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ARTICLES

The trust: Evolution from guardian to risk-taker, and how a lagging insolvency law framework has left financiers and other stakeholders in peril – *Nuncio D'Angelo*

In the last few decades the trust has evolved into a widely used business entity for large-scale enterprise but the law has not evolved with it to protect stakeholders in insolvency. The global financial crisis has exposed this deficiency. Despite the fact that trusts (and managed investment schemes), not being legal entities, cannot be insolvent as such, the expression “insolvent trust” is today in common use. But what does it mean and how does Australian law deal with these trusts? In fact, the law in this area is poorly evolved and piecemeal, lacks an adequate and coherent statutory framework and is burdened with a range of uncertainties, particularly when compared with the corresponding law relating to corporations. Attempts by parties to remedy some of these deficiencies by contract have generally served only to further complicate the problem. Unlike the corporation, the trust was not originally intended, and is poorly equipped, to be used as a business vehicle, and its use in that context has even been described as a “commercial monstrosity”. As large trusts and schemes have begun defaulting on their obligations on a scale not before seen, financiers are finding themselves in a double bind: on the one hand, they have been forced to confront weaknesses in their documentation and security (if any), which were negotiated and executed in a more aggressively “borrower-friendly” environment and, on the other, they are faced with material uncertainties in the laws underpinning enforcement and insolvency. This article is an introductory treatment intended to identify several of the issues in an effort to shine a light into some of the many dark corners. The inescapable conclusion is that, as trusts and companies become increasingly aligned in terms of economic risk, a new legal framework is required, applying lessons from company law history, policy and principles. 279

Structuring Islamic finance transactions: Interaction with the law of secured finance – *Tina Savona and Shahriar Mofakhami*

The global Islamic finance industry has, in recent years, shown significant growth in Europe, Asia and the Middle East. A major factor in the boom has been the high price of oil leading to increased wealth in the Gulf Cooperation Council states and Iran. This has, in turn, resulted in an increase in the number of Muslims seeking mortgages, investments, bonds and specialist finance products. This article discusses the principles of Islamic finance and the various practices employed by Islamic financiers. While these practices are technically different to conventional-based finance, they are, in substance, similar to that of conventional lending transactions. The ultimate objective is the same – to provide finance. Similarly, the protections put in place by Islamic financiers provide a level of “risk control” within the boundaries of the Shariah rules. While Islamic financing may be more complicated given the “possession” requirement in Islamic mortgages and the fact that a security interest cannot be taken in a future asset, there is no reason why a Shariah-compliant financing transaction could not be undertaken in Australia. 306

Socially responsible investments: Markets, regulation and compliance risks – *Tony Ciro and Ewa Banasik*

Although recently popular amongst investors, ethical investments and investing in socially responsible investments (SRIs) have been around for a considerable period of time. The challenges for market regulators, investors and product issuers of SRIs requires an understanding of the market dynamics and investor behaviours associated with ethical investing. This, in turn, demands a detailed examination of the disclosure requirements for SRIs and an assessment of whether the disclosure requirements are meeting their stated objectives. This article critically examines the SRI industry and the disclosure requirements in Australia. The article also identifies a number of important compliance risks potentially affecting product issuers and superannuation trustees involved with SRIs. 332

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