

INSOLVENCY LAW JOURNAL

Volume 31, Number 2

2023

EDITORIAL – *Editor: Dr David Morrison* 83

ARTICLES

Insolvent Trading: Director Accountability for Minimal Returns to Creditors in Liquidations – *Mark Wellard*

Recent ASIC statistics relating to company liquidations suggest that insolvent trading is commonplace. Instead of accepting this as an unavoidable cost or inevitable outcome of corporate failure, amendments could be considered to improve accountability and incentives for directors of insolvent companies and better balance the competing imperatives of reasonable risk-taking (with its attendant economic benefits) and creditor protection (preventing abuse of use of the corporate form). The “safe harbour” from insolvent trading introduced in 2017 appears to support diligent directors of financially distressed companies in exploring legitimate turnaround options. However, the “safe harbour” reform did not address longstanding deficiencies in the statutory duty to prevent insolvent trading that undermine its effectiveness as a deterrent. Legislative measures introduced in 2019, to prevent directors abusing the Fair Entitlements Guarantee (FEG) scheme, may exemplify amendments that could be extended to automatically and temporarily disqualify directors of liquidated companies that deliver a “minimal return” to general unsecured creditors.

85

Australian Insolvency Practitioners as Unique Professionals: An Examination of the History of Liquidators and Trustees – *Christopher Symes and Michael Murray*

This article considers whether the history of company liquidation and liquidators in Australia is largely unremarkable and English-centred by focusing on the uniqueness of the corporate insolvency practitioner. The role of the Australian liquidator is examined in three parts. First by looking at the present nature of the insolvency profession, then tracing the history and origins of liquidators in both England and Australia through to the present day, and finally examining the professional context of corporate insolvency practitioners and questioning whether or to what extent they in fact do constitute a profession. The role of the bankruptcy trustee necessarily is covered in parallel, being the precursor to the liquidator and in its own right given Australia’s separate laws for personal and corporate insolvency.

97

RECENT DEVELOPMENTS – *Editor: Dr David Morrison*

Submission for the Inquiry into Australian Securities and Investments Commission Investigation and Enforcement – *Dr Jason Harris*

118

NEW ZEALAND REPORT – *Editor: Professor Lynne Taylor*

Tikanga and Insolvency Law

122

INTERNATIONAL NOTES – *Editor: Dr David Morrison*

Two-Steps Forward; Three-Steps Back: Johnson & Johnson and the Texas Two-Step –
Bruce A Markell 126

BOOK REVIEW – *Editor: Dr David Morrison*

Individual Voluntary Arrangements: Law and Practice, by **Alaric Watson** –
Reviewed by Dr David Morrison 135

Interpretation (2nd ed), by **Perry Herzfeld and Thomas Prince** – *Reviewed by*
Dr David Morrison 136