

Additional written submission from Dr Hamish Patrick, 4 December 2025

I was very pleased to give evidence to the committee yesterday and hope the committee found it useful. One point that was trailed a couple of times but not in the end picked up, was the role of possession in the Bill.

My written comments and those of some others suggested it was problematic to provide in s.4(1) that incorporeal property be treated as if it were corporeal property for the purposes of acquisition of ownership using the concept of possession - and then to substitute the concept of exclusive control for possession.

A similar approach was taken to digital bills of lading in the Electronic Trade Documents Act and I would agree that was a sensible approach there, as there is a substantial body of existing caselaw around the possession of a physical bill of lading into which it was sensible to plug for reasons of certainty - by treating control of an electronic bill of lading as if it were possession of a physical bill of lading.

There is no such argument of certainty in taking the same approach to digital assets in general and doing so will only serve to create uncertainty. For example, one existing rule of Scots law relating to the acquisition of ownership of corporeal property is the Roman Law doctrine of “specificatio”, under which when a person makes a different type of property from someone else’s property the person making the change owns the new “species” (the usual Roman Law example given is making wine from grapes).

Despite the niceties of “immutability” discussed yesterday (if it makes it through to the Act) it may be necessary to consider if specificatio has taken place if changes are made to the nature of a digital asset. Those advising on the new regime are going to be required to consider whether broader aspects of the law of corporeal moveable property (not limited to specificatio) may be applicable to digital assets because of this “detour” through corporeal moveable property law. Going straight to control without this detour will create far more certainty for those involved in the market - and it is possible that advisers will consider Scots law too uncertain and unusual to use and that English, US or other laws and courts will be used instead.

In addition, a further “exclusion” from the definition of digital assets to those discussed crossed my mind following yesterday’s session – uncertificated securities and units of uncertificated securities for the purposes of the Uncertificated Securities Regulations (at the moment largely various types of investments traded using the CREST system). There is a detailed regime dealing with them across which we should not be cutting (and the relevant regulations relating to the Moveable Transactions (Scotland) Act contains a relevant carve out here). There may well be more things that pop up here to exclude to add to the bills of lading etc under the Electronic Trade Documents Act and the “claims” and financial instruments” under

the Moveable Transactions Act regimes – reinforcing the need for a carve out list and power to alter it by statutory instrument.

I will be very happy to discuss these and other points relating to the Bill further if that might help.

Dr Hamish Patrick

Partner and Head of Financial Sector, Banking and Finance, Shepherd and Wedderburn LLP