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ARTICLES

Illegal phoenix activity: Quantifying its incidence and cost – *Helen Anderson*, *Ian Ramsay* and *Michelle Welsh*

Illegal phoenix activity has become a matter of increasing concern in recent years. Many parties are interested in understanding the size of the problem, how much it costs the economy, and how well current enforcement mechanisms work. These are important questions because they influence the allocation of government resources and the process of law reform. To answer the quantification questions, we undertook to gather together all the available data on the incidence and cost of illegal phoenix activity, as well as the enforcement of the various laws that can be utilised to combat it. However, despite the large amounts of information we obtained, we cannot provide a definitive answer to the quantification questions. Moreover, we believe that accurate quantification is highly problematic. This article, which is based on a much longer research report, presents a sample of our findings and explores the difficulties with quantification. 95

Unfair preferences: Putting an end to the peak indebtedness "rule" – *Stephen Russell* and *Sean Russell*

Over the last few years insolvency practitioners and lawyers have hotly debated: 1) the factors that determine the start of the continuing business relationship; 2) the transactions that make it up; and 3) the preferential nature of the transactions.This article examines the historical development, principled approaches and contemporary issues behind the peak indebtedness theory of preference claims in the context of the continuing business relationship and the former running account test. It will argue, by reference to the way in which the law has developed in Australia and New Zealand that the peak indebtedness theory is no part of the unfair preference regime imposed by s 588FA of the Corporations Act 2001 (Cth). 111

The Australian Taxation Office – what role does it play in anti-phoenix activity? – *Colin Anderson*, *Jennifer Dickfos* and *Catherine Brown*

The prevention of fraudulent phoenix activity is an increasing issue for the Australian Government and the loss of taxation revenue that results from these arrangments can be significant. For this reason, the Australian Taxation Office (ATO) has played a major role in the development of anti-phoenix regulation and, in particular, the 2012 amendments to the director penalty regime seemed largely aimed at that issue. Typically however, the ATO will have two competing roles in the context of phoenix arrangements, being the primary collector of Australian taxation revenue and also a major creditor in the resulting corporate insolvency. Therefore, two key questions arise – how pervasive should the ATO's collection powers be and to what extent should they be used to control fraudulent phoenix activity if the ATO is competing for funds against other creditors in the limited pool available. This article argues that there are several competing policy imperatives relevant to controlling fraudulent phoenix activity, and that legislative responses should consider the ATO's role as both creditor in insolvency and collector of taxation revenue.

Furthermore, the roles of the ATO and ASIC in relation to combatting phoenix activity need to be clarified. This article suggests that a framework based on decentred regulation might provide a better approach. 127

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