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ARTICLES

Shutting the Courts Out: Developing Consumer Credit Law in the Shadow of Alternative Dispute Resolution and the New Australian Financial Complaints Authority – *Nicola Howell*

The establishment of the Australian Financial Complaints Authority (AFCA) in late 2018 was a key development in the dispute resolution framework for consumer financial services disputes in Australia. Like its predecessors, AFCA gives individuals and small businesses an accessible forum for resolving low-value disputes. As AFCA has no application or hearing fees, focuses on negotiated outcomes, and makes decisions that are binding on firms, it is an attractive alternative to litigation. Consumers are voting with their feet, and most matters involving consumer credit law are now resolved through AFCA, with very few matters being litigated in the courts. This article considers the implications of the dominance of industry external dispute resolution (EDR) in the consumer credit sector. I argue that EDR schemes, such as AFCA and its predecessors, can be effective in advancing the private interests of the parties to the complaint or dispute. However, they are less effective in advancing key public interests, including the public interest in providing authoritative statements on the scope, meaning and application of consumer credit law. Instead, the role of providing authoritative statements remains an important one for the courts, and more is needed to ensure that the courts have enough opportunity to consider and determine matters involving consumer credit law. 57

ASIC v Citigroup Revisited: Are Agents in Syndicated Debt Facilities Fiduciaries? – *Nuncio D'Angelo*

The 2007 Federal Court decision in *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* is often cited as authority for the proposition that, as between arm's length contracting parties in a non-trust commercial setting, a fiduciary relationship and associated duties and proscriptions may be excluded entirely by agreement. This article seeks to test that proposition by reference to syndicated facility agreements commonly in use in the Australian corporate debt market (although the discussion is of broader application). Under those agreements the participating financiers appoint an agent to act for them for certain purposes. The agent will invariably insist that the agreement contain an express fiduciary exclusion, arguing that it is a mere contractual service provider. However, those agreements also contain what appears to be a fiduciary undertaking by the agent. This article considers applicable fiduciary law and the efficacy or otherwise of those fiduciary exclusions. It is argued that an exclusion may not always prevail where a relationship is otherwise fiduciary in nature; the outcome is dependent on the proper construction of the contract as a whole, a process that treats a purported exclusion as merely one factor to be taken into account. The conclusion is that a facility agent may owe fiduciary obligations to the participating financiers whenever it exercises its agency powers and discretions without specific financier instructions, with the fiduciary exclusion read down or overridden accordingly. 79

A Singular Loyalty: Superannuation after the Hayne Royal Commission – *Pamela Hanrahan*

This article explores the immediate implications for retail and industry superannuation funds of some key findings of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. Commissioner Hayne's interpretation of the duties of loyalty to fund members owed by RSE licensee and their directors, and subsequent legislative and administrative changes affecting enforcement of those duties, require superannuation trustees, their officers and advisers, and regulators to re-examination some entrenched assumptions about how superannuation law operates. 109

Receivables Financing: A Comparative Study of s 81 of the PPSA and Other Legislative Overrides to Anti-Assignment Clauses – *William Kim*

Section 81 of the Personal Property Securities Act 2009 (Cth) (PPSA) provides a limited statutory override to contractual anti-assignment clauses. Its aim is to facilitate receivables financing but necessarily reflects a compromise between the conflicting interests of obligors, assignors and assignees. How successful it will be remains to be seen. This article examines, from a historical perspective, legislative attempts across various legal systems to reconcile the interests of obligors, assignors and assignees in overriding anti-assignment clauses and critically analyses how the s 81 formulation fairs compared to its precursors. It demonstrates that s 81 is not a new innovation under the Australian version of the PPSA but the product of a gradually evolving, international legal heritage that started in the United States in the 1950s. 126

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