

JOURNAL OF BANKING AND FINANCE LAW AND PRACTICE

Volume 21, Number 1

March 2010

ARTICLES

The rise and fall of purchase money security interests at general law and under Article 9 regimes – Aidan Drinkwater

The enactment of the *Personal Property Securities Act 2009* (Cth) (PPS Act) has signalled the official arrival of Art 9 of the *Uniform Commercial Code* (US) in Australia. The legislation will effect a dramatic change to Australia's law of security interests which is in need of reform. At the heart of the new regime is the reorganisation of priority rules around the fundamental principle that priority be afforded to parties that perfect, mostly through registration, their security interest first. This is subject to an exception for purchase money security interests (PMSIs). PMSIs have received limited recognition at general law, however, the PPS Act sets out extensive provisions which incorporate vendor credit arrangements previously considered to be outside the scope of the law of security interests. Accordingly, the existing body of general law relating to retention of title and similar devices will be supplanted by the statutory PMSI regime. The purpose of this article is to consider the effect of this by comparing the establishment and extinguishment of the PMSI and the rights of vendor creditors under the general law with the position under the PPS Act's embodiment of Art 9.

5

Has the Financial Services Reform Act fixed the problems with the regulation of securities and derivatives? – Benjamin B Saunders

The *Financial Services Reform Act 2001* (Cth) introduced new definitions of "derivative" and "financial product" into the *Corporations Act 2001* (Cth), and replaced the separate regulatory regimes governing futures contracts and securities with a single financial markets authorisation regime and a single intermediary licensing regime. This article examines the reforms to evaluate whether they have been successful. It is argued that there are definite improvements resulting from the reforms, and the scope for regulatory arbitrage has been greatly reduced. However, numerous problems remain. There are significant differences in the regulation of securities and derivatives. The distinction between securities and derivatives is still based on legal characteristics, not economic function. There is uncertainty as to the exact scope and interaction of the definitions, particularly with respect to equity derivatives, warrants and options. The current law has thus not fully addressed many of the problems that existed prior to the reforms.

33

BANKING LAW AND BANKING PRACTICE

Contactless cards – Alan L Tyree 56

SECURITIES AND MORTGAGES

Personal Property Securities Act – Craig Wappett 59

| | |
|--|-----------|
| COMMERCIAL AND FINANCE LAW | |
| Your broker or mine? – Michael Charlton | 67 |
| INSOLVENCY LAW AND MANAGEMENT | |
| Set-off, the “anti-deprivation” principle and ipso facto clauses in the “financial crisis” – Lee Aitken | 70 |
| RECENT PUBLICATIONS | 79 |
| LONDON | |
| The new EU Rome I Regulation on the choice of law in contract – Dr Stuart Dutson | 83 |

Submission requirements

All contributions to the journal are welcome and should be emailed to the Production Editor, *Journal of Banking and Finance Law and Practice*, at LTA.jbflp@thomsonreuters.com for forwarding to the Editor.

Licences

- It is a condition of publication in the journal that contributors complete a licence agreement. Licence agreements can be downloaded at http://www.thomsonreuters.com.au/support/as_contributors.asp and emailed with the submission or mailed separately to the Production Editor, *Journal of Banking and Finance Law and Practice*, Thomson Reuters (Professional) Australia Limited, PO Box 3502, Rozelle, NSW 2039.

Letters to the Editor

- By submitting a letter to the Editor of this journal for publication, you agree that Thomson Reuters, trading as Lawbook Co, may edit and has the right to, and may license third parties to, reproduce in electronic form and communicate the letter.

Manuscript

- Manuscript must be original, unpublished work that has not been submitted or accepted for publication elsewhere, including for online publication.
- Personal details (name, qualifications, position) for publication and a delivery address, email address and phone number must be included with the manuscript on a separate page.
- Manuscript must be submitted electronically via email in Microsoft Word format.
- Manuscript should not exceed 15,000 words for articles or 3,000 words for section commentary or book reviews.
- An abstract of 100-150 words must be included at the head of articles.
- Authors are responsible for the accuracy of case names, citations and other references. Proof pages will be emailed to contributors but excessive changes cannot be accommodated.
- **Graphics** (diagrams and graphs) to be grayscale; in .jpeg format; no more than 12 cm in width; within a box; of high resolution (at least 300 dpi); font is to be Times New Roman, no more than 10pt. The heading for a graphic should be placed outside the box.

Peer review

- This journal complies with the Higher Education Research Data Collection (HERDC) Specifications for peer review. Each article is, prior to acceptance, reviewed in its entirety by a suitably qualified expert who is independent of the author.

Style

1. **Levels of headings** must be clearly indicated (no more than four levels).
2. **Unpointed style** is to be used – there are no full stops after any abbreviation or contraction.
3. **Cases:**
 - Where a case is cited in the text, the citation follows immediately after the case name, not as a footnote.
 - Authorised reports must be cited where published, and one other reference can be used in addition.
 - For “at” references use media-neutral paragraph numbers within square brackets whenever available.
 - For international cases best references only should be used.
4. **Legislation** is cited as follows:
 - *Trade Practices Act 1974* (Cth), s 51AC (including in full within footnotes).
5. **Books** are cited as follows:
 - Ross D, *Ross on Crime* (3rd ed, Lawbook Co, Sydney, 2006) pp 100-101.
 - In footnotes do not use *ibid* or *op cit*. Repeat author surname and add footnote reference to first mention.
 - ¹ Hayton D, “Unique Rules for the Unique Institution, The Trust” in Degeling S and Edelman J (eds), *Equity in Commercial Law* (Lawbook Co, Sydney, 2005) p 284.
 - ² Hayton, n 1, p 286.
6. **Journals** are cited as follows:
 - Kirby M, “The Urgent Need for Forensic Excellence” (2008) 32 Crim LJ 205.
 - In footnotes do not use *ibid* or *op cit*. Repeat author surname and add footnote reference to first mention.
 - ³ Trindade R and Smith R, “Modernising Australian Merger Analysis” (2007) 35 ABLR 358.
 - ⁴ Trindade and Smith, n 3 at 358-359.
 - Wherever possible use official journal title abbreviations.
7. **Internet references** are cited as follows:
 - Ricketson S, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Lawbook Co, subscription service) at [16.340], <http://www.thomsonreuters.com.au/default.asp> viewed 25 June 2007. Underline the URL and include the date the document was viewed.

SUBSCRIPTION INFORMATION

The *Journal of Banking & Finance Law & Practice* comprises four parts a year.

The journal is available for subscription via paper and/or online. An online subscription can include access to archived volumes of the journal dating back to 1990 and has the following benefits: all content is fully searchable; PDF versions are provided for easier reading; users can subscribe to an RSS feed to be instantly informed of updates.

For further information on how to subscribe:

Visit www.thomsonreuters.com.au

Tel: 1300 304 195

Email: LTA.Service@thomsonreuters.com

Advertising inquiries:

Contact Andrew Parsons on (02) 8587 7462 or email a.parsons@thomsonreuters.com

Editorial inquiries: Tel: (02) 8587 7000

Customer service and sales inquiries:

Tel: 1300 304 195 Fax: 1300 304 196

Web: www.thomsonreuters.com.au

Email: LTA.Service@thomsonreuters.com

Head Office

100 Harris Street PYRMONT NSW 2009

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



THOMSON REUTERS

© 2010 Thomson Reuters (Professional) Australia Limited ABN 64 058 914 668

Lawbook Co.

Published in Sydney

ISSN 1034-3040

Typeset by Thomson Reuters (Professional) Australia Limited, Pyrmont, NSW

Printed by Ligare Pty Ltd, Riverwood, NSW