



Corporate Law Teachers Association Conference

31 January to 2 February 2016

Never Stand Still

Business School

Taxation and Business Law



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Keynote and Dinner Speakers

The 2016 Corporate Law Teachers Association Conference is privileged to have distinguished speakers address us. Emeritus Professor Paul Redmond, former Dean of Law at UNSW and a visionary of the CLTA, will be addressing the theme of the conference— ‘Enduring Issues in, and Reflections on, Corporate Law and Policy over the Past 25 years’. This keynote address will be followed by a distinguished panel who will offer commentary on the stellar contributions made by Emeritus Professor Paul Redmond to the academy.

Mr David Ireland, Kensington Swan Lawyers, will be addressing the topic on financial regulation in New Zealand, followed by a distinguished panel who will offer comparative perspectives. David has been very influential in corporate law reform in this area and continues to play an active role.

Anthony Geoffrey Hartnell, AM (Atanaskovic Hartnell, former Chair of ASIC) is a long-standing supporter of the CLTA and will give the conference after dinner address – having also done so 25 years earlier.

EMERITUS PROFESSOR PAUL REDMOND, AM



Paul Redmond became the inaugural Sir Gerard Brennan Professor at UTS: Law in 2006 after many years at UNSW Law where he was Dean of the Faculty (1996-2002). He is an Emeritus Professor at UNSW.

His principal research interests are in corporations law, corporate governance and corporate responsibility. He is a member of a number of academic and professional bodies including the Law Council of Australia’s Corporations Committee and Business and Human Rights Working Group, the Supply Chains Working Group within the Commonwealth Attorney-General’s Department, and the Editorial Committee of the Australian Journal of Corporate Law. Since 1998 he has been Chair of the

Diplomacy Training Program, a regional human rights training non-profit established at UNSW Law by Nobel Peace Laureate José Ramos-Horta; he leads its business and human rights program as a pro bono trainer. He was the inaugural President of the Corporate Law Teachers Association and was made an Honorary Life Member of the association in 2007.

Paul Redmond also has a research and professional interest in legal education and lawyers’ professional responsibility. He was co-founder of the Australian Pro Bono

Centre and co-authored a report on the reform of legal education and training in Hong Kong (2001). He served as Chair of the Council of Australian Law Deans, as member of the International Legal Services Advisory Council and the Board of Directors of the College of Law. He is a foundation member of the Australian Law Schools Standards Committee established by the Council of Australian Law Deans. He has also held visiting appointments at several leading international law schools.

He was appointed a Member of the Order of Australia (AM) in 2013 for significant service to the law through contributions to legal education and professional bodies, and to the community.

MR DAVID IRELAND



David Ireland is a partner with New Zealand law firm Kensington Swan. He has been a member of Kensington Swan's financial services team since 1991, and has chaired the annual

Securities/Financial Markets Law Conference in New Zealand for several years. David has a particular expertise in financial intermediary regulatory matters, and is the current chair of the Code Committee appointed under the Financial Advisers Act to develop and maintain a code of professional conduct for authorised financial advisers; he has served on this committee since its inception in 2009. David is also a former chair of Workplace Savings NZ, New Zealand's peak

industry body for corporate superannuation schemes and KiwiSaver. Outside of his legal practice, David chairs the Onslow Cricket Club in Wellington and in recent years has received awards from both Cricket Wellington and New Zealand Cricket in recognition of his volunteer services to club cricket.

ANTHONY GEOFFREY HARTNELL, AM



Legal Practice

A Founding Partner - Atanaskovic Hartnell,
January 1994 to date

Formerly a Partner of Allen Allen & Hemsley,
July 1980 – June 1990 &
January 1993 -December 1993

Deputy Secretary, Department of Business & Consumer
Affairs 1976-1979

Senior Assistant Secretary,
Australian Attorney-Generals Department, 1974-1975

Other Experience

- Chairman, Australian Securities Commission 1989-1992 (Inaugural)
- Chairman, National Companies & Securities Commission 1990-1991
- Member, Companies & Securities Advisory Committee 1990-1992
- Member, Trade Development Council 1987-89
- Director, Australian Film Finance Corporation Pty Ltd 1988-1990
- Special Legal Adviser, Australian Government Inquiry into Telecommunications 1985
- Member, Trade Practices Act Review Committee 1976 (Swanson Committee)
- Visiting Professor of Law, University of Newcastle
- Visiting lecturer, Sydney University Law School, LLM course
- Chief Legal Counsel - Bankers Trust Australia Group 1997
- Member, Australian Law Reform Commission Advisory Committee on the Adversarial System of Litigation
- Contributor to Butterworths Corporations Law Service
- Chairman NSW Thoroughbred Racing Board 2000-2004

Current Public Directorships

- ANU Endowment for Excellence (President, Board of Governors)

Major Areas of Specialisation

- Corporate and Commercial Law, particularly, regulatory issues, corporate financing, takeovers, trade practices and collective investments, with more recent emphasis on investigations and enforcement actions.

University Qualifications

- BEc (ANU), LLB (Hons)(ANU), LLM (Highest Hons) (Geo. Washington Uni)

Honours

- Order of Australia (AM)
- Centenary Medal 2003

Other

- Proprietor of Meringo Stud, Moruya NSW

The First Corporate Law Teachers Conference

On the eve of the 19th annual corporate law teachers conference, I set down these recollections of the first conference, held at the University of New South Wales Law School in 1991. Angus Corbett, Ian Ramsay and I convened that conference.

The conference was held on Monday 4 February and Tuesday 5 Tuesday 1991. Many of the delegates arrived in Sydney on the Sunday evening and met then for a meal. About 85 academics attended the conference. Every academic teaching company law in an Australian law school or business law department had been invited. It was intended as a purely academic gathering with no delegates from legal practice (although some papers would be given by practitioners). Getting to know each other personally and establishing an *esprit de corps* was as important a purpose as any for the conference.

Why hold the conference?

Company law academics had met at the annual meetings of the Company Law Interest Group of the general law teachers association. But there might be only two or three interest group meetings in the generalist academic conference and attendance was declining. There was a feeling that we needed to complement these meetings with a specialist gathering. Tax teachers had held a conference in 1990 and planned to continue the meetings.

Besides, change was in the air. The Australian Securities Commission had commenced operation on 1 January 1991, replacing the dysfunctional split companies administration through the former National Companies and Securities Commission and the State and Territory commissions. The new Commonwealth corporations legislation enacted in 1989 had failed at the first hurdle when the High Court held that the corporations power in Constitution s 51(xx) did not support a general power of incorporation. However, by the end of 1990 the Commonwealth and States had reached agreement that enabled the former cooperative scheme to be recast with “federalising characteristics”, to appear to all the world as if it were Commonwealth rather than State law. This ersatz national scheme would endure for another decade until the States referred power to enable a truly national scheme based on Commonwealth legislation.

However, in 1991 it seemed revolution enough. The Australian Securities Commission under its vigorous first chairman, Tony Hartnell, had foreshadowed an ambitious enforcement program to clean up after the corporate collapses of the late 1980s. The Commission’s greatly expanded powers and national reach marked a brave new world of corporate regulation. Company law was giving way to corporate law. A new tide was running, and running strongly. It would have its rips and eddies, a time of danger for academics working alone as well as of opportunity and excitement.

So, it seemed time to invite colleagues together for a scholarly discussion on what was important for the corporate law curriculum and the new research agenda. We wanted this to be a conference with the usual academic goals of such gatherings, but we also hoped that it would trigger an academic conversation that would continue down the years. For my part, I had in mind something of the medieval guilds with their functions of mutual support and strengthening of the craft tradition. A company, cum pane: with shared bread we become a collegial group for shared learning. Less ambitious than the old Germanic guilds which sought for their members “material security in this life and salvation in the next”, but ambitious and radical enough for the times.

The conference program and themes

The program for the conference is indicative of the concerns of the times although it is striking how many of those concerns remain, some even reflected in the 2010 conference program.

The first day was given over to exposition and discussion of the new national scheme and key areas of substantive changes to company law. All the sessions were plenary. These topics and presenters (with their then institutional connections) were:

The structure and elements of the new national companies and securities scheme (Paul Redmond, UNSW)

- Enforcement powers of the Australian Securities Commission (Ralph Watzlaff, Australian Securities Commission)
- Changes to the takeovers provisions (Stephen Minns, Mallesons Stephen Jaques)
- Corporate fundraising and the new prospectus provisions (Kerry Bennett, Clayton Utz)
- Insider trading and securities markets offences (Roman Tomasic, University of Canberra)
- Directors’ and inter-corporate loans (John Kluver, Companies and Securities Advisory Committee)
- Developments in the law relating to directors’ fiduciary duties (Stephanie Rees, James Cook University)
- Insolvent trading liability (Abe Herzberg, Monash)
- The protection of minority shareholders (Jennifer Hill, Sydney).

We met that night for dinner in the UNSW Staff Club on the roof of the Electrical Engineering Building. That is not one of the architectural highlights of a campus then severely challenged architecturally. It was a balmy night and the wine and conversation flowed. Tony Hartnell, the last chairman of the NCSC and the first of the new Australian Securities Commission, was guest speaker. He spoke about the Commission’s enforcement strategy and objectives, and engaged in a lively and generous exchange with delegates. It was a memorable night and a fuller account

need wait some more years. Bread (and wine glasses) were broken. Cum pane and more.

The second day had a different character to the first and not only because of the dinner. It began with presentations by two of the key players in corporate regulation and financial markets, Ray Schoer and Leigh Hall. They addressed the topic “Corporate Law in the 1990s: Reflections for teaching and research”. Ray Schoer had just been appointed National Director of the Australian Stock Exchange (as it then was) after playing a leading role as Executive Director of the NCSC. Leigh Hall was Chief Manager of the Investment Division of the AMP Society, then arguably the most influential institution and individual in Australian securities markets.

Then we turned to the shared problems facing us as teachers, with parallel sessions for those working in law schools and business law departments on the topic “Corporate Law Teaching: Common problems and some uncommon solutions”. The panellists for the law school session were Suzanne Corcoran (Adelaide), Sally Sievers (Monash), Julia Tolmie (Sydney) and John Lessing (Bond). The business schools panellists were Bruce Gordon (UNSW), Rajee Johnson (Phillip Institute of Technology), Rosalind Mason (USQ) and Robert Rouse (Charles Sturt).

The morning concluded with parallel sessions on “The place of theory in corporate law teaching and research” convened by Angus Corbett and Ian Ramsay (both UNSW), “Researching the history of company law in Australia and England: Pitfalls for the unwary” (convenor Rob McQueen, LaTrobe) and “The teaching of company law in graduate courses” (convenor Philip Lipton, RMIT).

After lunch, there was a session on “Corporate law research: Issues, initiatives and agendas” led by the éminence grises of Australian corporate law, Professors Harold Ford and Bob Baxt, and Peter Swan, an economist with a chair in law and economics at the Australian Graduate School of Management. The conference concluded with a session on “Where do we go from here?” There was general agreement that this was an initiative worth continuing and the meeting accepted Roman Tomasic’s offer to host the second conference at the University of Canberra a year later.

Then and now: Objectives and philosophy

We had some core ideas for the conference. It is for readers to judge to what extent they have endured, and deserve to endure, in the same or mature form.

First, there was the idea of solidarity, of mutual support in the several aspects of professing company law. The bigger schools, better staffed, might help those working alone, in some cases with the burden of teaching tax as well as company law. Both fields were burgeoning. We sought to achieve that goal through structured opportunities for discussion but especially through informal discussion over coffee, dinner and after sessions. Conversations and friendships begun almost 20 years ago continue.

Second, we wanted to focus upon teaching as well as research. We chose the word 'Teachers' for the conference and later the Association. We had the feeling even then that teaching was going to be under pressure from the claims, pressures and delights of research. We wanted to keep teaching on the agenda and did not see it as competing with and inferior to research. When an academic group takes a research focus as one of its objectives, there is an inevitable and legitimate pressure from participants to present their research. We wanted to keep the conversation alive not just about research but also the problems and choices we share in the what and how of curriculum design and teaching. We did not provide in the program for paper presentation except for expositions of the main areas of reform. This was appropriate for the first meeting at a time of major change but not over the long-term. What is constant is the need for balance between teaching and research.

Third, we wanted cost to be no obstacle to attendance. The conference registration fee was deliberately and symbolically set at \$20 to signal its accessibility and academic character. That fee distinguished it from the ubiquitous programs then offered by commercial providers at fees of \$1,000 per day. We were able to do this in part because the legal publishers supported the conference financially and have done so consistently since. Happily, the Chartered Securities Australia under Dr John Nelson also came in shortly after to provide sustaining support.

Of course, this frugality had its costs. Sydney put on oppressively hot and sticky weather for the conference. Delegates who needed accommodation were offered a (spartan) student room in a UNSW college where air-conditioning was considered an effete indulgence. Some delegates still talk, affectionately, I think, of discomfort not experienced since early childhood.

The next steps

Roman Tomasic ran a successful second conference in 1992 at the University of Canberra, Peter Little organised the third at QUT, introducing overseas keynote speakers in Marc Steinberg and Cindy Schipani, and Michael Adams ran the 1994 conference at UTS. The structure of the conference has continued to evolve although the timing, in the first Monday and Tuesday of February has persisted. But that must be the subject of another account. This one concludes by noting that the 1994 conference delegates voted to adopt a constitution for an unincorporated association called the Corporate Law Teachers Association, and elected its first officers. The founding phase was over.

Paul Redmond
Foundation President
Corporate Law Teachers Association

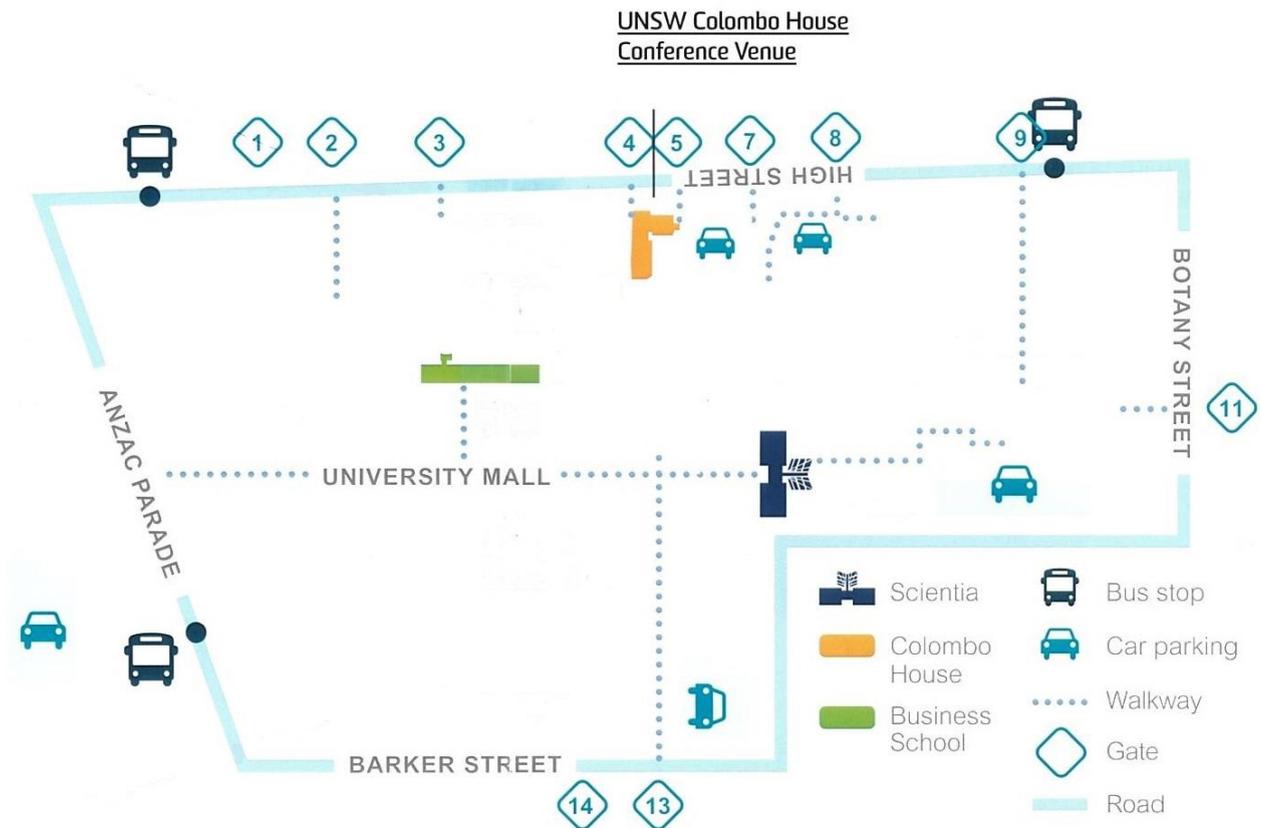
29 January 2010

25th Annual Corporate Law Teachers Association (CLTA) Conference

Welcome to the Corporate Law Teachers Association's (CLTA) 25th Annual Conference hosted by UNSW Australia, School of Taxation & Business Law.

Conference Venue – Colombo House, UNSW Australia

The Colombo House is located at Gate 4 High Street, Kensington NSW 2033.



Transport & Parking

Travelling from Coogee/Randwick to UNSW by bus

From Randwick: Catch the 400 and get off at Gate 9 High Street.

From Coogee: Catch the 370 or M50 and get off at Gate 9 High Street.

Travelling from the City (Sydney CBD) to UNSW by bus

All UNSW 890, 891, 892 and 895 Express bus services depart from Eddy Avenue (opposite Central train station) to UNSW at High Street, Randwick. There are several bus stops on High Street. Gate 8 is the nearest bus stop to the conference venue. Gate 4 is the nearest entry point to the conference venue at Colombo House. Buses to UNSW (non-express service) can be caught along the length of Elizabeth Street, Sydney (near Hyde Park). Check with the driver that it stops at UNSW, Anzac Parade. The conference venue at Colombo House is a 5-10 minute walk from Anzac Parade.

For more information, visit NSW public transport. <http://www.transportnsw.info/>

NSW Public Transport

An OPAL card is required for travel on Sydney buses, trains, light rails and ferries. It is available from many newsagents, convenience stores and other outlets.

Sydney Taxis

- Silver Service 13 31 00
- Premier Cabs 13 10 17
- St George Cabs 13 21 66

Parking

Please visit UNSW's Facilities Management website for more information
<http://www.facilities.unsw.edu.au/getting-uni/driving-parking>

Registration Times

- Sunday 31 January 2:30 – 3:30pm at Colombo House Foyer, or
- Monday 1 February 8:30 – 9:00am at Colombo House Foyer

You will receive your conference bag, a copy of the programme and a lanyard with a name badge when you register. Please wear your lanyard at all times during the conference.

Programme

The programme can be found in this booklet at page 15.

Wi-Fi Access During the Conference

Wi-Fi access will be available to registered CLTA delegates while at Kensington campus. Wi-Fi login and set-up details have been emailed to all delegates but please see us at the registration desk if you need IT support.

Please follow instructions below on how to connect your laptop to the uniwide_guest network.

1. Simply view available wireless networks on your laptop or device.
2. Select **uniwide_guest** from the list of wireless networks.
3. Click to connect.
4. Open a web browser which will automatically bring the authentication page.
5. Log-in using your username and password provided for the guest account.

Information for Speakers and Chairs of Sessions

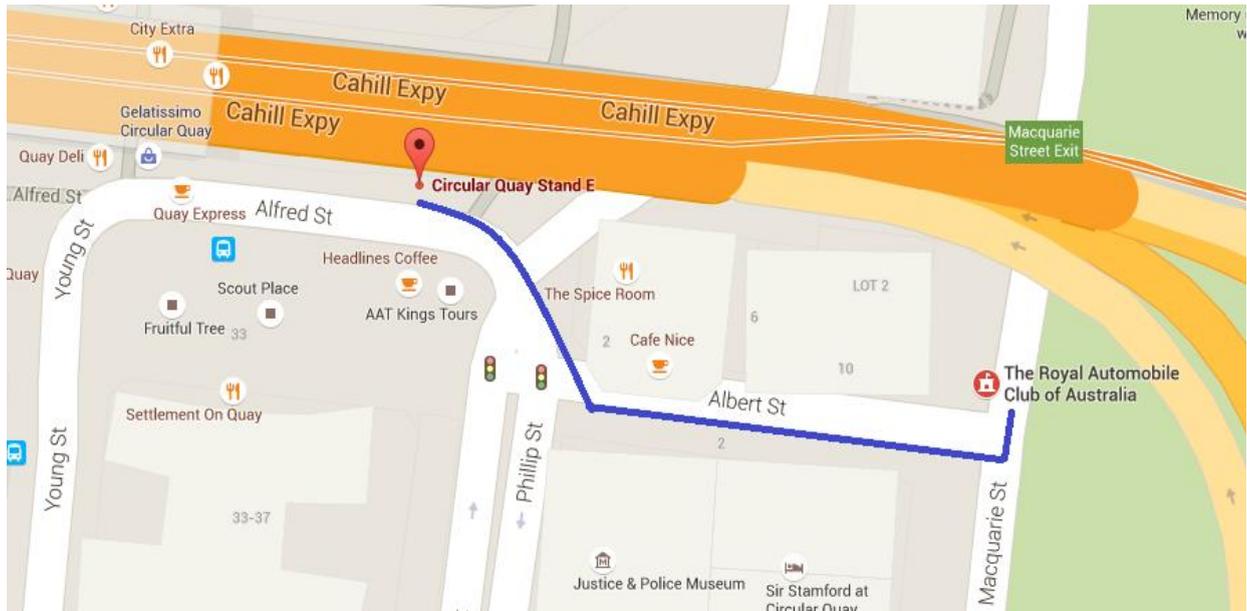
The Speakers and Chair schedule is on page 18 – 23. Speakers are reminded to please bring their presentations slide on a USB. We are unfortunately unable to accommodate Keynote presentation software and other software programs incompatible with Windows 7.

Conference papers

Electronic copies of the conference papers can be found on the following URL. Please visit <https://www.business.unsw.edu.au/clta-papers>

Dinner Venue – The Royal Automobile Club of Australia

The conference dinner will be held from 7.00 to 10:30 pm on Monday 1 February at the Royal Automobile Club Australia (RACA) at 89 Macquarie Street, Sydney. Please note that the conference registrants are expected to make their own way to the dinner venue. There are many buses which leave from Anzac Parade to Sydney CBD. Any bus to Circular Quay will take you to the venue. You will need to get off at Circular Quay, which is usually the last stop for most buses, and walk to the RACA. This should take approximately 5 minutes.



Dress Code

For all conference events, including the conference dinner on Monday nights, the dress code is 'smart casual'. The following are the dress code required by the Royal Automobile Club of Australia.

- Shorts, T- Shirts and flip flop style shoes are not acceptable at any time. Informal headwear is not permitted unless it forms part of National dress or is for medical or religious purposes.
- Joggers and sportswear not allowed. Jeans are permitted on the basis that they are clean, not stained or torn.
- Gentlemen as a minimum are required to wear a collared dress shirt, with long trousers and covered footwear.
- Ladies are expected to dress with commensurate formality according to the occasion and within the spirit of these rules, for example slacks with appropriate top, conservative dress, etc.
- Any National dress or Military uniform are allowed at any time.

For more information please visit <http://www.raca.com.au/functions/dress-code-and-club-policy/>



Corporate Law Teachers Association Annual Conference

Enduring Issues in, and Reflections on, Corporate Law and Policy over the Past 25 years

Conference Programme

Never Stand Still

Business School

Taxation and Business Law

Sunday 31 January

Time	Activity	Location
2:30pm	Registration	Colombo House Foyer
3:30 – 5:00pm	Teaching Session Chair: Associate Professor Anil Hargovan, UNSW Australia	Theatre A, Colombo House
3:30 – 4:15pm	Survey On Online Feedback to Students - How Does it Rate? (Technology Aided Learning) Fiona Martin and Kayleen Manwaring, UNSW Australia	Theatre A, Colombo House
4:15 – 5:00pm	To What Extent are Liability Issues of Business Structures Taught in Business Degrees? (Curriculum Design) Dale Boccabella, UNSW Australia; and Brett Freudenberg, Griffith University	Theatre A, Colombo House
5:00 – 7:00pm	Conference Welcome Reception	Goldstein Courtyard

Monday 1 February

Time	Activity	Location
8:30am	Registration	Colombo House Foyer
9:00 – 9:15am	Official Opening of Conference and Welcome	Theatre A, Colombo House
9:15 – 10:00am	<p>Keynote Address: Emeritus Professor Paul Redmond, AM (former Dean of Law, UNSW Australia), Sir Gerard Brennan Professor of Law, The University of Technology Sydney</p> <p>TOPIC: Corporation Law in the Global Economy and Society: New wine and old bottles? Reflections upon a quarter century of change</p> <p>Chair: Professor Ian Ramsay, The University of Melbourne</p>	Theatre A, Colombo House
10:00 – 11:05am	<p>Plenary Session on the Scholarship of Emeritus Professor Paul Redmond</p> <p>Panellists:</p> <ul style="list-style-type: none"> • Professor Ian Ramsay, The University of Melbourne; • Professor Stephen Bottomley, The Australian National University • Professor Peta Spender, The Australian National University • Dr Brynn O'Brien, The University of Technology Sydney 	Theatre A, Colombo House
11:05 – 11:30am	Morning Tea	Colombo House Foyer
11:30 – 1:00pm	<p>First Parallel Session (See Session 1 grid for list of papers and presenters)</p>	See Session 1 grid
1:00 – 2:00pm	Lunch	Colombo House Foyer
1:50 – 2:00pm	<p>LexisNexis Book launch: Australian Corporate Law, Harris, Hargovan & Adams 5th ed, 2016</p>	Colombo House Foyer
2:00 – 3:30pm	<p>Second Parallel Session (See Session 2 grid for list of papers and presenters)</p>	See Session 2 grid
3:30 – 4:00pm	Afternoon Tea	Colombo House Foyer
4:00 – 5:30pm	<p>Third Parallel Session (See Session 3 grid for list of papers and presenters)</p>	See Session 3 grid
7:00 – 10:30pm	<p>LexisNexis Conference Dinner</p> <p>The Royal Automobile Club of Australia (RACA), 89 Macquarie St, Sydney</p> <p>After Dinner Speaker: Anthony Geoffrey Hartnell, AM</p>	

Tuesday 2 February

Time	Activity	Location
9:00 – 10:15am	<p>Plenary Session on Financial and Securities Regulation</p> <p>Keynote Address: David Ireland, Kensington Swan Lawyers</p> <p>TOPIC: 'The Shifting Sands of Financial Services Regulation in New Zealand'</p> <p>Panellists:</p> <ul style="list-style-type: none"> • Professor Dimity Kingsford Smith, UNSW Australia • Professor Pamela Hanrahan, UNSW Australia • Dr Matteo Solinas, Victoria University of Wellington <p>Chair: Professor Larelle Chapple, Queensland University of Technology</p>	Theatre A, Colombo House
10:15 – 10:45am	Morning Tea	Colombo House Foyer
10:45 – 12:15pm	<p>Fourth Parallel Session (See Session 4 grid for list of papers and presenters)</p>	See Session 4 grid
12:15 – 12:45pm	Lunch	Colombo House Foyer
12:45 – 1:15pm	Annual General Meeting of the Corporate Law Teachers Association	Theatre A, Colombo House
1:15 – 2:45pm	<p>Fifth Parallel Session (See Session 5 grid for list of papers and presenters)</p>	See Session 5 grid
2:45 – 3:00pm	Afternoon Tea	Colombo House Foyer
3:00 – 4:30pm	<p>Sixth Parallel Session (See Session 6 grid for list of papers and presenters)</p>	See Session 6 grid
4:30pm	Close of Conference	

CLTA CONFERENCE PARALLEL SESSIONS

Parallel Session 1
Monday 1 February 2016, 11:30 – 1:00pm

1A: Theatre A	1B: LG01	1C: LG02
<p>Independent Directors</p> <p>Chair: Pamela Hanrahan, UNSW Australia</p>	<p>Insolvency Law</p> <p>Chair: Helen Anderson, The University of Melbourne</p>	<p>Corporate Governance</p> <p>Chair: Michelle Welsh, Monash University</p>
<p>The Rise of Independent Directors in Australia: Adoption, reform and uncertainty</p> <p>Presenters: Luke Nottage and Fady Aoun, The University of Sydney</p>	<p>Financial Twilight Re-Appraisal: Ending the judicially-created quagmire of fiduciary duties to creditors</p> <p>Presenters: Timothy Todd, Liberty University; and Anil Hargovan, UNSW Australia</p>	<p>The Board as Leaders in Corporate Governance</p> <p>Presenters: Susan Watson and Chris Noonan, The University of Auckland</p>
<p>Independent Directors in Superannuation</p> <p>Presenters: M Scott Donald, UNSW Australia; and Suzanne Le Mire, The University of Adelaide</p>	<p>Stormy Deed of Company Arrangement Weather: In pursuit of the corporate rescue ideal</p> <p>Presenters: David Morrison, The University Queensland; and Colin Anderson, Queensland University of Technology</p>	<p>Is the New Trend on Non-Financial Issues Shaping Corporate Behaviour?</p> <p>Presenter: Jean du Plessis, Deakin University</p>
<p>Independent Directors: Partnering expertise with independence</p> <p>Presenter: Suzanne Le Mire, The University of Adelaide</p>	<p>Director Liability for Fraudulent and Reckless Trading: A comparison between South Africa and Australia</p> <p>Presenter: Kathleen van der Linde, The University of Johannesburg</p>	<p>Governance of Monopolistic Government-Owned Businesses Supplying Necessary Goods: Lessons from stakeholder theory</p> <p>Presenter: Victoria Baumfield, Bond University</p>

Parallel Session 2
Monday 1 February 2016, 2:00 – 3:30pm

2A: Theatre A	2B: LG01	2C: LG02
Shareholders & Directors Chair: Suzanne Le Mire, The University Adelaide	Insolvency Law Chair: Helen Anderson, The University of Melbourne	Investor Protection Chair: Gill North, Monash University Note: Session ends at 3.45pm
Theorizing Exit in the Close Corporation Presenter: Alan Koh, The National University of Singapore	The Hybrid Fiduciary: Liquidators in Australia Presenters: Beth Nosworthy and Christopher Symes, The University of Adelaide	Comparative Approaches to Reliance and Causation in Defective Disclosure Litigation: A consideration of alternative approaches to investor redress in New Zealand, the United States and Australia Presenter: Trish Keeper, Victoria University of Wellington
Varieties of Shareholders as a Driver of Company Law Reform Presenter: Georgina Tsagas, The University of Bristol	Empirical Studies on Voluntary Administration Presenter: Jason Harris, The University of Technology Sydney	The Regulation of the Credit Industry by Command and Control: The inadequacy of market-based mechanisms in the United States Presenter: Daphne Tan, Monash University
Adjudicating Challenges to ASIC Disqualification Orders against Company Directors: An analysis of the reasoning of the Administrative Appeals Tribunal and the courts Presenter: Robin Bowley, The University of Technology Sydney	The 2015 Productivity Commission Report on <i>Business ... Closure</i>: Should insolvency reform have expected more? Presenter: Michael Murray, Queensland University of Technology	Corporate Risk Disclosure: A review Presenters: Achintya Sexena, Indrajit Dube and C.S. Mishra, Indian Institute of Technology Kharagpur
		The Penalty Quantum for Non-Compliance with Corporate Disclosure: Solace for the market Presenters: Larelle Chapple, Queensland University of Technology; Thu Phuong Truong, Victoria University of Wellington; and Michelle Welsh, Monash University

Parallel Session 3
Monday 1 February 2016, 4:00 – 5:30pm

3A: Theatre A	3B: LG01	3C: LG02
<p>Corporate Law: China</p> <p>Chair: Fady Aoun, The University of Sydney</p>	<p>Takeovers and Disclosure</p> <p>Chair: Colin Anderson, Queensland University of Technology</p>	<p>Directors' Duties</p> <p>Chair: Jason Harris, The University of Technology Sydney</p>
<p>Mapping the Landscape of Chinese Government-Controlled Companies in Australia: Corporate law and governance issues</p> <p>Presenters: Roman Tomasic and Ping Xiong, The University of South Australia</p>	<p>Assessing the Performance of Takeover Panels</p> <p>Presenter: Emma Armson, UNSW Australia</p>	<p>Illegality, Stepping Stones and Corporate Culture – Contention surrounding Directors' (and Officers') Duties Where a Company Breaches the Law</p> <p>Presenter: Rosemary Langford, The University of Melbourne</p>
<p>An Empirical Study of Share Buybacks in China: Where is it now and where is it heading?</p> <p>Presenters: Kimberly Bin Yu; Linbin Zhou and Shenglan Li, Sun Yat-sen University</p>	<p>A Comparative Study of Mandatory Offer in the United Kingdom and Taiwan</p> <p>Presenter: Edith I Tzu Su, National Chung-Hsing University</p>	<p>Another Way Forward? The Scope for an Appellate Court to Reinterpret the Statutory Business Judgment</p> <p>Presenters: Tim Connor, The University of Newcastle, and Wesley Bainbridge</p>
<p>Venture Capital Exits and the Structure of Stock Market: The case of China</p> <p>Presenter: Lin Lin, The National University of Singapore</p>	<p>Company Reporting & Communication: Investors, stakeholders & the broader communities</p> <p>Presenter: Gill North, Monash University</p>	<p>Corporate Claims Against Directors or Officers Following the Company's Unlawful Conduct</p> <p>Presenter: Wai Yee Wan, Singapore Management University</p>

Parallel Session 4
Tuesday 2 February 2016, 10:45 – 12:15pm

4A: Theatre A	4B: LG01	4C: LG02
<p>Corporate Regulation</p> <p>Chair: Pamela Hanrahan, UNSW Australia</p>	<p>Insolvency</p> <p>Chair: Peta Spender, The Australian National University</p>	<p>Corporate Culture and Crime</p> <p>Chair: Trish Keeper, Victoria University of Wellington</p>
<p>Quantifying Illegal Phoenix Activity</p> <p>Presenters: Helen Anderson and Ian Ramsay, The University of Melbourne; and Michelle Welsh, Monash University</p>	<p>The Use of the South African Business Rescue Procedure Outside of the Return of the Company to Going Concern Status</p> <p>Presenter: Natania Locke, The University of Johannesburg</p>	<p>Should Employees Have a Right of Representation on the Corporate Board?</p> <p>Presenter: Lang Thai, Deakin University</p>
<p>Phoenix Activity – Reflections on Regulatory Challenges and the Law</p> <p>Presenter: Anne Matthew, Queensland University of Technology</p>	<p>Policy Tensions in South African Corporate Insolvency Law Reform</p> <p>Presenter: Richard Bradstreet, The University of Cape Town</p>	<p>Corporate Culture and Criminal Responsibility</p> <p>Presenter: Shirley Quo, Murdoch University</p>
<p>Corporate Governance Codes: Defining the role of the board through policy and practice</p> <p>Presenter: Alice Klettner, The University of Technology Sydney</p>	<p>Corporate and Bankruptcy Law Reform in India: Issues and challenges</p> <p>Presenter: Anil Hargovan, UNSW Australia; and Ritu Gupta, National Law University</p>	<p>Corporate Manslaughter Committed by Industrial Robots at the Workplace: Who should go on trial under common law and civil law principles?</p> <p>Presenter: S M Solaiman, The University of Wollongong</p>

Parallel Session 5
Tuesday 2 February 2016, 1:15 – 2:45pm

5A: Theatre A	5B: LG01	5C: LG02
<p>History and Origins</p> <p>Chair: Dimity Kingsford Smith, UNSW Australia</p>	<p>Corporate Regulation</p> <p>Chair: Larelle Chapple, Queensland University of Technology</p>	<p>Directors' Duties</p> <p>Chair: Kath Hall, Australian National University</p>
<p>Why Law Really Matters! The Misreading of the History of Corporate Law by 'Law Matters'</p> <p>Presenter: Rob McQueen, The University of Melbourne</p>	<p>Is ASIC's 'Tool-Kit' Adequate for it to Effectively Deal with Corporate and Financial Wrongdoing? Taiwan</p> <p>Presenter: Vicky Comino, The University Queensland</p>	<p>From Enactment to <i>Mariner</i>: Does the Statutory Business Judgment Rule Change the 'Acoustic Separation' between the Conduct Rules and Decision Rules in Australia?</p> <p>Presenters: Sergio A. Gramitto Ricci, Cornell University and Jake Miyairi, The University of Sydney</p>
<p>Automatic Self-Cleansing Filter Syndicate Co. Ltd v Cuninghame Revisited</p> <p>Presenter: Stephen Bottomley, The Australian National University</p>	<p>Regulating Corporate Culture: An extraordinary development</p> <p>Presenters: David Wishart and Ann Wardrop, La Trobe University</p>	<p>The Director's Duty to Disclose: Fiduciary, equitable or otherwise?</p> <p>Presenter: Beth Nosworthy, The University of Adelaide</p>
<p>Law Against Social Responsibility</p> <p>Presenter: Harry Glasbeek, York University</p>	<p>Protection of Corporate Communications From Enforcers and Litigants</p> <p>Presenter: Steven Stern, Victoria University</p>	<p>Combating Insider Dealing: A comparative analysis</p> <p>Presenter: Shanti Segarajasingham, The University of Colombo</p>

Parallel Session 6
Tuesday 2 February 2016, 3:00 – 4:30 pm

6A: Theatre A

6B: LG02

CSR and Fundraising	Corporate Accountability
Chair: Susan Watson, University of Auckland	Chair: Michelle Welsh, Monash
<p>State Capitalism and Corporate Social Responsibility in China: Reflections on some recent cases</p> <p>Presenters: Jenny Fu, The University of Canberra; and Roman Tomasic, The University of South Australia</p>	<p>Removing the “Whistle-blowers” from the Corporations Act</p> <p>Presenters: Kath Hall, Heather Cork, The Australian National University</p>
<p>Corporate Social Responsibility in India – Origins and Prospects</p> <p>Presenters: Anil Hargovan, UNSW Australia; and Indrajit Dube, Indian Institute of Technology Kharagpur</p>	<p>Two’s Company, Three’s a Crowd? : Regulating third party litigation funding, claimant protection in the tripartite contract and the lens of theory.</p> <p>Presenter: Michael Duffy, Monash University</p>
<p>Crowd-Equity Funding Around the World</p> <p>Presenter: Marina Nehme, UNSW Australia</p>	<p>Rethinking the Corporate and Personal Wrongs Distinction: A pragmatic approach</p> <p>Presenter: Samantha Tang, The National University of Singapore</p>

Abstracts (Listed by first author)

Illegal Phoenix Activity – Some Lateral Solutions (Session 4A)

Helen Anderson and Ian Ramsay, The University of Melbourne
Michelle Welsh, Monash University

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Over more than two decades, various inquiries initiated by government have struggled to come up with a definition of illegal phoenix activity, as a step towards proscribing this troublesome and costly behaviour. At present, therefore, those who engage in this activity have only been brought to account by a patchwork of laws spanning taxation, labour and corporate law. Enforcement by both government agencies and private insolvency practitioners has been problematic, principally because it is difficult to differentiate a legitimate business rescue by a company's former controllers from a deliberate attempt not to pay a failed company's debts. This paper takes a lateral approach to 'solving' the phoenix issue by suggesting some structural and practical changes to the present landscape. These include proper identification of prospective directors and greater transparency of data for both liquidators and for creditor self-protection.

Assessing the Performance of Takeover Panels (Session 3B)

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Keywords: Takeovers, takeover panels, dispute resolution, corporate regulation and enforcement.

This presentation will examine the application of criteria for assessing the performance of Takeover Panels. First, it is contended that the objectives of speed, flexibility and certainty can be applied generally to Takeover Panels and like bodies. Secondly, it is considered whether there are other considerations that create difficulties in applying the criteria of speed, flexibility and certainty. For instance, challenges arise from overlap and tensions between the criteria. There are also two other important considerations relevant to the operation of Takeover Panels and like bodies, namely fairness and transparency. Finally, the presentation will focus on how to assess the performance of Takeover Panels using the criteria of speed, flexibility and certainty. This involves both a quantitative and qualitative assessment of its decision-making.

Governance of Monopolistic Government-Owned Businesses Supplying Necessary Goods: Lessons from stakeholder theory (Session 1C)

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Keywords: Stakeholder theory, concession theory, government-owned businesses, public sector governance.

Government-owned businesses ('GOBs') should be governed in the best interests of the public, especially where those GOBs operate as monopolist suppliers of necessary goods. Modern stakeholder theory helps explain why it is strategically in a GOB's best interests to act in accordance with the public's needs and concerns even in monopoly situations where the public appears to have little power to affect the GOB. Recent experience confirms the theory: while members of the public may be 'stuck' with monopolistic GOBs, those GOBs are themselves dependent on the public for their continued survival. Where public support is lost, the viability of even as seemingly secure an institution as a monopolistic GOB can be threatened. Thus, taking account of and attempting to accommodate the public's expectations is not only good policy in the GOB context, but also essential risk management.

This paper examines several theories that fall under the stakeholder umbrella, including concession theory, managerialism, and modern stakeholder theory, and draws principles from each that can assist in the creation of a more robust governance model for GOBs. Drawing heavily from the management literature, the paper examines how an examination of stakeholder identification principles, stakeholder salience principles, and power relationships arising from the interdependent nature of stakeholder interests may assist GOBs in making decisions that align with the public interest. The paper explains why GOBs should pursue this goal even though applicable law in Australia does not (yet?) impose multi-fiduciary obligations. Stakeholder theory makes plain an intuitive point: if stakeholder influence in both the commercial and political arenas is based on power, then the key to increasing customer influence is to increase their power. In a monopolistic system, this implies the need to create new legal rules to accomplish that purpose.

The paper also considers whether enlightened shareholder value principles and considerations of corporate objective may assist in the development of a better GOB governance model, and assesses criticisms of the stakeholder model in the GOB context.

Automatic Self-Cleansing Filter Syndicate Co. Ltd v Cuninghame Revisited (Session 5A)

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Keywords: Corporate governance, shareholders' rights.

In the recent case of *Australian Centre for Corporate Responsibility v Commonwealth Bank of Australia* [ACCR v CBA], the Federal Court of Australia held that the board of the CBA was not required to place certain resolutions proposed by the ACCR on the agenda for the bank's AGM. In support of this conclusion the Court relied, in a seemingly straightforward way, on a line of cases stretching back to the 1906 English Court of Appeal decision in *Automatic Self-Cleansing Filter Syndicate Co. Ltd v Cuninghame*. As is well known, there it was held that where a company's constitution gives directors the power to manage a company then the shareholders cannot interfere with the exercise of that power. This paper examines and questions the application of that line of cases to the particular facts in *ACCR v CBA*. More broadly, the paper examines the continued application of that line of authority in the context of the 1998 reforms now found in Part 2G.2 of the *Corporations Act 2001*, and by reference to the contemporary context for corporate governance in Australia.

Adjudicating Challenges to ASIC Disqualification Orders Against Company Directors: An analysis of the reasoning of the Administrative Appeals Tribunal and the courts (Session 2A)

Robin Bowley, The University of Technology Sydney
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ASIC's power to disqualify company directors of failed companies for up to five years under s 206F of the Corporations Act 2001 provides the regulator with a flexible enforcement tool to protect investors and other stakeholders of companies. Over recent decades, numerous challenges to the merits of ASIC's disqualification orders have been considered by the Administrative Appeals Tribunal (AAT). Several of ASIC's disqualification orders have also have been subject to further judicial review by the courts.

After discussing the legislative history behind s 206F (including s 600 of the former Corporations Law and s 562A of the former NSW Companies Code), this paper examines trends in the reasoning of the AAT and the courts in determining whether to uphold, vary or set aside disqualification orders by ASIC. From its analysis of these determinations, the paper shows that whilst the AAT and courts have exhibited flexibility in considering the particular circumstances of each case, these bodies have nevertheless demonstrated a firm approach in upholding compliance with the law and professional standards by company directors and officers.

Policy Tensions in South African Corporate Insolvency Law Reform (Session 4B)

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Keywords: Insolvency, corporate rescue, law reform; policy.

Insolvency law may be coarsely understood as the rules that create order around what would otherwise be a 'chaotic race to protect interests' (Vanessa Finch *Corporate insolvency Law: Perspectives and Principles* 2002: 7) when a debtor can no longer fulfil its obligations. Ideally, an insolvency regime should not only provide orderly procedures for distributing the debtor's assets in settlement of liabilities, but do so fairly. Having roots in Feudal England where the providers of credit were uncomfortable with the risk-taking activities of the merchant class, insolvency law had developed a hostile flavour by the time that it was applied to corporate entities. Companies must, by nature, engage in risk-taking yet the impulsion to punish (Finch 2002: 8) persisted even in corporate insolvency. In 1976, the Cork Report 'flagged an historic movement away from punitive towards rehabilitative objectives' (Finch 2002: 14) in the law of corporate insolvency, and more recently, the Australian Harmer Report has prescribed that insolvency law ought to provide mechanisms that foster participation by both creditor and debtor in expeditious procedures to efficiently and impartially deal with the assets of the insolvent debtor.

In the same way that the UK Insolvency Act, which followed the Cork Report, cannot be understood 'without comprehension of the powerful ideological undercurrents' at play in the context of its enactment, the values of the South African Constitution ought to be equally pervasive in all common law and legislative enactments. Although the Companies Act 2008 has expressly adopted many of these values, this is not to say that South Africa's existing insolvency law (which is still in the process of being reformed) should not be interpreted to align with the values enshrined in the Constitution.

'Business rescue' in South Africa, housed in the very progressive Companies Act of 2008 gives rise to an interesting conundrum when the purposes of what is essentially an insolvency procedure must be understood in the context of the more radical corporate law reform and policy that gave rise thereto. With reference to recent case law, this paper will pose the question of what role insolvency law ought to play in post-Apartheid South Africa, and specifically, whether the application of relevant value-laden principles ought to differ in the context of a near insolvency where there is a reasonable prospect of the company returning to solvency.

The Penalty Quantum for Non-Compliance with Corporate Disclosure: Solace for the market (Session 2C)

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Keywords: Continuous disclosure, securities regulation, securities enforcement, compliance.

In June 2014 a significant event happened in securities regulation and compliance – the New Zealand market regulator used its enforcement power to discipline a major corporate player with a penalty (\$130,000) for its breach of the disclosure rules. The market disclosure rules have been in operation since 2002 but until now there have been no instances where compliance has been enforced so overtly and to such a magnitude. Australia operates a similar system of disclosure regulation to New Zealand, but its enforcement record stands in stark contrast, where around the same time, a major Australia company agreed to a penalty of \$1.2M for 2 contraventions of similar laws. This paper reviews the respective regulatory landscapes in mandatory disclosure and compliance and reflects on the relevant market operators' and regulators' power and appetite for enforcement. These contrasting examples raise interesting questions in corporate law as to the effectiveness at enforcing market discipline in relation to disclosure, and whether quantum matters.

Acknowledgements:

Fleming, 1968: "...so long as some kind of basic humanity exists between the two people. When all kindness has gone, when one person obviously and sincerely doesn't care if the other is alive or dead, then it's just no good. ... I've thought about this and I've invented a rather high-sounding title for this basic factor in human relations. I have called it the Law of the Quantum of Solace."

Is ASIC's 'Tool-kit' Adequate for it to Effectively Deal with Corporate and Financial Wrongdoing? (Session 5B)

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Keywords: ASIC, corporate regulation, enforcement.

Following the recent string of high profile financial scandals and ASIC's mixed track record in some highly publicised cases, it is not surprising that ASIC has been subjected to increasing public scrutiny, especially with the Government's latest review of ASIC's capabilities. Yet, because of the Government's commitment to balance the Budget, this has meant that public authorities like ASIC have been put under intense funding pressure, which unfortunately has resulted not only in ASIC's funding and staffing levels declining, but also to its registry functions being privatised and perhaps even further uncertainty surrounding its funding as the move to a new industry funding model seems inevitable. The purpose of this paper is, therefore, to add its voice to the debate over whether the current enforcement options that ASIC has in its 'tool-kit' are adequate for it to be an effective corporate and financial services regulator. In particular, it will examine the use of settlements and enforceable undertakings. Notwithstanding the well-known difficulties associated with these measures and what are collectively known in the literature as "deferred prosecution agreements" – agreements to halt or defer prosecution (with conditions) – including, that they might be regarded by corporations as just another 'cost of doing business' and by the victims of corporate wrongdoing and the broader community as the 'sale of justice' with leniency applied usually in exchange for monetary payments from corporate defendants or even 'legal bribes' to avoid court action, it will be argued that they allow under-resourced agencies, such as ASIC to develop enforcement capability. This is particularly so if they are framed around the restorative/preventive justice paradigm (rather than retributive justice) as scholars, such as Simon Bronitt in his important work on deferred prosecution agreements suggests. In this way, settlements and enforceable undertakings can have the potential to change organisational/corporate cultures that produced the wrongdoing in the first place. It will also be argued that ASIC should be armed with some additional remedies and powers available in comparable jurisdictions, such as the US and UK. Principal amongst these are 'disgorgement', which had been recommended by the 2014 Senate inquiry into ASIC's performance and the power to ban certain retail products recommended by the Murray Inquiry.

Another Way Forward? The Scope for an Appellate Court to Reinterpret the Statutory Business Judgment Rule (Session 3C)

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Keywords: Directors' duties, corporate governance, the Statutory Business Judgment Rule.

How can the law best ensure directors and other officers take due care in their decision-making? In particular, how can it do so without stifling entrepreneurial risk-taking? The statutory business judgment rule in s 180(2) of the *Corporations Act 2001* (Cth) seeks to strike this balance but significant stakeholders remain dissatisfied with the result and there have been a number of calls for it to be amended or replaced. Interestingly s 180(2) has critics on both sides of this debate. Some argue it fails to offer adequate protection to directors who make business judgments in good faith. Others argue it has been interpreted in a manner which tips the scales too far in favour of director autonomy at the expense of accountability.

There is no doubt s 180(2) could have been more precisely drafted. However, a careful and rigorous analysis of the current text and extrinsic materials suggests an interpretation of the rule which would address the most serious policy concerns raised by its critics. This interpretation departs in important ways from the most detailed judicial analysis of the rule to date: Austin J's judgment in *ASIC v Rich* [2009] 75 ACSR 1 (*Rich*). However, given that most of Austin J's comments on s 180(2) in that case were *obiter dicta*—and given that those statements that form part of the *ratio decidendi* were made as a single judge of the Supreme Court—it remains open to an appellate court to replace Austin J's approach in *Rich* with the interpretation advocated in this paper.

In *Rich* Austin J determined that s 180(2) operates as a defence and the defendant bears the evidentiary onus. Several scholars have queried whether this corresponds with the legislative intent and some have called on Parliament to amend the legislation to clarify this point. This paper goes further and specifically argues that Austin's reasons for concluding that s 180(2) operates as a defence are relatively weak and that the better view is that s 180(2) should operate as a presumption in favour of directors.

Austin J's interpretation of s 180(2)(d) is also open to question. His approach here assumes there cannot be degrees of reasonableness, something is either

reasonable or it is not. This paper agrees with those scholars who point out that courts have long been comfortable with the concept of degrees of reasonableness. However, it is not appropriate to interpret s 180(2)(d) in light of the *Wednesbury* unreasonableness test in administrative law. Instead s 180(2)(d) should be interpreted in light of corporate case-law which evokes the concept of degrees of reasonableness, most notably the test for the oppression remedy established by the High Court in *Wayde v New South Wales Rugby League Limited* (1985) 180 CLR 45.

These and other aspects of the interpretation of s 180(2) advocated in this paper would both increase the comfort which s 180(2) provides to directors who are nervous about taking entrepreneurial risks and ensure that the sub-section does not undermine important progress in enhancing director accountability.

Independent Directors in Superannuation (Session 1A)

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Keywords: Superannuation, governance, independent directors, regulation.

Australia's largest superannuation fund boards oversee close to \$1.25tr on behalf of over 14 million Australians. The government's recent initiative to require that a minimum of 1/3 of the members of those boards are 'independent' extends a meme propagating through a wide range of corporate and public spheres. This paper assesses the relevance and practical impact of independence in the superannuation context, and also the extent to which the government's initiative is likely to achieve the various objectives articulated for it. The paper is informed by a process comprising both empirical and qualitative (interview) analysis, and comparison with approaches to independence in the listed company sector. It finds that notwithstanding the often-parochial rhetoric accompanying the policy process, the practical impact of the initiative is likely to differ markedly across different funds, and that this will only be loosely related to the industry sector occupied by the fund. Instead, idiosyncratic local circumstances, heavily contingent on the historical trajectory of the fund, are likely to be the key influence on the impact of the reforms. This suggests deficiencies in the policy process. It also poses challenges for the key regulatory agency, APRA, responsible for the superannuation sector, on which rests a tacit residual responsibility for ensuring that the policy is effective in meeting its objectives. Finally, it provides further evidence of the thesis advanced by O'Barr and Conley over thirty years ago that superannuation (pension) fund practice is as much determined by the history of the fund as by either economic rationality or regulatory fiat.

Is the New Trend of Reporting on Non-Financial Issues Shaping Corporate Behaviour? (Session 1C)

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In recent times there were several initiatives to ensure reporting on non-financial issues. The Global Reporting Initiative (GRI) is a good example. The International Integrated Reporting Council's Integrated Reporting Framework, promoting integrated thinking and Integrated Reporting <IR> is another example. In all Voluntary Corporate Governance Codes there are expectations to report on several issues, not required by law, but on a voluntary basis and based on the principle of "comply and explain". In this paper it will be considered how this is shaping corporate behaviour. How it is making companies better corporate citizens and ensuring that company adopt a long-term view of sustainable growth. Is this enough or will "hard law" have to replace the "soft law" approach to really have an impact on corporate behaviour?

Two's Company, Three's a Crowd?: Regulating Third Party Litigation Funding, Claimant Protection in the Tripartite Contract and the Lens of Theory (Session 6B)

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The advent of third-party litigation funding (TPLF) is arguably one of the most significant developments in civil litigation in Australia for many decades. It has affected corporate law and other areas of law through major funded class action litigation which has put company directors on notice that they may be increasingly financially accountable to shareholders and others. Whilst third-party funded and indemnified defendants have appeared in common law courts for some centuries, the recent corresponding appearance of third-party funded and indemnified plaintiffs is in many ways a seismic shift in our civil litigation culture. Whether this has been a welcome and overdue move towards improved access to justice and protection of rights of ordinary citizens or a dangerous step towards the creation, multiplication and inflammation of otherwise sleeping controversies is a topic of considerable and sometimes fierce debate. Nevertheless third-party litigation funding is here and spreading rapidly so that the burning question appears to be “what is to be done”. The writer’s focus in this article therefore will be on the governance of the relationship between litigant, funder and lawyer, with some bias towards the protection of the litigant as the more vulnerable party of the three. Given the importance of contract in governing TPLF arrangements the writer will explore some key theoretical insights into the phenomenon of complex multi-party contracting and the extent to which these have application to TPLF arrangements. Insights from both game theory and transaction cost economics will be applied for the first time to analyse the tripartite contractual relationships between lawyer, litigant and funder. The writer will also further develop at some length the application of agency theory. In doing so the writer will seek to answer difficult questions of how government and regulators should deal with third-party litigation funding, including analysis of the regulatory options.

State Capitalism and Corporate Social Responsibility in China: Reflections on some recent cases (Session 6A)

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Keywords: Corporate governance, corporate social responsibility, state capitalism, China

For various reasons, corporate social responsibility (CSR) has become an important part of the global debate about improving corporate governance. International scholars, such as Gunther Teubner, Larry Cata Backer and Peter Zumbansen, have contributed to this debate. With the PRC now mandating CSR through company legislation and administrative regulations, China has become a world leader in relation to CSR in terms of government-led initiatives in this regard. Through an examination of two recent scandals involving corporate failures which have had wider social and economic effects, and the role of the government in the handling of the aftermath of these scandals, this paper illustrates a unique function served by the regulatory regime for CSR in China, namely, the coordinative function of the State. The framework used in this analysis is that of state capitalism as a model of economic development and its interrelationship with CSR.

Law Against Social Responsibility (Session 5A)

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The awesome volume of report, conferences and scholarly literature on corporate ethics and social responsibility is generated by a social fact that most of this movement's protagonists want to deny, even though it is blindingly obvious to the general public, namely, that the routine outcomes of for-profit corporations' activities are exploitive and coercive. It would be a long step forward if the promoters of better corporate ethics and sense of social responsibility managed just to make corporations abide by existing laws, even if those standards often fall well short of the ethical and socially acceptable principles that law itself purports to uphold. It follows that, if the corporate ethics and social responsibility movements are to be about more than obeying law, they have a very long way to go. This paper argues that capitalism and its principal instrument, the for-profit corporation, get their legitimacy from holding out that they are bound by, and subject to, the principles of liberal law. But, liberal principles, honestly applied, impede the logic of corporate capitalism. Law has twisted its principles to put a great deal of anti-liberal and anti-social practice beyond challenge. Law justifies unethical and socially irresponsible behaviours. It has become capitalist law while holding itself out as liberal law. Only those religiously wedded to the current system of wealth production, market capitalism, and those who continue to believe that is truly as liberal as it purports to be, think that the anti-social acts perpetrated by means of corporations are aberrational and can be fixed by some clever engineering. The would-be promoters of better corporate ethics and a richer sense of social responsibility do not reject the legal cant that gives the corporation a central place in our political economies. They do not confront the fact that corporations are, first and foremost, instruments of capitalism and that the logic of capitalism needs to marginalise any ethical and social responsibility sensibilities that impede the accumulation project. For them to succeed, they need to penetrate the ideological web that has turned liberal law into capitalist law and to make an argument that there is a need to make corporations, their operators and controllers abide by the liberal legal rules, without any of the exempting privileges that the law accords them now. Failure to do this will mean that the CSR, stakeholder and ethical movements will remain quixotic at best or more direly, as Tombs and Whyte have recently shown, positively regressive. Things could get worse.

From Enactment to Mariner: Does the Statutory Business Judgment Rule change the ‘Acoustic Separation’ between Conduct Rules and Decision Rules in Australia? (Session 5C)

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Keywords: Business Judgment Rule, duty of care, acoustic separation, directors.

In the past 25 years, the Australian courts’ and legislatures’ endeavour to strike an appropriate balance between directors’ accountability for the exercise of due care and the promotion of legitimate risk-taking has resulted in a plethora of developments in the regulation of directors’ liability for breach of their duty of care. In 2000, the Commonwealth Parliament enacted a statutory business judgment rule in an attempt to further refine this balance. The express purpose of this provision was two-fold: first, to clarify and confirm the existing general law standard of review; and second, to protect directors’ authority to make honest, informed and rational business decisions in order to encourage entrepreneurial decision-making.

Yet the implementation of the statutory business judgment rule in Australia poses theoretical issues, and an enduring question remains over the extent to which it has actually modified the standard of review for directors’ duty of care. An examination of the efficacy of the rule is particularly timely in light of the Federal Court’s decision in *Australian Securities and Investments Commission v Mariner Corporation Limited* [2015] FCA 589 — the first case in which the statutory business judgment rule has been unequivocally invoked by directors in its 15 year history.

Against this backdrop, the objective of this Conference Paper is to assess whether the statutory business judgment rule has substantially altered the ‘acoustic separation’ characterising the existing relationship between conduct rules and decision rules governing directors’ liability for breach of their duty of care. In particular, this Conference Paper suggests that although the precise theoretical boundaries of the statutory business judgment rule and general law ‘business judgment principle’ differ, the practical ramifications of the ‘acoustic separation’ remain fundamentally unchanged.

Along these lines, this Conference Paper reflects on the extent to which the statutory business judgment rule has achieved its intended purpose of clarifying the existing standard of review while simultaneously encouraging legitimate risk-taking. An

analysis of the case law reveals a fundamental tension between the intended purposes of the provision, such that the rule has created further complexity rather than granting directors greater certainty in respect of their liability.

This Conference Paper is set out in four parts. Part I traces the evolution of directors' liability for breach of their duty of care in Australia. In particular, this section examines the underlying rationales of the statutory business judgment rule and its interaction with the existing legal framework. It also introduces the paradigm of acoustic separation under which the relative theoretical and practical implications of the duty of care, general law business judgment principle, and statutory business judgment rule will be assessed. Part II surveys the recent cases in which the statutory business judgment rule has received judicial consideration in Australia, with a view to delineating the theoretical distinctions between the statutory business judgment rule and the general law 'business judgment principle' from their practical ramifications. Part III evaluates the extent to which the statutory business judgment rule achieves its intended purposes by scrutinising whether the provision improves the efficacy and clarity of the legal framework regulating corporate directors' liability for due care. Part IV concludes.

Removing the “Whistleblower” from the Corporations Act (Session 6B)

Kath Hall and Heather Cork, The Australian National University

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Part 9.4AAA of the Corporations Act 2001 (Cth) contains the primary federal protections for individuals in the private sector who report or “blow the whistle” on corporate misconduct. However, there is broad consensus, both domestically and internationally, that these protections are deficient and do not accord with international best practice. Calls for reform focus primarily on the need to incentivise reporting, clarify the definition of protected reporter and applicable wrongdoing and allow for anonymous disclosures and disclosures to 3rd parties. None ask – do we have the basic framework of “whistleblowing” right?

This paper explores this question by considering the behavioural assumptions embedded in Australia’s private sector whistleblowing laws. It questions the dominant discourse of “one whistleblower” and “one disclosure,” and asks whether the way we discuss whistleblowing is narrowing our understanding of both the realities of reporting and the key limitations in the Corporations Act provisions.

Corporate Social Responsibility in India – Origins and Prospects (Session 6A)

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Keywords: CSR, history, law reform

India is the first country in the world to introduce mandatory Corporate Social Responsibility (CSR) through the new Companies Act 2013 (CA 2013). Prior to this landmark development, CSR was not a new concept in India. There are multiple drivers leading to this law, including moral, ethical, cultural and strategic reasons. The purpose of this paper, however, is to map the development of CSR in India from an economic and legal perspective and to capture the many phases in its development. The paper demonstrates that the seeds of statutory CSR were planted decades before, with its germination evidenced in the 2013 Act. Post – independent governance of India was an instrumental catalyst for CSR initiatives. India was governed with the mandate to achieve social and economic justice and aimed at economic pluralism. The role of business in nation building was readily recognised and this philosophical approach was echoed in the reports of various expert committees appointed to recommend company law and industrial reforms. In furtherance of this philosophy, major companies in different industrial segments were nationalised. The objective was to use the corporation as a vehicle for development and to utilise the profit for socio-economic upliftment. The Government emerged as a major equity holder, with all the government companies advocating a strong CSR mandate prior to the enactment of the new CA 2013.

Corporate Insolvency and Bankruptcy Laws in India: Issues and challenges (Session 4B)

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Keywords: Insolvency, bankruptcy, law reform

The Indian insolvency and corporate regime, till recently, could have been described as a mosaic of many segments that hardly joined each other. The framework for personal insolvency remained unchanged for more than a century while for corporate, it has remain unchanged for almost six decades. The uncoordinated as well as sporadic forays of working groups, committees and law making continuously talked about reforming bankruptcy laws in India. Spasmodic introduction of ancient 'the Sick Industrial Companies Act (SICA), 1985'; granting special rights to banks for recovery of debts through the Recovery of Debts due to Banks and Financial Institutions (RDDBFI) Act, 1993 and then enforcing security interests without intervention of the Courts through Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002 led to inefficiencies, delays and parallel proceedings that often gave rise to conflicting situations. It was way back in 1964 when the 26th Law Commission had recommended for major reforms in insolvency laws. Recently in November, 2015, the Bankruptcy Law Reforms Committee (BLRC) under the Chairmanship of Dr T.K. Viswanathan in its final report has suggested for a comprehensive 'Insolvency and Bankruptcy Bill, 2015'.

The author in this paper has made an attempt to trace the history of insolvency and bankruptcy regime in India and analysed the whole situation comprehensively. Further, an attempt has been made to map the missing links connecting to the equitability principle on the issue that is accepted globally. The new bankruptcy code has been discussed at length and at the end, certain suggestions have been made for further improvement of the regime.

Empirical Studies on Voluntary Administration (Session 2B)

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Voluntary administration (VA) is Australia's main formal corporate rescue mechanism and was inserted in Pt 5.3A of the Corporations Act in 1992 (operational from 1993). Since that time the VA regime has been subject to a number of inquiries and reviews which have all found that the regime works reasonably well. However, the numbers of VA appointments have more than halved in the past 10 years and there is a growing sense among the business community that it requires amendment. Indeed, some have argued for a complete rewrite. What is missing in this debate is hard data on how VA actually works. While deeds of company arrangement (DOCA) have been investigated by two empirical studies in the past 10 years, there have been no comprehensive studies of how administration itself works. This paper presents an empirical study that involves descriptive statistical analysis of the first 20 years of VA appointments and the results of a survey of insolvency practitioners and small business accountants on their views of the efficacy and value of voluntary administration undertaken as part of the author's doctoral work.

This paper fits within the corporate insolvency theme of the conference.

Comparative Approaches to Reliance and Causation in Defective Disclosure Litigation: A consideration of alternative approaches to investor redress in New Zealand, the United States and Australia (Session 2C)

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Keywords: Securities law, causation, fraud on the market.

Section 496 of the recently enacted *Financial Markets Conduct Act 2013* ('NZ') ('FMCA') contains an important statutory reform to securities law in New Zealand, particularly securities class actions, as it reverses the rules relating to causation and reliance in defective disclosure litigation. Prior to the FMCA, individual investors needed to prove actual reliance on any alleged untrue statements, which effectively precluded private representative actions as a pathway for investor redress and enforcement. However, s 496 provides that certain contraventions must be treated as causing a person to suffer loss or damage unless the contrary is proved. The section was introduced expressly to "reduce the difficulties that investors face in proving they have suffered loss or damage because of a contravention."¹ The paper outlines the difficulties faced by investors in New Zealand prior to the enactment of the FMCA and how s 496 operates to introduce a statutory version of the rebuttal presumption of 'fraud on the market' adopted by the United States Supreme Court in *Basic Inc v Levinson*² in 1988. The paper also considers the rationales for the 'fraud on the market' presumption and considers recent judgments and academic debate in the United States and Australia where issues of reliance and causation have been discussed and suggests possible difficulties New Zealand courts may have with the new rule.

¹ Financial Markets Conduct Bill 2011 (No 342-1), Explanatory Note, p 20.

² *Basic Inc v Levinson* 485 US 224 (1988).

Corporate Governance Codes: Defining the role of the board through policy and practice (Session 4A)

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Keywords: Corporate governance, soft regulation, boards of directors, norms and law.

The focus of this paper is the increasing use of codes of corporate governance as part of the regulation of corporations. A code of corporate governance can be defined generally as 'a non-binding set of principles, standards or best practices, issued by a collective body and relating to the internal governance of corporations'.¹ Codes comprise a relatively new form of soft regulation added to the control of corporate conduct in the last two decades.² Indeed, the publication of the United Kingdom's first code in 1992 marked the start of a remarkably fast proliferation of codes worldwide. Aguilera and Cuervo-Cazurra noted that there were 24 countries with codes in 1999 and Lopez-Iturriaga reported 63 countries with codes in 2008.³ The trend has continued with 94 countries providing their codes to the European Corporate Governance Institute in 2015.

This paper charts the development of codes of corporate governance over the last 25 years and explores both the policy behind them and the practical challenges they are designed to resolve. Their flexible, non-legal nature permits regular review and amendment and enables them to tackle some of the more complex dilemmas faced by large organisations including: optimal board composition; risk management; executive remuneration; and, most recently, gender diversity.

While focusing on the Australian code of corporate governance, the paper draws on parallel developments internationally to compare and contrast the different approaches applied to common problems. Its analysis of the evolution of corporate governance codes over time provides insights into the changing role of the board of directors. On the basis that code reforms both reflect and encourage the institutionalisation of norms of practice, the paper finds that the board's role has moved from a focus on monitoring towards stronger involvement in mediating and

¹ Weil, Gotshal and Manges, *International Comparison of Selected Corporate Governance Guidelines and Codes of Best Practice*, (New York, 2003) cited in D Seidl 'Regulating Organisations through codes of corporate governance' (Working Paper No. 338, Centre for Business Research, University of Cambridge, December 2006).

² D Kingsford Smith, 'Governing the Corporation: The Role of Soft Regulation' (2012) 35(1) *University of New South Wales Law Journal* 378-403, 378.

³ R V Aguilera and A Cuervo-Cazurra, 'Codes of Good Governance Worldwide: What is the Trigger?' (2004) 25(3) *Organization Studies* 417, 421; Lopez Iturriaga (ed) *Codes of Good Governance Around the World* (Nova, 2009).

strategising. Research on corporate governance codes is still in its early stages and yet has great potential to further our understanding of the role of the board in corporate governance and the interplay between policy and practice.

Theorizing Exit in the Close Corporation (Session 2A)

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Keywords: Corporate law, close corporations, shareholder oppression, unfair prejudice.

Over time, legislatures, courts, and scholars have come to general agreement that ultimate solution of shareholder conflict takes some form of shareholder exit. The remedies that have developed are, broadly categorized, dissolution (winding-up), appraisal, expulsion, and withdrawal. Of these, withdrawal (or share buyout) is in many jurisdictions available as one of the judicial reliefs under statutory rules on 'oppression' or 'unfair prejudice, with a presence in many jurisdictions and enormous bodies of case law. However, withdrawal remedies as a statutory remedy remains under-theorized, and draws the ire of contractarian scholars who argue that withdrawal should not be available at general law, but rather only to shareholders who expressly contract for it.

In this Paper, I make a case for withdrawal remedies in general close corporation law (i.e. without the need for express contract) and offer an analytical framework. First, I address and rebut in large part the arguments often advanced against withdrawal remedies in general law by primarily law and economics scholars by showing that their arguments are based on ultimately flawed assumptions about human motivation and behavior. Second, I argue that removing the necessity for close corporation participants to bargain for exit not only reduces transaction costs, but also preserves and vindicates economically irrational behaviors such as overoptimism and trust that are important for the creation and success of closely held businesses. Finally, I suggest that withdrawal remedies can be justified by a doctrine of shareholder duties *inter se* in the close corporation.

Illegality, Stepping Stones and Corporate Culture – Contention Surrounding Directors’ (and Officers’) Duties Where a Company Breaches the Law (Session 3C)

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Keywords: Directors’ duties, stepping stones, illegality defence, corporate culture.

Against a background examination of the policy considerations relevant to the imposition of liability on directors and officers in circumstances where a company breaches the law, this paper hones in on the so-called ‘stepping stones’ approach. This approach, first coined by Herzberg and Anderson, involves the imposition of liability of directors for breach of the duty of care (and also in some cases for breach of the duty to act in good faith in the interests of the company and potentially the duty to avoid improper use of position) in exposing the company to the risk of prosecution or liability where action is taken against the company for breach of the *Corporations Act 2001* (Cth) or some other law. The paper draws attention to the restrained application of the stepping stones approach in the 2015 case of *Australian Securities and Investments Commission v Mariner* (2015) 106 ACSR 343 and assesses this application in light of previous cases and commentary on the stepping stones approach. It provides comparative analysis of other jurisdictions, demonstrating the uniqueness of the stepping stones approach and of the absence of the illegality defence in Australia. In outlining the sources of liability imposed on directors and officers, the paper also comments on the proposed introduction by the Australian Securities and Investments Commission of liability based on corporate culture.

Independent Directors: Partnering expertise with independence (Session 1A)

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Scepticism about independence as a solution to corporate governance problems is both understandable in view of past failures and valuable as a spur for further thinking about corporate governance reform. This article challenges the sceptics' accepted wisdom that independence and expertise are mutually exclusive, and explores expertise instead as a useful partner to independence. It develops a theory of expertise for corporate boards that is suited to the board's role. This theory identifies three types of expertise that should be considered in the board context: domain-specific, firm-specific, and director-craft expertise. It examines the extent to which these are recognised in existing legislation, soft law and cases on the directors' duty of care and skill and disqualification in Australia and the UK. The article concludes that there is an increasing regulatory focus on expertise but that, as yet, this focus lacks sophistication and coherence.

Venture Capital Exits and the Structure of Stock Market: The case of China (Session 3A)

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Keywords: Venture capital, exits, stock market, China.

Academic literature has argued that there is a strong link between a vibrant venture capital market and an active stock market.¹ In particular, Black and Gilson argue that the vibrancy of the venture capital market is dependent on the presence of an active stock market through which the venture capitalist can exit from a successful portfolio company via IPO.² They have also argued that the venture capital industry tends to be stronger and more vibrant in stock market-centred systems, like the U.S., as compared to Germany and Japan which neither have a strong stock market like the U.S. nor a robust venture capital market.³

China is now the second largest country in venture capital investment, ranking only after the U.S. However, Chinese stock markets have long been blamed as largely underdeveloped in terms of structure and products. Due to the public ownership structure and the legacy of the planned economy system, the stock market was not established till 1990, when the two stock exchanges was opened– the Shanghai Stock Exchange in November 1990 and the Shenzhen Stock

¹ Bernard S. Black & Ronald J. Gilson, *Does Venture Capital Require an Active Stock Market?* 11 JOURNAL OF APPLIED CORPORATE FINANCE 36 (1999); Edward B. Rock, *Greenhorns, Yankees and Cosmopolitans: Venture Capital, IPOs, Foreign Firms, and US Markets*, 2 THEORETICAL INQUIRIES IN LAW 711 (2001); Gompers, P.A. and Lerner, J. (2001) The venture capital revolution, *Journal of Economic Perspectives*, 15, 145-68. Mayer, C., Schoors, K., and Yafeh, Y (2005) Sources of funds and investment activities of venture capital funds: evidence from Germany, Israel, Japan and the UK, *Journal of Corporate Finance*, 11, 586-608; Marc-Oliver Fiedler and Thomas Hellmann, "Against All Odds: The Late but Rapid Development of the German Venture Capital Industry". *The Journal of Private Equity* (2001) at 39; Jeng, Leslie A. and Wells, Philippe C., *The Determinants of Venture Capital Funding: Evidence Across Countries* (May 1998). Available at SSRN: <http://ssrn.com/abstract=103948> or <http://dx.doi.org/10.2139/ssrn.103948> (They analyse the determinants of venture capital for a sample of 21 countries and find that IPOs are the strongest driver of venture capital investing)

² Bernard S. Black & Ronald J. Gilson, *Does Venture Capital Require an Active Stock Market?*, 11 JOURNAL OF APPLIED CORPORATE FINANCE 36 (1999).

³ *Id.*

The Use of the South African Business Rescue Procedure Outside of the Return of the Company to Going Concern Status (Session 4B)

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Keywords: Business rescue, corporate, insolvency.

The South African Companies Act 71 of 2008 provides that business rescue must either maximise the likelihood of the company continuing in existence on a solvent basis, or if this goal is not possible, to result in a better return for creditors or shareholders than would result from the immediate liquidation of the company. The Supreme Court of Appeal confirmed in *Oakdene Square Properties (Pty) Ltd & others v Farm Bothasfontein (Kyalami) (Pty) Ltd & others* 2013 (4) SA 539 (SCA) that the latter goal of business rescue may be aimed for even at the commencement of the procedure, meaning that parties need not show first that there will be any attempt to return the company to going concern status. In the *Oakdene* case, it was clear from the start that the company had no prospect of becoming economically viable. In the end, the Supreme Court of Appeal held that it was not convinced that there was a reasonable prospect of realizing a higher return for creditors and the appeal was dismissed.

At present, it is not clear what the circumstances must be for there to be a reasonable prospect of realizing a better return for creditors than would result in the immediate liquidation of the company. The only reported case so far where this second goal was the objective is *Commissioner, South African Revenue Service v Beginsel NO & others* 2013 (1) SA 307 (WCC). In that decision, the ranking of creditors that would apply during insolvent liquidation was simply removed, which resulted in a higher return for the concurrent creditors, but in a severely reduced return for the South African Revenue Service. In my view, this constituted a misuse of the business rescue procedure. The purpose of the business rescue procedure is not to prejudice the settled ranking of creditors in insolvency.

This paper considers whether there is a legislative preference for business rescue rather than insolvent liquidation. It further considers in what circumstances there would be a reasonable prospect of 'rescuing the company' in the second sense.

Why Law Really Matters! The Misreading of the History of Corporate Law by 'Law Matters' (Session 5A)

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Keywords: Corporations, law, history, colonialism.

This paper critically examines the premises behind Rafael La Porta and his collaborators influential 'Law Matters' research, which, it claims to have demonstrated a set of pervasive correlations between economic outcomes, legal rules, and legal origin.

In this literature, legal origin means whether a country's legal system is based on British common law, or French, German, or Scandinavian civil law.

In most of the literature, these correlations have been interpreted as evidence that some structural difference between common and civil law has important implications for economic outcomes for those former colonial 'possessions' which have inherited one or other of these systems of law.

La Porta and his colleagues' research arguably demonstrates that colonies which inherited common law demonstrate superior economic performance to their civil law counterparts and that this difference in performance is strongly related to the legal systems these respective former colonies have inherited.

In the following these premises will be critiqued, particularly on the grounds that the regression analyses upon which they are based has not and cannot provide a properly fine grained demonstration of the claimed inextricable relationship between inherited legal system & post-colonial performance.

Phoenix Activity – Reflections on Regulatory Challenges and the Law (Session 4A)

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Keywords: Phoenix activity, limited liability, SMEs.

The adequacy and efficiency of existing legal and regulatory frameworks dealing with corporate phoenix activity have been repeatedly called into question over the past two decades through various reviews, inquiries, targeted regulatory operations and the implementation of piecemeal legislative reform. Despite these efforts, phoenix activity does not appear to have abated. While there is no law in Australia that declares 'phoenix activity' to be illegal, the behaviour that tends to manifest in phoenix activity can be capable of transgressing a vast array of law, including for example, corporate law, tax law, and employment law. This paper explores the notion that the persistence of phoenix activity despite the sheer extent of this law suggests that the law is not acting as powerfully as it might as a deterrent. Economic theories of entrepreneurship and innovation can to some extent explain why this is the case and also offer a sound basis for the evaluation and reconsideration of the existing law.

The challenges facing key regulators are significant. Phoenix activity is not limited to particular corporate demographic: it occurs in SMEs, large companies and in corporate groups. The range of behaviour that can amount to phoenix activity is so broad, that not all phoenix activity is illegal. This paper will consider regulatory approaches to these challenges via analysis of approaches to detection and enforcement of the underlying law capturing illegal phoenix activity.

Remedying the mischief of phoenix activity is of practical importance. The benefits include continued confidence in our economy, law that inspires best practice among directors, and law that is articulated in a manner such that penalties act as a sufficient deterrent and the regulatory system is able to detect offenders and bring them to account. Any further reforms must accommodate and tolerate legal phoenix activity, at least to some extent. Even then, phoenix activity pushes tolerance of repeated entrepreneurial failure to its absolute limit. The more limited liability is misused and abused, the stronger the argument to place some restrictions on access to limited liability. This paper proposes that such an approach is a legitimate next step for a robust and mature capitalist economy.

Stormy Deed of Company Arrangement Weather: In pursuit of the corporate rescue ideal (Session 1B)

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We suggest that there is stormy weather ahead for the administration of insolvencies in Australia as we grapple with the technical and social disruption of the challenges facing commercial entities. One potential contributing factor to the difficulties ahead is the piecemeal way that corporate insolvency law (and to an extent personal bankruptcy law) is viewed and treated by the Commonwealth. When legislative regimes are not properly reviewed from time to time, by being viewed within the broader structure of insolvency and more widely commercial law, then seemingly less significant changes to deal with particular circumstances give rise to unintended and often perverse consequences. Examples of these include practitioners, judges, and commentators making assumptions around the law: assumptions that are different from the intention of the legislature. Another example is where the courts and practitioners assume that the law is always followed as distinct from the regulators who might be making concessions for lower-order offences in order to ensure compliance but unwittingly initiating a culture other than legislatively intended into the practice of the law.

This paper examines the Deed of Company Arrangement provisions within the operation of the Australian corporate law rescue provisions and considers whether the Australian DOCA provisions facilitate the overall objective of Part 5.3A of the Corporations Act, to facilitate the rescue of companies operating within the zone of insolvency.

The 2015 Productivity Commission Report on *Business ... Closure*: Should insolvency reform have expected more?

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The current government focus is on encouraging some entrepreneurial spirit in what seems to be a tired and anxious business community. Rather than enlisting the usual lawyers for the task, the socio-economic focused Productivity Commission got the job. Its 2015 Report looks at the full spectrum of a business, from its start-up, to its end - the insolvent ending, sadly, being my interest and focus.

But insolvency academics are not sad or negative, because we see a business' failure as an opportunity to helpfully restore its fortunes, with lessons having been learnt; or, if not, to quickly dispose of the entity to allow a new idea to be pursued, still with those lessons in mind.

The human reasoning in including insolvency in a start-up inquiry, is, with some sound academic support, that an 'entrepreneur' entering business will, while being interested or excited by their new venture, at the same time have an underlying unease about the consequences of failure. By ameliorating those consequences, the young entrepreneur is more ready to venture their money, and ideas.

With that in mind, the Commission has proposed to ameliorate that possible exit, by giving the entrepreneur some incentive to properly monitor their business for signs of decline, which if left unattended, will require them to face up to their dramatic failure.

How the economists propose this - an idea no lawyer could think up – is to deny the entrepreneur access to voluntary administration if their company is already insolvent; or, put positively, to offer the incentive of assistance and protection only to those entrepreneurial directors who act and seek advice promptly.

While the Commission gives the standard jingoist rejection of any ideas from the US, its idea is more based on the encouragement to directors to act early offered by the more accommodating US 'debtor in possession' model.

Then, in further support of its reasoning, the Commission recommends that the entrepreneurial directors of those solvent companies should have 'safe harbour' protection while they endeavour to forestall their (borderline solvent) company's decline.

And even if our entrepreneur's business does failure and liquidation follows, the Commission recommends a quick simplified liquidation process to churn their company through.

The final bonus offered our entrepreneur is that, if having given personal guarantees such that personal bankruptcy is inevitable, it will only last 1 year and not 3.

How viable all this is, and how sound the reasoning, and whether we should have expected more from the Commission, and indeed whether that's all insolvency reform can expect, will be open for discussion.

Crowd-Equity Funding Around the World (Session 6A)

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Keywords: Crowdfunding, crowd-equity funding, fundraising, regulation

Crowd equity funding is a type of crowdfunding that allows companies to obtain seed or other capital through small equity investments from a large range of investors via an online portal. Investors receive shares in the company in return for their investment. This form of finance has been viewed as a way to remedy the shortfall of capital for small and medium enterprises. As a result, a number of countries such as the United States of America, Italy, United Kingdom and New Zealand have promoted this form of finance. Further, Australia has put forward proposals that may allow for crowd equity funding to be relied on by businesses to raise the necessary capital without the need of a disclosure document. The paper compares and contrasts the initiatives of different countries regarding the regulation of crowd equity funding to highlight the similarities and differences between the systems. The aim is to consider which regulations seems to be achieving consumer protection while at the same time allowing businesses to raise capital via this source of finance.

Company Reporting & Communication: Investors, stakeholders & the broader communities (Session 3B)

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Public corporations are increasingly acknowledging their role in society and the need to communicate and engage with audiences that extend well beyond existing investors. This broader focus is evidenced by the developing regulation and practice around community reporting. Various models of community reporting and regulation are emerging, including, but not limited to, management discussion and analysis reporting, corporate social responsibility reporting, sustainability reporting, citizenship reporting, and integrated reporting. The paper considers these corporate reporting and communication structures within digital environments. It highlights developing reporting trends, links between financial and non-financial performance reporting and analysis, and notable features of leading listed company reports and websites.

The Director's Duty to Disclose: Fiduciary, equitable or otherwise? (Session 5C)

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Keywords: Directors, obligations disclosure, fiduciary.

Directors owe a significant number of duties to their company – at common law, in Equity and according to the *Corporations Act 2001* (Cth). In Equity, the director-company relationship has long been recognised as founding a presumption of a fiduciary obligation flowing from the director to the company, which served as inspiration for ss 182-183 of the *Corporations Act*. Despite firm High Court authority as to the precise (and proscriptive) content of this obligation in Equity, over the past two decades case law has emerged suggesting that in limited circumstances directors owe a 'fiduciary duty of disclosure'.

This paper undertakes a detailed analysis of the first case to raise this misnomer, *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452. Through careful consideration of the cases cited as authority by the Full Federal Court, it argues that there has either been a misleading conflation of the words 'equity' and 'fiduciary', or a misstatement of the only defence available to a challenge of fiduciary breach – that of fully informed consent. The paper charts the cases which followed *Fraser v NRMA*, and confirms that the duty of disclosure is either grounded in Equity more generally, or specifically as a defence to a claim of breach of fiduciary obligation.

The Hybrid Fiduciary: Liquidators in Australia (Session 2B)

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Keywords: Liquidators, obligations, statutory, fiduciary.

The property of a company in liquidation does not vest in the liquidator. Instead the liquidator holds the assets of the company in liquidation in a fund, not a trust, so they cannot be said to be a trustee. The liquidator acts as an agent for the company in liquidation, yet they are really principals who make decisions to sell, contract, and so forth. They do replace the directors and officers of the company, who have fiduciary obligations under the common law and the *Corporations Act 2001* (Cth). Furthermore, when appointed by the Court, the liquidator is also then an officer of the Court, and owes further obligations.

With such truisms, can we conclude that the liquidator is a fiduciary? They are a hybrid duty-holder, owing obligations to act honestly, to use their powers bona fide for the purpose conferred and not for any private or collateral purpose, to avoid conflicts with private interests and to discharge their duties with complete impartiality. Although these themes can be seen within the fiduciary obligation, will Australian courts accept the liquidator as new nominate category of fiduciary?

This paper comments on the current position of liquidators beyond their statutory regulation and duties. It sheds further light onto the high expectations placed on the twenty-first century, non-legally trained insolvency practitioner.

The Rise of Independent Directors in Australia: Adoption, reform and uncertainty (Session 1A)

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Australia's blockholder tradition in ASX-listed companies has arguably impacted on the roles and composition of boards over the last 25 years. As outlined in Part II of this paper, for a book project on the spread of independent directors (IDs) throughout Asia, there has been a longstanding tension between those in Australia preferring a narrower view of directors' roles and duties (focused on corporate performance) and those advocating a broader view (including more emphasis on risk management, which may favour smaller shareholders). Nonetheless, there has been a shift since the early 1990s away from "executive" towards "monitoring" boards.

Yet this transition has not been rapid or particularly smooth (Part III). Following corporate excesses, in 1992 the ASX recommended mandatory IDs. After business opposition, it proposed a UK-style "comply-or-explain" regime in 1994, but then settled on an even weaker disclosure regime from 1996. Only after a wave of much more serious corporate failures did the ASX implement (from 2004) a requirement for listed companies to adopt a majority of IDs on an "if not, why not" basis. Minor revisions were made in 2007, but somewhat more stringent standards were implemented from 2014. This occurred in the shadow of post-GFC legislative initiatives, and case law that generally expanded the scope of directors' duties owed.

The cornerstone remains the ASX "Principles and Recommendations" (Part IV). They are underpinned by Listing Rules, which furthermore mandated an audit committee since 2004, and a remuneration committee since 2011 (albeit only for the largest 300 companies), each requiring a majority of IDs. There are detailed criteria for assessing independence, such as whether the director has direct (or, since 2014, "family") links with a "substantial" (5%) shareholder. This factor differs from the US and had a direct impact on earlier corporate governance reforms in Hong Kong, which shares Australia's blockholder tradition. Conversely, developments in Hong Kong and Singapore partly influenced a compromise reached in the 2014 ASX Principles regarding length of tenure.

Nonetheless, there is still only weak empirical evidence in Australia of positive effects from IDs, with respect to enhancing risk management and particularly corporate performance overall (Part V). A controversial econometric study published in 2013 concluded that over \$69 billion in corporate value had been destroyed over 2003-2011 by the (largely) "if not, why not" ASX requirement for a majority of IDs on

listed company boards. The authors were particularly critical of the ASX's view that major shareholders (or nominees etc.) would lack independence as directors, arguing that they instead have incentives to monitor management better. However, this criterion was not changed significantly in 2014, with one concern being that a relaxation might disproportionately benefit large over smaller shareholders.

There has also been little impact on policy-makers and regulators from a few other academic papers in Australia, which have recently queried the received wisdom about IDs from various perspectives. The lack of sustained public discussion is unfortunate, as many issues remain to be properly explored from theoretical, empirical and comparative perspectives (Part VI).

Corporate Culture and Criminal Responsibility (Session 4C)

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Keywords: Corporate culture, white collar crime, corruption, compliance.

This paper looks at the link between corporate culture and corruption as illustrated in the recent Volkswagen (VW) and FIFA scandals. Corporate culture forms part of corporate ethics and social responsibility which is one of the enduring issues in corporations law.

From a legal perspective, the concept of corporate culture was introduced into the Commonwealth Criminal Code in 2001. "*Corporate culture*" is broadly defined as an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place. The Criminal Code applies to all offences against the law of the Commonwealth on and after 15 December 2001.

As the name suggests, the purpose of the Criminal Code is to codify the general principles of criminal responsibility under laws of the Commonwealth. It contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created.

Part 2.5 of the Criminal Code is entitled, Corporate Criminal Responsibility, and deals with the difficult area of attributing criminal responsibility to corporations. Essentially, the Code applies to bodies corporate in the same way as it applies to individuals.

At common law, Australian corporate law principles have traditionally recognised the liability of corporations for criminal acts as being limited to those acts which could be traced to a sufficiently, highly placed functionary or group of functionaries within the corporation – the 'directing mind and will' test or Identification theory based on the UK decision in *Tesco Supermarkets Limited v Nattrass (Tesco)*. The Code is an attempt to deal with these issues and to introduce a concept of corporate culture which casts a "much more realistic net of responsibility over corporations than the unrealistically narrow *Tesco* test". The Explanatory Memorandum provides that the liability provisions of the Criminal Code are intended to extend the *Tesco* rule so as to "catch situations where, despite formal documents appearing to require compliance, the reality was that non-compliance was expected".

Section 3.1(1) of the *Criminal Code* divides an offence into “physical elements” and “fault elements”, which essentially replicate the common law concepts of “actus reus” and “mens rea”.

Division 12.3(1) provides that where "intention, knowledge or recklessness" is a fault element of an offence, that element must be attributed to a corporation that "expressly, tacitly or impliedly authorised or permitted the commission of the offence". The means by which an authorisation or permission may be established includes:

- proving that a corporate culture existed that encouraged or led to non-compliance; or
- proving that the body corporate failed to create a corporate culture that required compliance.

Although introduced in 2001, the concept of "corporate culture", as yet remains untested by judicial application to a real-life corporate crime, and it is difficult to assess the efficacy of the new principles of corporate liability until this has occurred. Exactly how mens rea should properly be ascribed to artificial legal entities such as corporations is one of the elements in which “white collar crime” differs from conventional crimes. A significant amount of “white collar crime” is committed by corporations.

The VW Scandal¹ serves as a wake-up call for Australian companies and directors to assess and review their own systems and processes, ensuring that corrupt behaviour is anathema to their company culture and met with zero tolerance. While the CEO of VW has resigned claiming he “had no knowledge of the manipulation of emissions data” this omission begs the question, why did such a high-risk decision not filter up to top management and board level? All boards should be asking the same question.

¹ It was publicly revealed in September 2015 that the company had fudged emissions tests using cheat software on diesel powered cars under its three mainstream brands, Volkswagen, Audi and Skoda.

Combating with Insider Dealing: A comparative analysis (Session 5C)

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Keywords: Securities law, insider trading.

The development of corporate and securities law over the past 25 years has been remarkable. This includes amendments to the corporate and securities legislation, much successful litigation by the regulators and more contribution on the part of the corporate sector towards the benefit of stakeholders. However, there are obstacles in the path of development and one of such obstacle is insider dealing. The debate as to how to deal with insider dealing is no more since it has been well accepted that insider trading should be made a criminal offence and a civil wrong as well. Despite the fact that there are laws in place, a challenge that regulators are faced with or an enduring issue that has not brought in total success is combating with insider dealing.

Sri Lanka being a developing country and a member of Commonwealth generally learn lessons from the UK, New Zealand or Canada with regard to the development of corporate and securities law. However, it has to be accepted that amendments or repeal to the law seldom takes place in Sri Lanka even when gray areas in the law are identified. Insider dealing is one of the issues that have been subjected to controversy due to many such occurrences in the recent past in the Sri Lankan stock market. The existing law of Sri Lanka to deal with insider trading dates back to 1987 and insider trading is still only a criminal offence. As a result, there are few cases at the lowest court of criminal jurisdiction and the cases are mostly compounded.

It has been well accepted that that capital market misconducts, including insider trading, affect the integrity of the market. This may be overcome by proper legislation, timely amendments, rules of stock exchange and securities commission, adherence to corporate governance and technology to detect the occurrence of insider trading. Jurisdictions may claim that all these are in place but can neither vouch that insider trading is not taking place nor are those dealt with effectively. This paper is an attempt to trace the history of insider trading, to identify the theories and concepts that have an impact on it, to analyse justification for both criminal and civil sanction and to address the draw back in the Sri Lankan law critically. It will be done by a comparative analysis of the laws of United States, United Kingdom and Australia. Rich judgements from these jurisdictions will be considered as lessons and the paper, in the end, will suggest reforms to Sri Lankan law that is practically possible, in the interest of all stakeholders.

Corporate Risk Disclosure: A review (Session 2C)

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Keywords: Corporate risk disclosure, literature review, systematic review, risk disclosure, corporate disclosure.

This paper reviews empirical studies and professional literature on corporate risk disclosures. Empirical studies done from the perspective of economic theory with application of statistical techniques have been growing over the years in the field of corporate disclosures. The very concept of risk and significance of corporate risk disclosures have been discussed in various studies and reports of professional bodies. Studies of corporate risk disclosures from the perspective of information asymmetry, utility as well as the perspective of economic theories of corporate governance have been steadily increasing over the last two decades or so. Associations between various firm characteristics and market behaviour have been sought to be studied by scholars in order to study the possible motivations behind risk disclosures as well as their usefulness to the end users of corporate disclosures viz. the shareholders, current and prospective investors, as well as the regulators. Methodologies from various disciplines like communications studies, econometrics, statistics, computer science etc. have been employed to study the phenomenon of corporate risk disclosure and its interaction with factors within and without the firm. Studies have been conducted for some jurisdictions in North America, Europe, Asia and Africa and scope exists for further study in more jurisdictions. The findings of empirical studies and discussions in professional literature are key aids for law and policy makers and researchers while formulating or proposing regulatory frameworks. This review paper aims to stimulate further research and debate on regulatory approach, policy and frameworks towards corporate risk disclosure based upon the conclusions drawn from empirical studies on corporate risk disclosure.

Corporate Manslaughter Committed by Industrial Robots at the Workplace: Who should go on trial under common law and civil law principles? (Session 4C)

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Keywords: Corporation, manslaughter, robot, liability.

The speculation of creating humanoid machines at some point has been entrenched in human thoughts since the beginning of civilisation. Accordingly, as the technological world is changing rapidly, many countries are fast approaching towards a society where humans and humanoids will live together. Robots are becoming increasingly prominent following their extensive use in various critical aspects of our lives that include: working at factories, driving automobiles, providing medical treatment, interacting with vulnerable people, and administering justice. Predictably, our daily life will be gradually pervaded in the near future by robots with a greater level of autonomy and interconnectivity than their current counterparts have; they will thus potentially cause more harm extending from killing to injuring humans alongside the good they will produce. For example, apart from the latest casualty at Volkswagen factory in Germany which occurred in June 2015, robots have also killed several workers in Japan and the United States, whilst reportedly 77 robot-related accidents took place in the United Kingdom in 2005 alone. Such harm has already given rise to a critical question of liability as to who should take the responsibility for such fatalities in the workplace – the creature itself, the creator, the manufacturer, the employer of the victim, or the victim himself/herself. The increased autonomy, intelligence, and connectivity of robots tend to challenge this liability issue in different ways. As technology has advanced, a resolution of the uncertainty surrounding liability is necessary before witnessing further casualties of this kind in this age of ‘corporatocracy’.

From a philosophical point of view, liability can be ascribed to a moral agent, however, machines like robots arguably cannot be regarded as an agent as yet owing to its deficiency in having strong autonomy. From a legal perspective, on the other hand, the personhood of a robot is not yet recognised in law as it is still dependent upon programming by human beings, meaning under heteronomous operations. These keep robots objects of law rather than rendering them to subjects; however, a robot’s legal personhood is being debated in academic discourse. Linked to this personhood, the legitimacy, prudence and efficiency in awarding punishment to such machines are questionable as well.

This paper examines the existing principles of common law and civil law systems governing corporate manslaughter with the aim of determining whether the individual or entity should be legally responsible for deaths caused by robots in the workplace. It argues that conferring legal personhood on robots, even on autonomous ones, would be inappropriate, and therefore, individuals and/or entities involved in hiring, programming, manufacturing, and/or functioning of errant robots ought to be held liable for their wrongful conduct causing harm including manslaughter.

Protection of Corporate Communications from Enforcers and Litigants (Session 5B)

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Keywords: Regulation, litigation, privilege, corporations.

The increased exposure of corporations and their officers to liability is – within the 2016 CLTA Conference theme - one of the enduring issues in, and reflections on, corporate law and policy over the past 25 years. This enduring issue in turn inherently has raised how to protect corporations and their officers in an enhanced regulatory and litigious environment. For example, evidence is vital in assisting a corporation and its officers in successfully resisting actions that are threatened or have been brought against them by regulators and litigants. Maintenance of privilege can protect sensitive communications from becoming admissible in these processes and proceedings. Increasingly, from the late 1980s, there has been a tendency to respond to pressures brought about through their increasing regulatory and litigious exposures by corporations appointing general counsel and expanding their in-house legal teams. This trend itself can create exposures unless there is careful monitoring by the corporation of its in-house operations to ensure privilege continues to be attracted and is protected against loss through inattention to detail. The ascendancy of economics, commerce and technology has created a situation where non-lawyers have tended to encroach on legal work (e.g. taxation); there accordingly has been a blurring of the distinctive nature of legal from non-legal work; and globalisation has accentuated the tendency towards transnational transactions whereby particularly in-house lawyers can be called upon to become involved in the legal features of transactions carried out in countries with very different laws and legal systems from those of their jurisdiction of admission. There are High Court of Australia authorities which indicate that, unless very careful precautions are taken, the ambit within which general counsel and in-house lawyers are able to attract privilege for their corporate clients can be substantially less when compared with the position outside Australia, including our major trading and investment partners. Australia might not have been as advanced as some other countries in capturing this legal and policy challenge that corporate law has confronted over the past 25 years, at a domestic and international level. In an increasingly globalised environment, these matters require immediate attention by Australian in-house lawyers and their educators, such as members of the Corporate Law Teachers Association in Australia, to facilitate Australian corporations competing on a level playing field internationally.

A Comparative Study of Mandatory Offer in the United Kingdom and Taiwan (Session 3B)

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Keywords: Tender offer, mandatory offer, securities regulation, minority shareholders.

Tender offer is a very popular way in merger and acquisition process and mandatory offer was created by English Law originally. Many countries has imported mandatory offer into their securities regulation including Singapore, Malaysia, European Union and Mainland China. Korea has adopted it from 1997 to 1998. Taiwan established its tender offer system in 1988 and imported mandatory offer in 2002. However, the Taiwanese mandatory offer regulation is very different than other countries. This paper provides an overview of mandatory offer from a comparative perspective. In part I, this paper briefly introduce mandatory offer in British system. In part II, this paper analyze mandatory offer in Taiwan and compare the difference from other countries. In part III, this paper concludes that Taiwanese mandatory offer regulation cannot protect the minority shareholders and the criminal liability should be abolished.

The Regulation of the Credit Industry by Command and Control: The inadequacy of market-based mechanisms in the United States (Session 2C)

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Keywords: Credit ratings agencies; corporate law reform issues, corporate regulation and enforcement, comparative corporate law.

The insufficient regulation of the credit rating industry was a key factor in recent corporate and economic failures, including the Enron scandal and the subprime lending boom and bust in the United States. Specific reforms were enacted to correct the industry's under-regulation, including the Credit Rating Agency Reform Act of 2006 and the Dodd-Frank Act of 2010. Whilst this regulation has led to increased government supervision, the regulation of the industry in the United States continues to rely heavily on the market mechanism to regulate the industry.

In Australia, the regulation of the industry is characterised by the requirement for credit rating agencies to hold an Australian Financial Services licence. Prior to the global financial crisis, ASIC exempted the industry from the requirement to hold an AFS licence. These exemptions have since been revoked. Although a licensing regime also governs the industry in the United States, it is only voluntary. Given the mandatory nature of the licensing regime in Australia, the regulation of the industry here operates, to a large extent, independently of the market mechanism.

This paper compares the regulatory strategies used in the post-crisis regulation of the industry in Australia and the United States. As the proper regulation of the credit rating industry is crucial to economic stability, this paper investigates whether the principal theoretical framework upon which the industry's regulation is constructed is appropriately conceived. This paper argues that the theories and strategies that have been employed in the United States may be inadequate to regulate effectively in the interests of those who rely on ratings and the economy more generally.

Rethinking the Corporate and Personal Wrongs Distinction: A pragmatic approach (Session 6B)

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Keywords: Corporate law, close corporations, corporate governance, shareholder remedies.

Too much judicial and academic ink has been spilled on the supposed distinction between corporate wrongs, which can be remedied only via derivative actions, and personal wrongs, which can be recovered by shareholders in their personal capacity, most notably via unfair prejudice claims. I argue that the judicial and scholarly attention given to such fine distinctions is disproportionate to their utility in resolving such conflicts. Judicial attempts at pigeonholing shareholder claims prolongs litigation, fails to resolve the underlying conflict, and produces real and costly consequences for shareholders falling on the wrong side of a thin, arbitrary line.

I propose a better approach: by shifting the spotlight from the untenable corporate/personal wrong distinction to the widely-held/closely-held company distinction. The latter distinction has its difficulties. Companies, after all, come in all shapes and sizes. The scope of the unfair prejudice remedy arguably has limited applicability to companies which do not fit the quasi-partnership mould. I argue, however, that the widely-held/closely-held distinction is a better fit and a more coherent explanation for the operation of companies in practice, and for shareholder remedies in general.

Should Employees Have A Right of Representation on the Corporate Board? (Session 4C)

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In countries that apply the “shareholder primacy” model such as in Australia, the board of directors manages the company. The flaw in this corporate law model is that the employees’ input into the company is largely overlooked. There is no formal recognition of employees’ interests in the company under the current corporate law structure. One argument is that employees have sufficient protection through employment and industrial relations laws. They are classed as an “outsider” to the company and they have only a contractual relationship with the company and no other person within the company. Directors may wrongly dismiss employees, for example by reason of corporate restructuring, and yet employees cannot sue the directors due to the fact that there is no direct contract between an employee and the board of directors. The purpose of this paper is to present an argument against the shareholder primacy model and to argue for employee representation on the corporate board. The aim is to explain that financial success of the company is very much dependent not only on the financial input of the shareholders initially, but is also dependent on employees’ contribution of human capital as part of their investment in the company, that employees’ contribution is as important as or even more important than shareholders’ contribution of finance capital. On the whole, employees’ interests should be recognised and formally acknowledged within the paradigm of corporate law.

Financial Twilight Re-Appraisal: Ending the judicially-created quagmire of fiduciary duties to creditors (Session 1B)

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Keywords: Creditors, directors' duties, law reform.

The directors' duty at common law to consider creditors' interests during insolvency continues to remain firmly under the judicial spotlight in the Anglo-American jurisdictions. The controversial nature of this duty has elicited a mixed judicial response across the world. Courts in the United States generally eschew recognition of directors' duties to consider creditors interests, based mainly on the ill-defined nature of the duty, whilst courts in the commonwealth jurisdictions (such as Australia, New Zealand, Canada and the UK) generally recognise such a duty in spite of the absence of clearly defined criteria as to the scope and operation of the duty. The majority judgment in the Appellate Court decision in *Westpac Banking Corporation v Bell Group Ltd (in liq)* (No 3) 2012 in the Supreme Court of Western Australia appears to have elevated the directors duty from one of consideration to one of protection of creditors interests during a failed attempt at corporate rescue.

This paper assesses the law on the directors' duty at common law to consider creditors' interests in the Anglo-American jurisdictions, with particular focus on contemporary legal developments which exposes the doctrinal mess in this area of jurisprudence. As part of that assessment, the paper addresses whether the development of the law on a fiduciary duty to consider creditor interests during insolvency attempts to fill gaps that do not exist.

Mapping the Landscape of Chinese Government-Controlled Companies in Australia: Corporate law and governance issues (Session 3A)

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Keywords: Corporate governance, Chinese SOEs, Australia.

Chinese state controlled companies (SOEs) already play a significant role in the Australian economy and will become more important following the Free Trade Agreement between China and Australia. Relatively little is known about the full extent of Chinese corporate activity in Australia, let alone about the internal corporate governance practices of Chinese government-controlled companies in Australia. In contrast to Western shareholder-oriented corporate law models, Chinese SOEs tend to follow a state-oriented model of corporate governance. As a result, other factors than shareholder wealth maximization are often more important to these enterprises. We seek to examine corporate governance patterns in Chinese controlled companies in Australia and compare these with comparable practices found in leading Australian companies. This research seeks to provide a template for international comparative corporate governance research into Chinese SOEs. In this paper we begin with an effort to map the contours of Chinese SOE control over companies operating in Australia.

Varieties of Shareholders as a Driver of Company Law Reform (Session 2A)

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Keywords: Shareholders, s. 172 Companies Act 2006, investor horizons, enlightened shareholder value.

The UK Companies Act 2006 replaced the common law duty to act in good faith in the interests of the company, with the duty to promote the success of the company for the benefit of its members as a whole. Whether the adoption of the 'Enlightened Shareholder Value' norm of section 172 CA 2006 prompts directors to consider the interests of third parties forms only one aspect of the academic debate. Another question which deserves attention is 'who the fictional shareholder to whom corporate managers owe a duty to' is. Using section 172 CA 2006 as a starting point, the paper analyses the investor horizons and incentives of different types of shareholders with an aim of creating a shareholder taxonomy that will challenge the efficacy of the shareholder primacy norm prevalent in UK company law.

Director Liability for Fraudulent and Reckless Trading: A comparison between South Africa and Australia based on a recent high-profile case in South Africa (Session 1B)

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Keywords: Fraudulent and reckless trading, insolvent trading, director and officer liability, director duties.

The media attention ignited by the collapse of the Pamodzi group of South African gold mining companies and the plight of its five thousand desperate employees was fuelled by the profile of those alleged to be responsible: a nephew of current president Zuma and a grandson of former president Mandela. They were directors of Aurora Empowerment Systems, the successful bidder for the acquisition of several of the insolvent Pamodzi mines. In *Engelbrecht NO & Others NNO v Zuma & Others* Case no 25965/12 [2015] ZAGPPHC (25 June 2015) they were declared personally liable, with three others, for all debts due by Aurora to Pamodzi. Their liability, which is expected to reach 1.7 billion ZAR, is based on section 424 of the Companies Act of 1973. This section provides for personal liability of anyone who is knowingly a party to the fraudulent or reckless conduct of a company's business – in this case the business of Aurora in taking over the management of the Pamodzi mines.

This paper analyses the legal and strategic reasons for basing the proceedings on the manner in which Aurora's rather than Pamodzi's business was being conducted. It also considers how broadly similar provisions under the Companies Act of 2008 (in operation since 1 May 2011 but without replacing section 424 of the Companies Act of 1973), could have been applied to the facts. It concludes with a comparison between South African and Australian law pertaining to director liability, focusing on differences highlighted by the facts of the *Engelbrecht* judgment.

Corporate Claims Against Directors or Officers Following the Company's Unlawful Conduct (Session 3C)

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Keywords: Directors' duties, corporate illegality, corporate attribution, corporate authorisation.

This article analyses the question of whether a company which has incurred substantial fines or other pecuniary losses as a result of an unlawful act may be able to bring a claim against its directors or officers either for causing the company, or failing to prevent their subordinates, to undertake the unlawful act. There are two main defences that have been raised by directors or officers, namely, illegality and corporate authorisation. In the case of the illegality defence, in *Safeway v Twigger*, the English Court of Appeal held that Safeway's claims against its directors or employees for its penalty and associated expenses as a result of causing Safeway to infringe the Competition Act 1998 were defeated on the ground of illegality. However, *Safeway v Twigger* was a controversial decision and the correctness of its outcome were left open in the recent UK Supreme Court decision in *Jetivia v Bilt*. In contrast, in Singapore, a different conclusion was reached in *Ho v Scintronix*, where the Court of Appeal held that claim for the value of the bribe paid by the company against its chief executive officer was not barred by illegality. This article also analyses how far authorisation may provide a defence to the directors and officers, notwithstanding the fact that the company has committed unlawful acts. Finally, it draws comparison with the positions in Delaware and Australia in their respective treatment of enforcement of breaches of duties owed by directors and officers and recommends reforms.

The Board as Leaders in Corporate Governance (Session 1C)

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Keywords: Board, directors, leadership, governance.

While never quite able to monopolise the field, for many years agency theory has been dominant paradigm in the practice and study of corporate governance and (North American) corporate law scholarship. Within this paradigm the board is seen as an agent, or at least the guardian of the interests, of the shareholders. The limitations of agency theory as a tool to understand corporate governance have become increasingly evident. In practice, boards are frequently not mere passive scrutineers but play an active role in guiding the company. They have a leadership role. Field research undertaken as part of a broader leadership in governance project has indeed confirmed the leadership role of the board can play in a number of domains, including in relation to shareholders and other stakeholders. The leadership role of the board is defined, in part, by the board's position at the nexus of corporate relationships and the need to reconcile the interests of the various stakeholder groups. The economic team production theory predicts benefits arising from the board playing a mediating role, but fails to explain how this occurs. Empirical investigation of board decision-making and critical perspectives on leadership can help fill the gap. The legal framework provides space, albeit imperfectly, for this model of leadership in governance to operate. The shareholders as a group often have formal powers to elect directors, but other rules can be identified that protect the space for the board to act as leaders. The paper seeks to layout an integrated framework of corporate governance and law and leadership.

Regulating Corporate Culture: An extraordinary development (Session 5B)

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Keywords: Corporate culture, legal personality, transplantation of laws, regulatory theory.

The concept of corporate culture as deployed in the Criminal Code (Cth) is much discussed but little used. Extraordinary processes initiated by the Netherlands central bank may change that. They allow for teams of investigators to descend on banks to investigate and report on their corporate culture in order to prevent systemic financial system failure as experienced in the Global Financial Crisis.

While much was done in Australia in 2010, continuing financial scandals suggest that it was not enough. The Netherlands process is being investigated by both APRA and ASIC to see whether it is appropriate for Australia. For the corporate lawyer, the Netherlands model is challenging both in terms of the form of its intervention in the internal workings of a company and for its positioning of the regulator in relation to the private sphere.

After an analysis of what is involved in the Netherlands approach, this paper explores the development from a number of perspectives. It considers the idea of corporate culture as it has been articulated in Australia, the psychological basis of the assessments undertaken; the impact such an approach might have on local ideas of the subjectivity of the company, and problems involved in its implementation in Australia. In so doing the paper reflects on problems in transplantation of laws, especially in terms of the difficulties in the ethnographic studies which should found such proposals, and on the relation between regulatory practice and regulatory theory.

An Empirical Study of Share Buybacks in China: Where is it now and where is it heading? (Session 3A)

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Keywords: Share buybacks, capital maintenance, deadlocks, empirical study.

Share buybacks of companies play an important role in resolving shareholder conflicts. The scope of share buybacks is not clear in China: there are conflicts between the Corporations Law, and the judicial judgments which limit the development of shares buybacks. Firstly, the Corporations Law restricts the scope of share buybacks -- public companies are not allowed to purchase their own shares and private companies can buy back their shares only in four circumstances. At the same time, however, some government agencies encourage companies to buy back their own shares. On 31 August 31, 2015, the Securities Regulatory Commission, the Ministry of Finance, the State-owned Assets Supervision Administration Commission and the China Banking Regulatory Commission jointly issued a circular entitled 'Notice on encouraging the listing Corporation mergers and acquisitions, cash dividends and buy back shares' that strongly supported public companies to buy back shares as a means of bolstering share prices in a rapidly falling market. Two weeks later, on 13 September, 2015, the State Council (the executive body of government) issued guidelines on 'deepening the reform of state-owned enterprises' that proposed reorganisations in the sector based on mergers and share buybacks.

Our empirical research shows that in 23% of cases involving disputes over the legitimacy of cases of limited liability company shares buybacks, courts have accepted as legal share buybacks that are clearly outside the situations in which buybacks are allowed under the Corporations Law including a number of instances where public corporations were allowed to repurchases their shares even though the Corporations Law explicitly prohibits this. The case studies show where judges permit the corporations to buy back their shares, deadlocks in the corporations can be resolved. Decisions to deny companies the ability to buy back shares are almost universally based on a "capital maintenance doctrine" that looks to see whether share buy backs could damage the corporations' payment liability.

Comparative study suggests other jurisdictions have far more relaxed view of the capital maintenance doctrine, while denying a company the right to buy back shares its shares is likely to inhibit resolution of deadlocks. This paper argues that China should relax its restrictions on share repurchases.

The outcome of the research can be of considerable significance, especially to foreign lenders, business partners or investors in Chinese companies.