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BY EMAIL ([corporations.joint@aph.gov.au](mailto:corporations.joint@aph.gov.au))  
Committee Secretary  
Parliamentary Joint Committee on Corporations and Financial Services  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Committee Secretary

**Submission to the parliamentary inquiry into corporate insolvency in Australia**

We refer to the above and thank the Committee for the opportunity to make a submission.

Attached, with the publisher's (Thomson Reuters) permission, is our most recent iteration and legislative solution around creditors and trading trusts.

Our previous submissions on this problem together with our suggested draft legislation to cure it without creating a further complication, have thus far gained little traction. It is our view that this this increasing complex mess be given immediate consideration and legislative improvement via Parliament.

We are delighted to assist the Committee further if called upon.

Yours faithfully

For Dr Garry Hamilton and Dr David Morrison

## Resolving problems with Insolvent Corporate Trustees – Some suggestions for consideration

By Dr Garry J Hamilton, Adjunct Professor, The University of Queensland, Senior Legal Consultant Taylor David Lawyers; Dr David Morrison, Barrister-at-Law, Reader in Law, The University of Queensland.

### Introduction

The following are submissions prepared in response to two Treasury Consultation Papers: the first, “Reforms to address corporate misuse of the Fair Entitlement Guarantee Scheme” issued on 17 May 2017, and the second, “Clarifying the treatment of trusts under insolvency law” issued on 15 October 2021.

The following text and proposed draft remedial legislation set out in the schedules has been updated to reflect the decision of the High Court in *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth of Australia*<sup>1</sup> (*Amerind*).

The purpose of the suggestions made in this paper, including the suggested draft legislation, is to provide a framework for informed discussion by all stakeholders. The framework underpins the authors’ view that complex legislation is not a fix per se, and that once the federal government embraces the way forward, judicial officers will be enabled to interpret the purpose of the amendments in making determinations around insolvent trading trusts.

The 1988 General Insolvency Inquiry, (“Harmer Report”)<sup>2</sup> made recommendations for legislative reform in this area, however none of those recommendations was adopted and no draft legislation was ever prepared. This is similar to the position in New Zealand where, as part of the recent reforms of trust law which culminated in the commencement of the *Trusts Act 2019* (NZ) on 30 January 2021, the issues arising from the intersection of trust and insolvency law were “identified” but “deferred until a yet to be announced review of trading trusts”.<sup>3</sup> Likewise in England, the relevant issues have been identified in the case law, however no legislation is in place to deal with them.<sup>4</sup> One might speculate that the reason no English-speaking jurisdiction appears to have attempted to draft remedial legislation in this area is, quite simply, that it is all too hard.

A great deal has been written on the difficulties in winding up insolvent businesses conducted by trusts. First identified by Harold Ford<sup>5</sup> and many thereafter, the problems have resulted in a continuous call from the legal and accounting professions for legislative reform. Legislative reform is necessary because it is apparent that the courts are unlikely to hear a ‘model case’ containing the necessary factual situation requiring judicial determination of all the existing problems.<sup>6</sup>

### A note on Amerind

The Australian insolvency profession hoped that *Amerind* would shed light on many of the questions which have arisen since the early 1980s regarding the winding up of insolvent trading trusts.

Unfortunately, the decision did not do so.

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<sup>1</sup> *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth of Australia* (2019) 93 ALJR 807; [2019] HCA 20

<sup>2</sup> 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*.

<sup>3</sup> L Taylor, “Creditors and Trusts” (2021) *Insolv LJ* 229.

<sup>4</sup> See, for example, T Lowe “Insolvency and Trustees”, *Trusts and Trustees*, Vol. 22, No. 9, Nov 2016, pp 948-955 (OUP 2016)

<sup>5</sup> Ford H, “Trading Trusts and Creditors’ Rights” (1981) 13 *MULR* 1.

<sup>6</sup> And, indeed, that determination would need to be at an appropriate appellate level so as to avoid conflicting decisions of lower courts.

*Amerind* decided, as ratio decidendi, only one aspect of the treatment of insolvent trading trusts: namely, that the employee entitlement provisions of the *Corporations Act 2001* (Cth)<sup>7</sup> applied to allow a receiver (and by implication, a liquidator) access to the “property of a company” constituted by a circulating security interest, to permit the payment of statutory employee entitlements.

Otherwise, it is difficult to draw a clear line between the ratio and the obiter of *Amerind*. So much is evident from the commentary since the decision, where varying “key points” or “takeaways” and similarly described interpretations of what the case decided, is apparent.<sup>8</sup>

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,<sup>9</sup> 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 but rather the inventory itself.<sup>10</sup> Gordon J went so far as to state that the right of indemnity was a “fixed asset”.<sup>11</sup>

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.<sup>12</sup>

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 remaining unresolved in this area.<sup>13</sup>

#### Treasury call for submissions, reasoning, and responses

The Australian government Treasury issued a consultation paper seeking comment. The Treasury Consultation Paper: “Reforms to address corporate misuse of the Fair Entitlement Guarantee Scheme”, (issued 17 May 2017), was followed by Treasury Consultation Paper “Clarifying the treatment of trusts under insolvency law”, (issued 15 October 2021).

1. The submissions on the first Consultation Paper are restricted in this discussion to point 8, namely:
  - 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”.

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<sup>7</sup> Section 433, and by necessary implication, section 561

<sup>8</sup> See Hamilton G, “Amerind – the Aftermath: Questions and Practical Difficulties Remaining” (2019) 27 (3) *Insolv LJ* 185 at 187.

<sup>9</sup> *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth of Australia* (2019) 93 ALJR 807, [50], [52]; [2019] HCA 20.

<sup>10</sup> *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth of Australia* (2019) 93 ALJR 807, [86], [87]; [2019] HCA 20.

<sup>11</sup> *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth of Australia* (2019) 93 ALJR 807, [108]; [2019] HCA 20.

<sup>12</sup> *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.

<sup>13</sup> See Hamilton G, “Amerind – the Aftermath: Questions and Practical Difficulties Remaining” (2019) 27 (3) *Insolv LJ* 185 at 189 and 190.

2. The submissions made assumed both relevant proficient technical knowledge and an understanding of the historic alternate propositions articulated in the various theses, articles and textbooks as advanced by scholars and practitioners of relevant court decisions up to that time.<sup>14</sup>
3. The Harmer Report had closely examined the submissions received from a range of expert professional bodies<sup>15</sup> and experts including Justice McPherson,<sup>16</sup> Professor Ford,<sup>17</sup> Professor Baxt<sup>18</sup> and former Attorney General of Australia, Daryl Williams QC.<sup>19</sup>
4. The Harmer Report noted the conflicting decisions in two cases: the Victorian Full Court decision in *Re Enhill Pty Ltd*<sup>20</sup> and the South Australian Full Court decision in *Re Suco Gold Pty Ltd (in liq)*<sup>21</sup>. At the time of the submission, these cases remained 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, in accordance with the strong obiter comments in *Amerind*, that the *Re Suco Gold* approach is to be preferred.
5. 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;<sup>22</sup>
  - 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 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”;<sup>23</sup>
  - 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”;<sup>24</sup>
  - 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

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<sup>14</sup> 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 go back however at least as far as *Worrall v Harford* [1802] Eng R 342; (1802) 32 ER 250.

<sup>15</sup> 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.

<sup>16</sup> McPherson B, “The Insolvent Trading Trust”, in PD Finn (ed) *Essays in Equity Law* Book Co, Sydney, 1985.

<sup>17</sup> Ford H, “Trading Trusts and Creditors’ Rights” (1981) 13 MULR 1.

<sup>18</sup> Baxt R, “Trusts and Creditors’ Rights” (1982) 11 ATR 3.

<sup>19</sup> Williams D, “Winding Up Trading Trusts: Rights of Creditors and Beneficiaries” (1983) 57 ALJ 273.

<sup>20</sup> [1983] 1 VR 561.

<sup>21</sup> (1983) 33 SASR 99.

<sup>22</sup> Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6 volume 1] paragraph 45, p 16.

<sup>23</sup> Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6 volume 1] paragraph 46, pp 16-17.

<sup>24</sup> Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6 volume 1] paragraph 47, p 17.

- voided in the trust instrument asserting same, however the court ought to be able to make orders as it sees fit;<sup>25</sup>
- 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”;<sup>26</sup>
  - 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”;<sup>27</sup>
  - 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 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”;<sup>28</sup>
  - 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)”;<sup>29</sup>
  - 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;<sup>30</sup> 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.”<sup>31</sup>
6. The recommendations appeared to have widespread support, however, the Law Council of Australia<sup>32</sup> opined otherwise.<sup>33</sup> The Explanatory Memorandum that accompanied the law reform legislation following the Harmer Report made no recommendations in respect of an insolvent corporate trustee<sup>34</sup>

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<sup>25</sup> Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6 volume 1] paragraph 48, p 17.

<sup>26</sup> Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6 volume 1] paragraph 49, p 17.

<sup>27</sup> 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.

<sup>28</sup> Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6 volume 1] paragraph 50, pp 17-18.

<sup>29</sup> Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6 volume 1] paragraph 50, p 18.

<sup>30</sup> Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6 volume 1] paragraph 51, p 18.

<sup>31</sup> Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6 volume 1] paragraph 51, p 18.

<sup>32</sup> Note that both Dr Hamilton and Dr Morrison are longstanding members of the Law Council of Australia (and the Insolvency Section).

<sup>33</sup> 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.

<sup>34</sup> The Parliament of the Commonwealth of Australia, House of Representatives, *Corporate Law Reform Bill 1992* Explanatory Memorandum.

and, unsurprisingly, no relevant provisions relating to the conundrum were contained in the legislation that followed.<sup>35</sup>

7. The Harmer Report had little to say in respect of trustee companies entering voluntary administration. It simply recommended that “the draft legislation (no such legislation was in fact drafted) relating to corporate trading trusts should, so far as relevant, also be made applicable to a company in administration.”<sup>36</sup>
8. Trust law lies within the common law in its broadest sense and is governed to an extent by State and Territory legislation.<sup>37</sup> 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 might 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. Although this may not be strictly necessary as it depends on the type of relief sought by a liquidator,<sup>38</sup> it is suggested that it would avoid any potential constitutional issue.
9. 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. It is important that amendments are made because the problem is ongoing, and it is imposing unnecessary costs.
10. Some of the issues are not difficult to remedy but can save practitioners the cost of a court application in many cases including those where there are few or no assets in the winding up. 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.
11. 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. Recently, 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.<sup>39</sup> 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).<sup>40</sup>
13. 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*

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<sup>35</sup> *Corporate Law Reform Act 1992* (Cth).

<sup>36</sup> Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6 volume 2]: paragraph 271.

<sup>37</sup> Specifically: *Trusts Act 1973* (Qld); *Trustee Act 1925* (NSW); *Trustee Act (NT)*; *Trustee Act 1936* (SA); *Trustee Act 1958* (Vic); *Trustee Act 1925* (ACT); *Trustees Act 1962* (WA); and *Trustee Act 1898* (Tas).

<sup>38</sup> See the discussion at 12 and 13 below, and in particular, the basis of Cheeseman J’s conclusion at 13.

<sup>39</sup> *Ward, in the matter of PIC Linfield 19 Pty Ltd (in liquidation) v Zhu* [2021] FCA 1526, per Cheeseman J, 3 December 2021.

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

*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 for her decision other than s 57 of the *Federal Court Act*.

14. 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)*,<sup>41</sup> 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.<sup>42</sup>
15. 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 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.
16. It is possible, as the draft legislation demonstrates, to be prescriptive in respect of cases falling under 15 (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.
17. In preparing the plan referred to in the preceding point, there are certain criteria that must be considered by the liquidator and the Court. 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.<sup>43</sup> Another example may be that with any particular insolvent trust, the interests of that trust’s creditors should prevail over the interests of that trust’s beneficiaries.
18. Difficult definitional issues are involved, 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.

#### Outline of submissions made

19. Detailed submissions follow at Schedules A, B, C, D and E.
20. Specifically, the content of the Schedules is in the form of draft legislation as follows:

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<sup>41</sup> [2019] FCA 1143.

<sup>42</sup> Referring to *Mercanti v Mercanti* [2016] WASCA 206.

<sup>43</sup> Consistently with the decision in *Re Suco Gold Pty Ltd (in liquidation)* (1983) 33 SASR 99 which was preferred by the High Court in *Amerind over Re Enhill Pty Ltd* [1983] 1 VR 561.

- 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 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 561<sup>44</sup> 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 might be inserted, uniformly into the State and Territory legislation dealing with trusts. Although this is perhaps not strictly necessary (as it depends on the statutory basis upon which the relief is sought by the liquidator),<sup>45</sup> the purpose of this is to overcome any potential constitutional issue that might arise.<sup>46</sup> The schedule also contains some transitional provisions.
21. 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 appended to Part B of the report.<sup>47</sup> 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 or administration of any particular insolvent corporate trustee.

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<sup>44</sup> 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 Saker; 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 Thackeray* (2012) 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 to exclude general receivership and liquidation costs, charges and expenses.

<sup>45</sup> See the discussion at 12 and 13 below, and in particular, the basis for Cheeseman J's conclusion at 13.

<sup>46</sup> See above, point 8.

<sup>47</sup> 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) This Chapter applies only to a trustee company.
- (4) 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.

#### 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, as the case may be;
- (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, the liquidator 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:
- (a) the creditors of the trustee company;
- (b) the beneficiaries of a trust where the trustee company is trustee, but only:
- (i) if it appears to the liquidator that the trust is or may be solvent; and in that case
- (ii) to those beneficiaries who are reasonably able to be identified from the terms of the relevant trust instrument or the books and records of the company;
- (c) ASIC; and
- (d) any other person as ordered by the Court.

#### **SCHEDULE E**

##### Proposed amendments to the various trust legislation of the States and Territories. Transitional provisions.

##### Insert the following two sections-proposed amendment to State and Territory trust legislation:

**[X]** (1) Notwithstanding any other provision of this Act, except section **[Y]**, Chapters 5A-1, 5A-2 and 5.3AB of the *Corporations Act 2001* apply to the winding up and administration of companies that, prior to their winding up or entry into administration, carried on business and incurred debts in their capacity as a trustee of one or more trusts.

**[Y]** (1) For the avoidance of doubt, section **[X]** operates so far as may be necessary to confer State and Territory powers in respect of any matter dealt with under Chapters 5A-1, 5A-2 and 5.3AB of the *Corporations Act 2001* on the Commonwealth pursuant to indicia (xxxvii) of section 51 of the *Commonwealth of Australia Constitution Act*.

##### Transitional Provisions to be included in the *Corporations Act 2001*

**[Z]** (1) Chapters 5A-1, 5A-2 and 5.3AB do not apply to any company which at the date of commencement of those Chapters was either:

- (a) subject to an order of the Court made under paragraph 480(d); or
- (b) a company in respect of which the liquidator has by reason of section 70-6 of schedule 2, become obliged to lodge a form with ASIC.