

JOURNAL OF BANKING AND FINANCE LAW AND PRACTICE

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ARTICLES

The Octaviar case: Some reflections – *Andrew Boxall and Nuncio D'Angelo*

The recent decision of the Queensland Supreme Court in *Re Octaviar Ltd; Re Octaviar Administration Pty Ltd* [2009] QSC 37 has serious implications for many existing secured financing arrangements. If correct, the decision will force radical changes in long established banking practice, and raises concerns as to the effectiveness of many existing securities. This article discusses the decision and its potential consequences, and questions the reasoning which underlies it. The article suggests that the decision is incorrect, both in the premises and assumptions on which it appears to be based and in the conclusions which it draws. Despite this, unless and until *Octaviar* is reversed on appeal or by legislative intervention, it would be dangerous to ignore the implications of the decision, both in relation to past transactions and new ones. 95

Personal property securities reform and the Conceptual Impossibility Doctrine – *Peter Ward*

The Conceptual Impossibility Doctrine maintains that a person cannot have a charge over a debt which he or she owes to another person (a chargeback). The Doctrine formed the basis for the decisions in cases such as *Re Charge Card Services Ltd* [1987] Ch 150 and *Broad v Commissioner of Stamp Duties* [1980] 2 NSWLR 40. While the exposure draft of the *Personal Property Securities Bill 2008* (Cth) seeks to reverse the Doctrine and enable chargebacks, this article identifies significant flaws in the provisions as proposed in the Bill. 106

The tensions between lenders and swap providers – *Tracey Dembo*

Frequently swaps are entered into as risk reduction devices in conjunction with, or as a condition to, the provision of finance to a borrower. However, tensions can arise between lenders and swap providers due to the competing credit concerns between them and as a consequence of the inherent differences between swaps and loans. This article examines the effect of these tensions on the negotiations between the parties and some of the consequences of failing to address them. 140

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