

BETWEEN:

CARTER HOLT HARVEY WOODPRODUCTS AUSTRALIA PTY LTD
Applicant

-and-

THE COMMONWEALTH OF AUSTRALIA
First Respondent

MATTHEW JAMES BYRNES AND ANDREW STEWART REED HEWITT
in their capacity as joint and several receivers and managers of Amerind Pty Ltd
(Receivers and Managers Appointed) (In Liquidation)
Second Respondents

BRENT MORGAN
in his capacity as liquidator of Amerind Pty Ltd (Receivers and Managers Appointed)
(In Liquidation)
Third Respondent

SECOND RESPONDENTS' SUBMISSIONS

Part I: Certify that this submission is in a form suitable for publication on the internet.

Part II: For the Second Respondents, this appeal presents the following issues:

1. The Second Respondents (**Receivers**), who are the receivers and managers of Amerind Pty Ltd (Receivers and Managers Appointed) (In Liquidation) (ACN 005 224 331) (**Company**), and whose activities (along with other asset realisations by their appointor) resulted in the surplus the subject of the proceedings, do not seek to make submissions as to the substantive issues raised by the Appellant's grounds of appeal.
2. Having argued the issue at trial, and appeared in the Court of Appeal to assist that Court, they do not seek to argue the question of whether the statutory priority regime in section 433 and associated sections of the *Corporations Act 2001* (Cth) (**Act**) apply to the surplus (once *inter alia* their remuneration, costs and expenses associated with their appointment are deducted).

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Filed on behalf of: the Second Respondents
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3. The Receivers' only interest in this appeal lies in there ultimately being in place a form of order governing this aspect of their future conduct of the receivership which is appropriate and workable. The history of the matter has shown that the other parties have, with respect, focused on the substantive issues and it has fallen to the Receivers to see that appropriate orders are made.
- 10 4. Given that any involvement by the Receivers in this appeal (coming on top of the litigation to date) will result in expense payable from the surplus and reduce what may be otherwise available to the creditors of the Company, the Receivers seek to minimise costs and ask to be excused from attending the hearing of the appeal and, if this course is considered appropriate by the Court, to make brief submissions in writing on the appropriate form of order upon the delivery of the Court's reasons for the judgment.
- 20 5. This requires a brief explanation.
6. On 23 March 2018, the trial judge delivered reasons for judgment and, after hearing argument, made orders on 5 April 2018¹ reflecting those reasons. In essence, the Receivers were directed that they would not be justified in proceeding on the basis that *inter alia* section 433 of the Act applied to the assets the proceeds of which comprise the surplus in so far as they were circulating assets. As the statutory priority regime did not apply, no further directions were required as to the course to be followed by the Receivers in this regard.
- 30 7. Upon the delivery of reasons by the Court of Appeal, which held that the statutory priority regime *did* apply, that Court made orders on 28 February 2018² setting aside the key declaration made by the trial judge and reserving liberty to apply for further orders to be made.
- 40 8. The Receivers duly so applied and further orders were made by the Court of Appeal on 9 May 2018³ which directed the Receivers as to how they were to proceed in light of the Court's decision that the statutory priority regime did apply. One of the orders

¹ CAB 139-141.

² CAB 277-278.

³ CAB 280-282.

made⁴ was for the remitter of the Receivers' proceeding to the trial judge, in order to address issues which the trial judge (but not the Court of Appeal) had determined in *obiter*, but had not been the subject of orders because of his principal finding.

9. The remitted proceeding was the subject of further orders by the trial judge (reflecting the application of the statutory priority regime) made on 23 July 2018.⁵

10. Therefore, in the event that this Court dismisses the appeal, then the orders made by:

(a) the Court of Appeal on 28 February 2018;

(b) the Court of Appeal on 9 May 2018;

(c) Robson J on 23 July 2018,

would all stand and there would be a straightforward outcome with appropriate orders already in place for the Receivers' implementation of the statutory priority regime.

11. Further, if this Court determines to allow the appeal, then it would need to set aside each of the Court of Appeal's orders made on 28 February 2018 and 9 May 2018 and either use its own powers⁶ to set aside Robson J's orders made on 23 July 2018 or remit that issue to the Court of Appeal so that it may do so. The trial judge's original orders of 5 April 2018 would then be revived as those governing the Receivers' conduct.

12. Either of those binary outcomes raises no difficulties for the Receivers: they have had significant input into the forms of order reflecting them.

13. The only circumstances in which the Receivers would need to be heard by this Court on the form of the orders is in the event that the reasons for judgment give rise to an issue for the Receivers which requires their consideration and input into a set of orders with which they are to comply.

⁴ Paragraph 3.

⁵ Second Respondent's book of further materials, page 5.

⁶ *Judiciary Act 1903* (Cth), section 37.

14. It is for this reason that they seek to reserve the right to make submissions in writing on the form of orders following the delivery of this Court's reasons for judgment.

Part III: Certify that the Second Respondents have considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* (Cth).

Part IV: Not applicable

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Part V: Not applicable

Part VI: Not applicable

Part VII: Not applicable.


As noted above, the Receivers:

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- (a) do not seek to be heard on the hearing of the appeal, but rather seek to be excused from attendance; and
- (b) if this course is considered appropriate by the Court, to make brief submissions in writing on the appropriate form of order upon the delivery of the Court's reasons for the judgment.

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Dated 2 November 2018


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