

JOURNAL OF BANKING AND FINANCE LAW AND PRACTICE

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ARTICLES

Consumer Credit Code disclosure: does it work? – Paul O’Shea and Dr Carmel Finn

Since 1996 all consumer credit transactions in Australia have been regulated by the *Consumer Credit Code*. The principal means by which the *Code* purports to protect consumers and prevent market failure is a detailed and prescriptive disclosure regime. There has been little empirical work done on whether or not such disclosure actually improves consumers’ understanding of their credit contracts. By exposing participants to typical consumer credit documents, this research discovered quite poor comprehension of important features of the relevant transactions. Most significantly, there appeared to be little difference in comprehension when the consumers read contracts which complied with the disclosure requirements of the *Code*, and when they read contracts which did not. These results cast doubt on the effectiveness of the *Code* disclosure regime. 5

Fiduciary cheque fraud: should banks be alert or alarmed? – Susan Barkehall Thomas

Banks are attractive targets when money is misdirected by a fiduciary. Money may be misdirected by the misuse of cheques. The law governing bank liability in these cases is complex and in need of simplification. This article examines the liability regimes in Australia, England and America. Cheque transactions in Australia and England are governed by a mixture of common law and statute. Since 1992 there have been significant differences between the Australian and English regimes, with England legislating to remove the transferability of cheques. In America, a statutory model is provided by United States uniform legislation in Art 3 of the American Uniform Commercial Code and the Uniform Fiduciaries Act. Suggestions for reform of the Australian system are offered, drawing on both the English and United States’ solutions. 17

The emotional case for secured finance: fear, monitoring and control – Mark Chivers

A fundamental characteristic of secured finance is the role which the secured lender plays in monitoring the borrower. This article examines the competing theories of the desirability of secured credit using the concept of monitoring as a starting point. It is argued that the need for monitoring and control of a borrower’s activities derives principally from the relationship between the lender and the borrower and between the borrower and its unsecured creditors. Various economic and emotional factors influence these relationships. These factors will differ from transaction to transaction. For this reason, each secured finance transaction will be different and involve different considerations of the interests of the various parties and stakeholders. A global theory of the desirability of secured credit is therefore discouraged and a combined theory is

proposed. This article tests this combined theory by considering the circumstances where these relationships are upset. By way of example, the uses of novel contractual provisions in security documentation, such as the automatic crystallisation provisions of the ubiquitous fixed and floating charge, are considered from the perspective of monitoring and control. The article concludes with the observation that emotional factors associated with fear, the need for control of the borrower's activities and a lack of understanding by the lender and the borrower of each other's requirements will determine whether or not the parties will enter into a secured finance transaction.41

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Customer Service and sales inquiries:

Tel: 1300 304 195

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Web: www.lawbookco.com.au

Email: LRA.Service@thomson.com

Editorial inquiries:

Tel: (02) 8587 7000

HEAD OFFICE

100 Harris Street PYRMONT NSW 2009

Tel: (02) 8587 7000 Fax: (02) 8587 7100



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