Act* and the *Uniform Trust Code*, which have 'transformed (US) trust law to conform to modern portfolio theory' (Sterk, 2010: 862). Nor has the report considered the competition between individual state trust laws in the United States for trust business.

3 Missed Opportunities

In light of the broader economic picture, it is critical to consider the implications of an anachronistic, not fit for purpose, trust law regime. Such implications necessarily include elements associated with service of the domestic Australian market as well as export of the country's trustee services industry and other financial sectors that operate in conjunction with trustee services, such as funds management, private banking and legal services. Harnessing the export market though targeted infrastructure and policy is the means by which Australia will secure and promote its position as a financial centre in the Asia Pacific region.

A later part of this research will build the case for a new alternative trust law from an export perspective. It will highlight the position of offshore high net worth and ultra-high net worth individuals (HNWIs/UHNWIs), especially in Hong Kong, Singapore, India and mainland China, and will look at business activity through the use of trust structures in the broader Asia Pacific region. Further, it will present the results of field research undertaken in Hong Kong and Singapore which will explain and measure the effectiveness of each city-state's trust law in achieving certain economic policy outcomes, such as promotion of the region as a financial services hub.

Domestic market

This section of the report will briefly consider the domestic Australian market and the direction it is heading in respect of trust structure usage and will present a domestic case for modernising Australian trust law.

Policy makers and those across the financial services industry acknowledge that Australia's population is ageing. The baby boomer generation currently make up 25% of the population but own 55% of the entire nation's private wealth. Recent research suggests that in 2020, 'when the older of the [baby] boomers hit their mid-70's, Australia will witness the biggest intergenerational wealth transfer in history' (McCrindle, 2014).

Because these assets will be transferred upon death, the baby boomers are likely to be less concerned with the tax treatment of their assets after their death. Their main focus will be on settlor autonomy and asset protection (aside from taxation considerations). They may have children who lack prudent financial judgment or who have social problems such as drug dependence, grandchildren who they wish to assist through payment of education expenses, blended families to provide for, children or grandchildren who lack financial capacity, and a desire to support charitable causes in an ongoing manner. These factors will influence the type of structure they choose to create to transfer their wealth and also whether they choose a local structure.

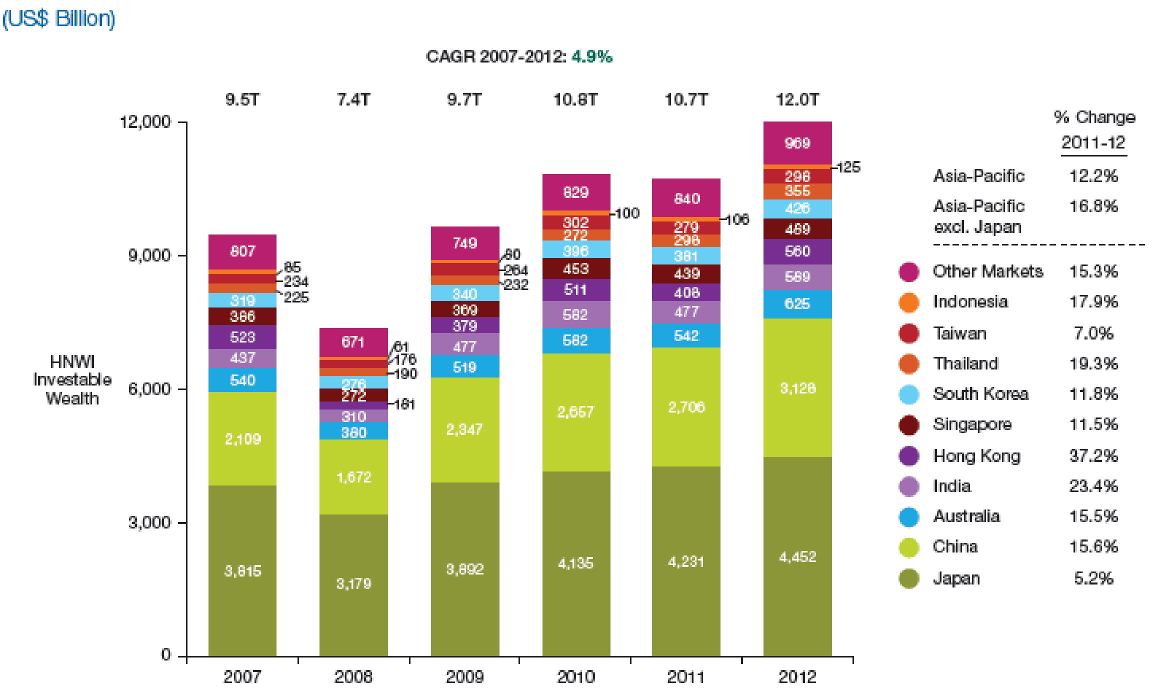
While $407 billion of the projected wealth transfer will be in the form of housing assets, there are also a significant proportion of business assets. Of the 2.1million businesses operating in Australia, almost 479,000 of them are currently held in the form of a trust structure (Australian Bureau of Statistics, 2013: 8165), with the business owner(s) and his/her family as named beneficiaries. The importance of trusts is further demonstrated by the 2010-11 income tax returns of trusts in Australia, where 729,622 trusts reported total business income of $316.7 billion (Australian Taxation Office, 2013: 66).

In the offshore jurisdictions that have either adopted or recognised non-charitable purpose trusts, these trusts have typically been established with the purpose of running a business or company. This indicates that settlors across the globe are using offshore trust structures, such as non-charitable purpose trusts, to run a business or company in perpetuity.

It is not the purpose of this report to discuss the merit or otherwise of the various features of offshore trust jurisdictions. However, it is not immaterial that some of the leading literature on this topic finds no practical or theoretic problems with a private purpose trust so long as the purpose is sufficiently specific and the manner in which the trustee is to achieve the purpose is evident (Waters, 2007: 241; Antoine, 2013). This literature, the offshore experience and the experiences of our Asia Pacific neighbours should be considered in light of the fact that business succession planning is clearly of critical importance to the baby boomers, and the Australian domestic market more generally. To ignore these interrelated economic aspects of trust law and the needs and preferences of the domestic market may have significant negative consequences for Australia. The gap analysis at Appendix A is designed to simply highlight certain key areas of trust law in which Australia diverges from its Asia Pacific neighbours because it has not yet moved to modernise its trust law.

In 2013, the World Wealth Report recorded that Australia had experienced the highest percentage increase (15.1%) of HNWIs, between 2012 and 2013, of the 12 countries that already have the highest numbers of HNWIs (for example fully developed nations such as the United Kingdom and the US). In the Asia Pacific region, Australia's increase in HNWI was on par with mainland China, and ahead of Singapore, but lagged Hong Kong and India. The number of (Australian resident) individuals with an excess of US$1m in investable funds is now 207,000 (Capgemini and RBC Wealth Management, 2013).

FIGURE 2. Asia-Pacific HNWI Wealth, 2007 – 2012 (by Market)



Note: Chart numbers and quoted percentages may not add up due to rounding; Other Markets include Kazakhstan, Malaysia, Myanmar, New Zealand, Pakistan, Philippines, Sri Lanka, and Vietnam
Source: Capgemini Lorenz Curve Analysis, 2013

The Asia Pacific Wealth Report estimates that the Asia Pacific region will become the world's largest high net worth market by the 2014/2015 financial year (Capgemini and RBC Wealth Management, 2013A*)*. It is therefore becoming increasingly important that Australia recognise the characteristics of its HNWIs and UHNWIs so as to secure their private wealth business within Australia. This is especially so given Australia's significant migrant population of Asian descent, the growing openness of global financial markets, and the increasing financial literacy of the general population. An analysis of HNWI characteristics and preferences presents an opportunity for Australia to facilitate flexible trust structures that incentivise capital inflows and the efficient allocation of capital.

Without delving into great detail in respect of HNWI characteristics it is worth flagging that these individuals in the Asia Pacific region have a strong preference toward wealth preservation, or asset protection, and have a high level of trust and confidence in wealth managers and firms, in comparison to the rest of the world (Ibid: 16). Where trust in the wealth management industry is low, HNWIs are more likely to invest their wealth into businesses, real estate and cash and might also distribute their wealth among a number of managers, thereby restricting the managers' ability to manage the wealth holistically on the basis of sound advice (Ibid:18). As such, the finding that trust and confidence in wealth management in the Asia Pacific is rising from an already high base is a clear opportunity for Australia to capitalise on current consumer sentiment.

And what of the domestic Australian market that is seeking wealth growth as opposed to wealth preservation? The Asia Region Funds Passport was one of the Johnson Report recommendations to promote Australia as a financial services hub. The Passport trial is now underway with Australia, New Zealand, South Korea and Singapore having signed up to the passport pilot at the APEC Finance Ministers' meeting in Bali in September 2013. The passport presents opportunities for Australia's funds management industry to export its services seamlessly across the region however, it also presents the same opportunity to the other participating economies. What this means for Australia is that there will be both opportunities and threats flowing from implementation of the passport, from an export and domestic standpoint respectively. The passport will make it much easier for Australian investors to invest their money into offshore managed funds and this may mean that where a particular nation or city-state has desirable features embedded in its collective investment regime, more of the domestic Australia market may choose to invest in those offshore managed funds.

There is an opportunity for Australia to mitigate this domestic market risk by making its trust infrastructure competitive across the Asia Pacific region.

4 How Does Australia Compare?

4.1 Comparative Analysis of Trust Law

A comparative analysis of trust law is important for the following reasons:

There has been a vast expansion of countries offering offshore financial services in which trusts play a vital role in the provision of those services. Trusts are a linchpin in the financial services industry, for example, wealth management for families, and commercial trusts-examples, pensions, unit trusts, collective investment schemes, collective security trusts for holders of bonds or debentures, syndicated loan trusts, subordinated trusts, securitisation through special purpose vehicles, project financing and future income streams, and custodial trusts in the financial or securities markets (Hayton and Ward, 2002: 3.7)

The Asia Pacific region has experienced the fastest growth of HNWIs and UHNWIs and this is expected to continue. Given the critical role of trusts in family wealth management and intergenerational wealth transmission, the demand for trust structures and professional advice concerning such structures will inevitably increase. The opportunities for increasing funds flows to Australian institutions from HNWIs depend on a range of factors, including the effectiveness and efficiency of Australian trust law to meet the needs of family settlors or stakeholders in the Asia Pacific region.

Australia has sought to expand its role as an international or regional financial centre in the Asia Pacific, and faces tough competition from Hong Kong and Singapore. Both of these jurisdictions have reviewed and revised their trust laws with a view to increasing their trust business. Many common law jurisdictions, such as New Zealand, are also codifying or amending their trusts laws. Whereas Australia has not departed from the common law model of trusts law, England has reformed its trust laws so as to maintain London's competitiveness as the world's leading international financial centre.

4.2 International Trust Model Jurisdictions

The international or offshore trust model originated in Caribbean tax havens in the 1980s and has evolved over a 30 year period. The model was developed as part of a series of legislative measures (including the creation of new forms of corporations) enacted by offshore financial centres (OFCs). In the case of the vast majority of OFCs, there was no domestic market because of the small population. As a matter of economic necessity, the focus of these OFCs has been the export of financial services, including trust and corporations. Thus the primary aim of OFCs has been the creation of attractive business vehicles for non-resident settlors who 'wished(ed) to avoid the restrictions of domestic laws in their own jurisdictions' (Antoine, 2013:1.12). Although some commentators in 'mainland jurisdictions' have criticised the offshore trust laws as undermining the essential core features of a trust, it can be argued that this misses a practical point. As Dr Antoine has argued, in the modern world, a 'trust is now properly viewed as a commercial entity…form(ing) the basis for important commercial or financial products', rather than a mere domestic private trust arrangement (Ibid: 1.04). The new reality is demonstrated by the fact that offshore trust law is now influencing legislative developments in 'mainland jurisdictions', and indeed the very notion of the idea of the common law trust (Ibid: 1.18).

The international trust model provides a series of significant advantages from a trust law perspective, including (Lupoli, 2000: 204):

- "Codify(cation) of equitable solutions, thus rendering them more generally applicable and more easily available [eg reservation of powers to settlors is permissible].
- Discipline(ing) aspects of the regulation of trusts which are still uncertain [eg granting unitholders limited liability].
- Remove(ing) roadblocks to development which the English law of trusts sometimes suffers as a result of legal precedent [eg abolition of the rule against perpetuities].
- (Creating) new rules to satisfy needs which did not exist or were not seen in the formative period of the English law of trust [eg recognition of non charitable purpose trusts, such as STAR trusts in Cayman Islands and VISTA trusts in the British Virgin Islands].

- Promulgating rules of private international law aimed at securing the exclusive competence of local law [eg firewall provisions that insulate trust assets against forced heirship laws]."

The international trust model has been applied by over 25 OFCs, including common law and civil law countries: Anguilla, Antigua and Barbados, The Bahamas, Belize, Bermuda, British Virgin Islands, Cayman Islands, Cyprus, Cook Islands, Gibraltar, Guernsey, Isle of Man, Jersey, Malta, Mauritius, Nauru, Niue, Saint Christopher and Nevis, Saint Vincent and the Grenadines, Seychelles, Turks and Caicos, Vanuatu and Western Samoa (International Monetary Fund, 2010: 19).

It is not well understood that OFCs provide legitimate services to satisfy the global financial needs of multinational enterprises (MNEs), businesses and HNWIs. There is a range of specialisations or niche markets, albeit that nearly all the jurisdictions provide international banking services (Lupoli, 2000: 201-66). The most diversified OFC is Cayman Islands, which has strengths in international banking and insurance, as well as being the market leader in offshore funds management. In contrast to the other small OFCs, Cayman Islands is a significant player in the US securitisation market by providing structured finance expertise, professional services and special purpose vehicles. The British Virgin Islands has a more limited role, specialising in providing offshore companies and trusts, whereas Bermuda dominates the offshore captive insurance market and has a healthy market in pension funds for MNEs, while Jersey has a strong reputation for both international banking and asset management. More recently, Singapore has become a world leader in wealth management competing with Switzerland, while Hong Kong has become the financial *e*ntrepôt for China, as well as a significant manager of financial assets of mainland Chinese. In all these examples, the underlying legal infrastructure and tools (especially the available corporate vehicles and skilled professionals) have played a critical role in servicing the needs of non-resident businesses, and has resulted in OFCs capturing a 'significant part of global financial flows' (International Monetary Fund, 2008; International Monetary Fund, 2010: 5-6, 8-9).

The early focus of the OFCs with new legislative trust models were tax settings and financial secrecy, as part of a competition to maintain and secure new export business. Indeed, as far back as 2000, the Financial Stability Forum Working Group on OFCs identified tax planning as the key reason why investors may use OFCs. That is, OFCs provide important functions, such as maximizing profits by international companies through low tax regimes, income tax minimisation by investors, and accumulation of reserves by insurance companies in low tax regimes (Financial Stability Forum, 2000:10). The fierce competition between OFCs – what has been characterised as a 'race for the trust'- has developed through 'radical' legislative codification and amendment to trust law principles.

The international trust model has been ignored by mainland countries such as Australia because of the belief that it was geared to tax and financial secrecy, and thus not suitable for incorporation in developed countries with relative high levels of taxation. However, this belief is out dated in that OFCs no longer aggressively market their services for tax and secrecy, and fails to understand that many legislative features of the international trust model could be usefully considered in an Australian context. The change in OFCs business model is elaborated in a later part of this report that deals with the paradigm shift in trust business.

4.3 Singapore Case Study

Singapore has sought to make itself a financial hub for the Asia Pacific region, and to position itself as a gateway to and from Asia. There has been a concerted government-backed effort to take positive action to make Singapore an attractive destination for business activity, especially financial services, including foreign banking and private investment. Whereas it took Singapore some 30 years to become a leading international and regional financial centre offering a wide range of financial services, it has taken the city-state only 10 years to become one of the world's leading asset and wealth management centres.

The Singaporean government's strategy of creating a 'full fledged financial centre' has been largely successful, in that it is now ranked 2nd in financial market development and 2nd in world competitiveness (World Economic Forum, 2013). Singapore has significant debt and equity capital markets, including a 'wide diversity of business trust listing on the SGX in shipping, aviation and infrastructure assets', and in Asia is only second to Japan in the size of its Real Estate Investment Trust (REIT) market, OTC interest rate derivatives market, and Foreign Exchange market (Monetary Authority of Singapore, 2014). Further, the World Bank ranks Singapore as the 'world's easiest place to do business' (World Bank, 2013), and Singapore has earned a positive reputation as a city-state that can be trusted by business and investors because of its 'smart regulation' (Menon, 2013).

As part of its strategy to cement Singapore's reputation as a jurisdiction providing high standards of trusteeship and protection of beneficiaries and investors, Singaporean law mandates that all trust business be carried out by a licensed trust company. It is a crime under section 3 of the *Trust Companies Act Revised Edition 2006* for any person to carry out trust business in or from within Singapore (regardless of where the trust is established), unless that person is a trust company licensed by the MAS. Trust business is defined so as to apply to all trustee companies and trust company service providers. There are a series of practical exemptions from the regulatory regime. The MAS vetting procedure for an applicant company includes considerations such as its physical presence and expertise, the financial soundness of the applicant and its parent company, ability to satisfy minimum financial requirements and professional indemnity insurance requirements, adequacy of internal compliance systems and processes, as well as competency and integrity. There are ongoing requirements to supply financial information and staffing numbers to MAS. Consequently, the regulatory system for personal trusts in Singapore provides superior protection to retail investors, than countries such as Australia, where the licensing scheme only applies to certain trustee company providers.

Singapore's adroit regulation and responsiveness to the needs of the market has resulted in significant economic benefits. Singapore's asset management industry has had a spectacular increase in size over the past decade, with trust structures playing a major role in the industry.

The MAS calculates that assets under management (AUM) in Singapore has grown from S$343.3 billion as at the end of 2002 to S$1.63 trillion (US $1.33 trillion) as at the end of 2011 (MAS, 2003. MAS, 2013). While 80% of total AUM is sourced from outside Singapore, 70% of the funds are destined for countries in the Asia Pacific region. The composition of AUM in Singapore may be divided into assets under discretionary management, which are sourced from institutional clients, collective investment schemes and individual clients, and non-discretionary assets, such as assets under advisory service and funds contracted by financial institutions.

These statistics show that Singapore has become a significant international and regional centre for asset management, and that despite the weak and uncertain world economic environment and the loss of trust in banks arising from the financial crisis, Singapore's position as a world-class fund manager has improved.

When enacting changes to Singapore's trust law in 2004, senior officials of the Government of Singapore emphasised that the main reason for enacting new trust laws was to 'position Singapore as a leading global trust domicile, contribute to the growth of the private banking industry, (and enhance) its reputation as a sound, well regulated and competitive financial centre' (Jimenez, 2005).

It can be seen from the Gap Analysis at Appendix A that while Singapore has steadfastly taken the opportunity to address obvious deficiencies in general trust law, it has not introduced a radical offshore style trust code, such as one that would allow settlors absolute control over the trust, including the power to completely rewrite it, were that desired (Chan, 2013: 374). In fact, local practitioners have described the revised *Trustees Act* as moderate and limited in scope and have surmised that Singapore's conservative approach is driven by a desire to ensure the perception of Singapore as a prudent and stable financial centre (Ibid: 375).

It is the perception of the non-resident market that is important to Singapore; those who would use Singapore as a financial services hub (Ibid: 375). Take for example the concept of non-charitable purpose trusts. These types of trusts, which historically have never been permitted to exist under the general trust law for want of certainty, have been adopted into trust law in major off-shore jurisdictions, such as Bermuda and the Cayman Islands. They have been adopted for three key reasons – because this is increasingly what settlors want; because the offshore jurisdictions have no domestic market to speak of and the autonomy of non-resident settlors is therefore critical to the offshore trust business model; and because there are very few practical problems associated with allowing such trusts (Waters, 2007: 241).

Despite the obvious positives, there has always been a fear in traditional mainland common/trust jurisdictions that non-charitable purpose trusts lend themselves to abuse (Ibid: 241). If there is no requirement to register a trust in a particular jurisdiction then the settlor and the trust could enjoy complete secrecy. In addition, the fact that there is no beneficiary with an equitable interest to enforce the trust, even where the trust instrument nominates a protector for this purpose, further bolsters the undesirable argument (Ibid: 241).

Singapore decided not to allow non-charitable purpose trusts under its domestic laws because of the risk of them being used improperly, for purposes that would not serve Singapore's interests. There was also a political and reputational imperative. The city-state was loath to be lumbered with the historic reputation of OFCs for excessive secrecy and perceived abuse of their corporate vehicles, or even worse, the recently tarnished reputation of Switzerland. It was recognised by policy makers and the business community alike, that it takes much more than low tax rates and a liberal legal framework for trusts to succeed as a major asset management centre. There are other, far more essential factors, such as, 'sound government, low levels of corruption, compliance with international standards on corporate and financial governance, a good international reputation for being business friendly and a sound supervisory framework that can deter and prevent money laundering' (The Economist, 2007).

What Singapore did, as a matter of policy, to secure its position as a major financial centre, was unique. Rather than dramatically liberalising its trust law infrastructure, it simply 'tidied-up' the existing law and tailored it for use in the 21st Century, and then concurrently decided to recognise the validity of and to enforce foreign trusts, subject only to public policy considerations (Chan, 2013: 376). This meant that, for example, an expatriate German national settlor could establish a non-charitable purpose (Cayman Islands) trust, and the trust would be recognised in Singapore, permitted to carry on trust business in Singapore and could even be enforced by the courts in Singapore, subject only to the condition that the trust not offend broader public policy. This approach was driven by export (not domestic) considerations and cleverly focused on both building up the private banking/wealth management industry in Singapore and on further promoting Singapore as a leading financial centre. As a result, Singapore's success as a financial services hub speaks for itself.

Presumably due to differing policy objectives, there are a number of areas in which domestic Singaporean law does not go as far as Hong Kong in modernising traditional trust law. For example, Singapore has extended the perpetuity period but has not abolished the rule against it. Also, unlike Hong Kong's *Trustee Ordinance*, the Singapore legislation does not contain firewall provisions that insulate Singaporean trust assets from the forced heirship rules of other countries. In fact, Singapore has its own version of forced heirship laws in the *Inheritance (Family Provision) Act 1966* (Singapore), which applies to deceased estates, except those of Muslim residents.

In terms of collective commercial vehicles, Singapore's *Business Trusts Act* is modelled on Chapter 5C of the *Corporations Act 2001* (Cth), though with some substantial differences. A business trust in Singapore can be used for both debt and equity capital arrangements, by the issue either of units in the trust or debentures to lenders. The commercial activities of a business trust are managed by a single trustee-manager, that must be a licensed trustee company, and whose role is akin to a Responsible Entity. This means that, unlike the case in Australia, the single responsible entity model applies to both debt and equity capital arrangements that operate through the use of a trust structure.

Similar to Australian Managed Investment Schemes (MIS), Business Trusts are governed both by the relevant Act and the common trust law (Nishimura and Asahi, 2010: 8).

However, the Singapore legislation has gone much further in curbing the undesirable aspects of applying the general law to these commercial trust arrangements. For example, sections of the *Business Trusts Acts* grant the unitholders in a registered business trust limited liability and provide any unitholder or holder of a debenture with the right to access the equitable remedy of oppression (s 32 and s 41) (Nishimura and Asahi, 2010: 8).

If one were to complete a stocktake of the trust infrastructure that Singapore has adopted with a view to cementing its position as the preeminent financial centre in the Asia Pacific, it would look something like this:

- An Act for all commercial trust endeavours including both debt and equity capital market arrangements.
- Legislation that recognises and takes steps to address the undesirable aspects of applying traditional trust law to modern commercial arrangements.
- A modernised and simplified regime for personal trusts, that is not so radical as to taint Singapore's reputation as a prudent and stable economy.
- A policy to recognise foreign trusts which promotes Singapore's trust services and private banking sectors which in turn advocates Singapore as an attractive financial services hub.

4.4 Hong Kong Case Study

Hong Kong has been transformed as a regional and international financial centre, from an uncertain future in the 1990s, followed by remarkable growth in the 2Ist Century as a powerhouse for the financial needs of Chinese State Owned Enterprises and private corporations.

Prior to the return of Hong Kong to China in 1997, many Hong Kong corporations and trusts were reorganised because of the perceived political risks concerning the future of Hong Kong. Typically, the seats of many trusts were re-located to foreign jurisdictions, albeit the actual administration and management of trusts remained in Hong Kong. In a number of cases, foreign resident trustees replaced local Hong Kong residents (Lupoli, 2000: 214-5).

However, with the passage of time there has been a growing confidence in Hong Kong as a global centre for finance and commerce. The rapid economic and peaceful political rise of China has resulted in a recalibration of the commercial opportunities and risks in Hong Kong. The competitive position of Hong Kong is demonstrated by its favourable metrics: ranked number three in world competitiveness by the IMD World Competitiveness Centre (albeit ranked number one in the previous year of 2012); ranked the 'world's number one free economy' by the Fraser Institute; and ranked first by the Milken Institute's 'Global Opportunity Index: Attracting Foreign Investment' (Yuen, 2012).

An important factor in the development and growth of any financial centre, including Hong Kong, is its legal environment for business. The all-embracing term 'rule of law' is frequently referred to as one of the key lodestones concerning economic development. Importance constituents of the rule of law from a business perspective are modern commercial laws, an independent judiciary and a skilled and honest legal profession to provide legal and dispute resolution services. Why the rule of law is important for business is the concept of 'asset protection' whereby contracts, property and other financial interests of private owners are protected from arbitrary or excessive government or third party interference (Chaikin, 2013), and any dispute concerning them is resolved through fair, transparent and peaceful means (Niall Ferguson cited by Yuen, 2012)

Hong Kong has become a major fund and asset management centre in the Asia Pacific region. According to the Hong Kong Securities and Futures Commission (SFC), the combined fund management business in Hong Kong, which includes SFC-authorised Real Estate Investment Trusts (REITS), asset management business, private banking business of registered institutions, and the funds advisory business of licensed corporations, was HK$12,587 billion at the end of 2012 (Hong Kong SFC, 2013) There has been a spectacular growth of total assets under management, rising from HK$1,491 billion in 2002 to HK$8,246 billion in 2012, with a 43.1% growth from 2011 to 2012 (Hong Kong SFC, 2003; Hong Kong SFC, 2013). The significant expansion in fund and asset management business in Hong Kong reflects the confidence that domestic and overseas investors place in the political and legal system of Hong Kong. This is confirmed by the fact that overseas investors contributed on average over the past five years more than 60% of the total fund management business, excluding REITS (Hong Kong, SFC, 2013). Important trends are the growing participation of mainland Chinese companies in the asset management business in Hong Kong, and the growth of the renminbi market in Hong Kong.

The Hong Kong legal and business community has become concerned that both its corporations law and trust law need modernisation if Hong Kong is to maintain its position as a financial centre. This viewpoint is summarised by a report by KPMG (2013: 23) of the trust industry in Hong Kong:

> 'Many trusts administered in Hong Kong are not Hong Kong jurisdictionally based for choice of law. The absence of a modern trust law has contributed to the move towards the use of offshore jurisdictions for the setting up of trusts or other company structures since clients seek legal certainty.'

The KPMG survey of the Hong Kong trust industry showed that the industry used the following jurisdictions for their structures: Hong Kong (31%); traditional offshore jurisdictions, such as Cayman Islands (14%), the British Virgin Islands (13%), Jersey (10%), Bahamas (6%) and Bermuda (4%), as well as Singapore (8%) and New Zealand (6%), and Others (8%). The reason that these jurisdictions were selected will be examined in a future study.

The immediate motivation for Hong Kong to change its trust law was that Singapore had revised its laws. In 2013 Hong Kong enacted the *Trust Law Amendment Bill 2013* so as to 'bolster the competitiveness of Hong Kong's trust service industry and attract settlors to set up trusts in Hong Kong' and thereby improve the reputation of Hong Kong as an international asset management centre (Hong Kong Legislative Council, 2013).

The Trust Law Amendment Bill amended two major ordinances of the trust law regime in Hong Kong - the *Trustee Ordinance and the Perpetuities and Accumulations Ordinance*. Like Australia, trust law in Hong Kong is substantially based on the general law, and supplemented by the two ordinances. The two ordinances had not been reviewed since their enactments in 1934 and 1970 respectively.

During the second reading of the Bill, it was noted that some of the provisions of the two ordinances were out dated and were not meeting the needs of present-day trusts. The Parliament outlined the purpose of modernising and to an extent codifying Hong Kong's trust law – 'the Bill seeks to bolster the competitiveness and attractiveness of Hong Kong's trust services industry, which will in turn enhance Hong Kong's status as an international asset management centre.'

In the section below we summarise and analyse the amendments. A more comprehensive comparative analysis of the major changes in Hong Kong's trust law is found in a gap analysis at Appendix A.

Broadly, the changes to the general law included complete abolition of the rule against perpetuities and its sister rule against excessive accumulation of income as well as enhanced trustees' default powers and the validation of certain trusts. The Hong Kong provisions certainly went further than Singapore's in terms of modernising and tailoring the substantive trust law, although the new ordinances could not be described as exceptionally liberal. The ordinances did not, for example, modify the rule in *Saunders v Vautier*, which is a pro-beneficiary/anti-settlor rule that has been abolished in a number of offshore jurisdictions, or allow for non-charitable purpose trusts. The submissions of the various stakeholders that were collected throughout the consultation process provided an insight into the underlying policy intent behind Hong Kong's middle-of-the-road approach.

It was pointed out in one submission that changes to trust law in Hong Kong should not be made simply with a view to meeting the standards in other jurisdictions, primarily Singapore, but should rather aim to better those jurisdictions so as to become a leader in the field of trust law reform (Hong Kong Legislative Council, 2013: 2). The same respondent identified New Zealand as being just as relevant to Hong Kong in terms of competition for trust business as Singapore, Jersey and the UK (Ibid: 2-3). This accords with the KPMG research which showed that New Zealand was a jurisdiction that the Hong Kong trust services industry used (6%) for its trust structures.

It was suggested that amendments to trust law would provide trustees with greater certainty which would encourage the establishment of private trust companies, that are increasingly preferred by wealthy families, and which in turn, would be likely to attract banking and investment business to Hong Kong. However, it was also noted that international interest in Hong Kong as a trust centre is based partly on the fact that Hong Kong is not a tax haven and does not promote tax havens, and is therefore looked upon favourably by the OECD, US and

EU (Ibid: 7). From an export perspective, it was therefore important to balance the need to do more than what had been done in Singapore with ensuring that the changes did not taint Hong Kong's reputation as a stable and secure financial centre.

Domestic considerations played a slightly greater role in the design of the new trust law than what they appeared to have played in Singapore's case. It was decided that if Hong Kong did not introduce provisions validating trusts that reserve certain investment and asset management functions to the settlor, then a significant proportion of trust business would continue to go offshore to places such as Singapore. However, it was obviously not deemed necessary to modify or abolish the rule in *Saunders v Vautier* for the same reason, implying that this aspect of the general trust law was less important to the domestic market than other aspects. In its submission to the review, the Joint Committee on Trust Law Reform stated that while the interest of settlors and trustees are paramount they must still be balanced with the legitimate interests of beneficiaries in order for Hong Kong to be considered both an attractive and robust jurisdiction for trusts (Ibid: 9-10).

Similar considerations would also be relevant to the Australian context. The needs of the domestic market would have to be weighed against the competing need to build up Australia's trust services and private banking sectors for export. Similar to Hong Kong, a review of trust law in Australia could flesh out those more important aspects of settlor autonomy and asset protection, modification of which would significantly improve service of the domestic market and would also attract non-resident users.

Hong Kong's new laws abolished the archaic rules against perpetuities and excessive accumulation of income. Submissions to the review process were strongly in favour of this approach based primarily on economic grounds. The fact that Hong Kong is mostly made up of leasehold land holdings was a major consideration as was the inappropriateness of applying the rules to commercial finance and security transactions, where it was said that the rules serve no discernible purpose (Ibid: 112).

The amendments to validate certain trusts were squarely in line with the new objectives of settlors in terms of autonomy and asset protection. They allow the settlor to reserve certain powers to him/herself, which under the general law would ordinarily invalidate the trust. Such powers include the power of investment and other asset management functions that are automatically reserved to the trustee by trust law. Further, the new legislation contains default provisions against the forced heirship rules of other countries, which in particular is designed to encourage more local and overseas settlors to use Hong Kong for trust administration (Hong Kong Legislative Council, 2013).

In respect of commercial trust arrangements, Hong Kong has enacted legal guidelines that apply to Real Estate Investment Trusts or infrastructure funds, but has not implemented specific legislation for other collective, equity or debt capital schemes. However, a regime like that contained in Chapter 5C of the *Corporations Act* or the *Business Trusts Act* (Singapore) may not be necessary in Hong Kong. This is because unit trusts for commercial purposes are structured as stapled entities. The trust, and each unit in it, is stapled to a company and each share in the company. Because the securities are stapled and cannot be separated or dealt with individually, broader company law principles apply to the structure. As a result, insolvency of the scheme is dealt with according to company law provisions and limited liability too is afforded to unitholders by virtue of the fact that their units are stapled to shares in a limited liability company.

Hong Kong's future looks bright; it now has a modernised trust law regime which will allow it to capitalise on its position as the gateway to China. A position it holds not only due to its geographical proximity but also because of its political relationship, and cultural, family and language affiliations. The newly rich business and political elite of mainland China are increasingly using Hong Kong structures and placing their funds in Hong Kong. This has been accompanied by the utilisation of Hong Kong to raise capital through IPOs of major Chinese companies, especially State Owned Enterprises.

5 The Paradigm Shift

In the past 15 years there has been a paradigm shift in offshore trusts from a singular focus on tax settings and financial secrecy to a greater recognition of the importance of asset protection and settlor autonomy. This reflects the worldwide legal and ethical shift away from the promotion or legitimacy of tax havens and financial secrecy which in turn has been influenced by the global financial crisis and the impact of global anti-money laundering (AML) and counter-terrorist financing norms (Chaikin, 2013A).

As a result of the Financial Action Task Force's 2000 'blacklisting' of popular offshore trust jurisdictions, including the Bahamas and the Cayman Islands, as well as new US law enforcement measures in the Patriot Act following the 9/11 terrorist attacks, the regulation of the offshore trust sector has dramatically improved. Trust companies and trust company service providers in OFCs are now required to carry out more extensive due diligence of their customer base than 'mainland' jurisdictions (De Willebois, 2011; Sharman, 2010: 138).

The use of offshore trusts for aggressive tax avoidance, tax evasion and tax fraud has been countered by international tax initiatives, especially by OECD actions in relation to tax havens and Harmful Tax Competition, and national onshore tax legislation. In addition, tax crimes are considered in many jurisdictions, such as Singapore, to be predicate crimes for money laundering, so that AML strategies are now preventing and detecting tax offences. Revision of AML laws has been complemented by an expansion of international co-operation between tax agencies, for example through tax information exchange arrangements which allow the penetration of offshore trusts (Chaikin, 2009: 96-108).

With increased levels of transparency of information and tax law enforcement, Australian resident HNWIs are likely to place less importance on tax considerations as to where trusts are located and administered. This is borne out by a 2011 STEP survey of trust and estate practitioners in Singapore and Hong Kong which found that tax is not the 'major driver of demand for trusts' and 'client awareness of the need for tax compliance is growing' (STEP, 2011: 4, 11). As highlighted previously in this report, the same study of 100 practitioners concluded that from the client's perspective, the drivers for the use of trusts are in order of importance, 'asset protection, succession planning and then tax' (Ibid: 10). That gainsaid, offshore HNWIs and their advisors who have the 'luxury of choice' will continue to focus on tax settings in Australia compared with competing jurisdictions. We thus consider that modernisation of trust law should be considered along with tax reform so as to improve the export of financial services.

The demand for asset protection through trusts and corporate vehicles in the Asian market is inevitably linked to minimising legal, business and political risks which are high in certain jurisdictions. Besides concerns about government expropriation of assets, HNWIs in Asia are worried that their assets will be lost or diminished by imprudent and greedy family members and potential creditors (Chaikin, 2013). That is, asset protection is designed to meet the desire of clients to channel their assets to places of 'safety and security', where the rule of law prevails, to avoid places of 'political and economic instability', and to ensure that their assets are transmitted to the persons of their choice (May, 2011).

Another finding of the 2011 STEP survey was that Asian wealthy families are 'reluctant to relinquish control over their assets to third parties (STEP, 2011: 3).' The demand for settlor control and autonomy raises the issue of whether and how trust law should be revised to accommodate the demands of clients.

While it is acknowledged that a settlor from a favourable trust tax jurisdiction is unlikely to choose to have his/her trust administered in a significantly less favourable jurisdiction, the tax element is the second part of the trust domicile consideration. First, the target country for trust administration must have the infrastructure available to support the administration of the offshore trust. If the trust cannot be recognised, legally, in that jurisdiction then no question as to tax policy arises. In focussing on the export side of the trust law equation, Australia would need to first consider whether it will allow certain trust structures, either by recognising offshore structures subject to public policy considerations or expressly allowing them through domestic trust law, and then determine what the tax treatment of these kinds of entities will be. An AATA would be just that – a new, alternative regime that can take a different approach on all fronts, including trustee tax, to what is currently in place.

Under orthodox trust law principles, there is a clear separation of legal and beneficial ownership of assets, and a limit on the power of settlors or stakeholders to influence decisions made by the trustee of the trust. However, offshore trust law regimes allow settlors to reserve certain powers, and this explains in part the popularity of trust jurisdictions, such as the Bahamas, Cayman Islands and British Virgin Islands. Indeed, according to the 2011 STEP survey, the bulk of clients of Hong Kong and Singaporean practitioners require reservation of powers in the trust documentation, which explains why offshore trust jurisdictions have been so attractive. The trend towards asset protection and settler autonomy in Asia has important implications for the growth of wealth management and private banking in Australia. Given the huge expected growth in the wealth of HNWIs in Asia and the potential to expand the asset management business in Australia, it is important that Australia gives serious attention to the current limitations in its trust law.

6 An Alternative Australian Trusts Act

This report has examined Australia's position when compared to other financial centres and has presented a case, both from a domestic and export perspective, for modernising Australian trust law.

The proposed second part to this research will provide a more detailed examination of what an *Alternative Australian Trusts Act* (AATA) might look like and what it might achieve for Australia, in light of the country's aspirations to become a leading financial centre in the Asia Pacific. In addition, the results of field research undertaken in Singapore and Hong Kong will provide a practical insight into the outcomes that could be expected to flow from modernisation of trust infrastructure in Australia. Further, any constitutional limitations will be identified and addressed, so as to present a workable proposal for change.

Appendix A

	QLD/NSW	ACT/VIC	TAS/SA	WA/NT	Singapore	Hong Kong	New Zealand
The rule against perpetuities	**Property Law Act 1974 (Qld), s 209:** Permits trust instrument to specify duration up to fixed term 80 years. **Perpetuities Act 1984 (NSW), s 7:** the perpetuity period applicable to an interest created by a settlement shall be 80 years from the date on which the settlement takes effect.	**Perpetuities and Accumulations Act 1985 (ACT), s 8(1):** the perpetuity period shall be 80 years from the date on which the settlement takes effect. **Perpetuities and Accumulations Act 1968 (VIC), s 5:** Permits trust instrument to specify duration up to fixed term of 80 years.	**Perpetuities and Accumulations Act 1992 (TAS), s 6 (1):** Permits trust instrument to specify duration up to fixed term 80 years. **Law of Property Act 1936 (SA), s 61:** Abolishes the rules against perpetuities and excessive accumulations.	**Property Law Act 1969 (WA), s 101:** the perpetuity period is, such period of years not exceeding 80 as may be specified in the instrument or, if no such period is specified, the period that is applicable under the rule at law. **Law of Property Act (NT), s 187:** A trust instrument may specify a perpetuity period of either (a) a life in being + 21 yrs or (b) 80 yrs from when the settlement takes effect. Where no period is specified in the instrument the perpetuity period is as per (b) above.	**Trustees Act (31 July 2005), s 89:** For the purposes of the rule against perpetuities, the provisions of sections 32, 33 and 34 of the Civil Law Act shall apply to trusts created on or after 15th December 2004. **Civil Law Act (1 August 1999), s 32:** The rule against perpetuities is a fixed period of 100 years (unless instrument specifies less) for trusts created on or after 15 December 2004. The 'wait and see' principle applies for all trusts taking effect on or after this date.	**Trust Law (Amendment) Ordinance 2013:** Abolishes the rule against perpetuities for trusts created on or after the passing of the Trust Law (Amendment) Ordinance 2013 on 31 December 2013.	**NZLRC Review:** recommends to replace the current judge-made rules and the Perpetuities Act 1964 with a clear, simple maximum duration rule for trusts of 150 years. Existing trusts will continue to operate according to their own terms.
Non-charitable/Private purpose trusts	**Common Law:** A rule of law rendering non-charitable purpose trusts and trusts for the benefit of corporations which are not charities void for remoteness (Trustee v Nolan (1943) 43 State R. (NSW) 169). **Property Law Act 1974 (QLD), s 221:** Expressly preserves the common law rule.	**Common Law:** A rule of law rendering non-charitable purpose trusts and trusts for the benefit of corporations which are not charities void for remoteness (Trustee v Nolan (1943) 43 State R. (NSW) 169).	**Common Law:** A rule of law rendering non-charitable purpose trusts and trusts for the benefit of corporations which are not charities void for remoteness (Trustee v Nolan (1943) 43 State R. (NSW) 169).	**Common Law:** A rule of law rendering non-charitable purpose trusts and trusts for the benefit of corporations which are not charities void for remoteness (Trustee v Nolan (1943) 43 State R. (NSW) 169). **Law of Property Act (NT), s 198:** Expressly preserves the common law rule.	Singapore does not have legislation specifically authorising non-charitable purpose trusts. But Singapore law recognises the validity of and the courts will enforce foreign trusts, subject only to public policy considerations. Singaporean settlors can establish their trusts under the law of any lawful jurisdiction.	Hong Kong considered but did not adopt non-charitable purpose trusts within the new Trust Law Ordinance (2013). Currently the common law rule applies (Morice v Bishop of Durham (1804) 9 Ves 399).	**NZLRC Review:** The NZLRC will follow its recent Report on trust law with a review of charitable trusts and other purpose trusts (the charitable and purpose trusts review). Currently the common law rule applies (Morice v Bishop of Durham (1804) 9 Ves 399).

	QLD/NSW	ACT/VIC	TAS/SA	WA/NT	Singapore	Hong Kong	New Zealand
Firewall provisions	**Family Law Act 1975 (Cth) and Succession Act 1981 (QLD):** applies. **Family Law Act 1975 (Cth) and Succession Act 2006 (NSW):** applies	**Family Law Act 1975 (Cth) and Family Provision Act 1969 (ACT):** applies. **Family Law Act 1975 (Cth) and Administration and Probate Act 1958 (VIC):** applies.	**Family Law Act 1975 (Cth) and Testator's Family Maintenance Act 1912 (TAS):** applies. **Family Law Act 1975 (Cth) and Inheritance (Family Provision) Act 1972 (SA):** applies.	**Family Law Act 1975 (Cth) and Family Provision Act 1972 (WA):** applies. **Family Law Act 1975 (Cth) and Family Provision Act (NT):** applies.	**None:** Inheritance (Family Provision) Act 1966 (Act 28 of 1966) applies save for the estates of deceased Muslims	**Trust Law (Amendment) Ordinance 2013, s 41Y:** foreign heirship rules will not affect the validity of a lifetime transfer of movable assets to a trust governed by HK law.	**Testator's Family Maintenance Act 1900 (NZ):** applies.
Reserve powers for settlors	**Common Law rule:** once a trust is created by a settlor all the powers vis-a-vis the trust property become vested in the trustee. If the settlor reserves to himself excessive powers the court may consider that there is insufficient certainty as to the settlor's intention to create the trust and may treat the trust as a sham.	**Common Law rule:** applies.	**Common Law rule:** applies.	**Common Law rule:** applies.	**Trustees Act 2004, s 90(5):** No trust shall be invalid by reason only of the person creating the trust or making reserving to himself any or all powers of investment or asset management functions under the trust.	**Trust Law (Amendment) Ordinance 2013, s 41X:** a trust is not invalidated because the settlor has reserved to himself the power of investment or some other asset management function.	**NZLRC:** did not recommend granting reserve powers to settlors.
Insolvency schemes for commercial unit trusts (not REITs)	**Corporations Act 2001 (Cth), Ch 5C:** there is no insolvency scheme for managed investment schemes. Insolvency outcomes are based on common law principles.	**Corporations Act 2001 (Cth), Ch 5C:** there is no insolvency scheme for managed investment schemes. Insolvency outcomes are based on common law principles.	**Corporations Act 2001 (Cth), Ch 5C:** there is no insolvency scheme for managed investment schemes. Insolvency outcomes are based on common law principles.	**Corporations Act 2001 (Cth), Ch 5C:** there is no insolvency scheme for managed investment schemes. Insolvency outcomes are based on common law principles.	**Business Trusts Act (2004):** The Trustee-Manager is personally liable for trust debts but may limit its liability to the assets of the trust. Liability of the Trustee-Manager is not limited where the Trustee-Manager has a right of indemnity out of the trust assets.	**Companies Ordinance (HK), s 166:** Provides for a scheme of arrangement but does not include a moratorium (an authorised period of delay in the performance of an obligation).	**NZLRC:** will follow its recent Report on trust law with a review of charitable trusts and other purpose trusts (the charitable and purpose trusts review) and a review of statutory trustee companies and other corporate trustees (the corporate trustee review).

	QLD/NSW	ACT/VIC	TAS/SA	WA/NT	Singapore	Hong Kong	New Zealand
Limited liability for unit holders (not REITs).	**Corporations Act 2001 (Cth), Ch 5C:** the chapter does not provide to unitholders limited liability.	**Corporations Act 2001 (Cth), Ch 5C:** the chapter does not provide to unitholders limited liability.	**Corporations Act 2001 (Cth), Ch 5C:** the chapter does not provide to unitholders limited liability.	**Corporations Act 2001 (Cth), Ch 5C:** the chapter does not provide to unitholders limited liability.	**Business Trusts Act (2004), s 32:** Liability of unitholders is limited in insolvency and otherwise and notwithstanding any provision to the contrary in the trust deed.	Hong Kong uses share-stapled unit trust structures for commercial purposes and unitholders in stapled entities are afforded limited liability by virtue of the fact that their units are stapled to shares in a limited liability company.	**Unit Trusts Act 1960 (NZ):** collective investment schemes are still governed by the Unit Trusts Act, which does not provide to unitholders limited liability.
Abolition of the rule in *Saunders v Vautier*	**Common law, the rule in *Saunders v Vautier:*** where beneficiaries of full capacity consent to terminate the trust the trustee must pay over to the beneficiaries their interest in the trust.	**Common law:** the rule in *Saunders v Vautier* applies.	**Common law:** the rule in *Saunders v Vautier* applies.	**Common law:** the rule in *Saunders v Vautier* applies.	**Common law:** the rule in *Saunders v Vautier* applies, however, foreign trusts that exclude the rule may still be recognised and enforced in Singapore	**Common law:** the rule in *Saunders v Vautier* applies.	**NZLRC** recommends that the New Trusts Act include statutory provisions restating (and clarifying the breadth of) the rule in *Saunders v Vautier;* a power of the court to waive the requirement for consent of any person and approve a revocation, variation or resettlement or change to the scope of trustees' powers
Legislated default deed provisions on trustee powers	**State/Territory Trustee Act:** contains some mandatory and default provisions.	**State/Territory Trustee Act:** contains some mandatory and default provisions.	**State/Territory Trustee Act:** contains some mandatory and default provisions.	**State/Territory Trustee Act:** contains some mandatory and default provisions.	**Trustees Act 2004:** introduced enhanced trustees' default powers, such as the power to keep trust property in the names of nominees and custodians as well as widening trustees' power to insure.	**Trust Law (Amendment) Ordinance 2013:** introduced enhance trustees' default powers, such as a general power to appoint agents, nominees and custodians, and widening trustees' default power to insure.	**NZLRC:** recommended expressly providing for six mandatory duties that are essential to the existence of a trust. These duties must be present in every trust and cannot be modified by the trust deed.

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