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ARTICLES

Phoenix companies and the AA fund – *Chris Symes and Matt Simpson*

Fraudulent phoenix company activity is an example of abuse of the corporate form. In 2009 the Australian Tax Office estimated that such activity poses a risk to revenue of around \$600 Million. In addition, are the unpaid employees and creditors left in its wake and immeasurable damage to the integrity of the market. From October 2005, the Howard Government targeted phoenix company activity by allocating \$23 million over four years to an Assetless Administration Fund (AA Fund). The AA Fund finances private liquidators to undertake thorough investigations into assetless companies, often the corporate shells left behind by phoenix activity. In this way, the AA Fund was intended in part to create a mechanism to facilitate the flow of information between the “ground zero” of a phoenix company and the enforcement agencies which prosecute phoenix-related breaches by company directors. Administered by Australian Securities and Investments Commission, it thus purports to close a longstanding regulatory gap which prevented the enforcement of director banning and insolvent trading provisions under the *Corporations Act 2001* (Cth). The current Labor Government has continued the AA Fund, and in December 2011 proposed a broadening of its scope. This article considers what is phoenix activity, how the AA Fund work, how successful it has been in addressing phoenix activity and the new proposed measures to complement the AA Fund. 227

Discharge in bankruptcy: An historical and comparative examination of personal insolvency relief in England and Australia – *John Tribe*

At its heart this article critically examines the concept of discharge in English and Welsh personal insolvency law and Australian personal insolvency law. This critique takes the shape of both an historical examination and a comparative analysis of the concept of discharge and its deployment and use in the two jurisdictions under examination. In relation to formal discharge from bankruptcy there are, it could be argued, two schools of thought as to the length of the bankruptcy period before discharge occurs. The first school of thought states that less onerous discharge provisions (“liberal regimes thesis”) will and have encouraged irresponsible borrowing activities by debtors, thus causing a rise in the number of people seeking redress to the bankruptcy system. Whether or not this is a desirable outcome for rehabilitation goals is also addressed. The second school of thought advocates the idea that the legislative changes have not caused additional redress to the bankruptcy procedure themselves, but that the changes in the legislation were accompanied by an increase in consumer credit availability generally and that this lead to a natural increase in debt related failure (“credit generosity thesis”) and therefore redress to the bankruptcy laws. This article examines these competing contentions through an examination of both historical and comparative sources. It is argued that countries with more “liberal regimes”, in terms of bankruptcy discharge provisions, have a lower incidence of bankruptcy usage caused by more cautious creditor behaviour. Both jurisdictions have reduced their automatic discharge time periods from three years to one

year, but following the suspected abuse of the shortened discharge period the Australian legislature have responded by increasing the period back up to three years. Can English policy makers learn from this speedy legislative intervention? 240

Distribution of a mixed fund – pragmatism prevails over esoteric tracing principles – *Samantha Kinsey and Leana Papaelia*

Over the years, the courts have developed a number of different approaches to tracing into and distribution from a mixed fund. Most recently, the courts have developed a more pragmatic and flexible solution where the application of traditional approaches has not been practically or economically feasible. This article analyses two recent cases in which the courts have ordered that assets be pooled and the mixed fund be distributed rateably to investors. In making those orders, the courts also preserved the possibility for individual investors to establish a different entitlement by adopting one of the traditional tracing approaches. A conclusion is reached that the overall fairness of this practical and flexible approach distinguishes it from the traditional approaches and is likely to encourage its continued application in the context of the distribution of mixed funds by future courts in Australia. 264

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