THE AUSTRALIAN LAW JOURNAL

Volume 99, Number 3

March 2025

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AUSTRALIAN APPELLATE COURTS ON PPSA: A DECADE OF EXPERIENCE

Sheelagh McCracken

This article explores how Australian appellate courts have addressed challenges posed by the *Personal Property Securities Act 2009* (Cth). It starts by highlighting the types of transactions coming before the courts. It then examines the courts' general approach to construing the PPSA – focusing initially on their interpretation and application of s 12, the threshold statutory provision defining "security interest"; and subsequently, on emerging differences in conceptualisation of that interest. Concerned that the PPSA be well attuned to the commercial transactions it affects, the article concludes by calling for the legislation to be kept under continuous expert review. 163

BANKS, AUTHORISED PUSH PAYMENT SCAMS AND MODELS FOR COMPENSATION

Jeannie Marie Paterson

Many jurisdictions are grappling with questions of whether and how to respond to the harms to individuals caused by scams. Typically the scammer cannot be found nor the scammed money recovered. Attention may then turn to the responsibility of the bank who made the payment to the scammer, especially where the bank knew, suspected or should have known or suspected a scam was occurring. This article considers these issues in the context of authorised push payment scams, where an individual directs their bank to pay money to the scammer. It compares responses in the United Kingdom and Australia, under both common law and legislation, as to whether and when bank customers should be compensated for losses resulting from scams and the form banks' obligation to pay compensation should take. 178

PROTECTING INDIVIDUAL INVESTORS: A COMPARATIVE APPROACH

Jodi Gardner

This article examines the legal protections afforded to individual investors in Australia and New Zealand, arguing that the current differentiated approach is inadequate. It highlights the challenges posed by increased life expectancy, high living costs, and the responsibilisation of retirement, which blur the lines between "sophisticated" and "unsophisticated" investors. The article compares international approaches, including those in Singapore, the United Kingdom (UK), and Hong Kong, which also differentiate based on financial means or knowledge. It critiques the reliance on disclosure and consent, noting the limitations of these orthodox contractual principles. The article calls for a rethinking of consumer protection in investment advice to ensure all investors receive appropriate advice and protection, regardless of their financial status. One possible approach is the implementation of an overarching consumer duty, similar to the UK's new consumer duty, could bridge the gap between different classes of investors. 194

THE GHOSTS OF LIVINGSTON'S CASE: ANALYSING THE "BENEFICIAL INTEREST" OF A FORMER TRUSTEE IN TRUST ASSETS HELD BY A SUCCESSOR TRUSTEE

Allison Silink

The trustee's equitable proprietary interest in trust assets in respect of its right of indemnity has been variously described as an equitable "lien" or "charge" and as a "beneficial interest". In Naaman v Jaken Properties Australia Pty Ltd, the import of the characterisation was central. It was argued that description as a "beneficial interest" supported a characterisation of it as the interest of a beneficiary under a trust, to whom fiduciary obligations are owed as a matter of right. By a narrow majority, the High Court of Australia confirmed that the trustee's proprietary interest is in the nature of an equitable lien rather than a beneficial interest and rejected the proposition that a successor trustee owes the former a fiduciary obligation. This much is now clear, but other questions remain. 210

THE TEST FOR "INSOLVENCY" AND LONG-TERM FUTURE DEBT: IS TIME A RESOURCE?

Mark Wellard

The judgment of the New South Wales Court of Appeal in *Anchorage Capital Master Offshore Ltd v Sparkes* involved the application of the statutory test for insolvency to the circumstances of a company carrying significant long-term future debt obligations. The judgment bears critical analysis in light of the Court's endorsement of differing standards of proof, or degrees of certainty, for short-term debts and long-term debts that may be alleged as relevant to the question of a company's solvency. The Court's approach to the "forward-looking" aspect of the statutory test for insolvency appears to diminish the relevance of long-term debt when assessing a company's solvency and raises concerns for the interests of creditors of financially distressed companies. 224

A REGULATORY SANDBOX FOR FINANCIAL MARKET INFRASTRUCTURES IN AUSTRALIA: KEY CONSIDERATIONS

Anton Didenko

The current regulatory framework for the settlement of securities in Australia is not fit for the purpose of promoting competition and propagates a vicious cycle that entrenches the incumbent operators. This article explores the limitations of innovative technologies, analyses novel regulatory frameworks for financial market infrastructures (FMIs) overseas and draws important lessons for the creation of a new form of regulatory experimentation for FMIs in Australia. I argue that the development of a bespoke regulatory sandbox for FMIs will help overcome the underlying challenges and obtain the much-needed data to facilitate the entry of innovative FMIs and develop permanent adjustments to the current regulatory settings. 238

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