

JOURNAL OF BANKING AND FINANCE LAW AND PRACTICE

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ARTICLES

Corporate restructuring: The impact of credit derivatives and distressed debt investing – *David Perkis*

Derivatives markets have attracted considerable attention recently, in the context of both the global financial crisis and equity derivative use in merger and acquisition activity. Yet limited consideration, especially in Australia, has been afforded to how the use of credit derivatives by lenders may affect the ability of a distressed borrower to restructure its debt. Against a background of increased corporate distress in 2007-2010, this article demonstrates that lenders benefiting from credit derivative protection may act in ways that are not conducive to restructuring. The separation of credit risk from legal ownership of debt increases the likelihood of distressed borrower liquidation and contributes to systemic risk. Although a regulatory response is possible, a commercial approach that does not prejudice the interests of market participants is preferable. Distressed debt investors, far from being “vulture funds”, act to restore the concentration of debt ownership reduced by changes to traditional relationship banking. They also restore the economic incentive to restructuring removed by credit derivative use. Australian restructuring and insolvency practice must facilitate the potential benefits of such investment. 185

The legal obligations of superannuation fund trustees: The VBN v APRA litigation – *Shauna Ferris and Peter Gillies*

The Administrative Appeal Tribunal’s decision in *VBN v Australian Prudential Regulation Authority* focused on decisions made by the corporate trustee of the AXA Australia Staff Superannuation Plan and by extension its directors. The AAT set aside disqualification orders made by APRA against seven of these directors pursuant to the *Superannuation Industry Supervision Act 1993* (Cth). This decision is of value in its consideration of the extent to which superannuation (and other) trustees – and in turn those who may be made liable for its conduct – can be held legally accountable for (frequently difficult) decisions made in the management of a fund’s affairs. Issues considered include non-disclosure of relevant information to members, lack of due care and skill, and partial decision-making as between classes of members. The decision also considers in some detail the principles to be observed by an appellate tribunal or court in conducting a merits review of a trustee’s exercise of discretion. 214

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