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ARTICLES

Directing the Sinking Ship – Where to From Here? – *William Porter*

In New Zealand the provisions relating to "reckless trading" have long-been subject to criticism. In 2021 the Court of Appeal in *Yan v Mainzeal Property and Construction Ltd* called for the law to be reviewed to ensure it provides a "coherent and practically workable regime" for the protection of creditors of insolvent or near-insolvent companies. This article discusses the controversy surrounding ss 135, 136 and 301 of the *Companies Act 1993* (NZ). It then suggests a series of amendments in response to the Court of Appeal's call for change. The article was the winning paper in the Banking and Financial Services Law Association's 2021 Research Essay Prize. 125

The Power to Alter Corporate Rescue in Australia – *Paulina Fishman*

Two statutory regimes which may be used to achieve corporate rescue in Australia are contained in Pts 5.3A and 5.3B of the *Corporations Act 2001* (Cth), respectively. The former regime confers a broad power on the court to "make such order as it thinks appropriate about how this Part is to operate in relation to a particular company". The relevant provision is s 447A. A replica of this provision appears, with some modifications, as s 458A in the new Pt 5.3B. This article examines s 447A's limitations, defines its proper role, and critically analyses three types of orders. That critical analysis supports the article's overall contention that s 447A is being construed too broadly by the courts. The article aims to assist with the future interpretation and application of s 447A, as well as s 458A, and thereby make a useful contribution to the operation of formal corporate rescue mechanisms in Australia. 144

An Identity Crisis? – The Changing Classification of Circulating and Non-circulating Security Interests – *Louise England*

The *Personal Property Securities Act 2009* (Cth) introduced the concept of a "circulating security interest", which was intended to replace the "floating charge" with respect to nearly all relevant property types. This article traces the pre-reform "floating charge", and how it was largely replaced by the "circulating security interest". It examines the legislative framework for determining when a circulating security interest arises and the relevant time for its classification. The article considers the steps that can be taken to convert a circulating security interest into a non-circulating security interest, particularly prior to the appointment of an external administrator, and the impact of such a conversion on priority creditors and the priority payment regimes set out in ss 433 and 561 of the *Corporations Act 2001* (Cth). The article concludes with an analysis of the potential areas for reform in Australia, which would aim to simplify the application of the circulating security interest concept and to better align the circulating security interest with the intentions of Parliament to promote commercial consistency and flexibility. 164

Operation Innovation or Operational Risk? An Analysis of the Financial Regulation of Fintech – *Riley Scott*

The development of fintech capabilities has fundamentally altered the relationships within the financial system, and in doing so has created different categories of systemic risk. This article considers whether the prevailing financial regulatory regime sufficiently addresses the nature of fintech and the systemic risks it presents. The analysis focuses on operational risk, and argues that fintech's nuances and modular, decentralised structure requires a conceptually different approach to regulation. As such, the article proposes a high-level approach to government intervention. 181

Compliance Programs Introduced in Response to Enforcement by the Australian Securities and Investments Commission – *Ian Ramsay and Mihika Upadhyaya*

This article reports the results of a study of compliance programs introduced or amended in response to enforcement by the *Australian Securities and Investments Commission* (ASIC), whether required by court order or as part of an enforceable undertaking (EU). Most of the compliance programs involved companies in the financial services industry. The article identifies the benefits and challenges associated with effectively designing and implementing a compliance program as well as the previous research on compliance programs in Australia. It then examines compliance programs introduced by court order as well as compliance programs introduced or amended as part of an EU for the five-year period 2016 to 2020. An issue of concern is that reports published by ASIC on compliance with EUs contain very little substantive detail on the implementation or revision of compliance programs required by EUs, making it difficult to assess why a compliance program was or was not deemed adequate to comply with the EU. This limited transparency has implications for accountability, deterrence and public confidence. 194