

# JOURNAL OF BANKING AND FINANCE LAW AND PRACTICE

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## ARTICLES

### **Responding to bank failure: Evaluating open bank resolution in New Zealand** – *Jordan Boyd*

In June 2013, the Reserve Bank of New Zealand's open bank resolution policy became a "live option", available to the Reserve Bank to use in the event of bank failure. Open bank resolution is, in short, a modified company bankruptcy process under which the bank would close; a portion of creditors' claims would be frozen to meet the distressed bank's debts, and the bank would re-open for business the following day. This article evaluates open bank resolution as a response to bank distress, with a focus on its effect on retail depositors. The article argues that open bank resolution is an inadequate response to the threat of bank failure due to its lack of specificity, its unrealistic assumptions about the discipline retail depositors' exercise over banks, and its lack of consideration about how open bank resolution might interact with a retail deposit guarantee. The article concludes that, had the Reserve Bank engaged with these issues, it likely would have found satisfactory responses to many of the deficiencies in the open bank resolution policy. ....

3

### **Bank custodians and systemic risk in the Australian superannuation system** – *M Scott Donald and Rob Nicholls*

Custodians play an integral role in the administration of Australia's superannuation system. This article considers the way in which the small number of custodians, and the increasingly diverse set of services they provide to superannuation funds, gives rise to systemic risk within the superannuation system. It also considers the way in which the current regulatory scheme addresses this risk. It finds a regulatory scheme in which the potential for systemic risk is increasingly recognised but in which little is currently done to manage this risk as a result of institutional, political and jurisdictional factors. ....

25

### **The adjudication of Shari'ah issues in Islamic finance contracts: Guidance from Malaysia** – *Tun Abdul Hamid Mohamad and Adnan Trakic*

Islamic finance contracts are not immune to the Shari'an compliance risk. Parties are free to raise Shari'ah issues and courts are expected to recognise and adjudicate the same. English law was and still is the most preferred choice of law in cross-border Islamic finance contracts. However, there is little that an English court can do to adjudicate Shari'ah issues. This is not surprising as it is, after all, a secular court which is not equipped to ascertain Shari'ah ruling. Hence, this article proposes Malaysian law as the law of reference. The Shari'ah issues raised before the Malaysian courts will be referred to the Shari'ah Advisory Council of the Central Bank of Malaysia for ruling which will then bind the courts. The efficacy and workability of this model has already been tested in Malaysia. This article argues that the model could be exported to and adopted by other countries wishing to introduce and develop their own Islamic finance industry. ....

39

BANKING LAW AND BANKING PRACTICE	
<b>The Code Of Banking Practice in Courts .....</b>	<b>60</b>
<b>Equitable contribution and the covenant not to Sue: Lavin v Toppi .....</b>	<b>64</b>
WEALTH MANAGEMENT	
<b>Looking back to take a step forward – The implied obligation of mutual trust and confidence in the superannuation context .....</b>	<b>70</b>
RECENT PUBLICATIONS .....	75