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Update Summary

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THE LAW RELATING TO BANKER AND CUSTOMER IN AUSTRALIA

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The following cases, with headnotes, have been included in the *Banking and Finance Reports of Australia* with this update:

[14 BFRA 229] Mercedes Benz Australia Financial Services Pty Ltd v Kucharski [2018] WADC 7

Mortgages – Chattel Securities – Grantee's right to seize and sale – Where mortgagee took possession of vehicle – Where mortgagor had attempted to sell vehicle – Whether mortgagee owed duty to mortgagor to give reasonable time to allow sale – Whether mortgagee obliged to sell at market value.

[14 BFRA 237] Bindaree Beef Pty Ltd v Chinatex (Australia) Pty Ltd (No 2)

Procedure – Interim Preservation – Freezing orders – Ancillary orders – Continuation of – Whether orders should be extended to other parties – Scope of ancillary orders – Uniform Civil Procedure Rules 2005 (NSW) r 25.12(1) Procedure – Interim Preservation – Stay of proceedings – Pending appeal – Whether granting stay will render appeal nugatory – Where inability to pay judgment debt a consequence of defendant's actions.

[14 BFRA 244] Commonwealth v Byrnes [2018] VSCA 41

Corporations – External administration – Winding up and receivership – Distribution of trust assets – Insolvent corporate trustee – Trustee's right of indemnity by way of exoneration – Whether right of indemnity is 'property of the company' – Whether statutory priority regime applies – Corporations Act 2001 (Cth) ss 433, 555, 556, 560, 561.

Trusts and Trustees – Insolvency – Insolvent corporate trustee – Right of indemnity in respect of trust assets – Nature of trustee's interest – Nature of trust creditors' rights of subrogation.

Corporations – External administration – Winding up and receivership – Distribution of surplus – Company operated as trading trust – Application of priority regime in Corporations Act – Where property of company includes trustee's right of indemnity in respect of trust assets – Whether necessary for right of indemnity to be subject to circulating security interest – Whether right of indemnity subject to circulating security interest – Right of indemnity characterised by trust assets available to satisfy it – Whether trust assets subject to circulating security interest – Whether trust assets to be treated under priority regime – Corporations Act 2001 (Cth) ss 51C, 433(2)-(3), Personal Property Securities Act 2009 (Cth) ss 8(1), 340.

Corporations – External administration – Winding up and receivership – Distribution of surplus – Company operated as trading trust – Application of priority regime in Corporations Act 2001 (Cth) s 433 – Relevant date for ascertaining whether property subject to circulating security interest – Whether date of creation of security interest or date of receivers' appointment – Corporations Act 2001 (Cth) s 433.

Securities – ‘Circulating asset’ – Whether property is circulating asset under Personal Property Securities Act 2009 (Cth) s 340 – Relationship between sub ss (1)(a) and (b) – Meaning of ‘in any other case’ in sub-s (1)(b) – Whether sub-s (1)(b) applicable if property excluded as circulating asset under sub-ss (1)(a) and (2) – Whether sub-s (1)(b) applies to assets covered in sub-s (5) – Corporations Act 2001 (Cth) s 51C; Personal Property Securities Act 2009 (Cth) ss 31, 340, 341, 341A.

[14 BFRA 328] Public Trustee v CBA (2018) SASC 25

Succession – Executors and administrators – Executor de son tort – General Principles – Where banks paid out estate’s deposits to executor de son tort – Whether banks themselves are executor de son tort.

Contract – Discharge by agreement – Whether payment to executor de son tort made in valid discharge of contractual obligation – Whether banks acted negligently.

Contract – Ratification – What amounts to – Where probate reached by way of settlement – Where probate declared following impugned conduct – Whether agreement to probate constitutes ratification of prior actions.

Equity – Equitable defences – Consent – Where three beneficiaries consented to impugned conduct – Whether beneficiaries’ consent binds the public trustee – Equitable estoppel – Whether beneficiaries’ representation to the bank binds the bank to that representation – Equitable set-off – General principles – Where banks have claim in indemnity against executor de son tort – Where no mutuality of claims – Whether indemnity claim can be set-off against present claim.

[14 BFRA 365] Re Club Capitol Pty Ltd (2018) NSWSC 398

Mortgages – Registration of assignments of chattels under statutory provisions – Rectification of register – Application for extension of requisite period – Whether just and equitable to extend time – Effect of grantor going into administration – Personal Property Securities Act 2009 (Cth) ss 62, 293.

[14 BFRA 370] ANZ Banking Group Ltd v Queensland (2018) FCA 464

Bankruptcy – Undischarged mortgage held by registered proprietor – Default of mortgage payments – Bank successful in application for possession – Trustee in bankruptcy appointed over property – Disclaimer of real property under s 133 of Bankruptcy Act 1966 (Cth) by trustee – Application for order under s 133(9) vesting property in mortgagee – Whether land escheats to Crown in right of State of Queensland after disclaimer under the Bankruptcy Act

Mortgages – Disclaimer of real property under s 133 of Bankruptcy Act 1966 (Cth) – Mortgagee’s interest in disclaimed property where mortgage undischarged – Whether land escheats to Crown in right of State of Queensland after disclaimer under the Bankruptcy Act – Mortgagee’s application for vesting orders following disclaimer of the property

[14 BFRA 376] Jones v Matrix Partners Pty Ltd (2018) FCAFC 40

Equity – Trusts and trustees – Trading trust – Trustee’s right of indemnity – Nature of trustee’s right of exoneration – Where corporate trustee insolvent.

Corporations – Winding Up – Trust Assets – Where insolvent corporate is trustee for trading trust – Whether trustee’s right of exoneration is property of the company under the Corporations Act – Whether proceeds of trustee’s right of exoneration can only be used to reimburse trust creditors – Whether liquidator requires Court order to sell trust assets - Corporations Act 2001 (Cth) ss 477, 501, 511, 555, 556, 560, 561.

Corporations – Winding Up [198]-[293] – Proof and ranking of claims [260]-[267] – Whether right of exoneration and proceeds thereof are distributed according to statute or pari passu - Corporations Act 2001 (Cth) ss 477, 501, 511, 555, 556, 560, 561.

[14 BFRA 424] PC Yarak v Quick Cash Advance Pty Ltd (2018) SADC 26

Consumer Protection – Whether misleading or deceptive conduct under s 18 of the Australian Consumer Law (ACL) – Where statements made by agent – Meaning of ‘person’ in s 2 of the ACL – Where company de-registered, whether action for damages lies against agent personally – Where statements as to future matters – Where no evidence reversing presumption

Consumer Protection – Actions for damages – Assessment or availability of damages – Where business has no current value

Consumer Protection – Where damages sought for bad debts incurred by the business because of misleading representations – Whether deductions for bad debts available where already written off against business income – Where reversal of bad debts would increase income earned by trust – Where distributions already made to beneficiaries – Where tax implications – Beneficiaries paid no tax on distribution – Where possible exposure to penalties by the ATO if reversed

Contracts – Where non-payment of income generated by the business by franchisor – Where failure to pay income struck at the heart of the relationship between the parties – Whether repudiation for non-performance – Whether termination for repudiation available separately to termination under the written terms of the contract – Whether contractual notice period required to be complied with where repudiation

[14 BFRA 461] Smithson and Baye Pty Ltd v Australian Securities and Investments Commission (2018) AATA 857

Consumer Credit – Whether contravention of National Consumer Credit Protection Act 2009 (Cth) (NCCP Act) – Where findings of contravention by Australian Securities and Investments Commission – Where Australian consumer licence cancelled – Application for review of decision – Hearing de novo – Exercise of discretion to cancel licence

Consumer Credit – Purchase of properties for self-managed superannuation funds – Where top-up loans used to purchase properties – Where loans re-financed – Whether loans

entered into by individuals or trustees – Construction of agreements – Whether NCCP Act applies to re-financed loans

Consumer Credit – Whether fit and proper person to hold ACL – Consideration of evidence

CONSUMER CREDIT – Where contraventions of NCCP Act – Whether licensee a fit and proper person – Consideration of factors relevant to the exercise of discretion – Where course of conduct giving rise to multiple contraventions – Whether to cancel Australian credit licence

[14 BFRA 496] Volkswagen Financial Services Australia Pty Ltd v Mandalavi (2018) FCCA 752

Consumer Credit – Credit Protection – Enforcement and termination – Where applicant held mortgage over first respondent's vehicle – Where first respondent defaulted – Where applicant unable to locate vehicle – Whether Court can make orders concerning individuals not joined to proceedings – Whether Court can compel police to assist with search for vehicle – Where police not joined to proceedings.

[14 BFRA 506] Re White (2018) FCA 471

Administration of property – Application by administrators – Where administrators undertook stocktake of consignment stock not the property of the company – Where substantial costs incurred – Whether administrators can impose levy on consignor property to recover costs of stocktake – Whether administrators hold equitable lien over consignor property

