



Australian Government



Australian
**Small Business and
Family Enterprise**
Ombudsman

8 December 2021

Mr Matthew Bowd
Manager
Market Conduct Division
The Treasury
Langton Crescent
PARKES ACT 2600

via email: MCDInsolvency@Treasury.gov.au

Dear Mr Bowd

Clarifying the Treatment of Trusts Under Insolvency Law

We welcome the opportunity to comment on the Treasury's discussion paper *Clarifying the treatment of trusts under insolvency law*. Insolvency processes continue to be extremely challenging for small business owners and whilst we are encouraged by recent efforts to increase support and simplify this process a comprehensive review of the insolvency system is required.

The Australian Taxation Office (ATO) has identified that in 2018-19 there were around 314,000 active corporate trustees, with 97% reporting under \$5 million of annual turnover. With fewer than 1 million companies in operation in the financial year 2018-19¹ it is clear that the use of the trust structure represents a reasonable proportion of Australian companies.

Through extensive stakeholder consultations we are advised that the operation of a business within a trust structure provides a high degree of asset protection and commercial benefit. However, trusts are complex, technically difficult to manage and costly to liquidate. As such we provide the following comments:

- 1. Where a company is acting as the trustee of a trust and becomes subject to an application for winding up in insolvency it should not be automatically removed from the trust.** Most trust deeds automatically remove insolvent trustees, and insolvency practitioners then need to seek court orders to replace the trustee and to liquidate the trust. These legal and court proceedings result in higher and often unnecessary costs that will deplete creditor and beneficiary distributions.
- 2. Trustee and trust ABN's to be linked and reported via the Australian Business Registry Service (ABRS).** Currently there is no public record that allows stakeholders to easily identify and link trustees and associated trusts. This lack of transparency can result in significant confusion for trustees, creditors, and liquidators, and creates additional opacity when navigating insolvency.
- 3. We recommend ASIC work with industry to formulate best practice trustee advice and education guidelines.** Trust structures are complex and challenging to manage, and small business operators may not be fully aware of their obligations when operating under a corporate trust. To encourage trustee best practice operations, small businesses require

¹ ABS, *Counts of Australian Businesses, including entries and exits*, July 2015 – June 2019

additional support, with this burden currently falling almost entirely on their trusted advisers. ASIC in conjunction with the professional accounting bodies should seek to formalise best practice trustee advice and education which can then be used by accountants and trustees to assist them in meeting their obligations.

Our Office is acutely aware that not every business will survive their first few years of operation, and established businesses may be liquidated for a range of reasons. However, liquidation processes need to be efficient, effective, and timely to provide businesspeople an affordable and dignified exit.

Thank you for the opportunity to comment. If you would like to discuss this matter further, please contact Mr David Meakin on 02 5114 6106 or at david.meakin@asbfeo.gov.au.

Yours sincerely



The Hon. Bruce Billson
Australian Small Business and Family Enterprise Ombudsman