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EDITORIAL 109

ARTICLES

An analysis of the rights test in determining classes of creditors – *Michael Josling*

Statutory provisions enabling binding compositions to be made between a company and its creditors have existed for almost 150 years. These provisions have, and still do, contain provision for class voting; the basic function of which is to require groups of creditors to meet and vote separately. Despite the importance of class voting, legislation has typically been silent as to how a class of creditors is defined. The article focuses on a line of English cases decided over the last 10 years which have made significant restatements to the law; in particular, by holding that only a difference in legal rights will require a separate class of creditors to be formed. The judges have justified this restatement relying upon parliamentary intention, precedent, and policy arguments; in particular that any other test would be unworkable. The author argues that it remains open to courts to adopt a wider and more flexible test for determining when separate classes should be formed, which he considers would be beneficial 110

Safe harbour reforms – should insolvent trading provisions be reformed? – *Anna MacFarlane*

This article reviews the three options outlined in the government discussion paper, Insolvent Trading: A Safe Harbour for Reorganisation Attempts Outside of External Administration (released on 19 January 2010). It provides an overview of, and insights into, the current provisions on insolvent trading, the two reforms outlined in the discussion paper, and the community submissions for and against. This article analyses the two options for reform in the context of the studies conducted regarding the patterns of economic decline in insolvency, and the use of the current insolvent trading provisions. The article is critical of the community submissions for deriving support from anecdotal rather than empirical evidence, and suggests that any future reform should be based on empirical evidence. It argues that presently the combination of an absence of empirical evidence and the trend evolving in the courts undermine any strong case for the safe harbour reforms. 138

Regulation of insolvency practitioners in New Zealand – *Matthew Berkahn*

New Zealand's current "business culture" tends to be very light handed compared to Australia's, a feature that is reflected in the regulation of insolvency practitioners in the two countries. Australia requires its practitioners to be registered and to satisfy educational and experience criteria, and subjects them to post-registration supervision and discipline. New Zealand does none of these things at present, but changes are afoot in the form of the so-called "negative licensing" regime contained in the recently-introduced Insolvency Practitioners Bill. This would strengthen existing measures to enforce performance standards and prohibit those practitioners that do not comply. Though it would not prevent unqualified or inexperienced practitioners from entering the profession, nor achieve better

co-ordination between the New Zealand and Australian regimes, it should provide an appropriately cost-effective method of removing the very worst practitioners, given the small size of the New Zealand profession. 148

Legislative proposals to codify directors' liability for insolvent trading in Hong Kong: A 10-year journey – *Tina Chu* and *Angus Young*

Hong Kong is a modern global city with a reputation for well-regulated financial markets, but for years, the government had been trying to enact laws on corporate rescue procedures with relatively little success. It is under the pretext of the global financial crisis, the threat of a future economic meltdown gave the Hong Kong government the impetus to revisit this issue. This third attempt to codify statutory obligations on directors' liability for insolvent trading has been criticised for either setting the standards too high or low for directors trading while insolvent. There is also some reservation given the beliefs and values of directors in Chinese family-owned and controlled companies. These companies would most likely trade out the difficult times. Nevertheless, this does not negate from the fact that the enactment of corporate rescue procedures in Hong Kong in 2010 is a momentous achievement for the Hong Kong government. 158

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