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Finance Law: Global and Regional Challenges 169

ARTICLES

Regulating financial institution culture: Reforming the regulatory toolkit – *Ann Wardrop*, *David Wishart* and *Marilyn McMahon*

Unethical behaviour and misconduct in the financial services industry is a significant problem. Laws aimed at misconduct or incentives to misbehave can be rendered ineffective by poor culture within financial institutions. Various regulatory and industry initiatives to tackle the problem have been proposed or put in place in Australia. This article provides an overview of these initiatives and argues that while such strategies may be worthwhile, they also have shortcomings. The article contends that ameliorating cultural problems within the financial industry requires a multi-disciplinary approach and Australia should therefore consider introducing a supervisory technique pioneered by the Netherlands Central Bank (DNB) that incorporates social and organisational psychology. It further argues that this approach, when placed in the hands of a regulator, offers a radical regulatory tool that could provide the "missing link" in promoting a culture of integrity within financial institutions. The DNB approach is described and various legal, theoretical and policy issues raised by this approach are discussed. 171

Bitcoin: Consumer protection and regulatory challenges – *Louise Parsons*

This article argues that there is at present no comprehensive and clear legal protection for Australian consumers acquiring bitcoins and/or transacting with bitcoins for goods or services. The unique nature of bitcoin as a cryptocurrency means that it is not always easy to bring bitcoin and related transactions within existing legal frameworks, such as the sale of goods legislation and legislation relating to financial products and financial services. Nevertheless, consumer protection may be available under the *Competition and Consumer Act 2010* (Cth) and the *Australian Consumer Law* (2010). Important protections offered to bank customers and credit card users are however not available, as there is no right of charge back and the *ePayments Code*, *Code of Banking Practice* and Financial Ombudsman Services do not generally apply to bitcoin transactions. The regulatory framework for cryptocurrencies should be revisited, as they are unlikely to disappear, and piecemeal development of regulation may lead to legal incoherence. Regulation should however not restrict developments in blockchain technology because of its wide-ranging benefits. 184

Small amount credit contract reforms in Australia: Household survey evidence and analysis – *Gill North*

A review of small amount credit contract regulation in Australia began in 2015 as mandated under s 335A of the *National Consumer Credit Protection Act 2009* (Cth). The

review panel sought comprehensive data on industry and consumer characteristics and trends. To provide such evidence, consumer groups commissioned original empirical research using data collected from a longitudinal survey that monitors the financial position and attitudes of Australian households. This data on household use of small amount credit contract loans was extracted for the last decade, allowing detailed analysis of the historical patterns and developing trends. The data indicates that overall demand for small amount short duration credit is growing in Australia, the consumer base is broadening, and the predominant form of lending today is online. Deeper analysis highlights the varying motivations of borrower households and their different stages and levels of financial difficulty. It also confirms the socio-economic, employment, educational and financial disadvantages of most households using these loans and their vulnerability to adverse changes in personal circumstances and negative external shocks. 203

Making prudence: Consumer credit and twin peaks, a comparison of Australia and South Africa – *Gail Pearson*

The genesis for the article is the prospective introduction of "twin peaks" regulatory architecture in South Africa and new affordability rules in its consumer credit legislation. This has presented an opportunity for comparative analysis with Australia. The article presents traditional prudential regulation and conduct rules as aspects of prudence. It examines connections between prudential regulation and responsible lending to explore different approaches to locating a consumer credit regulator in a twin peaks structure, how a consumer credit regulator may be responsible for prudential conduct, and the relationship between general market and responsible lending conduct rules. 223

Ad impossibilia nemo tenetur – on the recent attempts to harmonise the law of intermediated securities – *Matteo Solinas*

The Geneva Securities Convention offers harmonised transnational rules for the purpose of reducing the legal risks associated with the holding, transfer and collateralisation of securities held through intermediaries. It is uncertain whether it will ever take effect as the technical, doctrinal and political compromise reached has failed to achieve a reasonable degree of harmonisation and does not provide a uniform set of rules applicable irrespective of the law governing a given securities account. In particular, this article argues that the Convention's attempt to accommodate different legal systems and legal traditions within a common framework following a functional approach does not effectively promote confidence in the ownership and cross-border settlement of intermediated securities. Likewise, the search for minimal harmonisation rather than full harmonisation does not support the formation of a robust enough domestic system in order to meet the general needs of investors in intermediated securities, nor does it offer consistent and predictable outcomes where the laws of one or another legal system are applied to securities settled or pledged cross-border. This becomes evident when considering the numerous references to non-Convention law, the persistent differences between the rules of the securities settlement systems, the unpredictable impact of the mandatory insolvency rules and the complex system declarations available to Contracting States. 240

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