THE NATIONAL LAW REFORM CONFERENCE
14–15 APRIL 2016

Venue: University House
The Australian National University, 1 Batman Crescent, Acton ACT 2601

ANU College of Law
The Australian National University
5 Fellows Road
ACTON, ACT 2601
T: +61 2 6125 3483
E: enquiries.law@anu.edu.au
 Ranked among the world’s top 20 law schools, the ANU College of Law is Australia’s national law school.

Balancing global outlook with local focus, we have a long-standing reputation for excellence in education, research and community outreach, and remain focused on our objectives to

> shape and influence public policy, placing an emphasis on the values of law reform and social justice;
> use our position to help understand and address the major legal, social and political challenges of the 21st century; and
> remain a leader in legal education and research, with the outstanding calibre of our graduates as a key measure of success.

Across undergraduate, postgraduate and research degrees, the ANU College of Law provides a unique understanding of current law and policy, with alumni working not only as lawyers, but as agents for social change, improving public policy and enhancing global diplomacy.

With many academic staff recognised as leaders in their fields, the ANU College of Law has an enviable research profile, holding particular expertise in constitutional and administrative law, international law and environmental law. We have a continued commitment to increasing the representation of women and Indigenous Australians in law and legal practice.

And while our capital city location links us with the nation’s key law-making and legislative bodies, our ongoing innovation in legal education – including the introduction of the first fully online Juris Doctor from a Group of Eight law school – is allowing more people to study with us, regardless of their location.

For more information – including details of events at the ANU College of Law – visit law.anu.edu.au/news

Our education programs

 Across undergraduate, postgraduate and research degrees, the ANU College of Law equips students with the knowledge demanded by the world’s leading employers.

**Bachelor of Laws (Honours) (LLBHons)**
Our flagship law degree now sees all students who successfully complete the degree graduate with honours, placing a focus on independent research and providing additional skills that are particularly valuable in the workplace.

**Juris Doctor (JD)**
Designed for students with an undergraduate degree in a discipline other than law, the ANU Juris Doctor provides the professional qualification required for admission to legal practice in Australia, and is offered on-campus or online.

**Master of Laws (LLM)**
Taught by some of Australia’s best legal minds, the ANU Master of Laws enables students to build their own program of study, or specialise in environmental law, government and regulation, international law, international security law, migration law, and law, governance and development.

**Graduate Certificate of Law**
Developed for graduates without an undergraduate degree in law, the six-month Graduate Certificate of Law introduces the fundamentals of contemporary legal systems, and offers a pathway to the ANU Master of Laws.

**Graduate Certificate in Australian Migration Law and Practice**
Delivered online, the Graduate Certificate in Australian Migration Law and Practice is the compulsory qualification to work as a registered migration agent in Australia.

**Graduate Diploma of Legal Practice (GDLP)**
Building on a student’s LLB or JD, the Graduate Diploma of Legal Practice (GDLP) provides the practical skills required to be admitted as a lawyer in Australia. With an emphasis on flexibility, the GDLP allows students to study online, tailor coursework and placement, and select a wide range of electives.

**Master of Legal Practice (MLP)**
Delivered online, the Master of Legal Practice offers an advanced, practice-based qualification for students seeking a competitive edge from their practical legal training.

**Research Degrees**
Offering exciting opportunities to contribute to the understanding of law, research degree options include the Doctor of Philosophy (PhD), the Doctor of Juridical Sciences (SJD) and the Master of Philosophy (MPhil).

For more information – including details of application deadlines and semester dates – visit law.anu.edu.au/study
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Organising committee
Dr Ron Levy, ANU College of Law
Professor Simon Rice, ANU College of Law
Professor Peta Spender, ANU College of Law
Lauren Butterly, ANU College of Law
Dr Tony Foley, ANU College of Law
Associate Professor Molly Townes O’Brien, ANU College of Law
Associate Professor Pauline Ridge, ANU College of Law

Conference volunteers
Arisha Arif, Elsa Merrick and Natalija Nikolic

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GENERAL INFORMATION

Start and finish times

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<td>Thursday 14 April</td>
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<td>Reception</td>
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<td>Friday 15 April</td>
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Venue

This conference will be held at University House, The Australian National University, 1 Balmain Crescent, Acton, Canberra, ACT

Wifi

**Network:** ANU Secure/ANU Access

**Login:** unihouseguest

**Password:** aThEns14

Social media

Keep up to date with the conference on Twitter, using #NLRC2016
The Hon Michael Kirby AC CMG

Michael Kirby was the inaugural Chairman of the Australian Law Reform Commission (1975–84) before being appointed to the Federal Court of Australia, as President of the New South Wales Court of Appeal, and then High Court of Australia.

When he retired from the High Court of Australia on 2 February 2009, Michael Kirby was Australia’s longest serving judge.

Since his judicial retirement, Michael Kirby has been elected President of the Institute of Arbitrators & Mediators Australia, from 2009–10. He also serves as Editor-in-Chief of The Laws of Australia. He has been appointed Honorary Visiting Professor by twelve universities.

In 2013 he was appointed a Commissioner of the UNAIDS Commission on Sustainable Health (2013–14). Later, in 2013, he was appointed by the President of the UN Human Rights Council to head the Commission of Inquiry on Alleged Human Rights Violations in the Democratic People’s Republic of Korea (2013–14).

In October 2014, at Tokyo, he was elected Vice-Chair of the Human Rights Institute of the International Bar Association. Also in October 2014, in New York, he received the Leo Nevas Award for human rights from the United Nations Foundation of United States of America.

In 2015 he became a member of the Global Fund’s High Level Panel, Equitable Access Initiative to Fight AIDS, Tuberculosis and Malaria.
Professor Margaret Thornton

Margaret Thornton is a socio-legal and feminist scholar whose work on the legal academy and the legal profession is internationally recognised. She is regularly invited to participate in international projects in these areas.

Margaret’s scholarship has been acknowledged by election to the Academy of Social Sciences in Australia, the invitation to be a Foundation Fellow of the Australian Academy of Law, inclusion as a ‘Trailblazing Woman in Law’ in the Oral History Project of the Australian National Library (led by Professor Kim Rubenstein), and the award of an ARC Professorial Fellowship.

She has published extensively in the area of discrimination and the law and the 25th anniversary of her book *The Liberal Promise* (Oxford, 1990) was celebrated in 2015.

Margaret also has a particular interest in the impact of the corporatisation of universities on the legal academy and has conducted research in the UK, Canada and New Zealand, as well as Australia. Publications from this research include *Privatising the Public University: The Case of Law* (Routledge, 2012). Her current ARC-funded research focuses on work/life balance in corporate law firms, particularly the gendered effects of globalisation, competition and technology.
Professor Margaret Davies

After studying law and English literature at Adelaide University in the 1980s, Margaret Davies completed a doctorate in critical legal theory at Sussex University. Margaret was a foundation staff member of the Law School at Flinders University and has been a visiting scholar at Birkbeck College, Umea University, University of British Columbia, University of Kent, and Victoria University of Wellington.

She has been a recipient of three Australian Research Council grants, and is a Fellow of the Academy of Social Sciences in Australia and the Australian Academy of Law. From 2010–12, Margaret was a member of the Humanities and Creative Arts Panel of the ARC College of Experts, and chaired the panel in 2011.

Margaret is on the advisory boards of Social and Legal Studies, Feminist Legal Studies, and the Macquarie Law Journal. She has recently held a Leverhulme Visiting Professorship at Kent University.
Professor Simon Rice OAM

Simon Rice has worked and researched extensively in anti-discrimination law, human rights and access to justice issues. He chairs the ACT Law Reform Advisory Council and in 2014–15 he was legal adviser to the Parliamentary Joint Committee on Human Rights.

After a period in private commercial practice he worked at Redfern Legal Centre in Sydney and co-founded Macarthur Legal Centre. He was Director of Kingsford Legal Centre while director of clinical legal education programs at the University of NSW. He has been a board member of numerous community legal centres, Redfern Legal Centre, Redfern Legal Centre Publishing, the Communications Law Centre, the Disability Discrimination Legal Centre, the Intellectual Disability Rights Centre, and the ACT Welfare Rights and Legal Centre.

In 1989–95 he was a lecturer in the UNSW Law Faculty and director of clinical programs, and in 2000–01 he taught at Sydney University Law Faculty. He was a senior lecturer in Law at Macquarie University from 2005–07.

He has practised extensively in poverty law in community legal centres, particularly anti-discrimination law. In Australia and internationally he has trained and advised a wide range of businesses, agencies and NGOs in human rights and anti-discrimination law, and has consulted to NGOs on organisational management and strategic planning.

In 2002 he was awarded a Medal in the Order of Australia for legal services to the economically and socially disadvantaged, and he has received a UNSW Alumni Award. In 2008 he was an invitee to the Australian Government’s 2020 Summit.
Mr Julian Morrow

Julian Morrow is an Australian comedian and television producer from Sydney, although he has a law degree from the University of Sydney and worked 2003 worked for several years as an employment and industrial lawyer. He is best known for being a member of the satirical team The Chaser. As a member of The Chaser he has appeared on several ABC Television programs including CNNNN (2002–03), The Chaser’s War on Everything (2006–07, 2009) and The Checkout (2013–present), of which he is also executive producer.
LIST OF PRESENTERS

Commercial Activity

> Shelley Marshall, Monash: A global regulatory new deal for precarious and informal workers
> Tess Hardy, Melbourne: To what extent should firms be held liable for workplace contraventions?
> Joellen Riley, Sydney: Brand new ‘sharing’ or plain old sweating? How will work be regulated in the new ‘collaborative’ economy?
> Adrian Coorey, ACCC: Do Australians really know their consumer guarantee rights? Suggested reform to the current consumer guarantee regime under the Australian Consumer Law
> Leela Cejnar, UNSW and Rachel Burgess, Competition Law and Economics Consulting: Australia’s role in contributing to the development and implementation of ASEAN’s competition agenda
> Russell Miller, Minter Ellison: On the road to improved social and economic welfare: The contribution of Australian competition law and policy
> Ann Wardrop, La Trobe: Creating the virtuous financial institution: Looking beyond conventional regulatory methods
> Gill North, Monash: Banking and financial services law: Adjusting the policy lens to a consumer focus
> Ross Grantham, UQ: The privatisation of Australian corporate law
> Suzanne Le Mire, Adelaide: Lost in translation: Taking independence to Australian superannuation fund boards
> Kath Hall, ANU: Reforming the regulation of foreign bribery in Australia
> Mike Kobetsky, ANU: Aggressive tax avoidance by US multinationals: Treating the disease
> John Passant, ANU: Tax, inequality and challenges for the future

Criminal Law

> Russell Hogg, QUT: What is the criminal law good for? The challenge of over-criminalisation
> Anne Wallace, ECU: Australia’s criminal courts: Tackling 21st century problems in a 19th century paradigm?
> Simon Bronitt, UQ: Is the privatisation of Australian corporate law
> John Anderson, Newcastle: Context and tendency evidence in sexual assault cases
> Jeffrey Pfeifer, Swinburne: Jury Selection in Australia: Is there enough cause for challenge?
> Gary Edmond, UNSW: Fixing forensic science evidence
> Lorana Bartels, UC: Criminal justice law reform: Challenges for the future
> Anthony Hopkins, ANU: Compassion as a foundation for giving equal consideration in criminal justice law reform and criminal justice decision-making
> Helen Fraser, Cognitive and Forensic Phonetics consultant: Reforms needed to ensure fairness in the use of covert speech recordings in criminal trials: Problems and solutions from the perspective of phonetic science
> Wendy Larcombe, UMelb: Rethinking rape law reform: Challenges and possibilities
> Jonathan Clough, Monash: Improving the effectiveness of corporate criminal liability: Old challenges in a transnational world
> Blake McKimmie, UQ: Stereotypes in the courtroom
> Diane Sivasubramaniam, Swinburne: The justice motive: Psychological research on perceptions of justice in criminal law
Environmental Law

> Robert Fowler, UniSA: Towards a new generation of Australian environmental law: The APEEL project
> Jan McDonald, UTas: Making environmental law responsive to change
> James Prest, ANU: Clean energy and the law: Competition and the solar energy revolution
> Andrew Macintosh, ANU: Transparency and disclosure
> Bronwen Morgan, UNSW: The legal roots of a sustainable and resilient economy: Challenges for commercial activities and legal practice
> Benjamin Richardson, UTas: Money talks? Fossil fuel divesting campaigns and environmental governance reform
> Lee Godden, UMelb: Substantive inclusion of Indigenous peoples’ interests in emerging statutes governing environment, resources and energy
> Leon Terrill, UNSW: Supporting economic development on Indigenous land
> Irene Watson, UniSA: Looking from both sides of the frontier—the laws of first nations peoples, and what is the mainstream?
> Virginia Marshall, Macquarie: Overturning aqua nullius: Pathways to national law reform
> Natalie Stoianoff, UTS: A governance framework for Indigenous ecological knowledge protection and use
> Nicole Graham, UTS: Law, science and the subsidence impacts of Longwall coal mining on water systems
> Cameron Holley, UNSW: Future water – new directions or staying the course?
> Amanda Kennedy, UNE: Good stewardship is not enough: Environmental law for future rural landscape governance

Legal Practice

> Vivien Holmes, ANU: Weather ahead: The ethical climates in which lawyers work. Observations from an empirical study of new Australian lawyer
> Justine Rogers, UNSW: The dream team: Teaching and cultivating teamwork knowledge and skills to improve ethics capacity
> Adrian Evans, Monash: Strengthening Australian legal ethics and professionalism
> Paul Maharg, ANU: Disintermediation
> Margaret Thornton, ANU: Reimagining liberal legal education in the corporatised academy
> Nick James, Bond: More than merely work-ready: Appropriating vocationalism and promoting professionalism in the law school
> Craig Collins, ANU: The end of ramism—and the shape of things to come
> Colin James, ANU: Legal practice on time: The ethical risk and inefficiency of the six-minute unit
> Paula Baron, La Trobe: Lawyer well-being: Putting gender on the agenda
> Judy Harrison, ANU: Legal practice and the repertoire of contention: What can legal practice learn from social movement theory
> Katie Murray, USQ: Contemporary challenges and views of role in lawyers’ ethics: An empirical perspective
> Mary Anne Noone, La Trobe: Wearing two hats: Lawyers who act as mediators
> Helen McGowan, ANU: Turn away or triage? Engaging with conflicts of interest in the bush
> Christine Parker, Melbourne: Taking lawyers’ duty to the administration of justice: Why lawyers must be allowed to blow the whistle on their firms and clients
> Kath Hall and Heather Cork, ANU: Corporate whistleblowing laws in Australia
> Liz Curran, ANU: Practical, effective, inclusive processes and approaches that lead to responsive, connected policy by enabling voices to be heard
Obligations

> Samantha Hepburn, Deakin: The public/private divide: Ownership in land and natural resources in a modern energy landscape
> Robyn Honey, Murdoch: It’s time to ‘get real’ about consent in contract and property law
> Dilan Thampapilai, ANU: Rethinking the presumptions? Undue influence, elderly parents and adult children
> Wayne Morgan, ANU: Torrens mortgage conundrums: Unresolved conceptual incoherence
> Lee Aitken, UQ: The assignment and ‘a genuine commercial interest’
> Pauline Ridge, ANU: Tracing in Australia
> Robyn Carroll, UWA: Offering to make amends: What can we learn from Australian defamation law?
> Prue Vines, UNSW: Apologies, liability and civil society: Where to from here?
> David Winterton, UNSW: Contract damages and the Aman case
> Darryn Jensen, ANU: The pitfalls of statutory reform: Third party recipient liability for breach of trust
> Joachim Dietrich, Bond: Recreational activities and personal injury compensation: Complexity in need of reform
> Matthew Harding, UMelb: Reforms to Australian charity law: Challenges and opportunities
> Ian Murray, UWA: Nudging charities to balance the needs of the present against those of the future
> Elise Bant and Jeannie Paterson, UMelb: Statutory interpretation and the critical role of soft law guidelines in developing a coherent law of remedies in Australia
> Simone Degeling, UNSW and Kit Barker, UQ: Reparations schemes

Public Law

> Andrew Kenyon, UMelb: A positive freedom of public speech? Australian media reform and freedom of political communication
> Dominique Dalla-Pozza, ANU: Parliamentary committees and the continuing challenge of Australian counter-terrorism law reform: are some committees more effective than others?
> Tom Campbell, CSU: Deliberative democracy and the implementation of human rights
> Graeme Orr, UQ: Compulsory voting: Elections yes, referendums no
> Scott Stephenson, UMelb: Reforming constitutional reform
> Ryan Goss, ANU: Chosen by the people: Reforming local democracy
> Lael Weis, UMelb: Does Australia need a popular constitutional culture?
> Kim Rubenstein, ANU: Court records, archives and citizenship
> Ron Levy, ANU: The deliberative case for referendums and plebiscites
> Daniel Stewart, ANU: Encouraging openness and transparency in government
> Melissa Castan and Paula Gerber, Monash: Constructions of identity and problems of public law
> Rebecca Ananian-Welsh, UQ: The protection of fair process
> Julie Debeljak, Monash: Human rights dialogue under the Victorian charter: The potential and the pitfalls
> Gabrielle Appleby, UNSW, and Anna Olijnyk, UAdel: Constitutional dimensions of law reform
> David Kinley, USyd: Awkward intimacy: Why finance and human rights must learn to love each other
# National Law Reform Conference

**Thursday 14 and Friday 15 April**

Program and speakers are subject to change without notice.

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<td>Registration</td>
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<td>9 – 9.15 am</td>
<td>Dean’s Welcome: Professor Stephen Bottomley</td>
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<td>9.15 – 10.15 am</td>
<td>Plenary: The Hon Michael Kirby AC CMG</td>
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<td>10.15 – 10.30 am</td>
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<td>10.30 – 12 pm</td>
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<td>Is criminal law reform a lost cause?</td>
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**Lunch**

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<td>Criminal Law and Evidence</td>
<td>Law (Reform), Economy and Environment</td>
<td>Legal Education</td>
<td>Doctrinal Questions</td>
<td>Reforming the Vote</td>
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**Ross Grantham, UQ**  
The privatisation of Australian corporate law

**Suzanne Le Mire, Adelaide**  
Lost in translation: Taking independence to Australian superannuation fund boards

**Kath Hall, ANU**  
Reforming the regulation of foreign bribery in Australia

**John Anderson, Newcastle**  
Context and tendency evidence in sexual assault cases

**Jeffrey Pfeifer, Swinburne**  
Jury selection in Australia: Is there enough cause for challenge?

**Gary Edmond, UNSW**  
Fixing forensic science evidence

**Bronwen Morgan, UNSW**  
The legal roots of a sustainable and resilient economy: Challenges for commercial activities and legal practice

**Benjamin Richardson, UTas**  
Money talks? Fossil fuel divestment campaigns and environmental governance reform

**James Prest, ANU**  
Clean energy and the law: Competition and the solar energy revolution

**Paul Maharg, ANU**  
Disintermediation

**Margaret Thorton, ANU**  
Reimagining liberal legal education in the corporatised academy

**Nick James, Bond**  
More than merely work-ready: Appropriating vocationalism and promoting professionalism in the law school

**Craig Collins, ANU**  
The end of ramism – and the shape of things to come

**Wayne Morgan, ANU**  
Torrens mortgage conundrums: Unresolved conceptual incoherence

**Lee Aitken, UQ**  
The assignment and ‘a genuine commercial interest’

**Pauline Ridge, ANU**  
Tracing in Australia

**Graeme Orr, UQ**  
Compulsory voting: Elections yes, referendums no

**Scott Stephenson, UMelb**  
Reforming constitutional reform

**Ryan Goss, ANU**  
Chosen by the people: Reforming local democracy
### SESSIONS 3

**2.35 – 4 pm**

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<td>INDIGENOUS PEOPLES, LAND, LAW AND KNOWLEDGES</td>
<td>WELLNESS &amp; PROFESSIONALISM IN LAW</td>
<td>REMEDIES</td>
<td>CONSTITUTIONAL CULTURE AND NARRATIVE</td>
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- **Ann Wardrop, La Trobe**  
  Creating the virtuous financial institution: Looking beyond conventional regulatory methods

- **Gill North, Monash**  
  Banking and financial services law: Adjusting the policy lens to a consumer focus

- **Lorana Bartels, UC**  
  Criminal justice law reform: Challenges for the future

- **Anthony Hopkins, ANU**  
  Compassion as a foundation for giving equal consideration in criminal justice law reform and criminal justice decision-making.

- **Helen Fraser**  
  Reforms needed to ensure fairness in the use of covert speech recordings in criminal trials: Problems and solutions from the perspective of phonetic science

- **Irene Watson, UniSA**  
  Looking from both sides of the frontier—the laws of first nations peoples, and what is the mainstream?

- **Natalie Stoianoff, UTS**  
  A governance framework for Indigenous ecological knowledge protection and use

- **Virginia Marshall**  
  Overturning aqua nullius: Pathways to national law reform

- **Colin James, ANU**  
  Legal practice on time: The ethical risk and inefficiency of the six-minute unit

- **Paula Baron, La Trobe**  
  Lawyer well-being: Putting gender on the agenda

- **Judy Harrison, ANU**  
  Legal practice and the repertoire of contention: What can legal practice learn from social movement theory

- **Robyn Carroll, UWA**  
  Offering to make amends: what can we learn from Australian defamation law?

- **Prue Vines, UNSW**  
  Apologies, liability and civil society: Where to from here?

- **David Winterton, UNSW**  
  Contract damages and the Amann case

- **Lael Weis, UMelb**  
  Does Australia need a popular constitutional culture?

- **Kim Rubenstein, ANU**  
  Court records, archives and citizenship

- **Ron Levy, ANU**  
  The deliberative case for referendums and plebiscites

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**4.05 – 5.15 pm**

**Plenary:** Prof Margaret Thornton, Prof Simon Rice OAM and Dr Andrew Leigh MP, chaired by Prof Rosalind Croucher AM

**6.30 pm**

**Reception:** Mr Julian Morrow

**7.45 pm**

**Dinner:** own arrangements
### FRIDAY 15 APRIL 2016

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<td><strong>COMPETITION AND CONSUMER LAW</strong></td>
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<td>Adrian Coorey, ACCC&lt;br&gt;Do Australians really know their consumer guarantee rights? Suggested reform to the current consumer guarantee regime under the Australian Consumer Law.</td>
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<td>Leela Cejnar, UNSW &amp; Rachel Burgess, Competition Law and Economics Consulting&lt;br&gt;Australia’s role in contributing to the development and implementation of ASEAN’s competition agenda.</td>
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<td>Russell Miller, Minter Ellison&lt;br&gt;On the road to improved social and economic welfare: the contribution of Australian competition law and policy.</td>
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<td><strong>CRIMINAL LAW AND PSYCHOLOGY AND GENDERED VIOLENCE</strong></td>
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<td>Jane Delahunty, CSU &amp; Mark Nolan, ANU&lt;br&gt;Experientially-based law reform: Effective integration of legal psychology.</td>
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<td>Wendy Larcombe, UMelb&lt;br&gt;Rethinking rape law reform: Challenges and possibilities.</td>
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<td>Leon Terrill, UNSW&lt;br&gt;Supporting economic development on Indigenous land.</td>
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<td>Helen McGowan, ANU&lt;br&gt;Turn away or triage?: Engaging with conflicts of interest in the bush.</td>
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<td><strong>ALTERNATIVE CONCEPTIONS OF LEGAL PRACTICE</strong></td>
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<td>Darryn Jensen, ANU&lt;br&gt;The pitfalls of statutory reform: Third party recipient liability for breach of trust.</td>
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<td>Joachim Dietrich, Bond&lt;br&gt;Recreational activities and personal injury compensation: Complexity in need of reform.</td>
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<td>Matthew Harding, UMelb&lt;br&gt;Reforms to Australian charity law: Challenges and opportunities.</td>
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<td><strong>THE INTERACTION OF COMMON LAW AND STATUTE I</strong></td>
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<td>Daniel Stewart, ANU&lt;br&gt;Encouraging openness and transparency in government.</td>
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<td>Melissa Castan &amp; Paula Gerber, Monash&lt;br&gt;Constructions of identity and problems of public law.</td>
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<td>Rebecca Ananian-Welsh, UQ&lt;br&gt;The protection of fair process.</td>
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<td><strong>REFORMING SAFEGUARDS</strong></td>
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<td>COMMERCIAL ACTIVITY</td>
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<td>SESSIONS 5</td>
<td>TAXATION</td>
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<td>Mike Kobetsky, ANU</td>
<td>Aggressive tax avoidance by us multinationals: Treating the disease</td>
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<td>John Passant, ANU</td>
<td>Tax, inequality and challenges for the future</td>
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<td>Diane Sivasubramaniam, Swinburne</td>
<td>The justice motive: Psychological research on perceptions of justice in criminal law</td>
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<td>Cameron Holley, UNSW</td>
<td>Future water – new directions or staying the course?</td>
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<td>Nicole Graham, UTS</td>
<td>Law, science and the subsidence impacts of Longwall coal mining on water systems</td>
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<td>Amanda Kennedy, UNE</td>
<td>Good stewardship is not enough: Environmental law for future rural landscape governance</td>
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<td>Christine Parker, UMelb</td>
<td>Taking lawyers’ duty to the administration of justice: Why lawyers must be allowed to blow the whistle on their firms and clients</td>
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<td>Ian Murray, UWA</td>
<td>Nudging charities to balance the needs of the present against those of the future</td>
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<td>Julie Debeljak, Monash</td>
<td>Human rights dialogue under the Victorian charter: The potential and the pitfalls</td>
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<td>Gabrielle Appleby, UNSW, &amp; Anna Olijnyk, UAdel</td>
<td>Constitutional dimensions of law reform</td>
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<td>David Kinley, USyd</td>
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1–2.30 pm  | Lunch and Plenary: Close |  |  |  |  |  |
**Criminal Law Stream**

**SESSION 1: CRIMINAL LAW’S CHALLENGES**

**Russell Hogg**

**OUT**

**What is the criminal law good for?**

**The challenge of over-criminalisation**

Even as crime rates have generally declined this century, legislative ‘hyper-activity’ around crime persists across Australia, as do steep increases in incarceration rates that disproportionately affect the most disadvantaged Australians.

The excessive reliance on criminalisation and punishment by governments around Australia has assumed the status of a habit which politicians (and perhaps large sectors of the wider community) appear unable to kick. Breaking this costly, and in many ways self-defeating, cycle in order to produce a fairer, more just and effective system of criminal law presents numerous challenges. They need to be addressed at every level – the law-making process, policing, prosecution and how (and how much) we punish.

Brief suggestions will be made in relation to each of these aspects of criminal law, but an essential dimension of the reform process involves influencing change in the political conversation around crime.

This requires first a recognition that it is a political conversation that is inescapably (and thus legitimately) concerned with political and moral values and popular attitudes and emotions, and not simply rational, evidence-based law and policy-making. Rather than simply toning down the political rhetoric around law and order, we need a different rhetoric.

**Anne Wallace**

**ECU**

**Australia’s criminal courts: Tackling 21st century problems in a 19th century paradigm?**

Australia’s criminal courts are facing significant challenges to their ability to effectively, efficiently and fairly administer criminal justice, particularly in the high volume magistrates’ courts that dealt with nearly 97% of Australia’s criminal caseload. Key issues for these courts include:

- Consistently high workloads for judicial officers;
- The incorporation of therapeutic and less adversarial approaches to dealing with particular types of crime;
- Changing demographics in the court user population, in particular, increasing cultural and linguistic diversity, and increasing numbers of court users who do not have legal representation; and
- The impact of modern technology, notably, social media and audio-visual links.

There are considerable efforts being made at the level of many individual courts to address these challenges. However, attempting to do so in an environment dominated by resource pressures, and the day-to-day operational demands of a high volume jurisdiction, often means that there is little opportunity for a strategic or systemic approach to planning, and that evaluation, where it occurs, is focused narrowly.

This paper argues that to move Australia’s criminal courts beyond the 19th century paradigm requires new skills, appropriate levels of resourcing, and the adoption of modern methods of workload management and workforce planning. Increased opportunities for, and structures that facilitate, the sharing of resources and expertise across, and between jurisdictions, and between courts and academia, could assist in all these respects.

**Simon Bronitt**

**UQ**

**Is criminal law reform a lost cause?**

In a celebrated essay, Professor Andrew Ashworth expressed hope for a more principled criminal law, though ultimately conceded that, in the UK at least, the prospect of achieving better conformity between principle and the existing criminal law “may be a lost cause” (Ashworth 2000). This paper reflects upon a similar question, though in the context of criminal law reform in Australia.

The sense of futility surrounding criminal law reform in Australia reflects the ‘uncivil’ and parochial agendas of ‘law and order’ politics (Hogg and Brown 1998). The past two decades have witnessed periodic enthusiasm for codification and uniformity (eg Model Criminal Code/Laws Project 1990–present), as well as a stronger rhetoric around the value of ‘evidence-based’ criminal justice policy (eg Rudd Government’s Federal Criminal Justice Forum 2008), and some significant successes,
such as the joint report of the Australian Law Reform Commission and NSW Law Reform Commission on family violence (ALRC Report 114 2010). Overall, however, many initiatives have failed to achieve hoped-for changes. The paper (i) examines the structural and institutional impediments to achieving Ashworth’s vision of a more principled, effective and legitimate criminal law, and (ii) reflects on whether this ‘liberal promise’ remains a valid set of goals/attributes for the modern criminal law.

The paper also examines why reform in many fields of the criminal law - drugs, terrorism and organised crime – remains flatly resistant or deeply hostile to engagement with academic and empirical research. Until this tendency is openly confronted and addressed, criminal law reform in Australia continues to remain, in Ashworth’s terms, a lost cause!

SESSION 2: CRIMINAL LAW AND EVIDENCE

John Anderson
Newcastle

Context and tendency evidence in sexual assault cases

‘These distinctions [between tendency and relationship / context evidence] – somewhat fine – are productive of much uncertainty, and therefore much difficulty for trial judges. In a trial for a sexual offence, where many of these concepts may intersect, the task of a trial judge in explaining coherently the use (and non-misuse) of evidence falling within the different categories is an unenviable one, as is the task of a jury of lay persons in comprehending and faithfully applying the required directions. In my opinion, relationship evidence – including context evidence – should be seen for what it is. It is tendency evidence. …’

This is one example of the substantial amount of judicial decision-making and commentary arising from the admissibility of evidence that discloses a tendency, particularly uncharged acts of a sexual or indecent nature, but is adduced by the prosecution at trial to prove the relationship between the defendant and another person, usually one or more complainants. Such evidence, now often referred to as context evidence, carries the strong potential to be unfairly prejudicial to the defendant. It is not subject to the same stringent admissibility requirements as tendency evidence under the scheme of the uniform Evidence Acts. Rather it is often admitted subject to the need for careful judicial direction to the jury that clearly circumscribes the use that can be made of this evidence in their deliberations. As Priest JA has observed this is an ‘unenviable task’, which assumes juror comprehension of using the evidence for a purpose that has been described as ‘contrary to ordinary human experience’. 2

The result is a fraught dichotomy between context and tendency evidence in these cases that raises two important and distinct reform considerations. In this paper, it will first be argued that the admissibility of relationship evidence under the uniform Evidence Acts should be specifically governed by a statutory provision similar to section 34P Evidence Act 1929 (SA), which presumptively makes all evidence of ‘discreditable conduct’ inadmissible and sets a rigorous threshold for the prosecution to persuade the trial judge that the evidence is admissible.

This will require a transparent judicial balancing process rather than simply relying on the outmoded notion that directions to the jury will ameliorate the unfair prejudice to the defendant. Second, it will be contended that increased use of expert evidence to explain counterintuitive behaviours of sexual assault victims, particularly children, is an option in certain cases that will be a more objective way of maintaining the credibility of victims without the need for a detailed and highly prejudicial account of ‘misconduct’ and events leading to the charged offence.

1 Murdoch (a Pseudonym) v The Queen [2013] VSCA 272 per Priest JA at [92]-[93].

Jeffrey Pfeifer
Swinburne

Jury selection in Australia: Is there enough cause for challenge?

This presentation will examine the jury empanelment process across Australian jurisdictions as well as outline a number of recent trends and issues that may suggest a need to open a dialogue regarding a refreshment of the selection phase in order to effectively (and procedurally) address identified juror biases. The issue of juror bias is one that has been long recognized by a variety of Common Law countries including Canada and the United States and has recently been highlighted with regard to a number of high profile cases in Australia.

A review of international Common Law approaches to jury selection indicates that the United States represents
The National Law Reform Conference
PRESENTERS & ABSTRACTS

Anthony Hopkins
ANU
COMPASSION AS A FOUNDATION FOR GIVING EQUAL CONSIDERATION IN CRIMINAL JUSTICE LAW REFORM AND CRIMINAL JUSTICE DECISION-MAKING

Equality is a fundamental concern of human existence. Expressed in the principle of equality before the law it entails the requirement that those who become subject to criminal justice processes be treated as being of equal value and be given ‘equal consideration’. In circumstances where those who come before the law are marked by their differences, giving of equal consideration requires that difference be understood and taken into account. But understanding difference, and the different lived experiences of ‘others’, presents a significant challenge. Meeting this challenge requires information, imagination and effort, together with the recognition that the pursuit of understanding is an active and continuous process. Further, it will be argued that the pursuit of understanding requires compassion as its foundational motivation: that is, the desire to understand and alleviate suffering. If it is accepted that equality before the law cannot be whole-heartedly pursued in the absence of compassion, this leads to the conclusion that there is much to be gained by naming compassion as a key attribute of the criminal justice decision-maker and supporting these decision makers to cultivate a compassionate mind.

Gary Edmond
UNSW
FIXING FORENSIC SCIENCE EVIDENCE

Many longstanding forensic science techniques have never been rigorously tested. Consequently, many of the opinions expressed by forensic practitioners are not based on scientific research. This presentation will consider what this reveal about legal practice, the critical abilities of lawyers and judges as well as how we might go about reforming the institutionalised forensic sciences and the legal reception of their evidentiary products.

Helen Fraser
Cognitive and Forensic Phonetics consultant
REFORMS NEEDED TO ENSURE FAIRNESS IN THE USE OF COVERT SPEECH RECORDINGS IN CRIMINAL TRIALS: PROBLEMS AND SOLUTIONS FROM THE PERSPECTIVE OF PHONETIC SCIENCE

Covert recording (‘bugging’), now authorised in almost every major investigation, forms an ever-increasing part of criminal trials. Unfortunately, since the need for secrecy compromises control over recording conditions, covert audio is often indistinct, making it easy to mistake what is said, or who is saying it. Legal practice for the handling of indistinct covert recordings has evolved haphazardly over the past 30 years, with no consultation of phonetic science. This has resulted in a number of anomalies, notably the fact that detectives are allowed (as ‘ad hoc experts’) to present their own transcripts of indistinct audio to ‘assist’ the jury in interpreting the audio evidence.

S E S S I O N 3: C R I M E A N D I M P R O N S E M E N T

Lorana Bartels
UC
CRIMINAL JUSTICE LAW REFORM: CHALLENGES FOR THE FUTURE

This paper will argue that Australia’s criminal justice policy should henceforth be focused around the central issue of whether any proposed reform will increase or decrease our prison population. If the evidence prima facie suggests the former is likely to occur, the policy proposal should not proceed.

All legal and policy initiatives should be adequately funded to ensure independent evaluation of their impact on the prison population, with particular attention to the over-representation of Indigenous people. The paper calls for all stakeholders to develop and maintain a commitment to evidence-based policy-making and law reform.
SESSION 5: PERCEPTIONS OF JUSTICE

Jonathan Clough
Monash

Improving the effectiveness of corporate criminal liability: Old challenges in a transnational world

Traditionally a product of Anglo-American common law, corporate criminal liability is now recognised, to varying degrees, in a wide range of jurisdictions and legal systems. Initially, criminal liability provided a public enforcement response to unlawful conduct by large corporations during the industrial revolution. Today, corporations are subject to criminal sanctions across their operations; from environmental protection and workplace safety, to consumer protection and taxation. Yet the threat of effective prosecution is often more theoretical than real. More broadly, the challenge is now a global one, with transnational corporations able to act outside their home jurisdictions, with the potential to facilitate a range of transnational crimes including trafficking in persons, drugs or arms, corruption and money laundering.

Drawing on domestic and international examples, this paper will consider three issues which, it is argued, must be addressed in order to make corporate criminal liability a more effective regulatory tool both domestically and internationally. First, the need for appropriate models of liability. Although the artificial nature of legal persons initially presented challenges, today there is no shortage of models of liability; from derivative models based on the conduct of individuals, to realist models based on ‘corporate culture’. Particularly significant in Australia is the hybrid role of civil penalties, allowing the imposition of significant penalties but without criminal conviction. The form and model of liability chosen must be tailored to the wrong being regulated, and the need to provide a form of liability which facilitates enforcement while also reflecting the culpability of the organisation.

SESSION 4: CRIMINAL LAW AND PSYCHOLOGY AND GENDERED VIOLENCE

Wendy Larcombe
UMelb

Rethinking rape law reform: Challenges and possibilities

In the field of sexual offences, two important challenges for law reform are to better support victim/survivors’ justice needs and to better facilitate offender accountability and reintegration.

This paper argues that, in order to meet these challenges, the way that sexual offences law reform has been developed and implemented to date needs to be comprehensively re-thought. Drawing on rape law reform as a case study, the limitations of progressive, repeated statutory reform are explored. It is suggested that three questions are useful for analysing why reforms to rape law have often been ineffective or incoherent: What are the aims or goals of law reform? Who is the (reformed) law speaking to and who does it speak for? Should all rapes be treated similarly?

The final section of the paper explores possibilities for thinking differently about each of these questions and thus for changing our thinking about the criminal law and rape law reform.
In the context of a criminal case, this will often result in a retributive impulse – a “bad person” deserves bad treatment and a bad outcome. We must therefore consider the impact of this mismatch between legal and human notions of justice: to what extent will this mismatch affect the acceptability of criminal law reforms in the community and, ultimately, the viability of those reforms?

In this paper, I address this question in relation to restorative justice procedures and preventive detention schemes. The psychological literature sheds light on the conditions under which these processes are acceptable to the community, and the fundamental motivations driving people’s decision making about restorative justice and preventive detention. Methodological issues central to the psychological literature on justice motivations are also considered.

An understanding of the motivations driving community perceptions of justice is crucial in assessing the long-term viability of criminal law reform.

Thirdly, as corporate criminal liability is no longer a purely domestic concern, it is necessary to ensure that, in appropriate cases, domestic corporations are subject to effective forms of extraterritorial criminal liability. Further, as assistance may be requested by other states, mutual assistance and other cooperative instruments must be adapted if they are to apply where the entity being prosecuted is a corporation.

Blake McKimmie
UQ

Stereotypes in the courtroom

Stereotypes have a functional, relatively automatic, and pervasive influence on how we form impressions of other people. Despite this, or perhaps because of this, little attention is given to considering how stereotypes might influence jurors’ decisions. As stereotypes are an extra-legal factor, they are an undesirable influence on decisions, but they do not represent a failing on the part of jurors.

This presentation explores how stereotypes influence jurors in a number of different domains – sexual assault, demeanor, and perceptions of dangerousness of criminal defendants – and further suggests ways in which the effect of stereotypes can be reduced. The possible ways for intervening include changes to how evidence is presented, how jurors are instructed to evaluate witness statements, and changes to the design of the courtroom.

Diane Sivasubramaniam
Swinburne

The justice motive: Psychological research on perceptions of justice in criminal law

Psychological research on justice perceptions demonstrates that people’s intuitive judgments of justice differ markedly from legal notions of justice. While several principles (eg, procedural fairness, rehabilitation, retribution, deterrence) guide the determination of just outcomes in criminal law, psychological research on the justice motive indicates that deservingness is the fundamental component of people’s intuitive concepts of justice.
Environment Stream

SESSION 1: APPROACHES TO ENVIRONMENTAL LAW REFORM

Robert Fowler
UniSA
Towards a new generation of Australian environmental law: The APEEL project

Australian environmental law has evolved since the early 1970s from its origins in traditional land-use planning to include environmental assessment and approval processes, measures for the protection of environmental quality and natural/cultural heritage, the management of natural resources and, more recently, to address climate change and promote clean energy. Early measures based on command and control regulation and protected areas have been complemented by innovations that involve the use of economic instruments and voluntary mechanisms, including private land conservation initiatives.

Despite these developments, the overwhelming evidence, as confirmed by regular State of the Environment reports, is that the environmental gains achieved in Australia through environmental law and policy are seriously outweighed by the ongoing losses in biodiversity, other forms of environmental damage and the growing impacts of climate change. In addition, a political agenda of “regressive” action in relation to existing environmental laws has emerged recently within both the federal and some state governments. Thus, it appears that existing laws, rather than being the subject of reform efforts to improve their effectiveness, are instead under attack in terms of their continued operation.

It was in this challenging context that the Australian Panel of Experts in Environmental Law (APEEL) was established in late 2014 to develop a blueprint for the next generation of Australian environmental laws. The Panel comprises 17 experts in environmental law, aided by some additional expert advisers (apeel.org.au). Whilst it is entirely independent, it is supported logistically by the Places You Love Alliance, a network of over 40 Australian environmental non-government organisations.

APEEL has recently released 5 Technical Discussion Papers that set out a wide range of proposals for environmental law reform. This paper will summarise their key conclusions and recommendations and outline the process for developing the Panel’s final recommendations, due to be delivered in mid-2016.

Jan McDonald
UTas
Making environmental law responsive to change

Planetary systems face unprecedented rates of change. There are high levels of uncertainty about future conditions and how human activities will push systems closer to ecological tipping points.

The legal and governance framework for environmental protection and biodiversity conservation that we have established over decades is poorly equipped to respond. It is designed to offer legal certainty and stability, rather than agility and adaptability.

Most regulatory frameworks are premised on notions of system stasis, or increasingly unattainable goals of ecological restoration or the return to some historical baseline of ecological quality.

This presentation outlines some of the ways in which environmental decision-making could be reformed to suit the new challenges of the Anthropocene. Drawing on principles of adaptive governance and resilience theory, it identifies specific tools for building in flexibility to environmental decisions, as well as proposing reforms to environmental law-making processes more generally.

James Prest
ANU
Clean energy and the law: Competition and the solar energy revolution

Preventing dangerous climate change requires that we achieve deep and rapid cuts in greenhouse gas emissions from the electricity and transport sectors. In this context, the role of national and sub-national legal frameworks in promoting deep de-carbonisation of those sectors has become extremely important.

Rapid cost declines of solar photovoltaic technologies are increasingly being combined with an additional disruptive energy innovation, in the form of cheaper battery storage. The rise of these distributed energy technologies represent challenges to the three large incumbent vertically integrated generator-retailer companies that dominate in the electricity sector. The
late Hermann Scheer, a German solar energy pioneer, when writing ‘In Praise of Creative Destruction’, predicted strong resistance from the vested interests of incumbent electricity suppliers to the technological revolution represented by solar energy.

This paper takes Scheer’s predictions as the starting point for a discussion and observation of the patterns emerging across Australia, the USA and Spain, of the proposals by electricity distribution companies to make and approve new electricity tariffs that are unfavourable to solar generators. These proposals selectively impose ‘solar taxes’, e.g. additional fixed charges to customers who are also generators of solar electricity.

To consider these issues in depth, this article examines a Federal Court decision of December 2015 rejecting the appeal by an electricity distribution company against a decision of the Australian Energy Regulator to refuse regulatory approval for a differential solar tariff which would have imposed a discriminatory and larger network charge for connections by households with solar systems in the South Australia.

The paper progresses to examine regulatory disputes and litigation in US states including Arizona, New Mexico, South Carolina, concerning attempts to impose separate and discriminatory utility rates for solar owners. In particular, the Australian Federal Court decision is compared and contrasted with litigation in the US Federal Court between Solar City and an Arizona electricity distribution utility. The paper argues that unless we reform national electricity law and associated state laws to more actively encourage the entry of renewable energy technologies (and their disruptive effects), the resistance of established fossil-energy interests will hinder our response to the urgent problem of climate change.

SESSION 2: LAW (REFORM), ECONOMY AND ENVIRONMENT

Andrew Macintosh

ANU

Transparency and disclosure

For over 50 years, legal, economic and policy scholars have debated the merits of various substantive environmental policy instruments. Most of this debate has centred on which instrument type is more cost-effective in achieving desired environmental outcomes: economic instruments, command-and-control regulation, voluntary environmental instruments, or information instruments. The caricature is that economists favour economic instruments (e.g. taxes and tradeable permit schemes) and lawyers favour command-and-control style regulation. While this debate has produced many important insights, it has often occurred in a theoretical vacuum. Insufficient attention has been paid to the practical constraints that limit the choices of environmental policy-makers and what they mean for policy design and implementation. This presentation will explore this issue, arguing that the choice and calibration of procedural policy instruments can be just as (if not more) important as the decisions made in relation to substantive policy instruments. Particular attention will be paid to the role of procedural instruments that are designed to improve transparency and accountability.

Bronwen Morgan

UNSW

The legal roots of a sustainable and resilient economy: Challenges for commercial activities and legal practice

The key challenge facing environmental law in the near-to-medium term future is the degree to which its effectiveness is constrained by its structural relationship to commercial law, and the related implications for legal professional services. Responding to environmental challenges through the medium of law requires us to move away from an inherently regulatory response that effectively bolts environmental goals onto the edifice of commercial exchange as a protective afterthought.

Drawing from findings from a three year research project on the legal and regulatory support structures for small-scale sustainable economy initiatives, I argue that a more productive approach is to rework the tacit legal underpinnings of commercial activities. Creative use of commercial and transactional legal strategies has the potential to weave social and ecological values into the heart of exchange, and thus to address environmental law goals ‘from the inside out’.

To fulfill this potential effectively, legal and policy debates should address questions of: 1) innovative hybrid legal entity models that transcend not-for-profit/profit dichotomies; and 2) gaps in legal professional services related to issues of culture and values, specific technical skills sets, and the cost and accessibility of commercial advice for small-scale organisations.
Benjamin Richardson
UTas
Money talks? Fossil fuel divestment campaigns and environmental governance reform

Socially responsible investment (SRI) is acquiring a serious market presence in Australia, but can it actually reorient markets towards environmental sustainability such as addressing climate change, as many now expect? Given major limitations in the efficacy of environmental law in Australia (as in other countries), we should consider whether and how environmental governance might be pursued beyond the state through market-based processes such as financial investing.

The fossil fuel divestment movement is an intriguing attempt to leverage positive environmental changes in the economy when many governments have failed to show leadership in tackling climate change. For example, the investment fund of the Australian National University recently withdrew from seven resource sector companies that it judged had violated environmental performance criteria. Also, the National Australia Bank announced it would not support the proposed Adani coal mine in Queensland. While many persuasive reasons have been given for investors to tackle climate change, the questions of whether they can in fact exert influence, and how so, remain largely unanswered. Nor is it clear how government regulation should respond to such market pressures.

This presentation critically assesses the capacity of the financial sector to address climate change, highlighting the impediments and opportunities. It evaluates how government regulation and other legal norms in Australia affect the scope for SRI, and it makes recommendations for law reform to facilitate SRI as means to supplement and improve environmental governance beyond the traditional legislative framework. The work of the Australian Panel of Experts of Environmental Law, which is looking at the role of the private sector and business law in promoting sustainability, is also considered.

The presentation draws upon my recent work in:
> Beate Sjafjell, and Benjamin J. Richardson (eds), *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge University Press, 2015).

Natalie Stoianoff
UTS
A governance framework for Indigenous ecological knowledge protection and use

Australia has grappled with the issue of protecting Indigenous knowledge and culture for more than 40 years. Protecting Indigenous knowledge benefits not only Aboriginal, Torres Strait Islander and local communities but also the long-term economic security and sustainable development of Australia. Further, the

Irene Watson
UniSA
Looking from both sides of the frontier – the laws of First Nations Peoples, and what is the mainstream?

We know the challenges that are a result of the unfinished business of colonialism. The legal limit in dealing with the fact of First Nations Peoples existence was once again reiterated and set by the High Court in *Mabo No 2*. That is, the extent of recognition cannot move beyond the ‘skeletal principle which is the foundation of the colonial state’.

Yet the genocide of First Nations continues, the record of animal and plant extinction is out of control and the ecocide of our territories is holding by a thread about to tear with each new and damaging development proposal.

While this paper sits within the environment stream to include resources, Indigenous relationships to the environment, property, the call for reform crosses all areas of the law, so the character of the paper is much broader. First Nations legal systems are relational and not segmented and categorised into property, contract etc. In response to environmental concerns I will embrace the complexity of First Nations legal systems and the problem for us in fitting into the limits of western eurocentric colonial legal systems.

In the near future the challenges are immense and the legal and policy responses should be aware of those complexities and impossibilities. So where to begin at the spaces where the cracks of possibility emerge?
subset of Indigenous ecological knowledge has become increasingly recognised as a more effective means of managing the Australian landscape, particularly since that knowledge has an holistic approach of understanding the seasons, biodiversity, land and water. In addition, there is concern regarding intergenerational loss of knowledge about Country. This is not a new issue but rather a well-recognised issue that is cause for concern for the knowledge holders and their communities and the whole of humanity.

Despite numerous government and non-government consultations and reports, landmark cases, suggested protocols, models and draft legislation, Australia is no step further toward meeting international expectations in providing an effective mechanism for recognising and protecting Indigenous knowledge and culture.

The legislative solution proposed by the White Paper, Recognising and Protecting Aboriginal Knowledge associated with Natural Resource Management, prepared for the Office of Environment and Heritage New South Wales (NSW) in 2014 (the White Paper), provides a potential solution. Like other proposed models, it establishes a competent authority to provide an appropriate governance framework to administer a protection, access and benefit sharing regime. Unlike other models it recognises the concerns that community consultation has raised about the form such an authority would take, its independence from government, how it would be funded and wound up, and local Aboriginal and Torres Strait Islander representation and engagement. This paper recognises the need to address these concerns from the grassroots not a top down approach, and identifies a variety of legal structures suitable for governing and administering a protection, access and benefit sharing regime that accords with cultural norms and practice while building the capacity for Indigenous involvement in natural resource management.

Virginia Marshall

Overturning aqua nullius: Pathways to national law reform

A conundrum arises when one tries to define Aboriginal property interests through Western legal concepts, because the values, beliefs and law inherent in Western and Aboriginal ontological concepts exist within polarised cultural paradigms. Aboriginal property rights in water are inherent in Aboriginal law where the rights and obligations to land and water remain inseparable.

Australia has entered into a series of international conventions and declarations that acknowledge the importance of international law and Australia’s international obligations. International human rights principles provide a framework for promoting and protecting the substantive rights of Indigenous peoples.

Successive Australian governments have disenfranchised Indigenous people in Australia from their water rights and interests through what I have termed ‘aqua nullius’, a legal fiction that places insurmountable barriers between Aboriginal people and the exercise of their water rights. A national paradigm shift is required to elevate the status of Indigenous water rights in Australia to that of a ‘first nations’ right, from that of the lowest and least stakeholder in the consumptive pool.

This means a shift away from applying simplistic legal metaphors to explain Indigenous rights and relationships and towards a water ethics discourse which benchmarks Australian water governance against international legal principles. Reforms to national water law and policy need to enshrine reserved Aboriginal water rights within governance framework that addresses barriers, promotes equity and builds the capacity of Indigenous water holders.

SESSION 4: INDIGENOUS PEOPLES, LAND AND LAW

Lee Godden

UMelb

Substantive inclusion of Indigenous Peoples’ interests in emerging statutes governing environment, resources and energy

The challenges faced by environmental law and associated property law regimes is to grasp the understanding that the major governance frameworks for environment, land, resources and energy are statutory; and that this factor has implications for the inclusion of Aboriginal and Torres Strait Islander interests. By contrast, the story that law tells itself about property is dominated by concepts of private law and a common law heritage.

Within Australia that narrative was shaken, but not dislodged, by the recognition of native title in 1992. Major questions of ‘ownership’ of land and resources and political recognition receded against the view that recognition of native title should not fracture the skeleton of principle constituted by the doctrine of tenure.
The ultimate, negotiated compromise was statutory – the *Native Title Act* 1993. This paper examines the ramifications for the near and medium term for the further development of statutory frameworks governing access to land, and the control of energy and resources, as well as regimes for environmental protection and restoration. Recent ‘property-based’ reforms in areas, such as water law in the Murray Darling Basin through the CoAG model, are remarkable for the marginalisation of Aboriginal and Torres Strait Islander interests. This occurred, notwithstanding the contemporary development of the state based and Commonwealth statutory water law reforms with the Native Title Act.

Currently there are significant windows of opportunity to build substantive inclusion of indigenous peoples’ interests into statutory regimes around water, carbon farming and savannah burning, biodiversity protection and the statutes that may in the future drive energy transitions. If law reform is to achieve a more equitable inclusion of the interests of Aboriginal and Torres Strait Islander peoples, it will require a critical examination of the development of and the allocation processes within the emergent statutory ‘property forms’ in these fields of environmental and resources laws.

**Leon Terrill**

**UNSW**

**Supporting economic development on Indigenous land**

More than 22 per cent of Australia is Indigenous land and recently Australian governments have been looking for ways to increase the level of economic development on that land. At times this has taken the form of prescriptive remedies, such as the introduction of township leasing. At other times governments make general statements about enabling ‘people to leverage their land assets for economic development’ without being clear about what this means.

There is some uncertainty about the nature of the problem that governments are trying to address. It is often assumed that existing land-ownership structures are a barrier to development without being clear as to why. There has also been confusion about what constitutes a solution.

This paper argues that governments should be taking a different approach to supporting economic development on Indigenous land. Rather than promoting the adoption of particular models, their role should be to facilitate the sharing of information about what works, what doesn’t, what people identify as a problem and the solutions that are being attempted. There is considerable support in the literature for such an approach, however it poses two challenges. The first is that governments find it difficult to play this facilitative role without imposing their own values. The second is that in order to be effective, information sharing requires clear and intelligible frameworks for understanding the issues, which we do not yet have.

**SESSION 5: PRACTICAL PERSPECTIVES ON LAW REFORM**

**Cameron Holley**

**UNSW**

**Future Water: New directions or staying the course?**

Water law and policy has taken over two decades to evolve and advance. Urgent government interventions were needed to offset a national water crisis in Australia. However, with the ending of the Millennium Drought, national attention to water is beginning to wane. Such equivocation does little to encourage innovation, and jeopardises long term sustainability, as many important but unfinished reforms are left on the sideline (NWC 2014 p4). Indeed, while substantial progress has been made implementing Australia’s approach to non-urban water governance, there is still much to be done to improve water management.

This presentationcatalogues national water law and governance aspirations and critically evaluates the performance of its legal and policy architecture, giving particular focus to place based water planning, enforcement, water markets and learning and improvement systems. Successes are identified, but many lingering shortfalls in design and implementation are found to have undermined the delivery of equitable and sustainable water management.

The paper will consider what challenges water law should accordingly be geared to in the future and outlines the legal and policy responses needed. Connections will be drawn between the presentation’s law reform recommendations and the work on natural resource management by the Australian Panel of Experts of Environmental Law.
Nicole Graham

UTS

Law, science and the subsidence impacts of Longwall coal mining on water systems

Longwall mining subsidence is regarded as predictable and immediate by those working in the area. In NSW, the practice occurs predominantly in the Hunter and Illawarra regions of the Sydney coal basin. The impacts of subsidence of anthropocentric concern have long been addressed by legislation and planning processes in NSW. However, impacts on environmental systems are less well-regulated. Accordingly, some of the most adverse and enduring impacts of longwall mining subsidence are on the habitats of non-human life forms and the geohydrological systems supporting those habitats. This paper contends that the differentiation of law regarding the subsidence impacts of longwall mining along an axis of anthropocentric concern reflects an out-dated world view which is unsupported by scientific knowledge and at odds with the precautionary principle in modern environmental law. The extension and incorporation of this principle into the legislative and planning provisions concerning longwall mine application, approval and audit is desirable because it would integrate into mining law the substantial and currently externalised costs of non-evidence-based regulation.

Amanda Kennedy

UNE

Good stewardship is not enough: Environmental law for future rural landscape governance

Intact native biodiversity is by its nature most likely to be found in areas that have not been the subject of intensive development, and these are largely rural areas. However, the indicators of our rural landscape environmental health are bleak. Biodiversity decline has been significant, and many threats to biodiversity remain including the impacts of climate change, economic drivers, and declining public investment. The nature of biodiversity challenges is becoming more complex, due to things like the increasing diversity of rural land uses, foreign or urban land ownership, and long term economic pressures on traditional agricultural uses of the land.

The legal instruments that have been generally used (and which remain the main instruments) in the biodiversity protection armoury are focused largely on the individual stewardship of private landholders. The outcomes of this focus have not been convincing that this approach is sufficient, and there are sound reasons to believe that it cannot be sufficient. Among these reasons is the need for whole of landscape responses to many issues, within a landscape where uses and ownership are very diverse; where there are many levels of disagreement about objectives and methods of protection and restoration; and where there is a limited economic capacity of many farmers and other rural people compared to their urban counterparts. These considerations point to the need to adopt new governance mechanisms that incorporate but go beyond the focus on private stewardship.

This paper will consider some of the directions for effective legal arrangements, and explore some of the implications for legal scholarship and public policy. Among the considerations are the proper role of (and limits to utility of) science-informed legal arrangements; the potential for effective co-regulation; citizen empowerment; and negotiated localism in dealing with interest conflicts.
**Legal Practice Stream**

**SESSION 1: LEGAL ETHICS**

**Vivien Holmes**

ANU

*Weather ahead: The ethical climates in which lawyers work. Observations from an empirical study of new Australian lawyers*

The organisational culture in which people work can influence them toward (un)ethical behaviour. Using validated instruments, I and my co-researchers (Tony Foley, Stephen Tang, Margie Rowe) empirically explored the perceptions held by new lawyers of the organisational culture/‘ethical climate’ in which they work.

Our research responds to the call from Chambliss (2010) for a more rigorous methodology to address the perceived normative bias and lack of empirical foundation of much of the research into the organisational culture of legal practice and the effect of that culture on the behaviour of individual lawyers.

This paper reports on preliminary results from our study.

**Justine Rogers**

UNSW

*Finding the dream team: Barriers and pathways to cultivating ethical behaviour within and by lawyers’ teams*

Legal practice has been typically characterised as individual, independent and competitive work. Today, teamwork and collaboration constitute an increasing proportion of legal activity and expertise. This seems particularly so for large law firms, where lawyers work in practice area groups, but teams are also found in and cut across myriad entities and disciplines. To thrive in the current environment, lawyers need to possess the knowledge, attitudes and skills to rely on and support each other in teams. Moreover, the team is a central mediator of individual, mediating and organisational and professional ethics. Lawyers identify and resolve ethics issues, or not, within a team structure and dynamic.

Legal ethics pedagogy and regulation have tended not to occupy themselves with this aspect of practice; with the motivation and skill required for individuals to able to confidently and effectively speak up in team contexts, and to deliberate upon ethics issues and related work conditions and processes. The professional conduct rules attend to certain features of a lawyer’s relationship with their colleagues, but not as team-members. The team involves leadership and hierarchy, and a variety of norms around reflection, consultation, discipline and potential change, each implied by ethical activity. A team’s ethicality is important for many intrinsic reasons and indirect outcomes.

This paper examines the scholarship from law, business and social psychology, and some of the author’s own research, to chart what we know about the influence of the team on the ethics of an individual and the group. The findings reveal the risks and barriers, antecedents and pathways, to ethical behaviour within and by teams, both general and specific to law. The paper goes on to show some of the frameworks and recommendations for improving a team’s ethical culture and an individual’s ethical capacity within a team. While offering cautions about team-based approaches to ethics, the paper concludes by drawing out the implications of the current research for teaching and training, regulation, and further scholarly investigation.

**Adrian Evans**

Monash

*Strengthening Australian legal ethics and professionalism*

Numerous and prominent examples of lawyers who prioritise justice, and the recent creation of an emerging Uniform Law regulating many Australian lawyers, tend to disguise the fact that legal ethics education still under-nourishes the moral sensitivities of future lawyers and that in consequence, there remain significant unethical features in Australian legal professional regulation. These practices include conduct rules that negate a key feature of legal ethics – loyalty to clients – to secondary importance; the funding of lawyer regulation; under-performing continuing legal education structures and a reluctance to engage with the assessment of lawyers’ individual integrity.

This paper briefly describes these and other limitations of Australian legal ethics education and practice. Achievable remedies are proposed, while recognising that a number of these suggestions will require the display of political and professional courage, in the face of heavily vested interests.
SESSION 2: LEGAL EDUCATION

Paul Maharg
ANU

Disintermediation

Disintermediation is a concept well-understood in almost all industries. At its simplest, it refers to the process by which intermediaries in a supply chain are eliminated, most often by digital re-engineering of process and workflow. It can often result in streamlined processes that lay claim to being more customer-focused, though this is a contentious and highly complex cultural and economic issue. It can also result in the destruction of almost entire industries and occupations, and the re-design of many aspects of customer and client-facing activity.

To date, legal education in particular has not given much attention to the process. In this paper I explore some of the theory that has been constructed around the concept. I then examine some of the consequences that disintermediation is having upon our teaching and learning, and on our research into legal education, both as part of the general landscape of digital media churn and as part of the discourse of the rapidly evolving debate on what constitutes higher education. Finally I show how we might co-opt aspects of the process in two case studies that are, effectively, versions of the future of legal education.

Margaret Thornton
ANU

Reimagining liberal legal education in the corporatised academy

The compulsory core of legal education has not changed markedly since law was first taught in the university in the 19th century, despite the dynamic social changes that have occurred. Most recently, we have witnessed state disinvestment in public universities, the transformation of the legal profession as a result of competition policy, and a proliferation of law students and new law schools. Unsurprisingly, less than 50 per cent of law graduates go into private practice and remain there. These factors compel us to question whether we should continue to adhere to a standardised ‘core’ curriculum and uniform admission rules or whether it is time for a radical rethink.

This presentation outlines the trajectory of change and makes some suggestions as to the way forward. In particular, it places the case for diversity squarely on the curricular agenda. At the very least, a critical socio-legal education is not only intellectually and pedagogically superior to the narrow doctrinalism favoured by the admitting authorities, it should appeal to those who argue that there are ‘too many lawyers’ as it would better equip students for a diverse range of destinations.

Nick James
Bond

More than merely work-ready: Appropriating vocationalism and promoting professionalism in the law school

A ‘vocational’ approach to legal education is one that emphasises the importance of developing practical legal skills, drawing connections between legal knowledge and legal practice, and ensuring graduate employability. The vocational approach has in recent years re-emerged as one of the dominant approaches to teaching law, to the extent that for many academics it is taken for granted that the primary purpose of a law degree is to prepare students for a legal career, whether as a legal practitioner or as some other worker with legal expertise. Vocationalism within the law school is not, however, unopposed. Vocationalism’s critics point to other, equally valuable (perhaps even more valuable) approaches to legal education, such as approaches that emphasise the importance of theoretical rigour, or preserving the rule of law, or identifying and addressing social injustice, or preparing students for lifelong learning and lives as broadly educated and socially responsible citizens.

Given the value to university administrators of law schools as mechanisms for attracting high quality students to the institution, the vocal demands by students for qualifications that will lead to salaries generous enough to justify their university fees, and the ever closer ties between the academy and the practicing profession, the juggernaut of vocationalism is unlikely to stopped, or even slowed down by its critics. This paper presents the argument that vocationalism’s critics should instead seek to appropriate vocationalism’s momentum to achieve their own objectives. They should embrace the notion that law schools must focus upon preparing their students for legal careers, and participate in – and thereby influence – vocational initiatives with a view to creating law graduates who are not only ‘work ready’ (thereby satisfying students, employers and university administrators) but also theoretically informed, broadly
educated, committed to the rule of law, and concerned about social justice. This can be achieved by adopting and promoting an expanded notion of ‘professionalism’, one that incorporates all of these traits in what it means to be a legal professional.

Craig Collins
ANU

The end of ramism – and the shape of things to come

The Australian law curriculum, as with virtually all university curricula, is shaped by what might be described as a Ramist mental framework. This mentality is both the progenitor and the product of the printed text, and may be attributed to Professor Petrus Ramus of the University of Paris. In 1576, he was perhaps the first to use the word ‘curriculum’ in an educational context. Since then, and with impetus for law from Blackstone and Langdell, the law school curriculum has been shaped by and contained within the receptacle of ‘the text’. And until now, online legal education has been constrained by the Ramist mentality - merely transferring and reproducing text-based notions of law curricula online.

But as the digital age gains traction, the ‘new wine’ of information is flowing with a rapidity matched only by the rate at which the ‘old bottles’ of physical containment are being discarded (drawing upon Barlow). And so, perhaps the greatest challenge facing legal education in the near-to-medium term future is the dissolution of the receptacle of ‘the text’.

This prospect has left regulators scrambling, yet still grasping familiar notions such as ‘content’, ‘volume of learning’ and ‘learning outcomes’, even as the ground shifts beneath their feet. With the Ramist mentality dissolving before our eyes, what is the shape of things to come?

In drawing lessons from pre-Ramist and other non-Ramist approaches to legal education - including insights as to how junior lawyers continue to grow and develop within the legal profession itself - suggestions are made towards reimagining a law curriculum for the digital age.

Colin James
ANU

Legal practice on time: The ethical risk and inefficiency of the six-minute unit

Since the 1980s the billable hour has become entrenched in commercial legal practice. The ‘six-minute unit’ serves the partners of firms in maximising gross income from the services of employed lawyers, enabling a quantitative tool for management by comparing performance and promoting competition between lawyers.

However, in these firms performance is measured in the form of gross income to the firm, a direct benefit to partners, and provides only indirect benefit if any to the employed lawyer. In fact, research has confirmed that time billing increases the risk of ethical breaches by lawyers and causes some to over-work to meet billing targets, with wellbeing impacts from reduced work-life balance, and increased anxiety from the risk of failing to meet billing targets and from subtle but strong pressure for fraudulent actions such as ‘rounding up’ time spent on files.

The evidence suggests in addition to the risk of ethical breaches and anxiety, that long hours commonly associated with time billing practices leads to measurable reduction in quality of work as hours increase. The paper concludes by discussing a range of alternatives to time billing for an ethical, profitable and safe legal practice.

Paula Baron
La Trobe

Lawyer well-being: Putting gender on the agenda

The lawyer well-being discourse in Australia has developed rapidly since 2009. Discussions about lawyer depression, anxiety, substance abuse and suicide have become increasingly open, and much valuable work has been done by the academy and by the profession to highlight the problems and offer potential solutions to the problems of lawyer well-being.

But in this growing body of wellness discourse, there has been very little acknowledgment of the gendered dimensions of lawyer well-being. Our discussions have remained firmly ‘gender-neutral’. This is in contrast with
the wellness literature in medicine where there has been some good work around well-being and gender, particularly in regard to surgeons.

This presentation seeks to promote a conversation about the gendered dimensions of lawyer well-being. It argues that if we are serious about addressing the issues of wellness that are so problematic for our profession, gendering – in terms of lawyering, law firms and well-being itself – must be acknowledged and addressed. To do so, however, will pose a challenge to existing legal workplace cultures. Can the wellness debates be the catalyst for what many consider to be long-overdue cultural change in the legal profession?

Judy Harrison

ANU

Reform, lawyering and the repertoire of contention

On 6 March 2012, the Western Australian Minister for Aboriginal Affairs announced the commencement of the WA Stolen Wages Reparation Scheme which would be open for six months from that day. The Scheme would pay up to $2,000 to Aboriginal people who had ‘income’ withheld while living in a ‘Government Native Welfare Settlement’ in Western Australia.

In this paper, I focus on five theoretical frameworks I have found useful in trying to conceptualise my learning from working as a lawyer for and with Aboriginal claimants and with staff of Kimberley Community Legal Services. The frameworks are: progressive legal contextualisation; locating micro-aggression in macro critique; legal whitesplaining; legal repertoires of contention; and jurisgenerative moments.

In response to the theme of ‘Different approach to practice (and) how might law be practiced differently’, I argue that some answers involve lawyers overcoming obstacles they can address such as reconceptualising and reforming their own lawyering.

SESSION 4: ALTERNATIVE CONCEPTIONS OF LEGAL PRACTICE

Katie Murray

USQ

Contemporary challenges and views of role in lawyers’ ethics: An empirical perspective

The normative literature on lawyers’ ethical decision-making addresses questions such as the nature of the lawyer’s role, the moral justifications for that role, and what happens when the lawyer’s own personal values or broader considerations such as ‘justice’ conflict with the client’s instructions or the lawyer’s professional role.

This presentation will draw from a recent empirical study of a group of Christian lawyers in Australia, which sought to explore how those lawyers navigated the ethical worlds of faith and legal practice, and whether and how their personal values influenced their ethical deliberations.

What emerged from the study was that, rather than experiencing an inherent conflict between faith and legal practice, participants saw these roles as being broadly consistent, including in the way that they related to their clients and colleagues within the profession, and because of a broad correlation between personal and professional ethical norms. In contrast, the study revealed challenges which were not limited to issues of faith and legal practice, and which might be used to suggest possible directions for future research and reform. These included challenges in the areas of maintaining work-life balance, firm culture and the charging of professional fees, which are of wider relevance to contemporary Australian legal practice.

Mary Anne Noone

La Trobe

Wearing two hats: Lawyers who act as mediators

In Australia, many lawyers (both barristers and solicitors) train to be mediators and commonly act as mediators. Mediation is an integral aspect of modern civil litigation. Professional legal bodies promote the use of lawyers as mediators claiming that “with their skills, training and experience solicitors are ideally placed to be mediators”.

Lawyers who act as mediators are wearing two hats: officer of the court and neutral third party. These dual identities pose significant challenges for lawyers/
mediators and the legal profession more broadly. How can the various professional responsibilities be reconciled?

In the context of an emergent discussion about the ethics of mediators and concern for the impact of mediation on public interest law practice, the following issues warrant ongoing examination: Is there an expectation that the lawyer as mediator will be more “fair and just”? Should a lawyer/mediator give legal advice during mediation, particularly, if a party is sacrificing clear legal entitlements of which they are unaware? Should a lawyer/mediator be concerned about systemic injustice? How can a lawyer/mediator ensure mediation enhances, not limits, access to justice? Elements of ‘best practice’ for lawyers who act as mediators are proposed.

Helen McGowan
ANU

Turn away or triage? Engaging with conflicts of interest in the bush

When faced with the possibility of a conflict of interest, the best advice to lawyers exploring this ethical issue has been to ‘just say no’ or to ‘turn away’ the new client. This prophylactic advice is based on avoiding future conflicts. However in ethics, context matters. Ethical legal practice demands situational sensitivity.

The appropriate ethical response when there are referral options for the ‘turned away client’ may not be the appropriate ethical response when there are no referral options. In some parts of regional, rural and remote Australia there are no local referral options.

Whilst ninety per cent of Australian lawyers are clustered in our major cities the other ten per cent of Australian lawyers are dispersed across ninety-eight per cent of the Australian continent. This legal diaspora results in a scarcity of lawyers in some parts of Australia and consequently few alternative legal services to whom conflicted clients can be referred. Some Australian communities have one lawyer to three thousand people and many local government areas have no resident lawyer. The prophylactic ‘turn away’ approach has the potential to have a severe impact on the delivery of legal services and consequently access to justice in Australian communities. This research is based on interviews with country lawyers to understand how they accommodate their communities’ need to access legal services, whilst ensuring robust ethical practice.

My research has found that country lawyers are less likely to ‘turn away’ possible conflicted clients at the threshold, and instead engage in a triage assessment, which examines a range of issues, before disqualifying themselves.

As our regulatory systems move to a principles based framework, is it time to go beyond the risk adverse ‘turn away’ and to engage with the situational ethics of the presenting client? As academics, lawyers and regulators how do we prepare our colleagues for this complex exercise of professional judgment?

SESSION 5: ACCESS TO JUSTICE

Christine Parker
Melbourne

Taking lawyers’ duty to the administration of justice: Why lawyers must be allowed to blow the whistle on their firms and clients

In 2006 Christopher Dale leaked information about Clayton Utz’s internal investigation into the events surrounding the destruction of documents that would have been relevant and damaging to their client, British American Tobacco in the 2002 McCabe litigation. He argued that his whistleblowing was justified as the only way to address a miscarriage of justice in the McCabe Case.

This paper uses this case study to suggest that it is indeed urgent that the law and professional conduct rules be clarified and reformed to make it clear that lawyers can and should blow the whistle on their own firms or organisational clients when they abuse the administration of justice.

This paper uses this case study to suggest that it is indeed urgent that the law and professional conduct rules be clarified and reformed to make it clear that lawyers can and should blow the whistle on their firms or organisational clients when they abuse the administration of justice.

The opportunity to blow the whistle where all other attempts to prevent abuse of justice have failed should be an essential element of lawyers’ zone of ethical discretion as officers of the legal system. The presentation will briefly set out the situations in which whistleblowing is ethically appropriate and evaluate the need for reform to law and conduct rules to reflect this.
Kath Hall & Heather Cork
ANU
Redefining whistleblowers – An important area for reform

Whistleblowers have become increasingly important in Australia for bringing to light unethical practices by corporations and businesses. Recent examples include the Reserve Bank corruption scandal, the treatment of employees by 7-Eleven, and the Commonwealth Bank investment advisory and CommInsure cases. Whilst it is now widely accepted that Australia’s private sector whistleblowing laws are inadequate and need reform, few questions have been asked about the underlying assumptions relevant to this reform.

We pick up on one of these assumptions – namely how the dominant discourse and law define whistleblowers. We argue that this definition has unnecessarily focused upon the isolated or lone whistleblower, in contrast to the reality of most organisational dissent. We draw upon interviews with whistleblowers to highlight the limitations of this assumption, and argue that redefining whistleblowers is one of the most important areas to get right in any future reform.

Liz Curran
ANU
Practical, effective, inclusive processes and approaches that lead to responsive, connected policy by enabling voices to be heard

If lawyers have an obligation to uphold the rule of law and maintain the integrity of the legal system then what is their role where they see laws that do not work or break people and reduce confidence and trust in the legal system? What are the ways in which new practices that are working can be supported rather than suffering the vagaries of pilot/trial short term or threatened cuts to funding which limit recruitment, stability and certainty and trust with promises having to be broken? What sorts of lawyers do we need for the future?

Given the Productivity Commission’s recommendations on ‘Access to Justice Arrangements’ have endorsed the value of systemic law and policy reform work of on the ground services to prevent problems and stop the revolving door and seen them as an effective and often efficient way of working – how can governments be convinced and less frightened and defensive? How can we get government to listen to the recent evidence based research and practice based experience linked to and not remote from day to day experience of laws and their administration that can inform effectiveness, efficiency and positive outcomes/impact on improving access to justice, inclusion and the improving the social determinants of health, rather than the often remote responses of policy makers?

This paper will explore how as law reformers we move forward to break down silos, open up dialogues and conversations and see practical effective, inclusive processes and approaches that lead to responsive, connected and effective services and ways of ensuring access to justice especially for those with complex and compounding needs and little of no voice? What are the key directions that need to be taken to move beyond a talking to a walking and practical real action? In order to do this, this paper will give practical examples and case studies of law reform that involved community members in having a voice on public housing a estate in Victoria and the ways to facilitate them have a role in drafting recommendations that affect their lives directly. This paper will also canvas some case studies in two report she has authored that show how to go about effective and responsive law reform that is not too remote from the lived experience of the laws and their administration.

How can we get government to listen to the recent evidence based research and practice based experience linked to and not remote from day to day experience of laws and their administration that can inform effectiveness, efficiency and positive outcomes/impact on improving access to justice, inclusion and the improving the social determinants of health, rather than the often remote responses of policy makers?
Obligations Stream

SESSION 1: SOCIETAL CHANGES

Samantha Hepburn
Deakin University

The public/private divide: Ownership in land and natural resources in a modern energy landscape

Ownership regimes for land and natural resources are not sufficiently responsive to the emergent demands of onshore energy production. In particular, the ownership conflicts that have occurred following the expansion of unconventional gas extraction in the Eastern states of Australia have dramatically escalated.

This is largely a consequence of the fundamental disconnection that exists between the individualist orientation of land and natural resource entitlements and the collective impact of new forms of onshore energy production. The challenge for the future is to recalibrate our existing ownership framework to ensure that the collective, social impact of energy production is more effectively mandated.

This paper argues that both private land and public resource ownership entitlements must be more effectively moderated by collective community engagement responsibilities. The impact of energy production upon social infrastructure and community landscapes has never been greater. What we need for the future is an ownership model with an internal governance framework capable of managing the private and public elements of land and natural resource ownership more effectively.

In the modern landscape, where the production of risk-managed, low emission, energy production is a global imperative, ownership models need to be reframed to ensure that public interest is appropriately prioritised over private benefit.

Robyn Honey
Murdoch University

It’s time to ‘get real’ about consent in contract and property law

The twenty first century has seen:

> an increase in the elder population, which has forced us to confront the aging process and the cognitive changes which often occur with age;

> a more sophisticated understanding of mental illness as a normal part of life; and

> a focus on domestic violence, which has included the recognition of emotional and psychological abuse.

Each of these presents a challenge for contract and property lawyers, because the capacity of an adult person to make a free and independent choice is one of the underlying assumptions upon which the laws of contract and property have been premised. Defences going to consent are very limited. This has produced a binary legal mechanism, which, it will be argued, must be re-evaluated in light of what we now know about the effects of aging, abuse and impaired mental health on the mind and decision making capacity.

Nineteenth century jurisprudence can no longer be allowed to serve. The challenge facing contract and property lawyers in the near-to-medium future is to facilitate a redevelopment of the law with respect to vitiated consent. In relation to elders, the matter is urgent.

The applicable common law defences do not function as they ought to do in situations where cognitive ability fluctuates and/or diminishes gradually. Furthermore, the equitable doctrine of undue influence, which is used to fill the breach, has been hampered by doctrinal instability. This paper will argue that, insofar as the concept of consent remains central to contractual obligation and to the transfer of title to property, at the very least, it ought more accurately to reflect what we know about the factors which impact upon the capacity to make a free and independent choice; and accommodate vulnerability without infantilising those who require assistance.
Dilan Thampapillai  
ANU  
Rethinking the presumptions? Undue influence, elderly parents and adult children  
It is a settled proposition that adults may be presumed to have unduly influenced their children in financial matters. However, the presumption does not run the other way. Nonetheless, as Australia’s population ages, and, as property prices rise above the reach of many young adults, there looms the prospect that some families will experience conflicts over property ownership and inheritance. This presentation examines the doctrine of undue influence in light of recent jurisprudence and considers the question of whether Australian courts should rethink the absence of presumptions in cases where an allegation of undue influence arises in the context of dealings between an adult child and an elderly parent. The suggestion that an elderly parent was pressurised to give up valuable assets to one adult child, instead of sharing them via inheritance with the other adult children, was made in cases such as Daunt v Daunt [2015] VSCA 58 and Mace v Mace [2015] NSWSC 1659. A reconsideration of the presumptions in this context might provide some guidance to Australian families as they grapple with issues of inheritance and wealth allocation.

Lee Aitken  
University of Queensland  
The assignment and ‘a genuine commercial interest’  
In the law of assignment it has been said that a touchstone for validity is whether the assignee has a ‘genuine commercial interest’ in the assignment. The meaning of this concept is opaque and recent cases discussed in the paper have not made matters clearer. As a basic matter why should, say, a debt be assignable when the consideration for it is usually only mere cents in the dollar of its face value? What is the ‘genuine commercial interest’ of the assignee in that context?”

Pauline Ridge  
ANU  
Tracing in Australia  
In English law and, so far, by default in Australian law, tracing is a process that enables a claimant to identify property in relation to which he or she has an equitable (or, perhaps, legal) claim. No judicial discretion is involved: it is simply a matter of recognising ‘hard-nosed property rights’. Accordingly, the tracing rules are viewed as ‘arbitrary evidential problem solvers’. This approach to tracing sits quite well in the English legal context where discretionary judicial power to alter property rights is routinely disavowed, but it is not as consistent with the Australian courts’ treatment of equitable property rights. Its cogency also varies depending upon the particular claim and remedy for which tracing is utilised. Finally, the distinction drawn between the ‘process’ and the ensuing ‘claim’ is not as clear-cut as the English law implies. It is some time since the High Court of Australia considered tracing and it is not a foregone conclusion that it will endorse the English approach. This paper considers some uncertainties in the law of tracing in Australia and suggests reform.
SESSION 3: REMEDIES

Prue Vines

UNSW

Apologies, liability and civil society: Where to from here?

The law of obligations has taken insufficient care to maintain civil society. The treatment of apologies in civil liability is a case in point. The usual advice not to apologise ignores the needs of civil society for responses other than vengeance and corrective justice. Reform of the law should move towards recognition of the significance of humans’ emotional as well as legal life and maintaining the balance of symbolic, emotional and monetary needs in the response to civil wrongs.

Robyn Carroll

UWA

Offering to make amends: What can we learn from Australian defamation law?

The primacy of damages as the remedial response to breaches of civil obligations sometimes obscures the role in law of other responses to wrongdoing, including corrections and apologies. This paper will explore the challenges for the law of obligations when it seeks to encourage non-monetary responses of this nature through a critique of the offer to make amends provisions in Australian defamation law.

The Australia Uniform Defamation Act 2005 offer to make amends provisions aim to encourage non-litigious and prompt resolution of defamation disputes and create a defence when a reasonable offer by the defamatory publisher is rejected by an aggrieved person. The history and purposes of the offer to make amends provisions in Australia are similar in some respects to the offer to make amends provisions in the UK and Ireland. There are distinguishing features of the Australian provisions that invite analysis and comment, including the fact that payment of compensation and the offer of an apology are not mandatory terms.

This paper will identify issues and concerns with this aspect of the Australian defamation legislation, propose what we can learn about the remedial functions of apologies and corrections in the law and make proposals for future reform.

David Winterton

UNSW

Assessment of damages for contractual repudiation: The problem of prospective inability and the burden of proof

This paper seeks to answer an important and unresolved question raised by the High Court of Australia’s decision in Commonwealth v Amann Aviation Pty Ltd. That question is how the law should respond to cases where, following a promisor’s contractual repudiation, the promisee cannot establish with sufficient certainty that it would have recouped all the expenditure it reasonably incurred in preparing for the contract’s performance. It is proposed that the first step in responding to such cases should be to award the promisee a sum that gives effect to the Robinson v Harman principle’s stated objective of putting this party into ‘the same situation… as if the contract had been performed’. In addition to upholding this principle, however, it is claimed that, following a proposal previously made by Professor Seddon, subsidiary legal principles should be developed that allow a decision-maker to apportion, as between the two contracting parties, the expenditure reasonably incurred by the promisee that will not be made good by an award made in accordance with the first step. Finally, the basis upon which such an apportionment might be made is considered, with it being suggested that regard should be had to various considerations, including the parties’ respective contributions in bringing about the contract’s early termination, and the extent to which either party has acted in ‘bad faith’ in bringing about the contract’s premature conclusion.

SESSION 4: THE INTERACTION OF COMMON LAW AND STATUTE I

Darryn Jensen

ANU

The pitfalls of statutory reform: Third party recipient liability for breach of trust

The law relating to third party liability for misappropriation of trust property is confusing largely because of the existence of multiple overlapping bases for making a claim against a recipient who is not a trustee. The different bases for making a claim attract different
measures of relief and different factors which defeat or limit liability.

This paper attempts to catalogue the different types of claim, identify the juridical bases for those claims and evaluate the attempts in Queensland and Western Australia to bring clarity to this area through statute law.

Joachim Dietrich

Recreational activities and personal injury compensation: Complexity in need of reform

Participation in sport and recreation is one of the most significant causes of personal injury in Australia, and many such injuries are of a serious or lasting nature. So the relevant liability rules constitute a practically important area of law. Despite their practical importance, however, the rules are complex, inconsistent and uncertain. This article highlights some of the key difficulties and suggests some reform options that could resolve some of the uncertainties, and at least avoid some of the inconsistencies.

Before noting some of the difficulties in the law, it is necessary to note that significant consequences flow from whether a person is injured as a result of recreational activities carried out as part of a paid-for contractual service (e.g., an adventure tour, paid activity such as trampolining) or not. A person negligently injured in the course of recreational services may sue the defendant provider of either in negligence, for breach of contract for failure to comply with one of the statutory guarantees contained in the Australian Consumer Law (ACL). Alternatively, (and this is the only alternative absent a service contract) the injured party may also sue defendants such as other participants in the activities, the occupiers of premises on which the activities took place, the supervisors of the activities etc, in negligence. Quite different legal consequences may flow accordingly.

Three sources of the legal difficulties are highlighted in this article and are the result of a number of inter-related factors:

> The existence of different defences in each of the state and territory Civil Liability Acts, dealing with recreational activities;

> The interaction between the law of negligence and the ACL statutory guarantees and particularly the capacity of recreational service providers in some circumstances to exclude liability for breach of the ACL statutory guarantees (and, therefore, also for the tort of negligence and for breach of contract) by means of contractual exclusion clauses; and

> The uncertain status of exclusion clauses (often wide-ranging) that purport to apply to minors and which have been signed by guardians on their behalf.

Matthew Harding

Reforms to Australian charity law: Challenges and opportunities

Australian charity law has recently been subjected to unprecedented reforms. The Charities Act 2013 (Cth) introduced a new definition of charity for the purposes of federal law, including centrally the purposes of federal tax law.

State and territory legislators have also enacted statutes modifying the definition of charity for certain purposes of their law. At the same time, for other purposes of state and territory law – for example, determining the validity of a purpose trust – the definition of charity drawn from equity jurisprudence and most famously expressed by Lord Macnaghten in Commissioners for Special Purposes of Income Tax v Pemsel [1891] AC 531 continues to apply. My paper will explore recent reforms to Australian charity law and the definitional proliferation to which those reforms have led.

The paper will also consider some of the challenges and opportunities raised by the reforms and how those challenges and opportunities might best be met and realised within the constraints of the Australian federation.

SESSION 5: THE INTERACTION OF COMMON LAW AND STATUTE II

Ian Murray

Nudging charities to balance the needs of the present against those of the future

Key goals of charity law are to facilitate the pursuit of charitable purposes autonomously from the state and to incentivise the production of public and quasi-public
goods in the pursuit of those purposes. Limited attention has been given to the temporal question of when a public benefit should be produced. However, it is high time to grapple with the issue.

While hoarding by Australian charities does not presently appear to be systemic, the level of Australian philanthropy is increasing, as are public expectations of charities, along with government reliance on charities to deliver a range of services. Moreover there are cautionary examples in Australia and abroad.

Accordingly, this presentation will examine:

> The need for an potential bases of an intergenerational balance;
> Regulatory constraints on hoarding;
> Gaps in the existing constraints; and
> Regulatory settings that could be adopted to promote an intergenerational balance

Elise Bant and Jeannie Paterson

UMelb

Statutory interpretation and the critical role of soft law guidelines in developing a coherent law of remedies in Australia

A striking feature of recent High Court jurisprudence has been its repeated emphasis on the principle of coherence as a guiding criterion in the interpretation and development of Australian law. It seems to follow as a matter of necessity that, if a coherent system of law is to develop, the role of statute as an independent but integral part of a broader legal context must be taken seriously.

This paper identifies two aspects of the interactions between statute and judge-made law that potentially play critical and under-appreciated roles in development of a coherent law of remedies in commercial and consumer transactions in Australia. The authors will develop these two themes in the context of key remedial provisions of the Australian Consumer Law and demonstrate how their recognition opens the door to development of a more coherent law of private law remedies more generally.

The first theme is that the substantive content of statutes cannot be identified without close analysis of their terms viewed, where necessary and appropriate, in the light of their neighbouring (and in many cases foundational) common law and equitable doctrines. In some cases, this process of statutory interpretation then appropriately informs, in turn, the development of cognate common law and equitable principles. It is only through this reflective and reflexive process that a rational and integrated law of remedies can develop.

The second is that the terms of statutes and the judicial expositions of their meaning often are inadequate to make the substantive content of statutory law as part of its broader legal context accessible to those who need it most. In this space, ‘soft law’ guidelines potentially play a critical and underappreciated role both in integrating statutory and judge-made doctrines into a coherent whole and in facilitating the operation of statute as a self-enforcing source of legal rights and remedies.

Simone Degeling

UNSW

Kit Barker

University of Queensland

Reparations schemes designed to repair historic injustice proliferate in domestic law

Recent examples of reparations schemes include the Defence Abuse Reparations Scheme (‘DART’) established to deal with institutionalised abuse within the Australian Defence Force and the models of redress proposed by the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse. Using these examples, we argue that the design of reparations schemes ought more closely to map the ethical commitments and remedial lessons of private law.

We argue that the corrective justice norm which requires the defendant to restore the victim of a wrong as fully to the position as they would be in, had the wrong or injustice not been done, is relevant. Amounts awarded under reparations schemes should not be regarded as ex gratia amounts or settlements but payments reflecting the violation of a relationship of duty and right.

Amounts awarded should also be individuated, according to the circumstances of the victim. In addition, we argue that private law offers useful procedural insights to reparations design.
The National Law Reform Conference

PRESENTERS & ABSTRACTS

Dominique Dalla-Pozza
ANU

Parliamentary committees and the continuing challenge of Australian counter-terrorism law reform: Are some committees more effective than others?

In many ways, the last two years have been the most intense period of counter-terrorism law reform in Australia since the edifice of Commonwealth counter-terrorism law was erected in the years immediately following the events of 9/11. In enacting these laws, parliamentarians have stated that counter-terrorism laws must strike a ‘balance’ between protecting Australia from the threats posed by terrorism and the need to ensure Australians enjoy individual rights and freedoms. Such statements suggest that parliament’s law-making processes, including the work done by parliamentary committees, allow such a balance to be struck. A critical law reform challenge in this area, then, is to ensure that parliament’s law-making processes function to achieve this result.

In this paper I examine the role played by various parliamentary committees as they conducted pre-enactment scrutiny of key pieces of counter-terrorism law passed in 2014 and 2015. I want to assess the effectiveness of various committees in recommending changes to the legislation. I also aim to test the claim that the Parliamentary Joint Committee on Intelligence and Security is wielding ‘increasing influence’ in the making of counter-terrorism law. If this is true, this committee should become the focus of efforts by citizens and civil society groups that seek to reform the content of Australian counter-terrorism law.

Tom Campbell
CSU

Deliberative democracy and the implementation of human rights

The Human Rights (Parliamentary Scrutiny) Act 2011 is a significant but controversial example of law reform in Australia. Some argue that it is scarcely even a half way house to a real human rights act which would give a greater human rights role to courts. Others see it as a novel attempt to preserve and promote human rights while protecting and even enhancing the cluster of human rights to democracy.
The presentation takes a look at the tension between human rights judicial review and democratic human rights, including minority rights. It then considers how the existing commonwealth human rights act might benefit from institutionalising further the principles of ‘deliberative democracy’ which are designed to improve the quality and effectiveness of public debate.

SESSION 2: REFORMING THE VOTE

Graeme Orr
UQ

Compulsory voting: Elections yes, referendums no

We value compulsory voting at elections, then bemoan the difficulty of updating the Constitution via referendum. The two things – compulsory turnout at the polls, and referendum on legal issues – should not be combined. It is not just reasonable, but socially democratic to heed the voice of every citizen as to who should govern them, how the nation is faring.

But Australia’s constitutional stasis does not need to be reinforced by encouraging ‘if in doubt, kick it out’ campaigns against reform, especially on topics such as division of state and Commonwealth powers. After all, the Constitution itself was adopted by … voluntary voting.

Scott Stephenson
UMelb

Reforming constitutional reform

Several elements of Australia’s system of government are well overdue for a fresh look. Among them are the division of fiscal and non-fiscal powers between federal and state governments, the manner in which human rights are protected, the role of local government, and the recognition, treatment and participation of indigenous persons.

The Constitution regulates, at least in part, these and many other elements through either its structure and provisions, as is the case with federalism and human rights, or its silences, as is the case with local government and indigenous persons. Indeed, part of the reason why these elements require a fresh look is that they are governed by a document that was written at the end of the nineteenth century. Yet it is also the Constitution that prevents Australians from taking a fresh look at these matters.

The Constitution is extraordinarily difficult to amend, a fact borne out by the many failed attempts at amendment. As a result, the reform process has become distorted. Today most government and non-government actors focus their efforts on proposals that either require minor constitutional amendments or, more commonly, require no constitutional amendment. Both options produce, at best, partially effective patchwork measures that leave the root of each issue untouched.

Consequently, this paper argues that constitutional law should be geared in the near-to-medium term future to reforming the constitutional reform process to allow significant constitutional amendment to become a plausible political option.

Ryan Goss
ANU

Chosen by the people: Reforming local democracy

This paper argues that the law relating to voting rights at local government elections needs to be reformed in five of Australia’s six states. In Queensland, the only people eligible to vote at local government elections are those who are resident in the relevant area and who are eligible to vote at state and federal elections. But the situation is not so simple in the other five states, with voting rights based partly on anachronistic factors including property ownership.

Such an approach to voting rights has no place in contemporary Australian democracy. This paper catalogues and explains all the relevant legislation for the first time, and calls for reform in New South Wales, Victoria, Western Australia, South Australia, and Tasmania.

SESSION 3: CONSTITUTIONAL CULTURE AND NARRATIVE

Lael Weis
UMelb

Does Australia need a popular constitutional culture?

A distinctive feature of Australian constitutionalism, particularly when compared to peer constitutional systems, is the absence of a popular constitutional culture. It has frequently been observed that the Australian body politic has poor general knowledge of the key features of Australia’s fundamental legal framework
for governance, and is relatively disengaged from the legal processes that affect that framework, including both important High Court constitutional decisions and—ironically—the amendment process itself. But is this a bad thing?

Does Australia need a popular constitutional culture? And if so, how might such a culture be cultivated?

This paper will explore the Federal Court’s role within the broader context of constructing our understanding of the roles and responsibilities of citizenship and illustrate the importance of the Court’s records as an archival resource. In doing so, it will highlight the parallels and inconsistencies between traditional archival institutions and the Court in relation to selection, preservation and access to records.

Ron Levy
ANU

The deliberative case for referendums and plebiscites

Under what conditions should a referendum be held? Deliberative democracy as a theoretical lens upon this question provides independent and coherent guidelines as to whether to hold a referendum. The proposition that significant matters should be settled by referendum, being intuitive, has tended to be stated in conclusory and imprecise fashion. To make out a normative case for referendums, I begin by describing the best defence for elite-led constitutional lawmaking. Deliberative democrats often contend that elite lawmaking is legitimated by the careful deliberation of informed elites – for example, governmental representatives and technocrats, and academic experts. In this idealised picture, such elites gauge other citizens’ democratic preferences, and faithfully implement these as law. I will call this the deliberative hierarchy defence.

Having set up the best defence of elite-led reform, I will then challenge the suitability of deliberative hierarchy for constitutional reform. Two distinct deliberative arguments suggest why referenda can constitute the normatively best option. Such arguments are of more than academic interest. They may also concretely guide choices as to whether a referendum should run. Throughout, therefore, I outline both circumstances in which the main normative arguments presented appear to hold, as well as where they do not. Applying the two novel, deliberative arguments noted, I consider whether public votes to

Kim Rubenstein
ANU

Court records, archives and citizenship

The Federal Court of Australia performs a fundamentally important role within Australia’s democratic system. It has served as a site for the disputation, negotiation and resolution of issues fundamentally important to Australian society. It does so in the context of a constitutional system affirming the principle of separation of powers and the rule of law, as a means of preserving and enforcing the rights of individuals and navigating the boundaries of the powers of the state. In that context, its records, gathered both through the internal workings of the court and through the cases that come before it, contain a narrative shaping our contemporary understanding of the rights of the individual and the role of the state. Despite the importance of its records in that narrative, the preservation and access to the Federal Court’s records continues to be seen through the lens of traditional understandings of the management of litigation.

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legalise same-sex marriage should be held. I conclude there was good cause to hold a popular vote in Ireland; however, different conditions in Australia compel the opposite conclusion.

SESSION 4: REFORMING SAFEGUARDS

Daniel Stewart

ANU

Encouraging openness and transparency in government

Governments are now defined by how they access, develop and use information. Some seem to be recoiling from still recent information disclosure reforms, attempting to review or wind back access to government information, and increasing government mandated surveillance and the categories of protected information.

Despite at least a rhetorical acceptance of the benefits of transparency, Government control of information seems addictive. This paper will consider the nature of that addiction and how we can rehabilitate our legal and political institutions.

More radical reforms may be needed before we can fully enjoy the benefits of an open and transparent government.

Melissa Castan and Paula Gerber

Monash

Constructions of identity and problems of public law

Australia’s birth registrations systems are regulated by the Registries of Births, Deaths and Marriages in each state and territory. The governing legislation is broadly similar in each jurisdiction, yet implemented in quite disparate ways.

This paper considers the legal and policy responses needed to address two distinct deficiencies in our birth registration systems, namely, (i) barriers to birth registration & getting a birth certificate that Indigenous Australians face, and (ii) barriers that transgender people in obtaining a birth certificate that aligns with their gender. The authors will explore various reform options that could overcome these barriers.

Rebecca Ananian-Welsh

UQ

The protection of fair process

Fair judicial process is vital to any liberal democracy. It is intrinsically linked with other bedrock principles, such as the rule of law, government accountability and judicial independence. In recent years, parliaments across Australia have demonstrated a willingness to compromise core elements of fair process.

This has led to a number of constitutional challenges, in which the importance of fair process has been recognised, but compromises to it have been upheld. In this paper I consider how fair process is protected and argue that this crucial and multifaceted notion is prime for enhanced statutory protection or constitutional safeguards.

SESSION 5: RIGHTS IN DIALOGUE

Julie Debeljak

Monash

Human rights dialogue under the Victorian Charter: The potential and the pitfalls

The Charter of Human Rights and Responsibilities Act 2006 (Vic) was enacted with the explicit purpose of creating a dialogue about human rights between the institutions of government – primarily the executive, parliament and judiciary. The dialogue model, coupled with limiting judicial powers of review under the Charter, were aimed at achieving the correct balance between rights protection and democracy (or avoiding judicial supremacy and retaining parliamentary sovereignty).

This paper will assess the inter-institutional rights dialogue. It will explore examples of dialogue between the arms of government, focussing on responses to judicial decisions, the work of the Scrutiny of Acts and Regulations Committee (SARC), and parliamentary engagement with rights. It will also consider some of the weaknesses of the current approach to dialogue, such as the judicial reticence regarding rights and the executive dominance of the rights scrutiny of pre-tabled legislative proposals. It will conclude with suggestions for reform of the Victorian model, which ought to form the basis for rights instruments across Australian jurisdictions.
How can this be when so much wealth abounds, and when finance is supposedly chastened and reformed after its latest global crisis? How, especially, can it be in an age where human rights are more valued and better protected than ever before? Can the financial sector be made to shoulder more of the burden of spreading wealth, reducing poverty and protecting rights? And if so, what role can human rights play in making it happen?

The paper summarises some answers to these questions in global and Australian contexts by drawing on a forthcoming book entitled *Necessary Evil: A Human Rights Journey into the Heart of Finance*. The book (and the paper) marshal a wealth of material from bankers, economists, lawyers and politicians, as well as human rights activists, philosophers, historians and anthropologists in building an argument for how finance can shed its conceit, return to its role as the economy’s servant, not its master, and regain the public trust and credibility it has so spectacularly lost over the past decade, by helping human rights, not harming them.
Commercial Activity Stream

SESSION 1: LABOUR LAW

Shelley Marshall
Monash

A global regulatory new deal for precarious and informal workers

Inequality has increased markedly across much of the globe. This is related to the growing incidence of low paid, insecure work producing heightened economic and physical precariousness for growing populations in both richer, industrialised nations and poorer ones. Labour law has largely failed these workers due to poor enforcement or because those most exposed to economic risk are not covered by existing laws. Most laws were designed with people who work in an office or factory with a single employer in mind.

This paper proposes a bold new international scheme to promote and enforce a global living wage. First, an International Living Wage disputes mechanism for enforcement of these minima; and second, the setting up of National Supply Chain Tribunals empowered to hear disputes concerning non-payment of living wages due to supply chain dynamics, and to hold parties in the supply chain responsible for non-payment.

The approach suggests novel tools and incentives for unions and state labour departments to become more active in mobilising and regulating this precarious workforce, and for businesses to change their behaviour.

Tess Hardy
UMelb

To what extent should lead firms be held liable for workplace contraventions?

Lead firms (eg those companies positioned higher in the supply chain or at the apex of the franchise network) frequently wield considerable commercial control and regulatory influence over the compliance behaviour of the businesses below them. Despite this commanding position, lead firms often remain legally insulated from liability for workplace contraventions perpetrated by third party employers. However, recent media investigations and subsequent government inquiries into the horticulture, food processing and franchising sectors have raised pertinent and pressing questions about the role and responsibilities of lead firms in this context.

A number of leading companies, including supermarket retailers and head franchisors, have acknowledged that they have a moral responsibility to ensure that entities and individuals directly involved in the conduct of their enterprise comply with workplace laws. While voluntary and self-regulatory measures, such as ethical sourcing policies, codes of conduct and independent panels, are commendable, it is questionable as to whether these ‘softer’ initiatives are likely to be effective in the absence of more coercive measures, such as legal liability and/or reputational damage.

The key question explored in this paper is to what extent lead firms should be held legally accountable for workplace contraventions occurring in their supply chain, corporate group or franchise network and on what basis?

Joellen Riley
Sydney

Brand new ‘sharing’ or plain old sweating?
How will work be regulated in the new ‘collaborative’ economy?

Politicians on both sides of the political spectrum in Australia have been embracing the potential of what they are calling the ‘sharing’, or ‘collaborative’ economy. New enterprises such as Uber and Airtasker are deriving impressive revenues from using app-based technologies to connect workers with those who want to hire their services.

Uber describes itself as a ‘ride-sharing’ service, but the traditional taxi industry sees it as an unregulated competitor in an age-old service business. Media attention to these new entrepreneurial businesses has focused largely on the disruption to investors in the established businesses with whom they compete, and to some extent on consumer protection concerns about ‘surge pricing’.

But what about the interests of people working under these new arrangements? The entrepreneurial intermediaries may be reaping profits from providing the connective technology and managing payment systems, but anecdotal evidence suggests that the people doing the work are at risk of working for less than the minimum wage, in highly precarious circumstances.
Are the labour protections that we have built over a century at risk of erosion in this rise of a new ‘on demand’ economy? Are there innovative ways of regulating these kinds of labour market exchanges without stifling innovation, but also without risking a return to the Hungry Mile?

**SESSION 2: COMPETITION AND CONSUMER LAW**

**Adrian Coorey**

ACCC

Do Australians really know their consumer guarantee rights? Suggested reform to the current consumer guarantee regime under the Australian Consumer Law

The consumer guarantees (CG) regime under the Australian Consumer Law (ACL) provides consumers, who acquire goods or services from suppliers and manufacturers, with a basic set of statutory rights and a legislative basis for seeking remedies. On 1 January 2011, the CG provisions set out Ch 3 Pt 3-2 Div 1 of the ACL replaced the implied conditions and warranties provisions in the former Pt V Div 2 of the Trade Practices Act 1974 (Cth) and the equivalent provisions in the state and territories Fair Trading Acts. The principal reasons for the replacement of regimes were lack of awareness and uncertainty of law. Since 1 January 2011, there has been no research conducted in Australia as to effectiveness of the CG regime.

On 12 June 2015, Consumer Affairs Ministers agreed Terms of Reference for the review of the ACL which commenced in 2016. The review is undertaken by Consumer Affairs Australia and New Zealand with a final report to be provided to Consumer Affairs Ministers in early 2017.

This presentation is aimed at identifying key areas of the CG regime which are considered not as effective as they could be. In particular, this presentation will provide a basic explanation of the CG regime, a short overview of the history of CG, a summary of areas of concern and recommendations for changes to the current CG regime. Rewording of a number of key provisions of the CG regime, including substantial amendments to the remedy provisions, will also be provided.

**Leela Cejnar and Rachel Burgess**

UNSW

Australia’s role in contributing to the development and implementation of ASEAN’s competition agenda

Over the last decade, the number of countries with competition laws has dramatically increased. In particular, in the ASEAN region, competition laws have been the subject of much legislative focus as the ASEAN Member States (AMS) committed to the introduction of competition laws by 2015.

Although competition laws are now in force in almost all of the AMS, the content and sophistication of the laws differ considerably, raising questions as to how the laws can be applied in a consistent manner across the ASEAN Economic Community (AEC). The level of enforcement has also varied significantly. The newly established competition authorities in AMS face challenges which are perhaps not contemplated by their established counterparts in ‘Western’ jurisdictions. Commonly, the competition authorities lack resources and expertise; they face a hostile business environment where competition laws are often still not seen to be necessary and have an extremely challenging advocacy role, where multiple cultural and language differences exist within individual AMS, let alone across the wider ASEAN region.

The paper will consider what progress has been made by the AMS in implementing their competition laws, including an analysis of case examples in the region. It will question whether a harmonised law across the ASEAN region would be preferable to the current ‘hotchpotch’ and ask what ability Australia really has to influence the development and interpretation of competition laws within ASEAN.

**Russell Miller**

Minter Ellison

On the road to improved social and economic welfare: The contribution of Australian competition and consumer law and policy law reform

The contribution of law reform in changing and updating laws to reflect the current values and needs of modern society, has been profound and no more so than in the area of economic regulation. This paper reflects on the contribution two key law reform initiatives have made in the fields of competition and consumer law in reshaping
Gill North

Banking and financial services law: Adjusting the policy lens to a consumer focus

Are consumers at the heart of financial systems? And are financial consumer outcomes the primary focus of policy makers when considering banking and finance law? This paper considers these critical questions using mortgage practices and regulation as a case study. Mortgages are the most significant credit product in Australia for both financial institutions and consumers. Residential mortgages represent more than 60 percent of total bank lending today. Moreover, around a third of Australian households hold a mortgage. Given this enormous exposure, the author questions whether the legal frameworks around the provision of mortgages are adequate to satisfy financial stability and consumer protection goals. She considers whether the current settings are unduly risky. She ponders whether regulatory responses have been sufficient to avoid catastrophic harm should external events turn sour. Ultimately she asks whether the existing regulation is primarily focused on the long term wellbeing of Australian households.

SESSION 4: CORPORATIONS LAW

Ross Grantham

UQ

The privatisation of Australian corporate law

Despite the prodigious length and prolixity of the Corporations Act 2001 (Cth), there are signs that Australian corporate law has become more, rather than less, private. This is manifested in the preference of the legislature to deal with the perennial issues of corporate law by mandating processes and procedures within the company rather than by directly regulating the issue and in loss of judicial oversight due to a marked reduction in the amount of corporate law matters coming before the courts.

This trend has at least two important implications for the future of Australian corporate law and the Corporations Act in particular. First, if the primary audience of the law is now those who are involved in the operation of companies – business people rather than lawyers and...
the courts – then the form, language, and complexity of the Corporations Act seems wholly ill-suited to that task. Secondly, and more fundamentally, privatisation brings to the fore the issue of the legitimacy of corporate power and the purposes for which as a matter of policy we should recognise the corporate form.

Companies may be superb creators of wealth, but they may also be very poor members of society.

Suzanne Le Mire
Adelaide

Lost in translation: Taking independence to Australian superannuation fund boards

For many years, independent directors have been seen as critical to the corporate governance of listed companies. In essence these directors are seen as particularly useful in monitoring management, bringing an alternative view to strategy and deliberation and linking the company to external resources.

Recently, following a series of influential government reports, the government has embraced a vision of independence for the superannuation fund boards that draws on the listed company approach. While at first blush the governance imperative for the superannuation fund boards that draws on the listed company approach. While at first blush the governance imperative for superannuation funds and large listed companies may seem similar, further exploration indicates that there are some key differences that make the translation process challenging.

These operate at a number of levels spanning regulatory approach, organisational structures and shared understandings. The challenges of negotiating this process of reform have proved to be considerable. This paper will draw on regulatory theory to explore this reform process with a view to charting a way forward.

Kath Hall
ANU

Reforming the regulation of foreign bribery in Australia

Allegations of foreign bribery and corruption by Australian companies are in the news – again. On 31 March, Fairfax Media and The Huffington Post published shocking revelations claiming that billions of dollars of government contracts globally had been awarded as the direct result of bribes paid on behalf of companies, including Australia’s Leighton Holdings. Many of these allegations are not new. What is new however is evidence on the extent of the corruption. It involves many of the world’s leading companies and appears to have been done with blatant disregard for the legal regimes criminalising this behaviour.

This paper will examine what has and has not been done to improve the legal regulation of foreign corruption in Australia since 2013 – the last time Leighton Holdings was facing allegations of corruption. In will then focus on answering the question – what are the most pressing areas of law reform of foreign bribery regulation in Australia?

SESSION 5: TAXATION

Mike Kobetsky
ANU

Aggressive tax avoidance by US multinationals: Treating the disease

The foreign earnings of US multinational enterprises that have avoided US taxation were estimated to be $2.1 trillion in 2013. The paper will assert that one of the main causes of OECD/G20 Base Erosion and Profits Shifting (BEPS) project was US multinationals exploiting the gaps in Subpart F of the US Tax Code which attributes the foreign income of controlled foreign companies to their US parent companies. Controlled foreign company rules are anti-avoidance measures designed to prevent companies deferring taxation on foreign income to avoid taxation. Robust controlled foreign company rules in capital exporting countries minimizes the incentive for multinationals to avoid tax in the foreign countries in which they operate. BEPS Action Plan 3 deals with designing effective controlled foreign company rules but it is unlikely to be implemented by the US Congress. On the other hand, Australia has effective controlled foreign company that counters the deferral of foreign income by Australian multinational enterprises. The paper will assert that US multinational enterprises, such as Google, are avoiding tax in countries such as Australia as a result of US tax policy encouraging US multinationals to indefinitely defer taxation of foreign earnings. This aspect of US tax policy provides US multinational enterprises with an unfair financial advantage and encourages some of them to engage in aggressive tax avoidance in countries such as Australia.
John Passant
ANU

Tax, inequality and challenges for the future

Inequality in Australia has been growing for over 3 decades, as the ACOSS Report ‘Inequality in Australia 2015: A Nation Divided’ shows. It is not just income inequality that has grown. That report also shows that wealth remains concentrated in the hands of those at the top and that concentration appears to be growing as well.

Thomas Piketty, Joseph Stiglitz, Neil Brooks, Paul Krugman, Andrew Leigh and ACOSS have all, among many others, raised concerns that the growing disparity in income and wealth threatens social stability, economic performance, and may even undermine democracy.

The ATO’s Corporate Tax Transparency Report shows many big businesses have very low effective tax rates. At the same time about 2.5 million Australians live in poverty and over 100,000 are homeless every night.

What then can be done in terms of tax to help reverse or slow growing inequality? My view is that we must put tax equity at the heart of our tax thinking. By OECD standards Australia is a low tax and low government spending country. In discussing tax reform, therefore, in my view nothing should be ‘off the table.’

To me this means considering, among other things, wealth taxes, ways to make the current income tax system more progressive (including higher tax rates at higher income levels and addressing tax expenditures that favour well off taxpayers), and revisiting taxes on economic rent but not limited to just resource rents. Rethinking how the low tax burdens of big business could be dealt with, by for example imposing a fee based on gross revenue for operating in Australia could be part of that discussion. Pollution and financial transaction taxes should also be part of any wide ranging tax reform debates.
CANBERRA TRANSPORT

ANU is located in Acton on the north side of Lake Burley Griffin, just west of the city centre.

Transport

Arriving by plane
Canberra is linked by regular flights to the other Australian capital cities and to international destinations via Sydney and Melbourne airports.

ANU is a 15 minute drive from Canberra Airport. An Airport Express bus to and from the city operates regularly throughout the day. Taxis are available at all times of the day.

Arriving by train or bus
Canberra is just over 3 hours from Sydney by car or bus (Greyhound or Murrays), or 5½ hours by train (Countrylink).

Buses arrive in the city centre, a short walk or taxi journey from ANU.

Taxi
> 13 22 27
> canberracabs.com.au

Action buses
> 13 17 10 or 02 6207 7611
> action.act.gov.au

Note: public buses are not available from the airport, however, shuttle buses are:
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