Managed Investment Schemes
Supplement to Chapter 5
Scheme Property

Page 76
At the end of the sentence at the top of the page add the following sentence:

This trust relationship between the responsible entity and the members attaches to the responsible entity by reason of its office and not by operation of the general law. Apart from the statutory character of this trust, it has been said to resemble a trust created as incidents of business transactions described as “commercial trusts”. Therefore, although the powers of the responsible entity in relation to the scheme property are to be approached “through the prism of trust law”, the extent to which the general principles of trust law apply will be affected by the purpose of this statutory trust, the Corps Act and the provisions of the particular scheme constitution.

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Insert the following between the first and second paragraphs:

Although a statutory trust is created over the scheme property pursuant to s 601FC(2) of the Corps Act, regard has to be had to the constitution and the scheme documents which provide express obligations and powers in relation to the initial application money and payment of management fees in advance. The whole purpose is to ensure that upon acceptance of an application, the application money is converted into a tax deductible payment of management fees. The conversion of the application money to payment of management fees gives effect to that purpose. This is consistent with the nature of the statutory trust described above.

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Delete the last paragraph at the end of section 5.2.1 and insert the following:

The courts are still struggling in determining what property constitutes scheme property in relation to agribusiness schemes. However, it appears that the following principles, at least in relation to when a scheme is being wound up, apply in relation to determining whether property held by a responsible entity in relation to a scheme is in fact scheme property:

(a) In order to determine whether property is “scheme property” as defined in s 9 of the Corps Act, it is necessary to look at what the scheme is according to the documents which regulate and describe the scheme and to see whether the property concerned is either a contribution of money’s worth to that scheme or property acquired with contributions or the proceeds of contributions to that scheme.

(b) In working out whether money or moneys worth is contributed by the members of the scheme, a forensic examination that traces to where the money went is of no assistance in identifying scheme property. The correct approach is one of objective

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1 Wellington Capital Ltd v ASIC [2014] HCA 43 at [13].
2 Ibid at [12].
3 Timbercorp Finance Pty Ltd v Collins [2016] VSC 776 at [86]-[88], [133]-[138].
4 Above n 8.
5 Willmott Forests Ltd (recs & mngrs apptd) (in liq) v Primary Securities Ltd [2013] VSC 574 at [119].
6 Re Willmott Forests Ltd (No 2) [2012] VSC 125 at [84].
characterisation having regard to the constituent documents of the scheme.\footnote{7}{Ibid, citing the decision by Keane J in Mier & Jonsson v FN Management [2006] 1 Qd R 339 and Treecorp Australia Ltd (in liq) v Dwyer [2009] FCA 278.} It is the scheme itself, not a forensic tracing of the funds, which provides the relevant connection between the “contribution” of funds made by investors to the scheme and any property that “acquired” or “derived” from those “contributions”.\footnote{8}{Ibid.}

However, the position as to whether an asset comprising an instrument that confers the right, for the purpose of the scheme, to use the land on which any primary production is carried out, which is held by the responsible entity pursuant to a condition of its licence is scheme property is a moot point. There are conflicting decisions. There is some case law that suggests that the fact that this asset is required to be held by the responsible entity under the conditions of its licence does not make that asset scheme property.\footnote{9}{Ibid at [78], followed in Willmott Forests Ltd (recs & mgrs apptd) (in liq) v Primary Securities Ltd [2013] VSC 574 at [108].} However, there is also case law that suggests that such an asset would be scheme property.\footnote{10}{Huntley Management Ltd v Timbercorp Securities Ltd [2010] FCA 576 at [61], followed in Re Gunns Finance Ltd (in liq) (recs & mgrs apptd) (No 2) [2013] VSC 365 at [149].} Even if such an asset is scheme property, it may not offer any protection to the investors in the event that the lessor of the land goes into liquidation. This is because the liquidator has the power to disclaim the lease over the land used for the scheme leaving the investors without any interest in the underlying primary production land.\footnote{11}{Willmott Growers Group Inc v Willmott Forests Ltd (recs & mgrs apptd) (in liq) [2013] HCA 51.} Insert a new section 5.4

5.4 Possible reforms

In July 2012, CAMAC issued a report (“CAMAC Report”) that made recommendations for reform of the law in relation to managed investment schemes.\footnote{12}{CAMAC Report, Managed Investment Schemes (2012) § 3.3.} One of the recommendations to assist in identifying what property in relation to a scheme was in fact scheme property was that there should be a requirement in the constitution for each scheme to require the responsible entity to maintain a register of scheme property.\footnote{13}{Ibid at pp 74-75.} This register would be definitive as to what property was scheme property.\footnote{14}{Ibid.} However, CAMAC also recommended that affected parties such as persons who dispute that certain property on the register is scheme property, should have rights to inspect the register of scheme property, and apply for an amendment to the register if it is incorrect.\footnote{15}{Ibid.} Further, in March 2014, CAMAC issued a further discussion paper (“Stage 2 Discussion Paper”) which it said was Stage 2 of CAMAC’s review of managed investment schemes.\footnote{16}{CAMAC Discussion Paper, The Establishment and Operation of Managed Investment Schemes, March 2016} In the Stage 2 Discussion Paper, CAMAC was to investigate whether there should be a number of reforms in relation to the definition of scheme property.\footnote{17}{Ibid at section 3.3.} In particular, CAMAC was to consider whether the definition of “scheme property” should be more comprehensive and, if so, whether specific categories of property should be added to the current definition. CAMAC
was considering two approaches to this issue. The first approach suggested would be to add to the definition specific items of property which should be scheme property. The second approach suggested was to have a more general definition to the effect that scheme property is property that is held by the responsible entity or its agents or employees in relation to the scheme. The impetus for this reform has abeyed since the impending abolition of CAMAC.