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**INSOLVENCY OF REGISTERED MANAGED INVESTMENT SCHEMES**

by  
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To Australians and New Zealanders, “collective investment vehicle” is synonymous with “trust”. Both countries have long been familiar with the unit trust structure under which property is held by a trustee and turned to account by a management company; and the beneficial interest in the trust fund is divided into units evidenced by certificates held by investors. This is the model that the High Court had before it more than half a century ago in *Charles v Federal Commissioner of Taxation* (1954) 90 CLR 598.

Tom Hadden says in his book “Company Law and Capitalism” that, in England, unit trusts were popular in the mid-nineteenth century but declined after *Sykes v Beadon* (1879) 11 ChD 170 and did not revive when that decision was reversed in *Smith v Anderson* (1880) 15 ChD 247. The revival came in the 1930s as a means of avoiding the increasing controls which were being imposed on the flotation of new issues on the stock market. It was this revival that prompted the *Prevention of Fraud (Investments) Act* 1939.

In Australia, responsibility for the growth and popularity of unit trusts probably rests with the tax system and its separate taxation of the income of companies without, until more recent years, related tax credits for shareholders on their dividends.

Today in Australia, the “single responsible entity” model holds sway as a result of the reforms that came from the report “Collective Investments: Other People’s Money” (1993). But trust principles remain at the forefront. Indeed, the resultant legislation (now reflected in Chapter 5C of the *Corporations Act* 2001 (Cth), “Managed Investment Schemes”) says in unambiguous terms in s 601FC(2):

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\* A Judge of the Supreme Court of New South Wales

“The responsible entity holds scheme property on trust for scheme members.”

This, of course, refers to a registered managed investment scheme. The effect of s 601FC(2) is that adoption of the registered managed investment scheme structure brings with it an unavoidable overlay of trust law: *Investa Properties Ltd v Westpac Property Funds Management Ltd* (2001) 187 ALR 462. I do not say this in any negative way. The trust concept imposes requirements of good stewardship and selfless attention to beneficiaries’ interests. That can only be good. But it brings with it the need in some areas to reconcile the statutory scheme with principles of trust law – including those sourced in trustee legislation. It was held in *Re Mirvac Ltd* (1999) 32 ACSR 107 and a number of later cases that the responsible entity under a registered managed investment scheme is a “trustee” for the purposes of that legislation.

My focus in this presentation – ten years after the enactment of the *Managed Investments Act* - will be upon financial stress and the registered managed investment scheme, the particular form of collective investment arrangement that the legislature has cast in the trust mould. I shall leave to one side the now quite extensive case law about winding up unregistered schemes.

How meaningful is it to speak of the insolvency of a registered managed investment scheme? The truth is that a trust or a managed investment scheme cannot become insolvent. It is not a person. It cannot sue or be sued. It does not own property. It is the trustee (or responsible entity, in registered scheme terminology) that owns property and owes money. Debts are incurred by the responsible entity and it is to that entity that creditors must look for payment. The responsible entity, as trustee, in turn, looks to rights of indemnity and reimbursement once the creditor’s demand is made.

The *Corporations Act* flirts with a concept of insolvency of a registered managed investment scheme. Section 601ND(1)(b) allows the court to intervene where, in summary, there is unsatisfied execution on a judgment against the responsible entity “in its capacity as the scheme’s responsible entity”. In such a case, the court may make an order directing that the responsible entity wind up the scheme. The legislation does not

say what winding up a scheme is or entails. Nor does it prescribe a method of winding up. The legislation says that a scheme's constitution may state circumstances in which winding up is to occur: s 601NA. It also says that the constitution must make adequate provision for winding up the scheme: s 601GA.

Under the general law, there is no such thing as the winding up of a trust – if, by winding up, we mean a compulsory process which sees assets collected, claims ascertained and paid and any surplus passed to beneficiaries. A court of equity has no jurisdiction to put an end to a trust. On the contrary, it must protect and uphold a trust pending vesting of trust property in beneficiaries. There is valuable discussion of these matters in the recent judgment of Einstein J in *Westfield Queensland No 1 Pty Ltd v Lend Lease Real Estate Investments Ltd* [2008] NSWSC 516. The registered scheme provisions change this. They make specific provision for the winding up of such a scheme, making it clear, at the same time, that a winding up, however initiated, will be undertaken by the responsible entity (or perhaps another person appointed by the court); and that the mode of winding up will come mainly from the constitution, with the possibility of supplementation by orders of the court: s 601NE(1), s 601NF(1) and s 601NF(2).

Let us look more closely at the situation dealt with by s 601ND(1)(b), that is, where there is a judgment and unsatisfied execution against the responsible entity “in its capacity as the scheme's responsible entity”. To act in its “capacity” as trustee, an entity must, at the least, act in due execution of the trusts of which it is trustee. It must exercise some power exercisable by it as trustee. And it must act for some purpose related to the trust property. Where the act is the making of a contract, it must be clear from the contract itself or from the surrounding circumstances that the entity contracted as trustee: *Re Interwest Hotels Pty Ltd* (1994) 12 ACSR 78.

But one wonders about the significance of the return unsatisfied of a writ of execution following a judgment against a responsible entity in its responsible entity capacity. Trust property itself cannot be taken in execution by the creditors of a trustee: *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 367. The trustee's own beneficial interest in the whole of the trust assets (to which I shall come in a moment) is an equitable interest that is, of its nature, inseparable from the obligations of the trustee. That interest is therefore, I suggest, incapable of being taken in execution even in

jurisdictions where the sheriff is empowered by statute to take equitable interests in specific property under the common law process of execution of a writ of attachment.

It follows, in my view, that an unsuccessful attempt at execution at law says nothing about the sufficiency of the trustee's rights against the trust property to meet the creditor's claim established by judgment. It merely shows that the trustee has no non-trust assets; and while that may indicate that the responsible entity itself is financially stressed and perhaps should be replaced, it says nothing about the financial health of the scheme or venture.

Section 601ND has a second leg to it: s 601ND(1)(a). It allows a court ordered winding up of the scheme on the just and equitable ground. An application under that part of the section was refused in *Re Stacks Managed Investments Ltd* (2005) 219 ALR 532. The scheme was already being wound up. An order was made in the subsequent case of *Re Orchard Aginvest Ltd* [2008] QSC 2. Interestingly, I think, the view that winding up of the scheme was just and equitable was based on what the judge unambiguously described as the insolvency of the scheme. Despite this, it is too early to say that a concept of insolvency of a managed investment scheme is meaningful or to see the alternative ground in s 601ND as allowing some form of winding up in insolvency. Conflicts of interest and other aspects of malaise of concern to equity were also at work.

What is the trustee's interest in the trust property? It is an interest that comes from the right to resort to the trust property to defray liabilities properly incurred in the execution of the trust or for reimbursement where the trustee has paid out of the trustee's own money. Although it now finds statutory expression in trustee legislation, the right was said by Lord Eldon in *Worrall v Harford* (1802) 8 Ves Jun 4 to be an incident of the office of trustee. In the case of a registered managed investment scheme, there is a statutory requirement that the responsible entity's rights to be indemnified out of scheme property for liabilities or expenses incurred in relation to the performance of its duties be specified in the constitution and be available only in relation to the proper performance of those duties: s 601GA(2)

This right in respect of trust property is often described as a charge or lien: see, for example, *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319. In *Chief Commissioner*

of *Stamp Duties v Buckle* (1998) 192 CLR 226, the High Court preferred to regard it as a proprietary right constituting a beneficial interest enjoying priority over the beneficial interests of the beneficiaries. And as was emphasised by the High Court subsequently in *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98, the “trust fund” enjoyed by the beneficiaries cannot be identified or quantified until the trustee’s superior right has been quantified and satisfied. And the trustee’s right is inseparable from and co-extensive with the trustee’s obligations, both those already discharged and those incurred but not yet discharged.

The trustee’s rights in the respects just mentioned are fragile things. And their fragility may rebound upon creditors. The beneficiaries’ interest in trust property will not be postponed to a beneficial interest of the trustee unless the trustee’s interest exists. If the trustee’s interest does not exist, the trust property is shielded from the claims of the trustee’s creditors.

The trustee’s rights arise and exist only to cover or recover expenses incurred in conformity with certain conditions. Those conditions, according to Brooking J in *RWG Management Ltd v Commissioner for Corporate Affairs* [1985] VR 385, require that the expenses are properly incurred in the execution of the trust, so that the right is lost if the trustee’s powers are exceeded or there is a breach of the duty of reasonable diligence and care.

This duty of reasonable diligence and care can pose problems. On principle, one might think, a trustee does not exercise reasonable diligence and care if the trustee’s conduct is negligent in the tortious sense. But that is not so. It has long been recognised that a trustee’s liability for damages in tort may be recouped out of trust property, as long as the relevant acts or omissions occurred in the pursuit of activities within the scope of the trust: *Bennett v Wyndham* (1862) 4 DJ&J 259; *Re Raybould*; *Raybould v Turner* [1900] 1 Ch 199.

The line of demarcation was considered by the New South Wales Court of Appeal in *Gatsios Holdings Pty Ltd v Nick Kritharas Holdings Pty Ltd* [2002] NSWCA 29. The trustee of a trading trust was found to have engaged in misleading or deceptive conduct in the course of carrying on the business. A statutory liability for damages arose

accordingly. In addressing the availability of the trustee's right to resort to trust property, Meagher JA said that the right of indemnity does not exist if the conduct in question is a breach of trust or is criminal in nature or fraudulent. He found it "difficult to formulate any other limitations". In particular, he did not consider that there is any limitation defined by reference to what is "reasonable" or "proper".

The other members of the court agreed that the trustee's breach of the consumer protection statute did not make unavailable the right to resort to trust property. But they expressed reservations about Meagher JA's rejection of the "reasonable" and "proper" criteria. Mason P was not persuaded that those criteria are meaningless. Spigelman CJ, by contrast, found "more helpful than the use of conclusionary terminology of whether or not conduct was 'proper' or 'reasonable'" the nineteenth century approach in *Cotterell v Stratton* (1872) LR 8 Ch App 295 and *Corrigan v Farrelly* (1896) 7 QJL 105: whether the trustee's conduct amounts to "a violation or culpable neglect of his duty".

This decision was sharply criticised by the Court of Appeal of Victoria in *Nolan v Collie* (2003) 7 VR 287. It was seen as leaving "this important area of trust law rudderless and in a state where mischievous trustees might seize upon an almost unfettered right to indemnity as justifying improper depredation of trust funds, contrary to their obligation not to abuse their position by making it 'a means of profit or benefit' to themselves". Ormiston JA, who delivered the judgment of the court, then said:

"To my way of thinking the conventionally stated test as to expenses 'properly incurred' is merely a convenient shorthand to describe those restraints applicable to trustees who would seek to look to trust funds for the payment of their expenses and other trust liabilities. It also has the advantage of succinctly expressing the notion of propriety as underpinning a trustee's relationship with the trust estate and the beneficiaries. One must not forget, moreover, that in *Re Beddoe*, seen as one of the leading authorities, Lindley LJ explained that in cases of doubt the trust estate should bear the trustee's costs, and that: 'The words "properly incurred" in the ordinary form of order are equivalent to "not improperly incurred"'. The proposition was converted by another respected judge, Bowen LJ, who was perhaps more familiar with courts of common law, into 'a proposition in which the word "properly" means reasonably as well as honestly incurred'. His Lordship added that, while trustees ought not to bear expenses and liabilities personally 'on account of mere errors in judgment which fall short of negligence or unreasonableness', nevertheless 'mere *bona fides* is not the test'. A L Smith LJ concurred with the other members of the court."

In the case of a registered scheme, it is provided, as already noted, that the responsible entity's right of indemnity out of scheme property must be available only in relation to the "proper performance" of the responsible entity's duties. It seems to me that this "proper performance" test is likely to take its content from the general law approaches.

What might in some cases be an added dimension comes from s 601FH. It deals with the situation where the company that is the registered scheme's responsible entity is being wound up. The section does two things. It makes void against the liquidator any provision of the scheme's constitution or another instrument that purports to deny the company a right to be indemnified out of scheme property that the company would have had if it were not being wound up. It then says that a right of the company to be indemnified out of scheme property may only be exercised by the liquidator.

Section 601FH does not create any right of indemnity. The first aspect of it merely preserves for the liquidator a right that the company would have had if it were not being wound up. The preservation is against the effects of any contrary provision in the constitution or another instrument.

The underlying assumption here is that a trustee can be deprived of the right of indemnity by a provision in the trust instrument or some other instrument. That is an assumption that should be examined.

It is said in "Halsbury's Laws of Australia" (at 430-3795):

"Except in Queensland and South Australia the trust instrument may expressly provide that the trustee's right to indemnity and reimbursement may be denied or reduced in specific circumstances, or generally."

Halsbury goes on to say more about particular provisions.

It is true that in all States and Territories, there is a statutory provision which, in effect, confirms or restates the general law right of resort to trust property. In Queensland, it is provided that the statutory right applies whether or not a contrary intention is stated in the trust instrument. It was this that led McPherson J to observe in

*Kemtron Industries Pty Ltd v Commissioner of Stamp Duties* [1984] 1 Qd R 576 (and to confirm in *Ron Kingham Real Estate Pty Ltd v Edgar* [1999] 2 Qd R 439 and *Jessup v Queensland Housing Commission* [2002] 2 Qd R 270) that the right of indemnity cannot be excluded. In some jurisdictions, by contrast, it is provided that the statutory right applies subject to any contrary expression in the trust instrument.

The third possibility is reflected in the law of South Australia where the statutory right is conferred in terms which say nothing either way about the capacity of the trust instrument to exclude or modify it. In *Moyes v J & L Developments Pty Ltd (No 2)* [2007] SASC 261, DeBelle J concluded that, as a result, the indemnity could not be excluded by the trust instrument; nor could the trustee waive it as it existed for the benefit of the trustee's creditors as well.

I am not at all sure that the position in New South Wales is as portrayed by Halsbury. The provision creating or conferring the right of indemnity is s 59(4) of the *Trustee Act* 1925 which does not appear to be supplemented or qualified by either an entrenching provision or one allowing exclusion or modification by the trust instrument. Section 59(3) is a provision of the latter kind but applies only to s 59(1) and s 59(2). It must follow that s 59(4) takes effect in the way described by DeBelle J in relation to the South Australia equivalent. That may well explain Santow J's preference in *J A Pty Ltd v Jonco Holdings Pty Ltd* (2000) 33 ACSR 691 for the approach taken in *Kemtron*. In *Metropolitan Petar v Macedonian Orthodox Community Church St Petka Inc* (No 2) [2007] NSWCA 287, Ipp JA described s 59(4) as "an empowering provision of general application".

Returning to the registered scheme and the first aspect of s 601FH of the *Corporations Act* – the aspect that preserves the right of indemnity out of trust property when the responsible entity is subject to winding up – the position seems to be that the section potentially has work to do where the operative law is that of an Australian jurisdiction other than Queensland, South Australia and New South Wales – or, perhaps, the law of some place outside Australia.

Nothing has been said to this point about a trustee's right to be indemnified by the beneficiaries. It was said by Lord Lindley for the Privy Council in *Hardoon v Belilios*



[1901] AC 118 that “the plainest principles of justice require that the cestui que trust who gets all the benefit of the property should bear its burdens unless he can shew some good reason why his trustee should bear them himself”. His Lordship was speaking of a beneficiary of full capacity.

It was recognized in *Hardoon v Belilios* itself that the trustee’s right of recourse to beneficiaries may be excluded by the trust instrument or surrounding circumstances. As to the latter, Lord Lindley himself, in *Wise v Perpetual Trustee Co Ltd* [1903] AC 139, saw a social club in which members were perpetually changing and were required to pay no more than their annual subscriptions as an example of excluding circumstances.

One might be inclined to consider the circumstances of a widely held unit trust to be similar. But it appears that they are not. Perhaps the commercial aspect makes the difference. Unitholders were held liable to indemnify the trustee of a unit trust scheme in both *Causley v Countryside (No 3) Pty Ltd* (unreported NSWCA 2 September 1996) and *Fitzwood Pty Ltd v Unique Goal Pty Ltd* [2002] FCAFC 285. This was consistent with the earlier case of *JW Broomhead (Vic) Pty Ltd v JW Broomhead Pty Ltd* [1985] VR 891. In each case, however, the units were closely held.

If investment is sought from passive investors, the managed investment scheme constitution will almost certainly contain a provision excluding the trustee’s right of indemnity against beneficiaries personally. According to *Hardoon v Belilios*, such provisions mean what they say and are effective. But this may be subject to a public policy exception discussed by Young J in *McLean v Burns Philp Trustee Co Ltd* (1985) 2 NSWLR 623. An example there given was “a trust which is so geared to enable a person to avoid his creditors by hiding behind the vehicle of a trust”.

Uncertainty of the kind that comes from such a broad statement is anathema to the investment community. On three occasions in the last quarter of a century, Australian law reform bodies have advised lawmakers that limited liability of unitholders should be legislated for registered schemes or those exempt from registration. In August 1984, the Companies and Securities Law Review Committee recommended to the Ministerial Council that the liability of unit holders in public unit trusts be limited in the same way as the liability of shareholders of companies. In 1993,

the Australian Law Reform Commission and the Companies and Securities Advisory Committee, in their joint report "Other People's Money", made the same recommendation to government. The recommendation was repeated by CASAC in its own report "Liability of Members of Managed Investment Schemes" in 2000.

On each occasion, the concern was the same: that the general law left an uncertainty that served neither the interests of investors nor the interests of creditors. And on each occasion, the reaction was the same: the law was not changed.

I should mention, for completeness, the third possible source of recoupment for the corporate trustee. Under s 197 of the *Corporations Act*, a director of the trustee company will be required to discharge a liability incurred by the company as trustee where the company cannot do so and is not entitled to indemnity out of trust assets because of breach of trust, exceeding of powers or denial of indemnity by the trust instrument.

Let us now trace through what might actually happen when a registered managed investment scheme assets are insufficient to meet liabilities, the venture is trading unprofitably and cash flow is negative. The outcome will differ according to whether the responsible entity is rich or poor in its own right; whether it has substantial free assets apart altogether from the managed investment scheme.

Take the case of the independently wealthy responsible entity. As a trustee, it is personally responsible for the debts referable to the scheme (I am assuming here that creditors have not agreed to limit their recourse against the trustee personally so that they can resort to the trust assets only). Its right of recoupment out of trust property will ensure that whatever can be obtained from that source will be obtained and used to pay debts. If, by some chance, the right of recourse to beneficiaries has not been excluded, the responsible entity will resort to that also. And if any balance remains unrecouped, the rich responsible entity will ruefully put its hand into its own pocket and be poorer to the extent of that balance.

This is the result dictated by the law of trusts. Does the statutory scheme indicate any other result? The analysis just outlined supposes that it is consistent with the duties

of the responsible entity as a trustee simply to realize what can be realized to enable creditors' pressing claims to be reduced. That does not fit with the idea of an ongoing venture that was no doubt envisaged by the founders and embedded in the constitution. But even if the constitution does not allow an early termination or vesting in case of financial stress, the *Corporations Act* probably does, either on the basis adopted in *Re Orchard Aginvest Ltd* or under s 601NC which allows the responsible entity to initiate action directed towards winding up of the scheme if it considers that its purpose cannot be accomplished – a view likely to be clearly open if the scheme is no longer financially viable.

Consider next the case of a financially non-viable scheme with a poor responsible entity – a company with only just enough independent financial substance to support its licensed status and which has the operation of the particular scheme as its sole activity. In this case, it will not be long before a pressing creditor obtains an order for the winding up of the company in insolvency. That will permit ASIC to cancel the company's licence (s 915B(3)(b)) so that it no longer meets a basic requirement for being a responsible entity (s 601FA). There will then be grounds for ASIC or a member of the scheme to apply to the court for the appointment of a temporary responsible entity (s 601FN). The court may make an appointment if it is satisfied that it is in the interests of members to do so (s 601FP).

The Act makes it clear that a temporary responsible entity is just that: a responsible entity which holds office on a temporary basis only and has the specific task of calling a meeting of the scheme's members with a view to the appointment of a new responsible entity: s 601FQ. But a temporary responsible entity is still a responsible entity, at least from the time at which it is named in ASIC's registration of the scheme. That is made very clear by the s 9 definition of "responsible entity".

If there is going to be an appointment of a temporary responsible entity, there must first be some qualified company willing to be appointed, even if only temporarily. That, I suggest, will be a problem. When a new responsible entity takes office, it becomes, under s 601FS, the statutory inheritor of the rights, obligations and liabilities of the old responsible entity in relation to the scheme. The workings of that section were examined in both *Investa Properties Ltd v Westpac Property Funds Management Ltd* (above)

and *Syncap Management (Rural) Australia Ltd v Lyford* (2004) 51 ACSR 223. In our postulated situation, the successor will come to owe the debts that brought the old responsible entity undone and to have the rights of recoupment that were insufficient to allow it to continue. Simple replacement of the responsible entity in liquidation therefore does not seem a practical possibility. The automatic vesting of the non-viable combination of liabilities and inadequate rights of recoupment must mean that, in the real world, there will never be a new responsible entity.

A possibility that would then spring to mind is that the court, in exercise of its general jurisdiction, might appoint a new trustee. White J recently observed in *Dreiberg v Bettles and Carter* [2007] NSWSC 1204 that “it is undesirable for an insolvent company in liquidation to remain as trustee”. In that case, the liquidators of the corporate trustee in liquidation were themselves appointed to be new trustees. But in the case of a registered managed investment scheme, it seems that a solution by way of appointment of a new trustee by the court is ruled out by s 601FJ(2) which makes ineffective any purported change of responsible entity that is not in accordance with Division 2 of Part 5C.2.

Is there a case for the liquidator’s seeking the appointment of a receiver by the court, as in, for example, *Bastion v Gideon Investments Pty Ltd* (2000) 35 ACSR 466? That, I suppose, would be a possibility if the trust assets were seen to be in some kind of jeopardy. There might then be a case for appointing a receiver to bring them into court to ensure that they were appropriately dealt with in the winding up. The appointment of a receiver, as such, would not seem to cut across the prohibition on the replacement of the responsible entity except as the statutory provisions allow. A receiver’s functions would complement those of the responsible entity which, although in liquidation, would remain as responsible entity.

Any scope there might otherwise be for the appointment of a receiver of the responsible entity’s own beneficial interest, as trustee, in the scheme assets would seem to be ruled out by the second aspect of s 601FH which says that the responsible entity’s right to scheme property can only be exercised by the responsible entity’s liquidator in case of winding up.

The only really feasible outcome in the situation of the independently impecunious responsible entity seems to be for the company in liquidation to remain the responsible entity. That raises the issue already noticed. A liquidator's duty is to wind up the affairs of the company. To the extent that the affairs include the holding of property on trust, with ongoing duties, the liquidator's first task, it seems to me, will be to find a way to bring the managed investment scheme to an end, either by the *Orchard Aginvest* means (if it is truly viable) or by resort to s 601NC.

There will be, in the winding up of the responsible entity company (whether it is independently rich or poor), a question about how the company's beneficial interest in the trust property – the interest that comes from the right of recoupment – should be applied in the winding up.

In this connection, the conflict between the appellate decisions in *Re Enhill Pty Ltd* [1983] 1 VR 561 and *Re Suco Gold Pty Ltd* (1983) 33 SASR 99 seems to be on the wane. I do not want to go into this matter in any depth. It will be recalled that the Full Court of the Supreme Court of Victoria held in *Enhill* that the fruits of the right or indemnity – or what was later characterised in *Buckle's* case as the preferred beneficial interest in the trust property – was available to the trustee's liquidator for application in the winding up generally; while the Full Court of the Supreme Court of South Australia held in *Suco Gold* that this was so only to the extent that anything remained after prior payment of the trust creditors.

The matter has not since been directly considered by an appellate court. The conflict was mentioned by the Court of Appeal of Victoria in *Arjon Pty Ltd v Commissioner of State Revenue* [2003] VSCA 213 and in *Nolan v Collie* (above). In the latter case, the judgment included the pregnant words, "if *Enhill* be correct".

The preponderance of opinion backs *Suco Gold*. Trust creditors are subrogated to the trustee's right of recoupment out of trust property. That right is measured by and applicable only towards the claims of trust creditors. In a winding up of the trustee, therefore, the trust creditors should enjoy the benefit of the trustee's preferred beneficial interest to the exclusion of the non-trust creditors. If there were no winding up, the non-trust creditors would have no expectation of sharing in the benefit of the right of

recoupment; and there is no reason why that should change when winding up intervenes.

The case I have not considered is that where the responsible entity has separate and independent activities that cause it to become insolvent, even though the scheme or trust remains on a financially healthy footing. That is not really a case of insolvency central to the collective investment and a simple replacement of the responsible entity under the statutory provisions should be feasible.

So there we have it. The provisions about managed investment schemes do not attempt to deal in any comprehensive way with insolvency. To the extent that they approach the matter at all, they do so on the basis of two of the foundations of the scheme of regulation: first, that the responsible entity must be a company of a particular kind; and, second, that the scheme property is held by the responsible entity as a trustee. From there, matters of insolvency are left to be dealt with according to company law and the law of trusts.

Lack of financial viability of the venture carried on as a registered managed investment scheme is likely, it seems, to lead to a winding up in insolvency of the company that is the responsible entity. And the winding up of the company will, in some way, have to prompt a winding up of the scheme. It will be impracticable to replace the responsible entity in liquidation because any successor responsible entity will become the statutory inheritor of the financially non-viable venture. It will be impracticable to resort to the general jurisdiction of the court to appoint a new trustee because the provisions about managed schemes displaces it. And it will be impracticable to seek to secure the right of indemnity out of trust property in the hands of a receiver because it is exercisable only by the liquidator of the responsible entity. Subject to all that, ordinary principles of equity and company law will determine the course of the administration of the company's insolvent winding up.

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Most trusts investing in real estate are "managed investment schemes" (MIS) under the Corporations Act 2001 (Cth) (Corporations Act). This is because they typically involve the contribution and pooling of money for investment in a scheme to produce financial benefits (e.g. rental return) where members receive "interests" (i.e. units) in the scheme and do not have day-to-day control over the operations of the scheme. MIS Registration. Failure to register the MIS in breach of the requirement to register may lead to the scheme being wound up by order of the Court. Additionally the Corporations Act imposes criminal penalties of 200 penalty units (or in the case of a body corporate, 1000 penalty points) and up to 5 years imprisonment. Certain schemes not managed investment schemes.

(1) This regulation is made for the purposes of paragraph (n) of the definition of managed investment scheme in section 9 of the Act. (2) An approved benefit fund (within the meaning of subsection 16B(1) of the Life Insurance Act 1995 ) is declared not to be a managed investment scheme. (3) A scheme (an insolvency litigation funding scheme ) that has all of the following features is declared not to be a managed investment scheme: (a) the scheme relates to a Chapter 5 body corporate; (b) the creditors or members of the body corporate provide funds

The RE of a number of insolvent schemes was itself insolvent. All the scheme assets were charged, so the RE's right of indemnity against trust assets and ability to recoup the costs of winding up the schemes, was worthless (a factor which, as the Court pointed out, also rendered nugatory any thought of appointing a separate liquidator). What happens if the extent of insolvency varies between the MIS: can the RE "raid" the assets of one MIS to pay for the costs of liquidating another? This was recently the subject of judicial consideration in *Trio Capital Limited (Admin App) v ACT Superannuation Management Pty Ltd & Ors* [2010] NSWSC 941. A voluntary administrator was appointed to an RE which managed several MISs. The RE itself had some cash. Insolvency is the state of being unable to pay the debts, by a person or company (debtor), at maturity; those in a state of insolvency are said to be insolvent. There are two forms: cash-flow insolvency and balance-sheet insolvency. Cash-flow insolvency is when a person or company has enough assets to pay what is owed, but does not have the appropriate form of payment. For example, a person may own a large house and a valuable car, but not have enough liquid assets to pay a debt when it falls due

Insolvency vs. Bankruptcy. Insolvency is a type of financial distress, meaning the financial state in which a person or entity is no longer able to pay the bills or other obligations. The IRS states that a person is insolvent when the total liabilities exceed total assets. A bankruptcy, on the other hand, is an actual court order that depicts how an insolvent person or business will pay off their creditors, or how they will sell their assets in order to make the payments.