

The Insider

Priority of the Commonwealth vs Creditors: who dares wins!

May 2017

In March 2017, Justice Robson of the Supreme Court of Victoria delivered judgement in the matter of Amerind; a case in which his Honour determined the question of whether the assets held by an insolvent corporate trustee are 'property of the company' and what effect that had on the Commonwealth's claim to be paid in priority to unsecured creditors.

Amerind facts

Amerind Pty Limited (**Amerind**) was in the business of manufacturing and distributing decorative and architectural finishes. Importantly, Amerind was the trustee of the Panel Veneer Processes Trading Trust. It acted only in a trustee capacity, owned no assets of its own and incurred liabilities only in its capacity as trustee.

On 11 March 2014 the directors appointed voluntary administrators and thereafter the Receivers were appointed by Bendigo and Adelaide Bank (**the Bank**). On 13 August 2014 Amerind's creditors resolved that the company be wound up.

The Receivers and the Commonwealth

The Receivers decided to continue to trade Amerind's business and in doing so made a net surplus of approximately \$1.6 million after payment of amounts owing to the Bank and withholding a 'just estimate' for their costs.

The Commonwealth Department of Employment (**the Commonwealth**) paid accrued wages and entitlements exceeding \$3.8 million to the former employees of Amerind under the Fair Entitlements Guarantee Scheme.

In view of the surplus, the Commonwealth required the Receivers to pay to it as a priority under sections 433 and 556 of the *Corporations Act 2001* (Cth) (**the Act**) the monies it had paid to employees. The Commonwealth contended that the funds held by the Receivers were 'property of the company' or that Amerind's right of indemnity and lien over trust assets were 'property of the company' such that section 433 required the Receivers to pay the Commonwealth in priority in accordance with the Court of Appeal decision in *Re Enhill Pty Ltd* [1983] 1 VR 56.

The Receivers agreed with the Commonwealth.

The Creditor who dares

One creditor, Carter Holt Harvey Wood Products Pty Limited (**CHH**) represented by Polczynski Lawyers disagreed. CHH argued that trust assets were not property of the company such that the moneys claimed by the Commonwealth should not be paid to the Commonwealth in priority in accordance with the decision of Justice Brereton in *Re Independent Contractor Services (Aust) Pty Ltd (in liq) (No 2)* [2016] 305 FLR 222.

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Dare to be different

The Receivers sought directions from the Court as to their obligations to pay preferential debts under the Act out of the surplus from trading and other recoveries by the Bank. In declining to follow the *Re Enhill* decision, Justice Robson determined that:

1. neither the proceeds of sale of the trust assets nor the trustee's right of indemnity were 'property of the company'; and
2. the Receivers should not pay to the Commonwealth as a priority creditor.

What it means to be daring?

The Commonwealth has applied for leave to appeal Justice Robson's decision. For the time being, insolvency practitioners should be cautious about appointments to insolvent corporate trustees which only function is to act as a trustee. The *Amerind* decision if upheld will introduce a level of consistency between the states and will mean that assets held by an insolvent corporate trustee in its capacity as trustee:

1. are not 'property of the company';
2. are not subject to the priority regimes in the Act; and
3. should be distributed *pari passu*.

Polczynski Lawyers has vast experience in acting for secured and unsecured creditors, administrators, liquidators and receivers alike.

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