28 September 2023

Director
Investment Funds Unit
Retirement, Advice and Investment Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: misreview@treasury.gov.au

Dear Sir/Madam

Review of the regulatory framework for managed investment schemes

The Australian Restructuring Insolvency & Turnaround Association is pleased to provide this submission to the Treasury in relation to its review of the regulatory framework for managed investment schemes (**review**). We also appreciate the opportunity to have met with the Treasury staff to discuss issues raised in the consultation paper.

As the professional body representing around 85% of Australia's insolvency, turnaround and restructuring professionals, the Australian Insolvency, Turnaround and Restructuring Association (**ARITA**) is Australia's largest representative body of insolvency practitioners. More about ARITA is provided at the end of this submission.

We have focused our submission on the issues raised in Chapter 6 regarding the winding up of insolvent schemes.

In light of the recommendation for a comprehensive review of Australia's insolvency system being made by the Parliamentary Joint Committee on Corporations and Financial Services in its report on its inquiry into Corporate Insolvency in Australia (**PJC Inquiry**), our view is that any final decision on managed investment scheme (**Scheme**) insolvency procedures should be considered as part of that review. The findings from this review may assist with informing the body that is tasked with undertaking the comprehensive review.

It is ARITA's position that wherever possible, insolvency procedures established for non-corporate entities such as Schemes and trusts, should leverage the existing regimes for corporate entities. This ensures that Australia's insolvency laws are consistent no matter the underlying structure of a particular trading or investment entity.

This is the position ARITA took in its submission to the PJC Inquiry, and its submission to Treasury in December 2021 in response to the consultation paper "Clarifying the treatment of trusts under insolvency law", where we stated that the Committee should recommend that the laws be changed so that the relevant insolvency regimes are applied to insolvent trust funds as standalone economic entities.

ARITA's position is that, for the purposes of insolvency law, trusts should be treated as economic entities (but *not* legal entities) separate from their trustee, and legislation should enliven the existing insolvency regimes so that they can be applied to insolvent *trusts* as if they were standalone entities. Section 5.8 of ARITA's submission to the PJC Inquiry attached at Appendix A and our December 2021 submission to Treasury is attached at Appendix B.

This same principle should be applied to the entities within a Responsible entity (**RE**) / Scheme structure, which will allow for the affairs of the RE to be dealt with separately to potentially more than one Scheme under the RE's control. This also gives flexibility where not all the Schemes controlled by an RE are insolvent.

Should you wish to discuss any aspect of this submission further, please do not hesitate to contact Ms Kim Arnold, Policy & Education Director, on 02 8004 4340.

Yours sincerely

John Winter
Chief Executive Officer

About ARITA

The Australian Restructuring Insolvency and Turnaround Association (ARITA) represents professionals who specialise in the fields of restructuring, insolvency and turnaround.

We have close to 2,300 members and subscribers including accountants, lawyers and other professionals with an interest in insolvency and restructuring.

We are a not-for-profit, incorporated professional association run for the benefit of our members.

Around 82% of Registered Liquidators and 86% of Registered Trustees choose to be ARITA members.

ARITA's ambition is to lead and support appropriate and efficient means to expertly manage financial recovery.

We achieve this by providing innovative training and education, upholding world class ethical and professional standards, partnering with government and promoting the ideals of the profession to the public at large. In 2022, ARITA delivered 82 professional development sessions to over 5,000 attendees.

ARITA promotes best practice and provides a forum for debate on key issues facing the profession.

We also engage in thought leadership and public policy advocacy underpinned by our members' knowledge and experience. We represented the profession at 14 inquiries, hearings and public policy consultations during 2022.

Appendix A

Extract of ARITA submission to PJC of 30 November 2022

2.8 Trusts

Recommendation 17: The Committee should recommend that the relevant laws be changed to allow registered liquidators appointed to a trustee to access assets held in the relevant trusts without recourse to the courts.

Recommendation 18: The Committee should recommend that the establishment of a national register of trusts and until it is established, the ATO and other government agencies holding information that identify the relationship between trusts and their trustees should be authorised to disclose that information to an external administrator appointed to a corporate trustee.

Recommendation 19: The Committee should recommend that the relevant laws be changed so that the relevant insolvency regimes are applied to insolvent trust funds as standalone economic entities.

As the Committee would be aware, the Treasury has been conducting a major review of the treatment of trusts under insolvency law. To support our recent submission to that review[1] we surveyed our professional members about the prevalence of trading trusts in their insolvency administrations and the costs of necessary court applications. The survey showed that trusts were a common feature of insolvency matters and that practitioners having the power to deal with trust assets and make distributions to creditors without court involvement would be of substantial benefit to most external administrations involving trusts.

Broadly speaking, ARITA supports the fundamental recommendations in relation to corporate trading trusts from the Harmer Review in 1988[2], noting that some changes and additional reforms are required due to the passage of time, changes in market practice and changes to the available insolvency processes under the *Corporations Act*.

The nub of the problem is that a trust comprises two distinct economic entities – the trustee and the trust itself – but insolvency law only recognises one of them, the *legal* entity that is the trustee. This has led to uncertainty and unpredictability in how the assets of trusts are to be dealt with. Under current law, they are dealt with as part of the administration of the trustee if the trustee is insolvent or near to insolvency, subject to obtaining the necessary court orders. However, the law currently does not address a situation where the trustee is solvent while the trust is not.[3] In short, it means that whenever there is a trust in an insolvent

[1] A copy of our submission to Treasury can be found at https://treasury.gov.au/sites/default/files/2022-04/c2021-212341-arita.pdf.
[2] ALRC Report 45 1988, General Insolvency report, Canberra, pp221-271.
[3] If a trust does not have an external creditor, that is someone other than the trustee or a beneficiary, then it cannot be insolvent.

business, a liquidator should invariably head to Court. This adds significant unnecessary cost and delay to the process for no reason.

ARITA's position is that, for the purposes of insolvency law, trusts should be treated as economic entities (but *not* legal entities) separate from their trustee, and legislation should enliven the existing insolvency regimes so that they can be applied to insolvent *trusts* as if they were standalone entities. Conceptually, this is largely in line with the recommendations made in the Harmer Report.

ARITA does not support the development of a separate specific regime for insolvent trusts or interfering with the freedom to structure trusts as participants wish, such as forcing trusts to become companies or another form of legal entity.

If a corporate trustee is put into external administration, then all trusts of which it is trustee would automatically also be under administration. As noted above, currently, whilst the external administrator has access to the resources of the trustee, the external administrator must gain permission of the court to access the resources of any trust. Whilst this is normally granted, it is time consuming and expensive and as such, largely an unnecessary regulatory burden. At a minimum, the administrator, having advised the beneficiaries of the trust, should be given access to the trust fund assets with the court empowered to intervene only in exceptional circumstances.

If the external administrator of a trustee controls a solvent trust, they should, within a fixed period after appointment, in consultation with the beneficiaries, be able to declare that the trust will be transferred to a new trustee. It is not necessarily appropriate for an external administrator to be responsible for managing a viable and solvent trust as part of their duties. Naturally, sufficient time needs to be allowed for the external administrator to identify a suitable new trustee and arrange the transfer once the declaration is made.

Although not something that commonly happens, it is possible for a trust to be insolvent whilst the trustee is solvent say, if a trustee is protected via trustee limitation of liability clauses negotiated into contracts with creditors. The problem in this scenario is that currently almost none of the insolvency provisions will operate unless and until the trustee is insolvent.

There needs to be a clear mechanism for creditors of an insolvent trust fund to be able to apply to the court for the appointment of an external administrator to the trust. That administrator could take control of the trust away from the trustee and make an assessment about the future of the trust. If appropriate, the administrator could appoint or become a voluntary administrator (or equivalent) of the trust who can restructure the assets and liabilities of the trust via something similar to a deed of company arrangement. Alternatively, the fund could be put into liquidation and wound up, with distributions made to creditors in accordance with a legislated priority regime the same as for companies. Where appropriate, the external administrator could exercise claims and actions against the trustee such as to make good losses to the trust caused by breaches of trust.

A common problem, particularly with small businesses, is that the directors are not aware of the implications of the company being a trustee and do not disclose this information to the

external administrator. It would assist external administrators if there was an independent source that could advise if the company is a trustee. A national register of trusts would greatly simplify matters and may have other public uses. We appreciate that such a register will take time to develop and require engagement by the Commonwealth with the states and territories. A viable interim measure would be for the ATO or other government agency to be authorised to disclose to an external administrator if the company they have been appointed to is a trustee according to the agency's records.

Where the trustee is an individual, similar changes should be made to the *Bankruptcy Act* to allow for the effective administration of the estate in corresponding circumstances, which was also recommended in the Harmer Report.

The resolution of issues with insolvent trusts would be simplified within a merged corporate and personal insolvency framework especially if it is focused at those businesses most regularly facing financial difficulties, namely small businesses. In any event, any significant reform of insolvency laws must address insolvent trusts and in particular those issues raised in our December 2021 submission to Treasury.

Appendix B

ARITA submission to Treasury of 10 December 2021 "Clarifying treatment of trusts under insolvency law"

ARITA
AUSTRALIAN RESTRUCTURING INSOLVENCY & TURNAROUND ASSOCIATION

10 December 2021

The Manager
Market Conduct Division
The Treasury
Langton Crescent
Parkes ACT 2600
Attention: Mr Matthew Bowd

By email: MCDInsolvency@Treasury.gov.au

Dear Sir/Madam

Clarifying the treatment of trusts under insolvency law

Thank you for the opportunity to lodge a submission in response to the Consultation Paper on clarifying the treatment of trusts under insolvency law.

The structure of this submission is as follows:

- This cover letter, which sets out the overall themes of our submission.
- Appendix A: Harmer recommendations in relation to trading trusts that are supported by ARITA.
- Appendix B: Response to questions posed in the Consultation Paper.
- Appendix C Member provided examples of external administrations involving trading trusts.
- Appendix D: Results of ARITA survey of Professional Members on Trusts – November 2021.

As a definitional point, note that we use the expression “trading trust” in this submission. That should not be taken to have a narrow or technical meaning. It is intended to include all trusts, however configured (eg unit trust, discretionary trust) where the trustee engages in trading, business or commercial activities that give rise to debts, obligations and liabilities, whether contractual or non-contractual, in favour of parties external to the trust (ie persons other than a trustee, beneficiary, settlor, appointor etc in those capacities).

Is reform to the treatment of trusts under insolvency law needed?

ARITA has long been calling for reform in this area due to the lack of legislation, the numerous uncertainties in the law as a result of that legislative vacuum and the resulting need for court applications to be made on nearly all external administrations involving trading trusts.

To be able to support our answer to this question with evidence, ARITA surveyed its professional members about the prevalence of trading trusts in their insolvency administrations and the costs of necessary court applications. 170 members responded to the survey, but not every person answered every question. A full copy of the survey is attached at **Appendix D**.

86% of respondents stated that more than 10% of their external administrations had included a trading trust and 13.2% stated that 50% or more of their external administrations had included a trading trust[1].

When focusing on small and medium enterprise insolvencies (SME), the number above 10% did not change substantially at 84.8%, but 17.1% stated that over 50% of their SME external administrations included a trading trust, demonstrating that trading trusts are a significant issue in insolvencies at the smaller end of the market.[2]

Interestingly 35.25% of respondents said that in 90% or more of their SME appointments involving trading trusts, they knew about the existence of the trust before the appointment, indicating that the directors were aware of the trust[3]. However, it is clear that many directors have no understanding of the impact of the trust on the conduct of the external administration[4].

59.15% of respondents estimate the cost of court applications to be appointed as receiver of trust assets when they are a liquidator of an SME to be between $7,501 and $15,000. It is concerning that nearly one third stated that this cost is likely to be more than $15,001[5], particularly when most administrations with a trading trust require at least one and often two or more court applications[6]. On the basis of the survey, each administration with a trading trust is looking at an average cost of $21,252 in court applications[7].

The final piece of the puzzle is the value of trust assets in question. Based on the survey, nearly half of respondents said that SME trustees hold between $10,000 and $50,000 of

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[1] ARITA Trusts Survey 2021 Question 1
[2] ARITA Trusts Survey 2021 Question 2
[3] ARITA Trusts Survey 2021 Question 3
[4] ARITA Trusts Survey 2021 Question 4 – 62.2% of respondents stated that directors had no understanding of the impact of the trust on the conduct of the external administration
[5] ARITA Trusts Survey 2021 Question 6 – 28.2% of respondents estimate the typical cost at $15.001 and above.
[6] ARITA Trusts Survey 2021 Question 7 – one application 54.55% and 2 applications 29.7%
[7] ARITA Trusts Survey 2021 Question 6 and 7. Taking the weighed average of survey responses for each question assuming a cost of $25,000 for the last option in Question 6 and six applications for the last option in Question 7.

assets in trust[8]. Clearly, $21,252 in court application costs would consume a significant amount (if not all) of those assets and this cost does not include the liquidator's time in dealing with the application(s). Very often, without the court application, the liquidator has no legal right to deal with the assets, or their rights are dangerously uncertain – catch 22.

It is clear that having the power to deal with trust assets and make distributions to creditors without court involvement and having to be appointed as receiver, would be of substantial benefit to most external administrations involving trusts.

The data gathered from the survey confirms that our previously held beliefs were correct and there is a significant issue with the lack of legislation for the treatment of trusts under insolvency law in Australia.

To reinforce this, several of our members have contributed information about external administrations involving trusts where the complexities and/or increased costs would not have arisen but for the trust and the lack of legislation providing powers for the external administrator to deal with the trust. This information is set out in **Appendix C**.

Where should we look for the answers?

Broadly speaking, ARITA supports the fundamental recommendations in relation to corporate trading trusts from the Harmer Report in 1988,[9] noting that some changes and additional reforms are required due to the passage of time, changes in market practice and changes to the available insolvency processes under the *Corporations Act 2001* (Cth) (the **Act**). We have included the recommendations made in relation to trusts at **Appendix A**.

It is interesting that the Harmer Report raised concerns about the trading trust and how the companies legislation made little or no provision for corporate trustees which become insolvent as long ago as 1988. At that stage, trading trusts had already been used extensively for more than a decade. We are now a further 33 years on, the use of the trading trust has expanded dramatically and still nothing has changed. Faced with allocating rights, liabilities, assets and losses in insolvency, the Courts have sought to fit trusts into an Act and an insolvency regime that were never designed to deal with them and by solving the problem for one matter[10] can create more problems for future matters and the potential for unintended consequences[11].

Part of the problem is that a trust comprises two distinct economic entities – the trustee itself and the trust fund – but insolvency law only recognises one of them, the *legal* entity that is the trustee. This has led to uncertainty and unpredictability in how the trust fund is to be dealt with. Under current law, it is dealt with as part of the administration of the trustee. But

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[8] ARITA Trusts Survey 2021 Question 8 – 19.5% said $10,000 to $19,000 and 26.42 said $20,000 to $50,000, which totals 45.9%

[9] The 'Harmer Report' is the report of The Law Reform Commission entitled *General Insolvency Inquiry* (Report No 45, 1988). It dealt with trading trusts in Chapter 6.

[10] An example is *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth of Australia* (2019) 368 ALR 390

[11] D'Angelo N, *Transacting with Trusts and Trustees* (LexisNexis 2020), 10.48

even that doesn't work if the trustee itself is solvent while the trust fund is insolvent[12] because none of the insolvency mechanisms in the Act will be triggered unless and until the trustee is insolvent or near it.

ARITA's position is that, for the purposes of insolvency law, trusts should be treated as economic entities (but *not* legal entities) separate from their trustee, and legislation should be included in the Act (and the *Bankruptcy Act 1966* (Cth) (**Bankruptcy Act**)) for trusts with a trustee that is a natural person) to enliven the existing insolvency regimes so that they can be applied to insolvent trusts (or, more specifically, insolvent trust *funds*) as if they were standalone separate entities. Conceptually, this is largely in line with the recommendations made in the Harmer Report. It also is similar to the approach taken by the Government in respect of the proposed external administration of sub-funds of Corporate Collective Investment Vehicles[13].

To avoid doubt, by this we do *not* mean that trusts (or trust funds) should be accorded any particular special status under the legislation; the general law of trusts would continue to govern them except where displaced as a result of the external administration. We merely propose that the trust (or trust fund) should be explicitly recognised by the legislation as being an economic entity that is separate and distinct from its trustee, with its own assets and liabilities, creditors and equity participants (ie beneficiaries) that will be different from the assets and liabilities, creditors and equity participants of any other trust that the trustee controls, and of the trustee personally as a company in its own right. In our view, much of the confusion in the law and practice at the moment stems from the failure of legislation to recognise and allow for this distinction. Recognition would then support various other reforms suggested in this submission.

Separate recognition would allow the legislation also to recognise the possibility that a trust fund can be solvent or insolvent independently from the solvency or insolvency of its trustee (or of another trust controlled by that trustee). While this is rarely an issue with a single purpose/single trust trustee, a trustee of multiple trusts could be in control of one of more insolvent trusts while others (and the trustee itself) remain solvent. Similarly, a trustee that has its own personal business, assets or affairs may be in control of an insolvent trust but otherwise be solvent. An insolvent trustee may be in control of one or more solvent trusts.

Once this distinction is acknowledged, if it becomes insolvent in accordance with an agreed definition, a trust fund (including all assets and liabilities held by the trustee in its capacity as trustee of the relevant trust) should be removed from the control of the trustee and into the control (but *not* ownership, merely control in the same way that a company is controlled by an external administrator) of an external administrator and be dealt with in accordance with the statute relating to the particular type of external administration. This would not remove the trustee, or the assets and liabilities from the name of the trustee, but the external administrator would act in a quasi-trustee capacity in dealing with those assets and liabilities to the exclusion of the trustee. Among other things, the external administrator could exercise

[12] A situation that may arise if the trustee has contractually limited its personal liability for trust debts to its recourse to trust assets (a technique that is widely used by well-advised trustees in Australian commerce).
[13] Corporate Collective Investment Vehicles - Regulatory and Tax Frameworks | Treasury.gov.au

claims and actions against the trustee eg to make good losses to the fund caused by breaches of trust. Beneficiaries would have rights and liabilities similar to shareholders, and be dealt with accordingly, ensuring that their rights are not forgotten in the event that the trust is in fact solvent.

When a trustee is placed into external administration, all trusts automatically are as well and the external administrator would manage each external administration on a separate basis – just like a corporate group. As recommended by Harmer, trust creditors with a deficiency after the distribution of trust assets will have a right to share in any distributions of the property of the trustee (subject to the operation of any limitation of liability clause that survives insolvency). This works in the same way as joint and several estates in bankruptcy. That standard priorities in the Act (or Bankruptcy Act if the trustee is an individual) will apply to the distributions from each entity.

Only in *exceptional circumstances* would a creditor be able to apply to the court for an administrator to be appointed to an insolvent trust without the trustee also being subject to an external administration. This would be in situations where the trustee appears to be solvent but will not take any action in relation to the trust to make payment to trust creditors.

This leveraging of existing processes will apply equally to trusts that are registered Managed Investment Schemes (MIS).

These changes should apply to any trust that has an external creditor (ie someone other than the trustee or a beneficiary in those capacities) – if a trust does not have an external creditor then it cannot be insolvent. Where there is an external creditor, in the event of insolvency there arises a competition among creditors, and as between creditors and the beneficiaries (and possibly even the trustee, eg for unpaid remuneration) for the limited assets in the fund – that is when the law should step in to ensure an orderly allocation of assets in accordance with a policy-based legislative regime.

There is precedent for trusts to be recognised as if they were a separate entity – eg GST registration (trusts can have an ABN), and a financing statement can be registered on the PPSR against a trust that has an ABN.

ARITA does not support the development of a separate specific regime for insolvent trusts, or interfering with the freedom to structure trusts as participants wish (eg we do not support forcing trusts to become companies or another form of legal entity).

We also recommend that if the trustee is an individual, similar changes should be made to the Bankruptcy Act to allow for the effective administration of the estate in corresponding circumstances, which was also recommended in the Harmer Report.

What other steps need to be taken?

The Act providing for trustees and trusts to be able to utilise restructuring arrangements under Parts 5.3A and 5.3B of the Act

If a trustee and trust want to restructure via a small business restructuring under Part 5.3B or voluntary administration/deed of company arrangement under Part 5.3A, the general fiduciary and related duties of a trustee may inhibit the trustee from compromising the trust debts and using the trust assets to pay those debts. At a minimum, a well-advised trustee would want to ensure that it has the appropriate trust power in the trust deed (a modern style plenary powers clause would likely suffice) and it would need to determine in good faith that the compromise was a proper exercise of that power and in the best interests of the beneficiaries, free from unauthorised conflicts. However, the trust deed might not include such a clause. At that point, the trustee has three options: seek to amend the trust instrument if that is legally possible and permissible; seek and obtain the fully informed consent of all beneficiaries; or proceed to court to seek judicial advice and direction.

To ensure that the restructuring regimes are available to trustees and trusts, a power to agree compromises should be legislated so the trustee does not have to be concerned about lack of power in the trust deed. By way of safeguard, the Act could provide that trustees have that power and may exercise it without reference to the beneficiaries as long as they act in good faith and in the honest belief that the compromise would be in the best interests of the beneficiaries.

Register of trading trusts

One of the ways in which the law protects those dealing with Act companies is by compelling companies and their officers to lodge various information about the company with ASIC, which information is then publicly available and searchable. There is no equivalent for trusts (with the exception of trusts that are MIS, where *selected* information is lodged and made available).

Australia needs to implement a register of trading trusts. This register needs to record any trustee which carries on business in a trustee capacity or otherwise incurs debts, obligations or liabilities in favour of third parties in that capacity. The information disclosed in the register does not need to extend to beneficiaries, but it does need to make clear where a business is being conducted, or debts, obligations or liabilities are incurred, by a trustee for a trust.

At the moment in Australia, a trustee is able to enter into a transaction which involves incurring debts with a creditor, without disclosing that they are doing so as trustee for a trust. Whether or not a trustee discloses to an external counterparty that it is contracting in its trustee capacity does not determine whether a debt is a trust debt, although obviously it helps if it does make that disclosure. Whether a debt is a trust debt is a question of fact determined by the trustee's intention (as evidenced in board minutes and internal documents) and whether incurring that debt was a proper exercise of trust powers[14]. The

[14] D'Angelo N, *Transacting with Trusts and Trustees* (LexisNexis 2020), 1.130 to 1.139

creditor's knowledge or understanding of this is largely irrelevant to the question. And yet, they may be materially affected by the answer. If a debt is incurred in a trust capacity, then the creditor may have access to trust assets on enforcement and in insolvency. If it is not, then it is limited to the trustee's personal assets. Similarly, if the creditor is aware of the trust capacity, then it may make further enquiries about the trust and seek to ensure that all is in order in that regard.

Without knowing that the trustee is acting as a trustee, how is the creditor to protect their position and make informed decisions?

Disclosure of information about trustees and trusts will hold similar benefits to the Personal Property Securities Register which now discloses previously unknown information about, for example, chattel leases and retention of title arrangements.

Fees and expenses of the external administrator

In accordance with the recommendations of the Harmer report, the costs of the insolvency process need to be met from the trust fund or funds specifically allocated to the particular trust where time was spent, or for general time pro-rated amongst the trust funds. There is precedent for this in how the Courts are currently dealing with this issue.

This needs to be specifically legislated through the adoption of the s556 priorities for the winding up of trusts.

Insolvent trading, preferences and other recoverable property

These provisions should apply to a liquidation of a trust in the same way as a liquidation of a company. When considering whether such transactions have occurred, the external administrator will consider the transactions and operations of the trustee in its capacity as trustee of each trust separately.

***Trusts that are insolvent, where the trustee is* solvent**

Although not something that commonly happens, this is possible if a trustee is protected via trustee limitation of liability clauses negotiated into contracts with creditors.[15] The problem with this scenario is that almost none of the insolvency provisions of the Act will operate unless and until the trustee is insolvent.

There needs to be a clear mechanism for creditors of an insolvent trust fund to be able to apply to the court for the appointment of an external administrator to the trust fund. That administrator could take control of the trust fund away from the trustee and make an assessment about the future of the trust. If appropriate, the administrator could appoint or become a voluntary administrator (or equivalent) of the fund who can restructure the assets and liabilities of the fund via a deed of arrangement if it can be rescued. Alternatively, the fund could be put into liquidation and wound up, with distributions made to creditors in accordance with a legislated priority regime that reflects that for companies. Where

[15] See generally D'Angelo N, *Transacting with Trusts and Trustees* (LexisNexis 2020), Chapter 3.

appropriate, the external administrator could exercise claims and actions against the trustee eg to make good losses to the fund caused by breaches of trust.

***Trusts that are solvent, where the trustee is* insolvent**

If a corporate trustee is put into external administration, then all trusts of which it is trustee would automatically also be under administration. However, if a trust it controls is solvent, the external administrator of the trustee should, within a fixed period after his or her appointment, in consultation with the beneficiaries, be able to declare that the trust will be transferred to a new trustee. It is not necessarily appropriate for an external administrator to be responsible for managing a viable and solvent trust fund as part of their duties. Naturally, sufficient time needs to be allowed for the trustee to identify a suitable new trustee and arrange the transfer once the declaration is made.

As part of the restructuring process (under Part 5.3A) the external administrator should have the power to replace the trustee (possibly, with the agreement of the beneficiaries), in respect of trusts that are returned to solvency as part of any restructure. For example, where viable businesses within certain trust funds are restructured but others, including the trustee, are wound up.

Does the Bankruptcy Act need to mirror this legislative change?

Although individual trustees of trading trusts are not as common as corporate trustees[16], in our view, the Bankruptcy Act should take the same approach to trading trusts where the trustee is an individual as the Act where the trustee is a corporation. This is also consistent with the Harmer Report[17].

Questions posed in the consultation paper

ARITA has responded to the questions raised in the consultation paper and they are attached at **Appendix B**.

As always, we look forward to continuing to work closely with Treasury and the Government generally to ensure that any changes to changes to the treatment of trusts under insolvency law are efficient and effective to assist in driving economic recovery from the COVID-19 crisis and contribute to Australia's long term economic success.

Yours sincerely

John Winter
Chief Executive Officer

[16] ARITA Trusts Survey 2021 Question 5
[17] Appendix A Recommendation 7

About ARITA

The Australian Restructuring Insolvency and Turnaround Association (ARITA) represents professionals who specialise in the fields of restructuring, insolvency and turnaround.

We have more than 2,200 members and subscribers including accountants, lawyers and other professionals with an interest in insolvency and restructuring.

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ARITA promotes best practice and provides a forum for debate on key issues facing the profession.

We also engage in thought leadership and public policy advocacy underpinned by our members' knowledge and experience. We represented the profession at 15 inquiries, hearings and public policy consultations during 2020.

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Appendix A

Harmer recommendations in relation to trading trusts that are supported by ARITA:

1. Include a legislative provision stating that a reference to the business or affairs of a company for the purpose of the operation of the insolvent provisions of the legislation should expressly include a reference to its business or affairs as trustee.
2. Any reference in the companies' legislation to the property or assets of a company that is being wound up in insolvency should 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.
3. Any 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 a trust be void against the liquidator.
4. If a company is acting as trustee of a trust and becomes subject to any application for winding up in insolvency, any provision in the trust instrument allowing for the removal of the company as trustee or the exercise of any power that allows for the removal of the company as trustee shall have no effect. The liquidator or administrator would be able to cause the company to resign as trustee and the court would retain the power to remove the trustee.
5. Upon the insolvency of a corporate trustee, the exercise of the right of indemnity against both the trust property and the beneficiaries (if such a right exists) should be a 'collective' right exercisable by the company, through its liquidator, on behalf of all trust creditors, subject to any order of the court.
6. The following applies to the distribution of trust property:
    a. Company and trust property to be kept separate.
    b. Order of payment - Costs associated with the exercise of the indemnity and of the administration of property obtained as a result of the exercise of that right, then the administration costs of the winding up to the extent that the assets owned by the company in its own right are insufficient to pay those costs and then payment of creditors in the order of statutory priorities. Any deficiency of in claims of trust creditors are admissible to share in any property of the company available for general distribution.
    c. The right of indemnity is extended to include not only the amount of the 'trust' debts and liabilities, but also the total costs associated with the winding up of the company.
7. The principles developed for a corporate trustee should also apply to individuals who are trustees and who become bankrupt.
8. The draft legislation relating to corporate trading trusts should, so far as relevant, also be made applicable for the situation of a company under administration (it was this report that recommended voluntary administrations and they were subsequently introduced in 1993).

Appendix B

Response to questions posed in the Consultation paper

Question	ARITA position
Question 1: Should the corporate insolvency framework be amended so that it expressly provides for the external administration of insolvent trusts with a corporate trustee? If so, what external administration processes should the amendments apply to?	Yes. Current situation leads to uncertainty, unpredictability of outcomes and asset dissipation – money is being spent to deal with issues via legal advice and applications to court, most of which do not exist or arise in the insolvency of a company that is not a trustee. Harmer discussed this in 1988 – ARITA supports the fundamental recommendations of the Harmer report. Why – refer 10.24 of Dr N. D'Angelo's book, *Transacting with Trusts and Trustees*, for list of 17 issues resulting from the regulatory gap arising from lack of insolvency legislation dealing with commercial trusts (and that is not an exhaustive list). All external administration processes need to be covered if it is intended they be applicable to trusts. There is uncertainty around whether the appointment of any external administrator (including VA and SBR) may trigger the removal of the trustee – depending on the terms of the trust and the applicability of *ipso facto* laws (and grandfathering for pre 1 July 2018 trusts). Without specifically legislating for all external administrations to be available, there will be doubt about the ability to utilise any processes not included. Also note the need for a provision to specifically provide for the trustee to have the power to compromise debts in order to remove any doubt about the right to use Parts 5.3A and 5.3B.
Question 2: What benefits would a legislative framework deliver?	Certainty for all stakeholders, particularly employees and creditors (and insolvency practitioners) dealing with businesses held within a trust structure – whether they are aware that there is a trust involved or not. Reduced costs of the insolvency process – less need to seek detailed legal advice on complex issues and make court applications. At the moment, there is at least one court application required where the external administration is for an insolvent trustee that is removed while still holding the trust assets, but remains only as a bare trustee and thus without a power of sale or other powers to deal with the assets. Usually this application is

Question	ARITA position
	for the appointment of the liquidator as receiver to deal with the trust assets. Often there is a second hearing for the approval of the receiver's remuneration and consent to pay those fees from the trust assets and removal of the receiver. These applications may also need to be done separately depending on timing and sometimes more than one remuneration hearing is required depending on the size of the trust. A further hearing may be required to determine the distribution of trust funds, particularly if the company is trustee of more than one trust or also trades in its own right outside of the trust. Even beyond that, if any other uncertainties arise in connection with dealings with trust assets and liabilities, the insolvency practitioner is usually advised to seek judicial advice under s63 *Trustee Act 1925* (NSW) (and equivalents elsewhere), to avoid committing or being party to a breach of trust. Due to the extensive issues associated with dealing with the insolvency of corporate trustees of trading trusts and the fact that there is little or no statutory guidance on these issues, the law which applies when a commercial trust faces insolvency is highly inefficient and in any given case has the potential to frustrate the commercial expectation of stakeholders.

Question	ARITA position
Question 3: Is there potential for detrimental or unforeseen impacts if the statutory regime is extended?	In our view, not if the regime if properly thought through and drafted. Even apart from the Harmer Report, there is a wealth of guidance in professional and academic literature on the issues and how they can be addressed – the issues are not new. If a trust is insolvent then, as with a company, the creditors should have assured priority over the beneficiaries (who are the equivalent of shareholders). By ensuring that beneficiaries retain their position (like shareholders), in the event that the trust is solvent, they will be entitled to the surplus. Insolvent trusts will have the benefit of leveraging off existing insolvency regimes which (except for Part 5.3B) have been around for decades. The need for detailed legal advice and court appearances will only arise in the most complex of cases, saving money in the administration, increasing the funds available to creditors and increasing the chances of a return to beneficiaries.
Question 4: Should legislation expressly set out when a trust is deemed to be insolvent?	Yes, if there is acceptance of the concept that trusts (or trust funds) should be recognised in the legislation as economic entitles that are separate from their trustee (and of any other trust in that trustee's control), and be dealt with by the legislation as such. A definition would be needed because there is no useful common law on what "insolvent trust" means. The definition of "solvency" in s95A of the Corporations Act does not apply to trusts because a trust is not a "person". Insolvency is the trigger point for the appointment of an external administrator and a range of other matters in insolvency law. Thus, any ambiguity around when a trust is or becomes insolvent should be resolved by legislative mandate.
Question 5: What is the most appropriate way to prescribe when a trust is taken to be insolvent?	Dr D'Angelo analyses this issue in *Transacting with Trusts and Trustees* (refer 10.82 to 10.93). At 10.89 he suggests a cashflow definition of solvency for a trust that takes the same approach as for companies in that if a trust is not solvent it is insolvent. He also defines what a trust debt is, which is necessary to be able to determine solvency. We support these concepts and the definition put forward by Dr D'Angelo: *A trust is solvent if, and only if, the trustee is able to pay all trust debts as and when they become due and payable*

Question	ARITA position
	out of trust assets and (where it is obliged to do so) its own assets. *A trust which is not solvent is insolvent.* *A debt of a trustee is a 'trust debt' of a trust if the trustee is entitled to apply the assets of that trust to pay it (even if it is also obliged to pay it out of its own assets), disregarding for the purposes of this definition any application of the clear accounts rule.*
Question 6: Should the power of an insolvency practitioner to administer the trust assets and liabilities be expressly provided for in legislation?	Yes. An insolvency practitioner should have all the powers given to them in relation to companies when dealing with trust assets and liabilities, unconstrained by limitations in the trust instrument or the fact that the trustee otherwise has less than plenary powers (eg if it has been ejected and has become a bare trustee). The current need to make court applications results in delays and substantial unnecessary cost being incurred which is invariably ordered to be met from the trust assets (thus diminishing the pool of value available for distribution). Legislation giving the insolvency practitioner the requisite plenary powers should be able to be drafted, drawing on the principles of court decisions appointing liquidators as receivers to trust assets.
Question 7: Should the law provide that, subject to a contrary order by a court, the same insolvency practitioner may administer both the company, and the assets and liabilities attributable to any trusts for which the company is trustee?	Yes, this is generally what happens now when a liquidator of the trustee makes an application to court in respect of the trust assets – the liquidator is appointed as receiver over the trust assets. The affairs of the trust and the corporate trustee are intertwined in the same way as a corporate group and it is standard practice for the same registered liquidator to be appointed to all of the entities in the corporate group. Should any conflicts arise between the external administrations of the trustee and the trust/trusts, they would be dealt with in the same way as conflicts within corporate groups that are under external administration are dealt with now, which may include resignation from one of the appointments, court approval for the continuation of the appointments or the appointment of a special purpose appointee.

Question	ARITA position
Question 8: Should the affairs of a trustee company and each trust it administers be resolved separately in external administration?	Yes, refer to recommendation 6 of Harmer Report at Appendix A.
Question 9: Should there be a statutory order of priority in the winding up of a trust?	Yes, refer to recommendation 6 of Harmer Report at Appendix A. Although, creditors should be able to agree to alter this order in deeds of company arrangement (including employees under the legislated process). Small business restructuring plans provide for pari pasu distribution to all creditors and payment of a set % of funds distributed to creditors as remuneration of the restructuring practitioner for the plan – this is unable to be altered.
Question 10: Should a statutory order of priority replicate the regime for companies? Do additional factors need to be considered where a corporate trust structure is involved?	Yes, refer to recommendation 6 of Harmer Report at Appendix A and the issues noted above at Q9. The statutory order of priority in relation to companies is long established and is based on evolved policy positions. An example of this is the priority given to employee entitlements. There is no reason in policy why a regime for trading trusts should be any different (a point made by the High Court in the *Carter Holt Harvey* decision).
Question 11: Should there be additional limits on the enforceability of ejection clauses and/or clauses that seek to limit a trustee's right to indemnity, in situations involving insolvency or external administration?	Yes, trustee ejection clauses unnecessarily complicate the insolvency process. Due to grandfathering and the numerous exceptions that are available it is not always clear how the ipso facto provisions will interact with ejection clauses in every case. There will be a large number of trusts established before 1 July 2018 that the ipso facto provisions will not apply to. Therefore, any new law should specially deal with this issue and apply to all trusts in relation to trustees that enter into an external administration from the date of commencement of the new law with no transitional provision. Any clause that seeks to limit a trustee's right of indemnity in situations involving insolvency or external administration should also be legislatively stayed as against an external administrator. This is already the case in relation to trusts that are MIS: see s601FH of the Corporations Act.

Question	ARITA position
Question 12: What would be the impacts of any such limits?	The trustee (or the external administrator to whom control of the trust assets and liabilities is transferred under our suggested model) will retain the right to deal with the assets under the right of indemnity without ejection or a limitation being imposed on those rights due to the insolvency or external administration. This will remove the need for the external administrator of the trustee to apply to the Court for appointment as receiver to be able to deal with the assets. In combination with other reforms this will reduce the costs for the external administration and creditors.
Question 13: Are there any other issues that need to be considered in light of the questions above?	Include a section analogous to s447A in Part 5.3A to provide wide scope of power to the Courts. At the moment, the annual reporting regime (forms 5602 and 5603) to ASIC does not provide meaningful information to creditors about the transactions undertaken by the trustee and the trust as the are reported together on the one form as one list of transactions. This is the case even if there are multiple trusts. If the trust has multiple trustees, the same trust's transactions are currently reported in multiple annual accounts. Our suggested approach to deal with trusts should resolve this issue. Insolvent trading, preferences and other recoverable transactions – transactions dealt with from the perspective of each "entity". Legislate for the treatment of the external administrator's fees and expenses of dealing with the trust fund(s). Provide a mechanism so that an insolvent trust of a solvent trustee can have an external administrator appointed by a creditor. The Act should include a provision to ensure that the trustee and trust can utilise the restructuring regimes under Parts 5.3A and 5.3B. A register of trading trusts should be established. Similar legislation should be included in the Bankruptcy Act for the insolvency of trustees of trading trusts that are individuals. Where necessary, there is further information about these points included in our covering letter.

Question	ARITA position
Question 14: What is the most appropriate model by which a statutory regime could be expressed in the legislation?	ARITA does not support the development of a separate specific regime for insolvent trusts. Rather, ARITA recommends that the Corporations Act be amended so that the existing provisions of Chapter 5 can apply with respect to trusts as standalone economic entities (but not legal entities) separately from their trustee (and any other trust it controls). ARITA's position is that trusts should be recognised treated as a separate, standalone economic entities and legislation should be included to enliven the existing insolvency regimes so that they can be applied to insolvent trusts. Conceptually, this is largely in line with the recommendations made in the Harmer Report. This would require some quite detailed thinking and drafting in terms of deeming provisions, but should be achievable. Control of the trust fund (including both assets and liabilities) would move away from the trustee to the external administrator (in the same way that a company is controlled by an external administrator) and be dealt with in accordance with the statute relating to the particular type of external administration. Beneficiaries will align with the role of shareholders, and be dealt with accordingly, ensuring that their rights are not forgotten in the event that the trust is in fact solvent. This leveraging of existing processes will apply equally to Managed Investment Schemes (MIS).

Appendix C

Member examples of external administrations involving trading trusts

Group of Trusts example

Background

- Members were appointed voluntary administrators of the Group in early 2020 and subsequently appointed as liquidators a little over a month later. The majority of assets were sold during the administration period with all assets realised by the time the court application was finalised in mid-2020.
- Twenty of the twenty-two companies in the Group operated as trustees of trading trusts.
- The original and supplemental trust deeds the external administrators were able to locate did not contain automatic ejection or disqualification clauses for the trustee companies on the appointment of voluntary administrators or liquidators. Instead, upon liquidation, the trustee companies were required to give notice of retirement which the respective unit holders would then consider in a general meeting.
- Exhaustive efforts were undertaken by the Group's pre-appointment lawyers and accountants to locate documentation that could substantiate the current unit holder details for all trusts however complete records could not be located for us to assist with the convening of the required meetings.

Reasons for the court application

- [As per Clause 21.1] It would be improper for the liquidators to ignore any express requirements in the trust deeds, including the retirement provisions.
- [Clause 21.4] The trust deeds imposed a positive obligation upon the trustees to give notice of retirement upon them entering liquidation (note: no reference to VA or Deed Administrator).
- [Clause 21.5] The giving of notice of retirement thereby facing the potential, however unlikely event, of the liquidators / trustee companies being removed would be inconsistent with the liquidators' duty to wind up the affairs of the companies.
- [Clauses 21.2 & 21.3] Serving notices of intention to retire and calling meetings of the various trusts would be time consuming and costly. It is possible the liquidators would have needed to expend a considerable amount of time conducting further enquiries in order to satisfy themselves of the identity of all current unit holders.
- The liquidators would have also needed to engage with the unit holders to ensure they convened meetings to support the retention of the trustee companies as trustees.

Serving notices of intention to retire as trustee would delay the liquidations and the outcome would have been uncertain. In contrast, making an application to court would allow these matters to be resolved with certainty.

Court timeline

A timeline of key events from the court application process is outlined below:

- 17 June 2020: Submission of application to court including originating process and first affidavit from the liquidators.

- 19 June 2020: Letters issued to ASIC and known current/former unit holders notifying them of the court application.
- 31 July 2020: First directions hearing in the Supreme Court of Victoria.
- 11 August 2020: Submission of amended originating process and second affidavit from the liquidators.
- 4 September 2020: Second directions hearing in the Supreme Court of Victoria.
- 10 September 2020: Submission of third affidavit from the liquidators.
- 16 September 2020: Trial hearing in the Supreme Court of Victoria.

Outcome

- Ultimately, the Court made orders substantially in the form of those sought by the liquidators. Relevantly, the order sought under section 67 of the Trustee Act was made as excusing the trustees themselves as opposed to the liquidators. Over $80,000 was spent on legal fees, barrister's fees and court costs. This did not include the cost of the liquidators' management time.

Property developer with Unit Trust

- The company owns a residential development in North Queensland.
- There is a massive amount of uncertainty around who holds the units in the trust with all of the records being removed prior to the appointment of liquidators.
- The Trust Deed contains an ipso facto clause removing the company as Trustee.
- The liquidators were advised that the Trustee was replaced. The liquidators have never been provided evidence of this and believe it to be untrue.
- The liquidators were locked out of the site for 9 months.
- The only secured creditors are foreign companies registered in the BVI
- They have put the liquidators on notice that they will actively oppose an application for receivership.
- They have taken no active part in the liquidation leaving the liquidators with massive personal exposure to environmental claims. One of the liquidators is to be examined in a mandatory examination under the Qld EPA about what he has personally done to stop an insolvent company polluting.
- Because of all of the above (and more), the liquidators have no power to deal with assets other than as bare trustee.
- The liquidators have no funds to go to court.
- The liquidators are carrying professional fees in excess of $750,000 to try to get to a point where they could negotiate a solution to multiple issues and therefore make the property saleable.
- If from day one the liquidators had the security of knowing that they could deal with the assets as if they were the assets of the company the liquidators' hands would have been a lot freer to deal with the systemic issues of the appointment and realise the assets sooner. Because the secured creditor was obstructive in their realisation plans but refused to take steps themselves to act on their securities, the liquidators have been left in state of limbo on key issues. The liquidators had no power as bare trustee under threat by the security holder to do nothing but watch the assets deteriorate.

Business of property development

Simple corporate trust (company acted only in capacity as trustee of one trust). No power of sale in the trust deed and so the external administrators have had to apply to the court to be appointed receiver of the trust property. The legal fees for this otherwise rather straight forward application were ~$50,000. When the court appointed receivership concludes there will need to be court approval of remuneration and the lawyers have quoted $10-15k for that (whereas remuneration approval for the liquidation will be sought from the creditors with no need to incur legal fees).

Clothing retailer

Simple corporate trust (company acted only in capacity as trustee of one trust). The directors/trustee inadvertently leased the premises in the company's own right, not in capacity of trustee. This was beneficial as it gave the external administrators the power to claim a lien over the stock, shop equipment and fit-out to help secure the right of indemnity and they were able to negotiate an outcome. But this highlights the fact that the trustee directors (who, in the SME space are typically also the beneficiaries), don't always understand the legal structure their adviser has set up for them. This in turn exacerbates the number of creditors who also don't realise/haven't been informed they are extending credit to a trust.

Hotel/pub

Liquidators were of the view the business had been illegally phoenixed. Not only was the company assetless, the trust appeared to be so as well. Automatic ejection clause complicated the situation further and our opportunities to recover the outstanding indemnity were limited. Knowing the provisions of Part 5.7B (recovering property or compensation…) don't apply to a trust there was limited scope and the creditors were unwilling to fund risky litigation. If this was indeed an illegal phoenix, they got away with it.

Retailer

Multiple applications required to Federal Court during voluntary administration and deed of company arrangement in order to be able to deal with business which was held in the trust. Applications required to have:

- administrators appointed as receivers of the trust
- the purchaser of the business comfortable that the external administrator could complete on the sale, and
- fees approved as receivers of the trust.

Estimated cost of the applications, including barrister's fees, legal fees and time preparing affidavits would have been over $100,000.

Unit holder of real property trust

Member was appointed liquidator of a company by Court Order in October 2017. Prior to appointment the company was Trustee of a Trust. After the winding up application had been filed, the director removed the company as Trustee and appointed a new trustee company which she controlled.

The assets of the trust consisted of units held in another Trust which held real property. The value of the units was $125,000.

The liquidator made an application to Court seeking that the company in liquidation be reappointed as Trustee of the Trust or alternatively that the liquidator be appointed Receiver over the trust assets. The director opposed the application and obstructed and delayed the proceedings at every possible point.

The liquidator finally obtained Orders appointing himself as Receiver over the trust assets in March 2020.

Due to the conduct of the director, the legal fees incurred (including Counsel) were approximately $128,000. The liquidator's remuneration and disbursements were approximately $88,500. In addition, there were petitioning creditor costs of approximately $11,500 and costs for the valuation of the units which was another $8,800.

There were insufficient funds to meet the costs incurred and accordingly the liquidator and his lawyers had to significantly discount their fees (65% and 45% respectively) and there was no return to creditors.

Court liquidator resulting in disclaimer of assets

- A court liquidation where the company operated a business solely as trustee of a trading trust. The assets of the business were worth circa $20k.
- The costs of making an application to court would have been disproportionate to the anticipated recoveries and accordingly the liquidator disclaimed the assets.

Uncommercial transactions defeated by trust structure

A significant issue is that recoveries for uncommercial transactions are capped by the trustee's right of indemnity from the trust assets.

A liquidator faced this problem:

- 2 directors/proprietors operated a business via a trust with a corporate trustee.
- A dispute led them to break up the business and go their separate ways, dividing and transferring the clients / income streams to their own entities.
- They fell out so badly they couldn't even cooperate in winding up the trustee, leaving an ATO debt which accrued over a few years to $200k, and it was eventually wound up by force.

- The liquidators pre-break up business valuation was $700,000. The ATO debt was overdue and the company insolvent when they transferred the clients, leading to an uncommercial transaction / breach of duties claim.
- In a straight corporate structure, the claim would have been quantified at $700,000. But with the trust structure:
  - the corporate trustee's asset was not the business asset, but a right of indemnity amount from the trust and the claim was the value of the indemnity.
  - with right of indemnity quantified at the value of debts incurred, being the ATO debt, the claim was$200,000. But because the ipso facto clause in the trust deed removed the company as trustee, post appointment debts incurred (i.e., Liquidator's fees) could not be added to the claim.
  - the claim was strong enough that the liquidators ended up settling for the full $200,000. No dividend to the ATO because of costs.

Members Voluntary Liquidation

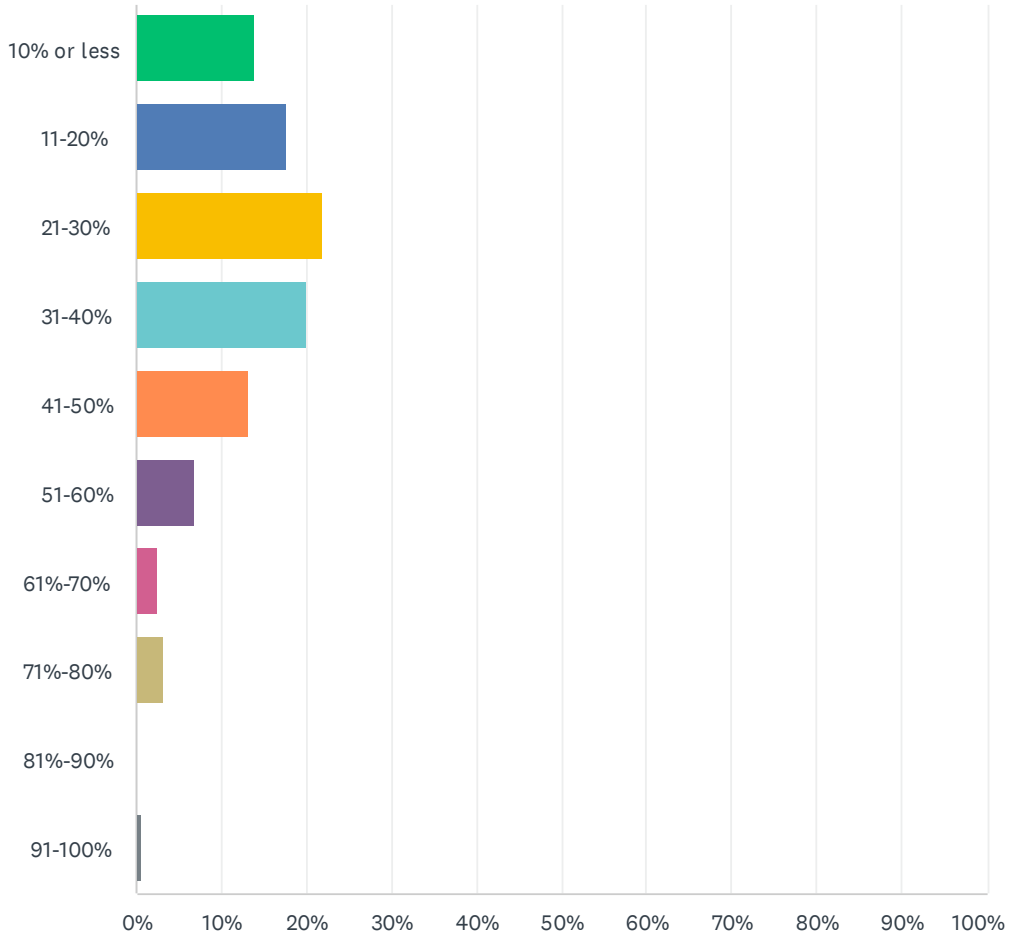
- Members' voluntary liquidation where the referring accountant was unaware that the entity was the actual trustee of a SMSF and a unit trust, and a bare Trustee for another related entity.
- This caused assets to be identified as company assets when in fact, they were trust assets.
- There has been time and costs incurred to verify that assets are trust assets and not assets of the company.

Appendix D

Results of ARITA survey of Professional Members on Trusts – November 2021

Q1 In your experience, how many external administrations that you have been appointed to have included a trading trust?

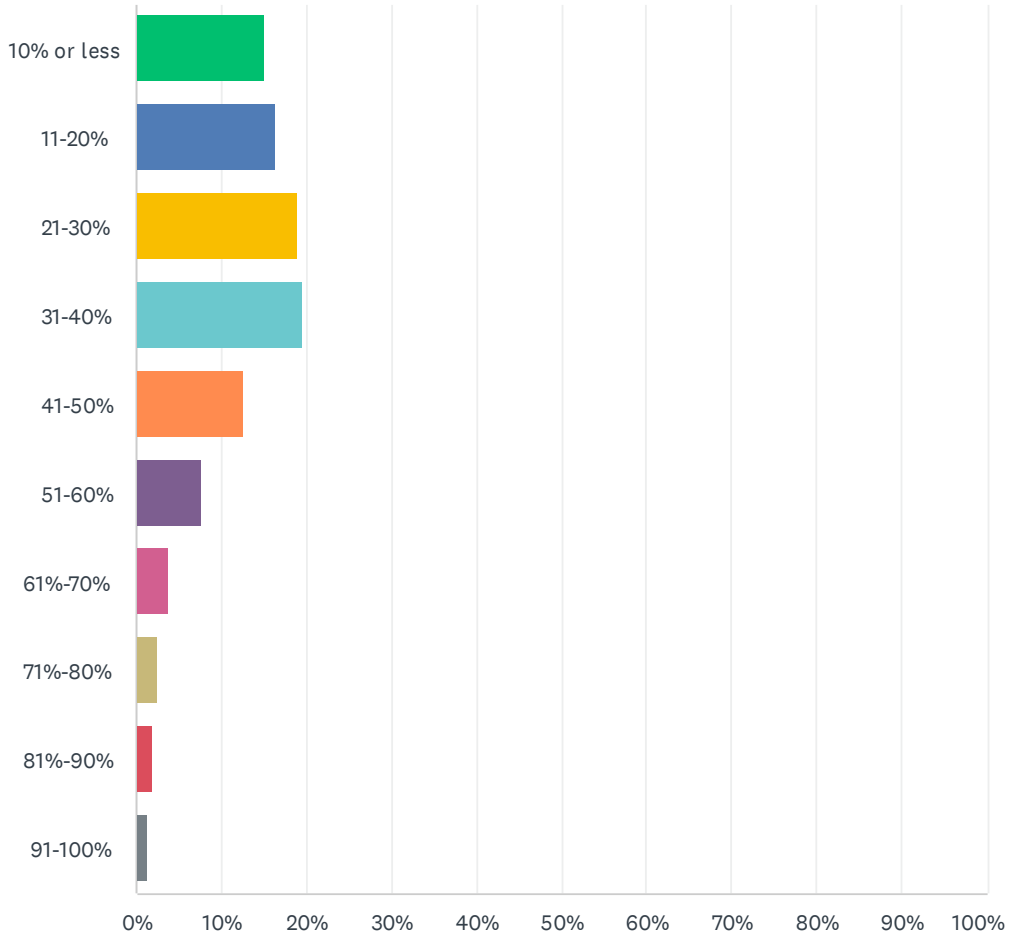
Answered: 159 Skipped: 11



ANSWER CHOICES	RESPONSES	
10% or less	13.84%	22
11-20%	17.61%	28
21-30%	22.01%	35
31-40%	20.13%	32
41-50%	13.21%	21
51-60%	6.92%	11
61%-70%	2.52%	4
71%-80%	3.14%	5
81%-90%	0.00%	0
91-100%	0.63%	1
TOTAL		159

Q2 In your experience, how many SME insolvencies that you have been appointed to have included a trading trust?

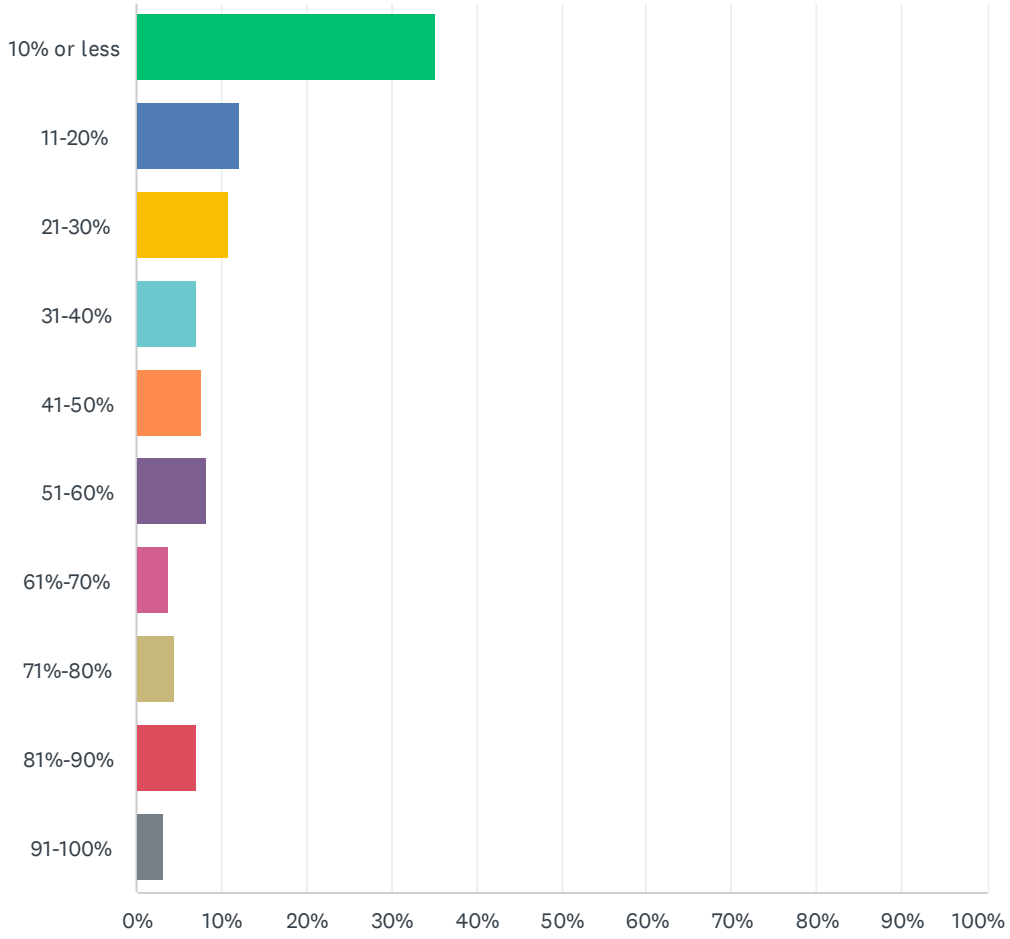
Answered: 158 Skipped: 12



ANSWER CHOICES	RESPONSES	
10% or less	15.19%	24
11-20%	16.46%	26
21-30%	18.99%	30
31-40%	19.62%	31
41-50%	12.66%	20
51-60%	7.59%	12
61%-70%	3.80%	6
71%-80%	2.53%	4
81%-90%	1.90%	3
91-100%	1.27%	2
TOTAL		158

Q3 In SME EXADs you've been appointed which had a trading trust involved, what percentage of those trusts were only discovered to exist after your appointment?

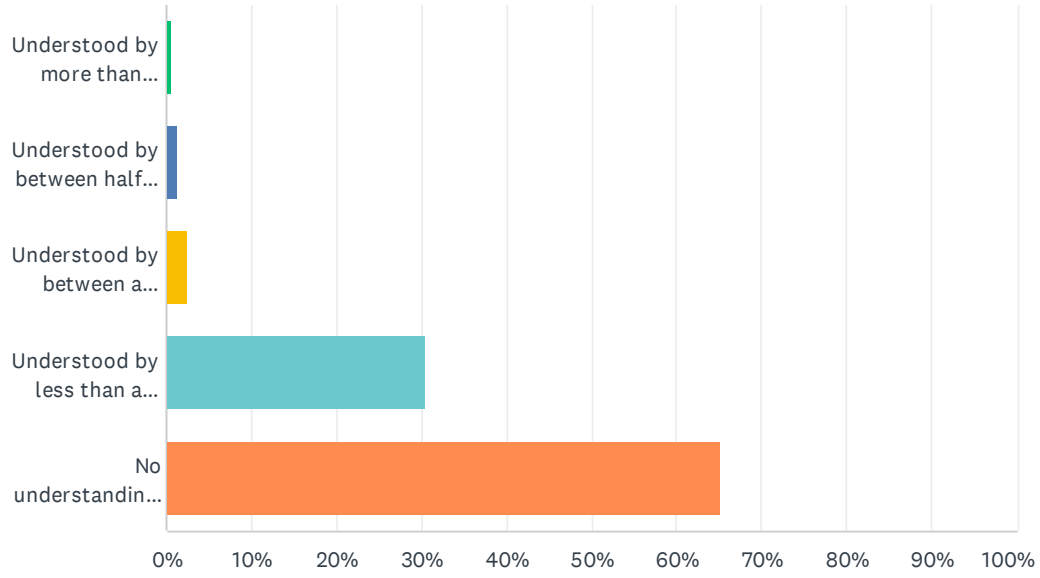
Answered: 156 Skipped: 14



ANSWER CHOICES	RESPONSES	
10% or less	35.26%	55
11-20%	12.18%	19
21-30%	10.90%	17
31-40%	7.05%	11
41-50%	7.69%	12
51-60%	8.33%	13
61%-70%	3.85%	6
71%-80%	4.49%	7
81%-90%	7.05%	11
91-100%	3.21%	5
TOTAL		156

Q4 Do directors of distressed SMEs understand that the existence of a trading trust in their business will change how the EXAD is run?

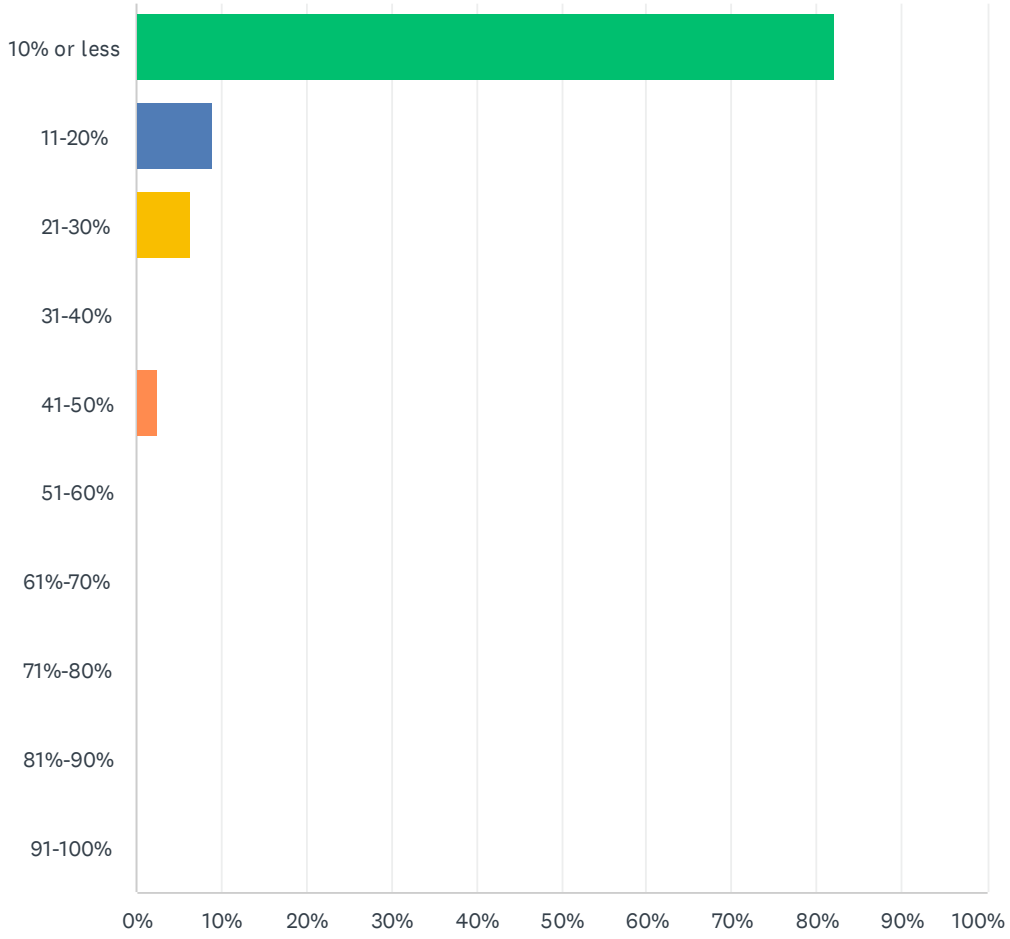
Answered: 161 Skipped: 9



ANSWER CHOICES	RESPONSES	
Understood by more than three-quarters	0.62%	1
Understood by between half and three-quarters	1.24%	2
Understood by between a quarter and a half	2.48%	4
Understood by less than a quarter	30.43%	49
No understanding by SME directors	65.22%	105
TOTAL		161

Q5 FOR REGISTERED TRUSTEES: In your experience, how many bankruptcies that you have been appointed to have involved a trading trust? (ignore question if not applicable to you)

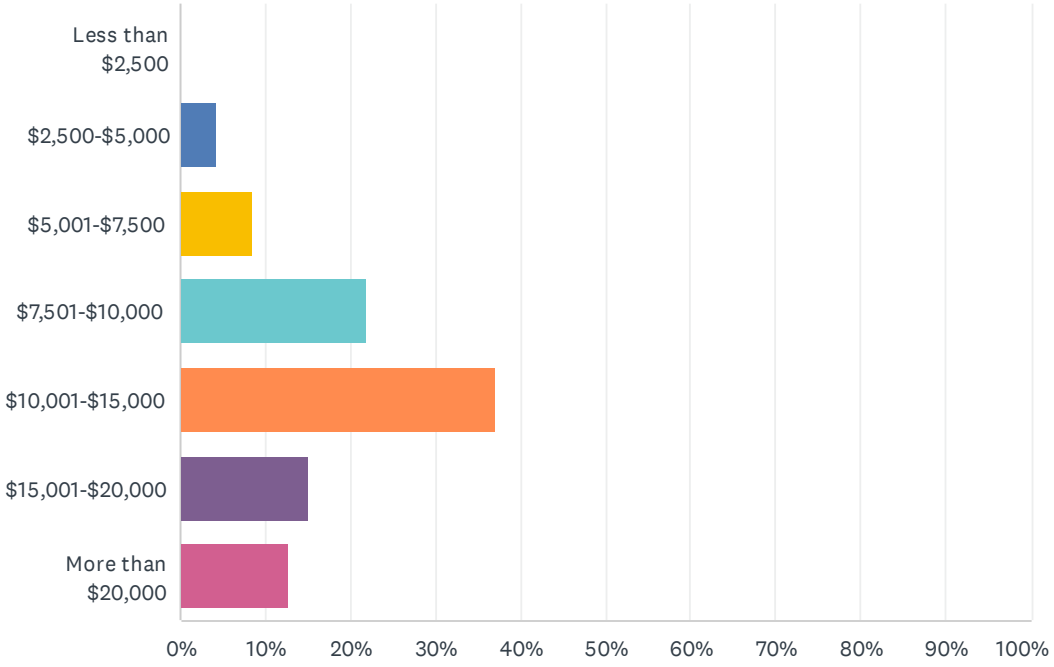
Answered: 78 Skipped: 92



ANSWER CHOICES	RESPONSES	
10% or less	82.05%	64
11-20%	8.97%	7
21-30%	6.41%	5
31-40%	0.00%	0
41-50%	2.56%	2
51-60%	0.00%	0
61%-70%	0.00%	0
71%-80%	0.00%	0
81%-90%	0.00%	0
91-100%	0.00%	0
TOTAL		78

Q6 In your experience, what is the typical cost of a court application to be appointed as receiver of a trading trust when you are the liquidator of an SME?

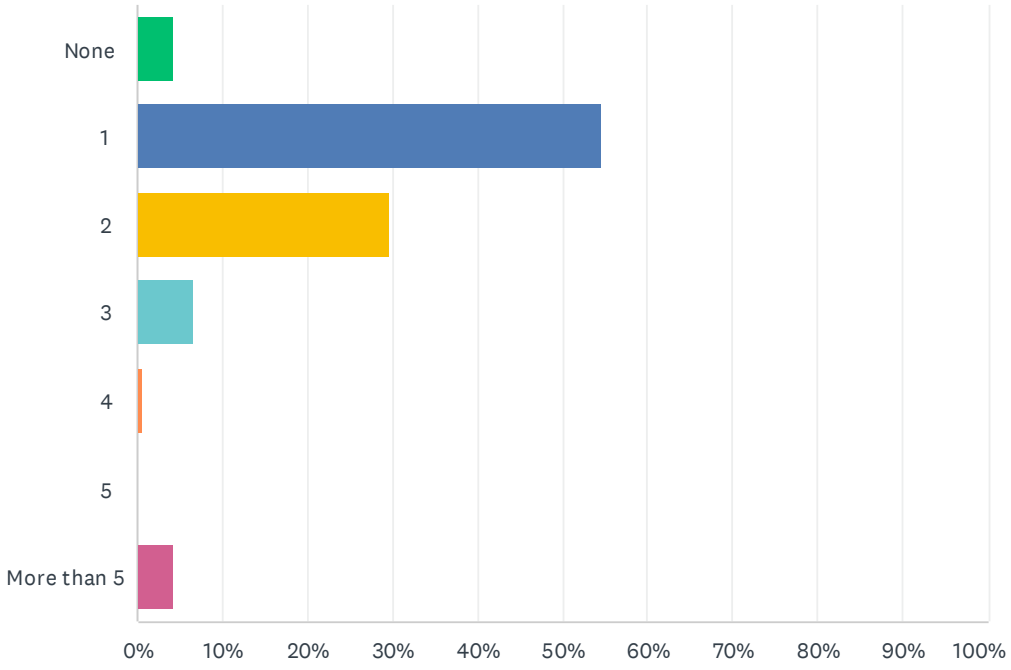
Answered: 164 Skipped: 6



ANSWER CHOICES	RESPONSES	
Less than $2,500	0.00%	0
$2,500-$5,000	4.27%	7
$5,001-$7,500	8.54%	14
$7,501-$10,000	21.95%	36
$10,001-$15,000	37.20%	61
$15,001-$20,000	15.24%	25
More than $20,000	12.80%	21
TOTAL		164

Q7 In your experience, how many applications to court are generally required where a trading trust is involved in an SME insolvency?

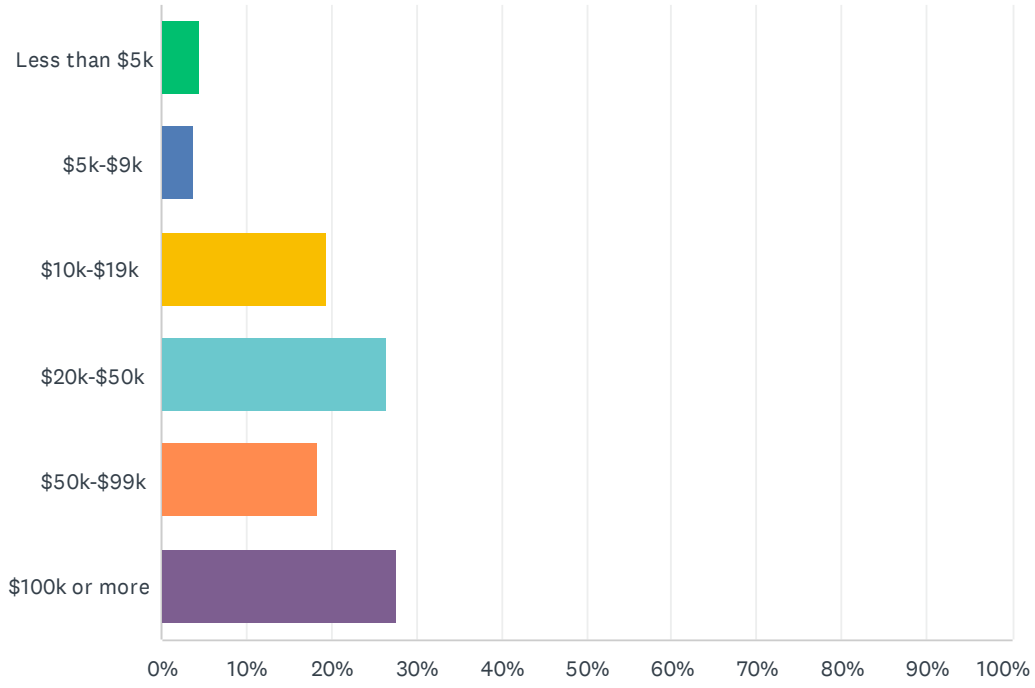
Answered: 165 Skipped: 5



ANSWER CHOICES	RESPONSES	
None	4.24%	7
1	54.55%	90
2	29.70%	49
3	6.67%	11
4	0.61%	1
5	0.00%	0
More than 5	4.24%	7
TOTAL		165

Q8 In your experience, what are the average assets held on trust by a SME trustee?

Answered: 159 Skipped: 11



ANSWER CHOICES	RESPONSES	
Less than $5k	4.40%	7
$5k-$9k	3.77%	6
$10k-$19k	19.50%	31
$20k-$50k	26.42%	42
$50k-$99k	18.24%	29
$100k or more	27.67%	44
TOTAL		159

Q9 Do you have any other comments/suggestions/ideas regarding the need for reform of trusts in insolvency

Answered: 57 Skipped: 113

#	RESPONSES	DATE
1	Needs to be amendments to permit external administrators to deal with trust assets broadly on the same basis as for company assets (and without the need to apply for that power), and for the same indemnities and priorities to be applied to proceeds of trust assets	11/19/2021 3:16 PM
2	Theoretically, the party most likely to oppose the action of the liquidator is the beneficiaries of the trust, who in most cases is the person that appointed the liquidator, so it is unlikely to happen. Creditors don't know or care. In my experience most liquidators are not applying the be receiver because there is no threat to their actions.	11/19/2021 11:13 AM
3	The government should consider the recommendations of the Hamer Report regarding insolvent trading trusts.	11/18/2021 2:35 PM
4	Most Directors do not realise that the Trust is trading they are set up by their accountant.	11/18/2021 11:41 AM
5	I am a lawyer and haven't advised on many SME insolvent administrations - hence not answering many of the questions. In my experience many groups of companies trade through trusts with little appreciation of the difference between a trust and a company. Our firm's view is that if a liquidator is appointed to a trading trust entity with an ipso facto ejection clause, an application must be made to the Court. We would always estimate $10k - $20k for an application. If it's not opposed, it will be less than that, but still in the sphere of $5K - $10k.	11/18/2021 11:04 AM
6	Would be great if Legislation was amended to fix the Company in Liquidation / Liquidators entitlement, and avoid the Court Process. I would also point out that on occasion related parties use the Court process as a way of defeating the Liquidators / creditors rights to Trust property	11/18/2021 10:50 AM
7	Where a trustee becomes insolvent, the EXAD should be run by a liquidator who is required to account to the various stakeholders - current situation of appointing a Receiver (typically the same person as the Liquidator) is unnecessarily complicating the process. All stakeholders should have the opportunity to review the conduct of the liquidator - how this may be drafted in statue - leave that to the legal brains' trust! What you have not asked in your survey is how many times has an insolvent trustee been removed prior to the EXAAD appointment - and left without funds/assets to challenge the new trustee and to recover assets pursuant to right of indemnity - this asset protection strategy is very frustrating and expensive to circumvent. I answered qu. 7 with "1 application", noting that there will likely be a number of appearances before the Court and numerous interlocutory applications.	11/18/2021 10:50 AM
8	There should definitely be reform to permit the automatic appointment of the insolvency practitioner as the receiver of the trust assets	11/18/2021 10:23 AM
9	My concern is that law reform confined to trading trusts will further complicate what is already a fragmented and complex legal regime. I would like to see trust-related reform as part of a broad-based review of the corporate and personal insolvency regimes.	11/18/2021 10:15 AM
10	It is simply not commercial to go to Court to dealing with insolvent entities that are a trustee. It just adds to the red tape and bureaucracy and legislative reform will simply the process. It is much more important than the SBR and simplified liqudiation reforms rushed through.	11/18/2021 10:07 AM
11	Trading trusts appear to be primarily used to manipulate income, defeat creditors and/or impede the role of insolvency practitioners - having to apply to court tio do our job despite being already appointed is ridiculous	11/18/2021 10:06 AM
12	Need inconsistent case replaced by legislation	11/18/2021 10:04 AM
13	It is cost prohibitive to have to seek court approval to deal with trust assets in small liquidations. If applications are made then there are no assets left to pay for the work that we need to do to liquidate the business. The Courts generally 'rubber stamp' the applications as 99% of the time they are uncontentious. Its a waste of Court time and legal fees.	11/17/2021 9:44 PM
14	This is a reform that is long overdue - we either need a way of ensuring the trust is dealt	11/17/2021 2:40 PM

	with in an EXAD, or a cost effective way of dealing with the trust after liquidation (rather than applying to court) - perhaps an application to a specific area of ASIC?	
15	I am a solicitor and not a liquidator however in my experience when advising liquidators and creditors in administrations involving a trading trust it is very common to find that creditors did not realise they were trading with a a trustee and are bemused by the expense and time needed for the affairs of the whole enterprise to be wound up and the available assets distributed. I find it surprising that the corporations legislation does not deal clearly and unequivocally with this issue and consequently the area is urgently in need of reform. The system should operate so that only the most unusual circumstance should necessitate a directions application to the court. An insolvent trading trust is not unusual. Otherwise the legislation should provide sufficient clarity for the relevant practitioner to enable them to carry out their tasks.	11/17/2021 11:53 AM
16	Change the law ASAP. There is no practical impact to any stakeholders and it adds an excessive cost burden for no real benefit, which results in less funds available to pay outstanding employee entitlements and unsecured creditors	11/16/2021 10:01 PM
17	Please note above is from the perspective of a lawyer briefed by appointees.	11/16/2021 6:19 PM
18	There are particular complications in retrieving the books and records of a trading trust to enable the winding to be completed properly.	11/16/2021 12:32 PM
19	one of the issues is that where there is a trust involved, it takes time to apply to the Court, but how do you disclaim leased premises that you have no power over	11/16/2021 11:47 AM
20	If a Trustee company's sole business is to act as Trustee of a Trust and there is no evidence of intention to replace the Trustee prior to liquidation, then trust assets should be considered company assets. Otherwise, creation of a trust should be seen to be nothing more than a creditor defeating structure	11/16/2021 11:04 AM
21	The Corps Act should be amended such that trust and company insolvencies are dealt with in the same manner.	11/16/2021 10:38 AM
22	Two suggestions for trustee liability: 1. If there remains trust creditor claims after the realisation of all trust assets then they could claim against a corporate trustee but only to the extent the corporate trustee has assets. 2. Corporate trustee liability for insolvent trading, similar to the operation of Corps Act s588M.	11/16/2021 10:03 AM
23	Include a field in the register of companies that requires disclosure as to whether the company is a trustee of a trust (or trusts) and require those trusts to be named and their ABNs disclosed.	11/16/2021 9:50 AM
24	The fundamental difficulty is that trust law is regulated by the States and differs between states slightly. Also the ABN system does not record identity of trustee of an trading trust of changes in those trustees - if it did this would solve many problems (provided the record is kept up to date with changes of trustee)	11/16/2021 9:31 AM
25	Simply legislate that for a trading trust with less than 100K (indexed) where trustee is not trustee of any other trusts, that liquidator automatically has power over trust assets (as was the practice for 50+ years)	11/16/2021 7:50 AM
26	There is no reason in insolvency why the liabilities of a trading trust should not be treated in the exact same way as a company trading in its own right, i.e. the priorities set by the legislation. There is no policy reason for this difference and that should be the cost of employing a trading trust.	11/16/2021 7:44 AM
27	The law needs to be amended so that trusts are treated the same as a company in a liquidation or bankruptcy scenario. The need for an application to court is an imposition that makes the process uncommercial and unnecessarily over complicated and costly.	11/16/2021 7:34 AM
28	The court costs are likely to be significantly less than the additional cost the EXAD incurs in dealing with issues that the existence of a trust necessitates.	11/15/2021 7:50 PM
29	Our practice tends to deal with more medium and larger entities, where asset values are higher. We are usually aware of trading trusts ahead of the appointment and are aware of the steps required to deal with the assets. However, directors are seldom, if ever aware of the implications in an insolvent scenario. Further, there are questions relating to how trust assets might be dealt with in a pooling scenario.	11/15/2021 7:22 PM
30	It is my intention to make submissions to Treasury directly on the approaches required	11/15/2021 6:39 PM
31	Clarify priorities of respective trustees. Clarify priorities of unpaid present entitlements/distributions.	11/15/2021 6:13 PM

32	Not sure what this survey seeks to achieve The issue is to avoid Court costs required to deal with the trust assets, that cover the right of indemnity. The right of indemnity in my view is property of the Corporate Trustee, it should simply be a realisation process. Maybe more complicated Trusts might be a different kettle of fish. And while we are on Tusts how do liquidators recover the Trust assets when a breach Corporation Law would ormally extinguish the right of indemnity against Trust asssets eg insolvent trading. Are we dudding the innocent beneficaries.????	11/15/2021 5:50 PM
33	legislation on how all classes of balance sheet items and parties to the trust are to be treated eg UPEs, beneficiaries, employees. Remove the ambiguity around these items	11/15/2021 5:38 PM
34	There needs to be a simple consent form from the director(s) of the corporate trustee, that can be signed with other liquidator appointment documents at the time of engagement, which allows the liquidator to deal with trust assets. This consent may need to be signed immediately prior to the liquidation to remove the clause terminating the trustee on liquidation. There should also be a seperate Rocap required for directors of a corporate trustee to complete for assets/liabilities/activities of the trust.	11/15/2021 5:36 PM
35	(1) Liquidator/Trustee in bankruptcy of insolvent trustee should have automatic access to assets of the trust for debts incurred on behalf of the trust without need for application to Court; (2) Trust Deed provisions whereby insolvent trustee is automatically removed as trustee upon insolvency should be banned; (3) if the settlor is a related party, he/she should not be able to appoint a new trustee upon the insolvency of the old trustee - the ability to merely change trustees is a very effective Phoenixing tool!	11/15/2021 5:20 PM
36	remove the unnecessary added layer of court appointed receiver to a trading trust. Windup or sequestration order of the trustee should automatically attach the assets to the trustee for indemnity purposes.	11/15/2021 5:19 PM
37	Primarily trading trusts are instituted as a tax effective strategy with the added benefit of asset protection an afterthought/secondary consideration. Few directors have any understanding of the legal implications of trust structure. Their advisors often don't prepare separate accounts for the trust and the corporate trustee further muddying the waters. Where corporate is a trustee of multiple trusts additional issues arise, none of which have been definitively resolved by case law. SME liquidations can rarely afford nor will it be commercial to apply to court for an appointment of a receiver of trust assets. A statutory regime for dealing with trusts in insolvency is required and should greatly improve outcomes for creditors.	11/15/2021 5:09 PM
38	Not at this time	11/15/2021 5:07 PM
39	A public register would assist with transparency to counterparties seeking to assess/ manage commercial credit. Legislative reform could provide external administrators of corporate trustees with default control of trust assets to satisfy the corporate trustee's right of indemnity. This would improve the efficiency and stakeholder outcomes in external administrations.	11/15/2021 4:55 PM
40	The law needs to catchup with business reality. The current system is clunky, inadequate and involves unnecessary court applications.	11/15/2021 4:51 PM
41	It is an extremely rare occasion where the Trust is not insolvent. Hence, the beneficiaries of the Trust typically have no residual interest as there are insufficient funds to pay creditors in full. It is difficult to rationalise the current position from a practical / commercial perspective. Furthermore some Judges are completely uncommercial and out of touch in their handling of applications to Court involving insolvent trading trusts.	11/15/2021 4:37 PM
42	The lack of a record of trustees allows change of trustee documents to be located at any time after the appointment, requiring court directions adding to the costs	11/15/2021 4:35 PM
43	The issue of external administrations to trusts (with a corporate trust) was considered many years ago by the then CAMAC. CAMAC was strongly of the view that corporate trustees and trusts needed to be specifically addressed at that time. Since then (without any change or new legislation) the courts have often had to deal with bespoke orders to address these circumstances.	11/15/2021 4:35 PM
44	These tend to be set up as tax structures only and not intended to have the broader legal implications that actually come with trusts and trust property. The manner in which directors typically go about trading, prior to an insolvency appointment, has no regard to the trust structure.	11/15/2021 4:32 PM
45	Trusts should be registered, regulated and the key details publicly available just like the requirements for corporations. Chapter 5 of the Corporations Act should apply to Corporate	11/15/2021 4:28 PM

	trustees and trust property held by them to avoid the need for Court applications to deal with the property of insolvent trustees.	
46	The heavy use of trusts is often identified in bankruptcy administrations, where there is often a routine of using trusts, with corporate trustees; but without disclosure of the trust relationship.	11/15/2021 4:27 PM
47	Each Trading Trust is a separate entity for tax purposes it holds its own ABN and TFN for example and therefore there should be an ability to make an appointment directly to that unique entity not just to the trustee	11/15/2021 4:27 PM
48	I am a registered trustee (not a liquidator) and thus have answered the questions solely with regard to my bankruptcy appointments. I would certainly like to see any future law reform extend to bankruptcies which involve a trading trust in order to provide a greater and more timely return to creditors.	11/15/2021 4:26 PM
49	change the law so that external administrator will just become trustee of the trust and remove bare trustee	11/15/2021 4:20 PM
50	Consider legislative reform that applies an enterprise focus to insolvency appointments of this nature that effectively pools the assets and creditors of the enterprise undertaken by the Trustee and the Trust. Then apply the existing insolvency regimen for either individuals or companies to the enterprise. ie CVL, VA, etc for the enterprise. Legislate an acceptable mechanism for dealing with ipso facto clauses in older Trust Deeds pre-appointment, if can be undertaken by consent.	11/15/2021 4:20 PM
51	The current law and necessity to involve the court is severely dysfunctional and it bewilders me that it has not been rectified to date. There is a serious need for reform, this reform is needed far more than the SME restructuring reform was. The cost of dealing with the trust structure often renders it uncommercial to realise and deal with material assets. It causes significant delays in the liquidation process. I've also had instances where this law has prevented a liquidator from being able to secure assets and other instances where it was utilised as a mechanism to defeat creditors.	11/15/2021 4:16 PM
52	Remove the need to apply to the Court. Adds a cost for no value.	11/15/2021 4:14 PM
53	• Will corporate and personal Trustees be dealt with in the same way and any flow on effects of such (together with any interaction between the Corporations Act and Bankruptcy Act); • Voidable/Antecedent Transactions recovery provisions of Trustees of a trust; • Interaction between State Law and proposed Federal Law; • Requirement for Trustees to disclose that they are acting in capacity of a trust (and the name of that trust) if purchasing assets and/or incurring debt and/or conducting a business (including requirements of States registrations – eg NSW Land Property Information);	11/15/2021 4:13 PM
54	It is necessary that the liquidator is able to realise trust assets without needing to be appointed as a receiver. The costs of court applications are often greater than value of the trust assets.	11/15/2021 4:13 PM
55	A very common problem which adds significantly to costs in applying for the appointment of a receiver, often which questions commerciality depending on the value of assets in the trust, yet cannot be ignored.	11/15/2021 4:12 PM
56	a register of trusts and their trustees should be mandatory Trust deed should be filed with ASIC Many instances in SME where is economy in going to court if assets less than or much the same as cost to go to court	11/15/2021 4:10 PM
57	I have answered this as a lawyer. The filing fee alone for Court applications for appointment of an external administrator as receiver is a significant expense. If Court applications are going to be required in these matters, it should be a simplified process not involving an appearance, and with a reduced filing fee. If beneficiaries take objection, they should bear the costs of bringing the application, not creditors.	11/15/2021 4:09 PM