2024 BFSLA ACADEMIC COMMITTEE SYMPOSIUM

FINAL PROGRAM

Abstracts

	Presenter	Topic	Abstract
1	**Dr Anton Didenko, UNSW**	***'Atomic settlement - much ado about nothing?'***	The concept of 'atomic settlement' has been hailed by its proponents as a key enabler of innovative financial market infrastructures of the future that ensures that both legs of the post-trade settlement process occur simultaneously, thereby eliminating counterparty risks. While the potential of certain technologies, like blockchain and smart contracts, to enable atomic settlement of assets has been investigated by multiple regulators across the globe, the distinguishing features of atomic settlement require a deeper analysis from a legal perspective – considering the existence of related concepts in financial regulation (such as 'delivery versus payment') that need to be distinguished from it, as well as inconsistent use of the term by different stakeholders. This session will provide a deep dive into the mechanics of 'atomic settlement' and explore whether (and how) this concept could disrupt the legal framework for clearing and settlement facilities in Australia.
2	**Professor Jodi Gardner, University of Auckland**	***Comparative law approaches to individual financial advice***	Many jurisdictions around the world draw a line between investors on the basis of financial means - providing higher levels of protection to those with less money to invest. Whilst this initially appears to be justified, recent events have called into question whether this approach is justified and whether higher-income individuals also need additional protection. The increased cost of living, increased life expectancy and frequency of fraudulent investment scams challenge the traditional distinction between 'sophisticated' and 'unsophisticated' investors. Some jurisdictions have responded to this challenge by increasing the level of means, creating an 'opt-in' system or utilising other forms of protection, but they do not appear to be sufficient responses. This paper questions whether a return to the traditional distinction of consumer and investor is a better way to respond and ensure adequate protection for those making important investment decisions about their ongoing retirement and living costs.

3	**Professor Andrew Godwin, Melbourne Law School**	***'Technology neutrality' in banking and financial services regulation: is it is still relevant in the digital age?***	The past decade has seen extraordinary growth in technological innovation. In relation to financial services, innovation has been driven by financial technology or 'Fintech' and has been spurred in particular by blockchain technology and artificial intelligence more broadly. The innovations include the following: new ways of raising finance, such as initial coin offerings; new means of exchange for payment purposes, such as cryptocurrencies; new asset classes, such as crypto assets (which include cryptocurrencies and tokens more broadly); new ways of delivering banking and financial services, such as robo-advice; and new forms of business, such as decentralised autonomous organisations. For many years, the principle of technology neutrality has been a guiding principle for banking and financial services regulation. Technological innovation, however, has presented challenges in this regard. This paper will explore whether the principle of technology neutrality is still relevant and, if so, how and to what extent.
4	**Professor Sheelagh McCracken, Sydney Law School**	***Australian appellate courts on PPSA: a decade of experience***	This paper offers a thematic analysis of Australian appellate case law on the *Personal Property Securities Act 2009* (Cth). It explores how Australian appellate courts have wrestled over the last decade with challenges posed by the Australian legislation.
5	**Professor Jeannie Paterson, Melbourne Law School**	***Who should be Responsible for Deep Fake Fraud: Banks' Duty to Follow Instructions, Liability Policies and other Regulatory challenges in the Age of AI***	This paper considers the problematic case of deepfakes created by AI and used to defraud individuals. In *Philipp v Barclays Bank UK PLC* [2023] UKSC 25 the English Supreme Court held that a bank must carry out the instruction of its customers promptly and should not concern itself with the 'wisdom or risks of its customer's payment decisions' [3]. The court considered that whether banks should be liable to reimburse the fraud victim and in what circumstances where questions for parliament. Many jurisdictions are currently grappling with questions of whether and how to regulate the generative AI that makes deepfakes possible. Included in these considerations are the question of redress for defrauded individuals and the incentives that might be provided for banks, and other intermediaries such as AI developers and digital platforms, to take more care against the risks of deep fake fraud. This paper considers the various strategies that have been proposed and assesses their likely effect, including the consequences of intervention including in delaying following payment instructions.

6	**Associate Professor Mark Wellard, SCU**	***The test for "insolvency" and long-term future debt: Is time a resource?***	A company that, on the balance of probabilities, is unable to pay a long-term, future debt may still be solvent. That appears to be a takeaway from the New South Wales Court of Appeal's decision in *Anchorage Capital Master Offshore Ltd v Sparkes* [2023] NSWCA 88 ("*Arrium*"), a case that arose from the collapse of Arrium Group, the steelmaker and mining consumables business. *Arrium* presented the opportunity for an appellate court to clarify the relevance of long term, future debts in applying the test for insolvency under 95A of the *Corporations Act 2001* (Cth) ("the Act"). Arguably however, this "forward looking" aspect of the s 95A test has been further complicated by the Court's endorsement of different standards of proof (or degrees of certainty) for short-term debts and long-term debts. This paper will consider whether s 95A is fit for purpose in providing a workable test for solvency.