INSOLVENCY LAW JOURNAL

Volume 20, Number 3

September 2012

EDITORIAL 157

ARTICLES

Debt agreements under Australian bankruptcy law: A successful experiment? – *Mary Wyburn*

The debt agreement is one of two types of debt relief arrangement between an individual debtor and their creditors that allows the debtor to avoid bankruptcy but still places the agreement within the bankruptcy legislative framework. When introduced in 1996, the debt agreement was an experiment of sorts. At the time, not many jurisdictions were heading in that direction in the consumer bankruptcy field. The Federal Government has kept a close eye on its development and over time the system has undergone a number of significant changes. Over the same period an expansion in the availability of consumer credit and the accompanying problems of overindebtedness, have seen several other jurisdictions, especially in Europe, develop similar types of legislated debt relief for individuals. A review of the effectiveness of the 2007 amendments to the debt agreement framework currently underway provides an opportunity to assess the success of this Australian experiment. This article examines the role of the debt agreement within the bankruptcy framework, the close scrutiny of its operation over its life so far and the issues being raised by the review. 158

Out of the shadows? Clarifying the liability of secured creditors in workouts – *Brendan Fitzgerald*

The controversial doctrine of "shadow directorship" has come under renewed examination following the recent New South Wales Court of Appeal case *Buzzle v Apple* and in the wake of the global financial crisis. This article examines a crucial aspect of the doctrine – whether or not a secured creditor that puts a debtor company through an informal "workout" could, and should, be held liable as a shadow director. It argues that, while largely correct, the current law is overly deferential to the actions of secured creditors. A better approach would be to hold creditors liable as shadow directors where they influence the debtor company to act contrary to its objective best interests. 179

Fruitful unfair preference actions – what's a liquidator to do? – *Andrew Poulton*

Statutory recovery powers relied upon by a liquidator aim to ensure assets of an insolvent company are distributed equally so no one creditor receives preferential treatment over another. Upon the successful recovery of assets, a liquidator may be faced with competing claims from secured and unsecured creditors as to who is entitled to the benefit of the recovery proceeds. The law in its current form is unclear as to whether the nature of the property recovered determines the ultimate class of creditor, either secured or unsecured. The decision of Finkelstein J in *Cook v Italiano Family Fruit Co Pty Ltd (in liq)* (2010) 190 FCR 474 provides justification for a complete analysis of the liquidator's dilemma. This article attempts to provide an examination of the position in Australia prior to, and after the C*orporate Law Reform Act 1992* (Cth) amendments. International perspectives and competing policy arguments are considered, with a suggestion for law reform proposed. 195

RECENT DEVELOPMENTS – *Dr David Morrison*

Penalties, directors' duties and non-executive directors: Australian Securities and Investments Commission v Healey (No 2) (2011) 196 FCR 430 – *Maria Nicolae* and *David Morrison* 209

REPORT FROM NEW ZEALAND – *Lynne Taylor*

Personal liability of directors for the debts of phoenix companies – *Lynne Taylor* 217