



# Dispatch

An occasional newsletter for clients and friends of

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## I work hard to -

Give excellent service

Carry out my clients' instructions speedily and economically

Ensure that my practice runs efficiently

## Directors and lawyer liable for "phoenix" activity

The New South Wales Supreme Court has found that eight directors of unrelated companies had acted in breach of the *Corporations Act* by engaging in illegal "phoenix" activity and that their lawyer, a Mr Somerville, had also contravened the *Corporations Act* by being involved in the directors' breaches.

The directors had sought advice from Mr Somerville in circumstances where their companies were insolvent or nearing insolvency. The transactions entered into by the directors as a result of that advice were found by the court to have had the effect of taking assets out of the companies and out of the reach of creditor. Further, by causing the companies to enter the transactions, the directors had failed in their duty to act both in the interest of the companies and their creditors.

This is the first time ASIC has succeeded against an adviser for involvement in phoenix activity. The judge found that Mr Somerville had devised a series of transactions, with the appearance of legitimacy, to bring about asset stripping and disadvantage to creditors and that the transactions would not have taken place but for Mr Somerville's involvement. By his advice and conduct, Mr Somerville had facilitated his clients' breaches of their directors' duties and, as a consequence, he was found to have aided and abetted those breaches.

## The presumption of death

Earlier this year, Justice Gray of the Supreme Court of South Australia was asked to grant leave to swear to the death of a person who was missing and believed dead. The applicant sought the order so that the estate of the missing person could be administered.

The judge relied on the statement of the relevant legal principle made by Justice Dixon of the High Court in a 1937 case:

"If, at the time when the issue whether a man is alive or dead must be judicially determined, at least seven years have elapsed since he was last seen or heard of by those who in circumstances of the case would according to the common course of affairs be likely to have received communications from him or to have learned of his whereabouts, were he living, then, in the absence of evidence to the contrary, it should be found that he is dead. But the presumption authorizes no finding that he died at or before a given date. It is limited to a presumptive conclusion that at the time of the proceedings the man no longer lives."

Justice Gray observed that "the presumption of death is more accurately described as the displacement of the presumption of the continuance of life" and went on to state the four essential matters which must be proved:

## My fields of practice

Wills and powers of attorney

Deceased estates

Land transactions

Debt recovery

Advising small business

Notarial acts

Legal costs

- ▶ the person must have been absent for at least seven years;
- ▶ the person has not been heard of in that time;
- ▶ those who might be expected to have heard of the person have not; and
- ▶ due inquiries have been made without result.

The judge then considered the detailed and comprehensive evidence before him, including the finding of the person's car in Queensland, the subsequent extensive police inquiries, wide publicity about the disappearance, information about the person's financial affairs and state of health and information provided by relatives and acquaintances. The judge found that the evidence was sufficient to displace the presumption of continuance of life, and granted leave to the applicant to swear to the person's death having occurred on or since a specified date.

## Mobile service cancelled

Those clients who have a record of my mobile telephone number (0419 817 014) are asked to note that I have cancelled that service after I was advised by Telstra that the plan was to be withdrawn and I was to be transferred to another plan at twice the price. I have signed up to another mobile service but, as before, I will reserve it for business "emergencies" and I will not be making the number generally available.

## Elderly declare war on socks for Christmas

[This is an edited version of an article which appeared on news.com.au and was originally published by The Times of London.]

A group of feisty elderly residents in London is urging relatives to ditch the socks and bath soap this holiday season and be more creative with their gifts. Members of Southwark Circle, an organisation that fights for senior citizens' rights, gathered at a bus station in south London recently to campaign for useful presents from friends and family this Christmas. Waving placards declaring "No More Socks," they hope to see an end to the mundane gifts they are given each year.

"We've all got drawers full of ties," said 89-year-old Stan Hardy, a longtime member of Southwark Circle. "This year we're saying 'if you're going to spend your money, spend it on something we want.'" Bearing signs like "Not Another Tie!" and "Yes to Internet Lessons", members of the group are asking for better gifts, such as lessons on how to use a webcam to stay in touch with friends and family. Albert Summers told The Times of London, "Don't people realise that after 90 years on this earth I've got enough socks, ties and bloody bubble bath? I'd love to go to the West End and watch a show or get some vouchers for internet lessons or something."

## Electronic Dispatch

Please remember to keep me informed of your current e-mail address so you can be first to hear about publication of each issue of **Dispatch**! If you are still receiving the paper version but would like to receive future issues electronically, just send me an e-mail request and I will attend to it immediately. If you do not have an e-mail address, but do have access to the internet, then you can read the current issue of **Dispatch** by clicking on the link which appears on the home page of my website. You will need Adobe Acrobat Reader, which can be downloaded, free of charge, from the Adobe website.

**My office will close at 12-00 noon on Wednesday, 23 December 2009  
and will re-open at 9-00am on Monday, 18 January 2010.**

**Thank you for your support during 2009.**

**Please accept my best wishes for the Festive Season and for the New Year.**

This Newsletter is intended to provide general information to my clients and friends. It is not a substitute for considered legal advice. Do not act on any of the matters mentioned without first obtaining competent legal advice specific to your circumstances.

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