

# JOURNAL OF BANKING AND FINANCE LAW AND PRACTICE

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## ARTICLES

### **Collateral Undamaged: Conforming Financial Collateral Laws in a Global Market-place – Max Allan**

Law is the foundation on which financial markets are built. Effective legal frameworks play a critical role in the management of the risks inherent in financial markets. Recent international regulations are mandating the use of specified risk management techniques, such as margining. However, without reform and consistency of laws across borders, financial markets could be distorted and dislocated to the detriment of the broader economy. To facilitate effective risk management, the *Financial System Legislation Amendment (Resilience and Collateral Protection) Act 2016* (Cth) has fundamentally changed Australian financial markets and security law. The Act has introduced a powerful legal framework for mandated security-based collateral structures that is consistent with, and has improved on, sound international principles to enhance the resilience and efficiency of modern financial markets. Ultimately, risk management in global markets will only be as effective as its legal foundation. .... 175

### **Microfinance in Australia: Is the Law Doing Enough to Address Financial Exclusion? – Francisco Widjojo**

“Microfinance” has been used as a means to address financial exclusion in Australia since 2003. However, several factors are inhibiting the success of microfinance in Australia. First, in its current form, microfinance does not adequately address all the root causes of financial exclusion. Secondly, microfinance institutions in Australia do not operate under a financially sustainable business model. This article critically analyses the current legal framework underpinning microfinance in Australia and proposes a significant regulatory solution in the form of a mandatory referral regime to rectify the first limitation based on an approach being used in the UK banking sector. Ultimately, it is concluded that it is essential for the Australian government to intervene through law to better support microfinance and that, if it does not do so, it risks financial exclusion becoming more prevalent within Australian society. .... 195

### **The BEAR Necessities: What Jurisdictional Considerations will Australia’s Version of the UK’s “Senior Managers and Certification Regime” Need to Accommodate? – Andrew Eastwood and James Emmerig**

Treasury’s recent proposal to introduce an Australian version of the UK’s Senior Managers and Certification Regime, to be named the Banking Executive Accountability Regime (BEAR), raises the question of how a UK model supported by broad administrative penalties can be imported successfully into the Australian regulatory context. The use of administrative penalties in Australia is limited by Ch III of the Commonwealth *Constitution*, which provides that the judicial power of the Commonwealth may be vested only in Ch III courts. This article considers how the UK model would need to be adapted to fit within those limitations and the broader landscape of

administrative enforcement powers in Australia. It concludes that, while it is possible in theory to implement an Australian version of the UK's model, any attempt to do so must address these issues to avoid a future challenge to its validity. .... 221

**The Taxing Challenge of Digital Currency – Joel Emery and Miranda Stewart**

The taxation of digital currency presents at least two key challenges: first, ascertaining its tax characterisation; and secondly, ensuring users' compliance with broader tax and regulatory laws. In 2014, the Australian Tax Office issued rulings concluding that bitcoin should be characterised as a commodity instead of as money or a medium of exchange, for purposes of the Australian Goods and Services Tax (GST) and other tax laws. After significant inquiries and policy debate, the government has moved this year to change the GST law, so as to treat digital currency like money for GST purposes. This article discusses the characterisation challenge and effects, with a particular focus on bitcoin as the most widely used digital currency. It explains how the different taxation of traditional money compared to digital currencies that perform a similar function results in anomalous tax outcomes, which are detrimental to Australian digital currency businesses and are likely to drive these businesses offshore. It considers the issues in light of the legal meaning of money and argues that a functional approach to the definition of money and a purposive approach to the legislation, drawing on international experience, supports the legislative reform proposed by the government. This reform will foster the development of bitcoin intermediaries in Australia, the existence of which is likely to be an essential part of a successful regulatory framework for digital currencies in future. .... 236

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