Inaugural Arnold Bloch Leibler Honours Conference

Thursday, 18 October and Friday, 19 October 2012
Book of abstracts
## Schedule

**Day one – 18 October**

### 9–10.30am
**Welcome and Plenary** – Dean, Professor Arie Freiberg AM  
Keynote, Professor David Weisbrot AM  
Do It Yourself Genetics: the Challenge of Regulating New Technologies in the Public Interest

### 10.30–11am
Morning tea

### 11–12.30pm

| Session 1 | Session 1A Protecting property  
Chair: Sarah Noble, Lawyer, Maddocks  
1. Mavis Loke – Fixed on fixtures: Should Australia include a fixtures provision in its PPSA?  
Supervisor: Dr Lisa Spagnolo  
2. Stuart Butterworth – Hungry for reform? Regulating creeping acquisitions in Australia’s retail sector  
Supervisor: Professor Justin Malbon  
3. Claire Wesson – The post-GFC regulatory framework: Will it decrease the incidence of fraudulent mortgages?  
Supervisor: Associate Professor Pamela O’Connor | Session 1B Privacy and families  
Chair: Professor Nahum Mushin AM  
1. Elena Tsalanidis – Privacy and the public interest defence; Destined for Australia?  
Supervisor: Ms Sharon Rodrick  
2. Nigel Chan – The Future of ‘special contributions’ in Australia  
Supervisor: Dr Adiva Sifris  
3. Anne Poulos – In the best interests of the child: Same-sex marriage and the convention on the rights of the child  
Supervisor: Associate Professor Paula Gerber | Session 1C Courts and constitutions  
Chair: Ms Erica Contini, Solicitor, Victoria Legal Aid  
1. Elisabeth Howard – Best of both worlds: Dualist approaches to unincorporated treaties  
Supervisor: Dr Adam McBeth  
2. Joel Gory – None of your business: How governments keep out judicial review  
Supervisor: Dr Colin Campbell  
3. Paul Tamburo – The scope of the Federal nationhood power  
Supervisor: Associate Professor Greg Taylor |

### 12.30–1:30pm
Lunch

### 1.30–3pm

| Session 2 | Session 2A Accessing justice  
Chair: Ms Erica Contini, Solicitor, Victoria Legal Aid  
1. Ebony Booth – Implementing Integration: The Australian Hybrid Law and Legal Practice Degree Centred in Clinical Legal Education  
Supervisor: Mr Ross Hyams  
2. Christopher Hooper – Your Story and Theirs: Victoria’s Youth Justice Group Conferencing Program  
Supervisor: Mr Ross Hyams  
3. Ryan Komhauser – Racial Animus, Economic Individualism, and Punitive Attitudes  
Supervisor: Associate Professor Bronwyn Naylor and Dr Karen Gelb | Session 2B Technologies and intellectual property  
Chair: Aaron Yates, Lawyer, Davies Collison Cave  
1. Sabrina Hoare – The ambiguity requirement: Admissibility of surrounding circumstances in contractual interpretation  
Supervisor: Dr Sirko Harder and Dr Rebecca Giblin  
2. Nikki Wagstaff – Taking the dispute settlement body seriously: US vs. China  
Supervisor: Professor Justin Malbon  
3. Beata Khaidurova – Copyright of computer programs: Application of the authorship requirement  
Supervisor: Dr Rebecca Giblin | Session 2C Constitutional protections  
Chair: Dr Julie Debeljak  
1. Michela Agnoletti – The Kable Doctrine: A resuscitated guard dog as a constitutional protector of rights?  
Supervisor: Dr Becky Batagol  
2. Colette Mintz – Protecting Indigenous Australians: Evaluating constitutional safeguards against racial discrimination  
Supervisor: Ms Melissa Castan  
3. Melissa Molloy – Federal judicial power post-Momcilovic: The reality and the potential  
Supervisor: Dr Julie Debeljak |

### 3–3.30pm
Afternoon tea

### 3.30–5pm

| Session 3 | Session 3A Protecting people under international law  
Chair: Professor Susan Kneebone  
1. Melody Stanford – Fair game: A theoretical analysis of Australia’s regional engagement on asylum seekers  
Supervisor: Ms Azadeh Dastyari  
2. Laura John – Breaking the people smugglers’ business model: does deterrence work?  
Supervisor: Professor Susan Kneebone  
3. Cameron Grant – The responsibility to protect and military intervention in Libya  
Supervisor: Associate Professor Gideon Boas | Session 3B Promoting healthy law  
Chair: Dr Bill Glaser  
1. Annabelle Brennan – Open Disclosure and Medical Error: From Damage Control to a Just Culture in Health Care  
Supervisor: Professor Ian Freckelton  
2. Camille Eckhaus – Analysing the Doctrine Of Double Effect: Its Place in Law And Medicine  
Supervisor: Dr Penny Weller  
3. Jane Gregory – Class Action Chaos: Is the Group Member’s Right to Object to Settlement Superfluous?  
Supervisor: Dr Karrinne Ludlow | Session 3C Fairness at work and in court  
Chair: Catherine Dow, Corrs Chambers Westgarth  
Supervisor: Dr Karen Wheelwright  
2. Amy Yeap – Family and Flexibility under the Fair Work Act: Suitable for Ages 0 and Up?  
Supervisor: Dr Janice Richardson  
3. Fiona Crock – Hot Tubbing: Is it the Way of the Future?  
Supervisor: Associate Professor Paula Gerber |

### 5.30–6.30pm
Arnold Bloch Leibler cocktail function, Level 21, 333 Collins Street, Melbourne
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<td>9.30 – 10.30am</td>
<td>Plenary and Arnold Bloch Leibler Keynote</td>
<td>Leon Zwier, Partner, Litigation, Reconstruction and Insolvency</td>
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<td>10.30 – 11am</td>
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<td>11 – 12.30pm</td>
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|              | Session 4A | Equity and trusts                                                   | Chair: Dr Susan Barkehall-Thomas  
1. Elouise Davis – Issues faced by creditors of an insolvent trading trust in subrogating to the right of indemnity  
Supervisor: Dr Susan Barkehall-Thomas  
2. Kelly Goodwin – The taxing issue of trusts: A critique of recent changes to the streaming rules  
Supervisor: Professor Stephen Barkocy  
Supervisor: Dr Richard Joyce |
|              | Session 4B | Computers, media and online safety                                 | Chair: Kate Ballis, Lawyer, Minter Ellison Lawyers  
1. Hamish Mcavaney – Blogging on the Edge: Defining Journalism for the purposes of Journalists’ Privilege  
Supervisor: Ms Sharon Rodrick  
2. Nicole Gandel – Trolling: Does the law match the technology?  
Supervisor: Associate Professor Jonathan Clough  
3. Hui Ting Low – Privacy Issues with M-Commerce  
Supervisor: Dr Emmanuel Laryea |
|              | Session 4C | Exploring competition law                                           | Chair: Geoffrey Kozminsksy, Senior Associate, Litigation, Arnold Bloch Leibler  
1. Paulina Fishman – Barriers to entry in Australian competition law  
Supervisor: Associate Professor John Duns  
2. Justin Lipinski – Blurring the bright line? Recent developments in the case law on third line forcing  
Supervisor: Associate Professor John Duns  
Supervisor: Professor Justin Malbon |
| 12.30 – 1.30pm | Lunch |                                                                      |                                                                                  |
| 1.30 – 3pm    | Session 5 |                                                                      |                                                                                  |
|              | Session 5A | The Goldsworthy hour of power                                       | Chair: Professor Jeffrey Goldsworthy  
1. Kiran Iyer – Justice Scalia, Justice Thomas, and the Promise of Originalism  
Supervisor: Professor Jeffrey Goldsworthy  
2. Paul Jeffreys – The Functionality of Jurisdictional Error  
Supervisor: Professor Jeffrey Goldsworthy  
3. Charles Noonan – Court in the Act: Section 75(V), No-Invalidity Clauses and the Rule of Law  
Supervisor: Professor Jeffrey Goldsworthy |
|              | Session 5B | Corporations law                                                     | Chair: Christine Fleer, Senior Associate, Arnold Bloch Leibler  
1. Rani Kulkarni – Non-Executive Directors: Beyond the call of duty?  
Supervisor: Dr Karen Wheelwright  
2. Matthew Hearn – Accessing the safe harbour: The concept of “business judgment” under S 180 of the Corporations Act  
Supervisor: Associate Professor John Duns  
Supervisor: Dr Karen Wheelwright |
|              | Session 5C | Health and Environment                                               | Chair: Associate Professor Anne-Maree Farrell  
1. Sarah Spottiswood – Deferring to science: Investment treaty arbitration and public health  
Supervisor: Professor Jeffrey Waincymer  
2. Ellie Mulholland – One hundred years of sequestration: Australia’s carbon farming initiative  
Supervisor: Dr Gerry Nagtzaam  
3. Patricia Saw – Taxes and trading schemes: Will China successfully transition to a low-carbon economy?  
Supervisor: Dr Gerry Nagtzaam |
| 3 – 3.20pm    | Afternoon tea |                                                                     |                                                                                  |
| 3.20 – 4pm    | Concluding plenary                                                   |                                                                                  |
Michela Agnoletti
Supervisor: Dr Becky Batagol
The Kable Doctrine: A Resuscitated Guard Dog as a Constitutional Protector of Rights?
This presentation canvasses the extent to which the Kable doctrine, in its application, acts as a constitutional protector of individual procedural and substantive rights at State level. After lying dormant for over a decade, the doctrine has recently been invoked in the High Court to invalidate certain provisions of control and anti-association legislation. Given the increasing prevalence of these legislative instruments in a post September 11 society, and the absence of a bill of rights in the Australian Constitution, an examination of the potential role of the revived Kable doctrine as a constitutional protector of rights is thus germane. An analysis of the recent High Court cases invoking the Kable doctrine demonstrates how procedural and substantive rights were either impliedly or incidentally protected under Kable in those cases. It is acknowledged, however, that the absence of decisive indicia and clear ratios with which to define the Kable doctrine inhibit the ability of the States to frame statutes within the limitations postulated by the Kable doctrine. This is arguably to the substantial detriment of individual rights. Therefore, until the High Court pronounces a workable definition of the Kable doctrine, this constitutional guardian dog will inevitably leave individual rights vulnerable to legislative curtailment.
Biography
Michela commenced her BA/LLB in 2007 and completed her Arts Degree in 2009, majoring in French. She is in her final semester of law and will join Allens Linklaters as a graduate in the Melbourne office next year.

Ebony Booth
Supervisor: Mr Ross Hyams
Implementing Integration: The Australian Hybrid Law and Legal Practice Degree centred in Clinical Legal Education
The discontent and disillusioned voices of law students are the ‘law school’s miner’s canary’. When evidence is produced proving that over 40% of Australian law students are suffering from ‘psychological distress severe enough to justify clinical assessment,’ alarm bells should ring in the mind of every legal educator and for the entire legal profession. There is something inherently wrong with what law schools teach and the way the law it is taught. However, there is an element of the law degree that students are deeply satisfied with Clinical Legal Education. Through an analysis of the results of qualitative research conducted at Monash University with clinical student alumni, this paper will uncover the impact of Clinical Legal Education on a law students’ professional development, education and perceptions of the legal profession and their own legal careers. This paper will show that Clinical Legal Education satisfies students learning, professional development, and personal needs. It submits that a restructure of the law degree to include the requirements of Practical Legal Training that can predominantly be achieved through Clinical Legal Education, may be the necessary reform for legal education for Australia’s law students.
Biography
Ebony is a final year Arts/Law student who is passionate about education. She is currently completing her Practical Legal Training and will commence work at a management consulting firm in 2013.

Annabelle Brennan
Supervisor: Professor Ian Freckelton
Open Disclosure and Medical Error: From Damage Control to a Just Culture in Health Care
Adverse events are injuries resulting from medical intervention. A significant proportion of Australian hospital admissions are associated with an adverse event, which may result in temporary or permanent disability, or patient death. Health care clinicians involved in adverse events may also experience significant psychological implications. The current tort system is an inadequate mechanism of redress in the medical context, failing both injured patients and health care clinicians. First, it inadequately compensates injured patients; less than 2% of all patients injured through medical treatment bring an action, generally on the grounds of negligence. Second, the deterrent effect of litigation on medical errors is blunted largely because clinicians view medical litigation as an arbitrary and partial process where claims are not necessarily linked to the quality of clinical care provided. This thesis proposes an alternative model to the current fault-based system. It aims to compensate patients more appropriately and provide greater support to clinicians involved in adverse events. Implementation of this model has demonstrated convincing results in the United States, in particular, increasing both patient and clinician satisfaction following adverse events.

Biography
Annabelle commenced a Bachelor of Medicine/Bachelor of Surgery at Monash in 2007 and, in the following year, combined this with a Bachelor of Laws. She is interested in the governance of safety and quality in health care, which is reflected in her thesis.

Stuart Butterworth
Supervisor: Professor Justin Malbon
Hungry for reform? Regulating Creeping Acquisitions in Australia’s Retail Sector
Australia’s competition law framework seeks to enhance competition as a means of promoting economic efficiency and consumer welfare. Mergers which are likely to substantially lessen competition are prohibited, ensuring that market structure remains pro-competitive. However, by undertaking a series of small acquisitions which do not individually substantially lessen competition, firms are currently able to alter market structure without being caught by the prohibition. Amendments introduced in 2011 to address the issue have proved ineffective. However, other proposals to regulate creeping acquisitions are either impractical or carry unacceptable negative externalities. A more appropriate model would retain the ‘substantial lessening of competition’ standard, but broaden the application of the test to address the likelihood that a firm will continue to make similar acquisitions in the future.
Biography
Stuart is currently completing his final year of a BA/LLB. Next year, Stuart will commence as a Graduate with Allen & Overy in Sydney, hoping to practice in their competition law group.

Nigel Chan
Supervisor: Dr Adiva Sifris
The Future of “Special Contributions” in Australia
Parties’ past contributions and various prospective factors including future needs are the mainstays of the Family Law Act 1975 (Cth) in determining family property disputes. The term ‘special contributions’ or ‘special skills’ is not mentioned in the FLA. The notion of special contributions results in the Family Court giving a special loading to a spouse who has shown some form of stellar talent during the course of the relationship. However, the concept of rewarding one party for contributions made during a relationship at the expense of the other party, has recently been rejected, with a number of judges at first instance preferring a partnership approach.
The research paper argues that the major problem with special contributions is a tendency to prejudice the homemaker parent. Furthermore, it feters the discretion of the trial judge in achieving a result which is just and equitable. Although the Family Court has established several guidelines to ensure that contributions of homemaker and breadwinner would be treated equally, it is argued that they are unrealistic.

The research paper then compares the approach of the Family Courts in England, New Zealand and Canada (Ontario) to special contributions.

The research paper concludes that while special contributions should be an enduring feature in Australia, its operation should be restricted to circumstances where the special talent is found in sport, arts or some other such field of endeavour.

Biography
Nigel commenced his LLB in 2009 as an international student. He plans to get admitted in Melbourne after graduation. But, his long term goal is to return to Hong Kong and become a prosecutor or family law lawyer.

Fiona Crock
Supervisor: Dr Paula Gerber

‘Hot Tubbing’: Is it the way of the future?
Australia has been credited as having the most experience in the world with the ‘hot tub’ method of evidence- where experts present their sworn evidence to the court concurrently. In fact, the Oregon Law Review reported in 2009 that development of the process itself was attributable to Australia. Virtually since ‘the moment of its invention’, adversarial expert testimony has been fraught with problems.

Over the last decade, the Australian judiciary has been echoing international concerns that adversarial expert evidence is presenting serious obstacles to civil justice. In particular, issues of partisanship, cost, delay and effectiveness of evidence were raised by Freckleton, Reddy and Selby in their empirical study ‘Australian Judicial Perspectives on Expert Evidence’ in 1999. It is into this climate of awareness of the shortcomings of traditional expert evidence that concurrent evidence has reached greater mainstream recognition. This thesis will examine Australia’s system of expert evidence in order to show the capacity that concurrent evidence has to enhance way expert evidence is used in the courtroom.
— which have received more and more attention in Australian case law — are also discussed. It is argued that courts need to be aware of the former concept’s complexity, and should treat the latter concept with caution. Finally, the potential role of ‘impediments to entry’ in Australian competition decisions is considered.

Biography
Paulina majored in economics and will complete her Bachelor of Commerce/Laws double degree in 2012.

Jenna Friedman
Supervisor: Dr Karen Wheelwright

Unnecessary Overlap? Evaluating Disability Protection in Labour Legislation Against the Backdrop of Anti-Discrimination Law

There has been growing recognition of the need for disability protections in the workplace, with numerous statutes in Australia seeking to regulate this area. The focus of this paper is on disability protections in Australia’s federal jurisdiction, specifically analysing the Fair Work Act 2009 (Cth) (FWA) against pre-existing protections in the Disability Discrimination Act 1992 (Cth) (DDA). The introduction of the adverse action provisions in the FWA has significantly expanded the scope of protection afforded to employees with disabilities, as compared to previous labour legislation. Section 351 of the FWA prohibits adverse action from being taken on the basis of one of 14 proscribed attributes, including disability. Previously, employees with disabilities who were discriminated against outside of the dismissal context had to rely solely on specific anti-discrimination legislation for protection. However, s 351 now protects employees in circumstances extending beyond dismissal to conduct that occurs both prior to and during employment. As a result, there is a significant overlap between disability protections afforded by the adverse action provisions in the FWA and the anti-discrimination provisions in the DDA. Submissions to the 2012 Fair Work Act Review Panel highlight that several employers are frustrated at this level of duplication and, as such, have called for s 351 to be removed. The paper therefore examines whether this overlap is unnecessary, or whether the adverse action provisions do in fact add to pre-existing disability protections. The author argues that there are a number of significant advantages to the adverse action provisions for employees with disabilities, including the reverse onus of proof and the fact that broad penalties are available. The author also acknowledges that there are some areas of uncertainty, such as the term ‘disability’ being undefined. While each claim should be assessed on a case-by-case basis, ultimately the author concludes that the adverse action provisions are a necessary and favourable alternative compared to the overly burdensome and complicated anti-discrimination provisions in the DDA. Section 351 therefore takes Australia one step closer towards achieving equality in the workplace for employees with disabilities.

Biography
Jenna Friedman is studying a Bachelor of Arts (Journalism, Linguistics) and Law. She recently took part in the Law Exchange Program at Tel Aviv University in Israel, where she enjoyed being exposed to new cultures and creating international networks. Jenna plans to commence work at a commercial law firm after completing her degree in 2013.

Nicole Gandel
Supervisor: Professor Jonathan Clough

Trolling: Does The Law Match the Technology?

While the legislatures have enacted against various cyber-related offences, such as Cyberstalking, there exist online acts, which fall outside the scope of such provisions. ‘Trolling’, where individuals post inflammatory material online, designed to offend and harass their victims is a prime example. In this thesis, I analyse established offences of Stalking, Cyberstalking and Cyber Bullying, as well as other harassment offences, to develop the distinction between them, and novel Trolling behaviours. Behaviours, which are perpetrated by offenders who intend to, harass and offend others through the use of social media. Owing to the lack of legislation in this area, I analyse examples of Trolling committed within the Australian jurisdiction, and present how this next generation of offensive behaviour has created a distinct gap in the law. I present various legislation and case law which has been used in an attempt to deal with online harassment, as well as reflect on the question of why this new behaviour should be criminalised. It is argued that, the existing legislation used to prosecute Trolling offenders does not sufficiently and effectively deal with online harassment and offense. As such, this analysis shows that not only is it necessary to address the current gap in the law, but a separate and distinct Trolling offence is necessary; one which proscribes against a multitude of harassing and offensive online behaviours, caters to singular as well as protracted events, is measured against the judgment of a reasonable person and allows for sentencing discretion.

Biography
Nicole commenced her BA/LLB degree in 2008, and completed her Arts degree in 2011 at the University of Miami, Florida. Having completed her thesis in Cyberlaw, Nicole plans to complete a Master of Laws at the University College London in 2013.

Kelly Goodwin

Supervisor: Professor Stephen Barkoczy

The Taxing Issue of Trusts: A Critique of the New Streaming Rules

In July 2011 the federal government amended the taxation of trust income by introducing new trust streaming measures in the Tax Laws Amendment (2011 Measures No. 5) Act 2011. These amendments were introduced hastily as an interim measure pending a wholesale reform to the taxation of trusts following the High Court case of Bamford v Commissioner of Taxation. The amendments ensure that, where permitted by a trust deed, the streaming of capital gains and/or franked dividends to specific beneficiaries is effective for tax purposes. This thesis examines the historical background to streaming and the taxation of trust income, before examining the amendments in detail and providing a novel and easy to understand approach to their application. It is argued that the swift implementation of the amendments has led to significant flaws with the potential for unintended consequences.

Biography
Commencing at Monash in 2008, Kelly is a final year Commerce (Accounting)/Law student who will join King & Wood Mallesons as a graduate in 2013. A passionate traveller, she is looking forward to an extensive holiday in Canada and the USA.

Joel Gory

Supervisor: Dr Colin Campbell

None of Your Business — How Governments Keep out Judicial Review

Arguably the greatest triumph of public law in Australia has been the constitutionalisation of administrative law to create a minimum entrenched jurisdiction of judicial review. While privative clauses have played a pivotal role in the development of this position, they are not the only means by which the government can attempt to delimit the judicial review jurisdiction. This paper argues that there are other, less overt ways by which the government seeks to limit judicial review of administrative decisions. It surveys three examples of so-called ‘administrative arrangements’ implemented by the executive branch...
and its agencies in an attempt to limit the reviewability of its decisions. These are the outsourcing of government functions, the use of the procurement power in tendering processes and government inaction. Prima facie, each of these arrangements places demands on the very principles that lead to the hostility towards private clauses, yet at least in some circumstances, the courts permit a limitless exercise of power by the executive. Nevertheless, there may be principled arguments for giving greater deference to the executive in designing these arrangements. A greater recognition of the privative effect of these arrangements would assist courts to develop a nuanced approach to protect their judicial review jurisdiction.

Biography
Joel began his Arts/Law degree in 2008. The highlight of his time at university was travelling to Utrecht, The Netherlands to study on exchange. There he met many international students and nurtured his infatuation with public law, as reflected in his thesis.

Cameron Grant
Supervisor: Dr Gideon Boas
The Responsibility to Protect and Military Intervention in Libya
In light of the 1999 NATO operation in Kosovo then UN Secretary-General Kofi Annan set a challenge: reconcile state sovereignty and the protection of human rights. The answer was the Responsibility to Protect (R2P), which can be summarised thus:

- States have a responsibility (‘responsibility A’) to protect their population from genocide, war crimes, ethnic cleansing and crimes against humanity, and the incitement of such crimes;
- The international community of states has a responsibility (‘responsibility B’) to assist individual states in fulfilling responsibility A; and
- The international community of states has a responsibility (‘responsibility C’) to take timely and decisive action through peaceful, diplomatic and humanitarian means, and failing those, through more forceful means, in situations where individual states have manifestly failed to fulfil responsibility A.

In February-March 2011 the Security Council passed resolutions relevant to the crisis in Libya. UNSCR 1970 required Libya to take steps to ensure the protection of its population. UNSCR 1973, in light of Libya’s failure to take these steps, required Libya to take further steps and, in particular, authorised UN Member States “to take all necessary measures … to protect civilians and civilian populated areas under threat of attack in [Libya].”

UNSCRs 1970 and 1973 are clearly referable to R2P, and in particular Responsibility C. The aim of this Thesis is to establish the precise nature of this link. In particular, this Thesis will focus on the latter UNSCR and especially its authorisation of Member States “to take all necessary measures”. The following questions will be explored:

- what is the R2P doctrine; was UNSCR 1973 an enlivening of the R2P doctrine; was the NATO intervention in Libya in accordance with UNSCR 1973; and if the NATO intervention in Libya was not in accordance with UNSCR 1973 was it otherwise legal under international law?

Biography
Cameron has completed a Diploma in Languages (Indonesian); studied in Italy and the United Kingdom; participated in a DFAT-run exchange in Indonesia; and worked at the UN ICTY. He is about to complete Arts/Law and embark on a career in Japan.

Jane Gregory
Supervisor: Dr Karinne Ludlow
Class Action Chaos: Is a Group Member’s Right to Object to Settlement Superfluous?
Class actions have revolutionised the legal landscape. Individuals previously unable to pursue their legal rights now have an opportunity to do so. The business of litigation has also changed, with litigation funders keen to be involved and changing the way litigation is pursued. However, civil procedure is struggling to keep pace with the changes necessary to accommodate the growing flow of class actions. This thesis explores the most important aspect of class actions, what happens during settlement.

In a simple class action there are two parties: the group representative and the defendant. There are also a number of key stakeholders, such as the group representative’s lawyers, the group members and the litigation funder. These multiple interests occasionally conflict at settlement. To avoid these conflicts of interest court approval must be obtained before settling a class action. Group members have a right to object to any proposed settlement.

In this Thesis, Jane will explore the right to object and its significance for group members. The author submits that in practice the right to object is superfluous because the real issues that affect group members are based on systemic problems not addressed by the courts.

Biography
Jane is in her final year of Commerce/Law and works part-time at Slater & Gordon. While working at Slater & Gordon she has been exposed to several class actions. This experience prompted her to write on class action settlements. During her clerkship at Allen & Overy she learnt about some of the strategies employed by defendants in class action litigation. She will be joining Allen & Overy in 2013 and plans to rotate through litigation.

Matthew Hearn
Supervisor: Associate Professor John Duns
Accessing the Safe Harbour: The Concept of “Business Judgment” Under s 180 of the Corporations Act
This thesis analyses the concept of “business judgment” under the statutory business judgment rule in s 180(2) of the Corporations Act 2001 (Cth). The business judgment rule reflects the right of a director to argue that his or her decisions were made in the best interests of the corporation. If this “safe harbour” is established, the director cannot be held personally liable for a breach of his or her statutory duty of care and diligence under s 180(1).

Accordingly, a key requirement for directors to access the protection afforded by the rule is that they must have made a “business judgment”. Australian courts have not yet definitively considered this concept or its relevance to the operation of the business judgment rule. The weight of existing (albeit sparse) authority appears to suggest a narrow approach to this concept, that will only allow directors to access protection under s 180(2) where they have made a positive and well documented decision in respect of a particular matter relating to the business operations of the corporation. However, a closer analysis of the text of the provision, combined with case law interpreting this concept in foreign jurisdictions, as well as an examination of the commercial practicalities of the process by which boards decisions, ultimately demonstrates that the concept of a “business judgment” must be broadened to include directorial oversight and management functions. Indeed, the growing number of proceedings instituted by the Australian Securities and Investments Commission and likewise, litigation funders against directors, suggests that the concept of a “business judgment” is of growing importance in Australian corporate law and that our courts will almost certainly be required to address the meaning of this concept in the near future.
Biography
Matthew is a final year Bachelor of Commerce (Finance/Management)/ Bachelor of Laws student at Monash University. Throughout his studies, he worked at a top-tier commercial law firm where he developed his interest in corporations law, specifically concerning the duties and liabilities of directors. Matthew will commence a graduate position with Allens Linklaters in 2013, where he intends to pursue his interest in this area of law. In the longer term, Matthew hopes to undertake directorships with profit and not-for-profit organisations.

Sabrina Hoare
Supervisors: Dr Sirko Harder and Dr Rebecca Giblin
The Ambiguity Requirement: Admissibility of Surrounding Circumstances in Contractual Interpretation
In Codelfa Construction Pty Ltd v State Rail Authority of NSW the High Court of Australia laid down the rule that language must be ambiguous or susceptible of more than one meaning in order for evidence of surrounding circumstances to be admissible to assist in contractual interpretation ("The Ambiguity Rule"). The Court recently reaffirmed the rule in Western Export Services Inc v Jireh International Pty Ltd. This thesis examines the resulting practical, social, economic and philosophical implications for contractual interpretation. It is argued that tension between the values of pragmatism, certainty and efficiency versus discretionary flexibility and individualised justice has generated judicial and academic division in support of the rule. The conclusion is that greater transparency and explicitness by the High Court in its application of the rule is necessary in the interests of certainty for contracting parties and precedential consistency.

Biography
Sabrina commenced her BCom/LLB in 2008 and will major in Finance. She will join Freehills Herbert Smith as a graduate with Allens Linklaters. She graduated from the Bachelor of Arts (Politics/International Relations) at Monash University in 2012. She is completing her final year of a Bachelor of Laws student at Monash University. Sofia-Isabella Hopper
Supervisor: Professor Justin Malbon
The ‘Price Signalling’ Reform in Australia: A Welfare Analysis
This paper examines the recent and controversial amendment to the Competition and Consumer Act 2010 (Cth), which imposes two broad prohibitions against ‘price signalling’, or the disclosure of price-related information in certain circumstances. The reform has been met with fierce criticism from industry and legal commentators, and it has been branded as an example of legislative overreach. These criticisms, however, fail to consider the genuine economic case for the amendment. Censure of the reform has tended to be either politically motivated, driven by the self-interest of industry groups or premised upon an entirely non-economic rationale. At a broader level, the debate in Australia lacks appreciation for the damaging economic consequences of price signalling.

This paper assesses the likely impact of the price signalling reform against the competition policy objective of welfare maximization. Because the amendment has not yet been judicially considered, nor the subject of formal action, its actual impact is uncertain. However, its probable impact can be predicted by reference to dominant economic theories relating to price disclosures, and legal principles that will likely govern judicial interpretation of the amendment. This paper contends that, on balance, the Amendment will enhance total welfare, and produce welfare gains for consumers without causing significant harm to business.

Part II of this paper explores what is meant, in legal and economic terms, by price signaling. Part III critically considers the welfare maximization objective, and sets out three ‘welfare criteria’ that are applied in Part IV. The criteria is used to measure the likely impact of the amendment on total welfare. The amendment threatens some welfare loss, particularly for business. However, this is far outweighed by the welfare gain that is (more) likely to result from the targeted regulation of price signalling. Ultimately, the reform is consistent with the pro-competition aims of the CCA.

Biography
Sofia is completing her final year of a Bachelor of Arts (Politics/International Relations) and Bachelor of Laws. In 2013, she will leave her beloved job with the National Australia Bank legal team and start as a graduate with Allens Linklaters.

Elisabeth Howard
Supervisor: Dr Adam McBeth
Best of Both Worlds: Dualist Approaches to Unincorporated Treaties
Dualism proposes that in the absence of incorporation, international law and domestic law are worlds apart. Yet in Australia, a dualist nation, the influence of unincorporated treaty material can be seen in a wide range of domestic decisions. And we are not alone in this practice. As this paper demonstrates, Canada and Malaysia also foster similar practices, with the three countries eliciting judgments which almost dialogue with each other.

This paper aims to critically analyse the approaches of the three focus countries to the use of unincorporated treaty material in statutory interpretation. In particular, whether ambiguity in domestic statute is required before decision makers turn to unincorporated treaty material. It will be suggested that the approach of the judiciary across these jurisdictions is advancing generally, with Canada leading the way in its expansion of the presumption of conformity, providing a model which Australia and Malaysia are adapting and adopting.

Assuming ambiguity is no longer required, this paper then asks why. Why would common law courts seek access to treaty material before it has been incorporated into domestic legislation? While some would argue that parliamentary sovereignty stands in the way of this practice, it is suggested that judges are seeking to act in accordance with Australia’s international obligations as agreed to by the Executive. Furthermore, the removal of ambiguity does not...
place courts into an un navigable sea of uncertainty as judicial decision makers are well placed use seemingly uncertain principles in their decision making. Accordingly it is suggested that there is an inter-jurisdictional move away from requiring ambiguity in domestic legislation. This move should further allow domestic courts to fulfill international legal obligations in good faith.

**Biography**
Commencing at Monash in 2007, Elisabeth will finalise her Bachelor of Arts (French)/Laws, and Diploma in Modern Languages (Spanish) in 2012. Having long been passionate about international law, in 2013 she will be moving to Brazil to pursue this.

**Kiran Iyer**
**Supervisor:** Professor Jeffrey Goldsworthy

*Justice Scalia, Justice Thomas, and the Promise of Originalism*

Originalism is an influential theory of constitutional interpretation. Justices Antonin Scalia and Clarence Thomas have elevated originalism from the fringes of academic debate to the centre of the resolution of constitutional controversies before the United States Supreme Court. Originalism deserves re-evaluation in light of their judicial practice.

This thesis provides the first comprehensive comparison of the jurisprudence of Justices Scalia and Thomas from an originalist perspective. Originalism is not a unified theory. Justice Scalia’s and Thomas’s methodological differences expose the four most significant fault lines within contemporary originalism: defining original meaning; the relevance of natural law to constitutional interpretation; the distinction between original meaning and original expected application; and the compatibility of originalism and the doctrine of stare decisis.

This thesis will establish that Justices Scalia and Thomas have deviated from their own interpretive principles, undermining their claims to have developed a consistent methodology for constitutional interpretation. The inconsistencies in their jurisprudence have broader implications for originalism, highlighting the difficulty of reconciling fidelity to original meaning with other values defended by originalists such as certainty, stability and judicial constraint. Originalism in practice has failed to deliver on its promise of subjugating judicial discretion to the rule of law.

**Bio: Kiran**
Kiran is a final year Bachelor of Arts (Politics)/Laws student. He developed an interest in American constitutional law while completing an internship in the U.S. Senate in 2010. In 2012, he will be Tipstaff to NSW Court of Appeal Justice Ruth McColl.

**Paul Jeffreys**
**Supervisor:** Professor Jeffrey Goldsworthy

*The Functionality of Jurisdictional Error*

The High Court’s decision in Kirk v Industrial Court (NSW) (2010) 239 CLR 531 (“Kirk”) affirmed the constitutional entrenchment of review for ‘jurisdictional error’ at State level. However, the precise scope of jurisdictional error was further mystified by the apparent suggestion in Kirk that the identification of the concept does not require a rigid conceptual analysis but instead functional considerations. This new direction, if taken to its full extent, represents a notable shift of power from the legislature to the courts in determining the validity of decisions made by public bodies. While the High Court in Kirk was correct to concede the conclusory nature of jurisdictional error, the adoption of a functional approach should, with limited exceptions, be rejected. The main difficulty of a functional approach is the impractical breadth of the guiding aims and values underlying jurisdictional review. The risk of a reviewing court being misled by the underlying function outweighs the benefits of the approach. Nonetheless, a series of factors relevant to a functional approach may assist a reviewing court in interpreting the instruments empowering the original decision-maker to determine the validity of the decision under review.

**Biography**
Paul is in the final year of his Bachelor of Commerce/Bachelor of Laws, which he commenced in 2007. He loves watching sport and attending Planetshakers City Church in Melbourne. He is getting married to his fiancée, Vanessa, in February before beginning as a graduate lawyer at Minter Ellison.

**Laura John**
**Supervisor:** Professor Susan Kneebone

*Breaking the People Smugglers’ Business Model: Does Deterrence Work?*

‘Breaking the people smugglers’ business model’ has become the common slogan for Australian politicians in the debate about asylum seekers transiting through Indonesia and travelling onwards to Australia by boat. Migrant smugglers have become the target of Australian-Indonesian rhetoric about stopping the boats and controlling asylum flows, deliberately shifting the emphasis away from the refugees who comprise the majority of those smuggled.

This thesis will examine the development of anti-smuggling strategies in Australia and Indonesia, suggesting that the Australian-Indonesian approach is merely an extension of Australian policies that have been implemented for over a decade to deter the onshore arrival of refugees. It will be argued that the deterrence framework, which originates in the criminal justice system, is conceptually inconsistent with the notion of refugee protection, and is ineffective in ‘breaking the people smugglers’ business model’. Further it is not a sound foundation for bilateral cooperation. Finally, the legal implications of a deterrence approach will be explored in terms of state responsibility and the principles of non-refoulment and the right to seek asylum without penalisation.

**Biography**
Laura is in her penultimate year of her BA/LLB and hopes to work in the human rights field when she graduates. She enjoyed the opportunity to complete her thesis while interning with the United Nations High Commissioner for Refugees.

**Ryan Kornhauser**
**Supervisor:** Dr Bronwyn Naylor and Dr Karen Gelb

*Racial Animus, Economic Individualism, and Punitive Attitudes*

The public in much of the Western world, including Australia, the US, and the UK, is, in a general or ‘abstract’ sense, overwhelmingly supportive of punitive sentencing policy. The present study considers two explanations which purport to explain these attitudes on an individual level: the ‘racial animus model’ — which suggests that racial intolerance and prejudice causes punitive attitudes — and the ‘American Dream model’ — which attributes punitiveness to economic individualism.

Using data from the 2009 British Social Attitudes Survey, this study first empirically assesses the validity and relative strength of these two models in explaining punitive attitudes in the UK. These analyses indicate that both racial intolerance and economic individualism are salient predictors of punitive attitudes, with stronger support being found for the racial animus model.

Second, I offer two ways in which the racial animus and American Dream models can be incorporated into a single
causal process. Significantly, both of these hypotheses suggest that the effect of economic individualism on punitive responses is not simply a product of race-neutral and objective beliefs about economic and opportunity outcomes, but rather that economic individualism impacts policy judgments about sentencing in a racialised manner that is consistent with existing racial prejudices. In support of this, I shows that approximately one third of the effect of economic individualism on punitive responses is mediated by racial intolerance. On the other hand, however, the direct effect of economic individualism is not moderated by levels of racial intolerance.

**Biography**
Ryan Komhauser is a final year Bachelor of Arts/Bachelor of Laws student. Last year, he completed his Arts Honours in Criminology.

**Rani Kulkarni**  
**Supervisor: Dr Karen Wheelwright**

**Non-executive Directors: Beyond the Call of Duty?**
This thesis discusses the implications of the duty of care, skill and diligence expected of non-executive directors in Australia compared to the United Kingdom (UK) following the introduction of the Companies Act 2006 (UK) and recent spate of litigation aimed against non-executive directors.

The overall argument of the paper is that recent cases such as ASIC v Healey (No 1) [2011] FCA 717 (Centro) and ASIC v Hellicar [2012] 86 ALJR 522 (Hardie) have taken an excessively onerous approach by equating the duties of a non-executive director with an executive director. In comparison, the Companies Act 2006 (UK) and English case law acknowledges that while all directors are expected to perform minimum functions, their duties differ depending on the type of directorship they hold.

The Centro and Hardie judgments have muddied the type of qualifications and scrutiny of board minutes expected of a non-executive director. In addition, the heightened examination of non-executive directors could potentially impact on non-executive recruitment affecting board diversity and the level of decision making.

Therefore the stringent standard to which non-executive directors are held detrimentally impacts the economic and entrepreneurial features of a company. This is why Australian law would benefit from following the UK approach.

**Biography**
Currently a final year BA/LLB student at Monash University, Rani will finish her law degree at the end of 2012. Before commencing her graduate job in 2014 she is looking forward to travelling to Europe and South America.

**Beata Laurenson**  
**Supervisor: Dr Rebecca Giblin**

**Copyright of Computer Programs: Application of the Authorship Requirement**
Recent cases which have looked at the subsistence of copyright have placed a greater emphasis on the requirement for a human author, or of joint authorship as defined in the Copyright Act (1968). This thesis provides a response and analysis of this new approach. It analyses current copyright law, and critically evaluates how the principle of authorship applies to three case studies involving the development of computer programs. This paper will firstly analyse how the law applies to software written by an independent software developer. Secondly, it applies the law to software developed by a team, either within a company or otherwise. Finally, the law is applied to the development of free and open source software.

One of the issues foreseen from the analysis of the case studies is that the definition of joint authorship may inhibit the protection of software developed by multiple programmers. The law currently requires ‘collaboration’ for joint authorship to be recognised, but software is often developed in a way that doesn’t comply with this definition. Whether or not there is joint authorship may rest on the structure of the development team. Furthermore, the requirement for a human author, as opposed to a computer, may result in issues when the tools that compile source code into object code become more sophisticated. The more complex the compiler, the more it is involved with the selection and arrangement of the resulting object code. This could result in the view that the compiled code was computer generated, rather than authored by a human.

Possible solutions to the foreseen issues are discussed, including allowing the protection of computer generated works, allowing a broader definition of joint authorship, and of adding computer programs to Part IV of the Copyright Act as a new type of subject matter.

**Biography**
Beata commenced her studies at Monash University in 2007, and is currently in the final year of her Bachelor Engineering/ Bachelor Laws. She is interested in all areas of intellectual property law, and has recently been taken on as a trainee patent attorney at FB Rice.

**Justin Lipinski**  
**Supervisor: Associate Professor John Duns**

**Blurring the Bright Line? Recent Developments in the Case Law on Third Line Forcing**
Unlike other forms of exclusive dealing, third line forcing is prohibited per se, that is, prohibited irrespective of the effect the conduct has on competition. While this prohibition has been the subject of criticism from courts, parliamentary committees and academics, the way in which the provisions are interpreted has not been the subject of extensive commentary.

This thesis identifies two major problems in the interpretation of third line forcing provisions. Firstly, since the case of ACCC v IMB Group, there has been a significant shift in the way in which courts characterize whether there are two parties or three to a transaction. A consequence of this is that it is now more difficult to assess whether courts will treat conduct as third line or full line forcing. This has resulted in a greater degree of uncertainty in commercial transactions. Secondly, we do not have a structured approach for assessing whether there is a forcing of one product or two. Both problems have, by and large, not been discussed by commentators. My thesis considers alternative approaches with reference to other jurisdictions.

**Biography**
Justin Lipinski is a final year law student with a keen interest in competition law. When he is not writing his Honours thesis, Justin enjoys substantially lessening competition, engaging in cartel conduct and, on occasion, a little bit of resale price maintenance.

**Mavis Loke**  
**Supervisor: Dr Lisa Spagnolo**

**Fixed on Fixtures: Should Australia Include a Fixtures Provision in its PPSA?**
The new Personal Property Securities Act 2009 (Cth) (‘PPSA’) established a national law governing personal property security interests and introduced a single nationwide PPS Register where lenders can register their security interest in personal property and interested parties can search the Register to find information on security interests over certain personal property. Noticeably, security interests in fixtures are excluded from the ambit of the PPSA.

As this paper focuses mainly on security interests granted to the parties financing the purchase of articles before they are affixed to land (‘fixture financiers’) and the
ensuing priority disputes between them and various land interest holders, it seeks to show that the common law governing such priority disputes is complex and uncertain. Under the common law, fixture financiers are hardly able to protect their interest and are often at risk of losing their security interest in the fixtures. This paper will thus examine the fixtures provision under the Saskatchewan PPSA which deals with resolution of such priority disputes. It also seeks to consider the shortcomings of the Saskatchewan PPSA fixtures provision and then suggest ways to improve.

The paper closes by arguing that the Australian PPSA should include fixtures in the PPSA generally as well as adopt a fixtures provision similar to the Saskatchewan PPSA fixtures provision but with the suggested modifications. This is because doing so will not only simplify the law surrounding such priority disputes it will also clarify the priority between the parties thereby allowing fixture financiers to take steps to better protect their interests.

**Biography**

A final year BA/LLB student, Mavis will join Ashurst as a graduate at its Perth office next year. During her clerkship there, she developed an interest in the PPSA and was inspired to write her thesis on this area of law.

**Hui Ting Low**

**Supervisor: Dr Emmanuel Laryea**

**Privacy Issues with M-Commerce**

Electronic commerce (e-commerce) activity is growing exponentially, and it is revolutionizing the way businesses are run. There is now an explosion of mobile wireless services accessible via mobile devices. M-Commerce refers to the ability to conduct wireless commerce transactions using mobile applications in mobile devices. Although m-commerce creates new commercial opportunities, at the same time, it brings up many emerging issues in relation to the legal framework that surrounds them. One such issue is privacy, which stems from the unique characteristics and functionality of mobile devices. The availability of personal information, physical location and other contextual data are seen to be the most valuable unique characteristics of a mobile phone which allows organisations to target users with mobile-advertising (m-advertising). M-advertising is a common occurrence in Japan and United States. However, m-advertising is still in its infancy in Australia but is soon crawling its way into the Australian market. Despite the advantage of such marketing practices, there is a risk that they lead to an intrusion of privacy. Some users may not perceive advertising messages as useful but rather as spam and annoying. Is the Australia Privacy Laws sufficiently adequate to regulate the legal issues caused by m-commerce? Will it be sufficient for future m-advertising?

**Biography**

Hui Ting hails from Malaysia and is currently in her final year law school. She enjoys working with people and is sanguine by nature. Captured by the intricacies inherent in transactional matters such as restructuring of businesses, mergers and acquisitions, day to day contracts of a company from her previous work experiences, she hopes to one day be a successful commercial lawyer involved in mergers and acquisition.

**Hamish McAvaney**

**Supervisor: Ms Sharon Rodrick**

**Blogging on the Edge: Defining Journalism for the Purposes of Journalists’ Privilege**

A number of Australian jurisdictions have enacted or are in the process of enacting legislation which would presumptively confer on journalists an evidentiary privilege not to disclose the identity of their confidential sources. This raises the question of how a journalist should be defined for the purposes of journalists’ privilege, which has become increasingly problematic given the rise of bloggers and citizen journalists in the digital age. This thesis argues that a journalist should be defined as someone who is ‘engaged and active in the publication of news’, a definition which would capture both mainstream journalists and bloggers. The privilege conferred on journalists is merely presumptive, meaning that it can be rebutted by the courts where the public interest in the disclosure of the identity of the source outweighs the adverse impact of disclosure on the source and any other person and the public interest in the communication of facts and opinion to the public by the news media. The sensible exercise of this discretion should allay any potential concerns about the breadth of the definition. When exercising this discretion, the courts should ignore the platform on which the report is disseminated. Instead, it is argued that the process by which the journalist has attained and reported information from a confidential source should be the touchstone. This approach would best align with the underlying purpose of journalists’ privilege, namely, the free flow of information.

**Biography**

Hamish will finish the law component of his BA(French)/LLB in 2012. In 2013, Hamish hopes to finish his Arts degree in Mexico and travel in Latin America, before returning in to commence his career in the law in 2014.

**Colette Mintz**

**Supervisor: Ms Melissa Castan**

**Protecting Indigenous Australians: Evaluating Constitutional Safeguards Against Racial Discrimination**

In January 2012, the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander People presented its Final Report to the Prime Minister recommending a suite of reforms for the Australian Constitution to recognise and protect Indigenous Australians. This thesis explores the most contentious recommendation made by the Panel – the insertion of a clause into the Constitution that would protect Indigenous Australians from racial discrimination. The clause would prevent the government from discrimination on the ground of race, and would also allow affirmative action measures to ameliorate disadvantage. This thesis argues in favour of inserting this protection into the Australian Constitution and analyses two other jurisdictions to recommend the best drafting of the clause.

The thesis begins by describing the impetus for reform by explaining the present Constitution and its failure to protect Indigenous Australians. The bulk of the thesis then engages in comparative jurisdictional analysis to ascertain how to best draft this provision. It explores two common law jurisdictions, Canada and South Africa, and analyses the manner in which these jurisdictions have used constitutional reform to guarantee Indigenous people with a protection against racial discrimination. These jurisdictions are selected because they have both struggled to overcome the effects of colonialism. Moreover, Canada is a commonly cited comparator to Australia on constitutional and Indigenous matters, and South Africa has one of the most rights-oriented constitutions in the world. These jurisdictions are thus the most useful for the purpose of this thesis. Based upon the experiences in South Africa and Canada, a number of drafting techniques are recommended in this thesis. At the conclusion of the thesis, proposed drafting of the new clause is supplied to complement these recommendations.
Biography
Colette Mintz is a final year BA/LLB student. She will be commencing a graduate position at King & Wood Mallesons in February 2013. Colette’s interests include constitutional law and human rights.

Melissa Molloy
Supervisor: Dr Julie Debeljak

Federal Judicial Power Post-Momcilovic: The Reality and the Potential

In 2011, the High Court of Australia (‘HCA’) reviewed the first declaration of inconsistent interpretation made under human rights legislation in Momcilovic v The Queen. The HCA ruled that the declaration made by the Victorian Court of Appeal (‘VCA’) under s 36(2) of the Charter of Human Rights and Responsibilities Act 2006 (Vic) breached the constitutional limits of the federal jurisdiction in s 71 of the Constitution applicable to the VCA.

This thesis critiques the judgments in Momcilovic on s 36(2). It is argued that the four judgments of the HCA are too susceptible to individual judicial opinion in Momcilovic to guide future applications of s 36(2) or “judicial power”. This is indicative of the present disarray of s 71, in which courts are arguably applying the principles of s 71 in a “non-judicial” manner in concluding whether a function conferred on a federal court is “judicial”.

It is argued that a flexible functionalist meaning of “federal judicial power” would remedy this inherent contradiction present in the meaning of s 71 and incorporate recent experiences of the HCA when identifying constitutional meaning. This meaning would also be consistent with contemporary understandings of separation of powers in Australia.

Biography
Melissa is in her final year of a Bachelor of Arts (German Studies)/Bachelor of Laws degree. She was inspired to pursue her thesis topic as a result of her volunteering experiences in the community legal centre sector.

Ellie Mulholland

Supervisor: Dr Gerry Nagtzaam

One Hundred Years of Sequestration: Non-Permanence in the Carbon Farming Initiative

In 2011, the Australian government introduced the Carbon Farming Initiative (‘CFI’) as a voluntary scheme to tap into the abatement opportunities in the forestry and agriculture sectors and provide farmers and forestry managers with access to the growing opportunities in the domestic and international carbon markets. This paper focuses on sequestration projects under the CFI, where carbon is removed from the atmosphere and stored in trees and vegetation. The CFI issues permanent credits for sequestration, which can be used as offsets under Australia’s carbon emissions trading scheme. Under the CFI, sequestration is considered ‘permanent’ if it remains stored for 100 years. However, sequestration projects carry inherent risks of reversal, where the carbon is re-released into the atmosphere within the 100-year timeframe due to bushfire, drought, pests or arson. If this loss is not accounted for within the scheme, then sequestration offsets are being traded or have already been used to acquit liabilities that do not represent sequestered and stored carbon, compromising the environmental integrity of the system. This paper considers whether the CFI’s permanence mechanisms can adequately address the risk of non-permanence to justify the use of sequestration offsets as part of the scheme.

Biography
Ellie combines her law studies with an Arts degree, where she studies frivolous things like Philosophy and Spanish. She has a keen interest in climate change law and works in Energy and Resources as a paralegal at Allens.

Charles Noonan

Supervisor: Professor Jeffrey Goldsworthy

Court in the Act? Section 75(v), No-invalidity Clauses and the Rule of Law

Since its inception, s 75(v) of the Constitution has safeguarded the jurisdiction of the High Court to conduct judicial review of administrative action in accordance with the rule of law. However, Parliament is now seeking to indirectly evade this jurisdiction through the enactment of no-invalidity clauses. While a privative clause attempts to restrict the ability of a court to conduct judicial review for jurisdictional error, a no-invalidity clause provides that a failure to comply with a statutory requirement will not give rise to jurisdictional error or will not affect the validity of a decision. In removing the substantive basis upon which an administrative decision may be reviewed, a no-invalidity clause is not directly inconsistent with s 75(v); the court retains its ability to conduct judicial review and grant ‘mandamus or prohibition or an injunction’ pursuant to s 75(v). However, a no-invalidity clause may nevertheless ‘hollow out’ the scope and operation of s 75(v), leaving the constitutionally-entrenched jurisdiction of the High Court with ‘nothing on which to bite.’ It is for this reason that the no-invalidity clause is viewed as a serious threat to the rule of law in Australia. Through an examination of s 75(v) of the Constitution, this thesis will assess the constitutional validity of the no-invalidity clause and determine whether s 75(v) may prevent the legislature from evading judicial review in this manner.

Biography
Currently in his final year of a combined Bachelor of Arts/Bachelor of Laws degree, Charles will commence his traineeship at King & Wood Mallesons in February 2013. Charles enjoys fishing, video games and the fourth floor of the Law Library.

Anne Poulos

Supervisor: Associate Professor Paula Gerber

In the Best Interests of the Child: Same-Sex Marriage and the Convention on the Rights of the Child

Same-sex parented families are a feature of modern society in many parts of the world. The emergence of this demographic group challenges the traditional heteronormative conceptions of family, the institution of marriage and the legal frameworks within which children are raised. In particular, denying same-sex couples access to the institution of civil marriage may undermine the States protection of same-sex family members, including children, by perpetuating inequality and discrimination. In light of this, my thesis investigates the impact of this exclusion on the children of gay and lesbian parents and considers whether the Convention on the Rights of the Child might provide the impetus for the legal recognition of same-sex marriage. With a focus on the ‘best interests of the child’ principle contained in Article 3, it analyses the provisions of the Convention and considers whether they could be used to compel State Parties to legalise same-sex marriage.

It then examines the potential impacts of the new individual complaints mechanism, established under the Third Optional Protocol to the Convention, on the same-sex marriage debate. Though it may be some time before the Optional Protocol receives the 10 ratifications required for it to enter into force, once it does, children will be able to bring complaints before the Committee on the Rights of the Child. This poses the possibility that a child could bring a communication alleging a violation of the Convention on the basis that a State Party does not allow his or her same-sex parents to marry.
Patricia Saw
Supervisor: Dr Gerry Nagtzaam
Taxes and Trading Schemes: Will China Successfully Transition to a Low-Carbon Economy?
News that China will soon levy a national carbon tax hit the Western media in early 2012, lending further credence to China’s claims to be moving towards a low-carbon economy. This follows the development of a compulsory carbon emissions trading scheme in China, currently in the pilot-scheme stage, to be rolled-out nationally by 2015. Already the world’s largest carbon emitter, and with its emissions output growth rate continuing to soar, there is little doubt that China’s prompt action (or lack thereof) to curb its carbon emissions will largely determine whether or not, as an international community, we successfully avoid catastrophic climate change. It is for this reason that the efficacy of China’s planned emission reduction measures must be scrutinised, for it is imperative that any such measures result in substantial cuts in China’s emissions, rather than amounting to, as some commentators fear, a tokenistic gesture to cloak China’s rampant and irresponsible economic and emissions growth. The pertinent question therefore, is whether or not the emission reduction measures slated for implementation in China go far enough to fulfill China’s emissions reduction commitments. This paper seeks to answer this by analysing China’s emissions reduction obligations arising from international law and its domestic commitments, the development of emissions trading schemes and a carbon tax, their potential to cut China’s total emissions output, and whether they will go far enough to reduce global emissions. This paper concludes that while China’s ambition is laudable, several problems, including the fact that emissions reductions targets are relative rather than absolute, China’s lack of technical expertise and market depth, and likely reporting and verification inaccuracies, pose major hurdles to China – and the world – achieving meaningful emissions reductions to avoid dangerous climate change.

Biography
Patricia is a final year Arts/Law student. She is passionate about international environmental law and has completed part of her studies in China, including a one year course on a Chinese Government Scholarship in Nanjing, and a six-week intensive language course in Shanghai.

Sarah Spottiswood
Supervisor: Professor Jeffrey Waincymer
Deferring to Science: Investment Treaty Arbitration and Public Health
Challenges by global tobacco companies to Australian and Uruguayan tobacco plain packaging laws indicate an emerging trend in Bilateral Investment Treaty (“BIT”) arbitration: Evidentiary disputes about whether health regulations are legitimately supported by scientific determinations. It is problematic for arbitral tribunals to strictly review the correctness of scientific studies at the fact-finding stage of BIT arbitrations due to the nature of science and the multitude of complex policy considerations that comprise health regulations. This paper argues that BIT tribunals should not engage with whose science is ‘better’ because two conflicting studies may be equally plausible. Traditional legal fact-finding techniques simply cannot deal with this scientific pluralism. Instead, this paper advocates that rather than assessing the correctness of scientific determinations supporting health regulations, BIT tribunals should show limited deference to such studies at the fact-finding stage. Limited deference means that as long as a good faith study falls within the sphere of reasonable science, BIT tribunals should defer to it. Peer review, currency of data, qualifications, reliable scientific method and good faith may be instructive to determine whether State science is reasonable science. Limited deference draws on similar approaches taken by the World Trade Organization, North American Free Trade Agreement tribunals and the European Court of Justice when confronted by similar challenges. It is argued that the power of BIT tribunals to adopt a limited deference standard lies in the text of BITs, the inherent jurisdiction of tribunals and the public law subject matter of disputes. One concern with adopting a deferential standard towards State science is the potential for States to use science to disguise protectionism. However, deference to evidentiary conclusions of scientific evidence still allows for subsequent legal tests such as proportionality and improper purpose, which balance investor rights and state obligations, to identify protectionism.

Nita Rao
Supervisor: Dr Richard Joyce
Giller and the Future of Equitable Compensation
Breach of confidence is an equitable action, which protects against the unauthorised disclosure and use of personal information. Giller v Procopets and Doe v Australian Broadcasting Corporation Ltd are cases where the confidential information sought to be protected had no real commercial value but related to the dignity and privacy of the plaintiff. In this way, breach of confidence has become a stand-in action for privacy infringements. In Giller and Doe, the plaintiffs sought damages and/or equitable compensation for their loss, which was argued to be personal distress. Neave JA and Hampel J respectively, argued that equitable compensation is an appropriate remedy for a plaintiff whose loss is described as personal distress.

This thesis has three key aims. First, it will intend to critically analyse the different judicial opinions in Australia and the UK as to availability and extension of equitable compensation for breach of confidence actions, where the loss suffered is personal distress. Second, it will evaluate the merits of Neave JA’s argument that Lord Cairns’ Act damages can be extended to remedy purely equitable causes of action. Finally, it will discuss the implications of Lord Cairns’ Act damages being awarded for personal distress injuries caused by breaches of equitable obligations.

Biography
Nita Rao is a final year student, with a strong interest in equity and trusts. In 2011, she undertook a law exchange at Utrecht University, the Netherlands. In the future, she would like to pursue a career at the Bar.
Paul Tamburro
Supervisor: Associate Professor Greg Taylor
The Scope of the Federal Nationhood Power
Recent decades have seen the emergence of a new approach to the interpretation of s 61 of the Federal Constitution. A renewed focus on the text of the Constitution has given rise to a “nationhood power” derived from s 61 that gives the Commonwealth additional executive and incidental legislative powers based on its status as a national government. It gives the Commonwealth a capacity to “engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation”, and has been used to support stimulus payments in response to the global financial crisis, commemoration of the nation and the exclusion of aliens from entering Australia. However, the outer limits of the power are unclear and there is a risk that the power has expanded to an extent not clearly supported by the Constitution. Furthermore, the nationhood power may cause problems in relation to the rule of law and federal balance of powers. It is, therefore, necessary to consider ways in which the nationhood power can be limited in the future to avoid such problems.

Biography
Paul Tamburro is a final-year Bachelor of Laws and Arts (International Relations; Bahasa Indonesia) student. During her degree, Melody has undertaken study exchanges to Sweden and Indonesia and an internship at UNHCR Malaysia – experiences which have informed the direction of her thesis and her desired career in refugee advocacy.

Melody Stanford
Supervisor: Ms Azadeh Dastyari
Fair Game: A Theoretical Analysis of Australia’s Regional Engagement on Asylum Seekers
In light of the recognition that sharing of protective burdens is necessary to ensure the minimum level of protection required under the 1951 Refugees Convention is provided to the vast number of refugees worldwide, the concerning disjunction between Australia’s political rhetoric supporting burden sharing and its engagement in regional burden shifting calls for an inquiry into state decision making. This paper seeks to adapt the theoretical approach of game theory used by authors in various contexts to identify the inherent biases towards unilateral state action in refugee protection. In casting Australia’s international relations regarding refugees as a two-party, non-zero sum game, this paper draws on the analogy of a Prisoner’s Dilemma to identify the payoff structure of international negotiations, equipping international lawmakers with the tools to overcome biases against cooperation. In concord with conclusions reached regarding prospects for burden sharing in the European Union, it is argued that so long as deterrence underpins Australian asylum seeker policy – as has occurred during the Pacific Solution, the Malaysia ‘swap deal’ and policy changes pursuant to the recent Report of the Expert Panel on Asylum Seekers – the resultant inequality between states is an effective inhibitor to bona fide efforts to burden share in the Asia-Pacific.

Biography
Melody is a final-year Bachelor of Laws and Arts (International Relations; Bahasa Indonesia) student. She has developed her interest in international arbitration, through internships at the Hong Kong International Arbitration Centre, Mallesons Hong Kong and the Commonwealth Attorney General’s Department Office of International Law.
action against China. However, whatever the motivations for the criminal threshold argument, the US must have known that its argument fell embarrassingly short of the legal and evidential standards expected in any legal forum.

Ultimately, the DSB is not an appropriate forum to run unacceptable arguments for appeasing lobby groups. The DSB should be taken seriously as a dispute settlement body that follows legal process. Members approaching the DSB China should only pursue matters where they have reasonably arguable cases on the law with supporting evidence. The China case is thus an object lesson for future actions before the DSB. In conclusion, reforms may be required to provide procedures for excluding cases that have no proper legal or evidential basis.

Biography
After visiting China, Nikhi became interested in Chinese intellectual property enforcement. The China case provided insight into this fascinating area. The WTO setting of the China case allowed Nikhi to investigate the WTO, which she has encountered in international studies.

Priya Wakhlu
Supervisor: Dr Karen Wheelwright
Order of the Phoenix: The Corporations Amendment (Similar Names) Bill 2012

The phoenix company is an entity that has plagued the community and corporate regulators for many years. Manipulating principals of limited liability, the corporation will accumulate debts and then be declared insolvent, soon after this declaration a new company will rise like a phoenix from its ashes. This entity will conduct the same business, often utilising the same assets, employees and run by same or related directors. In a bid to prevent phoenix operators, the Federal Government is intending to introduce the Corporations Act (Similar Names Amendment). The amending provision imposes liability on directors who use a same or similar name to the company’s liquidated predecessor. This thesis seeks to examine the merits of the proposed Bill and also conducts a broader analysis of existing measures that challenge phoenix behaviour.

Biography
Priya Wakhlu is a 5th year Arts/Law student who majored in Indonesian and Politics.

Claire Wesson
Supervisor: Associate Professor Pamela O’Connor
The Post-GFC Regulatory Framework: Will it Decrease the Incidence of Fraudulent Mortgages?

This presentation examines the issue of identity fraud within mortgage transactions. In light of the changing economic landscape following the Global Financial Crisis a number of regulatory schemes were introduced, such as the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) and the regulation of mortgage brokers, in order to ensure that Australia had a robust financial system. These regulatory measures, although introduced to correct problems within the financial landscape as a whole, can be expected to have an incidental effect of reducing the incidence of certain types of identity fraud in mortgage transactions. However, given the ability of fraudsters to adapt to changing circumstances and the inadequate incentives provided by the regulatory scheme for mortgagees to increase their identity checking procedures, it will be argued that the most effective measure will be that which aligns mortgagees’ incentives with fraud prevention, by denying mortgagees the benefit of an indefeasible mortgage. Such a legislative model has been introduced in Queensland and New South Wales and it is argued that other jurisdictions should follow suit in order to effectively reduce the occurrence of identity fraud in mortgage transactions.

Biography
Claire is a final year Bachelor of Arts (Politics and History)/Bachelor of Laws student who will join Clayton Utz as a graduate in 2013. Claire enjoys travelling and will be embarking on one final trip to the Middle East and Europe at the end of the year before beginning full-time work.

Amy Yeap
Supervisor: Dr Janice Richardson
Family and Flexibility Under the Fair Work Act: Suitable for Ages 0 and Up?

This thesis analyses recent Australian reforms to the Fair Work Act 2009 (Cth) that aim to promote gender equality in the workplace and work life balance. The right to request flexible working arrangements and discrimination on the grounds of family and carer’s responsibilities are examined. The Fair Work Act 2009 (Cth) is compared with similar provisions in United Kingdom and Australian employment and anti-discrimination law. This legislation, and case law on it, are used to determine how the courts and tribunals may interpret the Fair Work Act 2009 (Cth) provisions and the sorts of employees that are likely to benefit from them. Following this, the efficacy of the provisions is evaluated. It is argued that although the legislation has several advantages, its effectiveness could be improved. Therefore, options for reform are also considered.

Biography
Amy is a final year Arts (Communications)/Law student who enjoys playing the piano, reading and watching legal television shows in her spare time. Next year she will start work as a graduate at a commercial law firm in Melbourne.
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