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Receivers Trading on at a Loss: Implications of Section 433 of the Corporations Act – *Jonathon Moore QC*

When a receiver is appointed to a company that conducts a business, the receiver may reasonably consider that it is appropriate to continue trading. Continued trading might be thought to maximise the chance of selling the business as a going concern. The receiver may also believe that the business can be traded profitably in the interim. Continued trading will inevitably utilise existing circulating assets to fund ongoing expenses. Often, it transpires that the business cannot be sold and the intervening trading by the receiver has produced significant losses. In those circumstances, what is the liability of the receiver to priority creditors under s 433 of the *Corporations Act 2001* (Cth)? 125

A Trans-Pacific Tale of Carrots and Sticks: Lessons for Australia from the United States' Experience of the Ipso Facto Stay – *Kathryn Sutherland-Smith*

The ipso facto stay is merely one component of the legal architecture required to create an environment where an insolvent company is able to preserve a valuable contractual asset. In its present form, the ipso facto stay raises a draconian spectre of counterparties being forced to throw good money after bad to trade-on with the debtor, notwithstanding that their pre-appointment debts remain unpaid. For this reason, counterparties are not expected to take the ipso facto stay lying down. "Vive la resistance" corporate Australia may well cry, exemplifying this sentiment through creative attempts to contract-out of the stay and judicial testing of the stay's boundaries. Such tactics will likely create practical obstacles to the exercise of the ipso facto stay for insolvency practitioners. Notwithstanding its anti-avoidance provisions, the *Treasury Laws Amendment (2017 Enterprise Incentives No 2) Act 2017* (Cth) leaves the door open to recalcitrance by creditors in an array of forms. Two key avenues for counterparty resistance are discussed in this article: termination for default and structuring supply arrangements to avoid the ipso facto stay entirely. An examination of the United States (US) executory contracts regime reveals that an incentive scheme that rewards those creditors who are selected to participate in the restructuring process is the missing component required to render the Australian ipso facto stay a success. This article draws lessons from the US experience of the ipso facto stay and tailors solutions to the Australian context that aim to reduce the likelihood of counterparty insurrection vis-à-vis the ipso facto stay. 134

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