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## ARTICLES

### **Equitable set-off: Principles, application and exclusion by contract** – *Dr Vicky Priskich*

Keane J has described the principles governing the availability of the right of equitable set-off as being consistent with the technique of equity which does not seek to define what an elephant is but knows when it sees one: *Forsyth v Gibbs* [2009] 1 Qd R 403 at 406; [2008] QCA 103 at [9]. This article seeks to draw together in a concise form for the assistance of insolvency practitioners answers to the following questions concerning the right of equitable set-off: (i) What is the test for equitable set-off? (ii) How has it been applied? (iii) What is the nature of the right of equitable set-off – is it substantive or procedural and what effect does it have? (iv) When is equitable set-off excluded by contract? Presently, the answer to question (iv) above can only be authoritatively resolved in Australia by the High Court due to the divergent views of superior courts in Australia. In the writer’s opinion the answer to question (iii) informs the answer to question (iv). .... 115

### **A framework for analysing the joint carrying out of “a business, a scheme or an undertaking”** – *Kelvin Tran*

Statutory provisions allow courts and liquidators to pool a company’s assets with those of other companies being wound up if the company jointly carried on a business, scheme or undertaking with those other companies. Those provisions do not, however, prescribe the matters relevant to the question as to whether a company is jointly carrying out a business, scheme or undertaking, and the few cases that have discussed the provisions so far offer little guidance. This article analyses the history and purpose of the provisions and adopts a law and economics approach to determine the way in which the provisions operate to achieve that purpose. It then offers a practical framework that allows courts and practitioners to determine whether a company has satisfied the criteria in the provisions. .... 131

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