Corporate Law Teachers Association Conference 2020

FULL PROGRAM

Day 1: Sunday 2 February 2020

Venue: Building H, Level 8, Caulfield Campus

Time	Session
2.00pm	**Registration desk open**
2.30pm	Venue – The Pavilion Foyer **Teaching session:** Venue – The Pavilion **2:30 - 3:30pm Panel discussion:** *Associate Professor Melissa Castan, Dr Catrina Denvir and Dr Jennifer O'Reilly* **Student Focus in Corporate law - engagement and disruption** **Abstract** Students today face new challenges and need transferable skills for work in the modern and developing workforce. Please join with the panellists in this interactive session, to explore pressure points and potential for teaching in the age of the fourth industrial revolution, for units traditionally quite focussed on 'black-letter law'. **3.30 - 4.30pm** *Dr Andrew Moshirnia* **Never Odd or Even: Universal Design for Learning and Multifunctional Multimedia** Well-designed doors, Australian crossing-lights, and palindromic puzzles; understanding the principles of these items can make your instruction more accessible and impactful. Please join Andrew in an exploration of universal design for learning, an educational philosophy with a central tenet: a lesson accessible to the greatest number of students will have the largest utility for each individual student.
4.30pm	**Welcome Cocktail Reception** Venue – The Pavillon foyer
6.00pm	**Day 1 concludes**

Day 2: Monday 3 February 2020

Venue: Building H, Level 2, 8 and 9, Caulfield Campus

Time	Session
8.30am	**Registration desk open, coffee on arrival**
9.00am	**Conference opening and introductions**
9.15am	**Plenary Presentation:** *Professor Lorraine Talbot, University of Birmingham* **Trust in Corporations and Other "Bullshit" Discourses: What Really Matters?**

	Chair: Professor Michelle Welsh, Monash Business School
10.30am	**MORNING TEA**
11.00am	**Plenary Panel: The Impact of Royal Commission on Corporate Boards, Corporate Governance and Corporate Culture: the views of the profession** *Panel members:* *Bob Santamaria, ANZ Bank* *Heather Lowenthal, Partner Governance, Regulation and Conduct, Deloitte* *Marie McDonald, Non-executive Director of CSL, Nanosonics and Nufarm* *Chaired by Jennifer Hill, Bob Baxt Chair Corporate and Commercial Law, Monash Law School*
12.15pm	**LUNCH**

PARALLEL SESSION 1 A – Financial Services

Monday 3 Feb 1.15pm

John Farrar

Billion Dollar Bonfires - A Comparative Study of Regulatory Failure in the Non-bank Finance Sector in Australia and NZ

Abstract:
The paper deals mainly with the demise of a number of non-bank finance companies and regulatory failure by both Australia and New Zealand. This particularly affected rural areas where banks have closed and was not considered by the Hayne Royal Commission.

Monday 3 Feb 1.45pm

Marina Nheme

Product Intervention Power: Enhancing Consumer Trust or An Indictment of the Financial Services Industry?

Abstract:
In April 2019, the Australian Securities and Investment Commission (ASIC) was provided with the power to issue product intervention orders: where a financial services/credit product available to retail clients/consumers has caused, will cause, or is likely to cause a significant consumer detriment, ASIC may 'regulate, or if necessary, ban' that product. The Treasury Laws Amendment (Design And Distribution Obligations And Product Intervention Powers) Act 2019 (Cth) also empowers the regulator with design and distribution powers for financial services/credit products; this power will come into effect in April 2021.

These powers have been on the horizon ever since the Financial System Inquiry ('FSI') in 2014, which hoped that product intervention powers ('PIPs') might help to 'build consumer confidence and trust in the financial system.' This aim remains urgent, particularly following well-publicised findings by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry ('the Royal Commission') of poor and even illegal practices in the financial industry. The presentation analyses these reforms with the aim of understanding the extent to which PIPs might enhance the regulatory regime and promote consumer trust. It will also observe whether the use of PIPs may be viewed as an indictment of the financial services industry.

Monday 3 Feb 2.15pm

Weiping He and Han-Wei Liu

Rebuilding Trust in the Financial Planning Industry: Lessons from the UK

Abstract:
Rebuilding public confidence in the financial industry has become one of the major challenges in the post-Banking Royal Commission era. This is particularly so when it comes to financial advisers. Australia has shifted from "suitability rule" to impose the "best interests duty" on financial advisers in the 2012 FOFA package. Yet, the level of public trust in our financial advisers is far from satisfactory, which led the Commissioner to call for reforms. In the UK—where the suitability rule remains central to governing financial

advisors—the public perception about the quality of the financial advice is generally positive. This raises an intriguing question: does the differences of public confidence in the UK and Australia indicate that we should revert back to the suitability rule—at least one possible option when we engage reforms? The purpose of this article is three-fold: First, we contrast how financial advisers are regulated in the UK and Australia as a matter of law. Second, we will also explore how, as a matter of judicial interpretation, the courts give meanings to the legislation, thereby informing and guiding the conduct of financial advisers. Relating to judicial interpretation is the issue of enforcement: who takes the lead in these lawsuits? Why and how effective are they in holding financial advisers accountable?

PARALLEL SESSION 1 B – Corporate Governance

Monday
3 Feb
1.15pm

Beth Nosworthy

The Cultural Impact of Employees: Regulation under sections 182-183.

Abstract:
The Corporations Act 2001 (Cth) provides significant regulation for the behaviour of directors and officers, particularly through the duties outlined in Chapter 2D. Of those provisions, sections 182 and 183, dealing with the improper use of position and information, also apply to 'employees', a term not defined in the Act. The courts provide some limits to the application of this duty, requiring employees to hold a sufficiently senior position that permits them to abuse the trust and confidence of the company, which echoes the threshold found for the fiduciary obligation owed by employees to their employer. As this area seems well served by the private remedies available to companies under the general law to respond to misbehaving employees, this paper asks: what is the justification for extending the civil penalty provisions of sections 182 and 183 to employees? Further, as employment law is currently grappling with the distinction between employees and independent contractors in a number of fields, should the term 'employee' be subject to closer scrutiny here? Finally, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry highlighted the impact that employees who would not satisfy the definition of director or officer under the Act can have on the culture of a company. In light of those examples, is there a case for extending liability under other duties within the Act to employees?

Monday
3 Feb
1.45pm

Andrew Obeid, and Tim Connor

Shareholder Primacy and its Challengers

Abstract:
The recent Financial Services Royal Commission has led to renewed interest in the status of shareholder primacy in Australia. In scholarly and popular media, various commentators have debated whether or not shareholder primacy still underpins the legal obligations of Australian directors and whether or not law reform is required. In this paper we seek to

contribute to this debate in three ways. First, we attempt to define 'shareholder primacy', basing our definition on the work of scholars who are commonly cited as champions of this approach. Second, we review the Australian case law that defines a corporation's interests for the purposes of the two most relevant duties of directors and officers: the duty of care and duty to act in the corporation's best interests. While recognising that there is some inconsistency in this case law, we argue shareholder primacy no longer adequately accounts for the approach of Australian courts, if indeed it ever did. Third, we consider the extent to which alternative theoretical approaches to defining the interests of the corporation fit the current Australian case law. We conclude that Australian case law on this topic currently lacks sufficient coherence to be adequately captured by any of the established theories. However, the 'entity primacy' approach recently proposed by Watson is one possible way forward. With some further development, this approach has the potential to draw together some of the recent developments in the case law and establish a theoretical basis for further clarification of this aspect of directors' duties.

Monday
3 Feb
2.15pm

Lang Thai

Reflection on "Good Faith" under s.237(2)(b) of the Corporations Act 2001 in Statutory Derivative Actions.

Abstract:
The idea of introducing the statutory derivative action ("SDA") was to enhance and maintain directors' accountability and corporate governance. An SDA is a court action brought by a shareholder or director on behalf of and in the name of the company to remedy a wrong done to the company where it is unable or unwilling to do so. Leave of the court is required to bring an SDA. This paper focuses on the "good faith" requirement in s.237(2)(b) of the *Corporations Act* 2001 (C'th), that "an applicant is acting in good faith" in making that application. The writer argues that while "good faith" is a relevant consideration for deciding on the leave application, the inclusion of good faith as a requirement in the Act is not necessary. Its inclusion could possibly do more harm to the company than good; some shareholders may be reluctant to put their good character on the test for others in the company, simply because there would just be too much to lose and very little to gain. This paper draws on the experiences from other jurisdictions and argues why the good faith requirement should be removed from the Act in order to encourage wider use of the SDA and bring about improvement to director's accountability and corporate governance.

PARALLEL SESSION 1 C – Corporate Legal Personality

Monday
3 Feb
1.15pm

Duncan Wallace
The Corporation and Community: The Legal Mechanics of Mistrust

Abstract:
Though sometimes forgotten, the first incorporated bodies in medieval Europe were towns, boroughs, social fraternities, guilds and religious bodies. Such bodies pre-existed incorporation by the state, incorporation therefore acting as formal recognition of what was already there. This process was later reversed: incorporation was used as a mechanism for the grant of privileges – for example mining or trading monopolies, but increasingly such grants through incorporation were awarded without a pre-existing corporate body. The grant would be extended, and the recipients of the grant would only then organise themselves corporately. In other words, the corporate body formed following the act of incorporation, rather than incorporation acting to recognise a pre-existing body. This marked the beginning of an era in which corporations became removed and unaccountable to their communities, a process which drew criticism from figures such as Thomas Paine and Adam Smith, and formed the basis for a growing anti-corporate sentiment.

After sketching some of this history, the paper will make some remarks regarding what this can tell us about why we see corporate mistrust today, and why mistrust of business corporations is particularly acute. I will suggest lessons we can take from this when considering organisational and regulatory reforms for building trust.

Monday
3 Feb
1.45pm

Matt Berkahn and Lindsay Trotman and Bundu Ronald
Should New Zealand and India adopt Lord Sumption's 'evasion' principle?

Abstract:
It is often said that the courts' jurisdiction to ignore the legal personality of the company ('lift' or 'pierce' the 'corporate veil) has defied all attempts at coherent analysis: see, for example, the judgment of Lord Neuberger PSC in *Prest v Petrodel Resources Ltd* [2013 2 AC 415 at [64]-[65] (UKSC). In that case, Lord Sumption JSC sought to provide certainty by limiting judicial veil-lifting to situations where 'a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control': *Prest* at [35].

Monday
3 Feb
2.15pm

Richard Stevens
The Legal Nature of Shares

Abstract:
Section 35(1) of the South African Companies Act 71 of 2008 provides that "a share issued by a company is movable property..."Section 92 of the Australian Corporations Act merely provides that a share is a form of security but does not define the term. Generally speaking South African case law and Australian case law recognise that shares consist of a bundle of rights. These rights would typically include rights to distributions by the company, voting rights and rights to any balance funds at the liquidation of the company. However, these rights can only be exercised if the name of the holder of the shares is entered into the securities register of the company. In a recent decision by the Western Cape High Court in the matter of *De Wet NO v Naspers Ltd* the court was confronted by an application for rectification of the securities register of Naspers Ltd. The court refused rectification due to public policy reasons, essentially due to the delay in bringing the application. This paper will consider the power of the court to rectify a securities register but also consider whether a share is ultimately property if the usual property law remedies are not available where the use and enjoyment of the property are lost and the only manner to enjoy the property is registration on the securities register.

PARALLEL SESSION 1 D – Directors & Insolvency

Monday
3 Feb
1.15pm

Julie Cassidy
Superfluous or Superlative: The Role of Reckless/ Insolvent Trading prohibitions in New Zealand, Australian and South Africa Directors' Duties Regimes

Abstract:
Under ss 135 *and 380(4) Companies Act 1993* (NZ), s 588G *Corporations Act 2001* (Cth) and s 22 Companies Act 2008 (SA) directors' have a duty not to engage in reckless trading (in the case of New Zealand and South Africa) and insolvent trading (in the case of New Zealand and Australia). Under s 137 *Companies Act 1993* (NZ), s 180 *Corporations Act 2001* (Cth) and s 76(3)(c) Companies Act 2008 (SA) directors have a statutory duty of care. In each jurisdiction the latter statutory duty stands side by side with the complimentary common law duty of care. The reckless/insolvent trading provisions have no common law equivalent. This paper asks the question, are these reckless / insolvent trading provisions an unnecessary duplication in light of the common law and statutory duties of care and skill? Both duties provide remedies when breached. Is it necessary to provide a remedy for a breach of both the reckless/insolvent trading provisions and the duty of care and skill when either of the two would suffice? While there is a significant overlap in each jurisdiction, it is ultimately concluded that the reckless / insolvent trading provisions play an important additional role. In the context of the reckless / insolvent trading provisions the director's must shift their

focus from the shareholders' to the creditors' interests. While the duty continues to be owed to the company, reflecting this concern with safeguarding creditors' interests, at times statutory relief is also extended to creditors. Arguably this focus on creditors' interests in times of doubtful solvency plays an important part in ensuring directors adequately monitor corporate solvency

Monday
3 Feb
1.45pm

Andrew Smith

Should I Stay or Should I Go: A Proposal for Reform of the Insolvent Trading Laws in Australia

Abstract:
A central purpose of the *Corporations Act 2001 (*Cth) is to facilitate and promote reasonable entrepreneurial risk taking by company directors for the benefit of its shareholders whilst also balancing the oft competing interests of creditors of those companies. The challenges of balancing those competing interests are most pronounced in times when a company is in a state of financial distress or insolvency.

Insolvent trading laws are one means by which the Parliament seeks to promote attainment of that infinitely difficult balance. Whilst Australia's insolvent trading laws have been described as 'arguably the strictest in the world',1 it appears that they are rarely effective in procuring returns to creditors of externally administered companies and/or discouraging insolvent trading. In the period 30 June 2011 - 30 June 2018, in over 90% of external administrations, the estimated return to unsecured creditors of those companies was cents.2 In the financial years ended 30 June 2017 and 30 June 2018, over 50% of instances where external administrators reported possible insolvent trading, it was estimated that those companies had continued to trade whilst insolvent for fifteen months or more. Such abysmal results raise serious questions about the effectiveness of the current insolvent trading laws and may be a factor contributing to the lack of trust in companies. This paper will articulate the potential limitations upon the operation of the current insolvent trading laws and outline potential wholesale reforms.

Monday
3 Feb
2.15pm

Anna Giardina and Stephanie Bruce

Creditor Defeating Dispositions.

Abstract:
Over the past two decades, confronting phoenix activity has been at the forefront of scholarly research, government inquiry and legislative reform in Australia. The costs, implications and issues associated with this prolific and often detrimental behaviour has triggered debate in determining the best approach for combatting such activity. The Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 (Bill) seeks to introduce a new voidable transaction specifically designed to tackle illegal forms of phoenix activity through the implementation of creditor-defeating disposition (CDD) provisions into the Corporations Act 2001 (Cth) (Act or Corporations Act).

This paper discusses the proposed CDD regime in comparison to existing case law and statutes designed to combat transactions to defeat creditors (TDC) and explores whether the proposed regime is capable of improving trust and understanding in the corporate landscape. This paper concludes, with reference to practical considerations, that the CDD regime is a necessary addition to the existing suite of provisions already available and is likely to enhance trust in the administration of corporate insolvencies.

Parallel 1E – Roundtable

This roundtable has been conceived to both share comments on the book Citizen Capitalism: How a Universal Fund Can Provide Influence and Income to All and remember Professor Lynn Stout, who co-authored the book.
Participants:
Alexandra Andhov, Meredith Edelman, Sergio Gramitto, Pamela Hanrahan, Jennifer Hill, Phillip Lipton, Saule Omarova, and Susan Watson

2.45pm Afternoon Tea

PARALLEL SESSION 2 A – Corporate ownership structures

Monday
3 Feb
3.15pm

Lauren Yu-Hsin Lin
Institutionalizing Political Influence in Business: Understanding Corporate Party Organizations in China

Abstract:
The American government and judiciary have long been trying to understand state- backed or state-influenced actions behind Chinese enterprises that threaten US business and economy. While party organizations have long existed in Chinese state-owned enterprises (SOEs), studies on party organizations and the channels through which they exert influence in business are scarce. The recent party-building reform in China, requiring all SOEs to formally write corporate party organizations into their corporate charters, provides a glimpse into the power structure of the Chinese Communist Party (CCP) in Chinese business.

This paper is an initial attempt to examine the unprecedented writing-in process. This paper first reviews the historical evolution of corporate party organizations in Chinese corporate history to understand the historical roots of party influence in business. By presenting the four-year data from 2015 through 2018, this paper finds that the writing-in is not just putting into written words something already in practice, as conventionally believed. The charter amendment illustrates the power struggle between the CCP and SOE managers, and is, in fact, a political renegotiation process in which the CCP regains its control over SOEs by institutionalizing party organizations in business. Although foreign and

minority shareholders expressed their concern about enhancing the party's influence by voting against the amendments, their power is limited, given the state's dominating shareholding in the SOEs. By giving party organizations a formal role in business decision-making, the CCP secures disproportionate power and ensures its continuing control over existing SOEs, in anticipation of declining state ownership following the mixed-ownership reform.

From a policy perspective, this paper suggests that future adjustments should be made to address the CCP's disproportionate control through party organizations to ensure that its power is exercised only for public interest purposes and is commensurate with the state's equity rights. As the written language in corporate charters is likely to become prima facie evidence of Chinese firms' relationship with the party–state, this paper urges the concerned court or government to consider the totality of the provisions, rather than the mere presence of a party organization in the firm, when determining the level of party–state control over a firm in world trade or cross-border investment cases.

Monday
3 Feb
3.45pm

Lance Ang

Capitalist Variations in 'Say on Pay': A Look at Corporate Governance Contradictions in Singapore and Hong Kong

Abstract:
To rebuild trust in businesses amidst concerns of excessive executive remuneration following the global financial crisis, 'say on pay' reforms have been implemented in many major jurisdictions, including the US, UK and Australia. Singapore and Hong Kong, however – which are recognized by the World Bank to have the second- and fourth-best regulatory environments in the world for investors respectively – have bucked the international trend of allowing shareholders a vote on executive remuneration. 'Say on pay' has either been rejected or ignored in the latest reforms to their corporate governance codes despite studies which have found that Singapore and Hong Kong have the highest executive pay in Asia, with base salaries for top executives rising to more than 25% higher than their US counterparts.

While Singapore and Hong Kong share the same common law legal traditions with the US, UK and Australia within the same bucket of liberal market economies, they practise a different form of 'regulatory capitalism' from their Anglo-American counterparts. 'Trust' in businesses, therefore, takes on a different meaning as compared with the Western context. This paper adopts an institutional approach and argues that this variance in 'say on pay' regulation is attributed to Singapore and Hong Kong's distinctive institutions of political economy – namely their patterns of corporate ownership, the restraint of institutional investors, the state's role and ultimately the socio-political culture and ethos. It concludes with what the implications of this variance may be for future legal reforms on 'say on pay' and theories of corporate governance.

Monday
3 Feb
4.15pm

Kaushiki Brahma

Related Party Transactions in the context of Ownership Structures: A Multi-Country Study

Abstract:
The abusive related party transactions are rampant in concentrated ownership structure economies due to the adaptation of international standards of corporate governance irrespective of cultural and structural differences of companies. There have been global financial crisis due to bad deals of related party transactions. There is a need for stringent corporate governance policies while a company engages in related party transactions with promoter controlled shareholders or block holders or interested directors in concentrated ownership structures. The fraud risks associated with abusive related party transactions have been mitigated by monitoring procedures through disclosure requirements, oversight by the board, auditors, etc.

In spite of these monitoring regulatory frameworks, the tunnelling by controlling shareholders are still prevalent in concentrated ownership structures. The regulatory framework of controlling abusive related party transactions is based on the Anglo-US model of corporate governance. In spite of the implementation of the Anglo-US Model where legal provisions are introduced regulating disclosure of related party transactions furthering the principles of transparency, accountability, and fairness there has been a high rate of corporate failures. The recent monitoring policies adopted in European Union Shareholder Rights Directive have strengthened the regulatory framework of related part transactions requirement of shareholders voting in the material transaction, providing shareholders and creditors the right to examine the fairness of related party transactions. The paper seeks to do a cross country comparative research (India, Brazil & Malaysia) on frailties in monitoring policies of regulating abusive related party transactions adapted from Anglo-US model in concentrated ownership structures and the need of regulatory reforms to prevent abusive related party transactions.

PARALLEL SESSION 2 B – Corporate Governance

Monday
3 Feb
3.15pm

Paul Redmond

The Corporation, Corporate Law and Slavery: A New Stage in the Relationship?

Abstract:
The corporation, corporate law and slavery have conducted a shameful *pas de trois* this past half-millennium. From the Elizabethan era chartered companies, through the Bubble Act response to the overreach of the slave trading South Sea Company, to the international production methods of modern global supply chains, the relationship has enabled slavery and influenced corporate law. In 2018 two Australian Parliaments—the Commonwealth and that of the State of New South Wales—passed

complementary statutes requiring large entities to report annually on measures they have taken to detect and respond to modern slavery in their operations and supply chains. While both statutes rely primarily on market sanctions for their efficacy—assumed active monitoring by consumers, investors, media and civil society that reinforces business incentives to protect reputation—corporate law concepts are essential to their architecture, provide essential building blocks, and contribute to efficacy of sanctions and effectiveness. What are the implications of these reporting, and perhaps conduct, requirements for corporate law, governance and culture? Is the relationship between the erstwhile partners fundamentally shifting to take on a more benign character? Are they being forced into a new and radically different choreography?

Monday
3 Feb
3.45pm

Rosemary Langford

Purpose-based Governance

Abstract:
Trust in societal institutions has decreased progressively in the last two decades, with two recent royal commissions highlighting the need for improved governance in both the charitable and corporate spheres. In addition, there is increased demand for business models that incorporate more than the generation of profit, with examples being shared value and social enterprise models. One way of increasing trust in institutions is via a governance model centred on purpose – referred to in this paper as 'purpose-based governance'. This model provides the potential for refocusing and reinvigorating governance and for incorporating the interests of stakeholders more comprehensively. A purpose-based governance model works particularly well in relation to charitable entities given that charities must articulate their purposes and given the importance of purpose in maintaining charitable status and registration. The importance of purpose is also increasingly recognised in the corporate sphere. Indeed a revolutionary transformation of corporate governance and regulation based on purpose has been proposed by Mayer and the British Academy. Media attention has recently surrounded the Business Roundtable's release of a new statement on the purpose of corporations which outlines a 'fundamental commitment to all … stakeholders'. This paper outlines and critically assesses the advantages of a purpose-based governance model, which has transformative potential.

Monday
3 Feb
4.15pm

Alice Klettner

Multinational Enterprise and Corporate Governance of Foreign Subsidiaries: Can the Law Find an Acceptable Balance between Risk and Responsibility?

Abstract:
Three recent UK tort cases highlight the awkward balance that multinational corporations must navigate when it comes to the governance of foreign subsidiaries. On the one hand, parent companies are strongly protected by the doctrine of limited liability which positions them simply as a shareholder of the subsidiary. On the other hand, the reality of business is that multinationals operate as group enterprises, often with a strong brand image,

and therefore the parent must take responsibility for its subsidiaries. Contemporary governance practices including the integration of social and environmental responsibility encourage companies to implement group-wide policies showcased in glossy sustainability reports. This paper explores how these practices have created an emerging avenue of potential parent company liability in tort law that circumvents the protections of corporate law.

Together with recent legal advances in the areas of modern slavery and conflict minerals, these tort law cases show that civil society is beginning to reach a consensus that corporate power and wealth should come with a level of responsibility. It can be argued that, while corporate law is becoming fundamentally distanced from modern reality, tort law is able to adapt. However this places corporations in a situation of uncertainty that hinders the flow of corporate social and environmental responsibility across borders. This paper considers whether it is time to re-think the doctrine of limited liability in the context of corporate groups in order to find a more acceptable balance between risk and responsibility in the parent-subsidiary relationship.

PARALLEL SESSION 2 C – Corporate Legal Personality

Monday
3 Feb
3.15pm

Phillip Lipton

The Utilisation of Evolutionary Concepts in Legal History: Company Law as a Case Study

Abstract:
Evolutionary concepts that draw upon Darwinian principles have been highly influential and widely used in many social science disciplines. This article suggests that an evolutionary perspective provides a useful theoretical framework from which to analyse legal change and its interaction with its environment and in some cases, the persistence of sub-optimal laws. An evolutionary approach does not seek to provide a determinist or predictive explanation of legal change, but rather, invites critical analysis of law because it sees legal outcomes as the result of historical contingencies, chaotic developments or sometimes chance accidents that quite feasibly could have turned out differently.

After discussing the utilisation of evolutionary concepts to law generally, the article then analyses the historical development of three fundamental concepts of company law: joint stock, separate legal personality and limited liability so as to provide an example of the application of evolutionary concepts to legal change. In so doing, a particular legal problem concerning the tort liabilities of corporate groups is identified that has been widely criticised around the world as a sub-optimal legal outcome. An evolutionary perspective, by recognising the significance of chance occurrences, encourages us to change the law for the better where this is appropriate.

Monday
3 Feb
3.45pm

Jonathan Barrett

Metaphysics and the Corporation

Abstract:
In *Meridian Global*, Lord Hoffmann plausibly instructed us to apply rules of attribution through the interpretation of relevant texts in determining corporate liability. However, his rejection of the relevance of metaphysics to an understanding of the corporation, and his denial of such a thing as the company – no '*ding an sich'* – was a remarkable example of intellectual bait-and-switch. Akin to using the underpinning concepts and language of the scriptures to argue for atheism, to denying the relevance of philosophy in explaining the nature of the corporation, Hoffmann invoked and relied on the language of Kantian metaphysics.
Hoffmann's jurisprudential equivalent of 'nothing to see here' was sure to pique interest. And, once such an oblique invitation to consider the nature of the corporation is made, various ontological possibilities are suggested, including the Kantian noumenon and the Platonic abstract object. This paper denies that the corporation is either, say, a Kantian noumenon or a Platonic abstract object, but also rejects the irrelevance of philosophical inquiry into the nature of the company.

Hoffmann's hermeneutic approach is persuasive in attributing liability in a corporate setting, but it is implausible to characterise the corporation as no more than an aggregation of interpretable texts. Intuition and, indeed, companies legislation, tell us that the company is something – but what is it? This paper does not presume to answer that question conclusively but asserts the value of metaphysical inquiry in seeking an answer.

Monday
3 Feb
4.15pm

Susan Watson

Trusting Other People: The Artificial Person in the AI Age

Abstract:
The success of the modern corporate form can be attributed to its separation from human beings. Boards are charged to act in the interests of the shareholders, the fund with a seed of capital contributed by shareholders, rather than for shareholders themselves. That separation combined with boards considering themselves constrained to act to maximise capital value means corporations grow and prosper at least financially. The consequence of that separation is that understandably the corporation as an artificial legal person struggles to engender trust from natural persons. At times of crisis and financial or ethical failure, it becomes all too apparent that behind the façade of brand and persona hides an artificial person that seeks to self-maximise by gobbling up forms of value and converting them to capital. Only when we understand what a corporation really is might we consider how it might, through its governance, change.

PARALLEL SESSION 2 D – Crowdfunding & trust in corporations

Monday 3 Feb 3.15pm

Steve Kourabas

Equity Crowdfunding – A New Way to Build "Trust" in the Company

Abstract:
The use of equity crowdfunding as a source of fundraising for small companies has grown significantly over the past decade. Several jurisdictions have created specific legal regimes to encourage the use of this fundraising mechanism. These regimes treat equity crowdfunding as an exemption from disclosure and other requirements that usually accompany a public offer of shares. The process allows companies to raise small amounts of money, usually from retail investors (the crowd), through an online platform that operates as an intermediary.

Relatively little legal academic focus has been devoted to the impacts of equity crowdfunding on the corporate form. This paper addresses this gap by exploring the potential for equity crowdfunding to enhance trust in corporations. Equity crowdfunding, using the crowdfunding model as its basis, is tailored specifically towards encouraging investment that has a social purpose. Retail investors are encouraged to invest in businesses that they "believe in" through advertisements placed on online platforms. This approach has the potential to enhance trust in corporations, as corporate purpose, usually associated with some socially desirable activity, is set out front and centre during the fundraising phase. However, there a number of restrictions in the process restrict this trust enhancement potential, particularly the lack of emphasis on promoting investor interests through mechanisms such as the provision of a mandatory constitutional purpose clause to ensure that companies adhere to their stated purpose beyond the fundraising period

Monday 3 Feb 3.45pm

Steven Stern

20/20 Hindsight: Reflections on Perceptions of Trust in Corporations

Abstract:
Perceptions around the lack of trust in some sectors of the economy, and the perceived inability of regulatory regimes to curtail undesirable corporate behaviour have received great focus in Australia. This paper asks: why a significant proportion of the population does not trust business; and by implication the corporate entities and the directors and officers in control? It will canvass what changes to organisational and governance arrangements and regulatory regimes could build trust. It has been claimed that "just" one "dopey but harmless idea from a clueless corporate regulator captures the corporate zeitgeist in this country" and "from the bureaucratisation of boardrooms to the blame-shifting by board members and corporate regulators, this is what's wrong with corporate Australia". To resolve it: "start with six basic norms of behaviour: obey the law; do not mislead or deceive; act fairly; provide services fit for purpose; deliver services with reasonable care and skill; and, when acting for another, act in the best interests of that

other". Is the answer: "If boards look out for their customers, all else falls into place, including the interests of shareholders"? While an essential starting point, this paper suggests the position might be more complex

Monday
3 Feb
4.15pm

Akshaya Kamalnath

The Hocus Pocus of Corporate Purpose and the Introduction of Social Enterprises

Abstract:
What is the purpose of the corporation? The debate around this often involves two schools of thought, namely the Friedman-esque notion that corporations should make profits for shareholders and the alternative notion that corporations must consider the welfare of employees, consumers and the society in general. What is often not emphasised is that each corporation is able to frame its purpose and indicate the same to others through its constituent documents.

This article will focus on social enterprise, the shiny new business form available in many markets. Shiny as the idea of social enterprises may be, it is important to consider the costs and implications associated with introducing it as a new business form. Specifically, the article makes the point that for-profit companies are already free to engage in activities that have a social impact. Although the point of creating a new type of business form for entities who engage in activities with a social impact may largely be the signalling effect on third parties, such signalling may also be achieved through a clause in the corporate constitution. Further, without a robust method of verifying social impact, creating a new business form for signalling social impact might not be useful. Finally, if a new business form is needed for entities that engage in social impact, it follows that the for-profit corporation will not engage in social activities. This is both untrue and counter-productive because many corporations already engage in CSR activities.

PARALLEL SESSION 2 E – Takeovers & trust

Monday
3 Feb
3.15pm

Emma Armson

Adaptions of the United Kingdom Takeover Panel in Hong Kong and Singapore: Convergence or Divergence?

Abstract:
This presentation will examine the transplantation of the Takeover Panel model from the United Kingdom into the Hong Kong and Singapore takeover regulatory systems. It will focus on the extent to which this has resulted in formal convergence between the Takeover Panel in the UK, and those established in Hong Kong and Singapore. Formal convergence is assessed in terms of the current institutional structures of these Panels based on their independence and roles, the powers of the Panels and their Executives, and review of their decisions. The presentation also provides a case study in

relation to the levels of functional convergence with the UK Panel. This analysis of functional convergence focuses on the way in which the Panels perform their functions based on an examination of the procedural rules and processes implemented by the Panels.

Monday
3 Feb
3.45pm

Afroza Begum

Restoring Public Trust: An Inevitable Necessity to Sustain Corporate Success in Australia

Abstract:
Indisputably, the magnitude of unethical conduct in business has generated an unprecedented level of mistrust and frustration among the Australian public about the credibility and integrity of large corporates. The ensuing tragedy not only offends consumers' convictions and business ethics but also distresses the livelihood of almost everyone in an integrated and interconnected social fabric which eventually prompted a range of important inquiries, including the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. The Royal Commission's final report 2019 highlighted dishonesty, greed and an unchallenged internal culture which prioritises profit over stakeholders, and the corresponding legal complexity and passivity as dominant factors leading to such a situation. The report recommended, *inter alia,* the introduction of more stringent regulation, requirements and enforcement with special focus on accountability and transparency aspects by further empowering ASIC and APRA. This paper will argue that the way 'legal compliance' is pursued may develop undesirable features within corporate internal affairs ranging from adverse reactions to resentment rationalising or concealing of misconduct. This study will showcase that while deterrence-based legal directives have been traditionally effective in fostering compliance, the inclusion of some ethical approaches and self-led corporate strategies are required to promote sustainable qualities within business practices and its employees to more efficiently ensure continued compliance and public trust.

4.45pm

Day 2 concludes

Monday
3 Feb
6.30pm

Pre-dinner drinks followed by dinner at the Isabella Fraser Room, State Library Victoria

Day 3: Tuesday 4 February 2020
Venue: Building H, Level 2, 8 and 9, Caulfield Campus

9.00am	**Registration desk open, coffee on arrival**
9.30am	**Plenary Presentation:** *Professor Benjamin J Richardson, University of Tasmania* **Fiduciary Capitalism: Building Trust through Responsible Financing** Chair: Anita Foerster, Monash Business School
10.30am	**MORNING TEA**

PARALLEL SESSION 3 A - Sustainability

Tuesday 4 Feb 11.00am

Vijaya Nagarajan
Superannuation firms as drivers of corporate sustainability

Abstract:
With over $2.3 trillion being invested in superannuation in Australia and over 64% the population believing that these funds should be proactively reducing their exposure to fossil fuel investments, the time is right to focus on how this actor can play a role in driving the growth of sustainable corporations in Australia. The range mechanisms used by superannuation firms driving sustainability among corporations include screening of investments, voting as shareholders in company meetings, and engaging directly with company officials on specific issues. In recent years they have relied more heavily on the latter two mechanisms. The paper assesses the effectiveness of these efforts in driving corporate sustainability and how they challenge our understanding of corporate law and governance.

Tuesday 4 Feb 11.30am

Anita Foerster
Using Corporate Law to Define the Role of the Corporation in Responding to Climate Change?

Abstract:
Climate change is increasingly treated as a source of material financial risk for institutional investors (superannuation funds and fund managers), which may manifest in the form of reduced asset values and investment returns. At the same time, investors are increasingly cast as critical actors in the societal response to a range of sustainability issues including climate change. If climate considerations are integral to investor decision-making on portfolio construction and capital allocation, as well as stewardship activities, such as engagement and voting shares, these actors can potentially play a significant role in helping to align capital and resources to transition away

from climate-damaging to climate-friendly practices. This dual appreciation - of financial risk exposure and of the potential contribution to be made by these private actors - is at the heart of the responsible investment / sustainable finance movement which is receiving renewed attention around the world since the conclusion of the Paris Agreement on climate change in 2015 and the UN Sustainable Development Goals in 2012.

Against this backdrop, this paper presents an exploratory, empirical investigation of investor decision-making on climate change by a sample of Australian institutional investors. We seek to understand how this decision-making is shaped and constrained by existing legal frameworks which require institutional investors to act in the best (financial) interests of beneficiaries and to address sustainability issues where they pose material risks to investments; by emerging regulatory developments, such as the industry-led Taskforce on Climate-related Financial Disclosures; as well as by dominant, investment theories and approaches to investment practice. In particular, we explore the extent to which responsible investment approaches (such as ESG integration, screening and impact investing), which are now gaining some maturity and traction in Australia, are being used by investors to respond to climate change, and how these approaches interact with more established, mainstream approaches to portfolio construction and asset allocation.

Tuesday
4 Feb
12.00pm

Ben Richardson

Aesthetics and Corporate Greenwashing Governance

Abstract:
We should understand the business corporation as an aesthetic phenomenon, and that because its environmental practices and communications in the name of CSR are similarly embedded in this aesthetic character, the law itself, in disciplining unscrupulous corporate behaviour, should use methods responsive to aesthetics. Corporate identities and CSR practices are aesthetically projected through logos, trademarks, websites, the presentation of products and services, stylish offices, company uniforms and other aesthetic artefacts. This corporate "branding" dovetails with the broader aestheticization of our pervasive media and consumer culture. Aesthetics has particular salience in CSR for influencing, and sometimes misleading, public opinion about corporate environmental performance. The green illusions of business communications create difficulties for regulation, which is better suited to disciplining discrete misleading statements about retailed products or trademarks rather than tackling the broader aesthetic character of business and the marketplace. However, the 'counter-aesthetic' strategies of social and environmental activist groups can inject a subversive narrative that can help to unmask these green illusions. Although the history of such tactics suggests they probably have only a modest effect in challenging corporate deception, the law can assist by protecting public spaces for counter aesthetic activism.

PARALLEL SESSION 3 B - Corporate governance

Tuesday
4 Feb
11.00am

Richard Bradstreet

Fiduciary Care, Wrongfulness, and The Benefit of Hindsight: (How) Does the Business Judgment Rule Benefit Common Law Jurisdictions?

Abstract:
The business judgment rule is generally understood as a statutory delineation of the 'safe harbour' against liability for directors acting bona fide in the best interests of a company. As
such, it enables a director to prevent a court from adjudicating the merits of a business decision that may inevitably involve the taking of a calculated business risk. In common law jurisdictions, the rule tends to be a statutory restatement of what is required to escape liability for negligently caused loss, applicable specifically to a company director. There is duality in this rule, however, in that although legal liability for loss caused by another's negligence finds its earliest origins in Ancient Rome, the statutory business judgment rule was first introduced in the American Model Business Corporations Act.

('MBCA') as a generalised restatement of American corporate law jurisprudence. Not only is the MBCA distinguishable, as a model code, from systems of company law allowing interplay between formal legislation and underlying common law rules, but the American conceptualisation of the duty of care as fiduciary in nature is fundamentally different to other common law systems. Notwithstanding these dissimilarities, jurisdictions such as Australia and South Africa have enacted business judgment rules.

This paper will attempt to reconcile what appears to be a theoretical overlap between the two dimensions of the rule with particular reference to the State of Delaware and the
formulation in the South African Companies Act, which is expressly based in common law principles traceable back to the Roman Lex Aquilia.

Tuesday
4 Feb
11.30am

Jenny Fu and Roman Tomasic

Directors' Duties in the Eyes of Chinese Judges

Abstract:
Directors' duty of care and duty of good faith/loyalty have been introduced into the PRC Company Law for over a decade. These duties are generally considered as poorly defined and rarely litigated in the Chinese courts. The more recent practices of publicising court judgments online backed by the Supreme People's Court of China have, however, showed an increasing number of civil cases on directors' duties brought before Chinese courts at various levels. This paper reviews and analyses over 150 judgments published on China Judgments Online on directors' duties dealt with by various intermediate courts over the past 5 years. In doing so, it attempts to

achieve two primary purposes. First, it explores how the Anglo-American concepts and the relevant principles on directors' duty of care and duty of good faith have been understood by the Chinese judges, where there is little direction given in the PRC company law legislation. Second, through looking at the types of alleged breaches, litigants including companies involved, the paper evaluates the effectiveness of the Chinese regime of directors' duties which mainly relies upon the company and its shareholders to pursue directors based on claims in tort. As another major round of revision of the Chinese company law since the 2005 revision is underway, this paper seeks contribution to this round of legislative reform through making suggestions on further amendments to directors' duties in China.

Tuesday
4 Feb
12.00pm

Shirley Quo

CSR, Corporate Culture, Governance and Remuneration

Abstract:

This paper explores whether there is a role for corporate social responsibility to help identify and manage non-financial risks facing corporations. It also looks at the links between CSR, corporate culture, governance and remuneration.

The author posits that CSR can be used as a governance tool to encourage sound management of non-financial risks, including the risk of misconduct, or conduct falling below community standards. This is based on the recent findings and recommendations by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Hayne Report) which traduced the culture, governance and remuneration framework of these financial institutions. Although the Hayne Report was focused on misconduct by financial institutions, it is suggested that the report and its recommendations are potentially relevant to all corporations, in particular large, for profit, public corporations in Australia and overseas jurisdictions where non-financial risks are identified such as conduct risks, that is, potential misconduct or conduct falling below community standards and expectations.

The Hayne Report did not explicitly discuss CSR but the author arges that it is implicit in any discussion about corporate governance given that CSR is generally recognised and accepted as one of its components. The terms of reference of the Hayne Report focused on misconduct by financial institutions including conduct that whilst not necessarily unlawful, was perceived to be conduct falling below community standards and expectations. In fact, this objective test arguably appears to be the new standard by which corporate behaviour is now assessed in Australia.

PARALLEL SESSION 3 C - Shareholders' remedies

Tuesday
4 Feb
11.00am

Alan Koh

Paradigms of Shareholder Withdrawal in Close Corporations:
Insights from An Anglo-German Comparison

Abstract:
Deprived of easy access to liquid markets for their membership interests, minority shareholders or members of closely-held incorporated business entities ('close corporations') often find it difficult under circumstances unconducive to continued participation in the close corporation to find buyers legally able to purchase, and willing to pay a fair price, for their shares or membership interests. In some jurisdictions, this difficulty is alleviated by the existence of legal mechanisms by which shareholders or members may sever their ties with the close corporation and other members and recover their investments – regimes that I collectively call 'withdrawal'. In the United Kingdom (UK), withdrawal in the private limited company (Ltd) is facilitated by the unfair prejudice remedy (Companies Act 2006, s 216); in Germany, the unwritten regime of *Austritt aus wichtigem Grund* regulates withdrawal in the *Gesellschaft mit beschränkter Haftung* (GmbH). The UK and Germany are selected for analysis because they do not only exert strong influence on the world economy and legal thought, but also span the common law/civil law divide. Through comparative analysis of these two regimes, this paper shows how withdrawal mechanisms may be classified into two models serving complementary functions, and which are built on a single meta-principle: protecting shareholders desirous and deserving of exit, but not at the expense of innocent constituencies from financial liability for the consequences of shareholder withdrawal.

Tuesday
4 Feb
11.30am

Genevieve Grant and Esther Lestrell

Profiling Oppression Proceedings

Abstract:
Company law's oppression action provides a critical remedy for members against unfair conduct, actions or resolutions of the company. Ramsay's valuable analysis of the use of the oppression remedy in Australia, based on 88 judgments from 1960-99, remains our main source of insight into this action in practice. In many ways, however, decided cases are outliers. More representative evidence of oppression claims is likely to come from analyses that include the vast majority of proceedings that don't make it to judgment.

This paper presents findings from an empirical analysis of the characteristics of 200 oppression actions filed in the Supreme Court of Victoria over a 6-year period (2009–15). It draws on data from the court's files and electronic case management system to construct a profile of oppression actions. In doing so, it sheds light on the cases, companies and circumstances in which the remedy is used and will help optimise the management and resolution of these disputes.

Tuesday
4 Feb
12.00pm

Nadia Hess

Oppression Remedy in Liquidation

Abstract:

This paper will consider whether the oppression remedy found in Part 2F.1 of the *Corporations Act 2001* (Cth) can be used when a company is in liquidation.

The oppression remedy is arguably the most important remedy available to shareholders and is an important tool in corporate governance. The type of behaviour that may be covered by the oppression remedy is broad and may include breaches of duties as well as conduct that may fall short of a breach of duties, but nonetheless is unfair or contrary to the interests of members as whole. Section 233 grants the court the power to make any declaration it considers appropriate including an order that directors pay compensation to the company or for an account of profits.
Whether the oppression remedy can be used when a company is in liquidation is the focus of this paper. There is minimal academic discussion on this point, and that discussion is not necessarily consistent. After an analysis of key cases it will be concluded that whilst no Australian court has granted relief under the oppression remedy when a company is in liquidation, it is possible that relief could be awarded in the right circumstances.

PARALLEL SESSION 3 D - Disclosure

Tuesday
4 Feb
11.00am

Belle Qi Guo

Chinese Cross-border Listed Companies' Struggles in Australia: Cause Analysis from a Theoretical and Comparative Perception

Abstract:
The entry into force of the China-Australia Free Agreement (ChAFTA) in December 2015 saw an increasing number of Chinese companies choosing Australia as their listing destination.

As trade between China and Australia increases, it can be expected that this trend will continue. However, Chinese cross-border listed companies in Australia have not operated as well as expected. They are struggling to meet the Australian continuous disclosure requirements to be listed on the ASX, and they have even been depicted as having poor corporate governance and transparency. Chinese cross-border listed companies in Australia face the challenge of having to comply with not only the continuous disclosure requirements in Australia but also those in China, which may cause confusion and even conflict within these companies. To put these struggles into perspective, this paper reviews the historical, economic and political underpins of the securities market in these two
countries to highlight the divergence of continuous disclosure regime in both Australia and China from a theoretical foundation. Accordingly, this paper regards the evolution and underlying theoretical rationales for continuous disclosure regime in Australia and China as the entry point. It further sheds light on the similarities and differences between the two jurisdictions. This is followed by a critical review of the implications of such theoretical divergences regarding the continuous disclosure compliance level of

Chinese cross-border listed companies in Australia. Subsequently, this paper concludes with insights for further research.

Tuesday
4 Feb
11.30am

SM Solaiman

Disclosure Philosophy for the Securities Market in Bangladesh: Not a Pearl Inside an Oyster

Abstract:
Lack of transparency and corruption have been serious concerns in Bangladesh for decades, where accounting fraud has become commonplace. The inception of its securities market dates back to 1954, though it remains in its infancy to date. Bangladesh Securities and Exchange Commission (BSEC) divorced the merit-based regulation (MBR) to marry the sophisticated disclosure philosophy in 1998, relying on foreign advice, on the plea of regulatory incapability to assess merits of public offers of securities. The regulator embraced the disclosure-based regulation (DBR) ignoring the ability to understand and utilise prospectus disclosures by the market which is overly dominated by investment-illiterate retail speculators, mostly driven by the curse of unemployment. The vulnerability of such investors is worsened by the absence of investment advisory services which could not flourish owing largely to lack of demand. This lack is conceivably attributable to the investors' financial ability to pay for such aids and overconfidence in their own talents to make money from the market, though most of the companies listed in recent years were found to be fundamentally poor, they were nonetheless able to float taking advantage of DBR. Consequently, the market witnesses repeated collapses when investors readily blame the regulator for every loss. Meanwhile, Australia has partially moved away from the disclosure philosophy. Consistently, ASIC and the Dutch Authority for the Financial Markets have lately asserted in a joint report that it is time to '"call time" on disclosure as the default consumer protection'. This paper critically examines the Bangladesh market and recommends that BSEC should return to merit regulation in order to generate and maintain investor confidence – bearing in mind that securities investors eat anything, though cannot consume everything.

Tuesday
4 Feb
12.00pm

Ellie Chapple

Trust and Disclosure: The Effectiveness of Market Operator Monitoring in Improving the Environment for Corporate Disclosure

Abstract:
This paper addresses the conference theme of trust in corporations. Investors have high expectations for fair and transparent capital markets and society funds regulatory activity to achieve this expectation. This paper investigates the effectiveness of the statutory continuous disclosure regime by examining the relationships among the securities regulator, the market operator and the regulated companies. In 2018, the Financial Markets Authority (FMA) reported its findings of its review of the New Zealand Stock Exchange's (NZX) performance. The review was negative in tone as regards

the NZX's market surveillance operations. In its 2019 review, the FMA reported improvements in NZX market surveillance operations. In reporting on the improved capacity of market surveillance, this research focuses on the price query letter as part of NZX's toolkit. The price query letters represent a dialogue between the market operator and the regulated companies. Using a sample of the 2017 and 2018 price queries, this research examines the factors that determine the NZX's decision to engage in the process through the lens of responsive regulation theory. Responsive regulation theory describes the co-operative and coercive regulatory process between regulator and regulatee. This research suggests that the price query letters, and the regulated companies' responses, operate as barometers of effective, fair and responsive regulatory action.

PARALLEL SESSION 3 E - Human rights

Tuesday 4 Feb 11.00am

Paul Redmond
Corporate Power, Corporate Responsibility and Employee Freedom of Speech and Belief

Abstract:
Do corporations have responsibilities beyond the obligation to obey the law? And do their directors have obligations beyond advancing the financial welfare of shareholders? If so, what are these extra-legal norms and what is the source of their authority? And how do these norms apply to the corporate parties in the Israel Folau affair—to the conduct of Rugby Australia in dismissing the elite footballer for social media posts expressing deeply held views grounded in his religious belief and the role of Qantas as Rugby's principal sponsor? What do these norms say, for example, concerning respect for individual and community values and for protection of human rights such as those relating to freedom of belief and expression and, on the other hand, protection against discrimination on spurious grounds? The argument presented here is that businesses have a responsibility to respect internationally recognised human rights and that this responsibility provides a framework for addressing, if imperfectly accommodating, such rights even when they are in conflict. That responsibility also addresses the currently contested legitimacy of chief executives expressing views on issues of wider social concern and associating their companies with those views.

Tuesday 4 Feb 11.30am

Rebecca Faugno and Sagi Peari
Corporations and Human Rights

Abstract:
The interaction between corporations and human rights is one of the most interesting and challenging topics of contemporary scholarship. Practically corporations are involved in many activities which naturally raise aspects of human rights. In this paper we will focus on two major aspects of this

fascinating interaction. One, we will tackle the question of the relation between the directors' duty of care, and the scope of this duty in relation to what is considered by international treaties of human rights. Specifically, we will argue that the duty of care, as a long-standing notion of corporate governance, can incorporate the human rights dimension, with careful qualifications. Second, and relatedly, we will tackle the recent draft Treaty, prepared by the Working Group of the United Nations Human Rights Council. On this matter, we will argue that the suggested proposal must take into account the specific nature of corporations, the notion of corporate responsibility and the contemporary vision of international human rights. In this way, our research will contribute to the growing amount of literature which tackles the fascinating link between corporations and human rights.

Tuesday
4 Feb
12.00pm

Shakoor Ahmed

Modern Slavery Reporting Practices in Australian Financial Services: Building Stakeholders' Trust

Abstract:
This research aims to develop a set of specific modern slavery disclosure principles based on contemporary legislation and policies. There are currently numerous mandatory and voluntary modern slavery approaches and policies that exist to tackle the prevalence of modern slavery practices including human trafficking, slavery, servitude, debt bondage, child trafficking and forced labour in the business operations and supply chains of business entities. The Modern Slavery Act 2018 (Cth) mandates that entities with an annual turnover threshold of AUD 100 million, whether its business operations are in Australia or globally, to produce an annual modern slavery statement.

This research critically evaluates twenty-five mandatory and voluntary approaches to modern slavery disclosures. Content analysis is used to identify the extent, quantity and quality of modern slavery disclosures in 30 Australian Securities Exchange (ASX) 200 listed financial entities' annual reports, sustainability reports, web-based reports and stand-alone reports.
This study is informed by existing literature, which highlights substantial heterogeneity in modern slavery disclosures. Entities required to report under the UK legislation are presenting an increasing amount of modern slavery information. It is posited that quantity and quality of the disclosures provided by entities could be expected to converge to a more homogeneous set of responses over time.

The research findings will provide evidence of Australian companies' responses to the challenge presented by modern slavery practices to encourage the minimisation of this unethical and illegal practice in domestic and global supply chains and operations. Challenging Australian companies to respond to and deal with this global problem may rebuild society's trust in corporate operations.

12.30pm **LUNCH AND CLTA ANNUAL GENERAL MEETING**

PARALLEL SESSION 4 A - Sustainability

Tuesday 4 Feb 1.30pm

Anita Foerster & Kym Sheehan

Investor Decision-making on Climate in Australia: an Empirical Study

Abstract:
Climate change is increasingly treated as a source of material financial risk for institutional investors (superannuation funds and fund managers), which may manifest in the form of reduced asset values and investment returns. At the same time, investors are increasingly cast as critical actors in the societal response to a range of sustainability issues including climate change. If climate considerations are integral to investor decision-making on portfolio construction and capital allocation, as well as stewardship activities, such as engagement and voting shares, these actors can potentially play a significant role in helping to align capital and resources to transition away from climate-damaging to climate-friendly practices. This dual appreciation - of financial risk exposure and of the potential contribution to be made by these private actors - is at the heart of the responsible investment / sustainable finance movement which is receiving renewed attention around the world since the conclusion of the Paris Agreement on climate change in 2015 and the UN Sustainable Development Goals in 2012.

Against this backdrop, this paper presents an exploratory, empirical investigation of investor decision-making on climate change by a sample of Australian institutional investors. We seek to understand how this decision-making is shaped and constrained by existing legal frameworks which require institutional investors to act in the best (financial) interests of beneficiaries and to address sustainability issues where they pose material risks to investments; by emerging regulatory developments, such as the industry-led Taskforce on Climate-related Financial Disclosures; as well as by dominant, investment theories and approaches to investment practice. In particular, we explore the extent to which responsible investment approaches (such as ESG integration, screening and impact investing), which are now gaining some maturity and traction in Australia, are being used by investors to respond to climate change, and how these approaches interact with more established, mainstream approaches to portfolio construction and asset allocation.

Tuesday 4 Feb 2.00pm

Christine Parker

Responsible Investment and Sustainable Food Systems

Abstract:
There is increasing recognition of the need for governance measures that encourage the finance and investment sector to support the transition to more sustainable economies. Progress has been made in the development of governance tools that

encourage consideration of climate risks in investment decisions that move investment away from fossil fuels and towards renewable energy. However, investor driven governance measures that would support a transition to sustainable food systems are still in their infancy. This is despite the fact that investor driven governance in the food sector presents the potential to address a range of urgent and intersecting environmental and public health challenges such as obesity, nutrition, land-clearing, food waste and greenhouse gas emissions. This paper reports data from a desktop review of current practice in responsible investment in relation to sustainable healthy food systems focusing on key Australian responsible investment funds and their approach to obesity, nutrition and sustainable food systems. (NB Interviews will follow later.) It will critically examine which themes are focused on, what metrics used and which types of responsible and sustainable investment and financing strategies used in Australia in the context of global developments in this field. The paper will conclude with some preliminary observations as to the value of investor driven governance in this field in the light of global developments in this field and regulatory studies and corporate governance literature.

Tuesday
4 Feb
2.30pm

Alice Klettner

Law Reform for Sustainable Finance

Abstract:
This article considers how Australia might improve the sustainability of its financial system through legal reform. In particular it explores to what extent the European Union (EU) approach might inform the policy process in Australia. The EU Action Plan on Financing Sustainable Growth, issued in March 2018, placed Europe at the forefront of international efforts to integrate sustainability considerations into financial policy frameworks. Ongoing implementation of the EU Plan involves co-ordinated legal reform across a wide range of different areas of corporate and finance law, targeting listed corporations, institutional investors, asset managers, credit rating agencies, financial advisors and the creators of financial products.

This article presents a comparative analysis of the state of play of sustainable finance in Australia and the EU. It draws on interviews with key stakeholders in the Australian finance system to better understand the potential barriers and facilitators for implementing the EU-approach in Australia. We find that, despite lack of coordinated government policy on sustainable finance in Australia, private organisations are pioneering voluntary initiatives and closely following global developments. This means they are well placed to respond to EU developments both in terms of managing risks and seizing opportunities. Normative changes around the scope of the fiduciary duties of both company directors and institutional investors will pave the way for likely legal reform directed at improving transparency and accountability along the length of the investment chain.

PARALLEL SESSION 4 B - Enforcement & regulators

Tuesday
4 Feb
1.30pm

Peta Spender

Class Actions in Australia: Rent-Seeking Entrepreneurs or Regulatory Node?

Abstract:
Can the class action regime in Australia achieve optimal enforcement of securities laws or is it merely a market of rent-seeking entrepreneurs who are pursuing their own interests? This presentation will examine recent developments in case law and court processes to consider whether the market for legal services and litigation funding can or should operate as a 'regulatory node'. The paper will also consider the re-emergence of adversarial regulation fostered by narratives of cause lawyering as manifested in the Hayne Royal Commission and ASIC's adoption of the 'why not litigate' strategy.

Tuesday
4 Feb
2.00pm

Helen Bird

No Enforcement Panacea: Why the new litigation focus by APRA and ASIC, the prudential and conduct regulators, won't repair poor perceptions of trust in Australian corporations

Abstract:
This paper investigates the role of public enforcement actions in addressing systemic mistrust in Australian corporations, particularly those in financial services, in the wake of the findings of the 2018 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. The Royal Commission found that customers of Australia's largest financial institutions were let down by acts of misconduct and conduct falling below community expected standards of behaviour. Misconduct that was motivated by corporate greed and effectively encouraged by the failure of both the prudential and conduct regulators, APRA and ASIC, to adequately prosecute misconduct through the courts. The message to the community could not be clearer: they were right to mistrust their financial institutions. This paper examines one response to the trust crisis, namely, the uptick in court based enforcement action by the prudential and conduct regulators, APRA and ASIC. It explores their response through new corporate plans, new enforcement strategies and enlarged budgets before specifically focussing on enforcement. The paper examines and critiques the new enforcement approaches, pointing out the cyclical nature of enforcement pendulum swings between regulatory settlements and court based enforcement. It also comments on recent court wins and losses by both regulators, drawing attention to the practical and legal obstacles that both frustrate and undermine the success of public enforcement actions. The paper contends that court based public enforcement is a distraction, not a panacea for addressing systemic issues of mistrust in corporate Australia. Community expectations of corporate prosecutions and jail time for high flying executives

involved in misconduct such as that identified at the Royal Commission are unrealistic and misplaced.

Tuesday
4 Feb
2.30pm

Zehra Eroglu and KE Powell

Role and Effectiveness of the ASIC Compared with the SEC: Shedding Light on Regulation and Enforcement in the US and Australia

Abstract:
The Australian Securities and Investments Commission's (ASIC) regulatory oversight of securities and financial markets increased considerably over time. However, the wisdom of this model has most recently been challenged by the Hayne Royal Commission as ASIC's enforcement activities were found to be relatively toothless. Accordingly, many criticised the agency and called for further ASIC reform.

After the Global Financial Crisis, the US Securities and Exchange Commission (SEC) faced the same criticisms of regulatory failure seen today at ASIC. Despite massive criticisms of the SEC's failure to sufficiently enforce regulations both before and after the Global Financial Crisis, the SEC regulatory structure and enforcement trends over the last decade can provide insight for implementation of further ASIC reform.

This paper analyses the SEC regulatory structure, enforcement activities, and governmental resources and then compares certain indicators of effectiveness such as the number of employees, budgets, and enforcement activities with those of ASIC over the past quarter-century. By comparing ASIC with the world's biggest capital market regulator, the SEC, this paper analyses the viability of further reform of ASIC, and argues that ASIC is woefully under-resourced to engage in increased enforcement action.

PARALLEL SESSION 4 C - Market integrity and insolvency

Tuesday
4 Feb
1.30pm

Juliette Overland

Maintaining Trust and Confidence in Market Integrity: The Relevance of General Deterrence in Insider Trading Cases

Abstract:
In Australia, insider trading is prohibited on the basis that it is a threat to market integrity. That is, if investors believe that insiders are able to unfairly benefit from inside information that they may possess, there is likely to be a loss of trust and confidence in the integrity of securities markets. It is also widely recognised that insider trading, like many corporate crimes, is difficult to detect, despite the development and utilisation of increasingly sophisticated methods of market surveillance. In response to these two factors, general deterrence is considered to be an important factor when imposing a sentence or penalty in insider trading cases, to deter others who may be tempted to engage in similar conduct. In this paper, the relationship of these two issues to insider trading will be explored. Judicial commentary

in insider trading cases will be examined, to consider the relative weight given to the concept of general deterrence in this context, and the degree to which general deterrence an appropriate consideration when imposing a sentence or penalty for insider trading will be analysed and discussed.

Tuesday
4 Feb
2.00pm

Casey Watters
Putting the Wind Back in the Sails: Restructuring Insolvent Foreign Shipping Companies under Chinese Law

Abstract:
The global financial crisis and corresponding slump in the shipping industry has resulted in the insolvencies of several global shipping giants, including that of Hanjin Shipping in Korea. Such cases highlighted the importance of delineating the relationship between maritime and insolvency law to provide certainty to creditors and facilitate the restructuring of insolvent shipping fleets with going concern value. When restructuring global shipping fleets, the ability to effectively restructure rest largely with the tools available under Chinese law as seven of the world's ten busiest ports are located within the PRC. Two important elements with respect to restructuring in the context of cross-border insolvency are the ability of China to recognize and assist foreign insolvency proceedings and to provide moratoriums staying legal proceedings and collection efforts against debtors, thereby providing debtors breathing room to formulate a repayment plan. In the context of shipping companies, where fleets are commonly composed of one-ship company subsidiaries and actions against ships are in rem, the scope of the Court's ability to extend a moratorium to protect the fleet is not always clear.

This article examines the role of insolvency law in restructuring global shipping fleets and explores the extent to which the Enterprise Bankruptcy Law of the PRC can be used to facilitate the restructuring of insolvent foreign shipping companies. It first discusses the ability of courts to recognize and assist foreign proceedings. Then, it discusses the scope of relief available to debtors, both with respect to assisting foreign proceedings and under domestic restructurings.

PARALLEL SESSION 4 D - Technology

Tuesday
4 Feb
1.30pm

Vivienne Brand
Artificial Intelligence and Corporate Boards: Ethical Implications

Abstract:
Advances in artificial intelligence (AI) are increasingly impacting on the operations of companies around the globe, with predictions that governance of AI will become one of the most significant issues facing boards over the next decade. Ethics issues will form an important part of these developments. Recent guidelines on AI ethics released by the European Commission, together with earlier reports in the United Kingdom and France

as well as draft guidelines in Australia, all offer insights into the ethical issues boards can expect to face as a result of this explosion in AI activity.

AI will have dramatic ethical implications for both the kinds of issues that will come before boards as part of their decision-making activities, as well as for the ways in which they make those decisions. In the case of the former, boards are likely to need to consider a range of ethical issues associated with the widespread influence of AI, including algorithmic bias, the so-called 'black box' unpredictability problem, and probable impacts on corporate workforces. At the same time boards may be grappling with the ethical issues arising from AI's incursions into the board's own decision-making processes, with suggestions now being made that AI has the capacity to replace some or all of the functions of human board members.

This paper will consider the potential impact of these AI-related ethical issues on corporate boardrooms, with a view to better understanding those effects and contributing to boards being better prepared for an AI-enhanced future.

Tuesday 4 Feb 2.00pm

Michael Adams
The Impact of Technology on Corporate Governance?

Abstract:
As the role of corporate governance and its strategic value to businesses and not-for-profit is well researched and documented. The contemporary challenge is the growth in information governance and the impact of social media to challenge CSR statements and links to litigation. Information governance is being impacted from document retention to privacy under EU law and the electronic discovery processes. Big data, analytics and the public/management of information is becoming more challenging for boards and teams. For the not-for-profit sector there is a real challenge with boards interpreting data and distinctions between regular reporting and *ad hoc* bespoke reports. There are significant developments in law and technology, and the use of technology to enhance the CSR credentials of organisations. Information governance is one aspect that cuts across both management and the boards' role in corporate governance. The 2019 survey by the Information Governance ANZ association has just released data on the growth in information governance frameworks and numerous business surveys state that cyber-security and social media are top concerns for boards in the UK, USA and Australia/NZ.

Tuesday 4 Feb 2.30pm

Pearlie Koh
Impact of Technology on Shareholder Empowerment

Abstract:
The legislative scheme for companies in practically all jurisdictions is premised on a dichotomy between the shareholders as a collective group, and the board of directors. In Singapore, the statutory balance of power is

tilted in favour of shareholders. There is, however, little empirical evidence of investors exercising their rights of supervisory intervention. According to conventional wisdom, information asymmetry and the difficulties of collective action stand in the way. However, the state of information flows has been radically changed in this century by information technology. Shareholders now have better access to information and are better able to communicate amongst themselves. In this research, we seek to understand the role that social media and social networking platforms may potentially have in facilitating shareholder empowerment. A key question we seek to answer is the extent to which shareholders trust information that is pushed out through digital and technology-enabled channels. Specifically, we want to understand how shareholders assess trustworthiness of information shareholders consume via the ability-benevolence-integrity framework that is much used in the organizational sciences (Mayer, Davis, & Schoorman, 1995). Our paper will present our research in two parts. We first consider the legislative position vis-à-vis power allocation in companies, adopting a comparative approach to compare and contrast the Singapore position with that in Australia and the UK. We then present the results of our empirical study into the state of shareholder activism in Singapore, the manner in which this activism manifests, and the extent to which modern information technologies will affect or contribute to shareholder activism via the different channels.

PARALLEL SESSION 4 E - Stewardship

Tuesday
4 Feb
1.30pm

Natania Locke

Australian Investor Stewardship and Global Trends in Regulation

Abstract:
This year marks a decade since the first publication of the UK Stewardship Code 2010 by the Financial Reporting Council. Since then, many jurisdictions have adopted Stewardship Codes and most have based those Codes on the UK example. A major revision of the UK Stewardship Code was published in October 2019, reflecting developments both in the European Union and globally. As in the case of the first two iterations of the UK Code, it is expected that the new revision will be used as a best practice guide by other jurisdictions. This paper considers the trends evidenced in the UK Stewardship Code 2020 and the extent to which these trends are reflected in the current bifurcated system of investor stewardship - the Australian Asset Owner Stewardship Code and the Financial Services Council Standard 23: Principles of Internal Governance and Asset Stewardship, as read with the ESG Reporting Guide for Australian Companies. Particular trends that will be explored include the move to 'apply and explain'; enhanced disclosure requirements; the inclusion of non-equity investments; the express inclusion of sustainability and ESG factors under the principles and reporting expectations, and; the express inclusion of service providers other than asset managers under the ambit of stewardship

Tuesday
4 Feb
2.00pm

Samantha Tang
Stewardship for Controlling Shareholders: The Case of Singapore

Abstract:
The introduction of the UK Stewardship Code sparked widespread interest in stewardship. Initially designed as a 'comply-or-explain' (now 'apply-or-explain') form of 'soft law' to incentivise institutional shareholders to play an active role in corporate governance, the UK Code has attracted apparent imitators, with stewardship initiatives and codes proliferating around the world. Yet, the UK concept of "stewardship" is arguably only relevant to a handful of developed jurisdictions – such as the US, UK and Australia – where institutional investors control significant (if short of outright majority) voting rights in many listed companies. In the rest of the world (arguably save Japan), it is controlling-block shareholders, who are able to directly monitor management or manage the company themselves, that dominate most listed companies. Employing the concept of "stewardship" as a device to discourage tunnelling and other abuses of controlling shareholder power is of presumptive utility to such jurisdictions, given the limitations of existing legal mechanisms for private enforcement such as the derivative action, oppression/unfair prejudice remedy and shareholder fiduciary duties. Drawing on my forthcoming work (with Puchniak), I explain how Singapore has experimented with stewardship codes as to develop a model of "stewardship" that commits state and family controlling shareholders to exercising their shareholder rights to ensure the long-term success of the company. This unique approach to stewardship premised on entrenching controlling shareholders may be critical to Singapore's reputation as an Asian corporate governance leader, and serve as an alternative to the UK Stewardship Code for other jurisdictions.

3.00pm

AFTERNOON TEA

PARALLEL SESSION 5 A - Sustainability

Tuesday
4 Feb
3.30pm

Alexandra Andhow & Sergio Gramitto
Corporations, Technology, the Planet: Shareholding in a Digital Era

Abstract:
Larger business corporations match some nation states in wealth and influence. Citizens could leverage on the power of the corporate sector to address societal, environmental and socioeconomic issues: business corporations can develop vital new technologies, mitigate climate change, and raise living standards. A large part of the population owns equity interests in the corporate sector; yet only a very small group of people exercise or determine share voting. This phenomenon ultimately makes corporate governance exclusive to few people and institutions. According to

various proxy reports, corporate activities appear centralized within a small, somehow homogeneous circle. However, technology can change this reality. New technologies have the potential for broadening access to share voting to almost everyone and making rational apathy and obsolete phenomenon. With such technologies, corporate governance has the opportunity to shift from exclusive to inclusive and to engage civic society. This Article analyses how new technologies can make corporate governance accessible to the average citizen, to an average shareholder. It also discusses the positive ramifications that an inclusive corporate sector would have on our society, economy, and planet.

Tuesday
4 Feb
4.00pm

Grace Borsellino

Developing Trust through Corporate Purpose: Lessons from Benefit Corporations

Abstract:
Modern corporations are increasingly becoming vehicles for achieving positive social change. Society's evolving expectations in relation to the role that corporations should play within the business community has intensified. The predictably longer-term presence of successful corporations means that their voluntary commitment and leadership to social issues have the power to surpass community's shorter-term reliance on the political promises made by the government of the day. Benefit Corporations are a hybrid business model pursuing profits whilst simultaneously producing a material positive impact on society and the environment. This corporate structure has the effect of developing trust by embedding accountability into its corporate model in relation to its corporate purpose. Leading with corporate purpose within the benefit corporation model removes ambiguities regarding the goal of the corporation, in addition to its right to dispose of its assets for a social purpose. This paper discusses the lessons that can be gained by examining benefit corporations focussing on a corporate purpose creating a positive impact on society and its environment. It will examine the various jurisdictions adopting the benefit corporation model and comment on Australia's position.

Tuesday
4 Feb
4.30pm

Akanksha Jumde

Challenges to Enforcement of Mandatory CSR under Indian Companies Act, 2013: Evidence from CSR disclosures of NIFTY 100 Companies

Abstract:
With the enactment of Companies Act, 2013, India became one of the few countries in the world to mandate corporate social responsibility through the legislative means. This paper is a qualitative investigation into the current issues prevalent in the existing legal framework on CSR in India and its compliance by Indian companies. For this analysis, this study utilises thematic content analysis of self-reported disclosures of the NIFTY 100

companies' for assessing the compliance of CSR regulations by Indian companies. This sample consists of both government-owned and privately owned companies catering to numerous industrial sectors. This analysis is substantiated with semi-structured interviews of various stakeholders: companies CSR managers, government regulatory bodies, and Big4 Accounting firms to develop further an understanding on the issues and challenges to the enforcement and implementation of the CSR regulations by companies.

This paper finds that while CSR reporting by Indian companies is lengthy and aspirational, the overall quality of the CSR disclosures needs improvement. The descriptive analysis of the CSR disclosures made by companies reveals that companies seem to be adopting a mechanical or "check the box" approach for complying with the legal mandate on CSR. The compelled nature of compliance demonstrated by Indian companies is triangulated by the information derived from the interviews of various stakeholders. To summarise, while government-owned companies comply with CSR owing to structural and bureaucratic pressures, private companies comply in order to further their business ends, barring a few notable exceptions. Overall, this research finds the need for "internalization" of CSR by companies, rather than "externalization" through compelled charity and corporate philanthropy.

Based on the above research findings, this study provides several policy recommendations, which may facilitate strengthening of the extant regulatory framework on CSR and its compliance by Indian companies.

PARALLEL SESSION 5 B – Social enterprise & social responsibility

Tuesday 4 Feb 3.30pm

Jeanne Nel de Koker

Duties of Directors of Charitable Companies Registered with the ACNC

Abstract:

Concerns about director accountability affect volunteer participation rates in leadership roles in charitable companies, exacerbating the challenges charities already face in an increasingly demanding environment.

Charities make invaluable contributions to the Australian community. In financial terms only, the Australian Charities Report 2017 reflects revenue from registered charities as $146 billion. 10 254 charitable companies are listed on the Charity Register. The absence of good, voluntary, leadership will impede charitable companies' ability to fulfil their growing role in delivering public goods with long-term ramifications for the broader Australian community and economy.

The Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012 (Cth) amended the Corporations Act 2001 (Cth) to 'turn off', among others, the statutory duties to act in good faith in the best interest of the

company and with due care and diligence, for charitable companies and other charitable bodies corporate registered with the ACNC. However, commentaries disagreed on the effect of the “turning-off” for individual directors.

In December 2018, the ACNC Review Panel recommended that the Corporations Act 2001 (Cth) be amended to ‘turn on’ the duties and other provisions previously ‘turned off’. (Recommendation 11). The Corporations Act 2001 (Cth) was amended in March 2019 to significantly increase the financial consequences for a breach of the statutory duties of good faith and care and skill. This paper explores the legal ramifications of Recommendation 11, especially in view of the March 2019 amendment of the Corporations Act 2001 (Cth).

Tuesday
4 Feb
4.00pm

Robin Bowley

The Accountability of Australia’s Federal Professional Services Regulators: Comparing Challenges to Professional Licencing Decisions of ASIC, MARA and the TPB

Abstract:
Australia has three key regulators at the federal level that license individuals to hold positions of responsibility in regulated professions. ASIC licences financial advisers, liquidators, auditors, and consumer credit providers; the Migration Agents Registration Authority (MARA) licenses migration agents; and the Tax Practitioners Board (TPB) licenses tax agents and BAS agents. These three regulators administer standards for individuals to be licensed for such professional roles, and may also take a range of disciplinary actions through banning unsuitable persons, and suspending or cancelling a professional’s registration. Through these professional licensing decisions, these three regulators play an important role in upholding professional standards in order to maintain public confidence in the industries they regulate. Individuals affected by such professional licensing decisions may seek merits review through the AAT (which may affirm, vary or set aside the regulator’s decision); and in some cases, judicial review through the federal court system. The body of case law of the AAT and the courts on such challenges provides a useful indication of the regulators’ accountability for the use of their professional licensing powers and their practices in applying these powers. This paper will examine the to which the professional licensing decisions by ASIC, MARA and the TPB have stood up to challenges at the AAT and in the courts. It will analyse the extent to which the regulators’ policies on the use of their powers have been considered, and/or criticised by the AAT and the courts, and also how these bodies have weighed up the personal impact of professional licensing decisions with the need to protect the public from unsuitable persons in professional positions. From this analysis, the paper will consider the broader policy questions such as the scope for ASIC, MARA and the TPB to develop more detailed and flexible policies on the use of their professional licensing powers that take account of the body of case law examined in this paper.

PARALLEL SESSION 5 C - Boards, oversight & trust

Tuesday
4 Feb
3.30pm

Peter Kupniewski

Association Cases and the Theoretical Vacuum

Abstract:
The objects of regulatory intervention in control transactions are embodied in the Eggleston and Masel Principles. The 2017 Takeovers Panel decisions regarding Molopo Energy Limited are rare examples of where those objects were preferred over the voting rights of members. This paper traces how those objects and the provisions for regulatory intervention in control transactions developed in response to the failure of markets to adequately deal with wrongdoing by directors and majority members. That analysis offers a theoretical model to predict the sorts of rules about company control to expect – the interests of target companies and the minority should be strong. This paper then considers whether that theoretical model is consistent with the extant rules about company control in Australia. The hypothesis is that the theory and the extant rules are consistent. However, except for the decisions in Molopo and the other rare cases like it, there is a tendency in the application of those rules to prefer the protection or prioritisation of the voting rights of members. That preference or application is contrary to the objects and provisions of the various rules about company control in Australia, and undermines the public's trust in businesses, and the corporate entities and directors that control those businesses.

Tuesday
4 Feb
4.00pm

Roman Tomasic

A Question of Trust: Are the lessons of the GFC still relevant in a post-Hayne world?

Abstract:
Corporate law reform tends to follow major scandals and market crises; but we all too quickly tend to forget the lessons learnt from such market failures. In an era of continuing and more intensive market crises, it is important to learn the lessons of earlier crises. The recent Global Financial Crisis (GFC) challenged community faith in both regulators and major financial institutions and led to the abandonment of a light touch approach to corporate regulation in the UK. Australian regulators continued to be relatively modest enforcers until very recent times. The GFC focused attention on the issue of trust and how the decline of trust in corporations affected corporate governance. This trust deficit remains a central issue in markets until this day. The GFC saw a modest reworking of corporate governance codes in Australia, the UK and around the world. It also saw efforts to deal with perverse incentives and misaligned remunerative structures that had fostered the bubble that caused the GFC. This was accompanied by an effort to foster enhanced shareholder activism and limited protection of a wider range of stakeholder interests. We also saw a renewed interest in more rigorous risk management both within companies and by prudential regulators, as well concerns about corrosive corporate

cultures. However, the limits of law as an effective regulatory and corporate governance tool have remained with us. This paper explores lessons of the GFC, particularly the failure of trust, and suggests a need to learn from these lessons before they are forgotten.

Tuesday 4 Feb 4.30pm

Vicky Comino

Life after Hayne – the Financial Services Sector and the Future of Enforcement for Australian Regulators

Abstract:
With the evidence and scale of misconduct by banks unearthed and made public by forensic analysis of counsel assisting the Hayne Royal Commission being far worse than anyone imagined, commentators described it as one of the most consequential royal commissions ever conducted in Australia. Earlier inquiries into bank scandals and misconduct saw satisfaction with 'apologies', stated commitments to making changes to restore customers' trust and banks seeking to explain away widespread wrongdoing as 'bad apples', or as in the CBA's initial submission to the Hayne Royal Commission 'pockets of poor culture'. In contrast, Commissioner Hayne was having none of that. He identified the overly aggressive sales-driven culture of banks - one that puts profits above all else - as a key contributor to the misconduct examined. Regulators also came under fire. ASIC *rarely* went to court to enforce misconduct, while APRA *never* went to court. This paper will critically examine whether the Hayne Royal Commission is the 'game-changer' many had hoped it would be, including the efficacy of ASIC's response of publicly committing to a new enforcement strategy going forward, encapsulated in the catchcry, 'Why not litigate?'

5.00pm **Farewell Drinks reception**