



Corporate Law Teachers Association Conference 2010

Educating Lawyers: Better Counsel and Better
Managers of the Corporate Legal Framework

Conference Abstracts

Monday 8th February 2010

Plenary Sessions - Bradley Forum 5th Floor Hawke Building

9.00 am – 10.15 am Professor Steven L Schwarcz

Correlations and Consequences – The Global Financial Crisis and the Role of Lawyers

In recent articles, Professor Schwarcz has argued that the global financial crisis can be attributed in large part to three causes - conflicts, complacency, and complexity - as well as to a type of tragedy of the commons. Professor Schwarcz's keynote address will focus on the failure of market observers, including corporate lawyers, to foresee or act on critical correlations that might have prevented or at least mitigated the crisis. Although conflicts, complacency, complexity, and the tragedy of the commons can help to explain this failure, the goal will be less to tie the failure to these factors than to demonstrate that the same types of failures to see the same types of correlations have been responsible for many of the major financial crises of the past century, including the current crisis, the collapse of Enron, the meltdown of Long-Term Capital Management (LTCM), and even the Great Depression. In accordance with the conference theme, "Educating Corporate Lawyers: Better Counsel and Better Managers of the Corporate Legal Framework," Professor Schwarcz will also examine what the responsibility of corporate lawyers should be, and how corporate lawyers can be better educated, to help their clients try to see these correlations.

10.15 – 10.45 am Professor John Farrar

The Development of an Appropriate Regulatory Response to the Global Financial Crisis

Professor Farrar will present a regional perspective on matters raised by Professor Schwarcz's keynote address, and provide his views on the underlying causes of the global financial crisis, and the current regulatory responses of governments and international institutions. He considers whether the regulatory responses represent a paradigm shift in the capitalist framework or whether the responses are merely evolutionary developments in the regulation of financial risk. Following Professor Schwarcz's and his presentation, Professor Farrar will raise a series of discussion questions on the relationship between these developments and the teaching of corporate law and related matters in Australian higher education.

11.15 am - 12.30pm Professor Paul Redmond

A corporate responsibility to respect human rights?

In June 2008 the United Nations Human Rights Council adopted the framework for business and human rights that had been proposed by the Special Representative of the Secretary-General, Professor John G Ruggie. This 'conceptual and policy framework' is intended to anchor the debate on corporate responsibility and accountability for the human rights impacts of operations. It comprises three core principles: the duty upon states to protect against human rights abuses by third parties, including business corporations, the corporate responsibility to respect human rights, and the need for more effective access to remedies. This paper examines the corporate responsibility to respect human rights, the nature of the underlying obligation asserted to exist, how the responsibility might be discharged by corporations, its relationship with national corporate law systems and with corporate social responsibility notions, and its implications for corporate governance systems generally. The paper concludes by assessing the utility of this responsibility as a response to challenges facing, and those posed by, cross-border business operations.

Monday 8th February 2010

Parallel Session One - GK5-15, 5th Floor George Kingston Building

2.00 – 3.00pm

David Morrison & Colin Anderson

Understanding insolvency in insolvent trading

The current (and likely ongoing) economic environment in Australia is uncertain and challenging. In this environment the law surrounding corporate insolvency is in the spotlight. One aspect of corporate insolvency law that has increasingly been questioned during this economic downturn in Australia has been the insolvent trading provisions. Some have questioned whether their form is too strict. Suggestions have been made that a new defence ought to be available. This paper looks at one aspect of the provisions that prohibit insolvent trading- the meaning of the word insolvent. In this paper we look at what insolvency means and how it is adjudicated upon in this application. We explore in the paper whether it may be possible to move forward on insolvent trading law reform by looking at the way that insolvency is defined in the context of director obligations. The paper will look at whether by changing that definition it may be possible to have a more effective enforcement regime and a clearer path for directors and their advisors to follow.

David Brown & Chris Symes

Achieving 'better' insolvency practice by using a code as part of Australia's corporate legal framework

At present, Insolvency Practitioners (IPs) have an unprecedented role in the Australian corporate legal framework and recently the professional body responsible for building excellence amongst these professionals, the IPA, introduced a Code of Professional Practice (CPP). While the entire comprehensive Code, that replaced all previous codes and statements of best practice, has been effective since May 2008, a draft Code of Professional Practice was released for comment in late October 2009, just 17 months and a GFC later.

Our paper explores the suitability of professional body provided self-regulation of the corporate insolvency industry. We raise the importance of considering IPs and the CPP when considering corporate governance reforms given that the IP can be receiver/controller, administrator or liquidator and conduct the operations of the company, in some cases for many months or longer. Our paper provides a comparative of this subject from the UK and NZ

We consider the application of the CPP to members of the IPA and IPs in so far as they are appointed to or contemplating appointment to any formal appointment under the Corporations Act. We discuss the principles of 'conduct', 'remuneration' and 'practice management' as expressed in the CPP. Furthermore, we perpend the use of the CPP by ASIC, CALDB and the courts.

3.30 pm – 4.30pm

Vivienne Brand & Chris Symes

"Fit and proper" liquidators in the Australian Corporate Legal Framework

The flow-on from the global financial crisis has increased focus on insolvency processes in Australia. The conduct of liquidators in particular represents a sometimes overlooked but critical aspect of the corporate legal framework. This paper reviews the current regime for regulation of this important group of professionals, who are required by legislation to be 'fit and proper' in their conduct of liquidations. It also considers the historical context in which this regime has arisen. These external administrators have high degrees of control and autonomy in relation to the management of very significant corporate assets in Australia every year, but surprisingly little academic discussion exists

in relation to the ethical conduct of liquidators. The Explanatory Memorandum to the *Corporations Amendment (Insolvency) Bill, 2007* noted that ‘some insolvency practitioners are not independent and are not exercising the high standards of honesty, competence, skill and diligence required of them or performing their duties efficiently and impartially’. A recent example of particularly egregious conduct by a registered liquidator in Australia (*ASIC v Ariff* [2009] NSWSC 829) suggests this may continue to be the case. This paper identifies potential shortcomings in the current framework.

Keith Bennetts

Liquidator’s avoidance of uncommercial transactions

Division 2 of Pt 5.7B, Corporations Act was introduced into the Corporations Law by the *Corporate Law Reform Act 1992*, effective from 23 June 1993. The Division forms a regime that provides in essence, that certain transactions entered into by a company within specified time periods prior to liquidation can be categorised as voidable.

The heart of the Division is section 588FE which provides that there are three types of transaction that are voidable; unfair loans, insolvent transactions and unreasonable director-related transactions entered into within certain time periods prior to liquidation. Insolvent transactions are then defined in section 588FC as being unfair preferences or uncommercial transactions entered into when the company was insolvent, or the company became insolvent as a consequence of entering into the transaction.

The objective of this paper is to review the operation and features of the uncommercial transaction, with reference to significant case law that has arisen subsequent to its introduction in 1992. The following topics will be covered in the paper, and are largely concerned with matters that liquidators and their legal advisors will be likely to encounter when contemplating the avoidance of an uncommercial transaction:

- The relevant statutory provisions
- What the liquidator must establish
- What is a “transaction”
- When is a transaction “uncommercial”
- Transactions likely to be challenged by a liquidator
- Court orders the liquidator may seek
- Available defences
- Nexus between uncommercial transactions and unreasonable director-related transactions

Monday 8th February 2010

Parallel Session Two - LB1-30, 1st Floor Law Building

2.00 – 3.00pm

Sheikh Solaiman

The role of private actors in promoting corporate governance: implications of the landmark James Hardie case for non-executive directors in Australia

The latest global financial crisis yet again reminds us of the importance of effective corporate governance and shows the magnitude of the devastating effects of corporate failures on the economies around the world. Corporate governance is a central concern for socio-economic development in the age of market economy. The mandatory inclusion of non-executive directors (NEDs) in the board is a relatively new concept in corporate regulation. The NEDs are expected to provide objective judgment on the activities of their corporations. The Supreme Court of New South Wales, Australia in its landmark verdict delivered in April 2009 on *ASIC v Macdonald (No 11)* [2009] NSWSC 287 (James Hardie case) held both executive and non-executive directors liable under s180(1) of the *Corporations Act 2001* (Cth) for approving an emphatic corporate announcement containing false and misleading statement about the adequacy of funds to meet all legitimate present and future asbestos claims. The decision requires NEDs to play more proactive role on the board. Although an appeal is pending, the judgment has attracted academic debates about treating both executive and non-executive directors equally in respect of approving such a defective announcement. The debating point is said to be an extension of duty of care, skill and diligence to NEDs. This paper analyses dominant theories of corporate governance and shows that the imposition of such duties on the NEDs is justified, and also argues that the duty is already entrenched in the directors' statutory responsibilities in Australia.

Trish Keeper

Independent directors – the holy grail of corporate governance reform

Since 2000, New Zealand in response to reforms in comparative jurisdictions has reformed the rules regulating board structure. One of the foundations of these reforms is the requirement that boards must now include independent directors. However, while recent research confirms an increase in the number of independent directors on boards of New Zealand listed companies, such research largely ignores that 'independence' is a contestable signifier. It also tends to overlook that independence is only one criteria required to be considered in the composition of boards.

This paper explores the contestable nature of independence in terms of how it has been defined in the New Zealand context and in other jurisdictions. The starting point of this analysis is the current skeletal regulatory structure in New Zealand. The New Zealand Securities Commission, in its *Corporate Governance in New Zealand – Principles and Guidelines*, states in Principle 2 that there should be a 'balance of independence, skills, knowledge, experience, and perspectives amongst the directors'. Under the headings of 'key findings from consultation' and 'Securities Commission view' additional guidance as to the meaning of independence is provided, although the status of this guidance is unclear. Additionally, the New Zealand Exchange's Listing Rules provides details of the minimum number of independent directors and simply requires the board to identify which directors it has determined to be independent directors.¹ The Listing Rules defines independent director as some one who is not an executive officer and has no disqualifying relationship. Listed companies are expected to comply with the Securities Commission's Principles and Guidelines.

¹ NZX Limited, *NZSX/ NZDX Listing Rules* (version adopted 3 April 2009) R.3.3.2.

The paper also reviews which companies listed on the NZSX and NZAX disclose the criteria used for determining independence and how independence is defined by such companies. It concludes that while the concept of independence is often understood at a superficial level, any analysis based on board composition does not provide the full picture.

3.30 – 4.30pm

Janine Pascoe

Whistle blowing, ethics and corporate culture: theory and practice

Recent instability in the global financial markets has highlighted the need for companies to remain vigilant in detecting fraud and other forms of misconduct. Providing an effective framework to protect whistleblowers is a vital aspect of companies' corporate governance and risk management strategies. While there have been various studies investigating whistleblowing programs in the public sector, there is virtually no empirical research into corporate sector whistleblowing in Australia. Whistleblowing programs are now an accepted aspect of good corporate governance. In 2007 the revised ASX Principles recommended that listed companies establish a code of conduct, suggesting that the code includes reference to the way in which whistleblower disclosures are handled. This paper looks at some of the theoretical issues relating to the adoption of corporate codes and whistleblowing programs. The paper then discusses the findings of an empirical study into the uptake of whistleblowing programs by Australia's leading 200 ASX listed companies.

Michelle Welsh

The politics of civil and criminal enforcement penalties

Often the response to a financial crisis, large corporate collapse or perceived failure in corporate regulation is a call to provide regulators with greater enforcement powers. Increasingly, legislatures consider the provision of civil penalties either as an alternative to, or in addition to, criminal sanctions for corporate misconduct.

Often the introduction of civil penalties is justified because the regulator has experienced difficulty in obtaining criminal convictions. Other reasons cited for the introduction of civil penalties include the desirability of providing regulators with a range of enforcement regimes, capable of being mapped on to an enforcement pyramid, in a manner envisaged by strategic regulation theory.

Opponents of civil penalties argue that no penalty of any kind should be imposed without the protection of the rules of the criminal law. Civil penalties are not desirable because they allow the state to bypass the limits imposed by criminal procedure in order to achieve a regulatory result.

This paper examines the policy and political tradeoffs faced by legislatures when they consider whether or not to introduce a criminal enforcement regime, a civil penalty regime or both. In addition, this paper examines the policy and political tradeoffs faced by regulators who have been provided with overlapping criminal sanctions and civil penalties. When faced with an alleged contravention of the corporate law these regulators are required to determine which of these two regimes will provide the appropriate regulatory response. This paper will draw on examples of ASIC's use of criminal and civil penalties to examine how the regulatory strategies adopted by it are influenced by the political environment in which it operates.

Monday 8th February 2010

Parallel Session Three - LB2-16, 2nd Floor Law Building

2.00 – 3.00pm

Patty Kamvounias

Corporate law hurdles to the ACCC's enforcement against dead and dying companies: is the outcome worth the effort?

This paper explores one aspect of the Australian Competition and Consumer Commission's (ACCC) enforcement strategy against corporate respondents. In several recent matters, the ACCC has pursued corporate respondents under external administration and in some matters, corporations that had been deregistered. In these matters, the ACCC has had to deal with corporations law requirements about litigating against corporations in these circumstances. For example, the ACCC had to apply for leave under s 471B of the *Corporations Act 2001* (Cth) to proceed against a company being wound up that allegedly was knowingly concerned in or aided and abetted contraventions of the exclusive dealing provisions of the *Trade Practices Act 1974* (Cth). In another example, before the ACCC could proceed against a company allegedly in contravention of the price fixing and market sharing provisions of that Act, it had to apply to the court for an order that the Australian Securities and Investments Commission (ASIC) reinstate the registration of the company. This paper examines the legislative procedures under the *Corporations Act 2001* (Cth) the ACCC has had to comply with in order to satisfy its enforcement strategy in relation to the *Trade Practices Act 1974* (Cth). It also considers the ramifications of this strategy for the corporations, their former management and others.

Debra Wilson

Revisiting personal liability of directors, servants and agents under the Fair Trading Act

Section 45 Fair Trading Act (NZ) states that any conduct engaged in by a director, servant or agent of a company shall be deemed, for the purpose of liability under the Act, to have been engaged in also by the company. This section was influenced by, and is almost identical to, s 84 Trade Practices Act (Cth). The wording of the section has led to increasing debate on whether it imposes personal liability on these individuals, or whether it merely attributes their conduct to the company, resulting in the company being principally liable, and the individuals liable only as accessories to a breach of the Act under s 43.

The 2006 High Court of Australia decision in *Houghton v Arms* assumed that personal liability as principals could be imposed on directors, servants and agents for conduct occurring during their employment under s 84 Trade Practices Act. The following year, however, the New Zealand Court of Appeal considered the wording of the equivalent section in detail in *Body Corporate 202254 v Taylor*, and was split 3:2 on how the section was to be interpreted.

This paper looks at these two decisions, plus subsequent decisions, and considers whether this issue of the appropriate liability to be placed on directors, servants and agents has been clarified, or whether further discussion is required.

3.30 – 4.30pm

Josephine Coffey

A case for persistence in disclosure obligation

A common criticism made by the media and commentators is that ASIC fails to be sufficiently

persistent in pursuing appropriate legal action against 'corporate wrongdoers'. Against this censure should be balanced the recent lack of success when such action has been attempted, for example in the *One.Tel* and *Citigroup* cases. Also, in spite of several delays, significant proceedings are awaiting the decision of the Federal Court in Perth. ASIC is seeking civil penalties against Fortescue Metals Group and for the first time against an individual, the chief executive, for being knowingly involved in the company's continuous disclosure contravention.

To date, there has been no criminal conviction for a contravention of the continuous disclosure provision. The difficulty of successfully mounting a criminal prosecution suggests that the regulator has been constricted by the criminal standard of proof required for prosecution. The first prosecution of this offence was discontinued in January 2009 following failure by the jury in the Brisbane Federal Magistrates Court to reach a verdict on the charge against a former executive of Harts Australasia. However, in February 2009, the same former executive appeared in Court on a charge of dishonestly causing detriment to another. The Commonwealth Director of Public Prosecutions is prosecuting this matter. The Chairman of ASIC states that the policy 'approach with insider trading and market manipulation is to emphasise the deterrence aspect by looking primarily at criminal proceedings above civil penalties', but will there be similar persistence with any future breach of the disclosure obligation?

Anil Hargovan

The significance of the James Hardie case for directors' and officers' duties

ASIC v Macdonald and Others (No 11) required the New South Wales Supreme Court to determine whether company directors and officers had breached their duties, in particular the statutory duty of care and diligence in s 180(1) of the Corporations Act, in the context of the board approving and releasing a defective media statement to the Australian Securities Exchange (ASX) commenting on the effects of a corporate restructure and the company's ability to meet future asbestos liabilities. In affirming liability on some of the civil penalty charges laid by the Australian Securities and Investment Commission (ASIC), significantly, Justice Gzell held that the 10 former directors and officers of James Hardie Industries Ltd breached their duty of care by approving and releasing a media statement that was false or misleading and deceptive and capable of having an adverse effect on the company and the market. In holding that the company also breached its statutory obligations under the continuous disclosure provisions, *Macdonald* highlights the responsibilities of the board, the chief executive officer and general counsel of listed companies to ensure compliance with the law.

This article analyses the reasons underpinning the results in this case, with focus on the modern scope and content of officers and directors duties. It considers the extent to which reliance can be placed by a non-executive director on other directors, management and external advisors. The article discusses the potential implications of the case and the lessons that need to be implemented for sound boardroom governance.

Monday 8th February 2010

Parallel Session Four - LB2-10, 2nd Floor Law Building

2.00 – 3.00 pm

Sulette Lombard

Corporate constituents and legislative reforms

The debate as to whether the corporate constituency should be expanded so as to provide for the interests of corporate stakeholders, other than shareholders, has been a popular one among corporate law scholars for a number of years. It has given rise to new theories on the nature of the corporation and new proposed models of corporate governance.

Beyond the sphere of academic debate the notion of an expanded corporate constituency has been recognised to some extent by the courts, as is illustrated, for example, by the judicial extension of directors' duties to include creditors' interests.

In the legislative arena the legislature has had the opportunity to revisit the notion of shareholder-supremacy in at least three commonwealth jurisdictions in the not too distant past: corporations legislation in Australia, England and South Africa dates 2001, 2006 and 2008 respectively.

This contribution will attempt a comparative analysis of relevant provisions of the above, in particular provisions defining directors' duties and those providing for enforcement mechanisms, to determine whether the legislature in these three jurisdictions have been persuaded to depart from the notion of shareholder-supremacy, or whether new legislative models are merely paying lip-service to the idea of an enhanced corporate constituency.

The importance of this issue goes beyond mere academic debate – our view of the corporation and the interests that should be served by its management will impact significantly on the ability of the corporate world to cope with new challenges in an ethical and equitable manner.

Alex Lau & Angus Young

Why are Traditional Chinese Cultural values so influential on the decision making process?

This paper argues that traditional cultural values are essential ingredients in the decision making processes by Mainland Chinese and Hong Kong based company directors. This study is based on a General Research Fund granted by the Hong Kong Government. It is the first of its kind conducted in Mainland China and Hong Kong, using specially designated corporate executives and professionals, as subjects of interview and investigation. These subjects are reading towards master degrees in corporate governance, business administration as well as accounting and finance. They are given questionnaires to test their awareness and adherence towards traditional Chinese cultural values, when making important business decisions. These values consist of 40 well established cultural beliefs and practices developed by the Chinese University in Hong Kong in the mid 1980s. The paper will conclude that despite considerable modernisation and Western influence, corporate executives go back to their roots even though the company is an imported concept.

3.30 - 4.30pm

Suzanne Webbey & Ellie Chapple

Private regulatory reform: the interface between corporate lawyers and insurers

This paper addresses the role of corporate counsel in private regulatory reform, arising from civil litigation against a corporation. The research presents an initial hypothesis that private regulatory reform is generated at the interface between corporate counsel and insurers through mutual objectives to reduce future claims and contain increased expenditure on premiums. The paper identifies the legal duties and obligations in the relationship between a corporation and its insurer and focuses on the responsibilities of corporate counsel at this interface. As a relationship requiring full disclosure and the utmost good faith, the transfer of information regarding a claim and its consequences provides an opportunity for insurers to specify terms and conditions for future insurance renewals. Likewise it provides an opportunity for a corporation to negotiate regarding these matters. Against the theoretical background of models of regulation, the paper hypothesises that corporate counsel performs a private self regulatory function through reform of corporate practices, processes and policies. The paper suggests that corporate counsel, through corporate transactions, have a role to play in managing the governance framework and risk profile of the corporation they act for. These professional innovations evolve private regulatory reform.

Key words: corporate counsel, directors and officers insurance, private regulatory reform, responsive regulation

Helen Anderson

Parent company liability for asbestos claims: some international thoughts

Throughout the world, the corporate group structure has long proved troublesome to the creditors, and particularly the tort creditors, of undercapitalised subsidiary companies. In the wake of Australia's James Hardie asbestos compensation inquiry, Senior Counsel assisting the Jackson Special Commission, Mr John Sheahan QC, called for the Commission to 'recommend reform of the Corporations Act so as to restrict the application of the limited liability principle as regards liability for damages for personal injury or death caused by a company that is part of a corporate group ...'. Following this call, in May 2008 the Corporations and Markets Advisory Committee released a report on long tail liabilities, making various recommendations for reform. Separately, legislation was passed making pooling available for insolvent group companies in Australia. This paper begins by examining the long tail liability suggestions and the 2007 pooling amendments. It will be argued that neither of these are adequate for the proper protection of tort creditors of insolvent subsidiaries. It then considers international alternatives which might satisfy Mr Sheahan's appeal for reform. These are the CERCLA environmental protection legislation from the United States which allows veil piercing on parent companies in specified circumstances; the equitable subordination doctrine, where parent company loans to the subsidiary may be subordinated to the claims of other creditors or even recharacterised as equity; and the substantive consolidation procedures in the United States and the pooling and contribution order mechanisms of New Zealand and the Republic of Ireland.

Tuesday 9th February 2010

Plenary Session - Bradley Forum 5th Floor Hawke Building

9.30am – 10.45 am

Bernard Murphy

Class Actions and Litigation Funding

The orientation of class actions and class action funding has shifted toward shareholder actions over the past 5 years with consequences for corporate regulation and governance. This paper will examine the current Australian class action landscape and consider implications of recent authority on the regulatory aspects of litigation funding.

Tuesday 9th February 2010

Parallel Session One - RR5-09, 5th Floor Rowland Rees Building

11.15 am – 12.45pm

Chye-Ching Huang

A Collective Theory of Colonial Business Corporations

This paper presents a new explanation of why the corporate form took root in the United States. It reaches that explanation by applying Law and Economics insights to new historical evidence. The paper undertakes a close textual analysis of the charters of the American colonial business corporations, and draws on Law and Economics theories originally developed to explain public and constitutional structures.

The paper claims that in the colonial United States, investors who chose to incorporate their businesses saw the corporation as a way of overcoming the “collective action problems” that investors faced in organizing decision making and economic activity as amongst themselves.

By contrast, the existing literature has emphasized characteristics of the company that regulate interactions between investors and outsiders (including the state), and argued that these characteristics explained the corporation’s emergence. This paper instead finds that these characteristics did not motivate the emergence of the earliest American corporations.

Phillip Lipton

A Historiography of Company Law

This paper surveys the important histories of company law from the late nineteenth century to the present time. The purpose of the paper is to analyse how the approaches to the writing of legal history has evolved over time. Earlier histories adopted an “internal” perspective which saw legal history in a formalist, largely autonomous way divorced from economic and social developments. Later histories sought to place legal change in the context of broader changes occurring in society. Modern histories borrow from various social sciences and draw on insights and perspectives which give legal history a multi-disciplinary character. Modern legal histories have more in common with the work of historians than lawyers. They possess “critical” dimensions which challenge or disturb accepted narratives or lead to alternative interpretations.

Neil Andrews

Which corporate legal framework? The case of transnational corporations originating in one party States

The legal framework for joint stock companies in Australian law schools and academic literature generally places an idealised Australian rule of corporate law at the centre. Internationalisation and the increasing significance of transnational corporations originating in one party states which control capital in other ways are outside this framework. China has maintained political control over capital and its deployment in large firms including banks and through stock markets. This has been described in various ways: a consistent pattern produced in the dissolution of state ownership and control in planned economies; the appearance of a business elite as a hybrid of socialist corporatism and clientism; and, as actors, including workers, exercising different rights over economic assets. The selling down of state shares in some companies has not displaced the significance of political control. State ownership of listed companies and state control of the CSRC blends with state political control and regulatory power. The State-owned Assets Supervision and Administration Commission of the State Council supervises state ownership in about 150 key enterprises including banks. The creation of the China Investment Corporation joined capital owned by the Chinese state with transnational enterprises and international financial markets in which it has invested. Both the SASAC and the CIC make conflicting claims consistent with financialised corporate governance and also the socialization of investment. The SASAC resembles the corporatism which emerged in Korea and Japan. The CIC more closely resembles the corporatism which emerged in Singapore with Temasek Holdings and the Government of Singapore Investment Corporation. Since 2005 there has been increasing resistance in Asian and Western states to acquisitions of assets by both Chinese and Singaporean companies because of uncertainty about their control and commercial objectives. Chinese corporations have produced concern over their regulation and commercial orientation in their acquisition of Australian companies.

Tuesday 9th February 2010

Parallel Session Two - LB1-30, 1st Floor Law Building

11.15am – 12.45 pm

Beth Nosworthy

Is it more appropriate or useful for the director's fiduciary obligations to be owed to the shareholders, rather than to the corporation?

In the early history of the English corporation, shareholders were dominant in terms of power and control. This position has evolved over the past two centuries to the point that shareholders, even when acting as 'the company' in general or special meetings, have limited power.

As an inherent consequence of the recognition of concepts such as the corporate veil, limited liability and corporate legal personality, the corporation has become capable of being the beneficiary of the directors' fiduciary obligations: simply put, not to profit or allow conflicts of interest with the company. A shareholder may bring an action on behalf of the corporation against the directors if these duties are breached. Would this complex situation be simplified if it were recognised that, in some circumstances, the shareholders are the appropriate beneficiary of the directors' fiduciary obligations?

Case law suggests that, in certain factual circumstances, the courts have implicitly recognised such a relationship. International observations confirm that the struggle to appropriately govern corporations without negatively impacting on their commercial activity is not solely an Australian concern. In that context, the value of explicit recognition of such a fiduciary relationship should be considered.

This paper will discuss whether the re-conceptualisation of directors' fiduciary obligations would be a useful advancement in corporate governance. Would such a fiduciary obligation assist to achieve healthy corporate governance, or would the limitations placed on such an expansion of the fiduciary concept be too restrictive for it to function effectively?

Frank Meng

A Comparison of Public Enforcement of Securities Laws in China and Hong Kong and its Implications for H-share Companies

In a relatively short period of time, the Chinese stock market has developed considerably in size and stature, especially when compared with other emerging economies. Fairly speaking, however, the market is still far from a truly functional one that is deep, liquid, transparent, and well regulated. Literature has suggested two approaches to stock market expansion. The law and finance studies advanced by La Porta et al. proposed that stock markets grow in the presence of good laws that protect investors. Meanwhile, scholars such as Coffee claimed that stock exchanges themselves are more effective regulators of the stock market since stock exchanges owned by their members have strong incentive to adopt rules that better meet the needs of investors. While the Chinese regulatory regime is generally a hybrid of these two approaches, recent years have seen a gradual transformation of the regulatory powers from the official regulator to the local stock exchanges, which are now encouraged to play a more important role in regulating the stock market.

In Hong Kong, the regulatory landscape is said to be "sound and of international standards". Strikingly, Hong Kong differs from other financial venues in that it attracts businesses by maintaining a light-handed regulatory approach. Even though, through the so-called dual-filing mechanism, the regulator is empowered to initiate disciplinary actions on listed companies, The Hong Kong regulatory regime has heavily relied on the stock exchange itself to enforce its listing rules in

regulating the market. Under the listing rules, the stock exchange has extensive regulatory powers, including suspending or withdrawing a company's listing. However, in practice, these powers cannot be strictly exercised for the reason that, because the Hong Kong Stock Exchange is demutualized, serious attempts to sanction listed companies are likely to harm the investors at the same time.

The comparison of the public enforcement mechanisms in the Chinese and Hong Kong stock market has serious implications for Chinese companies listed in Hong Kong, known as H-share companies. In 1990s, Coffee pioneered the idea that a company may well grow in spite of the home country's weak legal institutions by pursuing a listing in a legal regime that is more protective of investors without explicit legal reforms. Such a listing represents a form of "bonding": a credible and binding commitment by the issuer not to exploit minority shareholders regardless of whatever discretion it enjoys. In this "bonding" hypothesis, public enforcement is one of the most important elements. This paper examines the public enforcement mechanisms both in the Chinese and Hong Kong stock markets, and reaches the conclusion on whether a Hong Kong listing will subject Chinese companies to a higher regulatory standard in this regard.

Lin Zhang & Jingjing An

Convergence or divergence: evidence from Chinese state controlled listed companies

The global debate on the reform of corporate governance has never been stopped. Some scholars argue that convergence could emerge with the powerful forces of globalization and efficiency. Others insist that path dependence is the basic fact of shaping corporate governance owing to interest group politics. With the evidence from Chinese state-controlled listed companies, the author finds out that the theory of path dependence is closer to the reality. The implication of this research is that the improvement of the corporate governance of Chinese state-controlled listed companies cannot be separate from the Chinese political reform.

2.00 – 3.00pm

Michael Josling

Statutory Compositions and Guarantees from Third Parties

Statutory compositions (such as deeds of arrangement under Part 15A of the Companies Act 1993 (NZ)) often attempt to release not only the debtor company, but also third parties, from any liability. A common example is a clause releasing the directors from personal guarantees. Such terms benefit the third parties by enabling them to achieve finality following a corporate collapse. On the other hand, they can work to the detriment of creditors, since the main point of obtaining a guarantee is to insulate the creditor from the insolvency of the company.

Despite the practical importance of such provisions, there is a remarkable lack of consistency in the case law, both in terms of result, and reasoning, as to whether such terms are enforceable. In New Zealand, the Court of Appeal in *Buttle v Allan* [1994] 1 NZLR 396 held that guarantors were not discharged by operation of law. The opposite conclusion was reached by the English Court of Appeal in *Johnson v Davies* [1999] Ch 117. More recent cases have considered whether an express term will work to discharge a guarantor. Again there has been conflicting case law (such a clause was upheld in *Prudential Assurance Co Ltd v PRG Powerhouse Ltd* [2007] Bus LR (EWHC) and *Fowler v Lindholm* (2009) 178 FCR 563 (FCA), but not in *City of Swan v Lehman Brothers Australia Ltd* [2009] FCAFC 130; see also *Re Lehman Brother International (Europe)* [2009] EWCA 1161.)

The paper analyses the reasoning in the cases, together with the competing policy arguments. It concludes by offering principles to assist in determining whether guarantors may/will be discharged under the various statutory composition regimes in New Zealand and Australia.

Aishah Bidin

Insolvencies and Corporate Rescue in Malaysia

In recent years it has been an active year for legislative activity in the field of insolvency law reform in Malaysia. Malaysia have embarked on a closer reexamination of her insolvency law and have attempted to update these laws to take into account the commercial realities of the modern business world. By the end of 1997, the effects of the severe and prolonged regional economic crisis on the Malaysian economy wielded unyielding implications on the corporate sector with rising costs, falling demand, financing problems and mounting debts. During this period, inefficiencies in the domestic credit market and the loan intermediation process further accentuated financing problems faced by the corporate sector in higher lending rates that led to debt servicing problems and which in turn threatened the stability of the financial system. As Malaysia does not have a similar Insolvency Act 1986 as in United Kingdom to cater for a company voluntary arrangement or an administrative order, financial ailing companies have to resort to Section 176 of the Malaysian Companies Act 1965 for a scheme of compromise and arrangement with their creditors. Since there is a lack of legal and voluntary method to handle debt restructuring scheme, the government took a drastic measure by introducing alternative methods to manage financial ailing companies without having resort to legal process. This include the setting up of *Danaharta* and *Danamodal*, a specific purpose vehicle (SPV) and the Malaysian Central Bank option of Corporate Debt Restructuring Committee (CDRC) to reschedule corporate debts through informal channels. An analysis will also be made on the government measures for corporate rescues and evaluate these measures in the light of prevailing bankruptcy theory and policy. Finally this paper will conclude with a discussion of the implications of the introduction of new corporate rescues regime and to propose reforms on insolvency law in Malaysia namely the recommendations by the CLRC (Malaysia Corporate Law Reform Committee).

Tuesday 9th February 2010

Parallel Session Three - LB2-16, 2nd Floor Law Building

11.45 am - 12.45 pm

Marina Nehme & John Juriansz

Evolution of Indigenous Corporations

Some of the business structures available to indigenous people are companies created under the *Corporations Act 2001* (Cth) and incorporated associations which are regulated by State and Territory legislations. However, such structures do not take into account indigenous culture and practices. Accordingly, in 1976, the *Aboriginal Councils and Associations 1976* (Cth) was introduced to provide a simple method for legal recognition of indigenous people, their customs and traditions. In 2006, major reforms led to the abolition of the *Aboriginal Councils and Associations 1976* (Cth) and the introduction of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) instead. This paper considers the evolution of indigenous corporations under the *Aboriginal Councils and Associations 1976* (Cth) and the *Corporations (Aboriginal and Torres Strait Islander) 2006* (Cth) and discusses the differences that exist between the old and the new legislation. Further, it assesses how and to what extent the new legislation takes into account indigenous customs and traditions.

Susan Watson

The Global Financial Crisis and the Corporate Skeleton

Financial crises uncover a lot about the fundamental legal structure of corporations and financial markets. It is only after the corporate flesh has gone and the bones are being picked over that the irreducible elements of a company, and unavoidable contradictions those create, are exposed. Recognising the trade-offs inherent in the corporate form allows us to understand companies better and provides an opportunity to minimize the risks that arise when the corporate form is adopted. A comparison of a corporation established under the *Corporations Act 2001* (Aust) or *Companies Act 1993* (NZ) with related non-corporate forms like the LLC and LLP lays bare the corporate skeleton. Companies must have a board of directors, de jure or de facto. The legal separation of ownership and control in a company, which is absent in an LLC or LLP, means that shareholders can never have perfect control over the management of a company. Indeed, if they had such control, shareholders would not derive the benefits that the corporate form bestows. With risks come rewards and with rewards come risks.

2.00 – 3.00pm

Rob McQueen

Regulating Rumourtrage: A comment on ASIC policy

In response to the perceived distorting effects of rumours on investment markets in Australia the main focii of Project Mint, ASIC's year-long forensic investigation into the financial crisis, has been in respect to market manipulation by short selling, and the subsequent spreading of "false" rumours to drive the share price in 'targeted' companies down.

Despite the apparently laudable objective of this exercise by ASIC in attempting to prevent market distortions consequent upon rumours, it is nonetheless the case that there is considerable evidence/opinion that such strategies are inefficacious, even counter productive.

There has also been significant criticism in regard to some of the underlying assumptions of ASIC's

attempts to regulate the circulation of market sensitive rumours. A number of critics have pointed to the need in any such exercise in respect to appropriate balancing between interventions which prevent market distortions with the need to not restrict fair comment on financial matters in the financial press. Many have noted that many of the `rumours' circulating in the Australian press before the economic crisis were indeed subsequently proved to be true, and that the press in such circumstances had a responsibility to inform the public on such matters :

Much financial risk management requires ticking boxes designed to prevent the last disaster, using forensic work of innumerable court hearings, for example, Enron and HIH. It cannot forestall a current disaster. The concept of transparency, required in measuring 'safety', elides the contradiction between full information and competitive secrecy as in 'confidentiality'.

The short-selling bans, adopted since the crisis, are a case in point; with regulators such as the Australian Securities and Investments Commission (ASIC) in early 2009 ... even trying to outlaw 'rumourage' in the press, to avoid 'systemic' panic sell-offs (and short-selling's incitement to insider trading). But freedom of speech suffers if people cannot express doubts about, say, Macquarie Bank (whose former raison d'être included short-selling)

This paper examines the merits and demerits of attempting to regulate rumours in the marketplace. The history of research on rumours is examined and the lessons of this historical legacy is applied to the recent attempts to regulate rumours in financial and investment markets in Australia and elsewhere in response to the financial crisis.

PM Vasudev

Credit Crisis and Corporate Governance: A Review of Corporate Theory

Current corporate theory is based on management by full-time executives and oversight by the directors. To improve the efficacy of board oversight, there has been a significant emphasis in the recent decades on director independence. The idea is that directors who do not share a relationship with the managers would be more effective in supervising them.

Audit is another important element in corporate governance. It is devised as an external check on corporate governance, concerned mainly with the integrity of the financial statements. In the current dispensation, audit has little to do with business processes or the substance of corporate decisions and actions.

There are some issues with the governance framework outlined above. It begins on a note of distrust and places the constituencies in a position of conflict. Secondly, the model might be appropriate in a setting in which corporations are successful and competitive pressures are relatively low. But its principle is questionable in the current globalized markets in which competition is strong and companies must work hard to survive and grow.

My paper will explore the recent events, usually termed the credit crisis, from the perspective of corporate theory. The credit crisis has seen significant governance failures in companies such as AIG, Lehman Brothers and Bear Sterns. Using AIG as a case-study, the paper will question the suitability of the framework for the present age, and argue for a more relational vision of corporations that promotes convergence between management theory and legal theory.

Tuesday 9th February 2010

Parallel Session Four - LB2-10, 2nd Floor Law Building

11.15 am – 12.45pm

Michael Peters

Corporate governance Australian banking: A lesson in law reform or good fortune.

The GFC has highlighted faults within the corporate governance and regulatory regimes of both financial and non financial institutions globally.

Although the GFC could be summed up as the mismatch between risk and valuation, it also mirrors corporate governance issues which have been the subject of discourse, with less practice.

One possible exception is the relative health of Australian Authorised Deposit Taking Institutions (ADI). The regulation of Australian ADIs is well beyond capital and liquidity requirements; it is increasingly viewed as a model to drive a better corporate governance culture more attune to value adding and risk management.

The London G20 Conference 2009 examined the role played by APRA and foreshadowed a range of corporate and securities law reform in line with the existing ADI regulation developed by APRA. The current reform agenda is not new; it is a culmination of the work carried out by APRA since the demise of HIH.

The theme of the paper is that the lessons learnt from HIH had been by design or accident or good fortune navigated ADIs out of the global GFC turmoil and is now regarded as a model internationally. The paper examines how APRA through its delegated legislation and post HIH period had created a regulatory governance regime to address issues such as risk management, transparency, accountability setting policies to strengthen corporate governance culture, board duties and succession planning.

The paper outlines how this trend now has gained further momentum through to the risks posed by the proposed carbon value trading. In such a scenario the common law is less equipped to deal with these emerging forces, the time of general principles will be argued, may be destined to legal history as codification and the raise of civil law doctrines emerge as corporate governance beacons championed by the likes of regulators such as APRA.

Keturah Whitford

Regulation of Margin Lending

Margin loans became regulated as financial products under the *Corporations Act* in October 2009. Margin lending has featured in a number of corporate collapses. This paper examines the current position in relation to the regulation of margin loans in Australia. The paper considers the impact of the decisions in the recent cases of *Beconwood Securities Pty Ltd and anor v Australia and New Zealand Banking Group Ltd and ors* (2008) 246 ALR 361 (Beconwood) and *Lift Capital Partners Pty Ltd and ors v Merrill Lynch International and ors* (2009) 253 ALR 482 (Lift Capital). Beconwood arose out of the Opes Prime collapse and Lift Capital arose out of the winding up of Lift Capital. The paper also considers the collapse of Storm Financial and its implications for the regulation of margin lending. Aspects of the recommendations of the Parliamentary Joint Committee on Corporations and Financial Services in the Inquiry into Financial Products and Services in Australia are also reviewed.

Juliette Overland

Directors' Margin Loans and Insider Trading

The practice of listed company directors using margin loans to acquire shares in their own listed companies raises many issues of corporate law, not least of which is insider trading. Recently, this topic has been the subject of significant focus, largely due to the release by the Corporations and Markets Advisory Committee (CAMAC) of an Issues Paper and Report on "Aspects of Market Integrity" in response to a ministerial request. The topic of directors' margin loans was one of several issues raised in the Issues Paper and Report.

Market integrity and investor confidence are considered to be essential for the proper and efficient functioning of Australia's securities markets. Insider trading is acknowledged as a significant threat to the efficiency and integrity of securities markets, with the potential to greatly reduce investor confidence and participation. Despite its status as a criminal offence, insider trading is generally viewed as under-detected and under-prosecuted. Even where insider trading cannot be proven, the belief by investors and market participants that company insiders have an informational advantage and unfair opportunities to trade in company shares reduces investor confidence in the integrity of securities markets.

This paper will discuss the relationship between insider trading and directors' margin loans, analyses the current state of the law in the context of relevant commentary and law reform proposals, and proposes alternative mechanisms to address the complex underlying issues in light of the current policy focus on market integrity.



UniSA

City West campus



Building legend

AU	101 Currie Street	HH	Sir Hans Heysen Building
BE	189 Hindley Street	K	Kaurna Building
BH	Barbara Hanrahan Building	LB	Law Building
CS	Catherine Helen Spence Building	LS	Liverpool Street Studios
DB	Dorrit Black Building	N	Student Lounge
DP	David Pank Building	RR	Rowland Rees Building
EM	Elton Mayo Building	SM	27-29 North Terrace
G	Child Care Centre	WL	Way Lee Building
GK	Sir George Kingston Building	Y	Yungondi Building
H	Hawke Building		