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FOREWORD – *Guest Editors: Jason Harris, Helen Dervan, Louise Parsons, Ann Wardrop, Steve Kourabas and Allison Silink*

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Mortgage Broking, Regulatory Failure and Statutory Design – *Jeannie Marie Paterson and Elise Bant*

The Royal Commission into Misconduct in the Banking, Insurance and Financial Services Industry and the Productivity Commission Report into Banking raised questions about the quality of the service provided by mortgage brokers to consumers and recommended far-reaching changes to the way in which the mortgage broking industry is regulated. In response, the Commonwealth Government has recently introduced a "best interests" duty and tighter regulation of commissions. This new regime has potentially far-reaching significance, as the broking industry itself is at the threshold of considerable technological change prompted by the introduction of the Open Banking's initiative. This article assesses the reforms in terms of: (1) efficacy in improving the quality of the service provided by mortgage brokers; (2) fit with the existing regime, including insights from fiduciary law; and (3) flexibility in adapting to technological innovation. It aims to highlight the importance of good legislative design in responding to concerns about the effective functioning of a regulated market. 7

Consumer Lending by New Zealand Banks After the Royal Commission – Business as Usual or More Responsibility Required? – *Victoria Stace*

This article looks at the question of whether banks in New Zealand – which are for the most part wholly owned subsidiaries of Australian banks – would be acting in breach of New Zealand's responsible lending laws if they engage in certain conduct that was found by the Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry to be in breach of the Australian responsible lending laws. This involves considering the differences between the responsible lending laws in each jurisdiction, and assessing whether the conduct identified by the Royal Commission to be in breach of Australian laws would contravene New Zealand's equivalent laws. The article focuses on the lender's obligation to assess whether the proposed credit will cause the borrower substantial hardship, as this was a particular focus of the Royal Commission. ... 28

Prudential Regulation in Australia and the Banking Royal Commission: A Missed Opportunity for Reform? – *Steve Kourabas*

The global financial crisis (GFC) revealed fundamental regulatory weaknesses in many of the world's leading financial jurisdictions. In particular, there was a lack of attention to risks of a systemic nature. Post-GFC regulatory reforms in many of the world's leading financial jurisdictions have sought to address this problem through the introduction of regulation

that emphasises the systemic nature of financial risk as well as changes to regulatory structures. However, Australian policy-makers and regulators have tended to focus more on market conduct and consumer protection matters as evidenced during the recent Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. This article argues that the secondary status of systemic financial stability as a regulatory concern in Australia following the GFC undermines the centrality of systemic financial stability as a regulatory goal. The article proposes a number of reforms that have been introduced in jurisdictions such as the United Kingdom to give effect to global best practice following the GFC and that have as their key aim the maintenance of systemic financial stability. 45

Regulating Superannuation in the Shadows of the Twin Peaks – *M Scott Donald*

Australia's "Twin Peaks" model of financial regulation, in which responsibility for the superannuation system is split formally between the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission, is widely lauded. However, the extent and breadth of the misconduct in the superannuation sector identified by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry suggests that much is getting lost in the valley between those peaks. This article considers the demarcation of responsibility for regulation of the superannuation sector between the regulators and the recommendations for reform made by the Royal Commission. It identifies that regulatory culture and capability, not just ambiguities and gaps in the formal statutory authority, contributed to the conduct of the regulators impugned in the Royal Commission and that a more holistic perspective to regulating the superannuation system is required. It also questions whether recent legislative reforms are adequate to achieve that objective. 57

Role and Effectiveness of ASIC Compared with the SEC: Shedding Light on Regulation and Enforcement in the United States and Australia – *Zehra G Kavame Eroglu and KE Powell*

The Australian Securities and Investments Commission's (ASIC) regulatory oversight of securities and financial markets has increased considerably over time. However, the wisdom of this model has recently been challenged by the Hayne Royal Commission as ASIC's enforcement activities were found to be relatively toothless. Accordingly, many criticised the agency and called for further ASIC reform. After the Global Financial Crisis, the US Securities and Exchange Commission (SEC) faced similar criticisms of regulatory failure. As such, this article analyses the SEC regulatory structure, enforcement activities and governmental resources, and compares certain indicators of effectiveness with those of ASIC over the past quarter-century. By comparing ASIC with the world's biggest capital market regulator this article analyses the viability of further reform of ASIC and argues that ASIC is woefully under-resourced to engage in increased enforcement action. 71

Product Intervention Power: An Extra Layer of Protection to Consumers – *Marina Nehme*

In April 2019, the Australian Securities and Investment Commission (ASIC) was provided with the power to issue product intervention orders – that is, where a financial services/credit product available to retail clients/consumers has caused, will cause or is likely to cause a significant consumer detriment, ASIC may "regulate, or if necessary, ban" that product. The *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* (Cth) also empowers ASIC with design and distribution powers for financial services/credit products; this power will come into effect in April 2021. These powers have been on the horizon since the Financial System Inquiry in 2014, which hoped

that product intervention powers (PIPs) might help to "build consumer confidence and trust in the financial system". This aim remains urgent, particularly following well-publicised findings by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry of poor and even illegal practices in the financial industry. This article analyses these reforms with the aim of understanding the extent to which PIPs might enhance the regulatory regime and promote consumer trust. 88

Trust, Social Licence and Regulation: Lessons from the Hayne Royal Commission – *Anne Matthew*

This article takes a critical approach to examining key findings of the Hayne Royal Commission, using institutional theory as a lens. Institutional theory positions the social contract within its understanding of laws, rules and norms. It is argued that the Royal Commission's recommendations calling for a stronger regulatory response and simplification of the law are supported by institutional theory. Enforcement and simplification can provide clarity that the law is in fact a rule of the game and ensure that the institutional rules are in a strong position to influence behaviour. The role of the regulator in this process is pivotal. 103

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