IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M137 of 2018

BETWEEN:

CARTER HOLT HARVEY WOODPRODUCTS AUSTRALIA PTY LTD
Appellant

and

COMMONWEALTH OF AUSTRALIA AND OTHERS
Respondents

SUBMISSIONS OF THE COMMONWEALTH OF AUSTRALIA

PART I – CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II – ISSUES ARISING

2. Two issues arise in the appeal:

   (a) By reason of its right of indemnity as trustee, Amerind Pty Ltd had a beneficial interest in the assets of the Panel Veneer Processes Trading Trust. Was that interest 'property of the company' within the meaning of s 433(3) of the *Corporations Act 2001* (Cth) (***Corporations Act***)?

   (b) Section 433(3) of the *Corporations Act* applies to property coming into the hands of a receiver who is appointed by a debenture holder 'secured by a circulating security interest'. Was it necessary that the trustee's right of indemnity *itself* be 'property comprised in or subject to a circulating security interest'? If so, was the trustee's right of indemnity such property?

PART III – NOTICE

3. No notice is required under s 78B of the *Judiciary Act 1903* (Cth).

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PART IV – MATERIAL FACTS

4. To the facts set out in Part V of the appellant's submissions should be added that:

   (a) the appellant, Carter Holt Harvey, claimed to be a secured creditor of Amerind, ranking behind the bank;[1] and

   (b) Amerind had no non-trust creditors.[2]

PART V – ARGUMENT

A. SUMMARY

5. A receiver appointed to a trading company realises assets pursuant to a circulating security interest (the old 'floating charge'). If the company had been conducting business in its own right, its employees would be priority creditors under ss 433(3) and 561 of the *Corporations Act*. Is the result different when the business in question was conducted by the company as a trustee, and the company had a right of indemnity out of the assets of the trust to pay the employees?

6. The trial judge held that the answer was yes. No priority was afforded to the employees over the holder of a circulating security interest, because s 433(3) was held not to apply to assets held on trust. That was so notwithstanding that the trustee company had express power to create the circulating security interest over the trust assets; all the company's debts were properly incurred in conducting a business for the benefit of the trust; the trustee had a right of indemnity to pay the debts out of the trust assets; and the debts exceeded the value of those assets.

7. The trial judge's conclusion, if correct, applies with equal force to ss 556 and 561(1)(a) of the *Corporations Act*. Those provisions prescribe the order of priority in which debts and claims of the unsecured creditors of a company in liquidation must be paid. On the trial judge's approach, in all cases in which a corporate trustee is placed into liquidation, the statutory order of priority fixed by the *Corporations Act* will not apply. Employees will rank equally with every other unsecured creditor. Moreover, in any case in which a circulating security interest secures a debt equal to or greater than the value of the trust assets, the holder of the circulating security

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1 [2017] VSC 127 at [8] (CAB9).

2 [2017] VSC 127 at [52] (CAB18); [2018] VSCA 41 at [14] (CAB155).

interest will take all of the assets, leaving nothing for employees. This was the very vice that legislation first introduced more than 120 years ago was intended to avoid.

8. Five members of the Court of Appeal unanimously reversed the trial judge, and held that s 433 was engaged.[3] For the reasons set out below, the Court of Appeal's conclusion should be upheld.

9. The resolution of the appeal turns on the construction of two statutes of the Commonwealth Parliament: the *Corporations Act* and the *Personal Property Securities Act 2009* (Cth) (***PPSA***). As in any case involving statutory construction, one must begin, and end, with the statutory text.[4] The fundamental point is that
10 'insolvency law is statutory and primacy must be given to the relevant statutory text.'[5] Particularly in the case of priority payments, 'the question of whether such liabilities should be imposed on companies in liquidation is a legislative decision'.[6]

10. Sections 433, 556 and 561 of the *Corporations Act* give statutory priority to employees' claims in insolvency. That statutory priority has been recognised since at least 1825 in the case of bankruptcy, and 1883 in the case of corporate insolvency.[7] Employees have had priority over claims secured by a floating charge or equivalent security since 1897.[8] Priority for employees in insolvency is widely

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3 *Commonwealth v Byrnes (in their capacity as joint and several receivers and managers of Amerind Pty Ltd (recs and mgrs apptd) (in liq)* (2018) 354 ALR 789, 330 FLR 149, 124 ACSR 246, [2018] VSCA 41.

4 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

5 *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at 182 [78] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

6 *Re Toshoku Finance UK plc* [2002] 1 WLR 671 (HL) at 684 [46] (Lord Hoffmann).

7 *The Bankrupt Act* (1825) 6 Geo IV, c 16; *Companies Act 1883* (UK) 46 & 47 Vict, c 28, s 4; *Preferential Payments in Bankruptcy Act 1888* (UK) 51 & 52 Vict, c 62, s 1. In Victoria, see *Insolvency Statute 1865* (Vic) s 61; *Companies Act 1896* (Vic) s 148.

8 *Preferential Payments in Bankruptcy Amendment Act 1897* (UK) 61 Vict c 19, s 2. In Victoria, see *Companies Act 1910* (Vic) s 208(3).

recognised within[9] and beyond[10] the common law world.[11] The compelling reasons for that statutory priority for employee claims are well known.[12] The priority extends to a party (here, the Commonwealth) who advances money for the purpose of meeting the employees' claims.[13]

11. It is important to see what this case is about. It is a strong thing to deprive employee creditors of the statutory priority they have enjoyed for 121 years, merely because their employer had acted as a trustee, where that result is not required to preserve the property of beneficiaries of a trust, or to uphold the fiduciary obligations of a trustee, but is for the sole commercial advantage of a trade creditor and at the employees' expense.

12. Conversely, it is important to see what this case is not about. There are no non-trust creditors. There is only one trust. All the company's debts were properly incurred in conducting business for the benefit of that trust. The trustee had an unimpeded right of indemnity to pay the debts out of the trust assets. The debts exceeded the value of those assets. This case therefore does not give rise to the question of whether creditors of the company who are not 'trust creditors' may be paid by a liquidator or receiver from the proceeds of realisation of assets held on trust.

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9 *Insolvency Act 1986* (UK) sched 6, category 5; *Companies Act 1993* (NZ) sched 7, items 1(2)(a)–(e); *Companies Act 2014* (Ireland) s 621(2)(b)–(g); *Bankruptcy and Insolvency Act* (RSC, 1985, c. B-3) ss 81.3, 81.4, 136(1)(d) (Canada); 11 USC § 507(a)(4) (USA); *Companies (Winding Up and Miscellaneous Provisions) Ordinance* (Hong Kong) cap 32, ss 79, 265(1); *Companies Act* (Singapore, cap 50) s 328(1)(b).

10 In France, see *Code civil* arts 2331-4°, 2375-2°; *Code de commerce* art L625-7; *Code du travail* arts L143-10, L143-11, L742-6, L751-15, L3253-1. In Germany, employee claims were formerly given priority: *Konkursordnung* §61. The *Insolvenzordnung* of 1994 largely abolished priority claims; the interests of employees are now protected by payment of *Insolvenzgeld* from a social fund financed by employer contributions: *Sozialgesetzbuch III* §165.

11 It is also a matter of international obligation: International Labour Organisation, *Protection of Workers' Claims (Employer's Insolvency) Convention*, opened for signature 23 June 1992, No 173 (entered into force 8 June 1995). Australia accepted the obligations of Part II of the Convention, entitled 'Protection of Workers' Claims by Means of a Privilege', on 8 June 1994.

12 *Salomon v A Salomon & Co Ltd* [1897] AC 22 at 53 (Lord Macnaghten); *McEvoy v Incat Tasmania Pty Ltd* (2003) 130 FCR 503 at 505 [2] (Finkelstein J).

13 *Corporations Act* s 560.

B. FIRST ISSUE – TRUSTEE'S RIGHT OF INDEMNITY

B.1 'PROPERTY' OF THE COMPANY

13. Section 9 of the *Corporations Act* defines 'property' to mean 'any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description and includes a thing in action'.

14. As this Court has previously explained, a trustee's right of indemnity:

(a) arises by operation of law;[14]

(b) confers on the trustee an 'interest in the trust property [which] amounts to a proprietary interest';[15]

(c) is a beneficial interest in the trust property;[16]

(d) 'applies to the whole range of trust assets';[17]

(e) confers an interest that 'takes priority over the rights in or in reference to the assets of beneficiaries or others who stand in that situation';[18]

(f) is not simply a security interest or encumbrance over the beneficiaries' interest in the trust property;[19] and

(g) applies equally with respect to indemnity by way of reimbursement or exoneration.[20]

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14 *Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation* (2009) 239 CLR 346 at 358–9 [43] (French CJ, Gummow, Hayne, Heydon and Bell JJ) (***Bruton Holdings***).

15 *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 369–70 (Stephen, Mason, Aickin and Wilson JJ) (***Octavo***).

16 *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 247 [51] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) (***Buckle***).

17 *Octavo* (1979) 144 CLR 360 at 367 (Stephen, Mason, Aickin and Wilson JJ); *Bruton Holdings* (2009) 239 CLR 346 at 358–9 [43] (French CJ, Gummow, Hayne, Heydon and Bell JJ).

18 *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319 at 335–6 (Dixon J) (***Vacuum Oil***); *Buckle* (1998) 192 CLR 226 at 246–7 [50] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

19 *Buckle* (1998) 192 CLR 226 at 246–7 [50] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

20 *Buckle* (1998) 192 CLR 226 at 246 [48] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98 at 121 [51] (Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ) (***CPT Custodian***); *Bruton Holdings* (2009) 239 CLR 346 at 358–9 [43] (French CJ, Gummow, Hayne, Heydon and Bell JJ).

15. The definition in s 9 of the *Corporations Act* is fulfilled. The beneficial interest in trust assets conferred on a trustee by virtue of its right of indemnity is therefore 'property' of the company within the meaning of s 433 of the *Corporations Act*.

16. It is insufficient to assert, as the appellant does (AS [3]–[7]), that 'trust property' is *necessarily* excluded from the operation of the statutory scheme. Supposing a company has lawfully incurred debts in its capacity as trustee, four situations must be distinguished:

(a) If the **trustee is solvent**, and the **trust is solvent**, the trustee will have a beneficial interest in the trust property to the extent of its right of indemnity, but that interest will not exhaust the trust property; the beneficiaries retain equitable (or beneficial) interests in the trust property; and trust creditors are able to pursue the personal liability of the trustee in the usual way.

(b) If the **trustee is solvent**, but the **trust is insolvent**, no one other than the trustee will have a beneficial interest in the trust property. The trustee's beneficial interest exhausts the trust property: '[t]he entitlement of the beneficiaries is confined to so much of those assets as is available after the liabilities in question have been discharged or provision has been made for them'.[21] The trustee may also have a right of personal indemnity against the beneficiaries.[22] Trust creditors are able to pursue the personal liability of the trustee in the usual way.

(c) If the **trustee is insolvent**, but the **trust is solvent**, the trustee's beneficial interest will not exhaust the trust property; the beneficiaries retain equitable (or beneficial) interests in the trust property, and *that* interest is not 'property' of the company;[23] and trust creditors must prove in the insolvency of the company.

(d) If the **trustee is insolvent**, and the **trust is insolvent**, no one other than the trustee will have a beneficial interest in the trust property; the trustee may

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21 *Buckle* (1998) 192 CLR 226 at 246 [48] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

22 *Hardoon v Belilios* [1901] AC 118; *Trautwein v Richardson* [1946] ALR 129; *JW Broomhead (Vic) Pty Ltd (in liq) v JW Broomhead Pty Ltd* [1985] VR 891.

23 Cf *Re Kayford Ltd (in liq)* [1975] 1 WLR 279.

have a right of personal indemnity against the beneficiaries; and trust creditors must prove in the insolvency of the company.

17. This case concerns only the fourth category. The trustee, by reason of its right of indemnity, is the only person with a beneficial interest in the trust property. Importantly, the creditors do not have any direct claim on the trust property.[24]

18. The appellant's argument is internally inconsistent,[25] but to the extent the appellant contends that the trustee's right of indemnity does *not* give rise to a proprietary interest in trust assets, the contention is contrary to authority. This Court held in *Octavo* that a trustee with a right of indemnity was a person who has 'a beneficial interest in the trust assets',[26] and that '[t]he trustee's interest in the trust property amounts to a proprietary interest.'[27] The Court in *Buckle* expressly approved the proposition that 'the trustee has a beneficial interest in the trust assets to the extent of its right to be indemnified'.[28] And in *Bruton Holdings*, the Court said that a trustee with a right to be indemnified out of trust assets has 'a proprietary interest therein'.[29]

19. In this respect, the appellant's argument proceeds on the basis of a category error. The error is to treat the trustee's right of indemnity as being a proprietary right somehow arising separately from, or independently of, the trust assets to which it relates. That is incorrect. Put simply, the proprietary aspect of a trustee's right of indemnity *is* its beneficial interest in the trust assets. As this Court explained in *Buckle*:

> To the extent that the assets held by the trustee are subject to their application to reimburse or exonerate the trustee, they are not 'trust assets' or 'trust property' in the sense that they are held solely upon trusts imposing fiduciary duties which bind the trustee in favour of the beneficiaries.[30]

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24 *Vacuum Oil* (1945) 72 CLR 319 at 335–6 (Dixon J).

25 Contrast AS [12] with [35], and [28] with [29].

26 *Octavo* (1979) 144 CLR 360 at 367 (Stephen, Mason, Aickin and Wilson JJ).

27 *Octavo* (1979) 144 CLR 360 at 367 (Stephen, Mason, Aickin and Wilson JJ).

28 (1998) 192 CLR 226 at 246 [51] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ)

29 *Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation* (2009) 239 CLR 346 at 358–9 [43] (French CJ, Gummow, Hayne, Heydon and Bell JJ).

30 *Buckle* (1998) 192 CLR 226 at 246 [48] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

20. Just as a beneficiary may have an equitable interest in the trust property, so too does the right of indemnity give the trustee an interest in the trust property. This Court has so held.[31] Indeed, the very point of recognising the trustee as having a higher-ranking interest in the trust property is to resolve the priority dispute in respect of the same assets that would otherwise arise between beneficiary and trustee. In the case of an insolvent trust, the effect of the trustee's higher priority is to exclude any interest in the trust property that otherwise would have been held by the beneficiaries.

21. The appellant's statement (AS [3]) that 'the essence of a trust' is that the beneficiaries have 'the beneficial or equitable title to the trust assets' is incorrect. Whether the beneficiaries have any such 'title' will depend on the terms of the trust and, crucially, the extent of the trustee's right of indemnity.[32] The appellant's doubt as to whether the trustee's right of indemnity 'gives the trustee ownership of the trust property' (AS [18]) likewise raises a false issue. The blunt idea of competing 'ownership' is inapt when discussing the respective rights of trustee and beneficiary.[33] The trustee holds legal title to the trust assets, but the trustee also has a beneficial interest in those assets to the extent of the trustee's right of indemnity. Further, a trustee may continue to have a beneficial interest in trust assets by virtue of its right of indemnity, notwithstanding that legal title is subsequently vested in a successor trustee.[34] Once a trust becomes insolvent, the beneficiaries can no longer have any beneficial interest in the trust assets; the trustee's interest 'has completely overwhelmed the rights of the beneficiaries.'[35]

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31 *Octavo* (1979) 144 CLR 360 at 367, 369 (Stephen, Mason, Aickin and Wilson JJ); *Buckle* (1998) 192 CLR 226 at 246 [51] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Bruton Holdings* (2009) 239 CLR 346 at 358–9 [43], [47] (French CJ, Gummow, Hayne, Heydon and Bell JJ).

32 *Glenn v Federal Commissioner of Land Tax* (1915) 20 CLR 490 at 497 (Griffith CJ); *Buckle* (1998) 192 CLR 226 at 246 [48] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *CPT Custodian* (2005) 224 CLR 98 at 112 [25] (Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ).

33 *CPT Custodian* (2005) 224 CLR 98 at 112–13 [25]–[27] (Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ); *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* [1980] 1 NSWLR 510 at 519 (Hope JA); J Edelman, 'Two Fundamental Questions for the Law of Trusts' (2013) 129 *Law Quarterly Review* 66.

34 *Bruton Holdings* (2009) 239 CLR 346 at 358–9 [43] (French CJ, Gummow, Hayne, Heydon and Bell JJ).

35 *Lane v Deputy Commissioner of Taxation* (2017) 253 FCR 46 at 69 [58] (Derrington J) (***Lane***); *Buckle* (1998) 192 CLR 226 at 246 [48] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

22. The distinction drawn by the appellant between 'property' and 'property of the company' is inapt (AS [7], [11]). Parliament has defined 'property' widely in s 9 of the *Corporations Act*. As this Court has observed in relation to another section within Chapter 5 of the *Corporations Act*, 'no narrow meaning can be given to the legal relationships which are embraced by the word "property"'.[36] Further, where Parliament desires 'property' of the company to have a different meaning in the *Corporations Act*, it states so expressly, and in terms that are wider (not narrower) than the ordinary definition in s 9.[37] The width of the expression 'property of the company' is emphasised, for example, by its use in the prohibition in s 596(1)(c) on frauds committed by company officers in respect of property of the company. In the present context, there is no reason why the phrase 'property of the company' ought bear a constrained meaning as proposed by the appellant.

23. On ordinary principles, the same word when repeated in a statute is generally taken to bear the same meaning,[38] and 'cognate expressions in a statute should be given the same meaning unless the context requires a different result'.[39] Nothing in the context of the *Corporations Act* requires the construction proffered by the appellant.

24. Nor is there anything in the text or context of the *Corporations Act* that justifies the appellant's assertion that 'property of the company' means 'property beneficially owned by the company' (AS [30]). It is especially hard to see how the use of the word 'of' could justify that assertion. A company's rights as a mortgagee or chargee are property available in its insolvency, despite being security interests rather than 'ownership'. Likewise, profits a prendre or other interests in land falling short of 'ownership' of an estate. The concept of 'ownership' can be protean,[40] but even if the appellant's assertion about the need for 'beneficial ownership' was correct, the trustee company has a beneficial interest in the trust assets. It 'owned' that

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36 *Willmott Growers Group Inc v Willmott Forests Ltd (Receivers and Managers Appointed) (In Liq)* (2013) 251 CLR 592 at 603 [36] (French CJ, Hayne and Kiefel JJ) (***Willmott Forests***).

37 See *Corporations Act* ss 435B, 444E(4), 465, 489F, 513AA, 588C, 589(4), 601, 601C; sched 2, item 5-26.

38 *Federal Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* (2015) 257 CLR 544 at 560 [27] (French CJ and Kiefel J); 584–5 [119]–[121] (Keane J).

39 *Kline v Official Secretary to the Governor-General* (2013) 249 CLR 645 at 660 [32] (French CJ, Crennan, Kiefel and Bell JJ).

40 *CPT Custodian* (2005) 224 CLR 98 at 110 [16] (Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ); *Kent v SS Maria Luisa (No 2)* (2003) 130 FCR 12 at 33 [61] (Tamberlin and Hely JJ).

beneficial interest, which is not merely a security interest or an encumbrance upon a right held by someone else.[41]

25. The appellant's references to a trustee's 'own money' are irrelevant to this case (AS [27]–[28]). The phrase 'own money' was repealed from the bankruptcy legislation some 22 years ago,[42] and it never appeared in the *Corporations Act*. Even if the words were relevant, this Court in *Octavo* held that they would be satisfied by the trustee's beneficial interest in the trust assets.[43]

26. That other people may also have interests in the particular property is not to deny that it can be 'property' to the extent of the insolvent's own interest.[44] An insolvent landlord's reversionary interest is 'property' notwithstanding the tenant's leasehold, and vice versa. And even in the case of a solvent trust, the trustee's legal interest is 'property' notwithstanding the equitable interest of the beneficiaries. The tenant or the landlord, or the beneficiaries, are of course entitled to have their respective interests respected. As the Full Federal Court explained in *Vagrand Pty Ltd (in liq) v Fielding*:

> the assets come to the liquidator with their history and inherent characteristics. Although the liquidator takes the assets on behalf of the creditors, third parties retain any rights which enure to them as a result of that history or those characteristics.[45]

27. Here, though, by reason of the insolvency of the trust, Amerind as trustee had both a legal and a beneficial interest in the trust property, and the beneficiaries had no such interest. The Court of Appeal was correct to find that a corporate trustee's beneficial interest in trust property by virtue of its right of indemnity was 'property' of the company,[46] and that the insolvency legislation applied to that property.[47]

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41 *Buckle* (1998) 192 CLR 226 at 246–7 [50] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

42 *Bankruptcy Legislation Amendment Act 1996* (Cth).

43 *Octavo* (1979) 144 CLR 360 at 369 (Stephen, Mason, Aickin and Wilson JJ).

44 *Willmott Forests* (2013) 251 CLR 592.

45 *Vagrand Pty Ltd (in liq) v Fielding* (1993) 41 FCR 550 at 552–3 (Wilcox, Burchett and Beazley JJ). To the same effect are the reasons of Allsop CJ in *Jones v Matrix Partners Pty Ltd* (2018) 354 ALR 436 at 455 [79]–[82], 461 [103], 462 [107]–[108].

46 [2018] VSCA 41 at [269] (CAB 224).

47 [2018] VSCA 41 at [276], [281] (CAB 226–7).

28. Where, as here, the insolvent company has only acted as trustee of one trust, and had no business other than that conducted through the trust, 'there is no reason either in principle or by reference to context or text why the words of the statute setting the order of priorities should not be followed.'[48]

B.2 *RE ENHILL* OR *RE SUCO GOLD*?

29. The appellant's contention (AS [17]) that neither *Re Enhill* nor *Re Suco Gold* determined that the statutory order of priorities applied to a corporate trustee is incorrect. *Both* held that the statutory order of priorities applied.[49]

30. The resolution of this appeal does not require a choice to be made between the approach in *Re Enhill* or *Re Suco Gold.* Indeed, until *Lane*,[50] it seems that no court had any need to resolve the controversy generated by the different approaches in those cases.[51] But if a choice must be made, *Re Enhill* is the correct and preferable approach. Since the beneficial interest in the trust property held by an insolvent trustee of an insolvent trust is 'property' within the meaning of the *Corporations Act*, the statutory order of priorities applies according to its terms. That is because the statutory priorities apply to *all* property of the company coming into the liquidator or receiver's hands, and in respect of *all* provable debts. *Re Enhill* is the only approach that gives primacy to the statutory text. It also has the advantage of simplicity and administrative convenience.

31. If a trustee's beneficial interest in the trust property is 'property' within the meaning of the *Corporations Act*, the statutory concept of 'property' dictates the scope of its own operation. This Court has many times emphasised the 'primacy of the statutory text' in insolvency disputes.[52]

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48 *Jones v Matrix Partners Pty Ltd* (2018) 354 ALR 436 at 462 [108] (Allsop CJ).

49 *Re Enhill Pty Ltd* [1983] 1 VR 561 at 563 (***Re Enhill***) at 564 (Young CJ), and 572 (Lush J); *Re Suco Gold Pty Ltd (in liq)* (1983) 33 SASR 99 (***Re Suco Gold***) at 109 (King CJ) and 113 (Jacobs J).

50 (2017) 253 FCR 46.

51 [2018] VSCA 41 at [261] (CAB 221).

52 *Coventry v Charter Pacific Corporation Ltd* (2005) 227 CLR 234 at 253 [50]–[51] (Gleeson CJ, Gummow, Hayne and Callinan JJ); *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52 at 75 [62] (Gleeson CJ, Gummow, Hayne and Crennan JJ);; *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160 at 186 [35]–[37] (Gummow J), 214 [136] (Hayne J); *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at 182 [78] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

32. The statutory treatment of the trustee's beneficial interest is no different from any other way in which statute intervenes in insolvency so as to compel, forbid, or empower a trustee to behave in ways that would not otherwise have been compulsory, forbidden, or within power. Thus:

(a) a solvent trustee cannot disclaim contracts simply because they turn out to be onerous. An insolvent trustee, through its liquidator, is empowered to do so;[53]

(b) a solvent trustee can make dispositions of its own property. An insolvent trustee cannot do so after the commencement of a winding up, except through its liquidator;[54]

(c) a solvent insured trustee that is liable to a third party can choose whether the third party is paid from the insurance proceeds or some other resource. An insolvent insured trustee must pay the insurance proceeds to the third party;[55]

(d) a solvent trustee cannot ignore the proprietary rights of its secured creditors. An insolvent trustee may, through its liquidator, disregard certain securities granted shortly before liquidation;[56]

(e) the officers of a solvent trustee cannot ordinarily be compelled to disclose their reasons for decision-making. The officers of an insolvent trustee can be so compelled;[57] and

(f) a solvent trustee may choose which of its creditors to pay first. The liquidator of an insolvent trustee may recover preferential payments made to trust creditors.[58]

33. This last aspect is particularly important here. The appellant appears at AS [28] to concede (consistently with *Octavo*) that the statutory preference provisions apply to

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53 *Corporations Act* s 568.

54 *Corporations Act* s 468.

55 *Corporations Act* s 562.

56 *Corporations Act* s 588FJ.

57 *Re Londonderry's Settlement; Peat v Walsh* [1965] Ch 918; *Mandie v Memart Nominees Pty Ltd* (2014) 42 VR 325; cf *Corporations Act* s 586A.

58 *Corporations Act* s 588FC.

a payment made by a corporate trustee to a trust creditor. But the appellant does not explain why that aspect of Chapter 5 of the *Corporations Act* applies in a trust context, but (according to the appellant) the employee priority provisions do not.

34. Given the above matters, it is irrelevant to assert that, during the solvency of the trust, the trustee would not have been able to apply the proceeds of its right of exoneration towards non-trust debts. By force of statute, the situation is different in insolvency. It follows that the appellant's submissions at AS [20]–[24] address an immaterial issue. The question is whether the relevant statute applies according to its terms. If it does, there is no further room for debate. In that respect, there is no competition between 'company law' and 'trusts law'.[59]

35. Alternatively, the statutory order of priorities does not exclude the possibility that the Court might recognise that the property in question may be affected by a restriction 'inhering' in its 'nature and character'.[60] To take an obvious example, a leasehold is, during the solvency of the trustee, property subject to inherent limitations on the use to which it may be put. In the event of the trustee's insolvency, it is 'property' of the company, and thereby subject to the provisions of Chapter 5 of the *Corporations Act*, but the inherent limitations continue to apply.

36. Thus, if the Court accepts that property held on trust, which is subject to the trustee's right of indemnity exhausting the value of the estate, comes into the liquidation affected by a restriction pursuant to which the property can only be used to pay trust creditors, and those restrictions are unaffected by the *Corporations Act*, the appeal should be dismissed for the reasons given by Allsop CJ in *Jones v Matrix Partners Pty Ltd*.[61]

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59 Cf *Re Bell Hire Services Pty Ltd (in liq)* [2016] FCA 1583 at [37].

60 Cf *Jones v Matrix Partners Pty Ltd* (2018) 354 ALR 436 at 455 [79], 461 [103], 462 [107] (Allsop CJ); *Vagrand Pty Ltd (in liq) v Fielding* (1993) 41 FCR 550 at 552–3 (Wilcox, Burchett and Beazley JJ).

61 (2018) 354 ALR 436 at 455 [79]–[82], 461 [103], 462 [107]–[108].

B.3 THE LAW IN OTHER JURISDICTIONS

37. The conceptual problem of the insolvent trading trust is not new,[62] but in modern times it appears to be largely an Australian and New Zealand phenomenon.[63]

38. In New Zealand, it is recognised that the right of indemnity of a corporate trustee of a trading trust 'remains company property' (not trust property), and that a liquidator 'by controlling what the company does, can exercise the right to indemnity and divide the fruits of it among the creditors.'[64] Where debts were properly incurred by a trustee in respect of an insolvent trust, the right of indemnity is 'an asset of the company; indeed, it is the only asset of the company' that passed to the control of the liquidator. The statutory priority scheme applies, and gives the liquidator priority in respect of the liquidator's reasonable costs.[65] By contrast, where an insolvent trustee had no right of indemnity over trust funds, and the beneficiaries have a continuing equitable interest, employees who were not trust creditors were entitled to statutory priority only over non-trust assets.[66] The law as it relates to preferences paid from trust funds is similar to the position in Australia.[67]

39. Elsewhere, the question of priorities in relation to insolvent trusts is discussed by reference to Australian authorities;[68] or under the rubric of express statutory provisions;[69] or in accordance with other equitable principles.[70]

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62 Gai. Inst. IV.72–74a; Inst. IV.7.3–5a; D.14.4, 15.1–3.

63 New Zealand Law Commission, *Review of Trust Law in New Zealand: Introductory Issues Paper* (NZLC IP19, 2010) at [2.43]–[2.45], [2.67]–[2.72].

64 *Levin v Ikiua* [2010] 1 NZLR 400 at [118] (Heath J); aff'd [2011] 1 NZLR 678 (CA).

65 *Ranolf Co Ltd (in liq) v Bhana* [2017] NZHC 1183 at [36] (Gilbert J).

66 *Finnigan v Yuan Fu Capital Markets Ltd (in liq)* [2013] NZHC 2899 at [74] (Bell AsJ).

67 *McIntosh v Fisk* [2017] 1 NZLR 863 (SC).

68 See, e.g., *EC Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2013] 4 SLR 123 (Singapore); *Representation of Rawlinson & Hunter Trustees SA re Z Trusts* [2018] JRC 119 (Jersey).

69 For example, the US Bankruptcy Code expressly applies to insolvent business trusts: 11 USC §101 (9)(A)(v), defining 'corporation' to include 'business trust'.

70 See, e.g., *Re Berkeley Applegate (Investment Consultants) Ltd (in liq)*; *Harris v Conway* [1989] Ch 32.

C. SECOND ISSUE – 'CIRCULATING SECURITY INTEREST'

40. The second issue in the appeal turns on the interaction of the *Corporations Act* and the PPSA. The PPSA is 'a law about security interests in personal property.'[71] It addresses priority between competing security interests,[72] but it says nothing about which debts are entitled to priority payment in insolvency. In the case of an insolvent company, those priority rules are to be found in Chapter 5 of the *Corporations Act*.

41. Before the PPSA was enacted in 2009, s 433 of the *Corporations Act* referred to:

(a) a receiver 'appointed on behalf of the holders of any debentures of a company or registered body that are secured by a floating charge', or to one having control over 'property comprised in or subject to a floating charge' (s 433(2)(a)); and

(b) payment by the receiver 'out of the property coming into his, her or its hands' of specified debts — including employee claims — 'in priority to any claim for principal or interest in respect of the debentures' (s 433(3)).

42. Prior to 2009, therefore, the scheme of the *Corporations Act* was that where receivers were appointed by a creditor secured by a floating charge, the receivers had to pay from any property coming into their hands the priority claims of employees, before making any payment to the secured creditor. What mattered was the nature of the security (i.e. that it was a floating charge), not the nature of the funds coming into the receiver's hands. Importantly, the distinguishing feature of a floating charge was that the company was 'left at liberty, until one of the "crystallising" events happens, to dispose freely, in the ordinary course of its business, of any property to which it attaches.'[73]

43. The present form of s 433 of the *Corporations Act* was introduced by the *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Cth). That Act also introduced s 51C and other machinery provisions that couple the PPSA to the scheme of priorities established by Chapter 5 of the *Corporations Act*. It would

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71 PPSA s 3.

72 PPSA s 54.

73 *Stein v Saywell* (1969) 121 CLR 529 at 556 (Kitto J).

be surprising indeed if, as the appellant contends, the enactment of the PPSA and s 51C had the effect of eviscerating the priority that employee creditors hitherto enjoyed, particularly where:

(a) the amending Act was intended to 'maintain existing rights' and 'maintain the status quo' on questions of priority;[74] and

(b) the underlying definition of 'circulating asset' in s 340 of the PPSA was intended to 'confirm the existing case law on floating charges' within the structure of the new statutory scheme.[75]

44. The PPSA has now abolished the concept of fixed or floating charges, along with the notion of a charge 'crystallising'. This is because the PPSA now provides for:

(a) a statutory *security interest* – namely 'an interest in relation to personal property provided for by a transaction that, in substance, secures payment or performance of an obligation': s 12;

(b) given by a *grantor* – namely, 'a person who has the interest in the personal property to which a security interest is attached': s 10;

(c) to a *secured party* – namely, 'a person who holds a security interest for the person's own benefit': s 10;

(d) that *attaches* – namely, that applies to personal property in which the grantor has an interest, and where value is given for the security interest: s 19;

(e) to *collateral* – namely, 'personal property to which a security interest is attached': s 10;

(f) which is *perfected* – namely, made effective, as here by registration: s 21; and

(g) which is then afforded a particular *priority* over other security interests by the statutory scheme: Part 2.6.

45. The PPSA provides the functionality of a floating charge through the definition of 'circulating asset' in s 340. The parallel with the floating charge is made explicit in

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74 Explanatory Memorandum, Personal Property Securities (Corporations and Other Amendments) Bill 2010 (Cth) at 19.

75 Replacement Explanatory Memorandum, Personal Property Securities Bill 2009 (Cth) at 138 [9.67].

s 339(5). A 'circulating asset' is personal property which by its nature, or by reason of the secured party's lack of control over it, is able to be used by the grantor in the ordinary course of its business free of the security interest. The language of 'fixed' assets or 'crystallisation' is now irrelevant, because in the case of a security interest in a circulating asset the security interest attaches as soon as the grantor has an interest in the collateral (see s 19(4)) and is perfected (s 21) by the secured party registering a financing statement with respect to the relevant collateral (s 150(1)).[76]

46. Here, Amerind granted the bank a security interest in all its 'present and after-acquired personal property', whether held beneficially or as trustee of a trust.[77] That property included cash at the bank and stock,[78] each of which is a circulating asset within the meaning of s 340 of the PPSA.[79] Thus, a 'security interest' within the meaning of the PPSA had 'attached to a circulating asset', thereby satisfying the definition of 'circulating security interest' in s 51C of the *Corporations Act*.

47. Most relevantly for present purposes:

(a) a receiver was 'appointed on behalf of the holders of any debentures of a company or registered body that are secured by a circulating security interest', thereby satisfying s 433(2)(a) of the *Corporations Act*. That is to say, the receiver was appointed by the bank, in respect of the general security agreement; and

(b) the company was not being wound up, thereby satisfying s 433(2)(b).

48. Therefore, by force of s 433(3), the receiver 'must pay, out of the property coming into his, her or its hands' the employees' priority claims 'in priority to any claim for principal or interest in respect of the debentures'.

49. What matters in the PPSA's interaction with the *Corporation Act* is the nature of the security held by the secured party; not the nature of the interest in the personal property held by the grantor. The register established under the PPSA is a register

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76 Appellant's Book of Further Materials at 154–5, Registration Number Search Certificate.

77 Appellant's Book of Further Materials at 151, General Security Deed, definitions of 'personal property' and 'collateral'.

78 [2017] VSC 127 at [32] (CAB 13); [2018] VSCA at [311] (CAB 239).

79 Cash at the bank is an 'ADI account' (PPSA ss 10, 340(5)(c)); stock is 'inventory' (ss 340(5)(e), 341(1B)).

of *security interests*, not a register of personal property.[80] Section 433 of the *Corporations Act* is engaged if the *secured party* held a *security interest* in *circulating assets*. The status of the trustee's right of indemnity is irrelevant to that analysis, and the Court of Appeal was correct so to hold.[81]

50. The error in the appellant's argument (AS[49]) is its focus on the rights of the grantor, not the nature of the secured party's security, and its consequent imposition into the statute of an irrelevant and extraneous requirement. The appellant's reference to 'fixed' securities (AS[49]–[50]) is, for the reasons set out above, anachronistic and irrelevant to the scheme of the PPSA. Within that scheme, the trustee's interest in the trust property was, from the point of view of the bank, *collateral*, not a *security interest*.

51. Likewise, the error in the appellant's submission (AS[52]) is that it fails to apply the text of the statute. Section 433(3) is emphatic. The receiver 'must pay' the employees' priority claims. The receiver must do so 'out of the property coming into his, her or its hands'. And the receiver must do so 'in priority to any claim for principal or interest in respect of the debentures'.

52. The effect of the appellant's submissions on this ground is that, even if s 556 of the *Corporations Act* applies to the distribution of property held on trust to the extent of the trustee's right of indemnity, s 433 does not apply, because the trustee's right of indemnity cannot itself be classified as a circulating security interest. Parliament could not have intended such an outcome. It would permit a secured creditor with a circulating security interest over trust property to 'scoop the pool', leaving nothing for employee creditors, notwithstanding that their statutory priority rights in s 556 were otherwise engaged through the trustee's right of indemnity. As noted above,[82] that was the very situation – described by the House of Lords as a 'scandal'[83] – that legislation first introduced more than 120 years ago was intended to avoid. The appellant's construction is contrary to the purpose of s 433, which is remedial

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80 PPSA ss 147–8.

81 [2018] VSCA at [315], [317] (CAB 239–41).

82 Paragraphs 7 and 10.

83 *Salomon v A Salomon & Co Ltd* [1897] AC 22 at 53 (Lord Macnaghten).

legislation that should be construed according to the matters of high public policy which led to its enactment.[84]

53. If 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. For the reasons set out in paragraphs 14 to 26 above, a trustee's right of indemnity is a proprietary interest in the assets of the trust. It is not a proprietary interest *apart* from those assets. Those assets included circulating assets. Therefore, even if it were necessary to classify the *grantor's* interest as being the right of indemnity, not its legal title, and to show that *that* interest was subject to a circulating security interest, the Court of Appeal was correct to hold that this too was satisfied on the facts.[85]

PART VII – TIME ESTIMATE:

54. It is estimated that up to 2.5 hours will be required for the Commonwealth's oral argument.

DATED: 2 November 2018.

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84 *Acts Interpretation Act* 1901 (Cth) s 15AA; *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 528 [99] (Gummow J); *Jones v Matrix Partners Pty Ltd* (2018) 354 ALR 436 at 462 [108] (Allsop CJ).

85 [2018] VSCA at [327]–[329] (CAB 244–5).