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# Update Summary

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**UPDATE 192**

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## **THE LAW RELATING TO BANKER AND CUSTOMER IN AUSTRALIA**

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Author Gregory Burton SC has updated commentary in the work and the more significant are referred to below.

## Derivatives

### Main objects of the Ch 7 of the *Corporations Act 2001*

It is noted that there are new legislative provisions in support of the objective of reduction of systemic risk and the provision of fair and effective services by clearing and settlement facilities. The legislation is in partial operation from 24 September 2024 for crisis management of such facilities including an interventionist impact on derivative trading, in *Corporations Act 2001* (Cth) Pt 7.3B and amendments to Pt 7.3, which complements existing powers of regulatory bodies over licensees, See [5.11910].

#### “Financial products”

In *ASIC v BPS Financial Pty Ltd* [2024] FCA 457 the court, in relation to a digital token exchange, focused on the mechanism as the financial product that was capable of being issued, acquired or dealt in. That a financial product’s functionality required integration with another product, facility or thing did not necessarily mean that the other product, facility or thing formed part of financial product. Hence the blockchain was not a financial product and did not form part of the financial product even though it was how a facility operated. See [5.11940].

#### Financial services licence

It is noted that, depending on the scope of the written authorisation, a representative may or may not be authorised by the licensee to issue a product that is the representative’s product: *ASIC v BPS Financial Pty Ltd* [2024] FCA 457. In any event, the exemption, in s 911A(2)(b), from being required to hold an AFSL for a financial service the person provides does not extend to where the unlicensed representative itself issues the financial product (even if the representative holds an authority from a licensee holder to do so); a unlicensed issuer of financial products must engage the services of a licensee to distribute the product. See [5.11980].

#### Licensee's statutory obligations

On the scope of a licensee’s obligations in relation to its representatives’ conduct, including where the licensee contracted with other licensees for administration, promotion and platform functions, see *ASIC v Diversa Trustees Ltd* [2023] FCA 1267.

Further, for benefits between related entities see *ASIC v Commonwealth Bank of Australia* (2023) 299 FCR 604; [2023] FCAFC 135. On a licensee’s obligation to take reasonable steps to ensure that an authorised representative did not receive conflicted remuneration, and the interaction with the best interests obligation, see *ASIC v RM Capital Pty Ltd* [2024] FCA 151; *ASIC v DOD Bookkeeping Pty Ltd (in liq)* [2023] FCA 1622. See [5.11990].

#### Target market determinations

In *ASIC v Firstmac Ltd* [2024] FCA 737, a financial product provider was found to have contravened s 994E(3) of the *Corporations Act 2001* (Cth) by marketing a product with a target market determination of higher risk and longer term investors than the risk

profile and maximum permitted deposit period of term deposit holders to which the marketing occurred.

A contravention was also found in *ASIC v Bit Trade Pty Ltd* [2024] FCA 953 where the provision was of margin facility for trading on a digital asset exchange. No target market determination had been issued. See [5.12125].

## **Mistaken transactions**

### **Subsequent authority**

It is noted that, the applicant for restitutionary payment bears the onus of proving the vitiating factor in the transaction that constitutes the receipt by another, such as mistake or undue influence. It is not enough simply to show that there was a payment, a receipt and no full return when requested: *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353; 66 ALJR 768; [1992] HCA 48; *Redland City Council v Kozik* (2024) 98 ALJR 544; [2024] HCA 7. See [10.620].

### **Enrichment, benefit and consideration with compulsory services and charges**

In *Redland City Council v Kozik* (2024) 98 ALJR 544; [2024] HCA 7 the majority upheld that ratepayers were entitled to a refund of a levy for public drainage and beautification works that had been invalidly imposed. The Council failed in its argument that it was not unjustly enriched. There was no case put of “fiscal chaos” as a species of change of position. See [10.640].

Mortgages and charges

### **Right to redeem - Equitable rules**

In *Bonanno v Finamore* [2022] NSWCA 276 the primary decision was upheld that the provisions of a deed whereby a borrower granted a call option for transfer of a property outright to the lender of monies to the borrower for no consideration apart from the loan was void as a clog on the equity of redemption. See [13.3240].

### **Priority by agreement between mortgagees**

It was noted in *Rathner v Runner Investment Ltd* [2023] FCA 754 that a priority deed may not be enforceable against persons not party to it by reason of the operation of the relevant Torrens title legislation. See [13.4930].

Securities: enforcement and relief

### **Power of sale**

in *Rathner v Runner Investment Ltd* [2023] FCA 754 it was noted that a second or subsequent mortgagee, absent an applicable restriction in legislation or in agreements between mortgagees, has the same power of sale rights and duties as a first mortgagee, subject to arranging the discharge of the first mortgage or sale subject to the first mortgage. See [14.870].

### **Exercise of power in good faith**

In *Rathner v Runner Investment Ltd* [2023] FCA 754, the first mortgagee was denied its interest that had accrued in the period in which it had contested the second mortgagee’s exercise of its power of sale. See [14.920].

Documentary credits and other independent payment obligations

## The fraud exception

It will be an abuse of process to allege fraud in proceedings in one jurisdiction as the reason to challenge the validity of a demand and not to allege fraud as the basis of resistance in proceedings in another jurisdiction: *Shinetec (Australia) Pty Ltd v Gosford Pty Ltd* [2024] NSWCA 174. See [15.240].

## The negative term exception

The orthodox principle that a court may restrain the beneficiary from demanding payment when the beneficiary is contractually bound not to call on the credit or demand guarantee in the circumstances, a so-called “negative term” or “negative pledge” was reinforced in *Shinetec (Australia) Pty Ltd v Gosford Pty Ltd* [2024] NSWCA 174. See [15.400].

## Bank's responsibility to ensure they deal with the correct person

In *Shinetec (Australia) Pty Ltd v Gosford Pty Ltd* [2024] NSWCA 174, the NSW Court of Appeal confirmed that the bank ought to have paid on the standby credit even though it was activated by receivers appointed to the beneficiary. The beneficiary's name had not changed, the receivers signed the demand as agents of the beneficiary company on the company letterhead. See [15.1600].

In this update we have updated the New Developments section and inserted a copy of the new Banking Code of Practice.

New Developments includes the following content.

## Recent cases

Digests of recent cases have been inserted for all of the related following commentary chapters:

- The Australian financial system: law, practice, regulation, institutions - [ND.1] – [ND.15];
- Financial Institution and Customer: basic principles - [ND.16] – [ND.17];
- Financial Institution and Customer: accounts and types of customer - [ND.18] – [ND.26];
- Consumer Payment and Finance - [ND.27] – [ND.32];
- Business finance facilities - [ND.33];
- Guarantees - [ND.34] – [ND.45];
- Mortgages and Charges - [ND.46] – [ND.62];
- Securities: Enforcement and Relief - [ND.63] – [ND.75]; and
- Documentary credits and other independent payment obligations - [ND.76].

## Related Reading

Abstracts for the following articles have been inserted:

- *Stubbings v Jams 2 Pty Ltd: Unwritten Law versus Statutory Unconscionable Conduct ...* [ND.100]
- *Do the Hokey Pokey – Step-in Rights and the PPSA ...* [ND.110]

- A Matter of Opinion: Statements of Opinion, Implied Representations and Liability for Misleading or Deceptive Conduct ... [ND.130]
- Unwinding the Common Thread: When Is It Unconscientious to Deny Subrogation Rights? ... [ND.140]
- A fractured vision of uniformity: electronic signing of agreements and deeds in Australia ... [ND.150]
- Can a Statutory Demand Be Issued for Cryptocurrency? ... [ND.160]
- The Origins, Evolution and Merits of the Civil Penalty Regimes Enforced by ASIC ... [ND.170]
- The Solicitor's Equitable Lien: An Update *Candey Ltd v Crumpler [2023] 2 ALL ER 527...* [ND.180]
- Recent Developments: Boats, PPSA interests and liquidator liability ... [ND.190]
- The Equity of Exoneration and Figments of the Trustee's Imagination ... [ND.200]
- Resolving the Tension between Common Law and Australian Accounting Standard Board Interpretations of Accounting Terms and Concepts – Part 1 ... [ND.210]
- Reimagining Legal Tender and Banking Law for the Issuance and Usage of a Retail Central Bank Digital Currency in Australia ... [ND.220]
- Assignment, Security, and Securitisation ... [ND.230]
- Securities and Mortgages; Security in dispute resolution: Does the PPSA apply? ... [ND.240]
- Why a Director Can and Should Be Held Liable for Inducing Their Company's Breach of Trust ... [ND.250]
- Regulate or Revise: Addressing Algorithmic Bias in AI-driven Residential Mortgage Underwriting in Australia ... [ND.260]
- Australian law diverges from the Privy Council's position regarding the priorities of successive trustees where trust assets are insufficient to satisfy all trust liabilities ... [ND.270]
- Piercing the corporate veil: Recent international developments ... [ND.280]

### **Regulator's material**

Media releases addressing the following issues have been added:

- APRA outlines new priorities in 2024-25 Corporate Plan ... [ND.600]
- ASIC expands strategic priorities for coming 12 months ... [ND.610]
- ASIC further extends transitional relief for foreign financial services providers ... [ND.620]
- Improved transparency lowers international money transfer costs but switching promises extra \$200m in savings per year ... [ND.630]

- APRA and ASIC issue final rules and information for the Financial Accountability Regime ... [ND.640]
- ASIC approves enhanced Banking Code of Practice ... [ND.650]
- Report backs anti-money laundering reforms ... [ND.660]

### **Banking Code of Practice**

As mentioned above, ASIC announced on 27 June 2024 that it had approved a new version of the Australian Banking Association's (ABA) Banking Code of Practice, which includes enhancements to key protections. The new Code will commence on 28 February 2025.

ASIC Listed the following as some of the main enhancements of the Code:

- expanding the definition of a small business from \$3 million in aggregate borrowings to \$5 million meaning another 10,000 businesses will be eligible,
- improved inclusivity and accessibility for customers, including via interpreter services,
- new provisions for deceased estates,
- broadening the definition of financial difficulty, and
- enhanced protections for loan guarantors.

Important provisions regarding the handling of consumer complaints and ensuring the robust oversight of the Code by the Banking Code Compliance Committee have also been retained, including by a new provision that commits subscribing banks to be bound by their obligations under the Banking Code Compliance Committee Charter.

ASIC also noted that its decision to approve the new Banking Code of Practice follows an independent review of the code in 2021, public consultation by ASIC on a revised code from November 2023 to January 2024 and engagement with the ABA, consumer groups and other interested stakeholders. See [APX 6.100].