Australian Banking Association

10 December 2021

Manager
Market Conduct Division
Treasury
Langton Crescent
Parkes ACT 2600

By email MCDInsolvency@treasury.gov.au

Dear Manager

Clarifying the treatment of trusts under insolvency law

The ABA welcomes the opportunity to provide feedback on Treasury's consultation paper *Clarifying the treatment of trusts under insolvency law* (15 October 2021).

Overview

Australia's current corporate insolvency regime does not expressly cover how companies that structure themselves through a trust, or businesses that have a corporate trustee ('corporate trusts'), are to be dealt with during insolvency which results in unhelpful ambiguity.

As corporate trusts are commonly used by small businesses, having a clear statutory regime is particularly critical to enable banks to provide appropriate insolvency solutions as the economy recovers from the impacts of COVID-19.

Following reforms introduced by the Government in 2020 to the insolvency framework for small businesses, the ABA notes additional focus areas have been identified to help businesses in distress reorganise, restructure or efficiently wind down their affairs as well as reducing the regulatory burden on business.

The ABA supports sensible reforms being made to provide clarity, direction, and simplification for the treatment of trustees and trust structures during times of financial distress as this will ultimately lead to better outcomes for companies, creditors, employees, and the broader community.

We address particular questions in the consultation paper in the below Attachment.

Should you have any questions, please contact me on the details below.

Yours sincerely

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Answers to specific questions

QUESTION	COMMENTS
Question 1: Should the corporate insolvency framework be amended so that it expressly provides for the external administration of insolvent trusts with a corporate trustee? If so, what external administration processes should the amendments apply to?	*Amendments to insolvency framework* Yes. To the extent possible, the amendments should address existing gaps that add unnecessary cost, inefficiency, and complication to the external administration of corporate trustees. The effect of the amendments should be that, in an insolvency scenario, businesses operated by a company acting as a trustee (and its creditors) will be treated no differently to a company acting in its own right. This outcome would be consistent with the decision of the High Court in **Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth [2019] HCA 20 ('Amerind')**. Amendments to the legislation would provide clarity on this issue. Currently, decisions by the Courts may vary and lead to complexity and cost. *Processes to which the amendments should apply* All existing insolvency processes within the Corporations Act 2001 ('the Act').
Question 2: What benefits would a legislative framework deliver?	*Reductions in time and costs* Achieving greater certainty via legislative reform will reduce the cost of the external administration of a corporate trustee, in turn benefiting stakeholders. For example, an external administrator of a corporate trustee often need to obtain court orders to facilitate dealings with trust property. This can add unnecessary additional cost to an insolvency process. *Turnaround efforts* A clear statutory regime may also assist directors of corporate trustees, making the decision to seek assistance in times of financial distress, a less complicated one. *Availability of credit to trustees* Clarity provided on how insolvent trustees are to be dealt with should allow better and more streamlined risk assessment processes for lenders providing credit.
Question 3: Is there potential for detrimental or unforeseen impacts if the statutory regime is extended?	Assessing the full impact of the extension of the regime is difficult in the absence of draft legislation. We would welcome the opportunity to provide comment on any draft legislation. Generally speaking, we would expect the amendments to be a positive development overall.

Question 4: Should legislation expressly set out when a trust is deemed to be insolvent?	No. Section 95A of the Act already adequately addresses the circumstances in which a person, which includes a company, whether or not acting as trustee, is insolvent.
Question 5: What is the most appropriate way to prescribe when a trust is taken to be insolvent?	As above, section 95A of the Act adequately addresses this.
Question 6: Should the power of an insolvency practitioner to administer the trust assets and liabilities be expressly provided for in legislation?	Yes. Rights of possession and sale arguably lost upon the automatic removal of an insolvent trustee should be expressly provided for. Where these rights are lost, court intervention is often required. This can add unnecessary cost to the external administration of corporate trustees. Our view is that the result of the amendments should be that the automatic removal of a trustee has no effect upon appointment of a registered liquidator.
Question 7: Should the law provide that, subject to a contrary order by a court, the same insolvency practitioner may administer both the company, and the assets and liabilities attributable to any trusts for which the company is trustee?	Yes. The effect of the legislation should be that an insolvency practitioner has all the rights necessary to administer the trustee company's affairs without having to seek court orders. There should be limited basis for seeking the alternative orders and the criteria for matters for the Court's consideration should include whether there would be a prejudice to other creditors if the orders were made, the extent of the administrative and cost burden on the administrators should the orders be made and whether it would be more likely that the objects for administration would be achieved if the orders were made.
Question 8: Should the affairs of a trustee company and each trust it administers be resolved separately in external administration?	Yes. This aligns with existing accepted legal principles.
Question 9: Should there be a statutory order of priority in the winding up of a trust? **Question 10:** Should a statutory order of priority replicate the regime for companies? do additional factors need to be considered where a corporate trust structure is involved?	Q 9 and 10 Yes, generally it seems sensible to align with the decision in Amerind regarding existing statutory priorities for companies acting in their own right. Additional factors do arise when a corporate trustee transacts in multiple capacities. Further consideration and consultation may be needed in this area.

Question 11: Should there be additional limits on the enforceability of ejection clauses and/or clauses that seek to limit a trustee's right to indemnity, in situations involving insolvency or external administration?	Yes. The effect of the legislation should be that an ejection clause has no effect on a trustee to which a registered liquidator has been appointed i.e. receivership, voluntary administration or liquidator. The Ipso Facto reforms are a recent similar example of the modification of contractual rights in an insolvency scenario.
Question 12: What would be the impacts of any such limits?	It will reduce the cost of administering insolvent corporate trustees and maximise outcomes to stakeholders.
Question 13: Are there any other issues that need to be considered in light of the questions above?	Further issues may arise depending on the form the legislation takes. We see that further consultation following release of draft legislation should help resolve any such issues. A few issues which may need to be considered are issues particular to trusts. For example, clarifying that external administration of a trustee does not constitute resettlement of the trust and that there should be no change in the tax treatment of the trust.
Question 14: What is the most appropriate model by which a statutory regime could be expressed in the legislation?	The model by which laws regulating the administration of a trustee company should mirror existing provisions within Chapter 5 of the Act.