

# Research Workshop Series

## Abstract

**Monday 10 August 2009**

**Presentation by: Lisa Sarmas** (Melbourne Law School)

### ***Cummins* and its Progeny: 'Equality' and its Discontents**

This paper explores the gendered effects of an arguably new trusts principle - an inference of equal ownership of the family home - developed by the High Court of Australia in *Trustees of the Property of Cummins (a bankrupt) v Cummins* (2006) 227 CLR 278. Considerable doctrinal uncertainty surrounds the Court's decision in *Cummins*. Can it be reconciled with traditional trust principles, or does it replace them? Does the inference extend to all family assets, or is it confined to the matrimonial home? This paper explores these doctrinal questions before embarking on a discussion of the gendered implications of the decision. Here, the particular question posed is whether an ostensibly 'equal' starting point for apportionment of family property can lead to substantively just results in the context of women's structural disadvantage in relation to men, and in the context of differences between women. The paper contends that while the '*Cummins* principle' may improve outcomes for some women, its basis in an 'identical treatment' model of equality renders it fundamentally problematic. A legislative solution, based on the factors applicable to separating partners under the *Family Law Act 1975* (Cth), is proposed as a more satisfactory way of dealing with claims against family property.