

Clarifying the treatment of trusts under insolvency law. Request for feedback and comments. Treasury Consultation Paper 15 October 2021

Consultation questions

A legislative framework for insolvent trusts

As noted, it has been argued that the extension of the insolvency framework to businesses which utilise a corporate trust structure may provide greater certainty to participants where a company involving a trust structure becomes insolvent. Stakeholder views are sought as to whether such clarification would be beneficial.

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? **Yes. It should be amended to apply generally to liquidations (except members' voluntaries), to administrations and deeds of company arrangement, and to the employee entitlement provision of receivership (s 433) and liquidation (s 561).**

Question 2: What benefits would a legislative framework deliver? **It would finally lay to rest what the late Professor HAJ Ford, in his article as far back as 1981 ("Trading Trusts and Creditors' Rights" MULR Vol 13), described as a "commercial monstrosity" (i.e., the corporate trading trust when the trustee becomes insolvent).**

Question 3: Is there potential for detrimental or unforeseen impacts if the statutory regime is extended? **While unintended consequences of legislative change cannot be guaranteed, the provisions suggested along with a provision such as the universally curative and practically useful s 447A (now contained in Part 5.3A – Administration) ought to be sufficient to address the problems that currently exist. See comments and draft legislation attached.**

Key design considerations for a legislative framework

Clarifying when a trust is taken to be insolvent

Extending the legislative framework could involve clarification of when a trust with a corporate trustee is deemed to be insolvent. Doing so could provide greater certainty to creditors and other parties, and better alignment with the framework used for insolvent companies.

Question 4: Should legislation expressly set out when a trust is deemed to be insolvent? **Yes. See comments and draft legislation attached.**

Question 5: What is the most appropriate way to prescribe when a trust is taken to be insolvent? **See comments and draft legislation attached.**

Clarifying the role of the external administrator

As a result of the uncertainty surrounding the power of an external administrator to administer trust assets and liabilities, external administrators commonly apply to the court for their appointment as receiver of the trust assets. This is particularly the case where a trust deed attempts to limit a trustee's right of indemnity.

Question 6: Should the power of an insolvency practitioner to administer the trust assets and liabilities be expressly provided for in legislation? **Yes. We currently have a situation where a formal application to Court is required to deal with assets where an automatic ejection clause operates. The costs are between \$10K and \$15K – often where there are no assets in the liquidation. This can be overcome completely by two sentences in proposed remedial legislation. See comments and draft legislation attached.**

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. See comments and draft legislation attached. Even more appropriately, the legislation should avoid a liquidator of an insolvent corporate trustee from having to apply to the court to have himself or herself appointed receiver of the trust with attendant ancillary powers. See comments and draft legislation attached.**

Distribution of assets

There may be benefit in expressly setting out how the assets and liabilities attributable to trusts are to be treated under external administration.

One approach could be to specify that the assets and liabilities attributable to each trust, as well as of the trustee company, are to be resolved separately. This would allow the liabilities attributable to each trust to claim against the assets attributable to that particular trust only. Likewise, liabilities incurred by the corporate trustee in its own right would claim against the assets it holds in its own right.

This approach could also include a clear statutory order of priority for repayment of liabilities attributable to trusts along the lines already contained in the Corporations Act¹ and clarification of who can claim against the proceeds of the trustee's right of indemnity and how these claims are prioritised.

Some of these issues have already been clarified in case law.² However, there remain difficulties presented on a case-by-case basis or in more complex corporate structures, such as corporate trustees trading as a partnership.

Question 8: Should the affairs of a trustee company and each trust it administers be resolved separately in external administration? **This is a complex consideration because of the ways the problem may arise, including, for example, (i) where a trustee company exists for the sole purpose of acting as a trustee; (ii) where a trustee company acts as trustee and trades in its own right; (iii) where a trustee company acts as trustee for two or more trusts where all trusts are insolvent; and, (iv) where a trustee company acts as a trustee for two or more trusts where at least one of those trusts is insolvent. See comments and draft legislation attached.**

Question 9: Should there be a statutory order of priority in the winding up of a trust? **Yes, see comments and draft legislation attached.**

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? **Yes, generally as to the first question but see comments and draft legislation attached as to the second question.**

Ejection and indemnity clauses

Some trust deeds may include 'ejection clauses', which provide for the automatic removal of a trustee if an insolvency event occurs, including the appointment of an external administrator. The

¹ See, for example, section 556 of the Corporations Act.

² See, for example, *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth of Australia and Others* [2019] HCA 20

intent is to remove a trustee who may have become undesirable to beneficiaries as a result of insolvency or an external administration.

The operation of ejection clauses may hinder the progress of an external administration, as their effect may be to impede the external administrator's ability to efficiently and effectively administer the company and its business. While a court can make orders to suspend these clauses, this can add additional time, complexity and costs.

A trust deed may also include a clause which seeks to remove a trustee's right of indemnity in situations involving insolvency. While the courts have provided guidance as to the applicability of these clauses, it may nonetheless be beneficial to clarify this in legislation.

The Government's 'ipso facto' reforms, introduced as part of the *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017*, establish an existing framework to limit the enforceability of certain ipso facto clauses. The reforms provide that ipso facto clauses triggered as a result of an insolvency event are stayed for certain contracts entered into on or after 1 July 2018.

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. See comments and draft legislation attached.**

Question 12: What would be the impacts of any such limits? **Automatic ejection clauses should be voided on liquidation and administration, as should attempted limitations on an insolvent corporate trustee's right of indemnity for debts properly incurred. As for the former a Court application costing between \$10k and \$15k can be avoided. See comments and draft legislation attached.**

Other issues

Views are sought on any other issues that stakeholders would like to raise in connection with this consultation process. Should this consultation support the case for legislative clarification, consideration would also need to be given as to how this would be expressed across the statute book.

Question 13: Are there any other issues that need to be considered in light of the questions above? **Yes, quite a few. See comments and draft legislation attached.**

Question 14: What is the most appropriate model by which a statutory regime could be expressed in the legislation? **See comments and draft legislation attached. The draft legislation is compatible with the current section numbering and Parts in the External Administration chapter of the *Corporations Act 2001* (Cth)**

Submissions on the Australian Government’s Consultation Paper on Reforms to address corporate misuse of the Fair Entitlements Guarantee scheme. By Dr Garry J Hamilton, Taylor David Lawyers and Dr David Morrison, Barrister-at-Law, Reader in Law, The University of Queensland. 30 June 2017 (revised and updated November/December 2021)

A note on Amerind

The draft legislation in the Schedules and the text below have been updated to take into consideration the decision of the High Court in *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth of Australia*³ (**Amerind**).

The Australian insolvency profession was hoping that *Amerind* would shed light on many of the questions regarding the winding up of insolvent trading trusts. Those problems have confronted the profession since the early 1980s.

Unfortunately, the decision did not do so.

Amerind decided, as ratio decidendi, only one aspect of the treatment of insolvent trading trusts, and that was that the employee entitlement provisions of the *Corporations Act 2001* (Cth)⁴ applied to allow a receiver (and by implication, a liquidator) access to the “property of a company” constituted by a circulating security interest, in order to permit the payment of statutory employee entitlements.

It is difficult to draw a clear line between what is ratio and what is obiter. So much is evident from the varying “key points” or “takeaways” and similarly described interpretations of what the case decided, as is apparent from the large number of commentaries on the decisions⁵

This possibly arises from the fact that there were three separate judgments: first, Kiefel CJ, Keane and Edelman JJ, second, Bell, Gageler and Nettle JJ and third, Gordon J, with their Honours adopting a different approach to the first of the following two questions which fell for determination:

1. Did Amerind’s right of indemnity constitute “property comprised in or subject to a circulating security interest” within the context of s 433(2)(a) of the *Corporations Act 2001* (Cth); and
2. Was the receivers’ surplus inventory available for distribution under s 433?

As to the first question, Kiefel CJ, Keane and Edelman JJ considered that the right of indemnity itself was a circulating asset,⁶ whereas the other four Judges, Bell, Gageler, and Nettle JJ (with Gordon J agreeing), considered that the circulating asset for the purpose of s 433 was not the right of indemnity

³ *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth of Australia* (2019) 93 ALJR 807; [2019] HCA 20

⁴ Section 433, and by necessary implication, section 561

⁵ See Hamilton G, “Amerind – the Aftermath: Questions and Practical Difficulties Remaining” (2019) 27(3) *Insolv LJ* 185 at 187.

⁶ *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth of Australia* (2019) 93 ALJR 807, [50], [52]; [2019] HCA 20.

but rather the inventory itself.⁷ Gordon J went so far as to state that the right of indemnity was a “fixed asset”.⁸

As to the second question, however, the High Court was unanimous in holding that s 433 applied, with the necessary implication that those other sections governing the priority of distribution of employee entitlements also applied.⁹

Thus, the legal precedent left by *Amerind* was narrow, and as has been pointed out there are at least 7 questions and/or practically difficult issues which remain unresolved in this area.¹⁰

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1. We thank Minister O’Dwyer and Minister Cash for the opportunity to make these submissions. The opinions expressed in this document are those of its authors and not the organisations they are employed by.
2. These submissions are restricted to point 8 of the Consultation Paper dealing with:
 - a. “8.1 Option 7: Reform the law regarding trust assets where an insolvent company is a corporate trustee”; and
 - b. “8.2 Option 8: Clarify the priority of employee entitlements under sections 433 and 561 of the Corporations Act and align the sections”.
3. These submissions assume a high level of relevant technical knowledge and the alternate propositions articulated in various theses, articles and textbooks as advanced by scholars and practitioners to date as a result of relevant court decisions.¹¹

⁷ *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth of Australia* (2019) 93 ALJR 807, [86], [87]; [2019] HCA 20.

⁸ *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth of Australia* (2019) 93 ALJR 807, [108]; [2019] HCA 20.

⁹ *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth of Australia* (2019) 93 ALJR 807, [51], [126] [153]; [2019] HCA 20. These are sections 555, 556 and 561.

¹⁰ See Hamilton G, “*Amerind – the Aftermath: Questions and Practical Difficulties Remaining*” (2019) 27 (3) *Insolv LJ* 185 at 189 and 190.that

¹¹ A discussion of these decisions in recent times usually commences with *Octavo Investments v Knight* [1979] HCA 61: (1979) 144 CLR 360, concerning a trustee’s right of indemnity that the High Court found to be of a proprietary nature. The decisions do go back however at least as far as *Worrall v Harford* [1802] Eng R 342; (1802) 32 ER 250. The recent decision in *Re Amerind Pty Ltd (receivers and managers apptd) (in liq)* [2017] VSC 127, (currently on appeal), is set down to be heard by the Victorian Full Court of the Supreme Court on 19 July 2017. In addition, in *Killarnee Civil & Concrete Contractors Pty Ltd (in liq)* [WAD 181 of 2016], a single Judge of the Federal Court in Western Australia, has referred another of these problematical matters to the Full Federal Court. That case is set down for hearing for 10 and 11 August 2017. The essential problem however with this

4. The 1988 General Insolvency Inquiry, (“Harmer Report”),¹² closely examined the submissions received from a range of expert professional bodies¹³ and experts including Justice McPherson,¹⁴ Professor Ford,¹⁵ Professor Baxt¹⁶ and former Attorney General of Australia, Daryl Williams QC.¹⁷

5. The Harmer Report noted the conflicting decisions in two cases: Victorian Full Court decision in *Re Enhill Pty Ltd* [1983] 1 VR 561, and the South Australian Full Court decision in *Re Suco Gold Pty Ltd* (1993) 7 ACSR 873.¹⁸ These cases, remain a problem for courts seeking to resolve the law regarding trust assets where the company is a corporate trustee. It is suggested however in the draft legislation which follows that, in accordance with the strong obiter comments in *Amerind*, that the *Re Enhill* approach is to be preferred.

6. The Harmer Report made clear recommendations for reform as follows:
 - a. Ensure that “reference to the business or affairs of a company for the purpose of the operation of the insolvency provisions” includes a reference to that company in its capacity as a corporate trustee;¹⁹

 - b. The references to “the property or assets of a company that is being wound up in insolvency should be taken to include property and assets held by the company as trustee to the extent that the company is entitled to a charge or other beneficial

appellate approach as a means of resolving the multiplicity of issues in this area is that they deal with only one aspect of such issues and whichever way they are decided, will be in conflict with a significant number of decisions (some Full Court decisions) going back to the start of the 1980s. For a general discussion of the relevant cases as to whether a right of indemnity is “property of the company” available to a liquidator, see G Hamilton, “Winding up insolvent corporate trustees—what happened to the liquidator?” (2016), 17 *Insolvency Law Bulletin* 6.

¹² Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988. This resulted in the *Corporate Law Reform Act 1992* (Cth) which made significant amendments to the *Corporations Law*.

¹³ Including: AICM (NSW), Victorian Bar Council, Qld Law Society, Australian Credit Forum, DPP (Cth), Hon P Spyker, Law Council of Australia, IPAA, ICAA, ASA, and Australian Credit Forum.

¹⁴ McPherson B, “The Insolvent Trading Trust”, in PD Finn (Ed) *Essays in Equity* Law Book Co, Sydney, 1985.

¹⁵ Ford H, “Trading Trusts and Creditors’ Rights” (1981) 13 MULR 1.

¹⁶ Baxt R, “Trusts and Creditors’ Rights” (1982) 11 ART 3.

¹⁷ Williams D, “Winding Up Trading Trusts: Rights of Creditors and Beneficiaries” (1983) 57 ALJ 273.

¹⁸ Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6, volume 1] paragraph 44, p 16: “The following matters require resolution: the power of the liquidator of a corporate trustee to administer the trust property; the power of the liquidator of a corporate trustee to administer not only the affairs of the company but also the affairs of the trust; limitations on the right of indemnity and of the exercise of the right of indemnity; the circumstances in which the corporate trustee may be removed as trustee; the extent to which trust property may be applied to meet the claims of creditor of the company especially where the terms of the trust did not provide for the company to engage in the particular transactions that resulted in the liability; and, the order of distribution of trust property among creditors.”

¹⁹ Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6 volume 1] paragraph 45, p 16.

interest in respect of the property or assets. The expression ‘charge or other beneficial interest’ is designed to cover both the right of a company to recoup expenses and liabilities paid or met by the company from its own resources and the right of a company to exoneration out of trust property for debts or liabilities properly incurred”;²⁰

- c. “A term or condition in a trust instrument or agreement that might have the effect of excluding or barring a company from exercising the equitable right of indemnity against trust property for debts and liabilities properly incurred by the company in the conduct of the trust should be void as against the liquidator. However, there should be no change to the existing law which allows a beneficiary to contract out of a similar liability”;²¹
- d. Given the ability of a liquidator or administrator to cause the company to resign as trustee, the power allowing removal of a trustee where the trustee company becomes insolvent ought to be voided in the trust instrument asserting same, however the court ought to be able to make orders as it sees fit;²²
- e. In the event of an insolvency, the liquidator of the corporate trustee ought to be able, subject to an order of the court, to exercise “the right of indemnity against both the trust property and the beneficiaries (if such a right exists)” and that ought to “be a collective right exercisable by the company, through its liquidator, on behalf of all trust creditors”;²³
- f. In respect of distribution of trust property, the “proceeds obtained from the exercise of a right of indemnity should be reserved for creditors who have legitimate claims on those proceeds”;²⁴
- g. The order of the distribution of trust property is “first, the costs associated with the exercise of the right of indemnity and of the administration of property obtained as a result of the exercise of that right; secondly, the administration costs of the winding up... to the extent that the assets owned by the company in its own right are sufficient to pay those costs. The statutory priorities must be

²⁰ Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6 volume 1] paragraph 46, pp 16-17.

²¹ Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6 volume 1] paragraph 47, p 17.

²² Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6 volume 1] paragraph 48, p 17.

²³ Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6 volume 1] paragraph 49, p 17.

²⁴ Namely; “the creditors whose debts or liabilities have been incurred in the conduct of the trust to which the indemnity relates”: Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6 volume 1] paragraph 50, p 17.

observed when distributing the proceeds of the exercise of the right of indemnity. Unsatisfied claims by trust creditors are admissible to share in any property of the company available for general distribution”;²⁵

- h. “The right of indemnity should include not only the amount of the trust debts and liabilities, but also the total costs associated with the winding up (where the assets of the company available for general distribution are not sufficient to cover those costs)”;²⁶
 - i. The general law ought not to change and therefore continues to apply in circumstances where a trustee acts outside their power, including the distribution of the proceeds of the exercise of the right of indemnity;²⁷ and
 - j. “The recommendations, applicable to the insolvency of a corporate trustee, should so far as practical also be applied to individual trustees. They should also be made applicable so far as relevant to the situation of a company under voluntary administration.”²⁸
7. The recommendations appeared to have widespread support, however, the Law Council of Australia²⁹ opined otherwise.³⁰ The Explanatory Memorandum that accompanied the law reform legislation following the Harmer Report³¹ made no recommendations in respect of an insolvent corporate trustee.³² Such silence was reflected by an absence of any relevant provision in the legislation that followed.³³
8. The Harmer Report had little to say in respect of trustee companies entering voluntary administration. It simply recommended that “the draft legislation (and no such

²⁵ Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6 volume 1] paragraph 50, pp 17-18.

²⁶ Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6 volume 1] paragraph 50, p 18.

²⁷ Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6 volume 1] paragraph 51, p 18.

²⁸ Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6 volume 1] paragraph 51, p 18.

²⁹ Note that both Dr Hamilton and Dr Morrison are longstanding members of the Law Council of Australia (and the Insolvency Section).

³⁰ Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6 volume 2]: paragraph 244, p 110; paragraphs 246-247 pp 110-111; paragraph 250 p 112; paragraph 256 p 114; and, paragraph 260 p 115.

³¹ *Corporate Law Reform Act 1992* (Cth).

³² The Parliament of the Commonwealth of Australia, House of Representatives, *Corporate Law Reform Bill 1992* Explanatory Memorandum.

³³ *Corporate Law Reform Act 1992* (Cth).

legislation was in fact drafted) relating to corporate trading trusts should, so far as relevant, also be made applicable to a company in administration.”³⁴

9. Trust law lies within the common law in its broadest sense, and is governed to an extent by State and Territory legislation.³⁵ The Act on the other hand is, (by virtue of agreement between the States and Territories), a Commonwealth statute. For simplicity, and uniformity, it is suggested that the respective Attorneys-General of each State and Territory be approached to have the relevant State and Territory trust legislation amended by the insertion of a simple, common provision, such as that set out in Schedule E. This would be required where, as sometimes occurs, liquidators seek power of sale over trust assets under the State or Territory trust legislation,³⁶ rather than under other State or Territory legislation giving the Court power to appoint a receiver.³⁷
10. It is acknowledged that these submissions will not find favour universally, however that is frequently an inevitable outcome of law reform. More than three decades have now passed since the Harmer Report and the inattention to the matters originally raised by it has resulted in the continuing problems confronting practitioners and the courts. The reform process needs to start somewhere.
11. Some of these problems are not difficult to remedy but can save practitioners in many cases including those where there are few or no assets in the winding up, the cost of a Court application. Such an application is necessary where, as is often the case, the trust deed contains an automatic ejection clause on a winding up. In that case, the liquidator needs to apply to the Court for an order under State or Territory legislation for power to deal with the trust assets, or alternatively and now more commonly, an order appointing the liquidator receiver of the trust assets, with attendant ancillary powers. Where the winding up was not Court-ordered, the filing fee alone, in both the Federal and State Supreme Courts for the required originating application, is between \$4,000-\$5,000, professional costs are around the same amount and Junior Counsel’s fee will likely be about \$3,000 -\$4,000 should one be engaged to settle the material and appear.
12. As one will observe, this costly ongoing problem, which is the subject of frequent reported decisions, can be easily rectified in its entirety by drafting several simple sentences.

³⁴ Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6 volume 2]: paragraph 271.

³⁵ Specifically: the *Trusts Act 1973* (Qld); the *Trustee Act 1925* (NSW); the *Trustee Act (NT)*; the *Trustee Act 1936* (SA); the *Trustee Act 1958* (Vic); the *Trustee Act 1925* (ACT); the *Trustees Act 1962* (WA); and, the *Trustee Act 1898* (Tas).

³⁶ The position is different, however, if the power is sought under the *Federal Court Act* or State and Territory legislation permitting the appointment of receivers by the Court at any stage of a proceeding where it appears to the Court “just or convenient so to do so”; see e.g. *Federal Court Act*, s 57(1).

³⁷ See paragraphs 13 and 14 below.

13. As recently as last week,³⁸ liquidators of a trustee company brought an urgent application before Justice Cheeseman of the Federal Court seeking orders that they be appointed receivers and managers of the trust assets, with power to sell those assets.³⁹ It was the typical situation where the trustee carried on business as a trustee only and the trust deed contained a provision automatically removing the trustee on a winding up. The application was brought under (i) the provisions of the trust deed; (ii) s 57 of the *Federal Court Act*; (iii) s 59(4) of the *Trustee Act 1925* (NSW); and (iv) s 90-15 of the *Insolvency Practice Schedule Corporations* (Schedule 2 to the Act).⁴⁰
14. In that case, Cheeseman J made the order appointing the liquidators as receivers and managers under s 57 of the *Federal Court Act*, with ancillary orders being made as to the costs, expenses and remuneration of the receivers. Her Honour referred to the relevant cases and noted that in a situation such as that before her, “the common course is to appoint the liquidators as receivers over all trust property for the purpose of realising the assets for the benefit of creditors” [*Re Hughes (in their capacity as joint and several liquidators of Substar Holdings Pty Ltd (in liq) and Anor* [2020] FCA 1863, per Markovic J]. Her Honour did not find it necessary to rely on any basis other than s 57 of the *Federal Court Act*.
15. One might be forgiven for thinking certain “self-help” measures to overcome the difficulties attendant on the winding up of a corporate trading trust where the relevant trust deed contained an automatic ejection clause might be encouraged. However, that is not the case. To the contrary, in *Carrello, in the matter of Gembrook Investments Pty Ltd (in liquidation)*,⁴¹ the trust deed was amended just prior to the appointment of the liquidator to remove the automatic ejection clause and provide for the liquidation costs charges and expenses, as properly incurred, to be paid from the trust assets. The Court took issue with this approach on the basis that the power of amendment was exercised for the benefit of creditors rather than beneficiaries. The Court observed that a power of amendment in a trust deed could not be used for an extraneous or ulterior purpose.⁴²
16. This approach ignores the observation of Street CJ when dealing with concerns expressed by counsel as to the rights of beneficiaries of an insolvent corporate trustee when his Honour said: “insolvency changes everything.”⁴³ It appears that it may have been that same concern which resulted in the opposition by the equity-focused lawyers to the recommendations of the Harmer Report.
17. Drafting legislation to accommodate all the possible scenarios is difficult because of the different ways the problem may arise, including, for example (i) where a trustee company exists for the sole purpose of acting as a trustee; (ii) where a trustee company

³⁸ 3 December 2021.

³⁹ *Ward, in the matter of PIC Linfield 19 Pty Ltd (in liquidation) v Zhu* [2021] FCA 1526, per Cheeseman J.

⁴⁰ *Ward, in the matter of PIC Linfield 19 Pty Ltd (in liquidation) v Zhu* [2021] FCA 1526 at [7].

⁴¹ [2019] FCA 1143.

⁴² Referring to *Mercanti v Mercanti* [2016] WASCA 206.

⁴³ xxx

acts as trustee and trades in its own right; (iii) where a trustee company acts as trustee for two or more trusts where all trusts are insolvent; and, (iv) where a trustee company acts as a trustee for two or more trusts where at least one of those trusts is insolvent.

18. It is possible, as the draft legislation demonstrates, to be prescriptive in respect of cases falling under (i) above so to avoid Court involvement. With the other scenarios however, it is not possible to take that approach as it would otherwise require the liquidator to make decisions as to how it would be best to deal with the competing interests of the various stakeholders, including “trust” creditors, “non-trust” creditors and beneficiaries. In that case it is suggested therefore that the liquidator prepares a brief plan as to how she or he considers the winding up and distribution of available assets might most appropriately occur and applies to Court which may approve the plan and direct the liquidator to implement it, with or without modification. There are various criteria which it is suggested must be considered by the liquidator and the Court, and various interested parties who should be given notice of any such application.
19. An example of one of such criteria is where multiple trusts are involved, and in that case, the assets available to satisfy the creditors of a particular trust should be confined to the assets of that trust and no other.⁴⁴
20. Difficult definitional issues are involved here. Take, for example, the insolvency element. It is not correct to speak of a trust which is “insolvent” because of course a trust is not a legal entity. However, it will in most cases be understood generally what a reference to an “insolvent trust” means. Possibly however, the most coherent way to refer to an insolvent corporate trading trust is by reference to (a) its trustee; (b) s 95A of the Act; and (c) the company’s right of indemnity, including both limbs of that right (i.e. the right of recoupment out of trust assets when debts have already been paid and the right of exoneration to satisfy debts incurred in trading but not yet paid). In that way, insolvency can be linked to the inability of a trustee company, by use of the right of indemnity to pay its debts which it has incurred as a trustee, as and when those debts become due and payable.
21. Detailed submissions follow at Schedules A, B, C, D and E.
22. Specifically, the content of the Schedules is in the form of draft legislation as follows:
 - a. Schedule A. Chapter 5A-1: Provisions relating to the winding up of an insolvent corporate trustee where the corporate trustee traded in its trustee capacity only. It is proposed that this follows on from existing Chapter 5 dealing with winding

⁴⁴ Consistently with the decision in *Re Enhill Pty Ltd* [1983] VR 561 which was preferred by the High Court in *Amerind over Re Suco Gold Pty Ltd (in liquidation)* (1983) 33 SASR99.

up. The section numbering is consistent with and accommodates the existing and section numbering.

- b. Schedule B. Chapter 5A-2: Provisions relating to the winding up of a corporate trustee that has traded in capacities other than as a trustee of a single trading trust. This follows Chapter 5A-1, with the section numbering consistent with and accommodates the existing section numbering.

[Chapter 5A-1 is restricted to the common situation where the corporate trustee traded only in that capacity and not in its personal capacity. On the other hand, Chapter 5A-2 deals with all other possibilities, including where the corporate trustee was trustee of more than one trust, some of which are insolvent and others solvent].

- c. Schedule C. Chapter X: these are new provisions required to address the complex issues arising under sections 433 and 561⁴⁵ and might usefully be inserted around those sections where relevant.
- d. Schedule D. Chapter 5.3AB: Provisions relating to the administration of the affairs of a corporate trustee. This follows on from Part 5.3A that deals with voluntary administration and deeds of company arrangement. The section numbering is consistent with and accommodates the existing section numbering.
- e. Schedule E. This contains two proposed sections that should be inserted, uniformly into the State and Territory legislation dealing with trusts. The purpose of this is to overcome any constitutional issues that might otherwise arise.⁴⁶ It also contains some transitional provisions.

- 23. Consideration was given as to whether it was necessary to incorporate provisions compelling companies which traded as a trustee to publicly notify that fact to ASIC in a searchable format or to refer to that fact on its business documents. It was thought sufficient however to compel those who are statutorily responsible for completing the company's new form of "RATA", i.e. the ROCAP, to complete that section which now contains this information and requires a copy of the relevant trust deed or deeds to be

⁴⁵ They address, for example, the subtle issue first raised in *Italiano Family Fruit Co Pty Ltd (in liq)* (2010) 190 FCR; 276 ALR 349, regarding a secured creditor's right, in certain circumstances, to a liquidator's preference recoveries. Also addressed is the continuing judicial confusion as to how section 433 and 561 interact and the priority of a liquidator's costs, charges and expenses and remuneration under section 561: see for example, *Re Sakr; Great Southern Ltd* [2014] FCA 1355, *Re ExDVD Pty Ltd (in liq)* (2014) 223 FCR 409; [2014] FCA 696 and *Re Great Southern Ltd (in liq)*; *ex parte Thackray* (2102) 260 FLR 362; [2012] WASC 59. In addition, the proposed amendments explicitly recognise the principle in *Re Universal Distributing Co Ltd (in liq)* (1933) 48 CLR 171 but confine its operation under both sections 433 and 561 so as to exclude general receivership and liquidation costs, charges and expenses.

⁴⁶ See paragraphs 9, 13 and 14.

appended to Part B of the report.⁴⁷ In addition, where that requirement is not met or overlooked, each proposed Chapter contains a provision analogous to universally useful s 447A (in Part 5.3A - administration) by which a Court can make such orders as it considers desirable as to how the Chapter is to operate in respect of the winding up of any particular insolvent corporate trustee.

⁴⁷ ROCAP, Part B, question B4.

SCHEDULE A

CHAPTER 5A-1: PROVISIONS RELATING TO THE WINDING UP OF AN INSOLVENT CORPORATE TRUSTEE THAT HAS TRADED IN ITS TRUSTEE CAPACITY ONLY

DIVISION 1 – SCOPE OF THIS CHAPTER

600L Definitions

In this Chapter:

- (1) **property** shall, wherever the context so permits, be taken to include a company's right of indemnity where, prior to its winding up, the company traded as a trustee;
- (2) **right of indemnity** means the equitable right available to a corporate trustee to have access to the assets of the trust to satisfy the debts:
 - (a) incurred by it but which remain unpaid; or
 - (b) incurred by and paid for by it but not recouped by it;in carrying on any business of the trust;
- (3) **trustee company** means a company that traded in its capacity as trustee only and not in any personal capacity;
- (4) a reference to a trustee company being **insolvent** is a reference to that company being unable to pay all its debts as and when they become due and payable;
- (5) a reference to a trust being **insolvent** is a reference to the trustee of that trust being insolvent;
- (6) a reference to a company trading in its **personal capacity** is a reference to that company trading in its own right and not in any capacity as a trustee.

600LM Winding up where this Chapter applies

- (1) This Chapter applies to the winding up of trustee companies that are wound up:
 - a. by the Court under section 459A;
 - b. by the Court under section 461;
 - c. pursuant to a resolution of creditors made under paragraph 439C(c);
 - d. pursuant to the provisions of Division 3 of Part 5.5 as a creditors' voluntary winding up;
 - e. where, because of subsection 496(8), the winding up commences to be a creditors' voluntary winding up; or
 - f. by the Court under paragraph 233(1)(a).
- (2) Subject to Division 2 of this Chapter, the provisions of Parts 5.4 to 5.9 of Chapter 5 apply:

- a. to the winding up of companies to which this Chapter applies; and
 - b. to the business, property, affairs and financial circumstances of such companies both in their personal capacity and as a trustee.
- (3) For the avoidance of doubt, this Chapter does not apply to a company that:
- a. is the trustee of more than one trust;
 - b. traded and incurred debts in a personal capacity.
- (4) This Chapter applies only to a trustee company.

DIVISION 2 – POWERS OF THE COURT

600LN Powers of the Court

- (1) The Court may make such orders as it thinks appropriate about how this Chapter is to operate in relation to a particular trustee company.
- (2) Any order made under subsection (1) may be made subject to conditions.
- (3) An order made under subsection (1) may be made on the application of:
- a. the trustee company;
 - b. a creditor of the trustee company;
 - c. the liquidator of the trustee company;
 - d. ASIC; or
 - e. any other interested person.

DIVISION 3 – LIMITATION ON POWER TO REMOVE CORPORATE TRUSTEE

600LO Limit on the power of removal of corporate trustee

- (1) Any provision, whether contained in a trust instrument, agreement or elsewhere, that has the effect of removing, or allows for the removal of a company as a trustee upon its winding up, is void.
- (2) Notwithstanding subsection (1), the Court may order the removal of a company as trustee on application made under subsection (3) if it appears to the Court that

it is appropriate or convenient to do so in order to facilitate the winding up of the trustee company.

- (3) The Court may make an order under subsection (2) on the application of:
- a. the trustee company;
 - b. a creditor of the trustee company;
 - c. the liquidator of the trustee company;
 - d. a beneficiary;
 - e. ASIC; or
 - f. any other interested person.

DIVISION 4 – THE RIGHT OF INDEMNITY

600LP Non-exclusion of, and dealing with, the right of indemnity

- (1) Any provision, whether contained in a trust instrument, agreement or elsewhere that has the effect of excluding or limiting a trustee company's right of indemnity is void.
- (2) The right of indemnity of a trustee company is exercisable only by the trustee company through its liquidator.
- (3) For the avoidance of doubt:
- a. no trust creditor has a right to exercise the trustee company's right of indemnity; and
 - b. notwithstanding section 100-5 of schedule 2 to this Act, the right of indemnity is not capable of being sold or assigned by the trustee company or the liquidator to any person.

600LQ Extension of the right of indemnity

- (1) Where the assets of the trustee company are insufficient to meet the costs of winding up the trustee company, the right of indemnity shall be extended to include any assets of the trustee company held by it in its personal capacity.
- (2) The right of indemnity shall be taken to extend to the trustee company's assets despite the trustee company having acted outside its powers as trustee.

- (3) Nothing in this section shall prevent the liquidator of the trustee company from exercising any rights that may be available under this Act or any State or Territory legislation dealing with trusts.
- (4) For the avoidance of doubt, the liquidator of a trustee company:
 - a. May recover from any director of the trustee company any liability which that director may have under section 197; and
 - b. Where:
 - i. The assets of the trust are insufficient to cover the right of indemnity and the costs charges and expenses of the winding up (in this subsection, such difference being called “the deficiency”); and
 - ii. The trust has been so constituted so as to allow the corporate trustee to recover the deficiency from the beneficiaries,
may recover the deficiency from the beneficiaries jointly and severally, as a debt due to the corporate trustee,

DIVISION 5 – LIQUIDATOR’S POWER TO WIND UP TRUSTS

600LR Liquidator’s power to wind up trusts

- (1) A liquidator shall have all powers necessary to wind up any trust of which the trustee company is the trustee.
- (2) Such powers shall include the power to carry on the business of the trust, and to otherwise administer the trust, but only so far as is necessary for the beneficial disposal or winding up of its business.
- (3) For the avoidance of doubt, the liquidator need not make an application to Court for approval of his or her authority to exercise the powers conferred by this section.
- (4) The Court order or the resolution whereby the liquidator is appointed shall be taken to confer upon the liquidator the powers given to the liquidator under this section and neither the order nor the resolution, as the case may be, need specify the liquidator’s power conferred by this section.

DIVISION 6 – DISTRIBUTION OF PROCEEDS IN THE WINDING UP OF TRUSTEE COMPANIES

600LS Where the trustee company traded the business of the company

- (1) The costs, charges and expenses of a liquidator incurred under subsection 600LR(2), shall have the same priority as that conferred by paragraph 556(1)(a).
- (2) The order of priority set out in section 556 shall apply to the winding up of a trustee company.

DIVISION 7 – APPLICATION FOR DIRECTIONS

600LT Liquidator's application for directions

- (1) A liquidator may apply to the Court for directions in relation to any particular matter arising in the winding up of a trustee company.

SCHEDULE B

CHAPTER 5A-2: PROVISIONS RELATING TO THE WINDING UP OF A CORPORATE TRUSTEE THAT HAS TRADED IN CAPACITIES OTHER THAN AS A TRUSTEE OF A SINGLE TRADING TRUST

DIVISION 1 – SCOPE OF THIS CHAPTER

600LU Definitions

In this Chapter:

- (1) **property** shall, wherever the context so permits, be taken to include a company's right of indemnity where, prior to its winding up, the company traded as a trustee;
- (2) **right of indemnity** means the equitable right available to a corporate trustee to have access to the assets of the trust to satisfy the debts:
 - (a) incurred by it but which remain unpaid; or
 - (b) incurred by and personally paid for by it but not recouped by it; in carrying on any business of the trust;
- (3) **trustee company** means a company subject to the operation of this Chapter;
- (4) a reference to a trustee company being **insolvent** is a reference to that company, when trading as a trustee, being unable to pay all its debts then incurred in that capacity, as and when those debts become due and payable;
- (5) a reference to a trust being **insolvent** is a reference to the trustee company of that trust being insolvent;
- (6) a reference to a company trading in its **personal capacity** is a reference to that company trading in its own right rather than in the capacity of a trustee.

600LV This chapter applies to winding up under certain sections

- (1) This Chapter applies to the winding up of companies that are wound up:
 - a. by the Court under section 459A;
 - b. by the Court under section 461;
 - c. pursuant to a resolution of creditors made pursuant to paragraph 439C(c);
 - d. pursuant to the provisions of Division 3 of Part 5.5 as a creditors' voluntary winding up;
 - e. where, because of subsection 496(8), the winding up commences to be a creditors' voluntary winding up; or
 - f. by the Court under paragraph 233(1)(a).
- (2) Subject to Division 7 of this Chapter and subsection (3) of this section, the provisions of Parts 5.4 to 5.9 of Chapter 5 apply:

- (a) to the winding up of companies to which this Chapter applies; and
 - (b) to the business, property, affairs and financial circumstances of such companies both in their personal capacity and as a trustee.
- (3) The provisions of Part 5.7B apply where a liquidator seeks an order under that Part for the benefit of the creditors of a particular insolvent trust which traded as a trustee, and where there are more than one insolvent trust, both or all of which traded as a trustee, any application or recoveries made by the liquidator under sections 588FF, 588M or 588W shall be made and recovered and accounted for separately in respect of each trust.
- (4) For the avoidance of doubt, this Chapter applies to the winding up of a corporate trustee that is insolvent and that:
- (a) is the trustee of more than one trust;
 - (b) traded and incurred debts in both its personal capacity and as a trustee of a trust;
 - (c) traded and incurred debts in both its personal capacity and as a trustee of multiple trusts;
 - (d) did not trade in its personal capacity but traded and incurred debts in its capacity as trustee of multiple trusts;
 - (e) traded in its personal capacity and also in its capacity as trustee of multiple trusts where all of those trusts are insolvent; or
 - (f) traded in its personal capacity and also in its capacity as trustee of multiple trusts, where some of those trusts are insolvent and some are solvent.
- (5) This Chapter does not apply to a company where Chapter 5A-1 applies.
- (6) Where at any time during the winding up of a corporate trustee where that corporate trustee was, or appeared to be, solvent at the date of commencement of its winding up, the liquidator forms the opinion that the company is insolvent, the winding up shall from that point be conducted in accordance with the provisions of this Chapter.

DIVISION 2 – POWERS OF THE COURT

600LW Powers of the Court

- (1) The Court may make such orders as it thinks appropriate about how this Chapter is to operate in relation to a particular trustee company.

- (2) Any order made under subsection (1) may be made subject to conditions.
- (3) An order made by the Court under subsection (1) may be made on the application of:
 - (a) the trustee company;
 - (b) a creditor of the trustee company;
 - (c) the liquidator of the trustee company;
 - (d) ASIC; or
 - (e) any other interested person.

DIVISION 3 – POWER TO REMOVE CORPORATE TRUSTEE

600LX Limitation on the power of removal of corporate trustee

- (1) Any provision, whether contained in a trust instrument, agreement or elsewhere, that has the effect of removing, or allows for the removal of a company as a trustee upon its winding up is void.
- (2) Notwithstanding subsection (1), the Court may order the removal of a company as trustee on application made under subsection (3) if it appears to the Court that it is appropriate or convenient to do so in order to facilitate the winding up of the trustee company.
- (3) The Court may make an order under subsection (2) on the application of:
 - (a) the liquidator of the trustee company;
 - (b) a beneficiary whose identity can be ascertained from the terms of the trust instrument whereby the trust is constituted;
 - (c) ASIC; or
 - (d) any other interested person.

DIVISION 4 – THE RIGHT TO INDEMNITY

600LY Non-exclusion of, and dealing with, the right of indemnity

- (1) Any provision, whether contained in a trust instrument, agreement or otherwise that has the effect of excluding or limiting a trustee company's right of indemnity is void.
- (2) The right of indemnity of the trustee company is exercisable only by the trustee company through its liquidator.

- (3) For the avoidance of doubt:
 - (a) no trust creditor has a right to exercise the trustee company's right of indemnity; and
 - (b) notwithstanding section 100-5 of schedule 2 to this Act, the right of indemnity is not capable of being sold or assigned by the trustee company or the liquidator to any person.

600LZ Extension of the right of indemnity

- (1) Where the assets of the trustee company are insufficient to meet the total costs of winding up the trustee company, the right of indemnity will, subject to any direction that may be given by the Court under Division 7, be extended to include any assets of the trustee company held by it in its personal capacity.
- (2) The right of indemnity shall be taken to extend to the trustee company's assets despite the trustee company having acted outside its powers as trustee.
- (3) Nothing in this section shall prevent the liquidator of the trustee company from exercising any rights that may be available under this Act or any State or Territory legislation dealing with trusts.
- (4) For the avoidance of doubt, the liquidator of a trustee company:
 - (a) May recover from any director of the trustee company any liability which that director may have under section 197; and
 - (b) Where:
 - (i) The assets of the trust are insufficient to cover the right of indemnity and the costs charges and expenses of the winding up (in this subsection, such difference being called "the deficiency"); and
 - (ii) The trust has been so constituted so as to allow the corporate trustee to recover the deficiency from the beneficiaries,the liquidator may recover the deficiency from the beneficiaries jointly and severally as a debt due to the corporate trustee,

DIVISION 5 – LIQUIDATOR'S POWER TO WIND UP TRUSTS

600LZA Liquidator's power to wind up trusts

- (1) A liquidator shall have all powers necessary to wind up any trust of which the trustee company is a trustee.

- (2) The liquidator's powers shall include the power to carry on the business of the trust, and to otherwise administer the trust, but only so far as is necessary for the beneficial disposal or winding up of its business.
- (3) For the avoidance of doubt, the liquidator need not make an application to Court for approval of his or her authority to exercise the powers conferred by this section.
- (4) The Court order or the resolution whereby the liquidator is appointed shall be taken to confer upon the liquidator the powers given to the liquidator under this section and neither the order nor the resolution, as the case may be, need specify the liquidator's power conferred by this section.

DIVISION 6 – DISTRIBUTION OF PROCEEDS IN THE WINDING UP OF TRUSTEE COMPANIES

600LZB Where the liquidator traded a trustee company with a view to winding it up

- (1) The costs, charges and expenses of a liquidator incurred under subsection 600LZA(2), shall have the same priority as that conferred by paragraph 556(1)(a).
- (2) Where the trustee company is the trustee of more than one insolvent trading trust, the provisions of section 556 apply to each such trust in the same proportion as the realisable value of the assets of each trust, as may be determined from time to time by the liquidator in his or her absolute discretion, bears to the total realisable value of the assets of all such trusts.

DIVISION 7 – APPLICATION FOR DIRECTIONS

600LZC Liquidator's application for directions

- (1) A liquidator shall apply to the Court for directions in relation to the winding up of a trustee company to which this Chapter applies.
- (2) In an application under this section, the liquidator must set out:
 - (a) so far as is reasonably practicable for the liquidator to do so from the books and records available to the liquidator, the financial position of the trustee company in both its personal capacity and as trustee of each trust where the trustee company is a trustee; and
 - (b) a proposal based on the following considerations as to how the winding up is to be conducted:

- (i) that the trustee company's own property and property held by it on one or more trusts each be administered separately in the winding up;
 - (ii) that the creditors of the trustee company incurred by it in its personal capacity and those incurred as trustee of one or more trusts be accounted for separately; and
 - (iii) each set of creditors referred to in subparagraph (ii) be entitled to a distribution out of the funds derived from the property in which they have an interest.

- (3) In any application under this section, the Court may:
 - (a) direct the liquidator to implement the proposal in paragraph (2)(b);
 - (b) modify the proposal in such manner as the Court considers appropriate; and
 - (c) direct the liquidator to implement the proposal as so modified.

- (4) In making any modifications to the liquidator's proposal, the Court shall have regard to:
 - (a) the considerations in subparagraphs (2)(b)(i), (ii) and (iii);
 - (b) the cost which may be incurred by the liquidator in applying those considerations as against the benefits likely to be obtained by the trustee company or its creditors as a result of so doing;
 - (c) the state of the books and records, if any, of the trustee company; and
 - (d) any other matter, fact or circumstance that the Court considers appropriate to facilitate the winding up of the trustee company.

- (5) Unless the Court otherwise orders, the liquidator shall give notice of an application made under this section to:
 - (a) those creditors of the trustee company who the liquidator may ascertain using efforts which the liquidator considers reasonable;
 - (b) the beneficiaries of a trust where it appears to the liquidator that the subject trust is or may be solvent-- to the extent that such beneficiaries are reasonably capable of being identified by the liquidator from the terms of the relevant trust instrument or from the books and records of the trustee company;
 - (c) ASIC; and
 - (d) any other person as ordered by the Court.

SCHEDULE C

CHAPTER X - EMPLOYEE ENTITLEMENTS, AMENDMENTS TO SECTION 433, AND PROVISIONS REGULATING THE INTERACTION OF SECTIONS 433 AND 561

XXXX Employee entitlements - general references to "property"

- (1) The reference to "property" in section 433 shall be read as including property of a company held in its personal capacity and, if that company traded as a trustee, property held by that company in its capacity as a trustee also.
- (2) For the avoidance of doubt:
 - (a) the references in section 561 to "the property of a company" and "any property" shall be read as including a reference to property of a company held in its personal capacity and, if that company traded as a trustee, property held by that company in its capacity as a trustee also;
 - (b) the right of indemnity available to a company that traded as a trustee is taken to be part of the property of that company for the purpose of sections 433 and 561.

XXX Amendments to section 433

- (1) Subsection **433(2)** is deleted and replaced by the following subsection [note: there is no subsection 433(1)].
- (2) "This section applies where:
 - (a) a person (in this subsection called "the lender") has loaned money or provided other financial accommodation to a company or registered body; and
 - (b) the loan or other financial accommodation is secured by a circulating security interest and either:
 - (i) a receiver is appointed on behalf of the lender to any property comprised in or subject to the circulating security interest; or
 - (ii) possession is taken or control is assumed by or on behalf of the lender in respect of any property comprised in or subject to the circulating security interest; and
 - (c) at the date of appointment or of the taking of possession or assumption of control (in this section referred to as the "*relevant date*"):
 - (i) the company or registered body has not commenced to be wound up voluntarily; and

- (ii) the company or registered body has not been ordered to be wound up by the Court.”
- (3) Subsections 433(3) and (4) are amended by deleting the word “debentures” where it appears and replacing it in each case with the words “loan or other financial accommodation.”

XX Liability under section 433 - nature and extent of liability

- (1) For the avoidance of doubt:
 - (a) where section 433 applies, the receiver or person taking possession or assuming control of any property shall be personally liable for the payments required to be made by subsection 433(3);
 - (b) the extent of the liability under paragraph (1)(a) shall be the value of the assets that are comprised in or subject to the circulating security interest at the date of the appointment of the receiver or the date of the taking of possession or the assumption of control as the case may be (in this section referred to as “the control date”);
 - (c) the value of the assets referred to in paragraph (1)(b) shall be the market value of such assets assessed on the control date;
 - (d) the assessment referred in the preceding paragraph shall be conducted on the basis of whether the receiver or other person taking possession or assuming control:
 - (i) continues to trade the business or substantially the whole of the business of the company, with a view to selling it as a going concern; or
 - (ii) ceases trading the business or substantially the whole of the business within 7 days of the control date.
- (2) The receiver or person taking possession or assuming control of any property where section 433 applies shall remain personally liable under paragraph (1)(a) until such time as the payments required to be made by subsection 433(3) have been made.
- (3) For the avoidance of doubt, the payment by the person responsible under section 433 to make the payments required by subsection 433(3) shall not be relieved of the personal liability imposed by paragraph (1)(a) by paying the amount, or any part of the amount required to be paid, to a liquidator or any other person except the employees entitled to such payment.
- (4) A person commits an offence if that person fails to comply with the obligations imposed upon that person under section 433.

Penalty: 50 penalty units

X Section 561 obligations - how discharged and the treatment of “surplus” funds arising from recoveries of voidable transactions

- (1) For the avoidance of doubt, where section 433 applies, section 561 shall not apply.
- (2) Where section 433 does not apply, any secured party in relation to a circulating security interest created by a company over its assets shall, as soon as practicable after the appointment of a liquidator, and to the extent that such assets allow, either:
 - (a) permit the liquidator access to the assets the subject of the circulating security interest to permit the liquidator to realise such of those assets to enable the liquidator to pay the amounts referred to in paragraphs 561(a), (b) and (c); or
 - (b) pay the amounts referred to in paragraphs 561(a), (b) and (c).
- (3) Where because of section 433, or paragraphs (2)(a) or (b), the claims of employees have been paid and the liquidator has recovered funds under section 588FF (in this section called “the voidable transactions recoveries”), the liquidator shall set aside so much of the voidable transactions recoveries to enable the liquidator to make the payment contemplated by paragraph (5)(d).
- (4) Nothing in subsection (3) shall be taken to limit the functions or powers of the liquidator, including by using some or all of the voidable transactions recoveries set aside under that subsection, to conduct any part of the winding up.
- (5) Where:
 - (a) section 433, or paragraph 2(a) or (b) applied; and
 - (b) the winding up of the company is substantially complete; and
 - (c) after providing for the costs to complete the winding up, the liquidator retains some of the voidable transactions recoveries;the liquidator shall pay to the secured party so much of the remaining voidable transactions recoveries as do not exceed the amount previously paid under section 433 or paragraph (2)(a) or (b), as the case may be.
- (6) Nothing in Chapter X prevents:
 - (a) a receiver or a person taking possession or assuming control of property of a company under section 433;
 - (b) a liquidator acting under paragraph (2)(a); or
 - (c) a secured party acting under paragraph (2)(b);

from deducting from the proceeds of sale of the relevant assets, that person's costs, charges and expenses, including remuneration, in respect of the:

- (i) identification;
- (ii) protection; or
- (iii) realisation of such assets.

- (7) A liquidator is not entitled to deduct from the proceeds of sale of the assets in subsection (6), any costs, charges or expenses, or remuneration, in respect of anything done by the liquidator in the winding up, except the work performed under and in accordance with that subsection.

SCHEDULE D

CHAPTER 5.3AB - PROVISIONS RELATING TO THE ADMINISTRATION OF THE AFFAIRS OF A CORPORATE TRUSTEE

DIVISION - 1 SCOPE OF THIS CHAPTER

452 Definitions

In this Chapter:

- (1) **right of indemnity** means the equitable right available to a corporate trustee to have access to the assets of the trust to satisfy the debts:
 - a. incurred by it but which remain unpaid; or
 - b. incurred by and paid for by it but not recouped by it; in carrying on any business of the trust but does not include the right of indemnity conferred by Subdivision B of Division 9 of Part 5.3A;
- (2) **trustee company** means a corporate trustee that is subject to the operation of this Chapter;
- (3) a reference to a trustee company being **insolvent** is a reference to that company, when trading as a trustee, being unable to pay all its debts then incurred in that capacity, as and when those debts become due and payable;
- (4) a reference to a trust being **insolvent** is a reference to the trustee company of that trust being insolvent; a reference to a company trading in its **personal capacity** is a reference to that company trading in its own right and not in any capacity as a trustee;
- (5) a reference to **the business, property and affairs** of a company is to include its business, property and affairs in both its personal capacity and as a trustee company;
- (6) a reference to the **books of the company** includes a reference to the books of the trustee company both in its personal capacity and in its capacity as trustee of any trust where it is trustee;
- (7) **administrator** means the person appointed as such under sections 436A, 436B or 436C;
- (8) **deed administrator** means the administrator of a deed of company arrangement constituted under Part 5.3A.

453 Companies that this Chapter applies to

- (1) The provisions of Part 5.3A of Chapter 5 apply, with such modifications as are made by this Chapter, to the administration of companies pursuant to that Part.

- (2) For the avoidance of doubt, this Chapter applies to the administration of a trustee company that becomes subject to Part 5.3A and that:
- (a) traded and incurred debts in both in its personal capacity and as a trustee of only one trust;
 - (b) traded and incurred debts both in its personal capacity and as trustee of multiple trusts;
 - (c) did not trade in its personal capacity but traded and incurred debts in its capacity as trustee of only one trust;
 - (d) did not trade in its personal capacity but traded and incurred debts in its capacity as trustee of multiple trusts;
 - (e) traded in its personal capacity and also in its capacity as trustee of multiple trusts where all of those trusts are solvent; or
 - (f) traded in its personal capacity and also in its capacity as trustee of multiple trusts where some of those trusts are insolvent and some are insolvent.
- (3) This Chapter does not apply to a company that is not a trustee of a trust.

DIVISION 2 – POWERS OF THE COURT

454 Powers of the Court

- (1) The Court may make such orders as it thinks appropriate about how this Chapter is to operate in relation to a particular trustee company.
- (2) Any order may be made subject to conditions.
- (3) An order may be made on the application of:
- (a) the trustee company;
 - (b) a creditor of the trustee company;
 - (c) the administrator;
 - (d) the deed administrator;
 - (e) ASIC; or
 - (f) any other interested person.

DIVISION 3- REPORTS AND OTHER MATTERS IN ADMINISTRATION

455 Reporting to creditors of a corporate trustee

- (1) In preparing the report to creditors required by section 75-225 of schedule 2 to this Act, the administrator shall, so far as is reasonably practical, report separately as to:
 - (a) the trustee company's business, property, affairs and financial circumstances in its personal capacity; and
 - (b) the trustee company's business, property, affairs and financial circumstances in its capacity as trustee of any trust.

457 Extension of the right of indemnity as defined in section 452

- (1) Where the assets of a trustee company are insufficient to meet the total costs of the administration of the trustee company, the right of indemnity shall be extended to include any assets of the trustee company held by it in its personal capacity.
- (2) The right of indemnity shall be taken to extend to the trustee company's assets despite the trustee company having acted outside its powers as trustee.
- (3) Nothing in this section shall prevent the liquidator of the trustee company from exercising any rights available under this Act or any State or Territory legislation dealing with trusts.
- (4) For the avoidance of doubt, the liquidator of a trustee company:
 - (a) May recover from any director of the trustee company any liability which that director may have under section 197; and
 - (b) Where:
 - (i) The assets of the trust are insufficient to cover the right of indemnity and the costs charges and expenses of the winding up (in this subsection, such difference being called "the deficiency"); and
 - (ii) The trust has been so constituted so as to allow the corporate trustee to recover the deficiency from the beneficiaries, may recover the deficiency from the beneficiaries jointly and severally, as a debt due to the corporate trustee.

DIVISION 5 – DEEDS OF COMPANY ARRANGEMENT

458 Deeds of company arrangement involving a corporate trustee

- (1) The instrument required to be prepared by the administrator by subsection 444A(3), shall so far as is reasonably practical, set out a proposal based on the following considerations as to how the deed of company arrangement will operate in respect of a trustee company:

- (a) that the trustee company's own property and property held by it on one or more trusts be dealt with separately;
- (b) that the creditors of the trustee company incurred by it in its personal capacity and those incurred by it as trustee of one or more trusts be dealt with separately; and
- (c) that each set of creditors referred to in paragraph (b) be entitled to a distribution out of the funds derived from the property in which they have an interest.

458A Application for directions

- (1) The administrator or deed administrator of a trustee company may apply to the Court for directions in relation to any particular matter relating to the administration or the operation of a deed of company arrangement.
- (2) Unless the Court otherwise orders, the administrator or deed administrator of a trustee company shall give notice of the application under subsection (1) to the following: