AUSTRALIAN BUSINESS LAW REVIEW

Volume 52, Number 1

2024

EDITORIAL – *General Editor: Michael Terceiro* 3

ARTICLES

Mischaracterised "Personal-Use" Crypto Assets – *Christina Allen*

In an environment lacking specific legislative guidance for crypto assets and with limited court cases testing the legal framework surrounding them, taxpayers often turn to the Australian Taxation Office (ATO) website for guidance. However, concerns arise regarding the ATO's approach to characterising personal-use assets on its website, as it relies on unprecedented legal principles. This article provides a principles-based interpretation of the tax law for crypto transactions involving personal-use assets, including collectables, which are a subset of personal-use assets. The article explores the conceptual underpinnings of tax policy and rationalises the complex capital gains tax (CGT) provisions designed to exclude consumption once it has been taxed based on income. It also examines the special tax provisions applicable to collectables and the measures in place to prevent the exploitation of tax exemption thresholds. After considering the tax policy and design aspects of Australian tax law pertaining to personal-use assets, this article suggests limiting the characterisation of crypto assets as personal-use assets. Specifically, the characterisation should be based on the nature and use of the assets traded in crypto transactions, with the mechanism to remove double-counted values. Cryptocurrencies and crypto assets that are CGT assets used for trading non-wasting intangible assets should be presumed as non-personal-use assets, except in exceptional circumstances. These recommendations aim to align the tax treatment of crypto assets with tax policy and principles, thereby minimising unaccounted costs to revenue. However, further analysis is necessary to address interpretative challenges associated with characterising various emerging types of crypto assets. 6

Do the Hokey Pokey – Step-in Rights and the PPSA – *Richard Winter*

Step-in rights are a common protection mechanism used in construction and project development. In the event a contractor fails to perform its obligations, make necessary payments or goes insolvent, these rights allow for financiers or other project parties to "step-in" and take over the contractor's obligations to make certain that the project or construction is completed. A loss of step-in rights is significant as it would prevent the right holder from being able to complete contract works, resulting in unfinished project works and thereby substantially diminishing the value of the project assets. To date this issue has not been considered as many step-in right holders have also had the benefit of general security arrangements and have not specifically had to enforce their separate step-in rights. The cases of *AWE Perth Pty Ltd v Clough Projects Australia Pty Ltd* and *Bluewaters Power 1 Pty Ltd v Griffin Coal Mining Co Pty Ltd* have shown that it is reasonably arguable that in the right circumstances step-in rights can be relevant for the purposes of the *Personal Property Securities Act 2009* (Cth) (PPSA) and a failure to register under the PPSA on time or at all could result in a loss of those rights in the event the defaulting party, that is the

party that granted the step-in rights, goes insolvent. Accordingly, there is a hidden issue within the PPSA that makes holders of step-in rights particularly vulnerable to significant loss, those right holders who have either not considered the need, or otherwise believe it is unnecessary, to register their step-in rights. It is argued that due to the potential for such a catastrophic loss of step-in rights, amendments should be made to the PPSA to protect step-in right holders to ensure those rights continue to be available following a defaulting party's insolvency, while maintaining the integrity of and policy behind the universality of the PPSA register by still requiring the need for registration to enable step-in right holders to obtain priority over other secured creditors in the exercise of those rights. 28

Collective Bargaining Following the Tribunal's Decision in Port of Newcastle Operations – *Rhonda L Smith*

In August 2020 the Australian Competition and Consumer Commission (ACCC) granted authorisation for the Minerals Council of NSW and 10 Hunter Valley coal producers to collectively bargain in relation to port charges with the Port of Newcastle Authority. The latter sought review of this decision by the Australian Competition Tribunal. In March 2022, the Tribunal handed down its first decision in relation to the authorisation of collective bargaining. This article explores some issues raised by the Tribunal in its determination. The first of these is its observation that the parties' submissions contained no analysis of the effect of the proposed collective bargaining conduct on competition in the market in which the bargaining would occur (the primary market). The second relates to substantiation of the public benefits from collective bargaining at a practical rather than a theoretical level. This was raised in the context of transaction cost savings from collective bargaining. The third is the implications of the finding that public detriments would "not be likely to result in any public detriment having any material weight", and similarly that the conduct "would not be likely to result in any public benefits having any material weight" so that there was no net public benefit causing the rejection of authorisation. 45

BOOK REVIEWS – *Editor: Nicholas Felstead*

The Law of Civil Penalties, edited by Deniz Kayis, Eloise Gluer and Samuel Walpole – *Reviewed by Lucy Cameron* 63

Customer Data Sharing Frameworks: Twelve Lessons for the World, by Anton Didenko, Natalia Jevglevskaja and Ross P Buckley – *Reviewed by Rob Nicholls* 68