

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, The University of Queensland.

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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.¹

¹ 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 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.

4. The 1988 General Insolvency Inquiry, (“Harmer Report”),² made close examination of submissions received from a range of expert professional bodies³ and experts including Justice McPherson,⁴ Professor Ford,⁵ Professor Baxt⁶ and former Attorney General of Australia, Daryl Williams QC.⁷
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 873.⁸ These cases, even today, remain a problem for courts seeking to resolve the law regarding trust assets where the company is a corporate trustee. This is because the *Corporations Act 2001* (Cth) (“the Act”) makes no provision for recognising the widespread use of corporate trustees in the conduct of trading trusts. Inevitably some of those corporate trustees become insolvent and, in the absence of clear provisions in the Act, the courts are left without guidance and seek to apply the general principles of trust law, hampered and confused as they now are, by a series of conflicting legal decisions since the early 1980s.
6. Nonetheless, the Harmer Report, understanding the potential for the insolvent corporate trustee to be more of a problem, 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;⁹

² Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988.

³ 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.

⁴ McPherson B, “The Insolvent Trading Trust”, in PD Finn (Ed) *Essays in Equity Law* Book Co, Sydney, 1985.

⁵ Ford H, “Trading Trusts and Creditors’ Rights” (1981) 13 MULR 1.

⁶ Baxt R, “Trusts and Creditors’ Rights” (1982) 11 ART 3.

⁷ Williams D, “Winding Up Trading Trusts: Rights of Creditors and Beneficiaries” (1983) 57 ALJ 273.

⁸ 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.”

⁹ Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6 volume 1] paragraph 45, p 16.

- 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”;¹⁰
- 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”;¹¹
- 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;¹²
- 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”;¹³
- 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”;¹⁴

¹⁰ Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6 volume 1] paragraph 46, pp 16-17.

¹¹ Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6 volume 1] paragraph 47, p 17.

¹² Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6 volume 1] paragraph 48, p 17.

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

¹⁴ 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.

- 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”;¹⁵
 - 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);¹⁶
 - 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;¹⁷ 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.”¹⁸
7. The recommendations appeared to have widespread support, (hardly surprising - at least in retrospect), given how practical, considered and measured they are. However, the Law Council of Australia¹⁹ opined otherwise.²⁰ The Explanatory Memorandum that accompanied the law reform legislation following the Harmer Report made no recommendations in respect of the insolvent corporate trustee.²¹ Such silence was reflected by an absence of any relevant provision within the legislation that followed.²²

¹⁵ Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6 volume 1] paragraph 50, pp 17-18.

¹⁶ Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6 volume 1] paragraph 50, p 18.

¹⁷ Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6 volume 1] paragraph 51, p 18.

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

¹⁹ Note that both Dr Hamilton and Dr Morrison are longstanding members of the Law Council of Australia (and the Insolvency Section).

²⁰ 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 .

²¹ The Parliament of the Commonwealth of Australia, House of Representatives, *Corporate Law Reform Bill 1992* Explanatory Memorandum.

²² *Corporate Law Reform Act 1992* (Cth).

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 legislation was in fact drafted] relating to corporate trading trusts should, so far as relevant, also be made applicable to a company in administration.”²³ This issue is addressed in Appendix D.
9. The aetiology of the difficulties posed by insolvent corporate trustees arises primarily from the use of a trust (an equitable creature) for hitherto unintended commercial purposes and the use of a company (a person of statute) as the trust’s trustee (often, for asset protection purposes, to otherwise protect a natural person from being pursued by a bankruptcy trustee). Further, trust law lies within the common law in its broadest sense, and, by virtue of various State and Territory legislation.²⁴ 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 legislation amended by the insertion of a simple, common provision, such as that set out in Schedule E.
10. Whilst innovation necessarily precedes unexpected legal development, it is submitted that when this occurs, it is promptly recognised and monitored, and if necessary legislated to address the mischief. It is, after all, not the work of the courts to do anything other than determine the matters before them. It is Parliament’s duty to ensure that where there are unlikely or unexpected complications arising from the intersection of seemingly different areas of law, that the matter be dealt with to ensure the smooth and somewhat predictable operation of the laws for all stakeholders to follow and, importantly, for those stakeholders to continue to hold the law in high regard. With respect, it is not as if these matters are not brought to Parliament’s attention. The Harmer Report, having raised the issue and made recommendations for correction in 1988 was not followed. Since that time, the problem has worsened and it is a pity that the matter has been allowed to fester to an almost unfixable mess before it is deemed significant enough to warrant attention. In short: it is recommended that Parliament recognise the well documented possibility that, from time to time, laws intersect in unexpected ways and produce unsatisfactory outcomes;²⁵ and, once recognised, it is imperative to take positive action to resolve the issue.

²³ Australian Government, “General Insolvency Inquiry” (ALRC Report 45), 13 December 1988, Corporate Trading Trusts [chapter 6 volume 2]: paragraph 271.

²⁴ 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).

²⁵ For example: Anderson C, Morrison D, “GST and Insolvency Practitioner Liability: Who are You?” (2001) 11 *Revenue Law Journal* 23; Brown C, Anderson C, Morrison D, “The certainty of tax in insolvency: Where does the ATO fit?” (2011) 19 *Insolvency Law Journal* 108 Routledge J, Morrison D, “Insolvency Administration as a Strategic Response to Financial Distress” (2012) 37 *Australian Journal of Management* 441; Morrison D, “Chasing the Phoenix” (2012) 20 *Insolvency Law Journal* 65.

Prompt positive attention will help to avoid circumstances like the current insolvent corporate trustee legal entanglement of conflicting decisions of various State Full Court and single Judge decisions across both State and Federal jurisdictions that is the subject of this submission.

11. It is acknowledged that these submissions will not find favour universally, however that is frequently an inevitable outcome of law reform. Unfortunately, though, we are now three decades down the track and the inattention to the matters originally raised by the Harmer Report has resulted in the legal morass we now face.
12. Detailed submissions follow at Schedules A, B, C, D and E.
13. 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 up. The section numbering is consistent with the existing and proposed sections.
 - 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 the proposed and existing provisions.
 - c. 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.
 - d. Schedule C. Chapter X: these are new provisions required to address issues arising under sections 433 and 561²⁶ and might usefully be inserted around those sections where relevant.

²⁶ 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.

- e. 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 the proposed and existing sections.

- f. Schedule E. This contains two proposed sections that might usefully be inserted, uniformly, into the State and Territory legislation dealing with trusts, so as to overcome any constitutional issues that might otherwise arise.

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 and incurred debts;
- (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 incurred by it in carrying on any business of the trust;
- (3) **trustee company** means an insolvent company that traded in its capacity as trustee only and not in any personal capacity;
- (4) a reference to a company trading or existing in its **personal capacity** is a reference to that company trading or existing in its own right and not in any capacity as a trustee.

600LM Windings up where this Chapter applies

- (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 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; and
 - f. by the Court under paragraph 233(1)(a).
- (2) Subject to Divisions 6 of this Chapter, the provisions of Parts 5.4 to 5.9 of Chapter 5 apply:
 - a. to the winding up of companies where this Chapter applies; and
 - b. to the business, property, affairs and financial circumstances of such companies both in their personal capacity and as trustee.

(3) For the avoidance of doubt, this Chapter does not apply to a company that is the trustee of more than one trust or a company that traded and incurred debts in its personal capacity, whether or not it traded and incurred debts in one or more of its trustee capacities.

(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 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 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 the trustee company is exercisable only by the trustee company through its liquidator.
- (3) For the avoidance of doubt:
 - a. no one or more trust creditors has any right to exercise the trustee company's right of indemnity; and
 - b. 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 trust, where the trustee company is trustee, are insufficient to cover the total 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 subsection (2) shall prevent any creditor of the trustee company or the liquidator from exercising any rights that may be available to them under this Act or any State or Territory legislation dealing with trusts.

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 where 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) 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 then 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).

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 and incurred debts;
- (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 incurred 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 company trading or existing in its **personal capacity** is a reference to that company trading or existing in its own right and not in any capacity as a trustee.

600LV This chapter applies to the following windings up

- (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; and
 - f. by the Court under paragraph 233(1)(a).
- (2) Subject to Divisions 6 and 7 of this Chapter, the provisions of Parts 5.4 to 5.9 of Chapter 5 apply:
 - (a) to the winding up of companies that this Chapter applies to; and
 - (b) to the business, property, affairs and financial circumstances of such companies both in their personal capacity and as trustee.

- (3) 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 only one 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, all of those being insolvent;
 - f. traded in its personal capacity and also in its capacity as trustee of multiple trusts, some of those being insolvent and some solvent.
- (4) This Chapter does not apply to a company where Chapter 5A-1 applies instead.
- (5) 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 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 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 one or more trust creditors has any right to exercise the trustee company's right of indemnity; and
 - b. 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 trust, where the trustee company is trustee, are insufficient to cover 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 acting outside its powers as trustee.
- (3) Nothing in subsection (2) shall prevent any creditor of the trustee company or the liquidator from exercising any rights that may be available to them under this Act or any State or Territory legislation dealing with trusts.

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 where 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) 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 LZA(2), shall have the same priority as that conferred by paragraph 556(1)(a).

DIVISION 7 – APPLICATION FOR DIRECTIONS

600LZC Liquidator’s application for directions

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

- (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 that they claim an interest in.
- (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 within subparagraphs (2)(b)(i), (ii) and (iii);
 - b. the cost of applying those considerations as against the benefits likely to be obtained 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 may be convenient or 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. the creditors of the trustee company;
 - b. to the beneficiaries of a trust where it appears to the liquidator or the Court that the subject trust is or may be solvent-- to the extent that such beneficiaries are reasonably able to be identified from the terms of the relevant trust instrument;
 - 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 to the lender by a circulating security interest; and either
 - c. a receiver is appointed on behalf of the lender to any property comprised in or subject to the circulating security interest; or
 - d. 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
 - e. at the date of appointment or of the taking of possession or assumption of control (in this section called 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 some other person.
- (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 sell 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 recovers 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 or impede 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, except for the payment of a dividend to the unsecured creditors.
- (5) Where:
 - a. section 433 applied; or
 - b. paragraph (2)(a) or (b) applied; and
 - c. the winding up of the company is substantially complete; and
 - d. 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; and
 - 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 incurred by the trustee 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 company trading or existing in its **personal capacity** is a reference to that company trading or existing in its own right and not in any capacity as a trustee;
- (4) 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;
- (5) 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;
- (6) **administrator** means the person appointed as such by resolution under section 436A;
- (7) **deed administrator** means the administrator of a deed of company arrangement constituted under Part 5.3A;
- (8) **deed** means a deed of company arrangement.

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:
 - 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, all of those being solvent;
 - f. traded in its personal capacity and also in its capacity as trustee of multiple trusts, some of those being insolvent and some 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 paragraph 439A(4)(a),* 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.

* From 1 September 2017, Insolvency Practice Rule 75-225.

DIVISION 4 – ADMINISTRATOR'S POWER TO CARRY ON THE BUSINESS OF, OR WIND UP, A TRUST

456 Administrator's and deed administrator's power to carry on the business of a trust

- (1) Subject to subsection (3), in addition to the powers conferred on an administrator by sections 437A and 442A, an administrator shall have all powers necessary to carry on the business of any trustee company where such business was previously carried on by the trustee company.
- (2) Subject to subsection (3), a deed administrator shall have all powers necessary to carry on the business of any trustee company where such business was previously carried on by the trustee company.
- (3) The powers conferred by this section to carry on the business of a trustee company shall apply only where, in the opinion of the administrator or deed administrator, as the case may be, the carrying on of the business is in the interests of the creditors of the trust.
- (4) For the avoidance of doubt:
 - a. the power of an administrator or deed administrator to carry on the business of a trustee company as provided by this section shall be exercisable without any direction or order of the Court;
 - b. subject to the following paragraph, the power of an administrator under paragraph 437A(1)(c) to terminate or dispose of all or any of the company's business shall include the power to wind up any trust that carried on business where the trustee company was trustee;
 - c. the administrator shall not exercise the power conferred by the preceding paragraph until the creditors have had an opportunity at the meeting convened under section 439A to consider any proposed exercise of such power.

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

- (1) Where the assets of the trust where the trustee company is trustee are insufficient to cover 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 subsection (2) shall prevent any creditor or the liquidator of the trustee company from exercising any rights available to them under this Act or any State or Territory legislation dealing with trusts.

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 under the deed;
 - 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 relating to the activities of the trustee company in its personal capacity and in respect of each trust where it is the trustee be entitled to a distribution out of funds derived from the proceeds of realisation of property that the creditors claim that they have an interest in.

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 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 or the Court 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;
 - c. ASIC; and
 - d. any other person as ordered by the Court.

SCHEDULE E

Proposed amendment to the various trustee legislation of the States and Territories. Refer footnote 24 and the relevant text.

Insert the following two sections:

YYY Notwithstanding any other provision of this Act except section ZZZ, Parts 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.

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