MONASH University | MONASH LAW CENTRE FOR COMMERCIAL LAW AND REGULATORY STUDIES

The History of Business Law and Governance

Thursday 18 January 2024

This Workshop is convened jointly by Monash Law's Centre for Commercial Law and Regulatory Studies (CLARS), Australia; University of Auckland Waipapa Taumata Rau Business School, New Zealand; and Queen's University Belfast, UK, in collaboration with the European Corporate Governance Institute (ECGI).

UNIVERSITY OF AUCKLAND Waipapa Taumata Rau NEW ZEALAND | BUSINESS SCHOOL

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About the Workshop

William Faulkner once famously said ‘The past is never dead. It's not even past’. The goal of this Workshop is to examine this statement in the context of the history of business law and governance. Capitalism, it seems, is currently at a critical inflection point, with recent calls for it to become more responsible, more inclusive, more sustainable, and more accountable to stakeholders.

This Workshop will examine the trajectory of business law and governance and the various theoretical and doctrinal twists and turns it has taken along the way. The Workshop will explore the historical underpinnings of a range of key contemporary corporate governance issues including the nature of the corporation; fiduciary law and the role of corporate officeholders; institutional investors and shareholder engagement/activism; insider trading; corporate social responsibility and ESG; and executive compensation. The Workshop will analyse these issues against the backdrop of some major themes in contemporary business law and governance, such as legal origins; convergence versus path dependence; and international versus jurisdictional governance pressure points.

The Workshop, which will be held at Monash University’s City Chambers at 555 Lonsdale St, Melbourne, is convened jointly by Monash Law’s Centre for Commercial Law and Regulatory Studies (CLARS); University of Auckland Waipapa Taumata Rau Business School; and Queen’s University Belfast, in collaboration with the European Corporate Governance Institute (ECGI).
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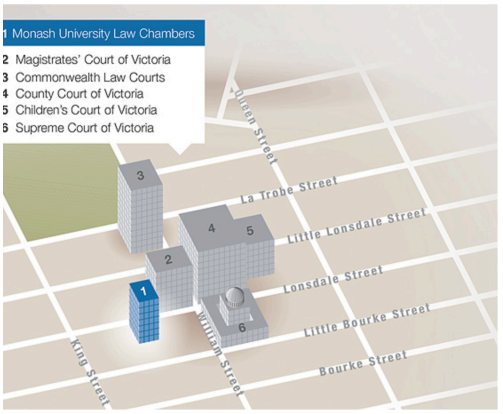
Monash University Law Chambers

Conference Location

Monash University Law Chambers (MULC)
555 Lonsdale Street (on the corner of Lonsdale Street and Crombie Lane)
Melbourne VIC 3000
Monash Law City Campus



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Workshop Schedule

Wednesday, 17 January 2024

6.30pm *Casual Pre-workshop Dinner* - Tsindos Greek Restaurant, 197 Lonsdale Street, Melbourne 3000.

Thursday, 18 January 2024

Workshop

8.30am – 8.55am Arrival and registration at Boardroom, Monash Law Chambers, 555 Lonsdale St, Melbourne CBD.

8.55am – 9.00am Jennifer Hill, Welcome on behalf of Monash Law's Centre for Commercial Law and Regulatory Studies (CLARS), University of Auckland Waipapa Taumata Rau Business School, Queen's University Belfast and ECGI.

9.00am – 10.30am **Session 1 I A History of Corporations and Corporate Fiduciaries**

Moderator: Tamara Wilkinson (Monash Law, Centre for Commercial Law and Regulatory Studies)

Speakers

D. Gordon Smith (BYU Law), *Creating the Modern Corporation*

Susan Watson (University of Auckland, Faculty of Business and Economics; Research Member ECGI), *Good Faith and Corporate Purpose: An Origin Story*

Steve Kourabas and Nick Sinanis (Monash Law, Centre for Commercial Law and Regulatory Studies), *A Historical Re-appraisal of the Director as a Fiduciary and a New Legal Basis for Director Accountability*

Timothy Peters (University of the Sunshine Coast, School of Law and Society), *On The History of Corporate Office*

10.30am – 11.00am Coffee break

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11.00am – 12.30pm **Session 2 | Corporate Theory, Shareholders and Stakeholders**

Moderator: Steve Kourabas (Monash Law, Centre for Commercial Law and Regulatory Studies)

Speakers

Sarah Haan (University of Virginia Law School; Washington and Lee University School of Law), *The Pathology of Passivity: Shareholder Passivity as a False Narrative in Corporate Law*

Jennifer Hill (Monash Law, Centre for Commercial Law and Regulatory Studies; Research Member, ECGI), *The History of the Agency Theory of the Corporation and its Hidden Fallacies*

Tim Bowley (Monash Law, Centre for Commercial Law and Regulatory Studies), *Australia's Industry Superannuation Funds: An Origin Story*

Victoria Barnes, Ciarán O'Kelly and Ciara Hackett (Queen's University Belfast, School of Law), *A History of CSR*

12.30pm – 2.00pm Lunch break

2.00pm – 3.30pm **Session 3 | Regulating Business in Different Contexts Around the World**

Moderator: Rosemary Langford (Melbourne Law School)

Speakers

Donna Nagy (Maurer School of Law, University of Indiana), *Beyond Fiduciaries—U.S. Insider Trading Law and a Broader Embrace of the Common Law*

Tilly Clough (Queen's University Belfast, School of Law), *The Role of the Regulator in Charitable Businesses: Lessons Learnt from the History of the Charity Commission for England and Wales*

Jenifer Varzaly (Durham University Law School), *Evaluating ASIC Enforcement: Evidence and Implications*.

Tom Gosling (London Business School; Executive Fellow, ECGI), *Regulation of Executive Compensation: The Worst of All Worlds?*

3.30pm – 3.40pm Victoria Barnes, Jennifer Hill and Susan Watson, Closing remarks

6.00pm Casual Post-workshop Dinner - HuTong Dumpling Bar, 14-16 Market Lane, Melbourne 3000

Friday, 19 January 2024

Visit to *Heide Museum of Modern Art* - 7 Templestowe Road, Bulleen 3105. Participants who wish to visit the museum will meet outside City Chambers (555 Lonsdale St, Melbourne CBD) at 9.30am and travel by taxi to the Museum.

List of Conference Attendees (alphabetical order)

- Victoria Barnes, Queen's University Belfast School of Law.
- Tim Bowley, Monash Law, Centre for Commercial Law and Regulatory Studies (CLARS).
- Tilly Clough, Queen's University Belfast School of Law.
- Tom Gosling, London Business School; Executive Fellow, ECGI.
- Sarah Haan, University of Virginia Law School; Washington and Lee University School of Law.
- Jennifer Hill, Director, Monash Law, Centre for Commercial Law and Regulatory Studies (CLARS); Research Member, ECGI.
- Steve Kourabas, Deputy Director, Monash Law, Centre for Commercial Law and Regulatory Studies (CLARS).
- Rosemary Langford, Melbourne Law School.
- Donna Nagy, Maurer School of Law, University of Indiana.
- Timothy Peters, University of the Sunshine Coast, School of Law and Society.
- Nick Sinanis, Monash Law, Centre for Commercial Law and Regulatory Studies (CLARS).
- D. Gordon Smith, BYU Law.
- Jenifer Varzaly, Durham University Law School
- Susan Watson, University of Auckland Faculty of Business and Economics, NZ; Research Member, ECGI.
- Tamara Wilkinson, Monash Law, Centre for Commercial Law and Regulatory Studies (CLARS).

Presentation Abstracts

Victoria Barnes (with Ciarán O'Kelly and Ciara Hackett)
Queen's University Belfast, School of Law

A History of CSR

CSR has long been dismissed as a useful regulatory tool for corporate governance in the United Kingdom, although it remains central in other common law jurisdictions, such as India. ESG has taken over in the United Kingdom with its links to equality, diversity and inclusion. It has important links to human rights and sustainability. This paper explores the history of CSR. It does so in a historical manner in order to show the ideological basis for CSR and the philosophy behind it. Our paper traces the birth of CSR and also its demise. In doing so, we reveal when CSR functioned more effectively than it does at present as a tool for corporate regulation.

Tim Bowley
Monash Law, Centre for Commercial Law and Regulatory Studies (CLARS)

Australia's Industry Superannuation Funds: An Origin Story

'Industry' superannuation (pension) funds are some of the largest public company shareholders in Australia. As a result of steady fund inflows and a wave of fund mergers, a small number of industry funds are now dominant players in the governance of Australian public companies. These funds adopt a distinctly engaged stance in public company governance.

Contemporary analysis frequently uses agency theory to explain institutional investors' corporate governance behaviour. Although agency theory has considerable explanatory power, it provides an incomplete explanation for the behaviour of Australia's industry funds. A historical perspective yields a more complete account, revealing three additional factors that underpin the funds' contemporary behaviour: the 'missionary zeal' of their leaders; the funds' distinct common identity; and the strategic establishment of an ecosystem of allied organisations and service providers. These factors originate in the funds' early struggles to develop and prosper.

In addition to providing a more complete explanation for the behaviour of industry funds and highlighting the path dependent nature of their current corporate governance influence, this 'origin story' also offers a cautionary message for the future. The aforementioned factors are not 'hard wired' and may exert much less influence as industry superannuation funds develop into internationally significant financial institutions and move further in time from their unique institutional origins. This has uncertain implications for the future of Australian corporate governance.

Tilly Clough
Queen's University Belfast, School of Law

The Role of the Regulator in Charitable Businesses: Lessons Learnt from the History of the Charity Commission for England and Wales

In England and Wales, governance of charitable businesses focuses on two key actors: charitable trustees of individual charities and the external charity regulator (i.e., the Charity Commission for England and Wales). Both parties are necessary for keeping charities effective and accountable, yet this paper will focus on the latter and explore the role of the external regulator throughout history.

The role of external regulators has historically differed across many jurisdictions. However, the fundamental mechanisms remain; they hold significant powers of oversight and supervision of charities. This paper will examine the historical role of the Charity Commission for England and Wales, using external regulators in alternative jurisdictions as a point of comparison. The paper will conclude by examining the lessons learned from various external regulators.

Tom Gosling
London Business School; Executive Fellow, ECGI

Regulation of Executive Compensation: The Worst of All Worlds?

The UK's approach to executive pay has been an unexpected export industry. The UK was the first country to implement say on pay in 2003, a practice that has now spread around the world. Say on pay rules were strengthened in 2013 with the adoption of a binding vote, resulting in the combination of a backwards-looking annual advisory vote on pay outcomes and a triennial binding vote on forward-looking remuneration policy. This basic framework was adopted by the European Union in the Shareholder Rights Directive in 2017. Why has the UK been so influential? The UK's approach is attractive to politicians because it enables them to "talk tough" on executive pay. But by relying on market mechanisms, and in particular shareholders, to regulate pay, the approach potentially provides a safeguard against pay constraints that are truly economically damaging and enables politicians to evade direct accountability for pay outcomes.

This presentation will give a brief history of UK pay regulation and its relationship with pay levels and practices. This will divide UK history since the late 1980s into four parts: liberalisation, with the privatisation of public utilities, leading to the first major pay controversies and calls for enhanced governance; globalisation, with the attempts of UK companies to adopt global remuneration levels and the dramatic transformation of UK pay practices towards a performance-based pay model; post-crisis austerity, when shareholders put the brakes on pay escalation, demanded greater simplicity, and imported practices from banking pay regulation; and finally the Brexit years, when stagnating living standards created a focus on fairness between CEOs and the wider workforce.

The presentation will argue that a consequence of the UK's attempts to regulate via the market is that the executive pay "problem" has never been solved to the public's satisfaction. But at the same time, UK boards report that creeping shareholder interference in pay is damaging UK competitiveness and their ability to attract leaders who will create the greatest value at the companies they steward. It could therefore be argued that the UK's approach has led to the worst of all worlds: one in which public dissatisfaction on executive pay remains high but where constraints on pay are meaningfully harming the attractiveness of the UK as a place to do business. The UK's historical trajectory in this area potentially provides lessons for other countries that are following the UK along this regulatory path.

Sarah Haan
University of Virginia Law School; Washington and Lee University School of Law

The Pathology of Passivity: Shareholder Passivity as a False Narrative in Corporate Law

This presentation, which will be a book chapter, argues that shareholder passivity is a potent but false narrative in corporate law theory—descriptively wrong and normatively harmful. Originally presented as a character flaw of the 1930s shareholder, shareholder passivity was transformed by the Law and Economics movement into a virtuous form of rational behavior in which the shareholder chooses to give up power. The chapter shows how the Passivity Thesis has obscured the role of law in shaping the participation of shareholders in governance, and argues that corporate organisation would have evolved differently if corporate law had created mechanisms and systems to facilitate active shareholder participation in governance. Finally, it asks whether the Passivity Thesis has helped to shape the modern political economy of American citizenship, including a broader range of norms related to civic virtue, self-government, and democracy itself.

Jennifer Hill
Monash Law, Centre for Commercial Law and Regulatory Studies (CLARS); Research Member, ECGI

The History of the Agency Theory of the Corporation and its Hidden Fallacies

During much of the 20th century, it seemed that corporate theory was either missing in action or up for grabs. That all changed in the mid-1970s, when Jensen and Meckling published their groundbreaking article on the agency theory of the firm, which subverted prior theories, and provided the foundation for modern corporate law and governance. This presentation will critically examine some of the assumptions generated by agency theory, which subsequently became bedrock principles. It will also assess the extent to which those principles "correspond with the real world" in the 21st century, in relation to matters such as the relationship between corporate managers and shareholders; private ordering; shareholder activism and ESG; executive compensation; and corporate accountability.

Steve Kourabas and Nick Sinanis
Monash Law, Centre for Commercial Law & Regulatory Studies (CLARS)

A Historical Re-appraisal of the Director as a Fiduciary and a New Legal Basis for Director Accountability

In 1742 Lord Hardwick, in *Charitable Corp v Sutton (*1742) 9 Mod 349, considered a claim for "breach of trust, fraud and mismanagement" on the part of "committee-men and assistants or directors of the corporation, and others as their officers and servants, and others as the representatives of them, standing in their capacities". Lord Hardwick determined the case through analogy between directors and agents and trustees. The decision, and other early cases like it, established a grounding of directors' duties in equity that has persisted to this day. This presentation forms part of a larger project that will critically analyse why equity was used as an accountability mechanism in the 18th and 19th centuries and the effects that this has had on company law. The project will adopt a legal historical and institutionalist approach to the issue.

Donna Nagy
Maurer School of Law, University of Indiana

Beyond Fiduciaries – U.S. Insider Trading Law and a Broader Embrace of the Common Law

Insider trading law in the United States is drawn mainly from administrative and judicial interpretations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, which prohibit fraud "in connection with the purchase or sale of any security." In prosecuting insider trading as a violation of these antifraud provisions, the principal challenge involves establishing that the defendant's silence about material nonpublic information was "deceptive". The U.S. Supreme Court, however, has unnecessarily heightened that challenge by insisting that disclosure duties can arise only in the context of fiduciary-like relationships between either the trader/tipper and the issuer's shareholders (the "classical theory" articulated in *Chiarella v. United States* (1980)) or the trader/tipper and the information's source (the "misappropriation theory" endorsed in *United States v. O'Hagan* (1997)).

This presentation will highlight an alternative exception to the general common law principle that only affirmative misstatements can be actionable as deceit—namely, the exception for the nondisclosure of material facts in transactions in which the knowledgeable party's informational advantage was wrongfully obtained. Although it is highly unlikely that U.S. courts will reframe the insider trading offence to embrace a broader conception of common law fraud, attention to this important history holds considerable persuasive power as the U.S. Congress continues to contemplate legislative reform.

Timothy Peters

University of the Sunshine Coast, School of Law and Society

On the History of Corporate Office

This presentation forms part of a larger project that seeks to articulate an account of the constitutive vicariousness of corporate power – that is, always exercised on behalf of another. In doing so, the presentation will seek to place our contemporary understandings of the corporation and corporate actors – in particular directors and officers – in relation to an older tradition of thinking about "office"'. The tradition of office encompasses both a mechanism of responsibility – imposing not only rights but duties and obligations on the officeholder – and a form of irresponsibility in that the effectiveness of official actions are separated from the intent of the individual performing them.

The project, in particular, looks to the history of the modern corporate officer. Alongside the debates over whether corporations are primarily public or private entities, there is a question about whether the role of director is a "public office" or private agent. Following Susan Watson's tracing of the modern duties of directors to the early oaths of officeholders of the imperial trading companies, the project will examine what is at stake in considering a director as fulfilling a (public) office and the way in which this affects the accounts of the source of corporate authority they exercise.

D.Gordon Smith
BYU Law

Creating the Modern Corporation

The functional approach to corporate law emphasises five core structural characteristics of the business corporation: (1) legal personality, (2) limited liability, (3) transferable shares, (4) centralised management under a board structure, and (5) shared ownership by contributors of equity capital. While these attributes have existed in corporations around the world since the early 1800s, the modern corporation emerged in the late nineteenth century only after general incorporation became widely available throughout the United States, and New Jersey took the lead in transforming corporations codes from regulatory to enabling statutes. While many accounts portray the development of the modern corporation as the natural and inevitable result of the Second Industrial Revolution, featuring massive innovations in steel, chemicals, electricity, transportation, agriculture, and other areas, this presentation argues that the development of modern corporate law is mainly a story about overcoming fear. Antebellum business corporations in the United States were constrained in every conceivable way, hedged up by the fear of the creators. In the late nineteenth century, the United States was changing quickly, growing industry through innovation, emancipation, and immigration.

Although reformers recognised potential social costs attendant to the development of law industrial corporations, the intellectual elite who drove the policy changes during the Gilded

Age expressed a steadfast belief in their capacity to tame the world. This confidence ultimately paved the way for New Jersey to create a modern corporation law as a populist move, contrary to the usual story framed by the muckrakers and many scholars of the modern corporation.

Jenifer Varzaly
Durham University Law School

Evaluating ASIC Enforcement: Evidence and Implications

This presentation will examine private enforcement actions by Australia's business conduct regulator, ASIC (Australian Securities and Investments Commission), over time, focusing on directors' duty and disclosure law breaches. The research comprises a significant empirical dataset including a comprehensive ASIC resource analysis over a 19-year period. The three key overarching contributions which emerge from the research are: 1. A comprehensive description of the enforcement landscape, showing the topographical significance of both public and private enforcement modalities; 2. A theory-based explanation for the contours of this landscape and its trajectory; and 3. An evaluation of the effectiveness of Australia's enforcement regime, as well as the international implications arising therefrom.

Susan Watson
University of Auckland, Faculty of Business and Economics; Research Member ECGI

Good Faith and Corporate Purpose: An Origin Story

The origin of the duty of good faith is traced to the oaths sworn by directors of governing bodies in the seventeenth and eighteenth centuries. Evidence exists that the oaths and resulting duty arose to ensure controlling shareholders, as members of governing bodies of business corporations, treated minority shareholders equitably. *Charitable Corporation v Sutton*, the origin case for fiduciary duties of directors, is considered in that historical context.

The analysis illustrates that the good faith duty is not owed to shareholders collectively at any time, but rather to the company as a separate entity from its shareholders. The duty does, however, encompass the interests of shareholders by virtue of their being held in the company as the capital base of the Corporate Fund (if the company is solvent). The good faith duty is then considered in relation to an obligation of even longer standing: that governing bodies of corporations ensure compliance with the purpose contained in the corporation's charter. The core argument set out in this presentation is that directors' duty to act in good faith and the best interests of the company is based on the interests of shareholders held in the corporate entity with that duty potentially bounded by corporate purpose.