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ARTICLES

Minimising risks to covered bondholders in Australia – *Michael WL Symons*

In October 2011, the Australian government amended the Banking Act 1959 (Cth) to allow for covered bonds. The hoped-for results include greater funding certainty to domestic banks; however, this relies upon the covered bond regime's success in providing new low-risk, collateralised debt products for investors. This article considers risks to covered bondholders. Its focus is three-fold: the maintenance of depositor protection at the expense of covered bondholders; judicial interpretation of contracts necessary to implement transaction under the covered bond regime; and legal risks introduced by choices made in specifying the regime. As well as identifying possible risks, this article suggests that improvements could be made to the advantage of both banks and covered bondholders.

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Preventing the release of commercially-sensitive information under the Personal Property Securities Act 2009 (Cth) – *Kenton Steicke and Michael Spurrutt*

The Personal Property Securities Act 2009 (Cth), which has recently come into operation, has fundamentally changed the previous regime for taking security over personal property; however, not all of its effects are immediately obvious. This article deals with a perhaps unexpected but significant outcome that has received little attention thus far. Under the new personal property securities regime, certain "interested persons" will be able to access information of a business not previously available. These interested persons may include competitors and the information they can obtain may be commercially sensitive. This article explains who these interested persons are, what information they can request and the strategies that may be employed by businesses that wish to keep such information private.

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When capital is inadequate: A hypothetical case for amending the Basel Accord's capital adequacy requirements to facilitate development and disaster recovery in developing countries – *Andrew G Pingree*

The Basel Accord's capital adequacy regime includes risk-weighting categories of substantial variance. While no liquid capital need be held for loans to the most stable of borrowers, 12% of loan value is required for safety against loans to the least stable. This creates inefficiency for lenders with unstable clients. Unstable borrowers are more common in less developed and developing countries and sometimes in major disaster areas. This in turn creates a disincentive for lenders to do business in such areas, creates an unfair advantage for the developed world, and thereby may contribute to the difficulties faced by developing countries in development and disaster recovery efforts. This study relies largely on theory due to a lack of relevant empirical data, and reviews a variety of plausible reasons for and against having high risk-weighting for unstable borrowers. Where data is available it is found that sophisticated, developed economies are capable of managing their own disaster recovery efforts through government intervention. It is also found that poorer nations and entities therein are able to obtain finance and debt resolution through a variety of backdoor means, and have shown solid economic growth in recent years accordingly. However, if international banking is to be subject to ever tighter

regulation to minimise risk and the financial backdoors are closed, then the developing world may face an uphill battle in obtaining further finance. Only if the risk-weighting categories are brought closer together, with some liquidity required behind loans to stable borrowers and less required behind loans to unstable borrowers, will the developing world be able to obtain good quality finance and continue overcoming poverty while the world risk-proofs its financial system. 109

Managing insolvency risk in New Zealand’s settlement before interchange payments system – *Simon Jensen and Kellee Clark*

In a world first, the New Zealand payments system has recently moved from a multilateral deferred payments system to a system based on bilateral settlement before interchange (SBI). SBI entails settlement taking place through the exchange of value between banks’ exchange settlement accounts at the Reserve Bank of New Zealand prior to interchange, and posting of the relevant credits and debits to the underlying account holders’ accounts at the receiving bank. This article examines the legal insolvency risk issues that were addressed as part of the introduction of the SBI system. In particular, it considers the legal characteristics of items in an interchange file; whether the simultaneous creation and discharge of a debt under New Zealand’s payments system rules is legally effective; whether bilateral netting arrangements are necessary (or effective) to manage insolvency risk; and whether there is a residual risk that transactions will be vulnerable as voidable preferences. 119

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