**Summary Report**

**The History of Business Law and Governance**

**Conference Date – 18 January 2024**

**Venue – Monash University City Chambers, 555 Lonsdale St, Melbourne**

Organised by Monash University Centre for Commercial Law and Regulatory Studies (CLARS), Melbourne, 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).

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**Introduction**

William Faulkner once famously said ‘The past is never dead. It's not even past’.

The Workshop sought 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.

The Workshop, which included leading corporate law scholars from a range of jurisdictions and a former Chair of the Australian Securities and Investments Commission (ASIC), examined the trajectory of business law and governance and the various theoretical and doctrinal twists and turns it has taken along the way. The Workshop comprised three sessions that explored the historical underpinnings 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 analysed 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.

A description of the various papers in the three session is set out below. Each session concluded with a lively discussion among all Workshop participants.

**Welcome:** Director of Monash Law’s Centre for Commercial Law and Regulatory Studies (CLARS), Jennifer Hill, welcomed the participants on behalf of CLARS and the co-hosting institutions, University of Auckland Waipapa Taumata Rau Business School, Queen’s University Belfast and ECGI.

**Session 1: A History of Corporations and Corporate**

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

Studies)

**Speakers**

**D. Gordon Smith** (BYU Law)

**Susan Watson** (University of Auckland, Faculty of Business and Economics; Research

Member ECGI)

**Steve Kourabas** and **Nick Sinanis** (Monash Law, Centre for Commercial Law and

Regulatory Studies)

**Timothy Peters** (University of the Sunshine Coast, School of Law and Society)

**Session 1 Summary**

The first session provided an in-depth examination of the history of the corporation and its officers from a comparative perspective. **Professor D.** **Gordon Smith** opened the Workshop with a paper titled **Creating the Modern Corporation**, in which he assessed the rise of modern capitalism through a US lens. A critical moment in the journey to modern US corporations was the advent of general incorporation laws in New Jersey, Delaware and other states, which transformed US corporations codes from regulatory codes to enabling statutes. Although this transformation is often depicted as a natural and inevitable result of the Second Industrial Revolution (featuring, for example, massive innovations in steel, chemicals, electricity, transportation, agriculture), Professor Smith’s presentation provided an alternative explanation – namely, the successful overcoming of fear towards big business.

As Professor Smith noted, prior to the Civil War, business corporations in the United States were constrained in every conceivable way, as a result of such fear. In the late 19th century, however, the United States was changing quickly, growing industry through innovation, emancipation, and immigration. According to Professor Smith, although reformers recognised potential social costs attendant to the development of law industrial corporations, the policy changes that arose during the Gilded Age reflected an optimism by the elites that it was possible to tame the world, including corporations. That confidence ultimately paved the way for New Jersey, as first mover, to create a modern corporation law as a populist initiative, contrary to the more familiar story of the rise of the modern corporation.

The next speaker, **Professor Susan Watson**, shifted the focus to development of the modern corporation from a UK perspective. Her presentation on the topic, **Good Faith and Corporate Purpose: An Origin Story**, explored the origins of the duty of good faith, tracing it to the oaths sworn by directors of governing bodies of some UK companies in the seventeenth and eighteenth centuries. In her presentation, Professor Watson scrutinised the wording of these oaths and argued that there is evidence suggesting that the oaths and resulting duty were designed to ensure that controlling shareholders, as members of governing bodies of business corporations, treated minority shareholders equitably. She considered the watershed 1742 decision on fiduciary duties of directors, *Charitable Corp v Sutton* (*Sutton’s* case) within this historical context.

Professor Watson’s analysis suggested that although 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 nonetheless encompasses the interests of shareholders by virtue of their contribution to the capital base of the Corporate Fund of any solvent company. In her view, the duty of good faith derives from an obligation of even longer standing – the obligation that governing bodies of corporations ensure compliance with the purpose contained in the corporation’s charter.

The central argument in Professor Watson’s presentation was that a 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.

The final two papers in Session 1 provided a deep dive into the historical role of directors and corporate officers as fiduciaries, with further analysis of the significance of the Lord Hardwick seminal decision in *Sutton’s* case.

In their paper, **A Historical Re-appraisal of the Director as a Fiduciary and a New Legal Basis for Director Accountability, Dr Steve Kourabas** and **Dr Nick Sinanis** noted that, in *Sutton’s* case, Lord Hardwick was required to determine the liability of the corporation’s ‘committee-men’ (ie its directors), officers, servants and others with respect to a claim of ‘breach of trust, fraud and mismanagement’. The judge did this via analogy between committee-men/directors, on the one hand, and agents and trustees on the other. *Sutton’s* case, and other early cases like it, established a grounding of directors' duties in equity that has persisted to this day.

The presentation by Dr Kourabas and Dr Sinanis represented part of their larger research project that is designed to critically analyse, through a historical and institutionalist lens, why equity was used as an accountability mechanism in the 18th and 19th centuries and the effects that this has had on company law in the United Kingdom and in other parts of the world, including Australia and the United States, where the leading corporate law courts in Delaware are courts of equity.

The presentation by **Associate Professor Timothy Peters**, **On the History of Corporate Office**, examined the role and responsibilities of company office holders from the perspective of corporate power. His presentation also formed part of a larger research project that seeks to articulate an account of the constitutive vicariousness of corporate power – namely that such power is always exercised on behalf of another. Professor Peters sought to place our contemporary understandings of the corporation and corporate actors, particularly directors and officers, in relation to an older tradition of thinking about the nature of ‘office’. This tradition interpreted office as both 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).

Professor Peters’ presentation examined the history of the modern corporate officer, noting that, alongside ongoing debates over whether corporations are primarily public or private entities, there is a parallel question about whether the role of director is one of a public officer or private agent. He drew on Professor Watson’s discussion of early oaths of officeholders to consider 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.

**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)

**Jennifer Hill** (Monash Law, Centre for Commercial Law and Regulatory Studies; Research

Member, ECGI)

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

**Victoria Barnes** (Queen’s University Belfast, School of Law)

**Session 2: Summary**

Session 2 began with a presentation by **Professor Sarah Haan**, based on her forthcoming book chapter entitled, **The Pathology of Passivity: Shareholder Passivity as a False Narrative in Corporate Law.** She argued that, although shareholder passivity (‘the Passivity Thesis’) has been a potent concept in business law history since the early 20th century, it is ultimately a false narrative in corporate law theory, which is, not only descriptively wrong, but also normatively harmful.

Originally presented as a character flaw of the 1930s shareholder, the later Law and Economics movement transformed shareholder passivity into a virtuous form of rational behaviour, whereby the shareholder voluntarily chooses to give up power. Professor Haan showed how the Passivity Thesis has obscured the role of law in shaping the participation by shareholders in governance, arguing that business organisations would have evolved differently if corporate law had created mechanisms to facilitate active shareholder participation in governance. Finally, she raised the provocative question of whether the Passivity Thesis is restricted to corporate law or whether it might also have had a broader impact on political economy and democracy itself.

The theme of myths in business law history continued with **Professor Jennifer Hill’s** presentation on the topic, **The History of the Agency Theory of the Corporation and its Hidden Fallacies.** Although corporate law theory seemed to be missing in action for several decades after the 1920s, it reemerged as a major topic in the mid-1970s, when Jensen and Meckling published their ground-breaking article on the agency theory of the firm. Agency theory, with its depiction of the corporation as a nexus of contracts, subverted both managerialism and anti-managerialism.

Professor Hill’s presentation critically examined some of the assumptions generated by agency theory, assumptions that subsequently became bedrock principles of modern corporate law and governance. She assessed 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 and whether a new paradigm of the corporation is now needed to accommodate governance changes that have occurred since Jensen and Meckling’s famous article.

Dr Tim Bowley’s paper, **Australia’s Industry Superannuation Funds: An Origin Story** examined the distinctive origins and engagement practices of ‘industry’ superannuation (pension) funds, which are some of the largest public company shareholders in Australia. These funds have become dominant players in the governance of Australian public companies as a result of steady fund inflows and a wave of fund mergers.

Contemporary analysis frequently uses agency theory to explain institutional investors ‘corporate governance behaviour. According to Dr Bowley, however, although agency theory has considerable explanatory power, it provides an incomplete explanation for the behaviour of Australia’s industry funds. In his view, legal history and path dependence provide a more complete account, revealing three additional factors that underpin the funds’ contemporary behaviour. These are the ‘missionary zeal’ of their leaders; the funds’ distinct common identity; and the strategic establishment of an ecosystem of allied organisations and service providers, which has allowed the funds to work together cooperatively. These factors originated in the funds’ early struggles to develop and prosper. According to Dr Bowley, this ‘origin story’ also offers a cautionary message for the future. This is because the 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.

The final paper in Session 2 was presented by **Dr Victoria Barnes**, on the topic, **A History of CSR** (co-authored with Ciarán O’Kelly and Ciara Hackett (Queen’s University Belfast, School of Law). In this presentation, Dr Barnes noted that, although corporate social responsibility (CSR) has long been dismissed as a useful regulatory tool for corporate governance in the United Kingdom, it remains central in other common law jurisdictions, such as India. She also discussed the shift in UK corporate governance over the last few decades from CSR to environment, social and governance (ESG), with its close links to factors, such as equality, diversity and inclusion, as well as human rights and sustainability. Dr Barnes’ presentation adopted a historical perspective to reveal the ideological basis for CSR and the philosophy underpinning it. In tracing the birth of CSR, together with its demise, Dr Barnes examined when CSR functioned more effectively than it does at present as a tool for corporate regulation.

**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)

**Tilly Clough** (Queen’s University Belfast, School of Law)

**Jenifer Varzaly** (Durham University Law School)

**Tom Gosling** (London Business School; Executive Fellow, ECGI)

The final session of the Workshop discussed the historical trajectory of several key areas of corporate governance regulation. **Professor Donna Nagy** opened the session with a historical account of insider trading law in the United States. Her paper, **Beyond Fiduciaries - US Insider Trading Law and a Broader Embrace of the Common Law**, noted that 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 the famous Rule 10b-5, which prohibit fraud ‘in connection with the purchase or sale of any security’.

Professor Nagy stated that the principal challenge in prosecuting insider trading as a violation of these antifraud provisions traditionally involved the need to establish that a defendant’s silence about material non-public information is ‘deceptive’. She argued, however, that the US Supreme Court has, in fact, exacerbated that challenge. This is because the court has insisted that disclosure duties will only arise 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)). Professor Nagy’s presentation highlighted an alternative exception to the general common law principle that only affirmative misstatements can be actionable as deceit - namely, the exception for nondisclosure of material facts in transactions where the knowledgeable party’s informational advantage was wrongfully obtained. While accepting that it is highly unlikely that US courts will reframe the insider trading offence to embrace a broader conception of common law fraud, Dr Nagy argued that attention to this important aspect of legal history may hold considerable persuasive power as the US Congress continues to contemplate legislative reform of insider trading law.

The next speaker in Session 3 was **Tilly Clough**, who explored the regulation through the lens of charities. Her presentation, **Charitable Businesses: Lessons Learnt from the History of the Charity Commission for England and Wales**, noted that the governance of charitable businesses in England and Wales focuses on two key actors. These are (i) charitable trustees of individual charities and (ii) the external charity regulator (i.e., the Charity Commission for England and Wales). Although both sets of actors are critical in keeping charities effective and accountable, her paper focused on the external charity regulator, exploring its role throughout history from a comparative perspective. Although the external charity regulator’s role has differed historically across a range of jurisdictions, fundamental similarities exist in that the regulators hold significant powers of oversight and supervision of charities. The presentation provided a case study of the historical role of the Charity Commission for England and Wales, using external regulators in other jurisdictions as a point of comparison.

**Dr Jenifer Varzaly** continuedthe regulatory theme with her presentation, **Evaluating ASIC Enforcement: Evidence and Implications**, which examined private enforcement actions by Australia's business conduct regulator, Australian Securities and Investments Commission (ASIC). The research project, on which her presentation was based, focuses on directors’ duty and disclosure law breaches and comprises a significant empirical dataset including a comprehensive ASIC resource analysis over a 19-year period.

Dr Varzaly noted that there are three key overarching contributions from her research. The first of these is comprehensive description of the Australian enforcement landscape, showing the topographical significance of both public and private enforcement modalities, which is lacking in most research on the topic of enforcement. Secondly, her research provides a theory-based explanation for the contours of this enforcement landscape and its trajectory. Finally, the project offers an evaluation of the effectiveness of Australia’s enforcement regime, together with international implications arising from it.

In the final presentation of the Workshop, **Regulation of Executive Compensation: The Worst of All Worlds?**, **Tom Gosling** provided a brief history of UK pay regulation and its relationship with pay levels and practices. He also discussed the transnational success of the UK’s regulatory approach to executive pay, particularly the ‘say on pay’ technique, which has spread around the world since it was first adopted in the UK in 2003.

The presentation considered why the UK approach has been so influential. It noted such a regulatory style is attractive to politicians. On the one hand, it enables politicians to ‘talk tough’ on executive pay. But, on the other hand, reliance on market mechanisms (particularly shareholders) to regulate pay, potentially provides a safeguard against extreme pay constraints that may be economically damaging, while also enabling politicians to evade direct accountability for pay outcomes.

The presentation argued 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 argue that shareholder interference in pay has damaged UK competitiveness and the ability to attract effective corporate leaders. This has resulted in the possibility UK’s regulatory approach to executive pay has, in fact, led to the worst of all worlds.