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10 December 2021

Department of Treasury
Manager
Market Conduct Division
The Treasury
Langton Crescent
PARKES ACT 2600

**Via Email: MCDInsolvency@Treasury.gov.au**

Dear Sir/Madam

**Re: Clarifying the treatment of trusts under insolvency law**

We refer to your request for submissions to the Department of Treasury in relation to the consultation paper *"Clarifying the treatment of trusts under insolvency law"* and take pleasure in providing the following submissions.

## A. CONDON ASSOCIATES

Condon Associates is a specialist Firm of Forensic, Insolvency and Turnaround Practitioners headquartered in Parramatta, NSW. The Firm undertakes Liquidations (Official and Voluntary), Receiverships, Voluntary Administrations and Deeds of Company Arrangement under the provisions of the Corporations Act 2001 (Corporations Act), as well as the formal administration of Bankrupt Estates and Part X Arrangements pursuant to the Bankruptcy Act 1966 (Bankruptcy Act). In addition, the Firm provides services within the related areas of Forensic Accounting, and Litigation Support as well as business and financial Turnaround and Advisory Services not involving formal appointments.

It should be noted that the general focus of our corporate work is in the small to medium, proprietary companies rather than Publicly Listed entities.

The Firm's Managing Principal, Schon Gregory Condon, was an Official Liquidator, and continues as a Registered Liquidator and Registered Trustee in Bankruptcy with in excess of 40 years of experience in the business recovery/insolvency field, with almost 30 years plus at the Principal/Partner/Director level.

## B. BACKGROUND

It is appropriate to note the basis on which these submissions are based. From a significant number of years of experience, the fundamental concern of Creditors of any insolvency boils down to two issues, the maximisation of their return, and the expediency with which it is done.

Therefore, the primary focus for all insolvency administrations should be that it be designed to be as expedient and cost efficient as possible. This is not only the appointees' fees, but also any necessary legal expenses and other costs are minimised, correspondingly providing maximum potential returns to Creditors.

In our experience, in the overwhelming majority of cases, the business, being the company and associated trust are handed over complete without any concern for the complexities brought about by legal review. They simply see the whole as the operational vehicle that is now defunct, hence the need for a liquidator. In these cases, it is highly likely that anyone will query the right of recovery of assets or the manner of the resultant distribution.

Issues normally arise where there has been an attempt to manipulate the system. In these instances, these issues can become very intricate and serpentine, which will result in potentially significant cost, to run proceedings, and significant risk, adverse costs orders that confront the liquidator. The level of these costs and risks become the key weapon in the arsenal of the miscreant director or adviser in preventing a liquidator from retrieving that value that rightfully belongs to Creditors.

Clear, quick and decisive legislated courses of action will protect those exposed to financial loss in matters of insolvency.

## C. QUESTIONS ASKED FOR COMMENTS

We note that we have adopted the ordering and sequence of the Questions provided in formulating our response.

### 1. Proposal Question One

*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?*

This question seeks our input on if the corporate insolvency framework be amended so that it expressly provides for the external administration of insolvent trusts with a corporate trustee and if so, what external administration processes should the amendments apply to?

It is imperative that the Statutory regime established under Chapter 5 of the Corporations Act 2001 (Cth) be extended to expressly provide the external administration of insolvent Trusts with a corporate Trustee. It is impossible to argue that the current legislation is comprehensive and effective when such a large percentage of the community that is set up to assist is excluded from its provisions.

The current legislation provides a number of forms of external administration to cater for various scenarios. Trusts experience the same scenarios as do businesses and therefore all of the forms of external administration currently afforded to businesses should also be available to Trusts.

## 2. Proposal Question Two

*What benefits would a legislative framework deliver?*

It is our belief that amendments to the legislative framework would clarify the treatment of Trusts would reduce the regulatory burden and uncertainty currently faced by businesses. Eliminating the current requirement of an external administrator to apply to the Court for directions will provide the following benefits: -

- Reduction, or avoidance of the costs and complexities involved with applying to court.
- Improve the timing and quantum of any potential return to Creditors as realisations are not depleted by legal fees.
- Assist in freeing up an already congested legal system.
- Provide external administrators with a clear order of distribution of trust property among Creditors.
- Improve financiers' confidence in lending to Trusts, thereby improving the costs and availability of funds available to Trust.

## 3. Proposal Question Three

*Is there potential for detrimental or unforeseen impacts if the statutory regime is extended?*

In Question 3 we are asked is their potential for detrimental or unforeseen impacts if the statutory regime is extended.

There is potential for detrimental or unforeseen impacts if the statutory regime is extended particularly in complex business structures where the Trustee is part of a larger group of businesses. This would occur mainly where differing parts of the Group are solvent and insolvent.

There currently exists a number of detrimental impacts to Trusts simply by not having a framework to address insolvent situations effectively. Therefore, not extending the legislation due to unforeseen impacts would be ill advised and would appear short-sighted. Once established, any detrimental or unforeseen impacts of the extended legislation that become exposed can then be addressed. Alternatively, an avenue could be included in the legislation to allow an application for directions to be made to the Court subsequent to the appointment.

## 4. Proposal Question Four

*Should legislation expressly set out when a trust is deemed to be insolvent?*

It is our view that the legislation should expressly set out when a trust is deemed to be insolvent as this will create simplicity and improve community understanding. The definition of whether a Trust is insolvent should remain consistent with the terms expressly provided for companies currently within the legislation. Should it appear at any stage that by not providing an express definition of insolvency as it relates to Trusts, then this matter may then be amended to ensure it does not cause any further detrimental impacts.

## 5. Proposal Question Five

*What is the most appropriate way to prescribe when a trust is taken to be insolvent?*

For this question we have been asked to provide our view on what is the most appropriate way to prescribe when a trust is taken to be insolvent.

As per Question 4, for the sake of simplicity and community understanding, the most appropriate way to prescribe when a Trust is deemed to be insolvent, should remain consistent with the terms expressly provided for Companies currently in the legislation.

## 6. Proposal Question Six

*Should the power of an insolvency practitioner to administer the trust assets and liabilities be expressly provided for in the legislation?*

This question raises the issues of what powers of an insolvency practitioner to administer the trust assets and liabilities be expressly provided for in the legislation

The power of an Insolvency Practitioner to administer the trust assets and liabilities should be expressly provided for in the legislation. To not do so will leave the legislation ineffective and will still require Insolvency Practitioners to apply to Court for Directions.

## 7. Proposal Question Seven

*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?*

Subject to a contrary order by a Court, the same Insolvency Practitioner should administer both the Company, and the assets and liabilities attributable to any trusts for which the Company is a Trustee. Where there is one company and one trust there would be unnecessary duplication and potential conflict where two separate appointments are made.

Requiring different Insolvency Practitioners may potentially result in increased time and complexities as both/numerous Insolvency Practitioners will be required to consult with the other/s over a number of issues. Utilising the same Insolvency Practitioner to administer both the Company, and the assets and liabilities attributable to any Trusts for which the Company is a Trustee may provide efficiencies similar to current situations where the same Insolvency Practitioner is appointed to administer a group of companies.

If there was a need to split in situations where multiple trusts exist with one trustee company, then potentially the most appropriate course of action would be to appoint individual liquidators to each of the trusts, and then appoint those same liquidators jointly to the corporate trustee. Thus, if issues arose between the different trusts and the appointees could not resolve it an application could then be made to the Court to seek directions based on the known facts that would be presented to the Court.

## 8. Proposal Question Eight

*Should the affairs of a trustee company and each trust it administers be resolved separately in external administration?*

The affairs of a Trustee company and each Trust it administers should be resolved separately in external administration much the same way as subsidiary companies that are part of a larger group subject to external administration are resolved separately. Whilst a fiduciary relationship exists between the Trustee Company and each Trust it administers, it is common for each Trust to have no relationship with other Trusts administered by a common Trustee Company.

The most common example that we have encountered has been where the company is the trustee of a trading trust that conducts all the business activities, and has also been made the trustee of the directors Self-managed Superfund, albeit that such instances are rare.

Further, solvent subsidiary Trusts should not bear the costs of an insolvent Trustee Company or other insolvent Trusts that a common Trustee Company administers.

## 9. Proposal Question Nine

*Should there be a statutory order of priority in the winding up of a trust?*

There should exist a statutory order of priority in the winding up of a Trust similar to that afforded in the winding up of a Company. This would ensure consistency in the legislation and provide certainty and clarification to Insolvency Practitioners, Creditors and other parties.

## 10. Proposal Question Ten

*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?*

The statutory order of priority in the winding up of a Trust should replicate the regime for Companies. However, additional factors need to be considered where a corporate trust structure is involved particularly in the event of any surplus that results from the winding up of a subsidiary trust.

Any solvent trust that belongs to a Trustee Company that has become insolvent by virtue of one of the trusts it administers should not have to bear any of the cost of the insolvent trusts. In the event that the structure of the group consists of a trust that bears the operational risk and the others hold the assets that are relevant to that trust business, it would appear to be more appropriate to consider the group as a whole rather then it's separate pieces.

## 11. Proposal Question Eleven

*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, there should be additional limits applied to the enforceability of ejection clauses and/or clauses that seek to limit a Trustee's right to indemnity in situations involving insolvency or external administrations. Given that the Trustee Company is acting in a fiduciary capacity to administer the assets and liabilities on behalf of and for the benefit of the creditors and beneficiaries, the trustee should retain unfettered access to the assets to deal with them appropriately.

Any such provisions should remain consistent with the Government's recently introduced 'ipso facto' reforms.

## 12. Proposal Question Twelve

*What would be the impacts of any such limits?*

Any such 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 on the have the potential effect of removing the beneficial aspects of Trusts and thus Trust structure become less desirable.

## D. CONCLUSION

We congratulate the Department of Treasury on seeking wide input and thank you for the opportunity to do so. Our response has been based on experience in the area and the available time, whilst still maintaining an active practice.

Should you have any enquiries in respect of this matter, please contact Schon Condon or Gavin King at this office on (02) 9893 9499.

Yours faithfully
**Condon Associates**
**Forensic, Insolvency and Turnaround Practitioners**

**Schon G Condon RFD**
**Managing Principal**