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EDITORIAL 143

ARTICLES

Asset lending, unconscionable conduct and intermediaries – *Denise McGill*

This article deals with cases where borrowers of loans for business or investment claimed their lender had engaged in asset lending which amounted to unconscionable conduct under the equitable doctrine or under the *Australian Securities and Investments Commission Act 2001* (Cth). The article reviews recent cases, seeking to identify the key factors influencing a conclusion of, or against, unconscionable conduct. The article examines the practice of lending through intermediaries and how the application of agency law can insulate lenders from the wrongful conduct of intermediaries. The article explains the gap in the current position and discusses possible law reform which may remedy that. 146

Certainty and the ISDA credit derivative determinations committees – *G P Craddock*

In the wake of the global financial crisis the International Swaps and Derivatives Association (ISDA) offered members a Protocol providing for auction settlement of credit default swaps. This solved several critical market problems. Settlement was made dependent upon the determination of the newly invented Credit Derivatives Determinations Committees, comprised of market participants. The success of the DCs and thus auction settlement depends upon their capacity to provide finality and to withstand challenges. A "legal stress test" finds the DCs sound, but identifies potential risks in the provisions for external review. Commentary includes the antitrust suits accusing the banks that staff the DCs, and ISDA and the DCs, of conspiracy. 187

Whither a unified approach to the functional dimension of market definition: Why Metcash was the one that got away – *Josh Buckland*

This article explores the often-neglected role of the functional dimension of market definition in Australian competition law. It traces the evolution of the case law on this issue, and considers the views of economist Rhonda Smith and her various collaborators, whose pioneering work on the functional dimension has been invaluable. The discussion of the functional dimension in *Australian Competition and Consumer Commission v Metcash Trading Ltd* [2011] FCAFC 151 is evaluated, and it is suggested that this case represents a missed opportunity to reconcile the vying strands of Australian jurisprudence on the topic. An attempt to foster such a reconciliation is made by the author, who favours an approach to market definition under which multiple functional levels are included in the market only in limited circumstances. This approach ensures that the competitive landscape is accurately mapped, and allows for constraints at other functional levels to be considered when assessing the competitive impact of the relevant conduct. 214

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