Society of Corporate Law Academics (SCOLA)

Conference Abstracts

UNSW

Karstens, Level 1, 111 Harrington Street, Sydney

4-6 February 2024

Contents

Conference Organising Committee

Associate Professor Marina Nehme
Professor Dimity Kingsford Smith
Professor Michael Legg
Associate Professor Anil Hargovan
Dr Anton Didenko
Associate Professor Scott Donald
Associate Professor Kayleen Manwaring
Ms Riona Moodley
Mr Tamas Allenby
Ms Vanessa Cali

Program- Sunday 4 February 2024

Next-Gen Session

10-11am- Registration desk opens and Networking session

11am-12pm- Panel Discussion: Corporate Law Next-Gen Forum: Teaching, Research and Outreach

Redmond Barry Distinguished Professor Emeritus Ian Ramsay AO (Unimelb)

Professor Dimity Kingsford Smith (UNSW)

Associate Professor Timothy Peters (USC)

Chair: Associate Professor Akshaya Kamalnath (ANU)

In this session, we will hear from three senior scholars about their tips and guidance regarding teaching, research, outreach, and balancing it all. This will be followed by a Q&A and early and mid-career scholars are especially encouraged to attend.

12-1pm- EMCR Research Profiles

The aim of this session is to introduce EMCRs to each other and to established scholars to facilitate research collaborations and joint grant applications further down the line. This will be done through a very brief presentation (about 5 minutes) highlighting your research interests and the future work you are interested in involved in.

2.30-3.30pm- Teaching Session 1

Post lockdown challenges: students' attitudes

Associate Professor Edith I-Tzu Su (NCHU, Taiwan)

Ms Nicola Kozlina (UNSW)

Chair: Xu (Sophia) Bai

Biography

Edith I Tzu Su is a distinguished associate professor in National Chung Hsing University in Taiwan and before joining NCHU faculty, she studied law at National Cheng Chi University in Taiwan and completed her LLM and JSD in Washington University in Saint Louis in the United States.

Her research interest centers on law, business and legal education. She has published widely in the fields of corporate law, securities law, and legal education. Her research in corporate law and legal education was supported by Ministry of Science and Ministry of Education in Taiwan, the total grant amount has exceeded 12,0000 AUD.

Ms Nicola Kozlina is a lecturer at the School of Private and Commercial Law, Faculty of Law and Justice at UNSW. Nicola specialises in teaching first year students in the LLB and JD programs and has recently been appointed as Co-lead of the university-wide Community of Practice: Enhancing the First Year Experience.

Before coming to academia, Nicola practised as a banking and finance lawyer in Sydney and New York.

3.30-4.30pm- Teaching Session 2

Corporate law assessment and creativity - will it blend?'

Dr Michelle Worthington

Abstract

Many of our students are highly creative people, with strong interests in the arts/expressive work. The nature of the law degree can, however, make it difficult for students to find opportunities to engage their creativity; finding such opportunities in the context of compulsory, doctrinal courses can be especially challenging. In this presentation I will discuss some benefits and difficulties associated with crafting corporate law assessment options for creatives, using as a case-study a short-film assessment that has run in a few different iterations in the compulsory LLB and JD Corporations Law course at ANU.

Biography

Dr Michelle Worthington is a lecturer at the ANU College of Law. She is an interdisciplinary scholar with a particular interest in the design of legal systems and devices, including the role that values play in legal design. She works largely in the areas of corporate law and corporate law reform, common law legal theory, and Australian and comparative constitutional law. She has also started researching generative AI and proper approaches to the regulation of such technology. Michelle's academic work is informed by her experience working in the private, community and public legal sectors.

Program- Monday 5 February 2024

Keynote Presentation: 9.30-10.30

Nudge versus Sludge: The Great Greenwashing and the Failure of Corporate Regulation

By *Professor Christine Parker*
Chair Professor Bronwen Morgan (UNSW)

We are seeing an explosion in use of unsubstantiated and unevidenced green marketing claims – a problem that has been labelled 'the great greenwashing' and drawn the attention of consumer and financial regulators, as well as environmental activist lawyers. Greenwashing takes advantages of citizens' desire to do good by representing that corporations can be trusted to take social and environmental responsibility to reverse global heating, address the plastic waste crisis, and create a green, circular economy. But green claims are commonly manipulated and monetised for consumption via a sea of claims that coagulate into a sludge distracting us from possibilities for more transformative change. In this talk, Prof Christine Parker will draw on socio legal research and the notion of 'ecological regulation' to critically evaluate the use of consumer law enforcement action and ESG disclosure regimes to stem this tide of sludge.

Biography:

Christine Parker is a Professor of Law and Associate Dean for Research at Melbourne Law School, The University of Melbourne and a Chief Investigator in the ARC Centre of Excellence for Automated Decision Making and Society.

Professor Parker has a long career teaching and researching on lawyers' ethics, regulatory studies and corporate accountability. Her socio-legal research has made important empirical, conceptual and policy contributions to the politics, ethics and democratic governance of regulation in a range of areas including competition and consumer protection law, the legal profession, environmental and health and safety regulation. Her recent work seeks to develop the concept of ecological regulation applied particularly to the food system and to the digital platform economy.

Professor Parker's books include *The Open Corporation: Business Self-Regulation and Democracy*; *Explaining Compliance: Business Responses to Regulation*, and influential critical text, *Inside Lawyers' Ethics*.

Professor Christine Parker has previously held positions at Griffith University, University of New South Wales, the Australian National University and Monash University. She holds a BA (Hons) and LLB (Hons) from The University of Queensland and a PhD from the Australian National University.

Concurrent Panels – 11am-12.45pm

Parallel Session 1- Directors Duties **Chair *Alan Koh* (NTU, Singapore)**

A Theory of Corporate Office and the Representational Nature of the Director

Timothy D Peters

This paper forms part of a larger project that, drawing upon the field of political theology, seeks to articulate an account of the constitutive vicariousness of corporate power—that is, always exercised on behalf of another. In doing so, I place our contemporary understandings of the corporation and corporate actors—in particular directors and officers—in relation to an older tradition of thinking about 'office'. The tradition of office encompasses both a mechanism of responsibility—imposing not only rights but duties and obligations on the officeholder—and a form of irresponsibility in that the effectiveness of official actions are separated from the intent of the individual performing them. One of the challenges in providing an account of the nature of 'corporate office' is that, since its modern origin, the office of director has been articulated as of a mixed nature encompassing both aspects of 'public office' as well as private agent. This mixed nature raises questions not only about whose interests the directors are to act for (the corporation, shareholders, other stakeholders) but also what the representational nature of the director is. Are they bound to represent the specific interests of those who appoint them, or as fulfilling an independent office, do they have the discretion to exercise corporate power as they see fit within the terms of their office? If their office encompasses a public duty, does this extend to purposes beyond economic value or intervening in contested political and social issues? Or are such activities an abuse of office?

Biography

Dr Timothy D Peters is: Associate Professor of Law, School of Law and Society, University of the Sunshine Coast; Adjunct Research Fellow, Law Futures Centre, Griffith University; and President of the Law, Literature and Humanities Association of Australasia. He is author of *A Theological Jurisprudence of Speculative Cinema: Superheroes, Science Fictions and Fantasies of Modern Law* (Edinburgh University Press, 2022), co-editor of the forthcoming *Routledge Handbook of Cultural Legal Studies* and the recipient of an Australian Research Council Discovery Early Career Researcher Award (project number DE200100881) funded by the Australian Government, examining 'New Approaches to Corporate Legality: Beyond Neoliberal Governance'.

Governing in the Best Interests of the Planet The role of directors' duties in influencing companies' climate and biodiversity impacts

Mayleah House

Governments globally recognise that private sector action is critical to achieve the goals of the Paris Agreement and Global Biodiversity Framework. Often, however, corporate environmental performance is misaligned with the trajectories necessary to achieve these objectives. Although Australia's substantive environmental law aims to minimise companies' impacts on climate and biodiversity, the intention behind these laws arguably conflicts with the objectives of corporate law: a body of law that indirectly influences corporate environmental performance. Despite corporate law increasingly incorporating environmental considerations, evidence suggests that the best interests duty may incentivise directors to prioritise short-term profits for shareholders at the expense of the climate and biodiversity. Accordingly, through qualitative interviews with legal professional, industry group and civil society experts whose professional roles frequently bring them into contact with Australian directors, this socio-legal research aimed to substantiate whether the best interests duty impedes positive corporate

environmental performance. It examined how Australian directors interpret the duty and how those interpretations influence their decision-making around their company's environmental performance. It further aimed to identify potential reforms to the best interests duty that could overcome any identified barriers to positive corporate environmental performance. Eleven interviews with the relevant experts were undertaken over Zoom between August and September 2023. Interviews were recorded and transcribed, with transcriptions subsequently analysed and coded. Findings indicated that Australian directors interpret the best interests duty through a financial lens and likely consider their paramount obligation is to prioritise profit maximisation. Despite permissions to limit their climate and biodiversity impacts, directors are arguably not incentivised nor compelled to take such actions and the duty is insufficient to encourage positive environmental performance. The findings suggest several principles for reforms to the best interests duty could positively influence directors' decisions related to their companies' climate and biodiversity impacts and the Paris Agreement and Global Biodiversity Framework goals. Similar research with Australian directors themselves would be beneficial to address gaps within this study.

Biography:

Mayleah House - Monash Business School - Department of Business Law and Taxation Master of Environment and Sustainability, Faculty of Science, Monash University Supervised by Dr Anita Foerster

Sustainability in the Boardroom: A View from the UK

Iain MacNeil and Irene-marie Esser

As elsewhere, the corporate system in the UK has attracted intense scrutiny in terms of its sustainability credentials and two issues are especially important in this context. First, to what extent does the law permit company directors to adopt sustainable solutions and in particular those that are costly for shareholders; and second, within the permitted zone of directors' action, what corporate law techniques are appropriate to enable the pursuit of sustainable outcomes. During our presentation, focusing on the position in the UK, we will deal with the scope of directors' discretion in board decision-making, the role of non-financial reporting, stakeholder engagement and corporate purpose. We then link these issues to our earlier proposal of an 'entity model of ESG' where the focus is on board decision-making and corporate fiduciary duty, in contrast with the financial model of ESG investing which focuses on the role of capital and investors in driving change in sustainability practices and pays more attention to intermediary fiduciary duties. We conclude with observations on the likely trajectory of development in the UK and elsewhere.

Biographies:

Iain MacNeil (https://www.gla.ac.uk/schools/law/staff/iainmacneil/)
https://www.gla.ac.uk/schools/law/research/groups/corporate-and-financial/
Iain MacNeil is the Alexander Stone Professor of Commercial Law at the University of Glasgow. He began his academic career after a decade working in investment banking in the City of London. He has undertaken research and collaborated with colleagues in Australia, Canada, China, Hong Kong and the United States. He is a Trustee of the British Institute of International and Comparative Law and Chair of the International Securities Regulation Committee of the International Law Association. He has acted as Senior Adviser on several projects examining national compliance with EU financial sector Directives.

Irene-marie Esser (https://www.gla.ac.uk/schools/law/staff/irene-marieesser/#)
https://www.gla.ac.uk/schools/law/research/groups/corporate-and-financial/.
Professor Irene-marié Esser is a *Professor of Corporate Law and Governance* and *Dean of the Graduate School, College of Social Sciences*. Since 2020 she is an Extraordinary

Professor at Stellenbosch University, South Africa. She was admitted as an Attorney of the High Court of South Africa in 2005. She was the Company Law Convener for the Society of Legal Scholars of the UK and Ireland for 3 years until 2021. She currently teaches Corporate Governance, Corporate Social Responsibility and Company Law and supervises postgraduate research students in the United Kingdom and South Africa. Her research spans doctrinal and empirical approaches, covering the UK, EU and South Africa.

Directors' duty of loyalty and ESG considerations: Aotearoa New Zealand's controversial Companies (Directors' Duties) Amendment Act 2023

Lynn Buckley

Directors have a fundamental duty to act in good faith and in the best interests of the company. Yet, the scope of this duty remains disputed. Competing interpretations have been offered regarding the best interests of the company. Much of this discourse reflects broader theoretical debates concerning shareholder- and stakeholder-oriented frameworks. Some equate the company's interests solely with those of its shareholders, while others argue the interests of other stakeholders, including society and the environment, should also be included.

This debate recently came to the fore in Aotearoa New Zealand with the Companies (Directors' Duties) Amendment Bill. The controversial bill proposed the addition of a new subsection to the statutory statement of the duty in s 131 to expressly permit ESG considerations on the part of directors. In August 2023, the Companies (Directors' Duties) Amendment Act 2023 received royal assent. The new subsection reads: "To avoid doubt, in considering the best interests of a company … a director may consider matters other than the maximisation of profit (for example, environmental, social, and governance matters)".

The purpose of the amendment was to dispel uncertainty surrounding a director's duties in cases where financial or profit-related considerations appear to conflict with ESG-related ones. But has this amendment succeeded in providing such clarity? Was it a missed opportunity for more radical change? And what, if any, are likely to be its practical implications?

Biography

Lynn Buckley is a Postdoctoral Fellow with the Department of Commercial Law at the University of Auckland Business School. Her research interests are in the field of company law and corporate governance, with a focus on directors' duties, director decision-making, and corporate environmental sustainability.

Going Back to the Future with Directors' Duties

Sulette Lombard

The topic of directors' duties remains popular among corporate law scholars and has given rise to interesting (and endless) academic debate about what directors are to do in order to comply with their obligations; the beneficiary of these obligations; enforcement of obligations; and so forth. A familiar and controversial aspect of these discussions remains the shareholder v stakeholder debate, which developed on the basis of different interpretations of the phrase 'interests of the company'. This paper takes a sympathetic view in respect of the position of directors in so far as proponents of the stakeholder view of the corporation would suggest that directors are required to determine the 'interests of the company' with reference to the interests of an open-ended group of stakeholders, often with conflicting 'interests'. It argues against an expanded notion of the 'interests of the company' in so far as the 'best interests' duty is concerned, and does so on the basis of historical, conceptual, and practical reasons. Instead, it argues that it is time to revisit the past in order to reconsider the origins and purpose of directors' duties, with a view to providing a fresh perspective on the content and application of

these duties in modern times. This is particularly pertinent where corporate conduct is increasingly scrutinised on the basis of the impact of corporate activity on society. Ultimately, the paper aligns itself with the views of those academics who view the 'best interests' duty as an inappropriate vehicle to achieve the ideals underpinning the stakeholder model. As an alternative, it suggests that there is merit in exploring the extent to which the duty of care and diligence could better achieve some of these objectives.

Biography

Sulette Lombard is an Associate Professor at the University of South Australia (Adelaide, Australia). Sulette commenced her career in academia in 1997 and over the last twenty plus years had the opportunity to teach into an array of commercial law subjects, primarily corporate law and insolvency law, at an undergraduate and post-graduate level, both in Australia and South Africa. The effectiveness of Sulette's student-centred approach to teaching was recognised by a national teaching award (Australian Award for University Teaching: Citation for Outstanding Contributions to Student Learning) in 2018.

Sulette authored and co-authored a number of high-quality research outputs with significant impact in areas of insolvency law; corporate governance; and corporate whistleblowing, including the text on Australian Insolvency Law. Sulette is invited regularly by professional bodies to present on topical corporate and insolvency matters; has been invited on multiple occasions to make submissions to the Australian Parliament in relation to law reform related to her areas of research; and has been invited numerous times to appear as an expert witness for various Senate Inquiries. Her contributions in this capacity have been sighted extensively in law reform reports.

Parallel Session 2- Regulation and enforcement — Chair *Vicky Comino* (UQ)

The Case for a Federal Specialist Enforcement Agency

Kerry Abadee

In the context of community concerns about ASIC's enforcement effectiveness and capability, there is current debate as to whether, and if so, how to replace ASIC or its functions. A range of proposals for reform to ASIC's remit have been put forward ranging from de-establishment to splitting ASIC into smaller regulators to internal restructuring and policy changes. The case for a further proposal, the establishment of a federal specialist enforcement agency, is presented.

The genesis for a specialist agency with responsibility for the conduct of Commonwealth civil penalty litigation is the proposal outlined by Commissioner Hayne in the final report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. Analysis is undertaken of the Commissioner's proposals for a separate enforcement agency and suggestions made for how it could work.

The establishment of a new body has the potential to address specific practical problems experienced by ASIC in conducting civil penalty proceedings, including in recent cases before the Federal Court discussed in the paper. Given that other prominent Commonwealth regulatory agencies are also actively enforcing civil penalty regimes and confront similar issues to ASIC, the paper argues that a specialist enforcement agency offers scope to introduce a set of holistic reforms impacting the civil penalty litigation process from the decision to commence proceedings to trial procedure and the imposition of penalties.

Biography

Kerry Abadee BEc LLB (Hons) (Macq) LLM (Syd) is a mid-term candidate for the Doctor of Philosophy at the Sydney Law School on the topic of ASIC's enforcement track record since the Hayne Royal Commission. She also teaches corporations law at the Sydney Law School.

Previously Kerry worked for several years in enforcement at the Australian Securities and Investments Commission and for many years as a solicitor at a predecessor firm to Norton Rose Fulbright.

Regulatory Chameleon? An Examination of ASIC's Enforcement Style During the Years 2018-2023

Tom Dearden, Helen Bird and Grace Borsellino

This paper examines the combined impact of key events affecting ASIC's enforcement of the *Corporations Act 2001* (Cth) between 2018-2023, including the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry; the Covid-19 pandemic; and the change of key ASIC personnel in mid 2021. It will be argued that each event caused ASIC to pivot and adjust its enforcement strategy with mixed results from the viewpoint of responsive regulation theory and as evidenced by ASIC enforcement data over the period. While the events are each well known, their combined impact on ASIC's enforcement policy remains unexplored. This article seeks to fill that gap, highlighting the impacts on the regulated community, the spectre of more interjections by the government into ASIC's remit, and ongoing concern about ASIC's regulatory effectiveness as Australia's corporate enforcement body.

Biographies

Tom Dearden is a dedicated Associate in the Banking & Finance team at MinterEllison, based in their Sydney office. With over 8 years of commercial law experience, Tom combines his in-depth legal knowledge and strong business acumen to deliver exceptional results for clients. He has a broad range of experience in property, construction, corporate, acquisition, and leveraged finance transactions, acting for both borrowers and lenders.

Helen Bird is an Industry Fellow at the School of Business, Law and Entrepreneurship at Swinburne University. She is a law and corporate governance specialist, researching, publishing and teaching about regulatory trends and the implications of corporate law and corporate governance for Australian companies, the provision of financial services, dealings in securities and initial coin offerings. Helen is also a panel member of the ASIC Corporate Governance panel (2020) and regular media commentator on corporate law and governance events in the news.

Helen's research on the public enforcement of corporate law has been supported by research grants from the CRC, the ARC and the CIFC. Her research on share ownership was cited by the NSW Supreme Court in *In the matter of Ten Network Holdings Limited* (subject to a deed of company arrangement) (receivers and managers appointed) [2017] NSWSC 1529 (10 November 2017). Her research on ASIC enforcement was cited by in the interim and final reports of the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*.

Grace Borsellino is a Lecturer and Course Convenor in Corporate Law and Governance at Western Sydney University, School of Law. Grace has been an invited international speaker to universities in Taiwan and Hong Kong delivering conference speeches in areas of Corporate Law, Corporate Culture and the Regulation of FinTech, the Digital Economy, and Blockchain related Cryptocurrencies. Grace has delivered comparative corporate law classes in Malaysia to one of the university's law school partners and co-convenes two legal technology units entitled Technology, Innovation and The Law and Designing Law Apps for Access to Justice.

The Exclusion of Deferred Prosecution Agreement Scheme from the CFB Bill 2023: A Missed Opportunity for Combating Serious Corporate Crime in Australia

Afroza Begum

The Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023 (the CFB Bill) is the third attempt at reforming foreign bribery laws in Australia. Founded on the previous two Combatting Corporate Crime Bills (CCB Bills) in 2017 and 2019 which lapsed before being passed by the Parliament, the CFB Bill aims to strengthen the legal framework for investigating and prosecuting foreign bribery. However, the exclusion of the Deferred Prosecution Agreement (DPA) Scheme from the CFB Bill represents a striking departure from preceding CCB Bills and a missed opportunity for prevention of serious corporate crime in Australia. This paper argues that despite some genuine concerns associated with the scheme, pursuing DPAs will better foster enforcement of foreign bribery cases and bring Australia in conformity with the global governance standards.

A DPA is a voluntary agreement between prosecutors and a corporation (non-trial proceeding) in which the prosecution can be deferred or suspended for a set period provided that the corporation complies with certain conditions stipulated in the agreement. Research confirms that successful prosecution of foreign bribery cases across nations, including in Australia, is rare because of their 'inherent complexities and resource-intensive nature of investigations.' To address these concerns, DPS has emerged in several jurisdictions as an effective and proactive avenue for achieving efficient outcomes and contemporary foreign practices are also indicative of DPA's increased reliance in managing foreign bribery. This paper however critically examines the prospective effectiveness of the DPA scheme for Australia by fundamentally looking at the UK experiences in dealing with foreign bribery.

Biography

Dr Afroza Begum is currently working as a Lecturer at the School of Law, University of Wollongong, Australia. Her teaching and research interest predominantly lie in International Business Law, Corporations Law and Public Law. She has published extensively in these areas in refereed journals in the UK, Australia, the USA, the Netherlands, India and Bangladesh. As a sessional academic at Macquarie Law School, Macquarie University, she also convened a range of business law related subjects, including International Trade and Finance and International Business Transactions. Dr Begum also carried out research in Australia under a Bangladeshi Government Grant and International Postgraduate Research Scholarships.

ESG Practice in Semi-conductor industry in Taiwan

Edith I-Tzu Su

Substantiality has been a crucial challenge globally and every country tried to promote the practice of ESG. Semi-conductor industry became a very important industry due to the high

demand of chips and the top leading companies are based in Taiwan. This research is empirical research to examine the practice of ESG in the semi-conductor company. How does ESG affect the board of director's duty and how the board monitor the practice of ESG? How does this practice different from other Asia jurisdictions and the west? This research tries to answer these questions and offer practical solutions to enhance more efficient ESG practice.

Biography

Edith I Tzu Su is a distinguished associate professor in National Chung Hsing University in Taiwan and before joining NCHU faculty, she studied law at National Cheng Chi University in Taiwan and completed her LLM and JSD in Washington University in Saint Louis in the United States.

Her research interest centers on law, business and legal education. She has published widely in the fields of corporate law, securities law, and legal education. Her research in corporate law and legal education was supported by Ministry of Science and Ministry of Education in Taiwan, the total grant amount has exceeded 12,0000 AUD.

The Stepping Stone Approach to the National Security Regulation of Foreign Involvement Australian Critical Infrastructure

Joseph Lee

The Security of Critical Infrastructure Act 2018 (Cth) (SoCI Act) relies on government-industry collaborations for its operation. Under this regulatory model, owners and operators of Australian critical infrastructure share information with the Commonwealth to manage all risks, including national security threats, supported by security obligations and civil corporate penalties. This paper argues that the statute's enforcement should be strengthened by a personal civil liability regime headed by ASIC. This proposal, it is contended, aligns with the conceptual, doctrinal, and socio-economic understanding of Australian corporate law. Implementing the proposal will not undermine the collaborative regulatory model under the SoCI Act. Instead, it would enhance the security of Australia's critical infrastructure.

Biography

Dr Joseph Lee- I was recently awarded a Ph.D. by the Australian National University. The title of my Ph.D. thesis is 'Reconceiving the National Security Regulation of Foreign Investment in Australian Critical Infrastructure'. My research is interdisciplinary, analysing the intersections between national security, critical infrastructure protection and corporate governance. The focus of this research is on the Five Eyes, an intelligence alliance comprising Australia, Canada, New Zealand, the United Kingdom and the United States. Currently working in the Australian Department of Defence (Navy), I aim to use this industry experience to better inform my research.

Parallel Session 3- Insolvency **Chair *Zofia Bednarz* (USYD)**

Company Administrations: Policing Purposes, Relegating Results

Paulina Fishman

The improper purpose concept has found its way into various court applications under Pt 5.3A of the Corporations Act 2001 (Cth). Its presence can be a ground for invalidity of a purported appointment of an administrator of a company; can constitute an abuse that warrants ending a company's voluntary administration; and may even lead a company under the regime to be wound up. But do improper purpose findings in Pt 5.3A cases aid or hinder the achievement of the regime's aims? This paper expounds, and then critically analyses, the risk of this concept undermining the efficacy of Pt 5.3A. The paper suggests certain reforms, as well as an approach that courts could adopt, to shift the focus in this context away from purposes and towards optimal economic outcomes.

Biography:

Dr Paulina Fishman joined Deakin University as a Lecturer (Corporate Law) in January 2023. Her previous employment includes working as a solicitor in the litigation practice group of a commercial law firm, a Judge's Associate at the Supreme Court of Victoria and a Legal Research Officer at the High Court of Australia. Her research focuses on corporate law generally, with a particular interest in corporate insolvency law.

Understanding Small Business Restructuring from the Practitioners' Perspective: Insights into Part 5.3B

Amanda Bull

Australia's response to the hardships faced by Small to Medium Enterprises (SMEs) during the COVID-19 pandemic led to legislative changes aimed at supporting financially viable SMEs. The Corporations Amendment (Corporate Insolvency Reforms) Act 2020 (Cth) introduced Part 5.3B and Part 5.5 (Subdiv 2) into the Corporations Act 2001 (Cth) in early 2021 (SME Regime). These amendments marked significant reforms in Australia's corporate insolvency landscape, offering statutory rescue and liquidation regimes tailored specifically for SMEs, enabling directors to retain control throughout the process.

The SME Regime was presented by the Australian Government as a more cost-effective, efficient, and less complex alternative for SMEs compared to existing statutory options, such as voluntary administration and liquidation (referred to as the 'Objectives'). However, submissions to the Parliamentary Joint Committee on Corporations and Financial Services (PJC) inquiry into Australia's corporate insolvency laws indicated that some of these Objectives were not fully realised by the SME Regime. These concerns were captured in Recommendation 8 of the PJC's final report, calling for further reforms to streamline the SME Regime pathways.

The presenter's research, based on interviews with small business restructuring practitioners, and preliminary findings from an upcoming survey scheduled for January 2024, reinforces some of the issues highlighted in the PJC inquiry. It also unveils fresh insights into the efficacy of the SME Regime in achieving its stated Objectives. This presentation provides a comprehensive examination of Australia's response to SME rescue, offering practical insights and areas for potential improvement as revealed by small business restructuring practitioners.

Biography

Amanda Bull, an Associate Lecturer and PhD candidate at the QUT School of Law, brings 12 years of hands-on experience in Banking & Finance, Insolvency, and Property Law to her research. She has also subsequently dedicated 8 years to teaching in these areas. Her Master's research focused on the practical challenges associated with implementing the Personal Property Securities Act 2009 (Cth), contributing extensively to the scholarly discourse.

Amanda's current research centres on the small business rescue and simplified liquidation regimes within the Corporations Act. Her research has involved interviews and surveys with small business restructuring practitioners, providing invaluable insights into the real-world applicability and efficacy of these regimes.

China's Bankruptcy Law Odyssey: Exploration, Promotion, and Reform (2007-2022)

Casey Watters & Jinlu Liu

This article provides an extensive examination of the Enterprise Bankruptcy Law of the People's Republic of China (EBL), tracing its evolution from its establishment in 2007 through 2022. It builds on the framework of Judge Zhang Hengzhu, segmenting the development into three stages: Exploration, Promotion, and Reform. The analysis commences with the Exploration Stage (2007-2011), highlighting the initial challenges in establishing a corporate bankruptcy regime. It then transitions to the Promotion Stage (2011-2015), marked by the Wenzhou financial crisis and subsequent efforts to streamline and publicize bankruptcy procedures. The final phase, the Reform Stage, is broken into two periods. The early reform period (2015-2018), observes significant legal reforms, including the establishment of specialized bankruptcy panels and the National Enterprise Bankruptcy Reorganization Platform, leading to a surge in bankruptcy filings. The next period (2019-2022) was a period of global reforms and saw China placing a revised EBL on the legislative agenda. The article underscores the EBL's pivotal role in China's economic transformation, detailing its influence on corporate restructuring, creditor rights, and the handling of 'zombie companies'.

Biography

Assistant Professor Casey Watters joined the Faculty of Law at Bond University in 2020 after previously holding positions with the University of Nottingham and Singapore Management University. Casey's research focus is corporate law and insolvency where he has published on corporate insolvency, personal bankruptcy, cross-border insolvency, mergers & acquisitions and piercing the corporate veil. Much of his research is comparative and examines the challenges in protecting the rights of debtors and creditors when enterprises are present in multiple jurisdictions and where legal regimes may provide inconsistent rights and obligations.

Title- One size does not fit all?– A Comparative Analysis of Structural Considerations and insolvencies of Small, Micro and Medium Businesses in Australia and India

Dr Jason Harris & Preeti Nalavadi

Enacting effective rescue reforms for the Micro, Small, and Medium enterprises (MSMEs) has been one of the main challenges for all jurisdictions throughout the world even before the pandemic and India is not immune to these. Time and again, institutions like the World Bank,

UNCITRAL and INSOL recommended principles and guidelines for different jurisdictions across the world and emphasised the need for early law reforms.

Australia, like most OECD countries, has comprehensive corporate and personal insolvency and restructuring laws. There have been long-standing concerns about whether these laws provide an optimal framework for *MSME* insolvency and restructuring. The recent report by the Commonwealth Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Insolvency in Australia* (12 July 2023), raised concerns about the cost and complexity of corporate insolvency laws and the access and equity problems that this can have for MSMEs and has recommended changes in Part 5.3A of the Corporations Act 2001 (Cth). Nonetheless, the law does not take into consideration the structure of Australian business structures in applicability.

In India, the Insolvency and Bankruptcy Code of India (IBC) has provided for special mechanism for resolution of stressed assets of MSMEs since 2020. Yet these businesses across India have not been able to avail the benefit of such reforms due to the disparity of the application of the law to such structure of businesses.

The authors investigate and answer these questions - Does the existing law in both jurisdictions apply ‘one size not fits all’ approach to MSMEs? What are the structural considerations and how does the law treat them?

Through this paper, the authors test the structural considerations of Australian and Indian MSME insolvency law till date from a comparative perspective. Is the law fit for purpose for MSMEs? The conclusion is to identify the common challenges and solutions that would be helpful for both the insolvency regimes.

Biographies

Dr Jason Harris is a Professor at Sydney University. He teaches and researches in the areas of Corporate Law, Insolvency Law, Commercial Law and Contracts at University of Sydney. Dr Jason's research is focused on the public and private regulation of financially distressed companies, including debt restructuring, voluntary administration, corporate governance and directors’ duties during financial distress and the regulation of corporate groups.

Dr Jason’s research is frequently cited in Supreme Court and Federal Court decisions and has been cited in the High Court of Australia as well as in Commonwealth parliamentary committees and by academic works in Australia and internationally. Dr Jason is an active participant in law reform initiatives through his policy work with the *Governance Institute of Australia*, the *Australian Institute of Company Directors* and the Corporations and Insolvency Committees of the *Law Council of Australia*. Dr Jason has served on a number of editorial boards including for the *Australian Journal of Corporate Law*, the *Australian Law Journal* and the *Journal of Banking and Finance Law and Practice*. Dr Jason is a former president of the Corporate Law Teachers’ Association and has previously held academic positions at UNSW, the ANU and UTS and has had visiting academic roles with Universities in England, Canada and the United States.

Preeti Nalavadi is a qualified and admitted corporate lawyer from India with over 18 years of experience. She has worked in different capacities both in Australia and in India including working as a Legal Manager at Canara Bank, one of the leading Banks in India.

She is currently a Doctoral Candidate at Adelaide Law School under the supervision of Emeritus Prof Chris Symes and Associate Prof David Brown. Her thesis topic is Comparative and functional study of corporate rescue in three countries- US Australia and India. She had been awarded Commonwealth and Zelling Gray Scholarships. She is a Sessional Academic for Commercial Law. She is expected to requalify as a Solicitor for Australia in 2024.

During her candidature she has been invited to present her research at various international conferences organised by the Australian Corporate Law Teachers Association (Scola), Australia and New Zealand Law History and Society, Ross Parson Centre at Sydney Law School and Prof Bob Wessels' PhD Conference (Leiden University). She is working on several publication projects for peer reviewed journals.

She is a member of INSOL ERA (the UK), American Bankruptcy Institute (the US), Australian Asian Lawyers' Association (Australia), Australasian Law Academic Association (Australia), Society of Corporate Law Academics (Australia) and Insolvency Law Academy (India).

Unravelling the liability for CGT in insolvency: A Dworkinian approach to priorities in corporate insolvency

Catherine Brown and John Minas

In its recent report on Corporate Insolvency in Australia, the Parliamentary Joint Committee on Corporations and Financial Services considered the role that the Australian Taxation Office (ATO) plays as a creditor in insolvency. The Committee also recommended a comprehensive review of the relative priority of certain creditors, such as employees, liquidators, and secured creditors. That questions regarding the ATO's ability to exercise its statutory powers so as to gain a quasi-priority in insolvency and the basis on which exceptions to the *pari passu* principle should be allowed are still being raised reinforces the need to consider a more holistic approach to aligning Australian taxation and insolvency laws.

One area which has previously been the subject of debate relates to the obligations imposed by s 254(1)(d) of the *Income Tax Assessment Act 1936* (Cth) on insolvency practitioners, and the potential priority for capital gains tax (CGT) arising on the sale of company assets following insolvency. While the High Court in *Australian Building Systems Pty Ltd v Commissioner of Taxation* dealt with the question of whether an assessment of taxation is required before the s 254 obligation arises, the more fundamental question of whether the liability is a pre or post insolvency expense was never fully resolved. This issue is important in establishing the amount of debt that is ultimately paid to the ATO as compared to other creditors of the insolvent entity.

This paper applies Dworkin's rights thesis and equality of welfare theories to examine the broader question of whether the obligations currently imposed on insolvency practitioners for the liability for CGT should be reconsidered. In doing so, the authors consider options for reform of Australia's CGT regime in the context of determining the liability for CGT in insolvency.

Biographies

Dr Catherine Brown is a Senior Lecturer in the Faculty of Business and Law, Queensland University of Technology. Catherine lectures in a number of areas, including insolvency, corporate law, taxation and real property. Catherine's current research interests include the intersection of insolvency and taxation laws

insolvency and bankruptcy law, the impact of technology on the legal profession and scholarship of legal education. Catherine has had extensive experience with the Queensland and NSW government sectors as an accountant and policy advisor. She also has experience in the private sector, predominately in the area of taxation law.

John Minas is an Associate Professor in the Department of Business Law and Taxation, Monash University and an Adjunct Research Fellow in the Griffith Law Futures Centre. His

research interests are taxation law and policy, and he is the author of *The Implications of Capital Gains Tax Rate Preferences* (Oxford University Press, 2019).

Parallel Session 4- CSR, Corporate Culture & Corporate Behaviour

Chair *Kayleen Manwaring(UNSW)*

When should companies provide essential services? Lessons from corporate commitments to water stewardship in mining

Jacqui Robertson

Access to clean water is essential for not only the health and wellbeing of individuals, communities, and the environment, but also the economic survival of both individuals and communities. Examining the role of companies in water governance provides a unique snapshot of the role of companies in society. Rarely do water resource legal frameworks require non-government actors to participate in water governance. Nevertheless, mining companies have willingly stepped into this space. Mining company commitments to 'water stewardship' are a recent development to address corporate water issues but have developed to also address catchment related issues. Various 'soft law' and voluntary initiatives encourage corporations to adopt sustainable development principles, leading them to implement corporate water stewardship, such as: the UN (United Nations) Global Compact (2015) (among others). Peak mining industry bodies such as the International Council on Mining and Metals (ICMM) also require corporate water stewardship commitments by their members. For ICMM members, such as Rio Tinto and the BHP Group, commitments include adopting a catchment-based approach to water stewardship and adopting strong and transparent water governance. These are admirable aims. However, the line between responsible corporate activity on the one hand and policy or resource capture on the other is easily blurred in this context. This paper questions the extent to which mining company commitments to water stewardship are appropriate in general water governance for a catchment. The paper highlights the changing role of corporations in our society and the extent to which we should expect companies to provide essential infrastructure.

Biography

Jacqui Robertson has over two decades of experience working as a legal practitioner in private practice advising mining and extractive industry companies on environmental and planning law. Prior to joining the Griffith Law School (where she teaches planning law and company law), she spent a few years in an in-house legal role with the Queensland Government. Her experience has been primarily advisory work relating to the extractive industries (petroleum, gas, mining, and quarries), and water governance. Her PhD focusses on governance mechanisms for sustainably managing water in the resources industry.

Corporate Social Responsibility, Profit-Making, and Governance: A Comparative Analysis of New Zealand and Indian Companies

Amrapali (Pali) Choudhury Macdonald

This paper examines the intricate relationship between large corporations, profit maximization objectives, and Corporate Social Responsibility (CSR) within the frameworks of New Zealand (NZ) and India. It begins by acknowledging the prevalence of large corporations dominating economic landscapes in both countries and the legal duties of directors under the Companies Act 1993 in NZ and the Indian Companies Act 2013.

Corporate Social Responsibility (CSR) is dissected within the broader context of Corporate Governance, emphasizing its evolution beyond legal compliance to encompass ethical

management and societal contributions. The significance of Environmental, Social, and Governance (ESG) reporting in establishing ethical credibility is highlighted, particularly regarding its treatment within the NZX Corporate Governance Code, 2023.

Drawing a comparison between NZ and India, the paper focuses on ESG reporting practices among selected companies: Synalit Milk and Meridian Energy in NZ, and Infosys and India Tobacco Limited (ITC) in India.

Furthermore, the paper explores the argument that CSR initiatives, while benefiting stakeholders and the community, also yield long-term advantages for corporations. By integrating stakeholder considerations into corporate planning, fostering better relations and public perception, companies can potentially enhance their market positioning and achieve their 'Corporate Purpose' without compromising profit-making goals.

Finally, the paper contends that profit-making objectives and CSR initiatives are not inherently incompatible, particularly within corporations with long-term visions. It posits that aligning CSR practices with long-term corporate strategies can harmonize societal contributions with profitability goals, presenting a nuanced perspective on the relationship between corporate profitability and social responsibility. Key Words: CSR, New Zealand, India.

Biography

Amrapali (Pali) Choudhury Macdonald is a Professional Teaching Fellow in Law at Lincoln University, Christchurch, New Zealand. She is a qualified lawyer in England & Wales and in New Zealand. Prior to teaching at Lincoln she worked as an Associate Solicitor at Transport for London. Amrapali obtained a LL.B (Honours) from the University of Sussex, England, and a LL.M in Commercial and Corporate Law from the London School of Economics. Having lived in India, England and now New Zealand, she considers herself a Global Citizen with a broad perspective on issues. Amrapali lives in Christchurch, New Zealand with her husband, Andrew, daughter, Niharika, and Finchley (the miniature schnauzer).

Shifting Connections Between Corporations and Society: The Challenges of Corporatized Money

Steven Stern

The conference organisers have reminded us that corporations have come to dominate economic life, and also to command the political domain in ways unimaginable a century ago. The rubric of corporate social responsibility has increasingly become a focus for those charged with the governance, direction and management of corporations. Where a State becomes unwilling or unable to provide such social welfare services as housing or education, corporations have moved in to fill the gap increasingly becoming responsible for the provision of these kinds of services. The issue of money traditionally was seen as an exclusive prerogative of exercising State sovereignty. The State's domination of economic life by the effective implementation of monetary policy and control over the supply of money, through such instrumentalities as a central bank, is still almost universally regarded as vital for the economic prosperity of a country. How will any "corporatisation" of "money" affect the State's capacity to exercise central control of the interest rate on money which the banks lend to, and borrow from, each other overnight; over the quantity of money used to settle interbank transactions; over the quantity and supply of, and demand for, Exchange Settlement balances that can be used by banks as a store of value and to make payments between each other; the interest rates on which banks may deposit money with a central State instrumentality or borrow

Exchange Settlement funds from the instrumentality; or the setting of price and quantity targets for State purchases of government bonds?

Biography

Dr Steven Stern (CTA FIPTA ICC) is an Adjunct Professor in Victoria Law School, Victoria University and a Barrister-at-Law practising at the Victorian Bar on List S Svenson Barristers. He has previously been the University Solicitor, and then the University General Counsel and University Secretary at Victoria University; a Senior Associate in the Merger & Securities Group at what is now King & Wood Mallesons;; Director, Legal Advice and Review Branch/General Counsel at the National Companies and Securities Commission/Australian Securities Commission; Corporation Secretary and Principal Legal Officer of the Australian Wool Corporation; and an officer of the Commonwealth Attorney-General's Department

Keynote panel: 1.45-2.45pm

The Role of Corporations in Australia's Consumer Data Right

Panel members:

Dr Natalia Jevglevskaja (UNSW)

Professor Jason Harris (USyd)

Mr Mathew Mytka (Co-founder & Chief Vision Shaper at Tethix)

Mr Aidan Storer (Treasury (Cth))

Chair: Dr Anton Didenko (UNSW)

Australia's Consumer Data Right ('CDR') legal framework has been hailed as 'the biggest reform to consumer law in a generation'. It facilitates the sharing of specified types of consumer data across the economy using prescribed data channels with the consumer's consent and under regulatory oversight. In simple terms, the CDR seeks to create a better and safer way for businesses to exchange consumer data. Crucially, the Consumer Data Right was from conception designed as a multi-sectoral framework. It was launched in 2020 in the banking sector and quickly expanded to other sectors, including energy and non-bank lending. The diverse panel of expert speakers will tackle the difficult questions about the role of corporations in the Consumer Data Right, the associated challenges to business and individual consumers – as well as discuss the future of this innovative legal framework.

Biographies

Dr Natalia Jevglevskaja is a Research Fellow at the Faculty of Law and Justice of the University of New South Wales (UNSW Sydney) and an Associate Fellow of the Higher Education Academy, UK. In her role as a Research Fellow at the Australian Research Council Laureate Project 'The Financial Data Revolution: Seizing the Benefits, Controlling the Risks', she looks at how data and technology are transforming financial services in Australia and abroad and what measures may be required in the area of data and technology governance to facilitate innovation in finance. Natalia's analysis of the Consumer Data Right has appeared in leading academic and professional journals in Australia and abroad. Her broader research and teaching interests include general international law, comparative law, and the law of armed conflict.

Professor Jason Harris is a Professor of Corporate Law at the University of Sydney Law School where he teaches and researches in the areas of Corporate and Insolvency law. Jason's research is focused on the public and private regulation of financially distressed companies. Jason has published widely in these areas with 13 books and over 90 papers in scholarly and professional journals. Jason's research is frequently cited in Australian courts, including the High Court of Australia as well as in Commonwealth parliamentary committees and by academic works in Australia and internationally. Jason is an active participant in law reform initiatives through his policy work with the Governance Institute of Australia, the Australian Institute of Company Directors and the Corporations and Insolvency Committees of the Law Council of Australia. Jason is a former President of the Corporate Law Teachers' Association (now SCoLA). Jason is a Fellow of the Governance Institute of Australia and a Fellow of the Australian Academy of Law.

Mr Mathew Mytka is the co-founder and Chief Vision Shaper for Tethix. With experience working in startups through to federal governments and fortune 500 companies, his work has been evolving at the intersection of ethics, trust and digital technologies for more than a decade. He recently served as the Regional Director of the Financial Data and Technology Association for Australia and New Zealand and over the past decade has been a tireless advocate for the creation of verifiably trustworthy data sharing ecosystems. He co-authored the Data Trust by Design toolkit that was at the basis of work he led with the Data Standards Body to create the CX Guidelines and Standards for the Consumer Data Right in Australia and with the Open Banking Implementation Entity for Open Banking in the UK. He's spoken at conferences around the world, co-authored playbooks on digital trustworthiness, contributed to frameworks for meaningful engagement in AI, guest lectured on socio-technical systems and public interest technology and was a 'disrupter of the year' finalist in the InnovationAus awards for 2023. He advises boards and startups and continues transdisciplinary work in responsible innovation, supporting courageous leaders across the public and private sectors to design the organisations, policies, business models and institutions we need as a species to flourish.

Mr Aidan Storer (Treasury (Cth)) is the Assistant Secretary of the Consumer Data Right Implementation Branch in the Australian Treasury. Aidan's branch is responsible for the development of the CDR's regulatory framework, including the drafting of legislation and rules to enhance the operation of the CDR and expand into new sectors. The branch works closely with the other CDR agencies, the Australian Competition and Consumer Commission, Data Standards Body and Office of the Australian Information Commissioner, and actively engages with industry and other stakeholders.

Prior to joining the CDR Implementation Branch in early 2023, Aidan was Head of the Australian Treasury's Perth Office and has served in a range of roles within The Treasury over more than a decade, including in financial services regulation, competition and consumer policy, social policy and international cooperation. Aidan has a Bachelor of Laws from the Australian National University, a Bachelor of Arts (Hons) from the University of Western Australia and a Master of International Relations from Macquarie University.

Concurrent Panels 2: 2.45-4.15pm

Parallel Session 1- Corporations & their Nature **Chair *Timothy Peters* (UniSC)**

Revisiting the Relationship Between the Corporation and Society

Susan Watson

The paradigm that companies are contractually based on their shareholders with resultingly the role of corporate agents to maximize profits for shareholders currently prevails. As a perspective that views the company primarily through an economic lens, it does not stand up legally. But what of the legal lens? We have long accepted that the law regulates and therefore shapes corporations. But the corporate form itself comes into existence and acquires its unique characteristics through the State via incorporation legislation. Those unique characteristics- being an artificial legal person and being based on a fund contributed by but legally separate from shareholders are characteristics that no amount of contracting could create. After inception decisions are made by its organs as governing bodies and the company is operated in the world through its employees and legal agents.

This paper considers how these insights can inform our socio-legal understanding of the modern company and suggests how society might operationalise the corporate form differently. Accepting that the State, or society, bestows unique characteristics on the corporation through incorporation legitimizes the State and society as a whole imposing obligations on corporations either as conditions of incorporation or as the company is operated in the world.

Biography

Professor Susan Watson holds joint chairs in the Faculty of Law, and the Faculty of Business and Economics at the University of Auckland. She is the Dean of the University of Auckland Business School. Professor Watson researches and teaches primarily corporate law and corporate governance. She has a particular interest in the corporate form and in her research seeks to understand how the form developed, why it is so successful, and the economic and societal impact of corporations. Her monograph The Making of the Modern Company focusses on these questions. She is a Research Member of the European Corporate Governance Institute (ECGI).

Revisiting Fiction Theory – Where Did It Come From? Where Is It Now? Where Is It Going?

Tim Connor

This paper on fiction theory will form one of the introductory chapters of a reader on the nature and influence of theoretical understandings of the corporate form. The paper will consider the contextual drivers for the emergence of the fiction/concession theory tradition; how it has travelled across jurisdictions and through time; how it is manifesting itself today; and how it might do so in future. In particular, the paper will examine the extent to which this theoretical tradition enables or constrains different political agendas and regulatory strategies. Whereas the contractarian and real entity traditions normatively expect corporate law to be based on particular understandings of how individuals and organisations function in practice; fiction theorists characterise corporations as legal fictions created by the state and do not expect the state to make these fictions resemble how organisations would operate in the absence of state intervention. To the extent some fiction theorists put normative limits on how states should

regulate corporations (and not all do), those limits tend to be based on the fictional nature of the corporate entity, not on how business organisations function in practice.

Biography

Dr Tim Connor is a senior lecturer at the University of Newcastle. His research focuses on corporate social responsibility, particularly the relationship between voluntary and state-sanctioned governance of workers' rights. Before commencing work at UoN, from 1995 until 2010 he worked for Oxfam Australia, coordinating research and advocacy regarding workers' rights in corporate supply chains. This work involved frequent trips to various countries in Asia to conduct field research and to consult with representatives of companies, trade unions and local civil society groups. He also conducts research into corporate governance and theories of corporate law, and he is a fractional Senior Research Fellow in Melbourne University's ARC Laureate Research Program on Global Corporations and International Law.

The Corporation: A Frankenstein's Monster?

Duncan Wallace

There are two interpretations of Mary Shelley's *Frankenstein*. One interpretation, characteristic of screen adaptations of the story, is to understand Victor Frankenstein's creature as a monster – a horror creature unleashed as a destructive force upon the world. The second interpretation is to understand Frankenstein's creature in a way more consistent with Shelley's original intention – that is, to understand the creature sympathetically. Under this more sympathetic understanding, the creature is not seen as inherently monstrous – rather, its descent into criminality is understood as related to the creature's rejection by its maker and its alienation from society.

In corporate law scholarship and in critical rhetoric the corporation is often compared to a Frankenstein's monster. This, however, is almost systematically according to the interpretation of the *Frankenstein* story characteristic of screen adaptations of it. That is, the comparison of the corporation with Frankenstein's creature is intended to convey the idea of the corporation as inherently monstrous. This paper breaks with this tradition. It argues that if the corporation is to be compared to a Frankenstein's creature this ought to be according to the original, Shellyian interpretation of *Frankenstein*. The corporation ought to be understood sympathetically, its anti-social tendencies not understood as inherent to it, but rather as an outcome (at least partly) of its social relations. Focusing on the investor-owned corporation, this paper suggests that the anti-social tendencies of such entities are related to their enslavement by their shareholders. It proposes that a means whereby such anti-social tendencies could be addressed would be to free such corporations from their enslavement.

Biography

Duncan Wallace is a PhD student and Teaching Associate at Monash Law School. His background is law, philosophy and economics, and his primary research interest is the corporation, towards which he takes an interdisciplinary approach. His research focus is on the ontological status of the corporation, the history of thought regarding the corporation's ontological status, and the history of the development of the publicly- traded business corporation. Before beginning his PhD, Duncan worked in the co-operatives and mutual sector, both as a consultant and in a full- time role.

The 'S Company': A reform model for Australian corporations law to encourage the pursuit of social and sustainable purpose

Apurva Kirti Sharma

The impetus for this paper is the growing body of academic and grey literature demanding a redefinition of the purpose of a corporation to create value for all stakeholders and serve as a force for good. Evidently, scholars, practitioners and courts worldwide are grappling with striking the right balance between shareholder and stakeholder interests. Failure to find a middle ground has created a dichotomy by classifying corporations as for-profit and not-for-profit according to their primary objective or corporate purpose. To that end, this paper considers reform of Australian corporations law by proposing a new corporate legal form for Australia to encourage the pursuit of social and sustainable purpose in the Australian *Corporations Act* 2001 (Cth). I call it the 'social and sustainable for-profit company ('the S Company').

While many other countries have a social enterprise or benefit legislation option for incorporation that allows companies to pursue the dual purpose of profits and social purpose, Australia has no such form. The alternatives to a traditional corporate structure (either propriety limited or public) are a company limited by guarantee under the Corporations Act, a state-based association, or a cooperative. None allow companies to pursue purpose-driven for-profit goals formally. This paper sets out the specific amendments to Australian corporations law to allow for robust debate to begin about not only the idea but also the detail.

Biography

Dr Apurva Sharma is an Australian lawyer. She has a PhD from RMIT University's Graduate School of Business and Law. Her work focuses on corporate purpose and social enterprise law through a business and human rights lens. Her broader research interests lie in corporate law, corporate accountability, modern slavery, migration law and media law. She has been admitted to practice law in Australia, New Zealand, and India.

Parallel Session 2- Disclosure in All its Forms **Chair** *Michael Duffy* (Monash)

'Where the feet of the corporate elite are held to the fire': Parliamentary committees as a site for law reform

Peta Spender

Recent media commentary has noted an upsurge in the activity of Australian parliamentary committees in requiring greater accountability of corporate executives. As stated in a recent article, 'Senate hearings have become one of the few public forums where the feet of the corporate elite are held to the fire'. However, the article also points to a danger: 'it's all framed within each Senator's personal and party-political agenda: … the points they seek to score might not always line up with other stakeholders.'

This presentation will critically examine the role of Parliamentary committees in corporate law reform, focusing upon a case study of the amendments to the continuous disclosure regime in 2020 – 2022 during a broader swathe of 'reforms' to class actions and litigation funding. I will invite discussion about the pros and cons of participation by scholars in this process.

Biography

Professor Peta Spender is an Emeritus Professor and a Fellow of the Australian Academy of Law. She is a Presidential Member of the ACT Civil and Administrative Tribunal and formerly appointed to the ACT Courts Joint Rules Advisory Committee. Her

research passions straddle corporations/financial markets law and litigation. She has published widely in both areas and made submissions to various law reform bodies including the James Hardie Special Commission of Inquiry.

Professor Spender is a co-author of the leading Australian casebook on litigation and specialises in class actions and collective redress. She is also a respected corporate law scholar and her works have been cited by the Australian High Court and in amicus briefs filed in the US Supreme Court. She is currently working on a number of projects that critically examine class actions and the conduct obligations of corporations.

ESG Disclosure Quagmire: Challenges in Corporate Governance

Cecilia Anthony Das

The evolving business landscape burdens directors, necessitating them to navigate an increasingly complex array of responsibilities. Since the emergence of socially responsible business practices in the 1970s, the role of directors and their decision-making processes regarding Environmental, Social, and Governance (ESG) credentials has added another layer of intricacy. Discussions among practitioners and academics have intensified, focusing on the accountability of directors in ensuring accurate and transparent ESG disclosures for the products and services offered by their organisations. Central to these discussions is the extent to which directors should be held responsible for any potential under-reporting or misrepresentation of their organisation's ESG credentials when the disclosures' requirements are unclear.

The duty of care and diligence, a cornerstone obligation for boards of directors, necessitates ensuring the precision of ESG-related disclosures to prevent potentially misleading stakeholders. However, a significant challenge arises from the lack of clarity regarding the requirements for disclosing ESG credentials. Although guidelines have been provided in Australia and New Zealand, the absence of mandatory requirements has resulted in varied disclosure standards among different entities. This absence of standardised disclosure requirements has led to divergent organisational practices, fostering ambiguity and inconsistency in ESG reporting across the corporate landscape.

This paper aims to delve into the complexities surrounding ESG disclosures and their impact on the duty to exercise care and diligence. It seeks to critically review the landscape of ESG disclosures and analyse how these disclosures intersect with the duty of directors to ensure transparency and accuracy in corporate reporting.

Biography:

Cecilia Anthony Das is a lecturer at **Edith Cowan University.** She has been in academia for over 13 years. Her tertiary teaching experience spans teaching in Australian offshore and onshore campuses. She has taught various units, from priestly to non-priestly, within the law discipline. Before academia, Cecilia was a corporate lawyer. She was involved in corporate exercises, including mergers and acquisitions, initial public offers, legal due diligence for foreign investments and private equity placements. She has extensive experience in transnational corporate practice, which she now translates into her teaching. She has completed her PhD in innovation policy, adding another dimension to her area of expertise and teaching. She was attracted to ECU given its environment and agility to respond to the needs of the time. She finds ECU a young university ahead of its times and has no parallels in student engagement.

Biodiversity reporting: Renewed pressure for disclosure on corporate purpose

Ellie Chapple

Each of the components of Environmental, Social and Governance (ESG) performance has been amplified over the last decade, attributed to environment concerns such as global climate change and carbon emissions compacts; in social concerns such as human rights due diligence laws, the UN Sustainable development goals; and governance concerns such as enhanced stakeholder engagement. One new frontier that will test Australian companies' ESG credentials is the area of bio-diversity reporting and the adjacent bio-diversity trading scheme. A company's ESG purpose can be evaluated by its performance (what they do) but primarily focuses on what they say they do. To a predominant extent, Australian companies (disclosing entities) have had the discretion to choose what to disclose as to ESG performance and the mechanism or channel through which to do it. Global frameworks such as the Global Reporting Initiative, the Carbon Disclosure Project, the Taskforce on Climate-Related Financial Disclosures (TCFD) have become well established over the last decade or two. However, since the International Sustainability Standards Board has promulgated new reporting standards for disclosing entities, the TCFD has become the highly influential global standard, and 2024 heralds a new era for Australian disclosing entities with mandatory reporting. ESG may have once been thought of as "nice to have", now disclosing entities will experience legal impositions and expectations on top of what was once was voluntary. The next target area for sustainability standards is the Taskforce on Nature-Related Financial Disclosures (TCND). This paper explores the trajectory of hard and soft laws on climate-change disclosure to comment on the proposed TCND for biodiversity reporting.

This paper addresses the conference theme by examining how boards, through disclosure and reporting, will manage the companies' business so that business strategies are sustainable and create long-term value for all stakeholders.

Biography

Ellie Chapple is a professor in the School of Accountancy, QUT Business School, where she teaches and researches predominantly on corporate, securities and insolvency law and corporate governance and accountability.

What does the social licence to operate look like? Visual rhetoric in CSR reporting.

Alice Klettner and Claire Wright

Corporate reporting on environmental and social issues has developed over recent decades from a few paragraphs in an annual report to colourful, inspirational brochures. This paper explores the visual imagery in these reports and its influence on the business-society relationship over the last 30 years. We are interested in the formative role of corporate social responsibility (CSR) reporting, viewing it as a tool for management to set and shape its own story and persuade readers of the values and priorities of the company. This is highly relevant to debates on the social licence to operate, particularly in the extractive industries where community acceptance of operations has become increasingly important. We ask, how do mining and energy companies use visual rhetoric to construct their social licence to operate? We draw on Greenwood et al.'s (2019) methodology for analysing visual imagery in annual reports, together with Aristotle's rhetorical strategies of ethos (trust), pathos (emotion) and logos (reason), to explore the persuasive tactics of CSR imagery. Our preliminary findings suggest that corporate imagery draws on emotional responses and does not reflect theories of the social licence based on negotiation and contract. Rather, companies have constructed a somewhat paternalistic identity, with the aim of engendering trust. The portrayal of stakeholder engagement in the visual social licence to operate is a much more recent phenomenon.

Biographies

Dr Alice Klettner is a Senior Lecturer at the UTS Business School where she teaches corporate governance and business law. Her research centres around corporate governance regulation and its impact on organisational behaviour. Research interests include the role and responsibilities of boards of directors, regulation of corporate sustainability, B corporations; and gender diversity in leadership.

Dr Claire E. F. Wright is a business historian at the UTS Business School. She is interested in the ways that interpersonal connections affect knowledge, markets, and business strategy, with an focus on corporate social responsibility and diversity in leadership. Claire is currently an Australian Research Council Discovery Early Career Researcher Award (DECRA) Fellow (2022-24), working on the first history of Australia's corporate women across the twentieth and early twenty-first centuries.

Parallel Session 3- Accountability and Regulation Chair *Michelle Worthington* (ANU)

Governance in practice: the reality of board diversity and recruitment in Australia

Kath Hall

Since 2021, the author has been working with Women on Boards – a thriving network working towards increasing the number of women on boards and in leadership roles in Australia. Women on Boards hosts one of the most extensive "noticeboards" of board positions which, along with the program and mentoring support offered by Women on Boards, has been instrumental in improving the representation of women on boards. At the end of 2023, women held 51.6 per cent of positions on Australian Government boards and 34.2 per cent of ASX 200 board positions. This is a significant improvement on recent decades and is due in part to the work of Women on Boards.

In this presentation, the author will draw upon her experience working with Women on Boards and the 2023 data from the organisation's noticeboard, to discuss the progress of board diversity in Australia. She will also outline how board recruitment works, the most common skills and attributes that boards are looking for, and the increasing ratio of paid to unpaid board roles.

Biography

Dr Kath Hall is an internationally recognised corporate governance expert, researcher and writer. She is also an award-winning legal educator with significant experience teaching and mentoring university students and law graduates.

Between 2005 – 2020, Kath worked as an Associate Professor at the ANU Law School teaching courses on Corporate Law, Corporate Governance, Foreign Bribery and Corruption, and Legal Ethics. She is a co-author of *Contemporary Australian Corporate Law*, Cambridge University Press (with S Bottomley, P Spender and B Nosworthy) and since 2020 has been teaching MBA courses on Corporate Sustainability, Women in Leadership, and Diversity and Inclusion. She is the ACT representative for Women on Boards Australia and runs regular programs for new and current directors on corporate governance, directors' duties, and ESG. She is also a non-executive Director of the Womens' Justice Network.

Public Interest Shareholder Engagement in Australia

Samantha Tang

The value of public interest-orientated considerations (eg "ESG") in corporate commercial decision-making is a hotly contested issue in both scholarly and business circles. "Public interest" considerations exclude the purely commercial interests of the company's managers and shareholders, but includes the interests of stakeholders, such as employees, consumers, and members of the public.

Shareholders have emerged as key drivers of corporate engagement on public interest issues. However, how various shareholders work with or around corporate law rules to engage in discourse about and make decisions on investee companies' actions from a public interest perspective remain poorly understood. What opportunities or obstacles does Anglo-Commonwealth corporate law present for investors as they debate and reach outcomes on whether and how companies should act in a way that is consistent with the public interest?

This Paper answers this question by critically examining episodes of public interest shareholder engagement in Australia, including the Rio Tinto scandal, as well as the introduction of climate change and sustainability reporting in Australia. Specifically, this Paper dissects the interaction between legal and non-legal factors in these episodes of shareholder engagement – particularly the extent to which legal mechanisms can cause managers to take shareholder demands more seriously without necessarily increasing shareholders' formal legal powers. To do so, I evaluate the effectiveness of shareholder engagements with reference to a new concept ("asymmetric shareholder voice") that I will develop in this Paper.

Biography

Samantha Tang researches on, and contributes to, research projects on environmental, social and governance (ESG) investing. Her dissertation is on how various shareholders work with or around corporate law rules to engage in discourse about and make decisions on investee companies' actions from a public interest perspective.

Holding Governments to Account for Culpable Conduct: Insights from Corporate Law

Elise Bant

The size, complexity and power of many modern corporate entities, including those functioning through corporate groups, mean that corporations can and do rival nation-states for both public goods and evils. Consistently, there has been considerable focus in recent decades on when, and how, corporations might be treated as public actors, for at least some purposes. Of far less focus has been the converse inquiry: that is, the lessons for governmental accountability from corporate law. Yet corporate law potentially has much to offer those interested in holding governments better to account for serious misconduct. In particular, developing holistic theories and principles of corporate responsibility shed light on group purposes, knowledge and values, which are of keen interest in both spheres. This paper seeks to provoke engagement with this reflective perspective through a thought experiment. It applies a novel model of corporate liability entitled 'Systems Intentionality' to a shameful chapter in the Commonwealth of Australia's public administration: the Robodebt Scheme.

Biography

Dr Elise Bant is a Professor of Private Law and Commercial Regulation, UWA Law School and a Professorial Fellow, Melbourne Law School. Professor Bant's main areas of teaching and research interests lie in the fields of unjust enrichment and restitution law, property, contract and consumer law, civil remedies, equity and trusts. She is author of The Change of

Position Defence (Hart Publishing, Oxford 2009) and co-author (with Justice James Edelman) of Unjust Enrichment (Hart Publishing, Oxford, 2016), editor of two collections of essays, co-author of a leading Australian casebook on Remedies and has published over 70 articles, chapters and other scholarly works in her specialist fields. Elise is also a general editor of the Journal of Equity with Professor Simone Degeling (UNSW) and Associate Professor Ying Khai Liew. Elise has conducted extensive Australian Research Council grant research with Professor Jeannie Paterson on the regulation of misleading conduct at common law, in equity and under statute. She has also been awarded an ARC Future Fellowship to examine corporate liability for serious civil misconduct.

Dual Class Shares Revisited: A Comparative View of Regulatory Competition among Singapore, Hong Kong, Mainland China, and Taiwan

Chang-hsien TSAI

This paper (by Chang-hsien (Robert) TSAI, Hung-Yu (Luke) CHUANG, and Hui WANG) provides a comparative analysis of the regulatory competition among Singapore, Hong Kong, Mainland China, and Taiwan regarding the process, purpose, and actual results of deregulating dual-class shares (DCS) structure. To attract unicorn companies and China concept stock companies to choose public offerings in regional exchanges, Hong Kong, Singapore, and Mainland China focused on announcing amendments to the listing rules in 2018 to allow the public offerings of DCS-structure enterprises while considering their preference for the ownership structure of unicorns. We employ the regulatory competition theory to analyze the competition of jurisdictions and how to accelerate the transplantation and convergence of corporate governance laws and regulations to a certain extent. We find that Hong Kong, Singapore, and Mainland China have transplanted the regulatory framework of DCS structure listing and added the shareholder protection and sunset restriction provisions, which presents a convergence of both form and function among them. We also discuss that the reason for non-convergence in Taiwan is mainly path dependence. By analyzing the phenomenon of DCS competition in Hong Kong, Singapore, Mainland China, and Taiwan, the paper not only enriches the theory of regulatory competition but also studies how this competition promotes the transplantation and convergence of DCS structure in corporate governance laws and regulations. We contribute to the existing literature by providing a comparative view of regulatory competition among these four jurisdictions and examining the potential impact of the US-China trade war on the deregulation of the DCS structure.

Biography

Chang-hsien Tsai (LL.B., LL.M., National Taiwan University; LL.M. in Corporate Law, New York University School of Law; J.S.D., University of Illinois College of Law) is a Professor of Law and Business at National Tsing Hua University in Taiwan, where he directs the Institute of Law for Science and Technology. His research interests focus on comparative corporate law and comparative financial regulation. As the author or co-author of over 50 scholarly outputs, his research was featured on the Columbia Law School Blue Sky Blog and the Oxford Business Law Blog. He has been an advisor on corporate governance reform in Taiwan.

Parallel Session 4- Business Structure & its Impact

Chair *Anil Hargovan*

The Corporate Purpose of Australian Government-Owned Businesses

Victoria Schnure Baumfield

For various reasons, Australia historically looked to government to provide necessary goods and services such as water, electric power, and public transport. The 1980s-1990s, in line with a global trend towards neoliberal economic reforms, saw a shift from the direct provision of government services to service provision by either decentralised government-owned businesses (GOBs) (ie, corporatisation) or privatised entities. Even where service delivery remains in the hands of government entities, those businesses are instructed to operate on a for-profit basis (commercialisation).

Australia is rather unique in how many commercialised businesses remain under government ownership. However, the continued use of these structures and focus on profits raise questions about what the purpose of these government business enterprises should be. Do they exist merely to provide revenue streams for their government owners or does government ownership imply a greater public or social purpose?

This presentation considers the question of the corporate purpose of corporatised Australian GOBs and concludes that obligations to operate on commercial, profit-seeking terms must be read in the context of the greater functional purposes for which these businesses were created and continue to exist. Indeed, the typical legislative frameworks relevant to GOBs specifically mandate that such enterprises must be operated in ways that take account of the public interest, including sustainability concepts such as the precautionary principle. These enterprises' corporate purpose can be seen as fundamentally to facilitate social and economic objectives in the public interest, even if *how* they are expected to do so is on a commercial basis.

Biography

Dr Victoria Schnure Baumfield is an Assistant Professor of Law at Bond University and a member of the New York Bar. She holds a BA in French and International Relations from the University of Pennsylvania, JD from Columbia Law School, and PhD in law from the University of Queensland. Victoria practiced commercial litigation at a large New York law firm for nine years before moving to Australia in 2006 and entering academia. Tory's research focuses on corporate law, corporate governance, and public sector governance, particularly in the context of government-owned businesses, public utilities, and the public/private divide.

Corporate Collective Investment Vehicles: Where are we now?

Tamara Wilkinson

In 2022, Australia introduced a new Corporate Collective Investment Vehicle (CCIV). CCIVs are corporate umbrella vehicles under which a number of sub-funds are established. They are intended to replace managed investment schemes, which are typically structured as trusts and are complex and poorly understood both locally and internationally. CCIVs are attractive primarily as retail (rather than wholesale) funds and are likely to be used for investment

strategies similar to those run through managed investment trusts. One of the key benefits of CCIVs is that they are taxed in the same way as attribution managed investment trusts and their members, meaning that they receive flow-through taxation. This makes CCIVs Australia's only corporate vehicle with flow-through taxation (something that is relatively more common overseas). Although their introduction is a positive step for Australia's business environment, the rules around how CCIVs work, and how they are taxed, are complex, and may not yet be well understood. It is also not clear what level of uptake the vehicle has seen. It is therefore worth examining, a year and half on from their introduction, how the new CCIVs stand in Australia, and whether they are likely to meaningfully contribute to Australia's suite of investment vehicles.

Biography

Dr Tamara Wilkinson is a lecturer in the Faculty of Law at Monash University. Her research centres on tax regulation and policy, specifically in the context of government venture capital incentives. Her most recent book, *Venture Capital Investment and Government Incentives: Law, Research and Policy Development*, is forthcoming in 2024 (Hart Publishing). Tamara teaches Private Investment Law, an innovation subject based on her research area, at the Masters and undergraduate levels. She also teaches Corporations Law and Lawyer's Ethics into the undergraduate and Juris Doctor programs.

Title: The Social Responsibility of Sporting Organisations and Clubs: Stay in the Lane or Widen the Lens?

Annette Greenhow

Sporting organisations and clubs are essential in society, entrusted to produce, deliver and promote their sport. Acting in what Julia Black describes as an 'intermediary' role, sporting organisations at the national level are guardians of their sport, linking governments' health and sport policies to the broader community. In return, sports organisations receive significant taxpayer funding and support. Fostering and optimising legitimacy as critical actors, sporting organisations enjoy access to 'green light' regulatory exemptions and autonomy through a traditional 'hands-off' regulatory posture of state actors.

Since the 1980s, many popular Australian sports' organisational characteristics and functions have evolved from loosely structured amateur associations into highly profitable and valuable businesses utilising the corporate form. Generating revenue from sources including the sale and licensing of broadcasting rights and sponsorship arrangements, the corporatisation and commercialisation of Australian sport added additional complexity. This created tensions in managing multiple stakeholders, balancing public and private interests and enacting their social responsibility.

This presentation examines how sporting organisations have traditionally fostered and optimised their legitimacy as critical actors. However, several high-profile events demonstrate how stakeholder activism and interventions influenced corporate behaviour in the sports domain. Institutional theory provides a framework through which to examine these events. This analysis illustrates the heightened social role of sporting organisations and their widespread impact on social life and signifies a shift in the balance of traditional attributes of stakeholder salience.

Biography

Dr Annette Greenhow is an Assistant Professor in the Faculty of Law at Bond University. Annette's teaching and research interests focus on sports law, corporate law, regulation and

governance. Annette's early interest in corporate law focused on Australia's statutory business judgement rule. Today, Annette's research interests examine corporate social responsibility in sport governance and stakeholder salience in corporate decision-making.

Lack of Investor Confidence in Securities Markets: Bangladesh Should Learn from Australian Overhauls for Its Initial Public Offerings

S M Solaiman

Disclosure regulation is currently the dominant regulatory philosophy for primary securities markets worldwide. A prominent argument for this philosophy is that regulators are unable to assess the merits of public offers properly, therefore, they should not take any responsibility for merit assessment. The disclosure-based regulation (DBR) unrealistically puts confidence in retailers' ability to judge the merits of IPOs, regardless of their serious lack of financial literacy. This lack is perilous in underdeveloped markets. Many of them have, nonetheless, adopted this sophisticated philosophy irrespective of its usefulness in their domestic markets. Bangladesh is one of them which introduced the DBR in 1999 relying on foreign advice. This philosophy allows any companies to go public requiring them to tell the "whole truth" to the public. Problems around the DBR are manifold. Most critical of them are lack of truth in disclosures, complexity and extent of information disclosed, investors' inability to understand and utilise disclosures, and behavioural biases of investors − which collectively render the regulation ineffective for retailers. The Bangladesh market has been striving to restore investor confidence unsuccessfully for decades. Whilst the equity market is struggling to survive, the regulator has opened a bond market which remains "small and dull" too. This paper argues that Bangladesh should make a paradigm shift from the pure DBR to a hybrid of both merit and disclosure regulation in line with, but going beyond, the reforms recently made in Australia under its "design and distribution obligations" regime. This may initially decrease IPOs, but it should be borne in mind that no egg is better than having rotten eggs to survive.

Biography

Associate Professor S M Solaiman has been in the legal academia since 1990. He teaches corporate law, and most of his publications are concerned with corporate regulation for stakeholder protection. He has published 68 research articles, 4 book chapters and presented 55 conference/seminar papers across continents− North America, Europe, Australia and Asia. Solaiman's works have been cited in the research publications of 53 countries worldwide. He had been a visiting scholar at several top-ranking universities situated in Europe, Asia, Australia and Oceania. He obtained 12 internal and external grants and is a recipient of a *Vice-Chancellor's Award for Interdisciplinary Research 2020* at the University of Wollongong.

Concurrent Panels 3: 4.30-6pm

Parallel Session 1- Directors & their Duties Chair *Edith I-Tzu Su* (NCHU, Taiwan)

Mandatory Corporate Governance Accountability For Senior Executives

Tim Bowley and Steve Kourabas

Imposing direct accountability on corporate executives through corporate law is a controversial issue. The controversy flows from an unresolved debate about the scope and role of the

corporation in society and, as a result, the scope and role of corporate law in holding executives accountable for the negative externalities associated with corporate misconduct.

One side of this debate conceives of the company as a private domain whose affairs should be determined primarily by the private actors involved in it. On this account, executive accountability is primarily a private matter between a corporate executive and their company. Any externalities generated by corporate misconduct must instead be addressed through government intervention under other areas of law. The other side of this debate adopts a public conception of the company which emphasises the importance of corporate activity being responsive to the public interest and subject to public accountability. It contemplates a more expansive role for corporate law in subjecting corporate bureaucracy to public accountability.

This paper argues, on both normative and practical grounds, that there is a role for corporate law to play in subjecting corporate executives to mandatory, and publicly enforceable, standards of behaviour. The paper critically examines the existing Australian approach, including the 'officer' regime in the Corporations Act. It argues that this regime is marred by conceptual confusion and technical complexity and is under-enforced. The paper argues that a more appropriate response may involve applying recent reforms to accountability in the financial services sector to a broader subset of Australian corporations.

Biographies

Dr Steve Kourabas is a Senior Lecturer at Monash University Law School. He works predominantly in the areas of financial regulation and corporate governance. Steve has a particular focus on prudential regulatory reform and the effects of technological innovations on corporations law and corporate governance. Steve obtained his doctoral degree from Duke Law School in the area of global financial regulation. He is the Deputy Chair of the Academic Committee of the Banking and Financial Services Law Association. Prior to entering academia, Steve held positions as counsel for the Victorian State Government and as Legal Counsel for Telstra.

Dr Tim Bowley is a corporate law researcher and experienced corporate lawyer. His research explores contemporary regulatory debates in corporate and securities law, with a focus on the role of shareholders in corporate governance. Tim has a particular interest in shareholder activism which is the subject of his 2023 monograph, *Activist Shareholders in Corporate Governance: The Australian Experience and its Comparative Implications* (Hart). Tim is a member of the Centre for Commercial Law and Regulatory Studies at Monash University Faculty of Law, a visiting researcher at the University of Sydney Law School, and a consultant at the Australian law firm, Johnson Winter Slattery.

Corporate Compliance Structures and Director Liability for Environmental Offences

Rangika Palliyaarachchi

Discussions surrounding corporate non-compliance have become a part of our daily discourse. Hardly a day goes by without some mention in the media of a scandal involving corporate non-compliance. While corporate compliance is a matter that is relevant for any field, the repercussions of corporate non-compliance practices in relation to the environment are profound and extensive, potentially devastating economies, political systems, ecosystems and even societal foundations. Therefore, it is no surprise that numerous environment-related statutes impose legal liability on the directors and offices of the corporation for environment-related offences committed by a corporation in Australia. The Environmental Management

System (EMS), a form of Corporate Compliance Structure (CCS), has been adopted in almost all industries to develop a framework within which corporations can establish structures that ensure compliance with regulatory requirements and provide a basis for raising the due diligence defence for senior officials of a corporation. It must be noted that CCSs, including EMSs, have been hailed as the cornerstone of corporate compliance in modern society and as a solution to the liability imposed on senior officials of a corporation. Therefore, this paper examines the relationship between the EMSs and the due diligence defence by investigating the manner in which the courts have considered EMSs when determining the liability of directors and officers for environment-related offences and to what extent the EMSs were relevant for the judicial decision-making process. Such an understanding is imperative in determining the significance of CCSs as a mechanism for substantive compliance with laws.

Biography

Dr Rangika Palliyaarachchi is a Lecturer at the School of Law Western Sydney University. She teaches corporate law and enterprise law, and her research interests lie broadly in commercial law, including but not limited to corporate law, consumer law and intellectual property law. Over the past four years, her research interests have focused mainly on understanding how organisations and, more specifically, corporations construct the content and meaning of laws. Rangika examines how socio-legal frameworks can be used to understand the meaning-making process to design better corporate regulatory regimes that achieve substantive compliance with laws.

Mandatory Human Rights Due Diligence and Director Liability: Bridging the Enforcement Gap

Alan K. Koh

Recent enacted and proposed legislation on mandatory human rights and environmental due diligence (mHREDD) introduce public law sanctions and civil liability for corporations failing to exercise due diligence or reasonable care in managing such ESG risks. At present, there appears to be little appetite in the ongoing debate about direct enforcement of mHREDD regulation against corporate managers. This enforcement gap may be unsurprising given that enforcement of directors' (and officers') duties in large, solvent public corporations has traditionally been rare and exceptional in most jurisdictions. Nevertheless, the global trend towards acceptance of mHREDD regulation means that the managerial enforcement gap deserves urgent attention. Even in jurisdictions that have yet to implement their own specific mHREDD regulations, corporations are increasingly exposed to potential liability under foreign law. Mechanisms by which managers can be held civilly liable in cases of corporate breaches of foreign law should also be considered.

This paper compares managerial civil liability regimes for corporate regulatory breaches in selected common and civil law jurisdictions. The possibilities contained in existing legal mechanisms for holding managers liable in connection with corporate breaches of present and future mHREDD regulation – including under foreign law with extraterritorial scope – would be of value not only to legislators and regulators taking mHREDD seriously, but also potentially victims of corporate irresponsibility seeking civil remedies.

Biography:

Dr Alan K Koh is Assistant Professor of Business Law at Nanyang Business School in Singapore and Research Scholar at the Kobe University Graduate School of Law. His research

focuses on comparative corporate law and governance, with particular interests in Singapore and Japan. He is also interested in comparative law and dispute resolution in Asia, particularly in cross-border contexts raising issues of private international law. He is the author of *Shareholder Protection in Close Corporations: Theory, Operation, and Application of Shareholder Withdrawal* (CUP 2022).

The Saudi Companies Law 2022: Duties of Directors between the Common Law and Civil Law Influence and the Sharia Judge Application

Hussain Ahmad Hassan Alobaidi

Many scholars noticed that the Saudi Companies Laws of 1967 and 2015 have been modelled after the Egyptian and French one. With the issuance of the new Companies Law 2022 (SCL 2022), the Saudi lawmaker has taken a new path, considering not only the French Companies Law but also the British, American (Delaware State) and Singaporean one, for instance. Introducing duties of directors in the SCL 2022 reflects such a new path. It is argued that the codification of duties of directors (duties of care and loyalty (s 26), conflict of interest (s 27), and the business judgment rule (s 31)) will fill a gap that the previous Companies laws did not. Further, it will enhance the ability of judges to issue concrete judgments dealing with directors' misbehaviours. Yet, codification of the duties does not stem out of Saudi precedents. While the USA, for instance, has many precedents that help in understanding the business judgment rule, the Saudi lacks such precedents. Indeed, the issued precedents under the previous Saudi Companies Laws did not deal with duties of directors as those in the SCO 2022. Accordingly, this paper argues that the codification of duties of directors without considering the Saudi legal history influenced by civil law system and Sharia will be of less benefit in filling the gap.

Biography

***Dr Hussain Ahmad Hassan Alobaidi-* Attorney**, The Law Firm of Salah Alhejailan Law Firm in Association with Freshfields Bruckhaus Deringer LLP, Khobar, Saudi Arabia, September 1, 2015 – Jan 18, 2018

Parallel Session 2- ESG

Chair *Guzyal Hill* (CDU)

Evaluating the Influence of ESG on India-Australia Trade Partnership: A Critical Analysis

Avin Tiwari & Sunavo Ray Chowdhury

India and Australia, both sunshine states in their own rights, have come a long way, individually as nations and bilaterally as trade partners over the years. The bilateral trade between them stands at an impressive 46.5 billion Dollar as of 2022. Environmental Sustainability and Governance (ESG) has emerged as a key factor in furthering the trade interests of both nations, demonstrated by the willingness of both countries to include ESG into their corporate laws based on the recommendations of the United Nations Conference on Trade and Development (UNCTAD). ESG further, has become a vital element for Investment Arbitration which could cause Expropriation by Judicial Mandate.

With this paper, the authors intend to qualitatively assess the impact of ESG on India-Australia trade and predict future trends based on the recent developments in both the markets and a critical review of the existing literature. The authors observe that, the Australian Constitution

under Section 51(xxix) and the Indian Constitution under Art. 48 A and also Articles 38, 39, 41 and 46 provide adequate ground for ESG, however, in Indian bilateral investment treaties (BITs), FET is not construed within the framework of International Minimum Standards. This difference in legal interpretation, application along with non-compliance with ESG norms increases investor vulnerability, therefore, a harmonious, cohesive and common ground on ESG is desirable for mutually fruitful corporate union.

Biographies:

Mr. Avin Tiwari is working as an Assistant Professor in the School of Law (VSL), VIT-AP University, Amaravathi, A.P., India and pursuing doctoral research from Rajiv Gandhi School of Intellectual Property Law, IIT Kharagpur. Mr. Tiwari has done his graduation in Law (LL.B) from the prestigious University of Delhi and post-graduation (LL.M) with University Gold Medal from the University of North Bengal, India. He also holds the prestigious Junior Research Fellowship awarded by UGC. His research area & interests are Corporate Law and Taxation Law. He aspires to excel as an efficient corporate law and tax law teacher and actively pursue legal research and build a pedigreed scholarship in his area of interests. email id: avin.tiwari@vitap.ac.in

Mr. Sunavo Ray Chowdhury is a legal researcher cum law student, (pursuing BA. LL.B) in the School of Law (VSL), VIT-AP University, Amaravathi, A.P., India and has a keen interest International Corporate Law and International Investment Law. Mr. Ray Chowdhury has actively participated in the EULab Summer School on Labour Migration hosted by the Department of Law of University of Napoli 'Federico II' under the ERASMUS+ programme of the European Union, and has presented in other notable conferences. He was also awarded the VIT-AP Merits award consecutively for the years 2021, 2022 and 2023. His research area and interests are Corporate Law, Cross-Border taxation and International Investment Law. He aspires to excel as an efficient Investment Lawyer with a deep knowledge and understanding of Corporate Law and actively pursue legal research in the new uncharted areas of law. email id: sunavo.20bal7010@vitap.ac.in

Corporate Purpose and Human Capital Management in the ESG Framework: A Comparison Between the EU and US

Lance Ang

Economic inequality has prompted a re-examination of the relationship between capital and labour. An important development has been the increasing recognition of the importance of human capital management (HCM) as part of the firm's corporate purpose under the ESG framework. The emergence of HCM disclosure and the management of human capital risks under the ESG framework are significant for several reasons. First, what has before now been largely a function of labour law has become a feature of corporate law and finance, as part of the "S" in ESG. Second, the management of sustainability risks is no longer simply a matter of ethics or CSR, but a legal obligation. At the same time, HCM disclosure is still in its infancy and is quickly evolving. This makes it challenging to determine the scope of HCM information that should be made available to investors and, most importantly, what purposes HCM disclosure should serve. To this end, this paper compares the divergent approaches between the EU and US towards HCM disclosure under their respective ESG frameworks. Both approaches vary in terms of the scope of disclosure required, the interpretation of sustainability risks and the purpose of such disclosure requirements. The US and EU merit comparison given their differences in the role of labour in corporate governance. This paper contributes to the existing debate by distinguishing between different conceptions of

sustainability, and, in turn, different approaches in the management of sustainability risks with respect to human capital as part of the corporate purpose.

Biography

Lance Ang is a Lecturer at the School of Law, Singapore University of Social Sciences and has held Visiting Fellowships at the University of Cambridge and City University of Hong Kong. Lance has received several prizes for his research, including the High Commendation Prize from the Corporate Law Teachers Association. He has published his work in several leading journals, including the Capital Markets Law Journal, Journal of Private International Law, and the Asian Journal of Comparative Law. Lance has been invited to present his scholarship at leading law schools, including the University of Oxford, Stanford Law School, and UNSW Law.

Parallel Session 3- Financial Services *Chair Anton Didenko (UNSW)*

Innovation, Disruption and Consumer Harm: Regulating Buy Now Pay Later in Australia

Lucinda O'Brien

'Buy now pay later' ('BNPL') has been described as 'an Australian fintech growth story', an innovative and disruptive financial product that has fundamentally changed consumers' spending habits and transformed the global market for consumer credit. Providers of BNPL maintain that they promote financial inclusion, allowing consumers to avoid the fees and interest associated with other, more expensive financial products. Yet critics say that BNPL is too readily accessible and that it can cause serious hardship, particularly for low-income earners. This paper outlines the findings of an empirical study conducted by a team at Melbourne Law School, as part of a wide-ranging investigation of harmful financial products and their regulation. The study entailed a series of focus groups with consumer advocates, including community lawyers and financial counsellors, and an online survey of consumers who had used BNPL, either alone or in conjunction with a payday loan or pawn loan. It sought to gauge the impact of BNPL on Australian consumers and to assess the risk that it can cause or exacerbate financial hardship. The study confirmed that BNPL can lead to unmanageable debt and significant hardship for some consumers. At the same time, it found that many consumers, including some low-income earners, value BNPL as a convenient and cost-effective way to manage urgent or unexpected expenses. Drawing on these findings, the paper offers support for the Commonwealth Government's current proposal to bring BNPL within the ambit of the *National Consumer Credit Protection Act 2009* (Cth), but with 'modified' responsible lending obligations.

Biography

Dr Lucinda O'Brien is a Melbourne Postdoctoral Fellow at Melbourne Law School (MLS). From 2014 to 2023, Lucinda was a Research Fellow at MLS, where she collaborated with Professor Ian Ramsay and Associate Professor Paul Ali on major empirical studies of Australia's personal insolvency system and harmful financial products such as payday loans, pawn loans and 'buy now pay later' services. In 2024, Lucinda will commence her postdoctoral project, a cross-disciplinary study of bankruptcy in Australian law and literature from 1788 to the present.

Enhancing Private Law Remedies for Cryptocurrency Fraud

Aaron Lane

This paper provides a comparative analysis of legal mechanisms to addressing fraud, scams and financial crime using cryptocurrency. Although illicit transactions account for a small portion of total cryptocurrency transaction volumes, individuals incur significant private losses and there are unique enforcement challenges in the digital finance ecosystem.

The prevalent legal approach to addressing cryptocurrency-based fraud is public enforcement mechanisms. That is, the application of corporate regulation that imposes obligations on digital currency exchanges (e.g., designated services under the Anti-Money Laundering and Counter-Terrorism Financing Act 2006; proposed amendments to the Corporations Act 2001 to require Australian Financial Services Licensing). However, victims of cryptocurrency-based scams and fraudulent schemes already have private causes of action against perpetrators. Accordingly, this paper draws on the New Comparative Law and Economics (Shleifer et al. 2003, 2005) to examine the trade-offs between public and private enforcement as institutional strategies.

The paper then explores the complexities of these private law remedies, particularly the information challenges in identifying perpetrators – and the civil procedure mechanisms available to overcome these issues (e.g., preliminary discovery, accessorial liability, secondary liability). Despite these remedies and mechanisms, significant enforcement and jurisdictional issues remain.

The paper concludes by making recommendations to enhance private law remedies. In summary, the paper argues that in times where corporate-societal interactions are increasingly influenced by public enforcement, a renewed focus on strengthening private enforcement rights is essential for effective regulation of cryptocurrency-based fraud.

***Biography**:*

Dr Aaron M. Lane is a Senior Lecturer in Law and Senior Research Fellow with the RMIT Blockchain Hub at RMIT University. He holds honorary appointments at the University of Divinity and the UCL Centre for Blockchain Technologies. His research is focused on the law, economics, and governance of new technologies – and the intersection between innovation and regulation. Aaron is also a Barrister at the Victorian Bar practicing in commercial law, public law, and white-collar crime.

"Mission Critical" within the Financial Services Industry

Zehra G Kavame Eroglu

When two of Boeing's 737 Max aircraft crashed within five months of each other resulting in the death of 346 people, shareholders filed a suit against the directors for breach of duties. The Delaware court noted, while safety was "essential and mission critical" to Boeing's business, there was no board committee assigned the specific task of overseeing airplane safety.

Turning to Australia, when Storm Financial collapsed, many clients, the majority of whom were retirees or nearing retirement, suffered massive financial losses. With little or no prospect of rebuilding their financial position, these clients lost their investment, their homes and their life savings and still had significant debts outstanding. In a case instituted by ASIC, the Federal Court of Australia decided that the company's former directors, the Cassimatis couple, breached their directors' duties when they caused the company to violate certain provisions

of the law that could lead to its collapse. The core mission of Storm Financial was to provide financial planning and investment services to its clients whereas the advice the company provided to those investors was inappropriate to clients' circumstances.

While these cases involve different industries, the concept of "mission critical" is common to both and can be relevant in understanding the severity and consequences of their respective failures as well as implications for the boards. The paper looks at recent incidents in financial services in Australia and argues that each serves as a stark reminder of the importance of understanding the "mission critical" within the financial services industry.

Biography

Dr. Zehra G Kavame Eroglu is a Senior Lecturer of Corporate Law & Finance Law and the Director of Master of Accounting and Law at Deakin Law School. Zehra has a Master of Laws (LL.M.) from Columbia Law School and a Doctor of the Science of Law (S.J.D.) from Fordham Law. She taught Comparative Corporate Law at Fordham Law School and later taught at Swiss International Law School as the Course Leader of their Corporate Law Module. Zehra also worked as a Postdoctoral Research Scholar at Columbia Law School.

Finfluencers, ftw!

Akshaya Kamalnath

Social media has disrupted corporate law in many ways and continues to do so. Influencers on social media who have started having influence in the space of personal finance which includes providing ideas and tips about how and where to invest, have come to be known as finfluencers. Whether or not what they do qualifies as 'financial advice' has been a matter of regulatory interest across jurisdictions. This paper provides an account of the rise of finfluencers and argues that social media has enabled them to connect corporations and society like never before. The paper further argues that it is key to ensure that such regulation address the dark side of the finfluencing world without stymieing the many benefits. The paper's aim is to stake out the phenomenon in the context of broader social media disruptions of corporate law.

Biography:

Dr Akshaya Kamalnath is an Associate Professor at the ANU College of Law. Akshaya Kamalnath's research and teaching areas are corporate law, corporate governance, and corporate insolvency law. She has published on areas such as diversity within corporations, corporate social responsibility, AI and corporate governance, and equity crowdfunding regulation.

Kamalnath has also worked as a Lecturer at AUT Law School in Auckland and Deakin Law School in Melbourne. Prior to joining academia, she worked in a leading law firm in India.

Program- Tuesday 6 February 2024

Concurrent Session 4: 9.00-10.45

Parallel Session 1 Directors' and Officers' Duties

Chair *Irene-Marié Esser* (Uni of Glasgow)

Directors' Duty to Monitor
Pamela Hanrahan and Tim Bednall

This paper examines non-executive directors' legal liability to the state and other stakeholders in circumstances where there has been a conduct, compliance, or operational failure by their company. It continues our ongoing work that critically examines the role of individual accountability (including for negligence) in achieving corporate compliance. Here, we focus on non-executive directors' oversight responsibilities related to corporate risk management. The paper charts the sources and recent evolution of specific and general duties to monitor in Australia and elsewhere, and makes some observations about likely future developments.

Biographies

Dr Pamela Hanrahan (Johnson Winter Slattery) is a lawyer and non-executive director specialising in corporate law, collective investments and superannuation law, financial services regulation, and corporate governance.

Pamela is Chair of the Business Law Section of the Law Council of Australia and a member of the Corporate Governance National Committee of the Australian Institute of Company Directors. She is a Senior Fellow of the Melbourne Law School and a former Professor of the UNSW Business School and former Regional Commissioner of ASIC. Pamela is the author or co-author of several major legal texts including *Corporate Governance* (2017), *Securities and Financial Services Law* (2021), *Directors' Legal Responsibilities* (2022), and *Managed Investments Law and Practice* (1998-2023).

Tim Bednall (King & Wood Mallesons) practices in mergers and acquisitions, capital markets and corporate governance. Tim has advised Commonwealth and State governments and a number of leading companies in major M&A transactions, including Fairfax, Macquarie, China Molybdenum, Medibank Private, Brambles, BG Group, Telstra, Alinta Energy, Challenger, Glencore / Xstrata, ASX, Stockland and Westpac.

Tim was the Chairman of the Australian partnership of KWM from January 2010 to December 2012, during which time the combination between King & Wood and Mallesons Stephen Jaques was negotiated and implemented. He was also Managing Partner of M&A and Tax for KWM Australia from 2013 to 2014, and Managing Partner of KWM Europe and Middle East from 2016 to 2017.

Directors' Duties and Shareholder Power – Public-isation and Duty-fication
Pearlie Koh

Corporate purpose is in the limelight. As the world emerges from the Pandemic only to face other pressing environmental and humanitarian issues, calls to expand the idea of corporate purpose to embrace more than shareholder value are becoming increasingly louder – as Dan Puchniak puts it, "corporate governance around the world is living a woke moment". Indeed, it may be said that the philanthropic efforts of the many companies in redirecting profits to help in the recent Pandemic demonstrate in effect the stakeholder view of corporate purpose being put into practice. There is however no real consensus yet as to whether it should be a legal

requirement for companies to commit to a purpose beyond profit-making. Not only are there obvious questions as to the utility and efficacy of any such requirement, there are also difficult scoping and definitional issues, and perhaps more importantly, the impact that mandating purpose will have on the company's commercial freedom.

While corporate purpose defines the outer limits of managerial power as a function of authority and a measure of directors' duty, at a more fundamental level, the determination and enforcement of purpose is, for the larger part, dictated by shareholders upon whom the law endows with strong participatory and intervention rights. Perhaps the better question should be whether the existing legal framework for corporate governance can be tweaked at a different level to support a wider concept of "corporate purpose". I consider this question thus from a "duties" perspectives – the "public-isation" of directors' duties and the "duty-fication" of shareholder power.

Biography

Pearlie Koh is an Associate Professor at Singapore Management University.

Volunteer Charity Directors' Duty of Care and Diligence: The Corporatisation of Addressing Accountability Regulation and Unintended Consequences for Board Volunteering

Jeanne Nel

Directors' duties and personal liability, pecuniary fines and disqualification following non-compliance are regulatory tools designed to enforce accountability. Such regulation is often justified as essential to restore and maintain public trust in charitable organisations. However, volunteer leader recruitment poses a challenge in the charity and not-for-profit sectors, with research indicating a strong correlation between volunteer leader conduct regulation and a decline in leadership volunteering. The recruitment challenge impacts the sector's ability to fill board positions and pursue their objectives. Charities and their leaders play a vital role in Australian society. They are often regarded as the linchpin that holds our society together. It is, therefore, imperative to develop an appropriate approach to regulating volunteer charity directors' conduct to ensure accountability without unduly hindering leadership volunteering. This paper provides a historical perspective on specific aspects of accountability regulation within the charity sector, illustrating the impact of applying a commercial lens to our understanding of leader accountability benchmarks and the regulation of leader accountability in incorporated legal forms.

Biography

Jeanne Nel is a PhD Scholar at La Trobe Law School. Jeanne was a senior lecturer in the Department of Business Law and Taxation at Monash University. She taught Corporate Law and Business Law at the South African campus of Monash University (2001-07) and taught Family Law, Deceased Estates and African Customary Law at the University of Johannesburg, Vista University and the University of the Free State (1994-2000). In Australia, Jeanne has taught Corporate Law and Business Law at La Trobe University and Corporate Law, Corporations Law and Marketing Law at undergraduate level and Corporate Governance at postgraduate level at Deakin Law School. Jeanne is an advocate of the High Court of South Africa who holds a master's degree in human rights law.

Safe Harbour or Quiet Revolution? Companies Act 1993 (NZ) s 131(5)

Jonathan Barrett

New Zealand's Labour government (2020-23) has been criticised for its failure to act on its absolute parliamentary majority to deliver progressive policy outcomes. Nevertheless, in 2021, Duncan Webb, a Labour MP and previously a law professor with commercial law specialisation, introduced a member's bill that inserted an additional sub-section to *Companies Act 1993* (NZ) s 131 which became law in the latter days of the Labour government. In an ostensibly progressive move, this addition brings environmental, social, and governance (ESG) considerations within the ambit of directors' fundamental duty of loyalty.

Following the English common law tradition, section 131 provides that 'a director of a company, when exercising powers or performing duties, must act in good faith and in what the director believes to be the best interests of the company'. The 'company' has traditionally been understood to be synonymous with the general body of shareholders. The new subsection (5) provides 'in considering the best interests of a company … a director may consider matters other than the maximisation of profit (for example, environmental, social, and governance matters)'.

Does this innovation act as a safe harbour for directors, who may have been challenged by traditionalist shareholders on their ESG-motivated decisions, or does it, perhaps, represent carte blanche for directors to give full effect to stakeholder theory? This paper unpacks the amended section 131 and compares it specifically with *Companies Act 2006* (UK) s 172 but also considers comparable provisions of other jurisdictions. Unless, the new National-led government repeals the provision, it is possible that section 131(5) may have quietly revolutionised directors' duties in New Zealand. Conversely, the loose wording of the provision may have inadvertently entrenched shareholder primacy.

Biography

Jonathan Barrett is an Associate Professor at the School of Business and Government, Victoria University of Wellington Te Herenga Waka. Jonathan teaches company law and taxation. His PhD applied fundamental human rights to a taxation system, and he has published many articles the role of human dignity in everyday situations. He has a particular research interest in the role of the corporation in a human rights state.

CEO Benevolence and Corporate Culture: Addressing Top Management Team Gender Diversity

Ashesha Weerasinghe, Larelle Chapple & Alexandra Williamson

The expression "tone at the top" as used by corporate governance scholars is a shorthand way of articulating the complex concept of corporate culture. There are arguably several ways to observe the corporate "tone at the top", in this research we argue that corporate culture may be viewed by conflating the characteristics of the senior executives with the corporate personality, as expressed through particular corporate events or behaviours. We test the impact of corporate culture on the pervasive business problem of the under-representation of women in corporate leadership. Despite numerous mechanisms initiated by regulators and organizations, Australian companies have not successfully achieved gender balance in top management teams. Understanding the determinants of top management team diversity potentially overcomes one of the oft-cited barriers to gender equality in leadership, the so-called glassceiling. We examine the influence of a unique CEO characteristic, Benevolence (measured by the involvement in "for purpose" organization leadership positions), on top management team diversity . We argue that a CEO with broader societal business experience in a for purpose organization (the benevolent CEO) encourages a more benevolent "tone at

the top" and such companies will exhibit strategies to break through the glass-ceiling in terms of more gender diverse top management teams. Such an investigation sidelines discussion as to economic imperatives and examines top management team diversity as the right thing to do for corporate culture. This paper addresses the conference theme of "Shifting Connections Between the Corporation and Society" by emphasising that societal expectations of corporate leaders inform legal norms of corporate behaviour. Keywords: Corporate culture, Top management team diversity, Gender diversity.

Acknowledgements: This paper is based on Ashesha Weerasinghe's Doctor of Philosophy research project conducted under a QUT and Australian government scholarship.

Biographies:

Ashesha Weerasinghe is undertaking a Doctor Philosophy in Accounting at QUT Business school and a sessional academic, teaching Coporations Law. Her current research is on corporate governance, examining the influence of CEO/director Benevolence on corporate outcomes. Her interested research areas are corporate governance, culture, CEO/director ethics, Indigenous Australians, and diversity. Ashesha Weerasinghe, PhD candidate, QUT Business School, QUT, Brisbane, Australia Email: l.weerasinghe@hdr.qut.edu.au

Professor Larelle (Ellie) Chapple, QUT Business School, QUT, Brisbane, Australia Email: Larelle.Chapple@qut.edu.au

Dr Alexandra Williamson, Adjunct Senior Research Fellow, QUT Business School, QUT, Brisbane, Australia Email: a3.williamson@qut.edu.au

Parallel Session 2 Financial Services Chair: *Natania Locke* (Swinburne Uni)

Tippers, Tippees, Insiders, and Outsiders: Examining the Insider Trading Laws of the United States and Australia in Context

Donna M Nagy & Juliette Overland

There are a variety of distinctions that exist between the Australian and US laws prohibiting insider trading. While insider trading is prohibited in Australia under an express statutory prohibition, a broad anti-fraud provision in the US has been interpreted by courts to prohibit insider trading. Australian insider trading laws are based on the concept of an "information connection" rather than a "person connection", so that any person who possesses information that they know or ought reasonably to know is inside information is prohibited from trading or procuring trading in relevant financial products, or from communicating or "tipping" that information to another person likely to do so. However, in the US, such conduct is only illegal if it constitutes securities fraud, meaning essentially that the trader or tipper has breached a fiduciary duty of disclosure owed either to the source of the information or to the shareholders of the securities issuer. In this paper, we look at the differing treatment of "tippers" and "tippees" in these two jurisdictions and consider the varying factors that are emphasised when determining the severity of the conduct of engaging in trading or tipping. We also address the comparative relevance of the existence of a fiduciary or other close relationship both for liability to arise and as a possible aggravating factor in sentencing convicted insider traders.

Biographies

Professor Donna M. Nagy (BA Vassar College, JD NYU School of Law) is Executive Associate Dean and C Ben Dutton Professor of Business Law at Indiana University Maurer School of Law. She teaches and writes in the areas of securities litigation, securities regulation, and corporations. She has written extensively on the selective disclosure of government information; government officials and financial conflicts of interest; and insider trading and fiduciary principles. Prior to commencing her academic career, Donna was an

associate at the law firm of Debevoise & Plimpton in Washington, D.C., specialising in securities enforcement and litigation.

Associate Professor Juliette Overland (LLB (Hons I) (*QUT*), PhD (*ANU*)) of the University of Sydney Business School, researches and teaches in the area of corporate law, particularly the regulation of securities markets, insider trading, and corporate crime. Juliette's research examines issues concerning corporate liability for insider trading, the effectiveness of insider trading regulation, and the relationship between corporate governance and insider trading. In addition to her experience as an academic, Juliette has extensive practical experience as a corporate lawyer, having worked in leading Australian law firms and as the Australian legal counsel for a global technology company.

Regulatory Interventions in Green Financing: An Analysis on Indian Securities Law Regime

Bhagyalakshmi R & Shainy Pancrasius

Disclosures are mandated by the Securities Regulators across various jurisdictions for capturing informed investor choice and thereby ensuring the objective of investor protection against market odds and evil. The domain of the corporate world is dynamic and new entrants like green investment companies in the regime of sustainability and renewable energy are leveraging more focus in the market. Interestingly, in India, the investor portfolios are diverse and there have been instances of the stocks of green investment companies gaining market capture and also instances of downfall and imposing of additional surveillance measures by SEBI. In this context, it is imperative to understand the effectiveness of disclosures made by the green investment companies on the investor choice. The present study invokes a qualitative approach in analysing the effectiveness of disclosure documents filed by corporate entities for issuance of green debt securities from 2017-2023. The analysis is structured by corelating it with benchmarks identified for investor protection and investor choice in the light of the regulatory interventions.

Biographies

Ms Bhagyalakshmi R is currently an Assistant Professor at Department of Law, Central University of Tamil Nadu and a Research Scholar at National Law School of India University, Bengaluru, India. She was a recipient of Junior Research Fellowship of the University Grants Commission, India in 2016. She has completed her BAL LLB from Mahatma Gandhi University, Kerala in 2015 with third rank and LLM from NALSAR University of Law, Hyderabad in 2016 with second rank. Prior to her research, she was actively engaged in Academics as well as Legal Practise. She has been a litigation attorney at Das & Associates, Cochin and was practising before the honourable High Court of Kerala. Later she has joined as Assistant Professor, School of Law, Christ University, Bengaluru, India. She has been the Faculty Co-ordinator for events organised by International Relations and Foreign Policy Committee, Christ University. Her research interest includes Law and Development, International law and Public Private Partnerships.

Ms Shainy Pancrasius is an Assistant Professor in the School of Law, Christ (Deemed to be University) where she teaches Public International Law, Energy Laws and Nuclear Laws. She had previously taught at the University of Leicester, UK. She has graduated with LL.B and Masters in Business Law from the University of Kerala, India. She did her LLM in International Commercial Law from University of Leicester, UK. Her main research interests include International Law, International Energy Law and Conflict of Laws.

Sustainable Finance and Protected Areas: The 'no go' Commitment of Financial Institutions under the Ramsar and World Heritage Regimes.

Evan Hamman

Legally, the commitments made under international law are the responsibility of States. Yet, empirically, corporate and other non-state actors play a critical role in facilitating treaty implementation. In particular, banks, asset managers, proxy advisors and investors have all emerged as influential players within global environmental governance. Their claims to 'sustainability' often seek to surpass domestic regulatory requirements and are typically couched in the language of ESG (environmental, social and governance). Yet, whilst their presence in environmental governance may not be disputed, their alignment with particular treaty regimes is not well understood. This paper is the first in a series that seeks to better understand the role and influence of financial actors in the implementation of global protected area governance. Specifically, it traces the commitments made by financial institutions to avoid financing projects impacting World Heritage sites and Ramsar-listed wetlands (the so called 'no go' commitment). By examining the nature and scope of these claims, and the extent of public reporting thereof, two tentative points are developed: first (1), for financial actors to play a more meaningful role in treaty implementation, closer consideration may need to be given to the language and goals of the regime; and, second (2), a greater emphasis on transparency and reporting, including up and down the corporate value chain, seems warranted. The results of this analysis forms the basis of further empirical work on how financial corporations respond to protected areas risk within their portfolios.

Biography

Dr Evan Hamman is a Post-Doctoral Fellow at the University of Canberra's Centre for Environmental Governance. He holds a Bachelor of Laws and Bachelor of Commerce, a Masters in Environmental Science and Law, and a PhD. His research focuses on questions of implementation and compliance with international environmental law. Dr Hamman has an emerging research interest in the legal and policy aspects of ESG (environmental, social and governance) and is the co-author of a recent book on World Heritage entitled *Implementing the World Heritage Convention: Dimensions of Compliance* (Edward Elgard, 2023).

Annual Super Fund Members' Meetings: the Evidence So Far

Scott Donald

The trustees of Australia's superannuation funds have been required to hold formal members' meetings annually since 2019. This paper analyses the questions posed by members at the Annual Members' Meetings of the largest 20 superannuation funds over the past three years in order to engage, for the first time, with the question whether the meetings are merely performative, or whether they provide an effective mechanism for bilateral signalling between the funds' trustees and members that has value in the governance of the funds.

Biography

Scott Donald is an Associate Professor in the School of Private and Commercial Law. Scott joined the Faculty in 2010 after a successful career in the funds management industry advising governments, superannuation funds, insurance companies and fund managers on investment strategy, governance and regulation. Scott teaches corporations, trusts and superannuation law at both undergraduate and post-graduate level. He regularly presents at academic, professional and industry conferences in Australia and overseas and publishes in both the academic and professional press on research related to financial services regulation, governance and superannuation policy.

Purdue Pharma and Moral Bankruptcy: Rethinking Responses to Corporate Malevolence

Meredith Edelman

Purdue Pharma, maker of OxyContin, is a prime example of a morally bankrupt corporation – its wrongdoing pervasive or central to its operations, and yet the courts seem incapable of responding to its depravity. This article uses Purdue as a case study to develop the concept of moral bankruptcy. Purdue is responsible for a serious moral failing – the triggering of an epidemic – but it finds itself in a bankruptcy court, a system designed for financial bankruptcy. If it were not for its wrongful actions, it would have never incurred the tort liability that led it to chapter 11 bankruptcy, but the bankruptcy court is not empowered to find facts and make determinations of right or wrong in the way a criminal or civil court usually is.

The article describes Purdue's path through bankruptcy by reference to the documents filed on the bankruptcy court's docket. In addition to pleadings and orders, it considers letters from victims and other stakeholders sent to the bankruptcy judge. It describes the recoveries for victims and the changes to the company that will come into effect as a result of the bankruptcy case. The article then makes the case for a new system, one designed to address moral, rather than financial, bankruptcy. After imagining how a moral bankruptcy process might operate, the article provides theoretical grounding for the concept in responsive law and republican theory, and addresses concerns that a system of moral bankruptcy would constitute a corporate death penalty that needlessly punishes shareholders.

Biography

Meredith Edelman is a lecturer at the Business Law and Taxation School at Monash University. Meredith's research considers legal and political responses to wrongdoing by corporate or other organisational actors. Her PhD thesis, Judging the Church: Legal Systems and Accountability for Clerical Sexual Abuse of Children, was recently completed at the Australian National University. Before beginning her PhD, Meredith was a corporate restructuring lawyer in Los Angeles, California.

Should the Ends Justify the Means? Whistleblower Protection for Antecedent Conduct

Olivia Dixon

Whistleblowing is one of the most effective ways to detect and prevent misconduct that undermines the public good. Yet blowing the whistle is becoming an increasingly risky proposition due to opaque legal protection. Most federal and state statutes prohibit retaliation against whistleblowers, safeguard their identities in most circumstances and offer several reporting avenues. However, the law is presently silent as to whether a potential whistleblower is protected for antecedent acts, including obtaining evidence proportionate and necessary to the making of a protected disclosure. Yet it is axiomatic that evidence is required to substantiate any claim. What measures may a potential whistleblower take in order to obtain such evidence? Can they print work emails? Can they copy documents from a file? Can they take pictures of documents with their mobile phone? With reference to Boyle v the Commonwealth Director of Public Prosecutions, this article explores whether whistleblowers should be protected for antecedent conduct and, if so, how best to incorporate the limits of any such protections into Australian law.

Biography:

Dr Olivia Dixon is a senior lecturer at the University of Sydney Law School where her research focuses on corporate crime, with a particular interest in enforcement. She has written on diverse topics such as the Criminal Code, corporate culture, whistleblowing, data brokers and

sanctions. She was a member of the advisory panel for the ALRC Report into Corporate Criminal Responsibility and has recently published a book "*Corporate Misconduct and White-Collar Crime in Australia: Federal Regulation, Investigation Powers and Enforcement*" (with Michael Legg and Stephen Spiers).

Directors' Duties and Stakeholders' Interests: Public Enforcement Mechanism – Issues and Challenges

Param Pandya

The jurisdictions under study – India, UK, Singapore and Australia have recognised directors' duties to consider stakeholders' interests. While the UK and India have prescribed these duties under their respective company laws, Singapore and Australia have recognised these duties through judicial precedents and executive instruments. India treats stakeholder interests as an 'end goal' of corporate decision-making and adopts the 'pluralist' approach to directors' duties. The UK, Singapore and Australia have adopted the 'enlightened shareholder value' approach. They prescribe that while directors should consider stakeholders' interests, in case of conflict, they should prioritise the best interests of the company. However, these jurisdictions do not provide an effective enforcement mechanism to remedy breach of directors' duties to consider stakeholders' interests. This paper argues that public corporate law enforcement could serve as a potential enforcement mechanism. This paper discusses four key aspects: (1) the inadequacy of existing private enforcement mechanisms and challenges in relation to remedying breach of directors' duties to consider stakeholders' interests; (2) the conception of breach of directors' duties to consider stakeholders' interests to be 'public wrong' and thus, requiring regulatory intervention; (3) 'regulatory engagement' (I coin this term for informal public enforcement actions) and 'regulatory enforcement strategies and their application in the context of breach of directors duties to consider stakeholders' interests; and (4) institutional challenges to effective public corporate law enforcement. This paper further argues that in order to make stakeholder theory more functional, an enforcement mechanism that incorporates private and public corporate law enforcement approaches is necessary.

Biography

Param Pandya *is a PhD Candidate and the Presidents' Graduate Fellow at the National University of Singapore. He is a trained corporate lawyer and public policy analyst. Prior to completing the Masters in Law and Finance at the University of Oxford as J N Tata Scholar in 2019-20, he had advised the Ministry of Corporate Affairs, Government of India as a Research Fellow at the Vidhi Centre for Legal Policy, New Delhi. He had also advised various corporate and financial institutions as an Associate (General Corporate) at Cyril Amarchand Mangaldas, Mumbai, a top-tier Indian law firm.*

Param's thesis aims to propose an enforcement mechanism to remedy breach of directors' duties consider stakeholders' interests. His wider research interests lie at the intersection of climate change, corporate governance, and financial regulation.

Potential Challenges to Legal Regulation of CSR: Findings and Lessons from the Indian Experiment in the COVID Pandemic Context

Akanksha Jumde

In 2021, the Indian government solicited support through corporate CSR activities to combat the sheer scale and breath of its spread. This government-corporate nexus was established through regulatory-level changes to the CSR provisions under Companies Act, 2013. In this context, this paper examines Indian companies' CSR activities to comply with these regulatory amendments. For this examination, the paper uses qualitative content analysis of companies'

reports triangulated with detailed interviews of relevant stakeholders to critique the corporate compliance with Indian government's COVID-related corporate CSR directives. The findings highlight potential challenges if CSR is over-regulated. An over-bearing and penetrative law potentially risk corporate freedom and creativity to conceptualise and implement CSR activities based on companies' own CSR policies and vision. Considering these findings, the paper applies collaboration theory of the corporation to advocate for withdrawing governmental interference by treating corporates as 'co-adventurers' owing fiduciary duties to treat each other well.

Biography

Dr Akanksha Jumde is a Business and Corporate Law Lecturer at Central Queensland University, Sydney Campus. Akanksha specializes in corporate law, commercial law and business law. Her work focuses on various dimensions related to corporate law including CSR and corporate governance, with use of socio-legal empirical legal and interdisciplinary research methods to different facets of corporate law and intellectual property law.

Before joining Central Queensland University, Akanksha taught at the University of Tasmania as a law lecturer. She has had a stint with the EW Barker Centre for Business and Law, National University of Singapore, Singapore as a post-doctoral fellow. She has completed her PhD in corporate law from Deakin Law School, Deakin University, Melbourne. Akanksha's PhD thesis received a faculty-level nomination for the Alfred Deakin Best Doctoral Thesis Award at the Faculty of Business and Law, Deakin Law School, Deakin University.

Is Disclosure a Good Way to Monitor Insider Trading? --Evaluating Trading Plan 2.0

Chao-Sheng, Chiang

On Dec. 20, 1999, Rule 10b5-1 under the Securities Exchange Act was proposed by SEC. After a comment period, the final rule was published on Aug. 24, 2000 and effective on Oct. 23, 2000. The Rule provided affirmative defenses to insider trading liability for corporate insiders to buy and sell stocks as they adopted their trading plans (trading plan 1.0) before becoming aware of material non-public information. Over the past two decades, some insiders seem to find the loopholes of rule 10b5-1. The Wall Street Journal published an article whose title was Executives' Good Luck in Trading Own Stock in Nov. 2012. It studied thousands of SEC filings from 2004 that disclosed instances in which corporate executives traded their own company's stock within the five-day period proceeding company disclosure of material information. Some of corporate executives used trading plans and enjoyed abnormal gain without worry about insider trading liability. Later, some scholars' research results support the above assumption. At the end of 2022, SEC finally adopted amendments to Rule 10b5-1. The amendment established new trading plan (trading plan 2.0) elements. SEC Chair Gary Gensler said that "Over the past two decades, though, we've heard from courts, commenters, and members of Congress that insiders have sought to benefit from the rule's liability protections while trading securities opportunistically on the basis of material nonpublic information. I believe today's amendments will help fill those potential gaps." Does trading plan 2.0 fix all loopholes? This article will also explore a more fundamental question: Is disclosure a good way to monitor insider trading? Keywords: insider trading, fiduciary duty, trading plan

Biography

Dr Chao-Sheng, Chiang is a Professor, College of Law, National Chung Cheng University, Taiwan. Ph.D. in Law, National Taipei University; L.L. M., University of Pennsylvania, U.S.A; L.L. M., University of Illinois, Urbana/Champaign, U.S. A. This working research is sponsored by National Science and Technology Council, Taiwan 2023-2024 under the project" The Study of Amendments to Modernize Rule 10b5-1 Insider Trading Plan". My research areas include:

corporate law, securities regulations and financial regulations. Email: cschiang@alum.ccu.edu.tw

Keynote panel: 11.15am-12.15pm

Enforcement of the Corporation's Obligations to Society

Panel Members

Dr Vicky Comino (UQ)

Professor Michael Legg (UNSW)

Mr Joseph Longo (the Australian Securities and Investments Commission Chairman)

Chair: **Ms Sera Mirzabegian SC, NSW Bar**

The conference panel on "Enforcement of the Corporation's Obligations to Society" discusses how effective enforcement strategies and tools can be utilised to hold corporations accountable for their obligations to society, including sustainability and privacy, so as to contribute to a more responsible business landscape. Dr Vicky Comino will speak on whether ASIC's civil penalty regime is 'fit for purpose' with 2023 marking 30 years since the regime was introduced. Professor Michael Legg will discuss greenwashing and enforcement from the perspective of regulators, such as ASIC and the ACCC, and private litigation including test cases, representative actions and class actions. The Chair of ASIC, Joe Longo will speak on cyber and technology issues as they impact corporate responsibilities.

Biographies

Dr Vicky Comino is a Senior Lecturer at the TC Beirne School of Law at The University of Queensland. Dr Comino's main research area is corporate law, and in particular the regulation of corporate misconduct. Before commencing an academic career, she practised as a solicitor working at a top tier law firm in the fields of corporate law, leasing, commercial and residential conveyancing, strata development, securities and opinion work. Over the years, Dr Comino has worked voluntarily for Legal Aid, South Brisbane Immigration & Community Legal Service, Women's Equal Opportunity (WEO) and Justice and the Law Society (JATL) (UQ).

She has also served on numerous committees, most recently as the chair of a major Queensland Law Society accreditation committee for the accreditation of lawyers as Business Law Specialists. Dr Comino's recent articles have addressed important topics in the corporations law area. Those topics include the difficulties facing the use of civil penalties by calling for Parliament to pass legislation to resolve procedural obstacles, the adequacy of ASIC's 'tool-kit' to deal with corporate and financial wrongdoing, including the deployment of 'new' enforcement tools, such as enforceable undertakings and the possibilities and limits of the use of 'corporate culture' as a regulatory mechanism.

Her 2015 monograph *Australia's "Company Law Watchdog" – ASIC and Corporate Regulation*, which focuses on exploring how, and to what extent, a public authority like ASIC can achieve more effective regulation certainly comes at a time when ASIC's performance is increasingly under the microscope. This is in view of its mixed record of success in some highly publicised cases and a seemingly endless procession of corporate and financial scandals, such as those that engulfed the major Australian banks, prompting not only a number of parliamentary inquiries into ASIC's performance and capabilities, but the establishment of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. Her book also consolidates her position as a leading Australian

researcher on corporate regulation, with her work cited in the Final Report of the Banking Royal Commission and reports of the Australian Law Reform Commission on Corporate Criminal Responsibility.

Dr Comino's research has global relevance and she has extended her work beyond Australia to evaluate international developments, especially in the US and the UK. She is examining the different responses of regulators to the dilemmas presented by policing corporate and securities violations in the aftermath of, and since, the GFC to try to resolve the issue of how policy-makers and regulators should deal with corporate wrongdoing more effectively in the future. She also travelled to the UK in 2018 after being awarded a Liberty Fellowship from the University of Leeds to undertake collaborative work comparing corporate regulation there and in Australia.

Dr Michael Legg is a Professor in the Faculty of Law & Justice, UNSW and a Fellow of the Australian Academy of Law. He specialises in complex litigation, including regulatory litigation and class actions, and in innovation in the legal profession.

He is the author of *Case Management and Complex Civil Litigation* (Federation Press, 2nd ed 2022) and *Public and Private Enforcement of Securities Law* (Hart, 2022). He is the co-author of *Australian Annotated Class Actions Legislation* (LexisNexis, 3rd ed 2023), *Corporate Misconduct and White-Collar Crime* (Thomson Reuters, 2022), *Artificial Intelligence and the Legal Profession* (Hart, 2020) and *Civil Procedure in New South Wales* (Thomson Reuters, 4th ed 2020).

Michael has 25 years of experience as a legal practitioner having worked with leading Australian and US law firms. He is admitted to practice in the Supreme Court of NSW, Federal Court of Australia, High Court of Australia and in the State and Federal courts of New York. He holds law degrees from UNSW (LLB), the University of California, Berkeley (LLM) and the University of Melbourne (PhD). He also holds a B Com (Hons) and M Com (Hons) from UNSW.

Michael is a member of the Law Council of Australia's Class Actions Committee and the Federal Court Class Actions Users Committee.

Mr Joseph Longo commenced as ASIC Chair on 1 June 2021.He has more than 38 years' experience in corporate law, financial services, governance and regulation in Australia and overseas.

Most recently, he was a senior adviser at Herbert Smith Freehills, specialising in regulatory matters, enforcement, commercial law and internal legal matters. Earlier in his career, Joseph was a partner at Parker and Parker (now Herbert Smith Freehills).

Joseph was the general counsel for Deutsche Bank in London and Hong Kong for 17 years, advising on a range of regulatory issues, governance, infrastructure and non-financial risk.

Earlier, Joseph was the national director of enforcement at ASIC for five years, responsible for the coordination and direction of all enforcement and litigation activities.

He has experience navigating multi-jurisdictional investigations and enforcement activity across financial services.

He holds a Bachelor of Jurisprudence (Hons) and a Bachelor of Laws (Hons) from the University of Western Australia and a Master of Laws from Yale Law School.

Keynote Presentation: 1.45 - 3.00pm

Good Faith Information Forcing

By Professor Hillary Sale (Georgetown Law)

Discussant: Professor Jennifer Hill (Monash)

Chair: Professor Dimity Kingsford Smith (UNSW)

A question central to corporate governance is one that has remained unanswered both over time and because of time. That question is: what are the positive attributes of directors' fiduciary duties. There is, of course, a simple answer to this question: there are two fiduciary duties, care and loyalty (with candor omnipresent) and they are defined by the common law. Yet, as continuous litigation reveals, the actual contours of these duties are more opaque than one might think or even than fiduciaries might wish. This is particularly true of the good-faith and oversight branch of the duty of loyalty, which is the focus of this chapter. Interestingly, the reason for this ambiguity is also a question of time, albeit a procedural one.

The duty of good faith and oversight has been the subject of considerable litigation in recent years, and the cases reveal that information asymmetries between directors and management are significant and can result in tremendous harm. The challenge is that the court-created business judgment rule and strict pleading requirements intervene and result in very high rates of dismissals both at the motion to dismiss and summary judgment stages. Thus, both time and timing matter. Decisions occur at a moment in time, providing a snapshot or a window into the questions surrounding loyalty and oversight. The timing, however, is dictated by the procedural process, and it, too, hinders the understanding of the fiduciary duty. Here is where time and timing play powerful roles. Indeed, trials are largely non-existent and, as a result, so are fulsome discovery and fact-finding – increasing the importance of the content of procedural opinions.

This is where the information-forcing-substance theory, the disclosure premise of securities regulation, has potential traction. By deploying the theory in corporate-law matters, the courts can reveal the information gaps between officers and directors and create pressure for better processes and discourse, which in turn can impact both the way in which fiduciaries interact with each other and on behalf of shareholders, as well as the substantive choices they make. This chapter uses case studies involving Boeing and McDonald's to reveal how courts can use information forcing to develop more robust disclosure discourse in the good faith and oversight context and increase the creative friction vital to effective corporate governance.

Biography

Hillary A. Sale is an experienced board director and influential business leader and consultant. She is a recognized expert in financial services, ESG, securities, crisis management, compliance, corporate governance, strategy, and leadership. She is a director for the Cboe U.S. Securities Exchanges, Cboe Futures Exchange, and Cboe SEF. She served the maximum of two terms as a member of the FINRA Board of Governors from 2016-2022, where she chaired the Regulatory Policy Committee and served on the Executive, Nominating and Governance, Compensation, and Regulatory Operations Committees. She is also a member of the Advisory Board of Foundation Press, an educational publisher of scholarly books, is a faculty member with the National Association of Corporate Directors, speaks and works with boards across the country, and is also the Chair of the DirectWomen Board Institute.

Hillary is the Agnes Williams Sesquicentennial Professor of Leadership and Corporate Governance at Georgetown Law Center, where she was also the Associate Dean for Strategy

from 2020-2023, and a Professor of Management at Georgetown University's McDonough School of Business. As an award-winning scholar and industry-focused academic, she writes and speaks about corporate governance, ESG, securities, compliance, strategy, and leadership. In the spring of 2017, she was the Sullivan & Cromwell Visiting Professor of Law at Harvard Law School, teaching Corporate Boards and Governance and Leadership.

She is an accomplished business partner who speaks to industry groups and academic audiences and was selected by the St. Louis Business Journal as a "2014 Most Influential Business Woman." In addition to running governance and leadership programs, Hillary consults regularly with CEOs, C-suite executives, and boards on governance, strategy, ESG, inclusion and diversity, company culture, board effectiveness, and compliance. She also works with business leaders in both custom executive education programs and programs at Harvard Law, where she Chairs the Women's Leadership Initiative, and at Georgetown's McDonough School of Business and the Law Center.

Hillary graduated magna cum laude from Harvard Law School and holds a master's degree in Economics from Boston University, where she also completed her B.A., summa cum laude. Before joining the Georgetown faculty, she was the Walter D. Coles Professor of Law and a Professor of Management at Washington University in St. Louis. Previously, Hillary served as the F. Arnold Chair in Corporate Finance and Law at the University of Iowa College of Law. She can be reached at **hillary.sale@georgetown.edu or 202.662.4222**.

Jennifer Hill is the inaugural Bob Baxt AO Chair and Professor in Corporate and Commercial Law and Director of the Centre for Commercial Law & Regulatory Studies (CLARS) at Monash University Faculty of Law. Jennifer is a Research Member of the European Corporate Governance Institute (ECGI) and Director of the ECGI Corporate Purpose programme. She is also Director and Vice Chair of the Global Corporate Governance Colloquia (GCGC) and an Academic Fellow of the Jean Monnet Centre of Excellence on Sustainable Finance and EU Law (EUSFiL). Jennifer has held visiting positions at several international law schools, including Cambridge University; Cornell; NYU and Vanderbilt University.

Concurrent Session 5: 3.05-4.05pm

Parallel Session 1- Disclosure in All its Forms Chair: *Scott Donald* (UNSW)

ESG, CSR and disclosure of non-financial matters: Considerable developments especially regarding sustainability disclosure taxonomy

Jean J Du Plessis & Beth Nosworthy

The international development of disclosure requirements and standards to ensure consistency and comparability of sustainability-related disclosures is a mammoth task. It commenced formally circa 2015 with the formation, by the Financial Stability Board (FSB), of the Task Force on Climate-related Financial Reporting (TCFD), and continued by the International Financial Reporting Standard (IFRS) Foundation, formed in August 2022. Drawing on several Status Reports by the TCFD, the IFRS released a comprehensive Discussion Paper in July 2023 on a *Proposed IFRS Taxonomy: IFRS Sustainability Disclosure Taxonomy.* It is widely believed that it will be these standards, informed by the final Status Report of the TCFD (October 2023), that will become the international accepted disclosure requirements and standards on non-financial matters. Separately, in Australia, the Government indicated that these disclosure standards will be used as basis for local requirements for mandatory disclosure on non-financial matters, coming into effect for the largest companies as early as January 2024.

In this paper we provide an overview of these developments internationally and in Australia. These developments are significant and will, over the next 10 years, have a greater impact on corporations than any other law reform over the last 100 years. This will impact not only on affect disclosure, but will also have the secondary effect of requiring all companies and corporations to focus on Environmental, Social and Governance (ESG) reporting, within the concept of sustainability reporting. Given the potential for exaggerated (greenwashing), incorrect or insufficient disclosure on these non-financial matters to cause corporations to suffer reputational damage, this may in turn increase the likelihood of litigation against directors in relation to directors' duties.

Biographies:

Jean J Du Plessis is a Professor (Corporate Law) at Deakin Law School, Deakin University. Parts of this paper are based on work we have done in updating the fourth edition of Jean Jacques du Plessis, Anil Hargovan and Jason Harris, *Principles of Contemporary Corporate Governance* (CUP, 4th edn, 2018). The 5th edition will be published in 2024 under the authorship of Jean Jacques du Plessis, Anil Hargovan and Beth Nosworthy.

Beth Nosworthy is an Associate Professor at Adelaide Law School, University of Adelaide.

Corporate conduct, climate change and market regulation: An analysis of the scope and impact of forthcoming, TCFD aligned, legislative amendments to company disclosure

Maria Nicolae

All stakeholders are regulators and, as such, company conduct and profitability involve a balancing act of their respective interests and influence. Historically, in the context of environmental matters, such as climate change, this regulatory function was largely left to market participants, such as investors. To fulfil this function, investors need information. This created a tension between investors' demand for corporate disclosure and a paucity of statutory provisions in the *Corporations Act 2001* (Cth) mandating it. Companies resolved this tension by voluntarily providing such information, generally pursuant to existing disclosure standards, such as GRI, TCFD and ISO. In 2023, the Federal government announced that it will introduce standardised, internationally aligned reporting requirements for companies to disclose various climate-related matters. These new requirements will be consistent with TCFD. This paper examines the impact of the proposed amendments. After first outlining the TCFD disclosure standard, this paper analyses TCFD compliant corporate reporting, focusing on information provided in Annual Reports by the Big Four Banks (ANZ, CBA, NAB and Westpac) over the 2017-2020 period. Subsequently, this paper evaluates whether TCFD compliant disclosures enable investors to regulate company conduct on climate-related matters, and the impact (if any) of these disclosure requirements transitioning from their current voluntary status to legislatively mandatory. Lastly, this paper addresses the degree to which the proposed amendments drive company climate change sustainability performance.

Biography

Maria Nicolae is an Assistant Professor in the Faculty of Law, Bond University. Her research has focused on legal education, corporate governance, directors' duties, and corporate climate sustainability performance. Currently, Maria is completing her PhD thesis at University of Tasmania, focusing on domestic mandatory and international voluntary corporate climate sustainability performance disclosure mechanisms, and their ability to enable market regulation.

The Potential Use of Misleading and Deceptive Conduct and Disclosure Provisions with Reference to Net Zero Statements

Natania Locke

It has become common practice for corporations to make statements about meeting net zero emissions targets by a specified date. This paper considers the criteria that net zero statements must meet in order not to be considered misleading or deceptive for purposes of the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth). Consideration is given to both institutional investors and retail investors as potential plaintiffs on the basis that net zero statements influenced their decision to invest in the security of a particular corporation. The provisions of these statutes that deal with representations of future matters are particularly relevant. Statements about net zero targets are forward-looking and therefore inherently subject to some uncertainty. Disclaimers are usually included with forward-looking statements to reduce the risk of a misrepresentation owing to changed circumstances. Furthermore, it is not always easy to discern whether a statement is a target, a promise, or an opinion.

Biography

Dr Natania Locke is an Associate Professor and the Acting Dean at the Swinburne Law School. Before moving to Australia from South Africa, she was a Professor of Corporate and Financial Law at the University of Johannesburg, where she remains a Visiting Professor, and before that at the University of the Witwatersrand. She has published widely in the fields of corporate governance, corporate law and disruption, and business rescue. Her current research focusses on shareholder stewardship and the potential role of technology to improve corporate governance.

Parallel Session 2- Corporation and AI

Chair: *Akshaya Kamalnath* (ANU)

Fighting Fire with Fire: Regulating AI by Accounting for Corporate Design

Dr Michelle Worthington

Across the globe, national and regional governments are scrambling to create regulatory frameworks for artificial intelligence technologies. What is clear from these early attempts at regulation is that governments risk failing to properly account for the nature and design of the corporate device. More particularly, early attempts at regulation appear to overlook the influence that the self-regarding design of the for-profit corporation will have on the development and deployment of these emerging technologies. Drawing together insights from systems theory and Professor Peter Cane's illuminating work on responsibility in law and morality, this paper argues that in order to succeed as regulatory frameworks, laws targeting AI must do more than control for possible harms. Meaningful regulation of AI technology will require designing regulatory frameworks that demand good outcomes for the public, via the imposition of what can be described as 'productive responsibilities' on the part of corporations.

Biography

Dr Michelle Worthington is a lecturer at the ANU College of Law. She is an interdisciplinary scholar with a particular interest in the design of legal systems and devices, including the role that values play in legal design. She works largely in the areas of corporate law and corporate law reform, common law legal theory, and Australian and comparative constitutional law. She has also started researching generative AI and proper approaches to the regulation of such technology. Michelle's academic work is informed by her experience working in the private, community and public legal sectors.

AI and Principles-Based (Director) Regulation

Vivienne Brand

Companies will be powerful initiators and adopters of AI, as they have been of prior iterations of industrial revolution. Corporate boards thus necessarily have an important contribution to make to the implementation of AI. Despite attention to AI and its regulation there has been insufficient consideration of the importance of existing corporate regulatory frameworks' capacity to regulate the development and implementation of AI. This paper examines the intersection of longstanding legal principles, complex boardroom decision-making dynamics and fast-moving AI, to better understand the role directors might play. It suggests that established jurisprudence on directors' duties represents a regulatory system with significant potential and direct consequences for the implementation of AI in society. Evolved to respond to the regulatory needs of a complex artificial entity, the corporation, directors' duties encompass a number of useful characteristics, including the capacity to engage with nuance and complexity, experience in dealing with the interrogation of opaque decisions, and broadly accepted norms. Contemporary developments, in which changing social attitudes are increasingly integrated into corporate decision making, further assist in aligning corporate AI activity with society's expectations, with pro-social regulatory benefits.

Biography

Vivienne Brand is a professor at Flinders University. A legal academic with a background in practice, Vivienne researches in corporate law and governance, whistleblowing, social licence to operate and foreign bribery. She has published widely on these topics and appeared by invitation before Federal parliamentary inquiries on related topics. Vivienne teaches corporate law at Flinders University and is a recipient of an Australian Award for University Teaching Citation for an Outstanding Contribution to Student Learning.

AI Risks, Failures and Consequences: Corporate Governance for the AI Era

Zofia Bednarz & Susan Bennett

Financial entities increasingly leverage AI models for personalized consumer services, presenting remarkable efficiency gains but raising ethical and legal concerns. Such models are able to personalise financial products to consumers' needs, or process insurance claims, yet they harbour risks, enabling practices like excessive data collection and discriminatory and other unfair conducts. Notable instances, like high-profile data breaches affecting millions in Australia and class actions in the US alleging racial discrimination against Wells Fargo bank and State Farm insurer provide an illustration. Despite global policymakers proposing measures addressing the risks, the commercial and regulatory landscape still fosters AI use and data sharing, as seen in initiatives like open banking.

In this paper, we argue that financial entities face substantial liabilities and ethical risks stemming from AI model deployment. We identify three key problem categories:

(1) discrimination (direct, indirect, intentional and not) e.g. redlining and reverse redlining;

(2) lack of transparency of the decision-making processes for affected clients and for the company itself (e.g. where third party AI models or data are used);

(3) data misuse (e.g. segregation of data between subsidiary companies, purchasing data from brokers) and privacy breaches and cyber security issues.

These expose companies to risks such as regulatory fines, contractual fines and litigation, e.g. class actions. We propose to analyse the risks financial entities are facing, and discuss

potential mitigation strategies in terms of AI and data governance that need to be adopted by the boards to minimise the risks.

Biography

Dr Zofia Bednarz joined the University of Sydney Law School as a Lecturer in January 2022. She teaches and researches in the area of Commercial and Corporate Law. Zofia's current research focuses on the use of new technologies, such as Artificial Intelligence (AI) tools, by financial firms and the implications it has for provision of financial services to consumers. She is an Associate Investigator at the ARC Centre of Excellence for Automated Decision-Making and Society (ADM+S).

Prior to joining the University of Sydney Law School, Zofia was a postdoctoral Research Associate at the Centre for Law, Markets and Regulation UNSW. She also held a position of Associate Lecturer in commercial law at the University of Málaga, Spain, where she taught undergraduate and postgraduate courses in commercial law, company law and e-commerce law, both in Spanish and in English.

D Susan Bennett **PhD, LLM (Hons), MBA, FGIA, CIPP/E, CIPT -** Susan completed her PhD at the University of Sydney, Law School on the topic of Privacy and Data Protection: the interaction of meta-regulation and information governance. The thesis examines the challenge of controlling personal information from the standpoints of the regulator and the regulated organisation. It analyses the regulatory design of Australia's *Privacy Act 1988* (Cth) and the EU's GDPR, which include the use of conventional regulation (e.g. mandatory data breach notification) and meta-regulation (e.g. data minimisation), which devolves the design and implementation of compliance mechanisms to the regulated organisations. From the organisational perspective, the thesis examines the challenges for corporate governance where boards must grapple with multifaceted strategic opportunities and risks arising from the intersection of technology, data, and regulation. Based on interview evidence, the thesis develops a theory of effective information governance, which enables data and information to be safely leveraged as a business asset, while ensuring compliance with privacy and other information regulatory and legal requirements. The findings are intended as a practical governance solution that may assist organisations in achieving data and privacy meta-regulatory requirements, while pursuing strategic organisational objectives in complex and data-driven operating environments.

Susan has been a practising lawyer for more than thirty years' including as a senior partner and now in her own business. Susan works with senior executives and directors to improve governance mechanisms at the intersection of data and information, technology (including AI) and regulatory compliance, particularly data privacy and ESG. Susan is a sessional lecturer at the University of Sydney, Law School and has been teaching The Legal Profession and Corporations Law for the past three years.

Parallel Session 3- Accountability

Chair: *Juliette Overland (USYD)*

A Sustainability Panel for the World: Replicating the Success of Australia's Takeovers Panel

Ruoying Chen

Sustainability and associated risks, such as in climate change and clean energy transition, have been increasingly dominating legal and regulatory development for large corporations throughout the world. Unlike other risks currently subject to mandatory disclosure regimes and attractive to shareholder activism, to make judgement about sustainability risks require intensive expertise in science, technology and involve complicated modelling and cost-benefit

analysis. Neither conventional judges nor securities regulators are well equipped to ensure making such decisions with low error rates and in a timely fashion. The Takeovers Panel in Australia presented an ideal model for handling the sustainability risks, proving that it is much more efficient, effective and fair for professionals with legal, finance, scientific, technology and industrial expertise to make such decisions. Properly operated, the Australian sustainability panel would set standards, guidance and precedents not only for the domestic market, but also for the rest of the world, paving the way for Australia to be a global superpower in clean energy transition and in handling climate change. Solid reputation of law and legal professionals for securities regulation and international law, the unique geopolitical position, mature industries and strong research capacity of Australia would also help realize the above ambition.

Biography

Dr. Ruoying Chen is Senior Lecturer at the ANU College of Law. Her current research focuses on regulatory theories and global practice, especially in financial markets and climate change. Previously, she taught at Peking University Law School, the UNSW Business School and the University of Chicago Law School. She was a Global Professor at KU Leuven and John M. Olin Fellow in Law and Economics in the University of Chicago Law School. She worked at Freshfields Bruckhaus Deringer in its Beijing and Hong Kong offices for over five years on M&As, capital market, banking and distressed assets.

Third party litigation funding in insolvency and class actions compared.

Michael Duffy & Sulette Lombard

Third party litigation funding has become a significant force in litigation allowing claims to be brought that might not otherwise be financed. Though particularly significant in the class action area, litigation funding originally developed in Australia in the area of insolvency litigation where external administrators such as liquidators have often been funded to bring proceedings against directors and others for breaches of duty to the corporation. In class actions there has been an imperative to protect litigant consumers of litigation funding services (class members) and the question arises whether this protection is equally important in the insolvency space. Given greater financial sophistication of insolvency practitioners arising particularly from their repeat player status in litigation, this proposition is open to doubt. Certainly, protection of the ultimate beneficiaries of such insolvency litigation – creditors – is an imperative, however the approach to this may well be principally through the more traditional means of regulation and supervision of liquidators by regulators and the courts rather than through special litigation funding regulation.

Biography

Dr Michael Duffy is an Associate Professor at Monash University, director of the Monash Corporate Law, Organisation and Litigation Research Group (CLOL) and current secretary of the Society of Corporate Law Scholars (SCoLA). Michael has worked in major Australian law firms as an Accredited Commercial Litigation Specialist in large scale litigation and class actions and with the Australian Securities and Investments Commission (ASIC) in corporate investigations of market disclosure, insider trading, managed investment schemes and financial services.

An academic since 2007, Michael publishes extensively on ASIC law, company and shareholder law, class actions, litigation, market disclosure, liability of emerging technology and regulation of financial products such as litigation funding and digital currency, as well as human organisation and governance. He has been cited by the Federal Court of Australia, in amicus curiae briefs to the US Supreme Court, by the New Zealand High Court, the Australian Law Reform Commission and the Commonwealth Parliamentary Joint Committee on

Corporations and Financial Services. Michael's 2005 Masters in Law thesis focused on stakeholder ownership in corporations and his 2017 PhD thesis examined private securities class actions and investor protection.

Sulette Lombard is an Associate Professor at the University of South Australia (Adelaide, Australia). Sulette commenced her career in academia in 1997 and over the last twenty plus years had the opportunity to teach into an array of commercial law subjects, primarily corporate law and insolvency law, at an undergraduate and post-graduate level, both in Australia and South Africa. The effectiveness of Sulette's student-centred approach to teaching was recognised by a national teaching award (Australian Award for University Teaching: Citation for Outstanding Contributions to Student Learning) in 2018.

Sulette authored and co-authored a number of high-quality research outputs with significant impact in areas of insolvency law; corporate governance; and corporate whistleblowing, including the text on Australian Insolvency Law. Sulette is invited regularly by professional bodies to present on topical corporate and insolvency matters; has been invited on multiple occasions to make submissions to the Australian Parliament in relation to law reform related to her areas of research; and has been invited numerous times to appear as an expert witness for various Senate Inquiries. Her contributions in this capacity have been sighted extensively in law reform reports.

Final Session: 4.20-5.00pm Insolvency

Preferences post-*Badenoch*: Anomalies and policy considerations arising from the abolition of the "peak indebtedness rule"

Mark Wellard and Anil Hargovan

The High Court decision in *Bryant v Badenoch Integrated Logging Pty Ltd* [2023] HCA 2 confirmed that the "peak indebtedness rule" has no operation in the application of the "continuing business relationship" principle in s 588FA(3) of the *Corporations Act 2001* (Cth). While this High Court decision has been welcomed for settling a long-standing debate about the legitimacy of the "peak indebtedness rule", the decision raises new anomalies in the operation of s 588FA(3) of the Act. As reflected in the recent PJC Inquiry's Report into Corporate Insolvency (and the focus on preferences by the joint committee during the course of the inquiry), the *Badenoch* decision reinforces the need for a review of our unfair preference laws. The paper undertakes such a review with reference to international comparisons and the policy objectives underlying preferences.

Biographies

Mark Wellard is an Associate Professor at Southern Cross University. Mark is a published insolvency, corporate and commercial law academic with a national profile in academia and the profession. Mark practised as a senior insolvency lawyer with leading law firms in Australia and the UK. Mark is the former Legal Director of ARITA, Australia's peak professional association for insolvency practitioners. Mark is a member of The Law Council of Australia's Insolvency & Restructuring Committee and sits as a Ministerial appointee on statutory committees (convened by AFSA under the *Bankruptcy Act*) to consider applications for registration as a bankruptcy trustee.

Anil Hargovan holds the position of Academic Lead (Corporate Law) at the Governance institute of Australia. His research interests are in the area of corporate and insolvency law, a discipline in which he has presented many conference papers and published widely in refereed Australian and international law journals. His research has been cited by law reform committees (CAMAC and PJC) and the judiciary, including a citation in an amicus brief filed in

the Canadian Supreme Court. Anil has authored and co-authored several books, including *Australian Corporate Law* (8th ed, 2023, LexisNexis) and *Principles of Contemporary Corporate Governance* (5th ed, forthcoming 2024, Cambridge University Press). Anil is a former President of SCoLA, Associate Professor at the University of New South Wales, Sydney and co-editor of the Insolvency Law Bulletin.

Technology and the Insolvency Profession

Catherine Brown & Jennifer Dickfos

Technology provides an opportunity to generate efficiencies, increase cost effectiveness and optimise the performance of practitioners in the insolvency profession. Applying emerging technologies to automate processes and enhance innovation within this field represents an evolution in the operation of insolvency practices and the delivery of insolvency services. Despite this, empirical research on the various types of technology currently in use in insolvency practices and their subsequent impact on efficiency, cost structures and the future of the insolvency profession has been relatively sparse.

To address this lacuna in the literature, the authors carried out a survey in 2017-18 aimed at investigating the risks and opportunities of technology-driven automation and innovation within insolvency. Results indicated that insolvency professionals perceived that impact of digital practices as being some time away, and only 55% of those surveyed considered that technology (broadly defined as including artificial intelligence (AI), data reporting and big data analysis) would impact their practice.

Two years later, the Covid-19 pandemic prompted a rapid increase in the everyday use of technology-based work practices. This, along with the recent advances in generative AI, means that it is timely to revisit the impact that technology has on the future of the insolvency profession. The authors have, therefore, created a survey tool to determine insolvency practitioners' approach to, and current use of, specific technologies within the firm and the impact the adoption of these tools has had on work practices, external administration costs and future firm sustainability.

Insolvency practitioners' survey responses will determine whether, and to what extent, technology has been adopted by the profession, including whether digitised practices and generative AI tools (eg ChatGPT) are utilised, routine administrative tasks are automated, and data analytics are used for detection and prediction of insolvency. The survey will also explore the broader issue of workforce readiness, including whether there is a need to realign university curricula to service the employment and retention of insolvency staff with "data-centric technical skills".

Biographies

Dr Catherine Brown is a Senior Lecturer in the Faculty of Business and Law, Queensland University of Technology. Catherine lectures in a number of areas, including insolvency, corporate law, taxation and real property. Catherine's current research interests include the intersection of insolvency and taxation laws, insolvency and bankruptcy law, the impact of technology on the legal profession and scholarship of legal education. Catherine has had extensive experience with the Queensland and NSW government sectors as an accountant and policy advisor. She also has experience in the private sector, predominately in the area of taxation law.

Dr Jennifer Dickfos is a Senior Lecturer in the Griffith Business School, Gold Coast Campus. Prior to her academic career, Jenny was employed by the Australian Taxation Office and several large and small accountancy practices in their audit, tax and small business divisions. She currently lectures in Insolvency Law, Company law and Business Law. Her principal legal research interests are in the personal and corporate insolvency areas including AI and

insolvency, creditor protection measures, and insolvency practitioner regulation. Jenny's professional development interests include the promotion of Pracademic Experiences for Academic Staff. Jenny is currently the Director of the Academic Wil Pilot Program and Program Director of the Bachelor of Commerce.