

The New Section 100A Trustee Act 1925 (NSW): When a Beneficiary is Personally Liable to Indemnify a Trustee

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Introduction

Over the years since 1901 there has been a recognised principle in the law of trusts, derived from the Privy Council decision in *Hardoon v Belilios*¹, under which a beneficiary of a trust who was *sui juris* and absolutely entitled had, prima facie, a personal obligation to indemnify the trustee for liabilities that the trustee had incurred. In November 2019 a new section 100A of the *Trustee Act 1925 (NSW)* came into effect in New South Wales, which in terms abolished the “rule in *Hardoon v Belilios*”, with some minor exceptions, and made other alterations to the law concerning the liability of a trust beneficiary to indemnify a trustee. This paper considers how section 100A has affected the law in New South Wales, and the extent to which it will have effect outside New South Wales. It considers some of the circumstances in which, notwithstanding the enactment of section 100A, a beneficiary of a trust might still have an obligation to indemnify a trustee.

Part 1- The General Law Background to Section 100A

It is well known that trustees have a right of indemnity from the assets of the trust fund concerning liabilities incurred in the execution of the trust. The right of indemnity from the assets arises under both the general law² and also under the general trustee legislation of the various states and territories³, or sometimes under a statute governing a particular type of trust⁴. In some states and

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¹ [1901] AC 119

² *Worrall v Harford* (1802) 8 Ves 4, 8; 32 ER 250, 252 per L Eldon; *Re the Exhall Coal Company (Limited)*; *Re Bleckley* (1866) 35 Beav 449; 55 ER 970 per Lord Romilly MR

³ Section 59(4) *Trustee Act (NSW)*; section 36(2) *Trustee Act 1958 (Vic)*; section 72 *Trusts Act 1973 (Qld)*; section 71 *Trustees Act 1962 (WA)*; section 35 (2) *Trustee Act 1936 (SA)*; section 27(2) *Trustee Act 1898 (Tas)*; section 59(4) *Trustee Act 1925 (ACT)* and section 26 *Trustee Act (NT)*

⁴ Trustees of superannuation funds have an even more extensive right of indemnity from the assets, conferred by section 56 *Superannuation Industry (Supervision) Act 1993 (Cth)*, which pursuant to s 109 *Constitution* would prevail over the state-conferred right

territories, including New South Wales, the trustee's right of indemnity from the assets cannot be excluded by any contrary provision in the trust instrument.⁵

As well, since the 1901 Privy Council decision that Lord Lindley delivered in *Hardoon v Belilios*⁶ a beneficiary sometimes had a personal obligation to indemnify the trustee against liabilities that the trustee had incurred. The principle that Lord Lindley discovered and laid down in *Hardoon*⁷ was that a beneficiary of a trust who is *sui juris*, and absolutely entitled to the trust property, has a personal obligation to indemnify the trustee for liabilities incurred in the proper administration of that property, unless he could show some good reason why the trustee should bear them personally.

Unlike the trustee's right of indemnity from the assets, this personal obligation for a beneficiary to indemnify the trustee is based solely in the judge-made law: it is not mentioned in the trustee legislation of any of the states or territories.

in the event of any conflict between them. See J C Campbell *Some aspects of civil liability arising from breach of duty by a superannuation trustee* (2017) 44 Aust Bar Rev 24, 35 – 57. Also, a special situation arises under section 601 *FH Corporations Act 2001 (Cth)* if a company is the responsible entity of a registered scheme, and is being wound up, is under administration or has executed a deed of company arrangement. Any provision in the scheme constitution or any other instrument that purports to give the liquidator, or the administrator of the scheme or deed, any lesser right of indemnity from the assets than the company itself would otherwise have had is void against the liquidator or administrator. As well any right of indemnity of the company to be indemnified out of the assets can be exercised only by the liquidator or administrator.

⁵ There are decisions in Queensland (*Kemtron Industries Pty Ltd v Commissioner of Stamp Duties* [1984] 1 Qd R 576, 584–6; *Jessup v Queensland Housing Commission* [2002] 2 Qd R 270, 275 [14]), New South Wales (*JA Pty Ltd v Johnco Holdings Pty Ltd* [2000] NSWSC 147, (2000) 33 ACSR 691, 714 [87]; *Agusta Pty Ltd v Provident Capital Ltd* [2012] NSWCA 26, (2012) 16 BPR 30,397, 30,405 [39]) and South Australian (*Moyes v J & L Developments Pty Ltd (No 2)* [2007] SASC 261, (2007) 250 LSJS 61,[38]–[40]) that the statutory right of indemnity from the assets cannot be excluded. However there is a Victorian decision (*RWG Management Ltd v Commissioner for Corporate Affairs* [1985] VR 385, 395) and a Western Australian decision (*Franknelly Nominees Pty Ltd v Abrugiato* [2013] WASCA 285; (2013) 10 ASTLR 558, [212] – [242] that it can be excluded. These differences can be explained by whether the statutory right of indemnity of the trustee is one that the relevant state or territory statute itself permits to be excluded. Section 2(3) *Trustee Act 1958 (Vic)*, section 5(2) and (3) *Trustees Act 1962 (WA)* and section 64 *Trustee Act 1898 (Tas)* make the powers conferred by those Acts subject to any contrary intention in the trust instrument, but section 35(2) of the South Australian legislation, and the combination of sections 65 and 72 of the Queensland legislation, each makes clear that that the right of indemnity from the assets cannot be excluded. That is impliedly the case also in NSW, where s 59(3) makes certain limitations on a trustee's liability that are created by sections 59(1) and (2) subject to the provisions of the trust instrument, and then in s 59(4) confers the trustee's right of indemnity from the assets without saying it is subject to any contrary provision in the trust instrument.

⁶ [1901] AC 119

⁷ [1901] AC 119, 123

However well before the end of the twentieth century judicial decision had firmly embedded it in the law of Australia. The principle was adopted in 1946 by two of the three High Court judges who decided *Trautwein v Richardson*⁸. As a matter of precedent that cemented the principle into Australian law, unless and until the High Court reconsidered it, which it never has done. Since then the principle has been adopted in many cases, both in intermediate courts of appeal and at first instance. The intermediate appellate decisions of that type include *Paul A Davies (Australia) Pty Ltd (in liq) v Davies*⁹, *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties*¹⁰, *Rosanove v O'Rourke*¹¹, *Metcalf v NZI Securities Pty Ltd*¹², *Ron Kingham Real Estate Pty Ltd v Edgar*¹³, *Balkin v Peck*¹⁴, *Chief Commissioner of State Revenue v CCM Holdings Trust Pty Ltd*¹⁵, *Wieland v Texxcon Pty Ltd*¹⁶ and *Commissioner of State Revenue v Mondous*¹⁷. There is no corresponding principle in the trust law of the United States – there beneficiaries are not liable to indemnify trustees unless they have agreed to do so, or the beneficiary has been overpaid by mistake when a trust liability was still outstanding¹⁸.

There was reason to believe that the rule that Lord Lindley laid down in *Hardoon* imposed a personal liability on a beneficiary in a wider range of circumstances than any previous case had recognised, that the cases on which Lord Lindley had based the decision did not justify the rule that he formulated in it, that the justification of principle that he gave for the rule was inadequate, and that the rule could sometimes operate arbitrarily and unfairly. As well, even by 2019, there were aspects of the operation of the rule that remained unclear¹⁹. Several reports calling for reform or clarification of this aspect of the law, in the context of managed investment schemes had been made but not acted on²⁰.

⁸ [1946] Argus Law Reports 129 (at 131 per Latham CJ, 134 per Dixon J).

⁹ (1983) 1 NSWLR 440, 450 per Hutley JA

¹⁰ [1984] 1 Qd R 576, 581 per DM Campbell J, 584 per McPherson J (Andrews SPJ agreeing);

¹¹ [1988] 1 Qd R 171, 174 per Connolly J (Carter and de Jersey JJ agreeing);

¹² Full Federal Court 5 March 1996 unreported, 14 – 15

¹³ [1999] 2 Qd R 439, 442

¹⁴ (1998) 43 NSWLR 706

¹⁵ [2014] NSWCA 42 [72] (Gleeson JA);

¹⁶ [2014] VSCA 199, 313 ALR 724 [95];

¹⁷ [2018] VSCA 185, (2018) 55 VR 643, [140] per McLeish JA, McDonald AJA agreeing, [218] per Niall JA.

¹⁸ *Balkin v Peck* (1998) 43 NSWLR 706, 714; Nuncio D'Angelo *Commercial Trusts* (Lexis Nexis Butterworths Australia 2014, [4.156] – [4.160]; A H Oosterhoff, *Indemnification of Trustees: the rule in Hardoon v Belilios* 4 Est & Tr Q (1978) 180, 180.

¹⁹ These matters are discussed in J C Campbell, *The Undesirability of the Rule in Hardoon v Belilios* (2020) 34 Trust Law International 131 (forthcoming)

²⁰ NSW Law Reform Commission Report No 144, “*Laws relating to beneficiaries of trusts*” (May 2018) (hereinafter “*LRC Report 144*”) [1.5], [2.20] – [2.23].

In New South Wales those considerations have now become largely irrelevant, because in November 2019 a new section 100A, which abolished the rule in *Hardoon v Belilios*, was introduced into the *Trustee Act 1925* and immediately came into force.

Part 2 – Section 100A itself

2.1 The genesis of section 100A

The new s 100A was brought about because of a recommendation of the Law Reform Commission of NSW. At least one reason why the reference to the Law Reform Commission of the topic of beneficiary liability arose was because the continued operation of the rule in *Hardoon* was perceived to create problems for the use of trusts as vehicles for commercial activity. The Chairman of the Law Reform Commission, Alan Cameron AO, has said²¹ that when he was a young solicitor in the 1970s he was involved in some capital raisings for unit trusts, and that the then Corporate Affairs Commission always insisted that there be mention in the prospectus of there being a possibility of unit holders having personal liability for debts incurred by the trustee. Even when he gave the CAC an opinion from a barrister with particular expertise in trust law, to the effect that personal liability of beneficiaries could be negated by a clause in the trust deed, and that the clause in the deed of the particular trust that was seeking to raise money was effective, the CAC would insist that the warning go in²². In his experience this was a strong disincentive to investors, particularly foreign investors, and indeed caused some proposed capital raisings to be abandoned. From that time on he doubted the sense of the rule in *Hardoon*, and suspected that the way it operated as a drag on commerce was undesirable.

The topic was brought back to his mind when Nuncio D'Angelo spoke at the Supreme Court Commercial and Corporate Law Conference in November 2016²³ about how the rule continued to be an obstacle to the use of trusts in commerce. As by then Mr Cameron was Chairman of the Law Reform Commission he suggested that there be a reference to the Commission on the topic, so that there could be a proper examination of whether the rule should be retained. The

²¹ At the roundtable of interested people held at the offices of the Commission on 2 March 2018, which the author attended – see *LRC Report 144* para 1.4, and Appendix B

²² Successors of the Corporate Affairs Commission continued to require the Product Disclosure Statement for a managed investment scheme to contain a warning that the efficacy of a clause excluding member liability had not been definitely decided by the courts: Vince Battaglia, *The liability of members of managed investment schemes in Australia: an unresolved issue* (2009) 23 Australian Journal of Corporate Law 122,124.

²³ Conference jointly conducted by the Supreme Court of NSW, the Law Society of NSW and the Sydney University Law School, entitled “The burgeoning use of trusts in real estate and infrastructure”

Commission received a reference in April 2017 to conduct an enquiry. The Commission delivered its report in May 2018²⁴, and legislation to implement its recommendation was enacted in November 2019.

2.2 The text of section 100A

The new section, including the notes that were part of the legislation that introduced it²⁵ says:

100A Limitation of liability of beneficiaries in respect of trustees

(1) The rule of equity known as the rule in *Hardoon v Belilios* is abolished.

Note. The rule is considered to have originated in the decision of the Privy Council in *Hardoon v Belilios* [1901] AC 118. The NSW Law Reform Commission recommended the abolition of the rule in Report 144 (2018): Laws relating to beneficiaries of trusts. This section gives effect to Recommendation 2.1 of that Report.

(2) Accordingly, a beneficiary under a trust (whether created before, on or after the commencement day) is not liable to indemnify the trustee or make any other payment to the trustee or any other person for any act, default, obligation or liability of the trustee arising on or after the commencement day unless—

- (a) the beneficiary has agreed in writing to be liable, or
- (b) subsection (3) applies.

(3) This section does not prevent a trustee of an investment trust from recovering any amount that a beneficiary under the trust is liable to pay for a right, interest or other entitlement to profits, income or other returns generated by the trust.

(4) To avoid doubt, this section does not affect any liability that a beneficiary under a trust may have in a capacity other than as a beneficiary.

(5) In this section—

²⁴ *LRC Report 144*

²⁵ The new section 100A was enacted by cl 1.23 of Schedule 1 of the *Justice Legislation Amendment Act (No 2) 2019 (NSW)* (Act number 20 of 2019). That Act was an omnibus Act of the law reform (miscellaneous provisions) type. It made comparatively short amendments to a large number of statutes, of which the Trustee Act was just one.

commencement day means the day on which this section commenced.

investment trust means any trust (however described) created for the purpose of generating profits, income or other returns for its beneficiaries using funds provided by them, and includes a unit trust scheme within the meaning of the Duties Act 1997.

2.3 Extrinsic Aids to Construction of section 100A

While the note that follows subsection (1) is not part of the statute²⁶ it is able to be used as an extrinsic aid to construction²⁷. As well, both the Report of the Law Reform Commission, referred to in the note to the new section, and the second reading speeches made in Parliament concerning the new legislation, are permissible aids to construction of the legislation²⁸. However, the only statement in the second reading speeches that has any possible relevance to the construction of section 100A is a statement that not only does the new section implement a recommendation of the Law Reform Commission, it *fully* implements it²⁹. An “explanatory note” that immediately followed the new section 100A in the 2019 legislation that introduced it gave no additional explanation³⁰.

²⁶ Section 35(2) *Interpretation Act 1987 (NSW)*

²⁷ Section 34 *Interpretation Act 1987 (NSW)*

²⁸ The Report can be used, pursuant to Section 34 (2) (b) *Interpretation Act 1987 (NSW)*, because it had been tabled in Parliament before the enactment of the new s 100A. It was tabled on 31 July 2018 – see https://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Beneficiaries/Beneficiaries.aspx. The second reading speeches are a permissible aid to construction of legislation under section 34 (2) (f) *Interpretation Act 1987 (NSW)*.

²⁹ The second reading speech in the Legislative Council was given on 23 October 2019. The totality of the speech that relates to the new section 100A is:

“Schedule 1.23 to the bill will amend the *Trustee Act 1925* to abolish a rule of equity known as the rule in *Hardoon v Belilios*. This amendment fully implements recommendation 2.1 of the NSW Law Reform Commission's report entitled *Laws relating to the beneficiaries of trusts*.”

The second reading speech in the Legislative Assembly was given on 20 November 2019. That speech took less than a minute and a half for the entire Act. It did nothing more than invite Members to read the second reading speech that had been delivered in the Legislative Council.

³⁰ It said: “Explanatory note The proposed amendment abolishes a rule of equity (known as the rule in *Hardoon v Belilios*) under which a trust beneficiary could be held liable in certain circumstances to indemnify or make other payments in respect of acts, defaults, obligations or liabilities of the trustee. The NSW Law Reform Commission recommended the abolition of the rule in Report 144 (2018): *Laws relating to beneficiaries of trusts*.”

The purposes for which these extrinsic aids to construction can be used include³¹:

- (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made), or
- (b) to determine the meaning of the provision—
 - (i) if the provision is ambiguous or obscure³², or ...

Notwithstanding what is said in the note that follows Subsection (1), the new section 100A does not exactly follow the language of Recommendation 2.1 of the Law Reform Commission. That recommendation was³³:

- “The Trustee Act 1925 (NSW) should be amended to provide that:
- (1) Unless the beneficiary has otherwise expressly agreed, the beneficiary is not, as a beneficiary, liable for, or to indemnify the trustee in respect of any act, default, obligation or liability of the trustee.
 - (2) This does not affect a beneficiary’s liability for unpaid calls (if any) under the terms of the trust, or the beneficiary’s liability in any other capacity.”

Some explanation of the Commission’s intention is given in the body of its Report:

2.45 Our recommendation only excludes liability of beneficiaries as beneficiaries. This is reflected in the Canadian and Singaporean provisions³⁴. Our attention was, however, drawn to the possibility of

³¹ Section 34 (1) *Interpretation Act 1987 (NSW)*

³² Section 34 (1) (b) (ii) *Interpretation Act* also permits the extrinsic aids to be used “if the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made) leads to a result that is manifestly absurd or is unreasonable.”. No question arises of using the extrinsic aids for that purpose concerning section 100A

³³ *LRC Report 144* page viii

³⁴ The Canadian and Singaporean provisions referred to are set out at pages 19 – 20 of the Law Reform Commission’s consultation paper CP 19, accessible at

unpaid calls, where the beneficiary has invested in a trust in a manner similar to an investment in a company, under which their investment (usually in what are called units) is initially partly paid. The trustee in such a case should be able to recover the unpaid amount, and the investor/beneficiary, subject to the terms of the trust instrument, should not be heard to deny that liability.

2.46 It will also be necessary to ensure that a provision intended to protect beneficiaries does not affect the liability of directors (including shadow or de facto directors) of corporate trustees for insolvent trading, or protect beneficiaries who direct trustees to undertake transactions as their agents. Our recommendation seeks to address this by referring, in effect, to any liability of beneficiaries as such.

When the avowed intention of the legislation was to implement fully the recommendation of the Law Reform Commission, that recommendation can be treated as being a paraphrase of the legislation in any respect in which the wording of the legislation itself is unclear or ambiguous.

2.4 Geographical scope of section 100A

As a law of the NSW legislature, the new section 100A obviously will apply to trusts where the trustees, trust property and beneficiaries are all in NSW, and where the trust instrument has not stated that a system of law other than that of NSW will govern the trust. Whether it applies to trusts that have only one, or only some, of these connecting elements to NSW will depend on principles of conflict of laws.

In brief, if a question of conflict of laws concerning trusts arises between the laws of two Australian states, or between the laws of an Australian state and territory that conflict continues to be resolved under the common law concerning conflicts³⁵. Under that common law, the law that governs the trust is ascertained at the time the trust is established and is not affected by subsequent events³⁶: If the trust in question is one created *inter vivos* and contains an express statement that the trust is governed by the law of New South Wales, that would usually be

<https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Consultation-Papers/CP19.pdf>

³⁵ Section 7 (1) *Trusts (Hague Convention) Act 1991 (Cth)* and Article 24 of the Hague Convention

³⁶ *Re Dion Investments Pty Ltd* [2013] NSWSC 1041, [8]

sufficient to have section 100A apply to it³⁷: The same principle applies concerning trusts created by will³⁸. If no express choice of law has been made the governing law will be ascertained as “a matter of implication to be derived from all the circumstances of the transaction” and would be the system of law with which the trust has its closest connection³⁹. Thus, even if trustees were located out of New South Wales they would be required to apply New South Wales law if that was the law that governed the trust.

If an Australian court out of New South Wales were to decide a dispute about a trust governed by the law of NSW⁴⁰ that court would apply section 100A to the trust as part of the substantive law of New South Wales. The court would apply the New South Wales law not only through the operation of the general law rules of conflict of laws, but also pursuant to the “full faith and credit” provision in section 118 of the *Commonwealth Constitution*, and the *State and Territorial Laws and Records Recognition Act 1901 (Cth)*.

If a question of the applicability of section 100A arose in a court outside Australia, the question of its applicability would be decided in accordance with the rules relating to conflict of laws in the place where the question arose. These days, those rules may include, depending on the particular country involved, an adoption of the Hague Convention, which would result in a similar position to that which applies in Australian states and territories⁴¹.

Because section 100A is a law regulating rights between trustees and beneficiaries in substantive terms, it presents none of the opportunities for forum shopping concerning a particular piece of litigation that can arise from a law conferring jurisdiction relating to trusts on a court⁴². For as long as other states and territories have no equivalent of section 100A it may provide a reason

³⁷ *Augustus v Permanent Trustee Co (Canberra) Ltd* (1971) 124 CLR 245, 252; *Paramasivam v Flynn* (1998) 90 FCR 489, 502.

³⁸ *Re Lord Cable* [1977] 1 WLR 7, 20

³⁹ *Bonython v the Commonwealth* [1951] AC 201, 221, *Chellaram v Chellaram* [1985] Ch 409, 432

⁴⁰ As could happen if a statute conferred jurisdiction on a non-NSW court to do so, or the trustees were present in another law district and so amenable to the *in personam* jurisdiction of that law district: *Re Dion Investments Pty Ltd* [2013] NSWSC 1041, [32] – [36]; Davies, Bell, Brereton and Douglas, *Nygh’s Conflicts of Laws in Australia* (10th edition LexisNexis Butterworths Australia 2020) [34.37] – [34.39]

⁴¹ The operation of the Hague Convention is discussed briefly in *Jacobs on Trusts*, chapter 28

⁴² Cf *Retail Employees Superannuation Pty Ltd v Pain* [2016] SASC 121, 115 ACSR 1, *Westpac Securities Administration Ltd v Cooper* [2016] SASC 122, *H.E.S.T Australia Ltd v Inkley* [2018] SASC 127 concerning the power conferred by section 59C *Trustee Act 1936 (SA)* on the Supreme Court of South Australia to vary trusts.

that influences a settlor in choosing for, or against, New South Wales law as the proper law of the trust.

2.5 Temporal scope of section 100A

The new section 100A was adopted into law on 22 November 2019⁴³. Thus, that date is the “commencement day” for section 100A.

Subsection 2 contains what is in essence a transitional provision. It makes clear that the new section 100A applies to any trust regardless of whether it was created before or after 22 November 2019.

The rest of the transitional provision is not straightforward, because the syntactical structure of subsection 2 is a little complex. Inserting the date that is the commencement date, the structure of the part of subsection 2 up to the word “unless” can be spelled out as:

Accordingly, a beneficiary under a trust (whether created before, on or after 22 November 2019) is not liable to:

- (A) indemnify the trustee, or
- (B) make any other payment to the trustee or any other person

for

- (1) any act of the trustee arising on or after 22 November 2019
- (2) any default of the trustee arising on or after 22 November 2019
- (3) any obligation of the trustee arising on or after 22 November 2019, or
- (4) any liability of the trustee arising on or after 22 November 2019

It will be just a matter of fact whether an *act* or *default* of the trustee, concerning which subsection 2 frees the beneficiary from liability⁴⁴, is one that arises on or after 22 November 2019. It is a bit clumsy to talk about an act or default “arising”, but it is fairly clear that it means that the act or default occurs.

Before it is possible to decide whether an *obligation* or *liability* of the trustee arises on or after 22 November 2019 it is first necessary to decide as a matter of construction what counts as an *obligation arising*, or a *liability arising*. Has an

⁴³ The Act that included the new section 100A was assented to on 22 November 2019. In accordance with section 2 of the Act, schedule 1.23 took effect on the day of assent.

⁴⁴ Leaving aside for the moment the exceptions created by paras (a) and (b) of section 100A(2)

obligation or liability arisen when the trustee has undertaken, for example, a contractual obligation or liability that could give rise to a present obligation to pay if some particular condition is met? The distinction between debts that are presently due but not presently payable, and debts that are both presently due and presently payable, is well established. Has an obligation or liability arisen only when the obligation or liability is one that is presently due? Or is there the extra requirement that the obligation or liability be not only presently due but also presently payable?

Clearly a beneficiary could not be required to actually pay anything to indemnify a trustee until the liability of the trustee had itself become one that was presently due and payable⁴⁵. However, if at 22 November 2019 the trustee has incurred a contingent liability, but the contingency has not happened, is the beneficiary liable to indemnify the trustee if the contingency happens after November 2019? Or since the enactment of section 100A can the trustee require indemnity from the beneficiary only when there is an obligation or liability that became presently enforceable against the trustee prior to 22 November 2019?

The statute is silent on these questions, and no assistance in answering them can be found in the Law Reform Commission Report or the second reading speeches. The answer to them comes from the common law presumption that a statute does not operate to interfere with accrued rights unless the statute clearly shows an intention to do so⁴⁶. In applying this principle:

“The common law presumption against imputing to the legislature an intention to interfere retrospectively with rights which have already accrued does not call for a narrow conception of a right. If it were otherwise, the essential justice of the rule would be eroded.”⁴⁷

Before the enactment of section 100A a right of a trustee to indemnity concerning a liability of the trustee would have arisen as soon as the trustee

⁴⁵ *Hughes-Hallett v Indian Mammoth Gold Mines Company* (1882) 22 Ch D 561, and see text at footnote 57 below.

⁴⁶ *Maxwell v Murphy* (1957) 96 CLR 261 at 267. Another verbal expression of the same idea is that that legislation is “to be construed as not attaching new legal consequences to facts or events which occurred before its commencement” per Fullagar J, *Fisher v Hebburn Ltd* (1960) 105 CLR 188, 194, repeated by Mason J in *Geraldton Building Co Pty Ltd v May* (1977) 136 CLR 379, 401. Another is that “perhaps no rule of construction is more firmly established than this, that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards a matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.”: Wright J in *Re Athlumney* [1898] 2 QB 547, 551

⁴⁷ *Carr v Finance Corporation of Australia Limited (No 2)* (1982) 152 CLR 139, 151 per Mason, Murphy and Wilson JJ

incurred the liability. If the liability is one for a tort or a breach of contract, the liability against which the trustee seeks indemnity would arise when the cause of action against the trustee was complete. The law about limitation of actions will identify when any particular type of cause of action is complete.

A different type of liability of a trustee could arise if the trustee entered an obligation to make a particular payment if some event occurred. Even while such a liability of the trustee was merely contingent, the trustee would have a right to indemnity against that liability when and if it arose. If the trustee were to die after incurring the liability but before the liability was a presently enforceable liability, that liability would be one to which his or her executor would be subject, and the executor would have the right of indemnity from the beneficiary. Even though the right of indemnity is contingent on the events having happened that make the trustee liable, such a contingent right is transmissible on death⁴⁸. As Sugerman J has said “a contingent interest is transmissible when the contingency does not involve the continuance of the donee’s life, or the fulfilment of some other personal qualification”⁴⁹.

The result is that if a trustee came to be under an obligation, even a contingent one, before 22 November 2019 in proper exercise of the trustee’s powers and duties, and that obligation comes to result in the trustee being under a presently enforceable liability after 22 November 2019, a beneficiary who is *sui juris* and absolutely entitled could still have a personal obligation to indemnify the trustee concerning it. In this way, notwithstanding the enactment of section 100A, for many years to come the rule in *Hardoon* will result in some trust beneficiaries sometimes having a personal obligation to indemnify a trustee.

2.6 Construction of section 100A

2.6.1 Subsection (1)

The phrase “the rule in *Hardoon v Belilios*” is a piece of technical legal language, and so prima facie should be interpreted in accordance with its technical legal meaning⁵⁰. However, by the time the new section 100A was passed in 2019 cases since the decision in *Hardoon* had elaborated on the principle that Lord

⁴⁸ *Jarman on Wills* (8th ed 1951) p 1342-3

⁴⁹ *Perpetual Trustee Company (Ltd) v Scheiler* (1948) 49 SR (NSW) 169, 171.

⁵⁰ *Attorney-General (NSW) v Brewery Employees Union of New South Wales* (1908) 6 CLR 469, 531; *Ashfield Municipal Council v Joyce* [1978] AC 122, 134, 138-9; *Palgo Holdings Pty Ltd v Gowans* [2005] HCA 28, 221 CLR 249, [16],[24] cf [41]

Lindley put forward. For example, Lord Lindley had spoken about there being an obligation for a beneficiary to indemnify in a situation in which there was only one beneficiary of the trust who was *sui juris* and absolutely entitled, but later decisions had held that a beneficiary could have a personal obligation to indemnify a trustee where there were multiple beneficiaries of a trust, all of whom were *sui juris* and who between them were absolutely entitled.⁵¹ Also, there came to be recognised an exception, the scope of which was unclear, under which the right to indemnity did not arise in situations where “the nature of the transaction excludes it”⁵².

This raises a question of construction about whether the abolition effected by subsection (1) is the rule as Lord Lindley stated it, or that rule with the various elaborations that later case law have made to it. I suggest that the latter is the preferable construction. One reason is that by 2019 the usual usage of lawyers was that “the rule in *Hardoon v Belilios*” included the later judicial elaborations. As well, it is most unlikely that the purpose of section 100A was to abolish the rule in the simple form in which Lord Lindley stated it, but leave intact a rule requiring multiple beneficiaries of a trust, who are all *sui juris* and between them absolutely entitled, to have a personal obligation to indemnify a trustee. Further, the note to subsection (1), which can be used as an extrinsic aid to interpretation⁵³, talks of the rule as having “originated” in the 1901 decision, which is at least consistent with it having had a development beyond its origin.

Thus, the better view is that whatever it was that the previous case law referred to as the rule in *Hardoon v Belilios* is abolished by subsection (1), nothing more and nothing less. Thus, understanding what has been abolished requires an understanding of the previous case law.

2.6.2 Subsection (2)

2.6.2.1 The chapeau to subsection (2)

⁵¹ *Matthews v Ruggles-Brise* [1911] 1 Ch 194; *J W Broomhead (Vic) Pty Ltd v J W Broomhead Pty Ltd* [1985] VR 891; *Countryside (No 3) Pty Ltd v Bayside Brunswick Pty Ltd* (Brownie J, Supreme Court of NSW Equity Division 20 April 1994 unreported) (hereinafter “1994 *Countryside*”), 23 – 25 not challenged on the appeal *Causley v Countryside (No 3) Pty Ltd* [1996] NSWCA 97 (hereinafter “1996 *Countryside*”)

⁵² *Wise v Perpetual Trustee Co Ltd* [1902] AC 139. The uncertainty was not helped by the fact that, almost as soon as *Wise* was decided, it was correctly pointed out that it reached a conclusion not justified by the authorities it purported to be based on: Williams, *Club Trustees’ Right to Indemnity: A Criticism of Wise v Perpetual Trustee Co Ltd* 19 LQR 386 (1903), 394. Nor did it help that in *Wise* the judges in London had acted on a different view of what was the implicit understanding in becoming a member of a club in Sydney than the judges in Sydney had had – a topic on which the Sydney judges were inherently likely to have been better informed.

⁵³ Sections 34 and 35 *Interpretation Act 1987 (NSW)*

The force of the word “Accordingly” at the start of subsection (2) is not just that the provisions of subsection (2) are a consequence of the abolition in subsection (1). As a matter of ordinary English “accordingly” can have the force of “in agreement with that”, or “consistently with that”, or “here’s something else that we’re doing as part of the same general policy that produced subsection (1)”. I suggest that that is the force that “accordingly” has at the start of subsection (2).

If both the opening word “Accordingly”, and subsection (4), were not there, and s 100A(2) were read literally, it would remove any liability that a person who was a beneficiary of a trust had to indemnify a trustee, or to make a payment to the trustee for any act, default, obligation or liability of the trustee, except of the two types identified in paras (a) and (b). It would remove all the liability that a person who happened to be a beneficiary of a trust had to someone who was the trustee of the trust, apart from the two types of liability in paras (a) and (b), regardless of the legal basis on which that liability arose, and regardless of whether it had anything to do with the trust. However, the word “accordingly” conveys a requirement that what is done by the enactment of subsection (2) is part of the same policy as the abolition of the rule in *Hardoon*. And subsection (4) makes clear that it is only liability that the beneficiary has *in the capacity of a beneficiary* that is abolished by subsection (2). This can be understood, by reference to the Law Reform Commission’s recommendation and report, as being liability that the beneficiary has *as a beneficiary*, and that it is not intended to exclude liability that beneficiaries have if they are directors of a corporate trustee that has caused the trustee to engage in insolvent trading, or if they are beneficiaries who have directed trustees to undertake liabilities as their agents.

Section 100A(2) goes further than abolishing the rule in *Hardoon*, in two respects. The first is that its statement of the lack of liability of beneficiaries is not confined to those beneficiaries who are *sui juris* and absolutely entitled. Rather, it is a statement of the lack of liability of *all* beneficiaries to indemnify the trustee, whether or not the beneficiaries are *sui juris* or absolutely entitled. There was nineteenth century authority that where a trustee of a lease renews the lease at the request of the equitable life tenant, and undertakes obligations under that new lease, the life tenant is obliged to indemnify the trustee for breaches of those obligations that occur while the life tenant is alive⁵⁴. The obligation to indemnify in that case must have been a personal one, because the trustees of the lease were not trustees of the estate of the life tenant – rather they brought a claim against the administrators of the estate of the deceased life tenant. It would be the effect of s 100A(2) that the life tenant would not be liable,

⁵⁴ *Marsh v Wells* (1824) 2 Sim & St 87; 57 ER 278. See also *Phené v Gillan* (1845) 5 Hare 1,9; 67 ER 803, 806

simply by virtue of being a beneficiary of the trust, to indemnify the trustee for the breaches.

The second way in which section 100A (2) goes further than abolishing the rule in *Hardoon* is by removing an obligation to make a payment to a trustee for any *act* of the trustee. It has the effect that the beneficiary cannot be called on to pay fees to the trustee where those fees are recompense for some act that the trustee has done.

The near-total abolition of the right of a trustee to indemnity from a beneficiary has the consequence that it is hard to find scope for the operation of the provision in subsection (2) that the beneficiary is not liable to make a payment *to any other person* for any act default obligation or liability of the trustee. However, consistently with the principle that every word and phrase in a statute should be given some meaning and effect⁵⁵, some scope must be found if possible.

One way in which there is limited scope for that provision arises as follows. Under the rule in *Hardoon* and prior to the enactment of section 100A a beneficiary could be liable to make a payment to a person other than the trustee if the trustee had incurred a liability to that person in proper performance of the trustee's duties, and that person was requiring the trustee to pay. When the trustee sued the beneficiary to enforce the right of indemnity, the beneficiary could be ordered to pay the trustee's creditor directly. This was nothing more than an aspect of mode of operation of any right of indemnity that was enforceable in equity. The trustee's indemnity from the beneficiary, like all indemnities that are enforceable in equity⁵⁶, is *prima facie* enforceable on a *quia timet* basis - i.e., as soon as it is clear that there is an imminent likelihood that the trustee will be called on to pay the trustee can require the beneficiary to pay the creditor without the trustee having to first pay with its own money⁵⁷. Thus, the

⁵⁵ *Commonwealth v Baume* (1905) 2 CLR 405 at 414; *Beckwith v R* (1976) 135 CLR 569 at 574; *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at [71]

⁵⁶ Concerning the trustee's indemnity from the assets being enforceable *quia timet* see *In re Blundell* (1888) 40 Ch D 370, 376-7; *The Governors of St Thomas's Hospital v Richardson* [1910] 1 KB 271, 276

⁵⁷ *Phené v Gillan* (1845) Ha 1, 13; *Cruse v Paine* (1869) LR 6 Eq 641, 654; *Lacey v Hill* (1874) LR 18 Eq 182, 191; *Hobbs v Wayet* (1887) 36 Ch D 256, 258 - 259; *In re Blundell* (1888) 40 Ch D 370, 376-7; *In Re Richardson; ex parte The Governors of St Thomas's Hospital* [1911] 2 KB 705, 709.; *Rankin v Palmer* (1912) 16 CLR 285. But the indemnity cannot be enforced before the contingency that give rise to the trustee's obligation to pay has arisen: *Hughes-Hallett v Indian Mammoth Gold Mines Company* (1882) 22 Ch D 561

personal right of indemnity under *Hardoon* could operate for the trustee as a right of exoneration, not merely as a right of recoupment⁵⁸.

Section 100A abolished the right of the trustee to indemnity from a beneficiary, unless either para (a) or (b) of subsection (2) applied. But the “unless” phrase in subsection (2) applies not only to the beneficiary’s obligation to indemnify the trustee, it also applies to the beneficiary’s liability to make a payment to any other person for any act, &c, of the trustee. Thus one effect of the words that the beneficiary is not liable to make a payment *to any other person* for any act, &c, of the trustee is that in those limited situations where the beneficiary’s obligation to indemnify the trustee against a liability is preserved, so also is the obligation of the beneficiary, enforceable at the suit of the trustee who is at imminent risk of being called on to discharge that liability, to make a payment directly to the person to whom the trustee has incurred the liability.

Another circumstance in which it was arguable, before the enactment of section 100A, that a beneficiary might have a liability to make a payment to a person other than the trustee for an act default or liability of the trustee was if a creditor of the trustee could be subrogated to the trustee’s right of personal indemnity. However, it was unclear whether, or in what circumstances, a creditor of the trustee could be so subrogated. Some decisions held that subrogation to the right of personal indemnity was possible, but supported that view only by cases that held subrogation was possible concerning the trustee’s indemnity from the assets⁵⁹. Brownie J in 1994 *Countryside*⁶⁰ holds subrogation to be available, on the basis of (i) an opinion to that effect expressed by Ford and Lee (ii) [the doubtful analogy of] the practice of Chancery in administering estates (iii) it being “common sense”, and (iv) the obligation for the court, under s 63 *Supreme Court Act 1970 (NSW)*, to determine all matters in dispute and avoid multiplicity of proceedings. However those considerations were listed only after Brownie J had referred to the fact that the trustee was insolvent, and to *In Re Wilson; Kerr v Wilson*⁶¹ which had held that there was no need to sue the trustee to judgment before obtaining subrogation if it was clear that a judgment against the trustee would be fruitless. There is authority that a creditor cannot claim to be subrogated to the trustee’s right of indemnity from the trust assets unless the trustee is insolvent or there is other basis for concluding that a judgment against

⁵⁸ *Metcalfe v NZI Securities Pty Ltd* [1996] FCA 1287, [26]

⁵⁹ *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623, 640 per Young J, *Marginson v Ian Potter & Co* (1976) 136 CLR 161, 175-6, but relying only on a citation of a passage from Halsbury which (as McPherson JA pointed out in *Ron Kingham Real Estate Pty Ltd v Edgar* (1999) 2 Qd R 439 at 443) itself relied only on cases concerning subrogation to the trustee’s right of indemnity from the assets

⁶⁰ at 27-28

⁶¹ [1942] VLR 177, 183,

the trustee would be fruitless⁶². The same should apply concerning subrogation to the personal right of indemnity. Consistently with that, Professor Ford has said that “A creditor who seeks the benefit of a trustee’s right of indemnity against a beneficiary personally would have to make the trustee bankrupt”⁶³. Brownie J’s decision was upheld on appeal⁶⁴ but the availability of subrogation was not an issue on the appeal. In *Metcalfe v NZI Securities Pty Ltd*⁶⁵ Sheppard Burchett and Lindgren JJ spoke very guardedly: “It seems that [trustee’s creditor] would be subrogated to [trustee’s] rights against the unit holders, at least if it pursued [trustee] into liquidation, but perhaps without the necessity of doing so.” A recent full examination of the topic states “Whether, and, if so, the extent to which an unsecured creditor may be subrogated to the personal indemnity, where it exists, is by no means certain.”⁶⁶:

Whatever the true situation might have been about the ability of a creditor of a trustee to be subrogated to the personal right of indemnity before the enactment of section 100A, now that the trustee’s right of personal indemnity has been abolished there is nothing for the trustee’s creditor to be subrogated to, that could generate an obligation for the beneficiary to make a payment by way of subrogation to a person other than the trustee, other than in those circumstances where section 100A preserves the trustee’s right of indemnity. But subsection (2) preserves the liability of a beneficiary to make a payment to “any other person” for an act default or liability of the trustee in those situations where subsection (2) preserves the trustee’s right of personal indemnity from the beneficiary, and if and to the extent that subrogation to the trustee’s right of indemnity is available.

2.6.2.2 The exceptions to subsection (2)

Even though paras (a) and (b) in subsection 2 are literally only a qualification to subsection 2 any sensible reading of the section as a whole must treat them as also being a qualification to the abolition of the rule in *Hardoon* that is effected by subsection 1.

2.6.2.2.1 “the beneficiary has agreed in writing to be liable”

⁶² *Owen v Delamere* (1872) LR 15 Eq 134; *In Re Wilson*; *Kerr v Wilson* [1942] VLR 177, 180 - 183, *Deancrest Nominees Pty Ltd v Nixon* [2007] WASC 304, (2007) 25 ACLC 1681, [49]; *Zen Ridgway Pty Ltd v Adams* [2009] QSC 117, [2009] 2 Qd R 298, [13]

⁶³ *Ford Trading Trusts and Creditors Rights* 13 Melb U L Rev 1 (1981), 19.

⁶⁴ *1996 Countryside*

⁶⁵ [1996] FCA 1287, [27]

⁶⁶ Ahmed Terzic, *Subrogation to the Trustee’s Personal Right of Indemnity* (2017) 91 ALJ 736, 736. See generally Nuncio D’Angelo, *Commercial Trusts* [3.74] - [3.78].

There is no requirement for the writing in question to take any particular form, or to be signed or witnessed. There is nothing to stop an agreement in writing from being made up of several different pieces of writing read together. An expanded meaning of “writing” applies, pursuant to section 21(1) *Interpretation Act 1987*:

writing includes printing, photography, photocopying, lithography, typewriting and any other mode of representing or reproducing words in visible form.

As email and other electronic communications means are modes of reproducing words in visible form, the writing could take the form of electronic communications.

2.6.2.2.2 Subsection 3

2.6.2.2.2.1 “Investment trust”

The exception created by subsection 3 applies only to a limited subclass of trusts, namely those that fall within the definition of “investment trust”. However, the trusts that fall within that definition will be by no means small in number or commercially insignificant. A trust that is created for the purpose of generating profit, income or other returns for its beneficiaries using funds provided by them would include many of the unit trusts that are listed on the stock exchange, and many of the unlisted trusts that are set up as vehicles for investment or trading. It would include many, but not all, managed investment schemes are within the meaning of the *Corporations Act 2001*⁶⁷.

The definition of “investment trust” includes a “unit trust scheme” under the *Duties Act 1997*. The definition of that term in the Dictionary of the *Duties Act* is:

unit trust scheme means any arrangements made for the purpose, or having the effect, of providing, for persons having funds available for investment, facilities for the participation by them, as beneficiaries under a trust, in any profits, income or distribution of assets arising from the acquisition, holding, management or disposal of any property whatever pursuant to the trust.

⁶⁷ Ascertaining the precise extent of the overlap between “investment trusts” within section 100A and “managed investment schemes” within the meaning of the *Corporations Act* would involve carrying out a detailed term by term comparison of the definition of “managed investment scheme” in section 9 *Corporations Act* with the definition of “investment trust” in section 100A.

This definition would include those investment vehicles that involved financing the setting up of a farm or forest or mine by the issuing of units in a trust to investors, where the investors took the produce of the operation as assets *in specie*.

Both definitions are dependent on the capital of the trust having been provided in the form of “funds”. A collective investment scheme to which participants made only non-monetary contributions would not count. This excludes those managed investment schemes where an investor’s contribution to the scheme is not made in money but in money’s worth.

More importantly, both of these definitions would exclude all the trusts, either created *inter vivos* or by will, that confer rights, or the possibility of having rights, on beneficiaries as a gift from the settlor. Even if such a trust was to engage in investment or a commercial activity, if it did so with capital provided by the settlor, or indeed by anyone other than the beneficiaries, it is not an “investment trust” within the definition.

2.6.2.2.2.2 *“liable to pay for a right, interest or other entitlement to profits, income or other returns generated by the trust”*

Subsection (3) allows to be enforceable a provision whereby an investor in an investment trust must pay

- for a capital right like the unit itself, or
- for the right to participate in any profits generated by the trust, or
- for the right to participate in any distribution of assets in specie generated by the trust.

The payment for the right to participate in profits, or assets in specie, might be a payment for the right to participate in profits or assets generally, or it might be a payment for the right to participate in profits or assets of some particular type, or it might be payment for the right to participate in the profits or assets generated in some particular time period. To take just one example, if an investment scheme for growing timber required an investor in the scheme to pay a levy calculated as a proportion of the costs of operating the scheme during a year, or to pay a fee to the trustee, as a precondition of being entitled to have a right to receive part of the produce of that year⁶⁸, subsection (3) would ensure that such a provision was not made ineffective by s 100A.

⁶⁸ As sometimes happens: see Vince Battaglia, *The liability of managed investment schemes in Australia: An unresolved issue* (2009) 23 Australian Journal of Corporations Law 122, 124 – 5

This goes wider than the Law Reform Commission's recommendation that the liability of a beneficiary to pay for unpaid calls be retained. The extrinsic materials provide no assistance in understanding why it was drafted in the form it was.

Part 3 – Circumstances of Trust beneficiary being liable after introduction of section 100A

3.1 Being a beneficiary plus something else as a source of liability

Before the decision in *Hardoon*, the law recognised certain types of situation in which a trustee could be entitled to indemnity from a beneficiary if there was the relationship of trustee and beneficiary, plus some additional element. A question arises of whether these types of situation still give rise to a liability for a beneficiary to indemnify after the enactment of section 100A.

One such situation was where the trustee had accepted the office of trustee at the request of the beneficiary⁶⁹. One situation in which this might apply is where there was a trust deed where the settlor of a trust was also a beneficiary. Another was where there is no trust instrument, but A asked B to take up shares in a particular company and hold them on trust for A, and A gave B the money with which to buy the shares⁷⁰. A beneficiary who had requested the trustee to undertake the role was liable to indemnify the trustee for any liabilities that the trustee might incur as a consequence of being the trustee. The obligation to indemnify could arise if there were several beneficiaries, all *sui juris* and between them absolutely entitled, who had all requested the trustee to undertake the role⁷¹. Being a beneficiary was essential for this route to liability - a person who was a settlor but not a beneficiary had no obligation to indemnify, unless he undertook that obligation by a contract⁷², or some other recognised source of obligation to indemnify.

⁶⁹ *Balsh v Hyham* (1728) 2 P Wms 453; 24 ER 810; *ex parte Chippendale* (1853) 4 De G M & G 19, 54 43 ER 415, 428; *In Re National Financial Co* (1868) LR 3 Ch 791, 794, per Sir W Page Wood V-C at 795; *Hemming v Maddock* (1870) 10 Eq 47; *James v May* (1873) LR 6 HL 328; *Jervis v Wolferstan* (1874) LR 18 Eq 18, 24 per Jessel MR; *Hobbs v Wayet* (1887) 36 Ch D 256, 258; *Jeffray v Webster* (1895) 1 ALR 65, 66 - 67; *Toohey v McCulla* (1890) NSWLR (Eq) 264, 268 - 9; *Wynne v Tempest* [1897] 1 Ch 110; *Matthews v Ruggles-Brise* [1911] 1 Ch 194, 202 - 3

⁷⁰ *Hemming v Maddick* (1872) 7 Ch App 395; *James v May* (1873) LR 6 E & I App 328

⁷¹ *Matthews v Ruggles-Brise* [1911] 1 Ch 194, 202

⁷² *Fraser v Murdoch* (1881) 6 App Cas 855, 872 - 3, 880

Another situation in which the law before *Hardoon* recognised a personal obligation for a beneficiary to indemnify was where the beneficiary had requested the trustee to undertake some particular liability, or enter some particular transaction.⁷³ If that happened, the beneficiary could have a personal obligation to indemnify the trustee concerning that particular liability or transaction, though not concerning any other liability to which the trustee might become subject.

These situations where the personal obligation of a beneficiary to indemnify arose from being a beneficiary plus something else fit within the words “a beneficiary ... liable to indemnify the trustee ... for any liability of the trustee” in subsection 2, and so are situations where the beneficiary’s liability is abolished by subsection 2. They do not, as a matter of ordinary English, concern “liability that a beneficiary ... may have in a capacity other than as a beneficiary”, so they are not exempted from the operation of s 100A by s 100A(4). Therefore, the general abolition of beneficiaries’ liability under subsection (2) applies to them.

This is confirmed if one takes into account the purpose of the statute to implement the Law Reform Commission’s recommendations. These situations fall within the words “liability of a beneficiary as such”, and are therefore a type of liability that is intended to be abolished.

However, various aspects of the trustee’s right of indemnity from the trust assets remain unaffected by the introduction of section 100A. Section 59 (4) remains in the *Trustee Act* and in terms confers on the trustee a general right of indemnity from the assets. It could be arguable that a conflict arises between section 59(4) and section 100A (2) in the situation where trust assets were held for identified beneficiaries, because the taking of what would otherwise be a beneficiary’s property pursuant to the indemnity from the assets was within the words that the beneficiary was “liable to indemnify the trustee” in section 100A(2), even if the liability existed only in the limited recourse fashion of having his or her assets appropriated. Any such conflict is to be resolved by giving a purposive reading to section 100A⁷⁴. The word “Accordingly” at the start of subsection 2 suggests that subsection 2 has a connection with the abolition of the rule in *Hardoon*, that was effected by subsection 1. The Law Reform Commission report

⁷³ In *Balsh v Hyham* (1728) 2 P Wms 453; 24 ER 810 a beneficiary had requested the trustee to borrow money on the security of the trust property and pay the loan proceeds to the beneficiary; the beneficiary was obliged to indemnify the trustee against his having paid money to obtain a release of the obligation to repay the loan. Also *Hobbs v Wayet* (1887) 36 Ch D 256, 258.

⁷⁴ Section 33 *Interpretation Act 1987 (NSW)* requires a provision in an Act to be given an interpretation that would promote the purpose or object of that provision.

expressly stated that the alteration of the law that it was proposing would not affect the trustee's right of indemnity from the assets⁷⁵.

The case law recognised that when a beneficiary of a trust had requested a trustee to enter a particular transaction or undertake a particular liability which was not a breach of trust, and the trust property had later been divided so that separate trust property that was held for that beneficiary could be identified, that separate trust property could be resorted to to meet a liability that the trustee suffered as a result of undertaking the liability or entering the transaction⁷⁶. Because it relates to the trustee's right to resort to the trust assets rather than imposes any personal liability on a beneficiary, even after the enactment of section 100A this principle could be applied along with the statutory right of indemnity from the assets by making the assets held for the beneficiary who had made the request primarily liable.

As well, if a beneficiary requested the trustee to enter a transaction that was a breach of trust sometimes the trustee could reimburse himself for any resulting liability from amounts that would otherwise be payable to that beneficiary⁷⁷. Section 86 *Trustee Act (NSW)*⁷⁸ confers a power on the court to authorise the impounding all or any part of the interest of a beneficiary who had requested a trustee to engage in a breach of trust, as an indemnity to the trustee, and that power remains in force after the coming into effect of section 100A⁷⁹. None of these rights of the trustee to resort to trust property, rather than enforce a personal liability of the beneficiary, would be affected by section 100A.

3.2 Beneficiaries' liability pursuant to trustee's right of indemnity from assets and tracing

Another way in which beneficiaries might in practical effect be required to provide an indemnity for a trustee's obligation occurs if there has been a distribution of trust property to the beneficiary, and the trustee then comes

⁷⁵ "The right of a trustee to indemnity *from the trust property* is not in issue. What a beneficiary gains is the benefit of an interest in the trust property, and the principle of benefit and burden is adequately satisfied by allowing the trustee a right of indemnity to the extent of the trust property." *LRC Report 144*, [2.32] (emphasis in original)

⁷⁶ *Fraser v Murdoch* (1881) 6 App Cas 855

⁷⁷ *Trafford v Boehm* (1746) 3 Atk 440, 26 ER 1054; *Woodyatt v Gresley* (1836) 8 Sim 180; 59 ER 72.

⁷⁸ All of the other Australian states and territories have an analogous provision: Section 68 *Trustee Act 1958* (Vic); section 77 *Trusts Act 1973* (Qld); section 76 *Trustees Act 1962* (WA); section 57 *Trustee Act 1936* (SA); Section 53 *Trustee Act 1898* (Tas); section 86 *Trustee Act 1925* (ACT); section 50 *Trustee Act* (NT)

⁷⁹ The interaction of case law and statute law concerning this is complex, and is discussed in *Jacobs on Trusts* [21-21] – [21-25]

under a liability which it cannot discharge from the property it retains. The trustee's right to indemnity from the assets persists even after an asset has been distributed to a beneficiary, and so can attach to any of the distributed property that remains identifiable in the hands of the beneficiary⁸⁰. That is because the beneficiary is a volunteer so far as the distributed property is concerned, and therefore the proprietary right of the trustee to indemnity from that item of property continues to be enforceable against the distributed property in the hands of the beneficiary.

The source of the trustee's right to indemnity through tracing lies in the right of indemnity from the assets, not in the *Hardoon* principle. However when the trustee has parted with the trust property that right must still be enforced by the trustee seeking an order that the beneficiary pay the trustee, or alternatively that a receiver or trustee for sale of the asset into which the trust property can be traced be appointed.

The obligation of a beneficiary to indemnify a trustee from distributed trust assets in the beneficiary's hands falls within the literal wording of being "liable to indemnify the trustee... for any act, default, obligation or liability of the trustee arising on or after the commencement day". Thus it is within the literal wording of the type of obligation that subsection 2 abolishes. However, it is not a liability that the beneficiary has in the capacity of a beneficiary, because the trustee's equitable interest in the property would continue to bind the property in exactly the same way whether the property was distributed to the beneficiary as a volunteer, or to anyone else as a volunteer. Thus the liability is excluded from subsection 2 by subsection 4.

In any event, as a consequence, as discussed earlier, of the trustee's right of indemnity from the assets not being affected by the introduction of section 100A, the facet of the trustee's right of indemnity from the assets that allows the trustee indemnity from distributed trust assets that can be traced is not abolished by section 100A.

3.3 Where there are two alternative routes to liability – being a beneficiary, and some different route

⁸⁰ *Ron Kingham Real Estate Pty Ltd v Edgar* [1999] 2 Qd R 439, 441; *Grzonic v Suttor* [2011] 471, [66] – [68]. This is consistent with the right of a former trustee to assert a trustee's lien against assets transferred to a new trustee: *Jacobs on Trusts* [21-04] and cases there cited.

The case law gives examples of situations where it was possible to reach a conclusion that a person had a liability to indemnify or make a payment to a trustee for reasons that included that the person was a beneficiary, but also to reach a conclusion that that person had a liability to indemnify or make a payment to the trustee for reasons that did not depend on the person being a beneficiary. These are examples of situations that apply “the legal principles of indemnity to a person who happens to be a beneficiary of a trust.”⁸¹ In those situations, even after the enactment of s 100A the beneficiary could continue to be liable to the trustee, but only via the route that does not depend on being a beneficiary. I will give a few examples, that are by no means a complete list, of ways in which a beneficiary could still have a liability to indemnify or make a payment to a trustee after the enactment of section 100A.

3.3.1 Agency

The work of Nuncio D’Angelo has drawn the attention of the Australian profession to the possibility of a beneficiary being liable to indemnify a trustee if the trustee has acted as the agent of the beneficiary in incurring some liability⁸². For the sake of completeness I will mention some of the main principles relevant to liability arising by this route.

Normally a trustee is not the agent of his beneficiary⁸³. However, the relationships of trustee and agent can co-exist. A common situation in which the two types of relationship co-exist is a partnership, where the partnership property is held by the legal title-holders on trust for the partners, and the partners are agents of each other in carrying on the partnership business. Trusteeship and agency also co-exist when the trustee is a mere nominee, who must deal with the trust property as instructed by the beneficiary.

“Agent” is a notoriously slippery word⁸⁴. Whether one person is the agent of another in a particular transaction depends on a close analysis of the particular facts. It is possible for a person to be held to be the agent of another even if there

⁸¹ R A Hughes, *The Right of a Trustee to a Personal Indemnity from Beneficiaries* (1990) 64 ALJ 567

⁸² See Nuncio D’Angelo, *Commercial Trusts*, [3.26] – [3.56]

⁸³ *Construction Engineering (Aust) Pty Ltd v Hexyl Pty Ltd* (1985) 155 CLR 541, 546; *Scott v Davis* (2000) 204 CLR 333, [228] – [229]

⁸⁴ *Kirkpatrick v Kotis* [2004] NSWSC 1265, 62 NSWLR 567, [83] – [103]; “the protean nature of the concept of agency, which bedevils this area of discourse” – *Scott v Davis*, [4] per Gleeson CJ, “Difficulties ... arise from the many senses in which the word “agent” is employed” (*Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australasia Ltd* (1931) 46 CLR 41, 50 per Dixon J; *International Harvester Co of Australia Pty Ltd v Carrigan’s Hazeldene Pastoral Co* (1958) 100 CLR 644, 652

is no express appointment in which the word “agent” is used. It is possible for A to be the agent of P at one time or for some purpose, but not to be P’s agent at a different time or for some different purpose⁸⁵. It is possible for a person to have ostensible authority to act on behalf of another, even if they lack actual authority⁸⁶.

There are different tests for the existence of “agency” in different areas of the law. In deciding whether a trustee was the agent of his beneficiary concerning the incurring of some particular liability it would be appropriate to apply the test that is appropriate for the particular type of liability that is in question. Thus, if the question is whether a beneficiary is liable for some tort that the trustee has committed one would apply the tests for agency that operate concerning that type of tort. When deciding whether a trustee was the agent of his beneficiary for the purpose of a contractual liability one would apply the tests for agency that apply in contract. They depend on the agent having authority to bring about legal relations between his principal and another person⁸⁷. It is conceivable that a trustee could come to be under a common law restitutionary liability, such as to repay money paid under a mistake, in which case whether the trustee was the agent of the beneficiary would be decided in accordance with agency concepts used in the law of restitution.

Agency can be inferred. If executors carry on the business of the testator without authority to do so from the will, or the court, but at the instance of creditors, the executors have the rights of agents against the creditors on the basis that the creditors are their principals⁸⁸. In a similar way, if trustees engaged in conduct without power to do so, but at the instance of beneficiaries, they could be treated as the agents of the beneficiaries⁸⁹.

If the trustee is the agent of the beneficiary the beneficiary will be required to indemnify the trustee for liability incurred within the scope of the agency. Quite separately to this, if the trustee is an agent of the beneficiary the beneficiary might be sued directly by a person to whom the trustee had incurred a liability. Clearly if the trustee acts as the agent for a beneficiary who is a disclosed principal the beneficiary can be sued directly. It would be possible for a trustee to enter a contract on the basis that he was acting as an agent only, even though his principal was not disclosed, in which case only the beneficiary would be

⁸⁵ *Kirkpatrick v Kotis*, [88] – [89]

⁸⁶ *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2B 480

⁸⁷ *International Harvester Company of Australia Pty Ltd v Carrigan’s Hazeldene Pastoral Company* (1958) 100 CLR 644, 652.

⁸⁸ *Dowse v Gorton* [1891] AC 191, 208

⁸⁹ D Browne, *Ashburner’s Principles of Equity* (2nd ed, Butterworths, 1933) p 162.

liable on the contract⁹⁰. Even if the trustee acts at the time of incurring the liability as the agent for an undisclosed principal, if the agency has become disclosed by the time the liability comes to be enforced the other party can sue the formerly undisclosed principal.

3.3.2 Vicarious liability as a source of liability

Without going into the debate about the proper analysis of vicarious liability, and how vicarious liability relates to agency, it can be said that there are some situations where a court could hold that a beneficiary was vicariously liable for an action carried out by a trustee. One example is if the trustee was the employee of the beneficiary, and in acting as a trustee incurred a liability while also acting in the scope of his employment. There are examples in the case law of an employee being a trustee for his employer⁹¹. The scope of an employer's vicarious liability for torts of his employee has been widened somewhat by section 7 *Law Reform (Vicarious Liability) Act 1983 (NSW)*. Under the general law an employer can be vicariously liable for a tort of his employee even when the act of the employee is criminal, and even if there is no fault on the part of the employer⁹²:

As well, while it is not common for a case to be decided on the basis that an employer has vicarious liability for an employee's breach of an obligation in equity's exclusive jurisdiction, there have been examples of it⁹³, and the High Court has held that in principle it is possible⁹⁴.

3.3.3 Beneficiaries disgorging through receiving distributions in circumstances making them constructive trustees

Another route by which a beneficiary can be required to pay a liability of a trustee arises if the beneficiary receives a trust distribution in circumstances where the beneficiary becomes a constructive trustee of that distribution. One example would be if the beneficiary had misled the trustee into making a

⁹⁰ *Teheran-Europe Co Ltd v S T Belton (Tractors) Ltd* [1968] 2 QB 53, 59

⁹¹ *Hardoon* itself was such a case – an employee of a stockbroker was at first trustee of shares for his employer and had come to hold them in the course of his employment, though by the time of the events that were sued on he had become trustee for someone else.

⁹² *Prince Alfred College Incorporated v ADC* [2016] HCA 37; 258 CLR 134, [39] – [40], [80] – [81]

⁹³ *Coulthard v South Australia* (1995) 63 SASR 531, 535; : *Dubai Aluminium Co Ltd v Salaam* [2003] AC 366.

⁹⁴ *Ancient Order of Foresters in Victoria Friendly Society Limited v Lifeplan Australia Friendly Society Limited* [2018] HCA 43; 265 CLR 1, [5] cf [64]

distribution that the trustee would not otherwise have made and that is a breach of trust⁹⁵. The trustee has a liability to recoup the trust fund for the wrongful distribution, but the person who misled the trustee into making the distribution is liable to recoup the trust fund before the trustee's obligation to recoup the fund is called on⁹⁶.

Another is where a life tenant beneficiary has induced the trustee to make an unauthorised investment, and pay the income of that investment to that beneficiary. The beneficiary is obliged to pay the trustees the amount of excess income he has received because it is trust money received with notice that it is the product of a breach of trust⁹⁷.

Another is in the circumstances of *Ron Kingham Real Estate Pty Ltd v Edgar*⁹⁸. There, after a judgment had been given against a trustee concerning a liability incurred in its role as trustee, the defendants who controlled the trustee and were also beneficiaries of the trust arranged for the trustee to transfer all its assets to themselves:

"The defendants had notice of the plaintiff's claim at the time they arranged for the trust assets to be paid to themselves, and they enriched themselves at the expense of satisfying the plaintiff's claim against the trustee. It would plainly be against conscience for them to retain the proceeds of their conduct so as to defeat that claim. In equity they would be considered as constructive trustees of the assets received at least to the extent necessary to satisfy the trustee's liability."

The type of constructive trusteeship involved here is the type that generates a personal liability to repay, independently of whether it is possible to trace the distribution of the trust assets into any assets still held by the beneficiaries.

3.3.4 The Balkin v Peck situation

*Balkin v Peck*⁹⁹ concerned a trust established *inter vivos*, under which a single piece of English real estate was to be held on trust for the settlor's sister for life, then for the settlor's three daughters. When the life tenant died the trustees sold

⁹⁵ By analogy with *Fyler v Fyler* (1841) 3 Beav 550, 49 ER 216 and *Eaves v Hickson* (1861) 30 Beav 136, 54 ER 840. See also *Kellaway v Johnson* (1842) 5 Beav 319; 49 ER 691

⁹⁶ See the order in *Eaves v Hickson* (supra).

⁹⁷ *Raby v Ridehalgh* (1855) 7 De G M & G 104; 44 ER 41. The excess payment to the life tenant is recoverable by the beneficiaries in remainder, and the trustees can stand in the place of those beneficiaries in remainder for the purpose of recovering the amounts.

⁹⁸ [1999] 2 Qd R 439, 444

⁹⁹ (1998) 43 NSWLR 706

the real estate, and distributed the net proceeds to the three daughters. At that time the trustees did not realise that the death of the life tenant had triggered an obligation to pay an English capital transfer tax.

In due course the English revenue authorities issued a tax assessment to the trustees. If the trustees had retained part of the proceeds of sale they would clearly have been able to use those proceeds to pay the tax, because of their right of indemnity from the trust assets. But by the time the assessment came they had distributed the whole of the net proceeds. They had distributed it as money, so presumably would have had little hope of tracing the distributed money into any particular asset that the beneficiaries retained, and asserting their right of indemnity from the assets. But they succeeded in recovering the amount of their liability to the English tax authorities¹⁰⁰, using the principle in *Hardoon*.

If that sort of situation arose again after section 100A came into effect the route by which the court held the beneficiaries liable to indemnify the trustees would not be available. However an alternative route to recovery might be available, on the basis, in the common law of restitution, that the payment to the beneficiaries was a payment made under a mistake. The mistake that the trustees made at the time they distributed the sale proceeds was that they had no outstanding liabilities concerning the proceeds. That mistake was a mistake of law, but since the decisions of *David Securities Pty Ltd v Commonwealth Bank of Australia*¹⁰¹ the law has permitted the recovery of money paid under a mistake of law.

A claim made on the basis of recovery of an amount paid under a mistake of law has some complications that might not arise concerning a claim made under the *Hardoon* rule¹⁰². This is not the place for a full account of them, but they include that recovery is not possible if a payment is made voluntarily in submission to an honest claim¹⁰³, and that there is a defence if the recipient has received the money in good faith and changed his or her position in reliance on receipt of the

¹⁰⁰ A slight qualification to this is that the trustees had not paid the English tax assessment promptly, and so had been required to pay interest to the English tax authorities, as well as the amount of the tax itself. To the extent that they had incurred interest through delaying in paying the assessment the trial judge had held this was not a proper trust expense, and so not recoverable (43 NSWLR at 708), and this finding was not disturbed on appeal.

¹⁰¹ (1992) 175 CLR 353, refusing to follow the long-standing decision of Lord Ellenborough in *Bilbie v Lumley* (1802) 2 East 469, 102 ER 448 that had denied the possibility of recovering a payment made under mistake of law.

¹⁰² I say “might not arise” rather than “do not arise” because the case law has not explored whether these circumstances would count as good reasons why the trustee should bear the liabilities personally, within Lord Lindley’s statement of the rule in *Hardoon*.

¹⁰³ That is, where the payer is prepared to make the payment irrespective of the validity or invalidity of the obligation – see *David Securities* at 373 - 4

payment¹⁰⁴. The change of position defence is not always a total defence – the defence operates *pro tanto*, to the extent to which the recipient has changed his or her position in reliance on the receipt¹⁰⁵. As well if the payer has made a representation, or in some other way induced the belief, that the payee is entitled to the money, and the payee has relied on that inducement to his detriment, the payee might have a defence that the payer is estopped from denying the payee's entitlement.

3.3.5 Incomplete sales

In the latter part of the nineteenth century in England there was a rash of speculation in company shares, often with quick sales and resales after the shares were issued. Frequently a vendor of shares who had been paid for them and had signed a transfer of them was still the registered proprietor at the time that either a call was made for further capital, or the company went into liquidation and the vendor had some liability as a contributory. The result was usually that the court held that the vendor was a trustee for the ultimate purchaser, and that the ultimate purchaser, as beneficiary of that trust, was liable to indemnify the vendor.

A variant on that situation occurred when there was an agreement to sell shares, payment of the price and handing over of certificates, but the broker who acted for the real purchaser arranged for an impecunious stooge to be named as transferee of the shares, and when the company became insolvent a liability was imposed on the vendor¹⁰⁶. The judgments in those cases all made mention of the vendor holding the shares as trustee for the real purchaser, and the real purchaser thus being obliged to indemnify.

If any of these types of situation were to occur now, the vendor of the shares could still be held to be a bare trustee of them for the purchaser. However in

¹⁰⁴ *David Securities* at 385

¹⁰⁵ *Avon County Council v Howlett* [1983] 1 WLR 605; *Australian Financial Services and Leasing Pty Limited v Hills Industries Limited* [2014] HCA 14, [4], [17], [23] (French CJ) [86], [97] (Hayne, Crennan, Kiefel Bell and Keane JJ) [104] – [106] (Gageler J)

¹⁰⁶ In *Castellan v Hobson* (1870) 10 Eq 47 there was a contract for sale of shares, the real purchaser's broker gave the name of an impecunious workman of the real purchaser as the purchaser, and the vendor executed a transfer to that person. It was not registered when the company went into liquidation and a call was made on the vendor. In *Brown v Black* (1873) LR 15 Eq 363 (affirmed (1873) 8 Ch App 939) the transfer was taken in the name of the office boy employed by the real purchaser's broker, and was registered before the company went into liquidation. When liquidators discovered that the registered holder was a minor they treated his registration as a nullity, removed his name from the register and replaced the name of the vendor, then made a call on the vendor.

light of s 100A that would not be a basis on which the vendor of the shares could claim to be indemnified for liabilities that arose concerning the shares. But, depending on the particular facts, there may be other legal routes to the same conclusion.

One such legal route comes through the implied terms in a contract of sale. There were early nineteenth century decisions that when there is an assignment of a lease the assignor cannot free himself from his liability to the lessor on the covenants of the lease, but there is an implied term in the agreement to assign the lease that the assignee will indemnify the assignor against any liability that arises under the covenants once the assignment has occurred¹⁰⁷. Drawing on the analogy of the implied term for indemnity that arises on assignment of a lease, a similar implied term came to be recognised in contracts for the sale of shares. It was that where a vendor had done all that was in his power to pass the title to the purchaser, by signing and handing over a transfer form with any necessary certificates, and the defendant has power to become registered owner by seeking to have the transfer registered, there is an implied contractual obligation for the purchaser to indemnify the vendor against all liability that arises concerning the shares from the time the vendor hands over the transfer¹⁰⁸.

This analysis is easy to apply where there is a simple sale from one person to another, but it can also be adapted to strings of sales. If there is a string of sales without registration of any transfer, there is initially no contract between the initial vendor and the ultimate purchaser, but once the ultimate purchaser accepts a transfer signed by the initial vendor, and accepts the certificates from the original vendor, the ultimate purchaser is adopting the whole transfer, and comes into privity with the original vendor, such that an obligation to indemnify arises¹⁰⁹.

3.3.6 Oral agreements or inducements

¹⁰⁷ *Staines v Morris* (1812) 1 V & B 8, 13; 35 ER 4, 5-6; *Wilkins v Fry* (1816) 1 Mer 244, 263-4; 35 ER 665, 672. However this covenant is implied only when the assignment is of the full beneficial interest, and so does not apply when there is an assignment to trustees in bankruptcy, or trustees to divide property amongst creditors: *Wilkins v Fry*; *Levi v Ayers* (1878) 3 App Cas 842, 852-3

¹⁰⁸ *Walker v Bartlett* (1856) 18 CB (NS) 845, 861-4; 139 ER 1604, 1611-2; *Roberts v Crowe* (1872) LR 7 CP 629, 637 per Willes J (Keating J agreeing); *Kellock v Enthoven* (1873) 8 QB 458, 464 per Blackburn J; *Kellock v Enthoven* (1874) LR 9 QB 241 (Exchequer Chamber); *Thompson v Daunt* (1889) NSW R (L) 132 (NSW Full Court)

¹⁰⁹ *Hawkins v Maltby* (1867) LR 4 Eq 572, 576 – 7, this aspect of the decision approved in *Hawkins v Maltby* (1867) LR 3 Ch App 188, 193 per Lord Chelmsford LC; *Grissell v Bristowe* (1868) 4 CP 36 (at 46, the ultimate purchasers “have accepted the transfer, and placed themselves in the position of buyers, and taken upon themselves the obligations of the contract”); *Kellock v Enthoven* (1874) 9 QB 241, 246 -7.

Subsection 2 (a) creates a specific exemption to the beneficiary's lack of liability to indemnify or make a payment to the trustee if the beneficiary has *agreed in writing* to be liable. However if the beneficiary had made an oral request to the trustee to undertake some particular course of action, and had agreed to be liable for any consequences that arose for the trustee from following that course, or had led the trustee to believe the beneficiary would be liable for any consequences for the trustee that arose from following that course, there might be an enforceable contract, or an estoppel. In such a situation the liability of the beneficiary would be as a contracting party, or as the person who had become bound by an estoppel, not as a beneficiary.

This cuts down the significance of the "agreed in writing" exception in subsection 2, but does not destroy it completely. A beneficiary's agreement in writing to be liable for a trustee's act, etc., can be sufficient to make the beneficiary liable, under subsection 2, regardless of whether that agreement in writing amounts to a contract or some other free-standing way of imposing an obligation on the beneficiary. An agreement to be liable for a trustee's act, etc., that is not in writing will bind the beneficiary only if it meets the requirements of being some sort of free-standing legal obligation.

3.3.7 Insolvent trading, and similar remedies when trustee is insolvent

One of the circumstances of possible liability of a beneficiary that the Law Reform Commission specifically sought to preserve was "the liability of directors (including shadow or de facto directors) of corporate trustees for insolvent trading"¹¹⁰. Anyone who is a company director¹¹¹, at a time when the company incurs a debt to a creditor and is insolvent, is at risk of being made personally liable, if the company is being wound up, to pay to a liquidator the amount of the loss or damage the creditor suffers as a result of incurring the debt¹¹². The director can also be liable to pay directly to a creditor¹¹³ the amount of loss or damage that that creditor suffers in consequence of the debt to that particular

¹¹⁰ *LRC Report 144*, [2.46], quoted more fully at page 6 above

¹¹¹ The definition of "director" in section 9 *Corporations Act 2001 (Cth)* extends to alternate directors and de facto or shadow directors

¹¹² Section 588G, 588M *Corporations Act*. It is necessary that at the time the debt is incurred there are reasonable grounds to suspect insolvency. There is an extended definition in section 588G of "incurring a debt", but even as so extended it does not include the full range of ways in which a liability can be incurred.

¹¹³ The individual creditor can sue only with the consent of the liquidator – section 588R - or if after lapse of certain times, and service of a notice requiring the liquidator to commence proceedings the liquidator has failed to do so, or the court grants leave – section 588T.

creditor having been incurred¹¹⁴. There are complex provisions relating to defences and “safe harbour” procedures that can excuse a director from these liabilities¹¹⁵, and the court has power to excuse a director from personal liability¹¹⁶.

What matters for present purposes is that in the situation where a director of a corporate trustee is a beneficiary of the trust these sections could result in the beneficiary becoming liable to pay money in consequence of the trustee incurring a debt. The liability of the director/beneficiary concerning insolvent trading can be seen as one to indemnify the trustee, even though the payment is made to the liquidator or creditor, because it makes good the liability of the trustee for the debts incurred.

The amount that the director must pay in an insolvent trading action brought by the liquidator is fixed by the statute as “the amount of the loss or damage” that the creditor suffers in consequence of the incurring of the debt in the circumstances of insolvent trading. This is not necessarily the face value of the unpaid debts of the company: the loss or damage to the creditors from incurring the debts might be less than the face value, because any amounts recovered by the liquidator, and subsequently made available to the creditors, might make the creditors’ loss less than the total of the creditors’ unpaid debts¹¹⁷. Even though this liability of the director/beneficiary to pay the loss or damage is sometimes to pay less than the debt that was incurred, the result of paying the amount of that loss or damage, when put together with the amount that flows through to the creditor from the liquidator’s recoveries, is in theory that the creditor’s debt is paid. In this way also the payment can be seen as providing indemnity for the debt that the trustee incurred.

Separately to being considered an indemnity, the payment to the liquidator is a “payment to any other person ... for ... any obligation or liability of the trustee”, and to that extent within the type of payment that a literal reading of section 100A (2) excuses the beneficiary from being obliged to make. But the statutory

¹¹⁴ Section 588G, 588M *Corporations Act 2001 (Cth)*. An order for the director to pay compensation to the company of the amount of that loss or damage can also be made if ASIC brings civil penalty proceedings against the director concerning the insolvent trading (section 588J *Corporations Act*) or if there is a successful criminal prosecution for the insolvent trading (section 588K *Corporations Act*).

¹¹⁵ Sections 588GA and 588GAAA concerning “safe harbours”, 588H about defences

¹¹⁶ Section 1317S *Corporations Act 201 (Cth)*

¹¹⁷ *Re Swan Services Pty Ltd (in liq)* [2016] NSWSC 1724, [204] – [216]; *Re Substance Technologies Pty Ltd* [2019] NSWSC 612, [64]. Similarly, the amount that could be recovered if an individual creditor sued would be the amount of the loss or damage that that individual creditor suffered as a consequence of the debt having been incurred as an act of insolvent trading, which might be less than the face value of the creditor’s debt.

obligation that a director of a corporate trustee who happened to be a beneficiary of the trust had to make a payment in consequence of insolvent trading is a “liability that a beneficiary [has] in a capacity other than as a beneficiary”, and so, pursuant to section 100A (4), is one to which the director continues to be subject.

A different avenue for potential liability of beneficiaries to make a payment to a liquidator or trustee in bankruptcy arises if the trustee becomes insolvent, in circumstances where it has made comparatively recent distributions to beneficiaries. Exactly how this liability arises depends on the detail of the claw-back provisions open to a trustee in bankruptcy under the *Bankruptcy Act* and to a liquidator under the *Corporations Act*, and on the various pieces of state legislation that allow the setting aside of transactions to defraud creditors. The statutory regimes governing liquidation and bankruptcy¹¹⁸ each allow a trustee in bankruptcy, or a liquidator, to recover transfers for no consideration or inadequate consideration, sometimes ones made up to 5 years before the commencement of the bankruptcy or the liquidation. They also allow the recovery of transfers of property whose main purpose was to defeat creditors¹¹⁹.

The effect of any recovery under the clawback provisions or setting aside under these defrauding creditors provision is not that the beneficiary becomes liable for any particular liability of the trustee, but rather that the overall pool of assets available to the trustee is increased, so that the trustee comes to be put into a position of being able to meet liabilities it would otherwise not have had the funds to meet.

A different basis of liability of a beneficiary who is also a director of a trustee corporation can arise under section 197 *Corporations Act*. It makes a director of a trustee corporation personally liable for liabilities of the corporation if the corporation fails to meet them, and the corporation is not entitled to be fully indemnified out of the trust assets because it acted in breach of trust, or acted outside its powers as trustee, or there is a term of the trust instrument denying

¹¹⁸ s 120 *Bankruptcy Act 1966 (Cth)*, s 588FB and 588FDA *Corporations Act 2001 (Cth)*. An example of the liquidator of a trustee using s 120 to recover distributions that had been made to beneficiaries is *Re Pheon Pty Ltd* (1986) 47 SASR 427At 436-7 White J said “The obligation to refund settlements under s 120(2) has nothing to do with the principle in *Hardoon v Belilios*. It is a different principle altogether.”

¹¹⁹ s 121 *Bankruptcy Act 1966 (Cth)*, s 37A *Conveyancing Act 1919 (NSW)* and analogous provisions in other states and territories. While there are also provisions allowing the claw-back of transfers by an insolvent debtor that have the effect of giving a creditor a preference (s 122 *Bankruptcy Act*, s 588FA *Corporations Act*), distributions by a trustee to a beneficiary would not often be of that type. However it is not impossible - Ford *Trading Trusts* p 28 has pointed out that a beneficiary can become a creditor of a trustee if the trustee has stated an account that admits a liability to pay the beneficiary.

or limiting the corporation's right to be indemnified from the assets¹²⁰. Again, this can be seen as an indemnification of the trustee because the payment by the director/beneficiary discharges the obligation of the trustee.

4. Conclusion

The new section 100A has made it clear that a completely passive investor in a trust, who takes no part in its promotion or its management, is free from any risk of having a personal obligation to indemnify the trustee or pay for any act of the trustee, except in the very limited circumstances that s 100A spells out, and in the diminishing number of cases where the liability or obligation concerning which the trustee seeks indemnity arose before 22 November 2019. The new section 100A does away with the uncertainties and arbitrariness of the rule in *Hardoon* concerning acts, defaults obligations or liabilities of the trustee that arise after 22 November 2019. But the new section does not have the effect that someone who is a beneficiary of a trust will never have a liability to indemnify a trustee. What it requires is that if the beneficiary is to indemnify the trustee, other than in the very limited circumstances spelled out in s 100A, or where the trustee's liability arose before 22 November 2019, it must be for a reason other than that the beneficiary is a beneficiary.

The examples I have given of how a beneficiary could come to be under such a liability are by no means the only routes that there could be to a beneficiary having a personal liability to indemnify. The alternative routes in these examples are ones that come from agency law, tort law, statute law, and equity's exclusive jurisdiction. Deciding when section 100A applies involves questions of conflict of laws and statutory interpretation. Thus, deciding whether a person who is a beneficiary of a trust might have an obligation to indemnify a trustee could involve legal principles that come from any part of the private law, not just from the law of trusts.

¹²⁰ This last possibility would be relevant only for trusts governed by a law that permitted exclusion or limitation of the right of indemnity from the assets – see footnote 5 above.