

# JOURNAL OF BANKING AND FINANCE LAW AND PRACTICE

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## ARTICLES

### **Romalpa Suppliers and the PPSA – For Better or Worse in Insolvency – Part II –** *David Morrison and Matthew Broderick*

Part I of this series, published in (2018) 29 JBFLP 307, addressed the historical background of the eponymously named “Romalpa clause”, registration requirements under the *Personal Property Securities Act 2009* (Cth) (PPSA), the incorporation of retention of title (ROT) terms into sale contracts, enforcement and tracing. Part II considers the viability of the so-called “all moneys” ROT clause under the PPSA, the treatment of ROT claims in insolvency administrations, the impact of employee entitlements and a voluntary administrator’s statutory lien over ROT proceeds, and unfair preference claims by liquidators against ROT suppliers. .... 221

### **Cut Me Some Slack: An Analysis into the Extension of Time Provisions for Registering Security Interests under the Corporations Act –** *Amanda Jade Staninovski*

Section 588FM of the *Corporations Act 2001* (Cth) grants the court the power to fix a later time for registration of a security interest in the event that a corporation fails to comply with registration requirements under s 588FL. This provision largely reciprocates the wording of the former s 266(4), which allowed for extensions under the previous “charges” system. With the differences in the legislative regimes, the question arises as to whether the previous precedent and principles in respect of “charges” have continued applicability to the extension of time provision under the new regime. This article advocates for a broad application of s 588FM and submits that previous precedent is relevant and should be applied to each basis of relief and discretionary factor, to the extent that, contrary to the current judicial position, extensions should not be granted after s 588FL is triggered due to the new concept of “vesting”. .... 240

### **The Trustee’s Indemnity as “Property of the Company” under the Corporations Act 2001 (Cth): Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth –** *Allison J Silink*

In *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* the High Court found that the trustee’s unique proprietary interest in trust assets in respect of its right of exoneration is relevantly “property of the company” required to be distributed in insolvency in accordance with the statutory priorities under ss 433(3) and 561 of the *Corporations Act 2001* (Cth), resolving decades of uncertainty about the application of the Act. This article examines the Court’s reasons for finding that this interest in trust assets falls within the scope of the statute, and its implications. While the decision represents no change to existing analysis of the underlying equitable interest, it is argued that the construction of the statutory concept of “property of the company” for the purposes of insolvency has

been enlarged to accommodate this interest. It is argued that the decision is unlikely to resolve remaining live issues in relation to the insolvency of a trading trust or necessarily resolve the application of other sections of the Act, and that comprehensive and dedicated law reform that includes specific provisions for the winding up of a trading trust remains desirable. .... 272

**Finance v2.0 – an Analysis of the Impact of Blockchain, Smart Contracts and Extensible Markup Language on Debt Capital Markets in Australia – Andrew J Lunardi**

This article considers the application of blockchain, smart contracts and Extensible Markup Language (XML) on debt capital markets in Australia. Through a case study on an unsecured, wholesale, over-the-counter debt security issuance in Australia, the inefficiencies associated with the current issuance, secondary trading and clearing and settlement processes are identified. XML is applied to the drafting process, demonstrating how drafting time and cost can be reduced, and how law firms can effectively utilise and exploit data from previous transactions. Blockchain and smart contracts are then applied to the secondary trading, clearing and settlement process, showing how it can be used to replace the current Austraclear system. .... 297

**Disclaimer Explainer: What Are the Legal Consequences of Disclaimer of Real Property under s 133 of the Bankruptcy Act 1966 (Cth)? – Matthew Paterson**

Although trustees in bankruptcy are increasingly exercising their powers under s 133(1) of the *Bankruptcy Act 1966* (Cth) to disclaim real property, the legal effects of this disclaimer are far from clear. By looking to the nature of the rights that are being disclaimed and the historical background of the disclaimer provisions, this article argues that the effect of disclaimer under s 133(1) is to cause the land to escheat to the Crown in right of the State. While this means that the freehold estate is terminated, this article further argues that the courts can, under s 133(9), order a “statutory recreation” of the freehold estate, and vest that estate in a person claiming an interest in the land, if it is just and equitable to do so. Ultimately, by exploring these positions, this article seeks to provide a firm foundation upon which future jurisprudence regarding s 133 and the disclaimer of real property can be built. .... 318

**The Regulation of Cryptoassets in Australia and the United States – David Lu**

Digital asset projects raised billions of dollars in 2017 and 2018 through the pre-sale of tokens that represented varying forms of rights. While token sales have proved to be a popular fundraising option for entrepreneurs, various issues concerning tokens have surfaced, particularly around the legal nature of the interests generated by a token. This article examines the types of tokens that currently exist in the market and attempts to characterise them based on the rights they propose to provide. The examination reveals that, presently, numerous risks regarding cryptoassets are inadequately addressed. By comparing the regulatory frameworks of Australia and the United States, and their respective treatment of tokens, this article highlights the difficulties in regulating tokens and urges policy-makers across the globe not to regulate in haste given the technological nascency of digital assets. .... 332

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