

The Dynamics of Capital Market Governance: Evaluating the Conflicting and Conflating Roles of Compliance, Regulation, Ethics and Accountability

An ESRC/GOVNET Sponsored Workshop

**Australian National University
14-15 March 2006**

The management of conflicts of interest is one of the most important areas of regulatory reform introduced in the wake of high profile collapses in Australia and internationally. The problem is magnified precisely because the regulatory framework is based on the structural acceptance that conflicts must only be managed not eradicated. The debate, which is global in nature, raises profound legal, accountability and ethical questions. These apply both to the corporation and regulatory agencies charged with implementing the emergent paradigm, precisely because it is predicated on unparalleled external interference in business practice. The specific form and degree to which the resulting policy is implemented are country-specific. Common themes are, however, observable within and across three dimensions: (1) The introduction of more prescriptive modes of corporate governance; (2) Greater emphasis on the strategic use of enforcement as a behavioural change agent; (3) Increasing but still largely inchoate demands for compliance to be situated within a broader ethical framework.

The workshop addresses the implications of this crosscutting, contested, and contingent agenda for the governance of corporations, the capital markets in which they operate and the professionals who provide corporate advisory services. It is designed to illuminate how governance regimes are created and recalibrated. It seeks to transcend the zero-sum game of regulatory dynamics by situating the search for more effective compliance within an overarching ethical framework that encompasses the conflicting and conflating interests of the wider polity, the regulatory agency, the corporate entity and individual moral agents working within it.

The workshop brings together some of the most influential corporate and securities lawyers, ethicists, compliance, regulatory and accountability specialists, practitioners and policymakers to map what went wrong and chart an innovative research agenda. It will operate under Chatham House rules. In order to facilitate broader debate, however, a public lecture has been organized for the Australian National University on Tuesday 13 March to be addressed by Professor Coffee.

The workshop and the public events have been made possible by the generous support of the Economic and Social Research Council World Economy and Finance Programme and GOVNET, an Australian Research Council funded initiative. GOVNET was established in 2004 with a remit to engage in inter-disciplinary problem-oriented research across five distinct streams, which includes one on corporate governance and regulation.

WORKSHOP TIMETABLE

14 March 0900-0945	Opening Remarks: Malcolm Rodgers, Australian Securities and Investments Commission Chair: Justin O'Brien, CAPPE
0945-1100	Law and the Market: The Role of Enforcement John Coffee, Columbia Law School <i>Discussant: Ian Ramsay, University of Melbourne</i>
1100-1115	Morning Tea
1115-1230	Overlapping Fields and Constructed Legalities: The Endogeneity of Law Lauren Edelman, UC Berkeley Accounts of law and organizations generally presume that law is exogenous to organizations –i.e., that law stands above and outside of organizations and constitutes a force that is authoritative, coercive, and relatively unambiguous. In contrast, this article develops a theory of law as <i>endogenous</i> ; in this view, law is generated within the social realm that it seeks to regulate. Building on neo-institutional organization theory, which invokes the construct of organizational fields to explore the force of institutionalized logics, structures, models, and rituals within recognized areas of social life, I suggest that social and legal fields overlap in ways that allow institutionalized organizational practices to penetrate legal thinking. Ultimately, judges interpret laws regulating organizations in ways that give deference to organizational practices so that the meaning of law is shaped by organizational actors and through organizational fields. <i>Discussant: John Braithwaite, ANU</i>
1230-1345	Lunch
1345-1500	Evolving Rules of the Game in Corporate Governance Reform Jennifer Hill, University of Sydney At the beginning of this decade, some scholars claimed that convergence of corporate governance regimes was both imminent and inevitable. An embedded assumption in this argument was that a unified Anglo-American governance model existed and would form the point of convergence. The convergence/divergence debate has been complicated since its highpoint. First, common law jurisdictions, such as the US, UK and Australia, introduced a variety of regulatory responses to international corporate collapses, epitomised by Enron. Secondly, interesting forms of backlash are now emerging against some aspects of the post-scandal reforms, such as the recent report of the Committee on Capital Markets Regulation, warning of the danger to US competitiveness posed by the stringency of the US reforms. <i>Discussant: Justin O'Brien, CAPPE</i>

14 March 1500-1515	Coffee
1515-1630	<p>Roundtable 1: The Professions as Regulators The Case of Andersen Keith Houghton, ANU</p> <p>Why Auditors Don't Find Fraud Nick Hodson, Retired Partner, Ernst & Young, Toronto</p> <p>The Conflicted Role of the Lawyer Ian Ramsay</p> <p><i>Discussant: Malcolm Rodgers, ASIC</i></p>
1630 -1645	Break
1645-1800	<p>A Chronicle of a Death Foretold: The Dynamics of the Global Private Equity Boom and the 'Eclipse of the Public Corporation' Justin O'Brien, CAPPE</p> <p>At the height of the last leveraged buyout boom it was argued that we were witnessing the 'eclipse of the public corporation' (Jensen 1989). Private equity providers have once more become increasingly influential actors within capital markets. Their trading strategies succeed in partially bypassing the elaborate corporate governance, financial reporting and disclosure obligations imposed in the aftermath of scandal. Regulators in the United States, Australia and the United Kingdom have expressed concern that private equity expansion adds to systemic financial risk. The paper argues that it is impossible to understand the nature of the risk without disentangling the complex, conflicting and contingent nature of financial intermediary preferences and how these actors influence the trajectory of policy calibration. The impact of private equity is therefore tracked across a number of critical pressure points: within the corporation; within the professions who provide intermediating services to the market; within regulatory bodies; and, ultimately, within the political system itself.</p> <p><i>Discussant: John Coffee, Columbia Law School</i></p>

<p>15 March 0900-1030</p>	<p>Structural Limitations of Enforcement of Capital Market Regulation: The United Kingdom and its International Markets Iain McNeil, University of Glasgow In this paper I propose to examine how the structure and objectives of the regulatory regime for capital markets contains within itself limitations on the extent to which enforcement can be regarded as a credible strategy for promoting compliance. The analysis is built around several characteristics of the regulatory regime which are relevant for enforcement: (a) the nature of and relationship between the rules that comprise the regulatory framework; (b) the complexities in rule formulation and enforcement that arise in international markets (with particular reference to foreign listing); (c) the role of self-regulation and market discipline in the regulatory regime (with particular reference to corporate governance codes); (d) matching sanctions to contraventions (with particular reference to control structures within companies); and (e) the respective roles of public and private enforcement. These characteristics mean that the role envisaged for enforcement is limited. If that is the case, expectations as to what enforcement can achieve should be adjusted accordingly.</p> <p>Expecting Too Much? Enforcement Limitations in the Regulation of Financial Markets George Gilligan, Monash University In recent years scandals such as World Com and Enron in the US, and HIH, One Tel and the AWB in Australia have sprawled across all forms of the media, with attendant coverage about the allegedly dire state of contemporary business practice that would allow such disasters, interspersed with complaints that <i>somebody</i> should have had their eyes on the game and not allowed such egregious behaviour to occur. However, are contemporary expectations simply too high with regard to the capability of regulatory enforcement, especially in relation to the financial sector? This paper considers this issue in relation to Australia and the UK, drawing on the general literature in relation to enforcement, and the specific regulatory histories of the Australian and UK financial sectors.</p> <p><i>Discussants: Stephen Bottomley, ANU; Neill Buck, Managing Director, Asia-Pacific, Neill Buck & Associates</i></p>
<p>1030-1045</p>	<p>Morning Tea</p>
<p>1045-1200</p>	<p>The 'Fundamental Error' of Accountability Policies: The Case of Sarbanes Oxley" Melvin Dubnick, University of New Hampshire Failures of contemporary efforts to reform governance in the corporate and public sectors have been attributed to flaws in the design and/or execution of the policies, but little or no attention has been paid to the basic assumptions upon which such accountability policies are constructed. This paper highlights a "fundamental error" in assumptions of such policies regarding the role of agency in accountable governance and uses the case of Sarbanes Oxley to demonstrate the consequences and implications of that error.</p> <p><i>Discussant: Charles Sampford, GOVNET</i></p>
<p>1200-1215</p>	<p>Break</p>

1215-1330	<p>Enforcing Ethics: New Strategies For Tackling Creative Compliance Doreen McBarnet, University of Oxford</p> <p>This paper looks at the interweaving of law and ethics in the regulatory aspirations and enforcement strategies of the post-Enron era. What constitutes compliance is being increasingly recognised as problematic, with a growing intolerance of mere technical or ‘creative compliance’, and growing demand for what might be thought of as ‘ethical compliance’. The paper examines and assesses the strategies being brought into play to foster and enforce ethical compliance, looking not only at the initiatives of regulatory authorities but at new developments in the corporate accountability agenda of civil society.</p> <p><i>Discussant: Lauren Edelman, UC, Berkeley</i></p>
1330-1430	Lunch
1430-1545	<p>Embedding Ethics Seumas Miller, CAPPE</p> <p>Ensuring and managing compliance with ethical standards in the professions, including auditing, is a complex challenge. The challenge is twofold. In the first place, ethical concepts such as integrity and fairness are inherently complex, and in some cases contested. The second challenge pertains more to professionals who might not necessarily be well intentioned or, at least, be more susceptible to external pressures to unacceptably bend or breach ethical requirements. Here the problem is essentially one of institutional design: which admixture of monitoring and disciplinary processes should be put in place to secure optimal levels of compliance with relatively well-understood ethical requirements. The paper evaluates the effectiveness of the audit governance framework to address whether a recalibration is warranted and, if so, how.</p> <p><i>Discussant: Doreen McBarnet, University of Oxford</i></p>
1545-1600	Coffee
1600-1730	<p>Roundtable 2: Legal Theory, Ethics and the Limits of Regulatory Governance</p> <p>Chair: Ian Ramsay, University of Melbourne</p> <p>Tom Campbell, CAPPE</p> <p>Charles Sampford, GOVNET</p> <p>Dean Cocking, CAPPE</p> <p>John Coffee, Columbia Law School</p>

