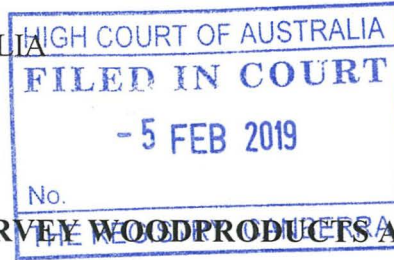


IN THE HIGH COURT OF AUSTRALIA  
MELBOURNE REGISTRY



No. M137 of 2018

BETWEEN:

**CARTER HOLT HARVEY WOOD PRODUCTS AUSTRALIA PTY LTD**  
Appellant

and

**COMMONWEALTH OF AUSTRALIA AND OTHERS**  
Respondents

**FIRST RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS**

## Part I – Certification

This outline is in a form suitable for publication on the internet.

## Part II – Outline

### A. First Issue – The *Corporations Act* priority rules apply

1. The definition of ‘property’ in s 9 of the *Corporation Act* is broad and inclusive: **RS[13]**.
2. By virtue of its right of indemnity, the trustee of a trading trust has a beneficial proprietary interest in the whole range of trust assets to the extent of the right of indemnity. The trustee’s proprietary interest arises by operation of law, and applies equally with respect to indemnity by way of recoupment or exoneration: **RS[14], [18]–[20]**.
3. A corporate trustee’s beneficial interest fulfils the statutory definition of ‘property of the company’. Accordingly, it is property to which the priority rules in ss 433 and 556 of the *Corporations Act* apply: **RS[15], [27]–[28]**.
4. It is a strong thing to deprive employee creditors of the statutory priority they have enjoyed for over 150 years. That statutory priority recognises a matter of high public policy,<sup>1</sup> reflected in many legal systems, and fulfils Australia’s international obligations.<sup>2</sup> **RS[10]–[11], [37]–[39]**.
5. On ordinary principles, the Court should prefer a construction of the statute that is consistent with such international obligations.<sup>3</sup>
6. Trading trusts are a well-known feature of commercial life. The *Corporations Act* must be construed against that background. ‘Trust property’ is not *ipso facto* excluded

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<sup>1</sup> To the authorities cited in RS[10] fn 12 should be added *Re Spectrum Plus* [2005] 2 AC 680 at 717–18 [97]–[98] (Lord Scott); *Jones v Matrix Partners* (2018) 354 ALR 436 (*Killarnee*) at 463 [112] (Allsop CJ), 480 [217]–[221] (Farrell J). The latter case is referred to in the Commonwealth’s written submissions as *Jones v Matrix Partners Pty Ltd*, but will be referred to as *Killarnee* in the Commonwealth’s oral submissions.

<sup>2</sup> The *Protection of Workers’ Claims (Employer’s Insolvency) Convention* referred to in RS[10] fn 11, ratified by Australia, has been provided to the Court: Supplementary joint book of authorities, vol 2, tabs 5–6, pp 787–99.

<sup>3</sup> *Momcilovic v The Queen* (2011) 245 CLR 1 at 37 [18] (French CJ); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 234 [247] (Kiefel J); *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31 at 50 [44] (French CJ and Kiefel J).

from the statutory scheme. To the contrary, this Court's decisions in *Octavo*, *Buckle* and *Bruton* recognise that:

- (a) the relevant 'property of the company' is the trustee's (not the beneficiaries') proprietary interest;
- (b) where debts properly incurred by the trustee in that capacity exceed the value of the assets held on trust, no person other than the trustee has any direct or independent interest in the trust property;
- (c) the trustee's beneficial interest in the assets forms part of the estate divisible in a statutory insolvency of the trustee: **RS[15]–[17], [26]**.

- 10 7. Nothing in the text or context of the *Corporations Act* requires 'property of the company' in s 433 to be read down in the manner asserted by the appellant. Neither the text of the *Corporations Act*, nor any implication from it, constrains the Act to apply only to a subset of property: **RS[22]–[25]**.
8. On either the *Re Enhill* or the *Re Suco Gold* approaches, the statutory scheme in insolvency is not displaced by the fact that trust creditors may be able to be subrogated to the rights of an insolvent trustee. Any such right of the creditors is derivative and indirect, and presupposes the prior existence of a proprietary right in the insolvent trustee that is caught by the statutory scheme: **RS[35]–[36]**.
- 20 9. The argument based on the word 'proceeds' in the *Bankruptcy Act 1966* (Cth) is not supported by a proper understanding of that word. In that context, the word simply means the funds held by the trustee in bankruptcy, after any necessary process of conversion of non-cash assets. If those funds can properly be regarded as 'property of the bankrupt' because, and to the extent that, the insolvent trustee had a proprietary beneficial interest in them, the proceeds are to be used to pay creditors in the statutory order of priority. In any event, the word 'proceeds' does not appear in the *Corporations Act*.
- 30 10. The facts of this case do not necessitate a choice, but *Re Enhill* is the preferable approach to resolving priority disputes where there are trust- and non-trust creditors. It gives primacy to the statutory text: **RS[29]–[31]**. And it gives a harmonious working to the statutory provisions about priority, preferences, and the rights and powers of liquidators or receivers generally: **RS[32]–[34]**.

11. In the alternative, in applying the statutory order of priorities, a limitation may be recognised, undisturbed by the *Corporations Act*, by which trust property is to be applied solely towards trust creditors, consistently with *Re Suco Gold* and the judgment of Allsop CJ in *Jones v Matrix Partners*: **RS[35]–[36]**.

12. In the further alternative, if the statutory order of priorities does not apply of its own force, the Court should recognise that Equity follows the law in adopting those priorities by analogy.

**B. Second Issue – PPSA ‘circulating security interest’**

10 13. The introduction of the PPSA did not, and was not intended to, affect the priority of unsecured claims in insolvency: **RS[40]–[43]**.

14. It would be particularly surprising if, despite having priority under s 556 of the *Corporations Act*, employee creditors are to be deprived of it under s 433 by reason of the PPSA: **RS[52]**.

15. The PPSA provides the functionality of the old ‘floating charge’ through the new statutory security interest applying over ‘circulating assets’: **RS[44]–[45]**.

16. The requirements of s 433(2) of the *Corporations Act* are met in this case. Therefore, by force of s 433(3) the receiver ‘must pay’ the employee claims ‘in priority’: **RS[46]–[48]**.

20 17. What matters in the PPSA’s interaction with the *Corporations Act* is the nature of the security held by the secured party; not the nature of the interest held by the grantor: **RS[49]–[50]**.

18. The appellant’s contentions introduce an unnecessary and extraneous requirement into the statute. If, however, it is necessary to characterise the trustee’s right of indemnity as an asset subject to a circulating security interest, it was such an asset: **RS[51], [53]**.

19. The construction of the *Corporations Act* in its interaction with the PPSA should likewise take into account the high policy reasons for affording statutory priority to employee claims: **RS[52]**.

**DATED:** 5 February 2019.

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Jonathon Moore

  
James McComish