

# JOURNAL OF BANKING AND FINANCE LAW AND PRACTICE

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## ARTICLES

### **Regulating Financial Product Design in Australia: An Analysis of the UK Approach** – *Rosie Thomas*

The Australian Government has agreed to implement certain “product regulation” law reform proposals. This article conducts an economically informed analysis of the UK experience of product regulation to posit three key claims. First, product governance is best conceptualised as a regulatory strategy to discourage market participants from designing products that exacerbate market imperfections within retail financial services. Secondly, once market responses influenced by product governance practices have been established, product intervention powers should only be exercised when a feasible intervention can improve on this market outcome. Thirdly, if the right product design standard is imposed by product governance obligations, product design interventions (ie banning products or regulating their terms) should only be necessary when market participants fail to meet that product design standard. However, given practical limitations to an intervention approach rigidly conditioned on breaches of product governance obligations, it is argued that this conceptual relationship between product governance and intervention should be used as a rule of thumb, rather than inscribed in law. .... 95

### **Difficulties with Derivatives? OTC Credit Derivatives and the Insurance Question** – *Adam Fovent*

Credit derivatives serve as an important means for capital market participants to isolate and transfer credit risk. Concerns have long been raised about the possibility of credit derivative contracts being characterised as contracts of insurance, and there are significant regulatory implications that would flow from such a result. However, the prevailing view has been that credit derivatives do not constitute insurance because payment is not conditioned on loss. Contrary to this view, this article argues that on the current state of Australian law, some credit derivatives can plausibly be characterised as, and be subject to regulation as, contracts of insurance - whether or not that is the most appropriate result as a matter of policy. .... 117

### **Reviving the Incentive to Compromise in Corporate Restructure: The Role of Secondary Debt Markets** – *William Stefanidis*

Whereas once there was a choice between reaching an artful compromise or taking action to dismantle a defaulting debtor, creditors today have a range of options for unilaterally controlling their credit exposure. This ability of lenders to unilaterally protect their financial interests can be most unfortunate for the distressed company seeking leniency from its captor. The incentive to compromise and restructure the payment terms of a loan agreement is not what it once was. Yet, just as a creditor may be seeking a speedy exit from a scene of distress, investors may seek opportunities to capitalise on heavily discounted loan assets that have the potential to generate substantial returns in the long term. This article explores the beneficial role that secondary debt trading can play in reviving the incentive to compromise in corporate restructure, and examines the

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