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ARTICLES

"MISsed" Opportunities and the Corporations Amendment (Crowd-Sourced Funding) Bill 2016 (Cth): The Challenges of Reconciling Australia's Existing Securities Regulation with Equity Crowdfunding – *Hamish R McCormack*

The effects of the global financial crisis on low-capital ventures, combined with the rise of social media and the growth of the interconnected "online economy", has created a "perfect storm" for the rise of equity-sourced crowdfunding (ECF). However, despite the popularity and growing media profile of this novel form of investing and capital raising, Australian policymakers have struggled to strike a balance between facilitating and harnessing the growth of equity crowdfunding while still providing adequate protection to investors – particularly given ECF's awkward fit within the existing Australian regulatory framework. This article argues that the criticism of the approach adopted in the failed 2015 and 2016 crowdfunding Bills is justified, and that a comparative analysis of the permissive US regulatory approach sheds light on more desirable alternative methods of regulation – which, given the significant potential (and largely undiscussed) public policy outcomes to facilitating ECF in the Australian context, should be examined as a preferable "way forward". 3

New Zealand Banks Mis-selling Interest Rate Swaps – Highlighting Deficiencies in Retail Customer Protection – *Victoria Stace*

In 2016, the first case to result from the mis-selling of interest rate swaps by New Zealand banks in the years just prior to the global financial crisis was heard. Due to certain peculiarities of New Zealand's contract law and the presence of a broadly worded exclusion of liability clause, no damages award was possible. This article looks at the decision in that case and concludes that an extension to the current unfair contract terms legislation is warranted. It also reflects on the existing system of industry self-regulation for banking conduct of business through a code of conduct. It discusses measures that could be adopted to improve code compliance in the broader interest of fostering confidence in the banking industry. 16

Equitable Subrogation in Australia and England – *MJ Cleaver*

This article examines the law of equitable subrogation to extinguished rights. Although the law of Australia and that of England and Wales share much in common in this area, over the last two decades a divergence has occurred. In England, subrogation is said to form part of the law of unjust enrichment. In Australia, this rationalisation of the case law has been rejected. This article reviews the divergence in light of the recent decisions of the Supreme Court of the United Kingdom in *Menelaou v Bank of Cyprus Plc* and *Lowick Rose LLP (in liq) v Swynson Ltd*. It isolates the practical and doctrinal implications of these decisions and argues that the latter entrenches but also subtly reformulates the English commitment to unjust enrichment. So understood, *Lowick* may form the basis for a principled reconsideration of the Australian aversion to reliance upon English subrogation

cases. The article advances towards this position through an exploration of three themes: first, the broader theoretical controversies over the status of unjust enrichment; secondly, the historical development of equitable subrogation to extinguished rights; and thirdly, the doctrinal uncertainty generated by *Menelaou* and the restatements and reformulations of principle in *Lowick*. The article then offers some general reflections on the future development of equitable subrogation, which is of special importance to insolvency practitioners. 34

Restricted Banking Licences: An Opportunity to Be Seized – *Anton Didenko, Katharine Kemp, Louise Malady and Ross Buckley*

In August 2017, the Australian Prudential Regulation Authority (APRA) launched a public consultation concerning a new licensing regime for authorised deposit-taking institutions (ADI). This article argues that the new Restricted ADI licences proposed by APRA should, if implemented, serve to promote competition and innovation in Australia's financial system. However, such promotion must preserve the integrity of the market and, crucially, ensure that Australians are not affected in case of possible failures of the new entrants. The integrity of the new licensing regime, which follows a global trend of creating new opportunities for businesses to enter the banking market, will ultimately depend on APRA's response to the underlying challenges highlighted in this article. 57