Solvency Accountants

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Manager
Market Conduct Division
The Treasury
Langton Crescent
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Via email: MCDInsolvency@Treasury.gov.au

Submission regarding clarifying the treatment of trusts under insolvency law

Dear Sir/Madam

On behalf of SM Solvency Accountants, the following submission is contributed to Treasury in relation to its review of the treatment of trusts under Australian insolvency law. The submission addresses the questions raised in your consultation paper of 15 October 2021.

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?

We support a framework that, in general, treats the administration of insolvent companies the same irrespective of whether the companies are trustees or not and which ends the uncertainty as to whether court directions are required when administering an insolvent corporate trustee. Over the course of several years, court precedents have served to determine how critical issues such as control and distribution of assets should be dealt with. In some instances, this has led to dividends to creditors and finalisation of liquidations being deferred whilst matters were before the courts.

What benefits would a legislative framework deliver?

A legislated framework would deliver certainty which has the capacity to reduce the cost and duration of insolvency administrations. It would also assist directors and shareholders to better compare their alternatives when dealing with an insolvent company.

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

We do not believe so. We consider that reform to remove the uncertainty associated with the vagaries of court decisions is overdue and is essential.

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

We do not believe so; this could result in unnecessary complication. Determining insolvency is assisted by a history of legal precedent, so creating a new 'set of rules' may reduce the likelihood of liquidators being able to achieve recoveries via antecedent voidable transaction claims and insolvent trading compensation claims by dint of having to 're-invent' issues already resolved in practice.

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

We support a simple and uniform approach. As the trustee is responsible for debts, the trust should be considered insolvent when it can no longer pay those debts as and when they fall due.

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

Yes. It is impractical and untenable for insolvency practitioners to seek court directions or appointments when they are appointed over trustee companies.

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. We seek to emphasise that insolvency practitioners (whether voluntarily appointed or court appointed) typically have limited resources available to cover their costs for the multi-faceted work they are required to perform. As much support must be provided by government as possible to reduce that burden and uncertainty (note: this could include making searches of the Australian Securities and Investments Commission and land titles databases free to insolvency practitioners and overhauling the current untenable liquidator supervisory cost recovery levy).

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

Yes, and there ought to be public awareness in the business community about corporate trustees and the need to check whether a company is a trustee and of which particular trust they are dealing with before they provide credit (secured or unsecured).

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

Yes.

Should a statutory order of priority replicate the regime for companies? Do additional factors needs to be considered when a corporate trust structure is involved?

We support academic research and broader business community consultation in relation to whether other factors ought to be involved.

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.

What would be the impacts of any such limits?

The impacts would be to provide the opportunity for less delay and cost in administering insolvent trustee companies and lessen the potential for unfair and non-uniform outcomes for creditors.

Other issues

We recommend the following two reforms:

i. Introduction of a register of trusts in which a detailed history of the trustees and copies of trust deeds (and any variations) are available.
ii. Clarity as to how a trust ceases to exist in circumstances where the trustee is wound-up and a replacement trustee is not appointed.

We appreciate the opportunity to provide feedback on this important issue.

Yours faithfully

Brendan Nixon
Partner

Solvency Accountants