BFSLA2023 Banking and Financial Service Law Association Academic Committee Symposium

2023 **Academic Symposium Programme**

Saturday 2nd September

Location: Rees Room, Q Hotel, Queenstown, New Zealand

Time	Session
8:45–9:00am	Arrival and registration
9:00–10:10am	***Session 1 Issues in Trusts*** **Contemporary challenges to the 'Irreducible Core' of trusteeship** Speaker: **Associate Professor Scott Donald** University of New South Wales **Does a former trustee's lien over trust assets have priority over a later trustee's lien?** Speaker: **Dr Allison Silink** University of New South Wales
10:10–10:30am	Coffee
10:30–11:40am	***Session 2 New Rights and Reforms*** **The crucial role of consumer trust in Australia's Consumer Data Right** Speaker: **Dr Anton Didenko** University of New South Wales **Comparing the small business restructuring reforms in Australia and the United States** Speaker: **Professor Jason Harris** University of Sydney
11:50–1:00pm	***Session 3 Regulatory Matters*** **The Governor and the Government: A 'Lowe' blow for central bank independence in Australia?** Speaker: **Dr Louise Persons** Bond University **Tweedledum and Tweedledee: Collateral Dreaming in the World of Crypto Lending** Speaker: **Associate Professor Matteo Solinas** Victoria University of Wellington

Time	Session
1:00–2:00pm	Lunch
2:00–3:10pm	***Session 4 Issues in Relation to Bank Accounts*** **Do (or should) we all have the right to a basic transactional bank account in New Zealand?** Speaker: **Victoria Stace** Victoria University of Wellington **Who Owns the Money in Your Bank Account?** Speaker: **Associate Professor Sagi Pearl** University of Western Australia
3:10–3:30pm	Afternoon tea
3:30–4:40pm	***Session 5 PPSA Questions*** **Unperfected PPSA Security Interests in Insolvency: Why We Should Delete s 267** Speaker: **Adam Waldman** University of Sydney **Do the Hokey-Pokey – Step in Rights and the PPSA** Speaker: **Richard Winter** University of Western Australia
4:45–5:00pm	Closing Discussion
5:00pm END	Leave to join Skyline Drinks

Notes:

2023 **Symposium Abstracts**

Speaker	Abstract
Associate Professor Scott Donald University of New South Wales	**Contemporary challenges to the 'Irreducible Core' of trusteeship** The proposition that there is an irreducible core of duties owed by any trustee has been debated in Anglo-Australian law for almost 25 years. Traditionally invoked in relation to the scope of exclusion of liability clauses, the use of protectors and other devices to mask the location of practical authority and limits on the disclosure of information to beneficiaries, this paper identifies three further contemporary practices where the sensibility underlying the principle would seem relevant: limits on the indemnification from the assets of the trust available to trustees; the purchase of trustee indemnity insurance out of trust assets; and the application of trust 'reserves' to indemnify trustees. It argues that in each case the rights and powers of the trustee must be qualified in order to maintain the accountability of the trustee that is essential to the integrity of the institution as a trust.
Dr Allison Silink University of New South Wales	**Does a former trustee's lien over trust assets have priority over a later trustee's lien?** It is well accepted that a former trustee retains a lien over trust assets enforceable against a successor trustee. However less well explored are the implications of insolvency of the trust such that the assets are insufficient to meet the claims of both the former and incumbent trustees. Does the former trustee's proprietary interest have priority over the subsequent trustee's proprietary interest in accordance with the general equitable principle under which where the merits are equal, the first in time prevails? The implications of this in insolvency are self-evident: if a former trustee's interest has no priority, any future recovery under its lien in the event of insolvency will be vulnerable to the extent of any or all subsequent trustees' interests. Under Australian law, the courts have accepted that ordinarily, the first in time will have priority. However, recently, in Equity Trust (Jersey) Ltd v Halabi (Jersey) [2022] UKPC 36 it was held by a bare majority of the Privy Council that a former trustee's proprietary interest ranks pari passu with the new trustee or trustees where the trust's assets are insufficient to meet all indemnity claims. This paper considers the general rule as to the priority of equitable interests, the implications of this divergence between the jurisdictions, and the question whether reform of the equitable principles applied under Australian law is appropriately a matter for law reform rather than judicial innovation.

Speaker	Abstract
Dr Anton Didenko University of New South Wales	**The crucial role of consumer trust in Australia's Consumer Data Right** The operation of the Consumer Data Right ('CDR') in Australia hinges on the voluntary interaction of consumers with different service providers: data holders, who initially store CDR data, and accredited data recipients, who receive CDR data only with the consumers' consent. It follows that consumer trust is a crucial element necessary for the operation of the CDR. The session highlights the institutional and dynamic nature of consumer trust and identifies two of its preconditions – risk and interdependence. It then builds a taxonomy of five principal enablers of consumer trust in the CDR and demonstrates that each of these enablers is associated with a corresponding deficiency that is likely to have a dampening effect on consumer trust if not addressed through regulation and/or design of the CDR ecosystem.
Professor Jason Harris University of Sydney	**Comparing the small business restructuring reforms in Australia and the United States** The COVID pandemic caused unprecedented disruption to businesses all around the world. Small businesses were particularly hard hit by lockdowns and declining sales. Governments in many countries introduced new restructuring laws to assist small businesses restructure their debts and avoid liquidation. This paper compares the small business restructuring laws in Australia and the United States, which offer contrasting approaches to addressing financial restructuring for small businesses. The paper compares the available empirical evidence of how the procedures are being used and consider potential law reform.
Dr Louise Persons Bond University	**The Governor and the Government: A 'Lowe' blow for central bank independence in Australia?** This paper examines the independence of the Reserve Bank of Australia (RBA) in the context of Michele Bullock's appointment as the new RBA governor at the conclusion of Philip Lowe's initial term. The paper analyses the legal and factual independence of the RBA and delves into the events preceding Bullock's appointment as governor. The main source of the RBA's independence is the Reserve Bank Act 1959 (Cth), and its independence has been further reinforced through multiple iterations of the Statement on the Conduct of Monetary Policy. These statements, jointly signed by the Governor on behalf of the RBA and the Treasurer on behalf of government, are typically issued at a time of a change of government or the installation of a new RBA Governor. The inaugural statement was issued in 1996, with the most recent in 2016. The paper highlights the power and limitations of the legal framework of the RBA in protecting the independence of the RBA.

Speaker	Abstract
Associate Professor Matteo Solinas Victoria University of Wellington	**Tweedledum and Tweedledee: Collateral Dreaming in the World of Crypto Lending** This paper considers lending arrangements available on a block-chain-based financial infrastructure, known as decentralised finance (DeFi) and the operating legal features of taking security in (non-native) crypto assets under English law. These are examined together with other functionally similar developments in crypto market practice, which rely on the involvement of intermediaries as direct providers of credit and/or custodians for the underlying collateral. A comparison of these models shows that, in addition to issues of legal uncertainty and major regulatory flaws, they are fundamentally problematic from a policy perspective. Namely, they both rely on a blockchain-based unregulated financial architecture that does not serve real-world assets and, as such, until it marries up with the real economy, ends up only promoting itself as a self-referential system fuelled by speculation. Without regulatory intervention, the genuine technological innovation underlying crypto lending is unable to supplement existing models in traditional finance and, more worryingly perhaps, is inadequate for providing a predictable framework for rational investors to find 'which road leads out of the wood'.
Victoria Stace Victoria University of Wellington	**Do (or should) we all have the right to a basic transactional bank account in New Zealand?** This paper will explore the idea that the time may have come to provide a right in law to a basic transactional bank account. There is an EU Directive on this (2014/92/EU) which provides that EU states are required to guarantee a right for consumers to open a basic account. There are groups of consumers in New Zealand society that struggle to get an account for various reasons, but at the same time there is increasing recognition of the importance of financial inclusion. Should we follow the EU example, and what would that mean in practice for banks?
Associate Professor Sagi Pearl University of Western Australia	**Who Owns the Money in Your Bank Account?** The classical common law position says that the money in person's bank account do not belong to that person, but to the bank. A similar position could be traced in the context of a transfer between two accounts: this transfer does not epitomise a movement of a proprietary right, but rather involves an interbanks process of debiting of the payer's account and crediting of the payee's account. This sounds as counterintuitive as most people would think that the money in their bank account belongs to them. The paper examines the origins of this classical common law position in light of such fundamental concepts as 'property', 'money' and policy considerations.

Speaker	Abstract
Adam Waldman University of Sydney	**Unperfected PPSA Security Interests in Insolvency: Why We Should Delete s 267** Section 267 of the Personal Property Securities Act 2009 (Cth) ('PPSA') provides that an unperfected security interest 'vests in the grantor' upon the occurrence of specified events indicating the grantor's insolvency. This paper critically examines this provision, and argues that it is unnecessary. Part I explores the operation of s 267, and identifies its commercial significance by considering when it leads to different outcomes than those which would occur anyway under other provisions of the PPSA. Part II considers the main policy objective of s 267, being to continue previous statutory provisions which it replaced. It argues that s 267 does not achieve the policies underlying those provisions, including due to differences between the PPSA and those statutes. Part III considers several other possible policy objectives of s 267, and argues that none of these necessitate retaining the provision. Finally, Part IV identifies the costs of retaining s 267, and argues these cannot be satisfactorily addressed through discrete amendments to its scope. The paper concludes that, while it may at first appear to be a radical solution, we should delete s 267.
Richard Winter University of Western Australia	**Do the Hokey Pokey – Step In Rights and the PPSA** Step-in rights are a common protection mechanism used in the construction and project development industries. In the event a contractor fails to perform its obligations, make necessary payments or goes insolvent, these rights allow for other project parties to "step-in" and take over the contractor's obligations to make certain that the construction is completed. As such step-in rights are a highly valuable and useful tool to ensure projects can be completed and continue to operate even where key parties are in default. However, the case of Bluewaters Power 1 Pty Ltd v The Griffin Coal Mining Company Pty Ltd [2019] WASC 438 (Bluewaters Case) made it clear that in the right circumstances such step-in rights can, in substance, be security interests for the purposes of the Personal Property Securities Act 2009 (Cth) and accordingly a failure to register such an interest, on time or at all, can result in a loss of those rights. The Bluewaters Case also provides valuable guidance on the mechanisms for obtaining extensions of time for registration of security interests but importantly highlights that any such orders are only available at the discretion of the court. On a cautionary note the Bluewaters case also highlights that extensions of time are not relevant nor available and will provide no relief where no registration has taken place. Non registration of security interests in respect of a grantor that has already gone insolvent results in the step-in rights being lost and vesting in the insolvent company, at the very time when the holder of those step-in rights needs to exercise them!