



“ In this edition we look at why it is important to keep ASIC informed of your current registered address as well as some recent legal decisions involving trust property and insolvent trading. ”

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UPDATE YOUR REGISTERED ADDRESS TO AVOID DISASTER

We recently encountered a matter where a company director sought advice from us in respect of a winding up action on foot against his company that he was unaware of until shortly before it was due to be heard by the court. The company had used the director's personal address as its registered office, and not that of the company accountant. The director had moved house circa 2017 and had failed to update the ASIC as to that fact and to provide it with the company's new registered address.

As a consequence, when the Australian Taxation Office commenced recovery action against the company in respect of outstanding taxes it issued its correspondence to the company's registered address as recorded with ASIC, being the director's previous residential address. Unfortunately for the director, the Australian Taxation Office's correspondence, including a statutory demand for payment as well as the winding up notice, failed to make its way to the company and therefore the director was unaware that his company was weeks away from being wound up.

PRIORITY CLAIMS & TRADING TRUSTS

Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth & Ors [2019] HCA 20 (Amerind Decision)

This case originated from a dispute as to whether trust property was subject to the statutory priority regime. By way of background, Amerind Pty Ltd solely acted as trustee of a trading trust which was placed into voluntary administration and receivership as a result of defaulting under various banking facilities.

The receivers of Amerind Pty Ltd realised the assets subject to their appointment and were able to provide a full return to their appointee, as well as having an additional approximately \$1.6 million available for distribution. Two parties argued that they had rights to these funds, being the Commonwealth (which became a creditor through the FEG scheme) and Carter Holt. The Commonwealth argued that it was entitled to priority to the \$1.6 million through the operation of section 433 of the Corporations Act 2001 (Cth) which essentially affords a priority to outstanding employee entitlements. Carter Holt argued that the assets of Amerind Pty Ltd were held on trust and that section 433 of the Corporations Act 2001 (Cth) did not apply to trust property and therefore no priority was afforded to outstanding employee entitlements.

In the first instance, the Supreme Court of Victoria held that the statutory priority regime did not apply to the distribution of trust property by the receivers. This decision was then appealed and subsequently overturned by a full bench of the Victorian Court of Appeal.

Leave was then sought, and granted, to appeal that decision to the High Court, which brings us to the current case. The decision of the High Court in this instance was unanimous, with all seven judges finding that the appeal by Carter Holt should be dismissed with costs. While there were three separate judgements within the decision, each of the judges found their own way to the same conclusion to the question of whether or not the trust property was subject to the statutory priority regime – it is.

It is also helpful to note that the High Court confirmed that while this case was decided in respect of receivership and section 433 of the Corporations Act 2001 (Cth), the same reasoning would also apply to liquidations and sections 556, 560 and 561 of the Corporations Act 2001 (Cth).



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It does not however extend to the general body of creditors of a company, which have been incurred in the company's own right and not in its capacity as trustee (that is, the priority for employee entitlements only applies to outstanding amounts which are incurred on behalf of the trust).

The High Court's decision also covered the need to recognise the trustee's right of indemnity, a concept which is separate and distinct from the assets themselves. The Court noted that the failure to keep these two separate was the misconception that was the basis for the decision at first instance. Essentially, the Court found that the receivers had taken control of the assets as they had found them, in this instance the assets involved were inventory which was therefore taken by the receivers as a circulating security interest (as being distinct from the right of indemnity).

There is still however some ambiguity as to how distributions should be treated in more complex scenarios, such as where the company in administration has incurred liabilities in both its own right and in its capacity as trustee, or where the company acted as trustee for several different trusts. Despite these issues, this decision has gone a long way to clarifying the order of priorities when dealing with trust assets.

PRESUMED INSOLVENCY - NOT KEEPING PROPER RECORDS

Substance Technologies Pty Ltd [2019] NSWSC 612

The company ran a scrap metal business and was wound up by order of the Court in 2016. The case involved an insolvent trading claim brought by the liquidator against the director at the time of liquidation, D1, and a previous director, D2. D2 was the director of the company for the period September 2004 to January 2015, whereafter D1 took over the directorship in January 2015 and continued to hold same up to the date of liquidation.

The liquidator's claim for insolvent trading related to two debts owing to the company at the time of liquidation - one to Ausgrid for the supply of scrap metal and one to the Australian Taxation Office in respect of taxation debts. As part of the action, the liquidator sought to establish insolvent trading through the presumption of insolvency as provided for in section 588E(4) of the Corporations Act 2001 (Cth) ("the Act"). This section provides that, if it can be established that the company failed to keep books and records for a period as required by section 286(1) or 286(2) of the Act, then the company is presumed to have been insolvent throughout that period.

Of interesting note, as part of their defence the directors argued that:

1. The books and records were maintained in accordance with statutory requirements however, they could not provide those records to the liquidator as they wished to exercise protection from self-incrimination. In respect of this argument, the Court noted that based on the reasoning in Allsop J's decision in *Griffin v Pantzer* (as trustee of the bankrupt estate of Griffin) [2004] FCAFC 113 it was "likely that the directors' privilege against self-incrimination has been abrogated by s 530A...".
2. The debt owing to the Australian Taxation Office no longer existed as the Australian Taxation Office had written off the amounts owed as unrecoverable. This argument was rejected by the Court, which noted "The fact that a creditor makes an accounting entry to reflect the prospects

of recovering a debt from an insolvent company does not detract from the fact that the creditor has suffered loss or damage in relation to the debt because of the company's insolvency".

3. The debt owing to Ausgrid no longer existed because Ausgrid as an entity had been dissolved when it was converted from a state owned corporation into a corporation constituted as a Ministerial Holding Corporation. The Court also rejected this argument, finding that "notwithstanding the changes made in respect of Ausgrid, its new persona is, for all purposes, to be a continuation of, and the same legal entity as, Ausgrid. As much was confirmed by Ausgrid's letter to the company. As such, the company's debt to Ausgrid was not extinguished."

In respect of the obligation to maintain records under section 286 of the Act, the Court found that this was a two fold obligation:

1. There is an obligation to keep records in accordance with section 286 of the act
2. There is an obligation to maintain those records for seven years.

The evidence in the case established that:

- The company had not lodged Income Tax Returns or Business Activity Statements since 2013
- The company's accountant did not have any financial records for the company's more recent years of operations
- The company had minimal records which had been tendered
- Both D1 and D2 had failed to cooperate with the requests made by the liquidator.

Based on the above, the Court found that the company had not maintained records in accordance with section 286 of the Act and therefore the presumption of insolvency in section 588E(4) prevailed. The liquidator was able to successfully establish their insolvent trading against both D1 and D2 and orders for compensation under section 588M(2) of the Act were made against them by the Court.

Please contact Todd, Mitchell or Ben should you have any questions regarding business restructuring or advisory matters.

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