



THE UNIVERSITY OF
MELBOURNE

Melbourne Obligations Group
Melbourne Law School

Obligations Group Annual Report 2019



About the Obligations Group

The Obligations Group at Melbourne Law School supports research on the law of contract, torts, unjust enrichment, equity and trusts, remedies and private law theory. The Group provides a forum for discussion of these topics and interaction between academics, legal practitioners and students on issues of current interest.

People

Professor Elise Bant and Professor Andrew Robertson were the joint convenors of the Obligations Group in 2019. The members and associates of the Obligations Group in 2019 were as follows:

Members

- ▶ Professor Katy Barnett
- ▶ Professor Emeritus Michael Bryan
- ▶ Professor Eric Descheemaeker
- ▶ Mr Liam Elphick
- ▶ Professor Matthew Harding
- ▶ Mr Wayne Jovic
- ▶ Associate Professor Rosemary Langford
- ▶ Dr Ying Liew
- ▶ Professor Jeannie Paterson
- ▶ Professor Jason Varuhas

Associates

- ▶ Professor Graeme Austin
- ▶ Dr Matthew Bell
- ▶ Associate Professor Alysia Blackham
- ▶ Mr Arlen Duke
- ▶ Associate Professor Andrew Godwin
- ▶ Dr Linda Haller
- ▶ Professor Ian Malkin
- ▶ Dr Wendy Ng
- ▶ Professor Ian Ramsay
- ▶ Associate Professor Lisa Sarmas
- ▶ Dr Julian Sempill

Graduate Research Students

MLS Research Higher Degree students affiliated with the Obligations Group in 2019 included Tobias Barkley, Liam Elphick, Robyn Honey, Nicola Howell and Vivi Tan.

Visitors

In 2019 the Obligations Group hosted a number of international scholars working in the field, including:

- ▶ **Professor David McLaughlan**, Victoria University of Wellington, New Zealand (January)
- ▶ **Professor Ken Simons**, University of California, USA (March)
- ▶ **Dr Wayne Courtney**, National University of Singapore, Singapore (May)
- ▶ **Professor Robert Chambers**, Thompson Rivers University, Canada (June)
- ▶ **Professor Ben McFarlane**, University College London, United Kingdom (July)
- ▶ **Professor Paul Davies**, University College London, United Kingdom (July)
- ▶ **Professor William Swadling**, Oxford University, United Kingdom (August)
- ▶ **Dr Denise Wiedemann**, Max Planck Institute for Comparative and International Private Law, Hamburg, Germany (August)
- ▶ **Dr Derek Whayman**, Newcastle University, United Kingdom (September)
- ▶ **Mr Marcus Roberts**, University of Auckland, New Zealand (November)

Research and Teaching

Obligations Group members teach in the areas of Consumer Law, Contract Law, Equity and Trusts, Private Law Theory, Property, Remedies, Tort and Unjust Enrichment and Restitution.

Members produce a substantial number and range of publications each year in these fields. Members also draw on their research to contribute to public debate on topical issues.

Engagement Activities and Events

In 2019, the Obligations Group continued to host lunchtime seminars, evening lectures, workshops and conferences, and also introduced a regular reading group meeting. The major events hosted in 2019 were as follows:

31 Jan **The Minimum Performance Rule in Contract Damages**

Lunchtime Seminar presented by **Professor David McLauchlan**, Victoria University of Wellington, New Zealand

In this seminar David McLauchlan discussed the long-standing rule concerning the assessment of damages for breach of contract that, where the contract allows for alternative methods of performance by the promisor, damages are to be calculated by reference to the minimum level of performance provided for in the terms of the contract. It was argued that the rule is inconsistent with the compensatory principle and that, since it has been undermined by various qualifications or exceptions that severely curtail its operation, it would improve the coherence of the law of damages if it were abandoned.

7 Feb **The Financial Services Royal Commission Final Report: Key Legal and Regulatory Issues**

Evening Lecture presented by **Professor Jeannie Paterson, Professor Elise Bant and Associate Professor Andrew Godwin**, Melbourne Law School

The panel, which was chaired by Professor Jeannie Paterson and included Professor Elise Bant and Associate Professor Andrew Godwin as the discussants, examined key legal and regulatory issues arising out of the Final Report of the Financial Services Royal Commission.

6 Mar **The Hegemony of the Reasonable Person in Anglo-American Tort Law**

Lunchtime Seminar presented by **Professor Ken Simons**, University of California, USA

Since the middle of the twentieth century, tort law has increasingly employed the rubric of the reasonable person in a variety of doctrinal domains. Many jurisdictions have rejected a differentiation of landowner duties according to the status of the entrant as trespasser, licensee, or invitee, and substituted a “reasonable person” test. Assumption of risk has been eliminated or greatly narrowed in favor of comparative fault, which asks simply whether the plaintiff failed to act as a reasonable person. The reasonable person plays a significant role even in intentional torts: apparent consent precludes liability when the defendant reasonably (though mistakenly) believes that plaintiff consented; putative self-defense precludes liability when the defendant reasonably (though mistakenly) believes facts that would establish that privilege; and offensive battery requires that the contact be offensive to a “reasonable” sense of dignity. What explains this widespread use of “reasonable person” tests? Judicial sympathy for tort victims? A desire for simplicity? The normative appeal of such a fault standard? A concern to empower juries? Lazy thinking? Is the hegemony of the reasonable person a welcome or unwelcome development?

21 Mar Purposive Contractual Interpretation

Evening Lecture presented by **Professor Andrew Robertson**, Melbourne Law School

It is now well recognised that contractual purposes play an important role in the construction of contracts. The role of contractual purposes in interpretation and implication, and the ways in which they are taken into account have not, however, been systematically explored. This lecture considered three central issues in the purposive construction of contracts: first, the reasons contractual purposes are relevant to the interpretation of express terms and the identification of implied terms; secondly, the way in which contractual purposes are identified and distinguished from individual party interests; and, thirdly, the different ways in which contractual purposes inform the processes of interpretation and implication. It was argued that contractual purposes can both raise and resolve interpretive choices, and that purposive construction plays a significant and under-recognised role in the identification of implied terms.

2 May Book Launch: *Company Directors' Duties and Conflicts of Interest*

The Obligations Group and the Centre for Corporate Law of Melbourne Law School jointly celebrated the launch by **Justice Michelle Gordon AC** of **Dr Rosemary Teele Langford's** book - *Company Directors' Duties and Conflicts of Interest*.

Company Directors' Duties and Conflicts of Interest provides a detailed analysis on directors' duties arising under UK case law, codes and statutory regulation, with extensive reference to the law in Australia, Canada, Hong Kong and New Zealand.

The book provides comprehensive analysis of the conflicts faced by directors, including conflicts of duties, unauthorised profits, corporate opportunities, multiple directorships, nominee directorships, and conflicts involving stakeholders' interests. The author subjects difficult aspects of these topics to rigorous and original analysis informed by a range of common law jurisdictions.

This extensive, multi-jurisdictional examination presents solutions to complex legal issues that have, to date, confounded courts and commentators alike and enables clarification of existing legal approaches. This is both a key reference work set in a practical legal context and an exhaustive and original theoretical re-assessment of this important and dynamic area of company law.

16 May Contractual Discretion

Evening Lecture presented by **Professor Jason Varuhas**, Melbourne Law School

Contracts often confer discretionary powers on one party to the contract which, when exercised, may affect not only their own interests but also those of the other party or parties. Increasingly courts in Australia and England are implying terms to regulate such contractual discretions in a diverse range of contractual contexts including employment and commercial contracts, and in doing so have drawn on principles derived from administrative law such as *Wednesbury* unreasonableness. This lecture presented an analysis of the emerging case law, considering the substance of the terms implied and how the courts have applied these terms in practice, identifying factors which render it more likely that a court will find breach. The lecture also considered several outstanding questions including how the content of such terms may develop over time given an increased judicial willingness to draw on administrative law principles; whether such terms are implied in law or fact; and the remedial consequences of breach of such terms, focusing on damages and voidness.

23 May Offers to Mitigate

Lunchtime Seminar presented by **Dr Wayne Courtney**, National University of Singapore, Singapore

After a tort or breach of contract has occurred, the wrongdoer (or, occasionally, the victim) may propose a course of action that will eliminate or ameliorate the harm flowing from the wrong. The avoidable loss rule is routinely applied to assess the victim's decision to reject, or to decline to make, such an offer. If the victim acted unreasonably, its damages are assessed on the counterfactual basis that it acted reasonably and did accept, or make, the offer.

Controversy has emerged over how this principle applies to a surprisingly simple situation. Suppose that the victim has suffered damage as a result of the breach of contract or tort, and that the damage can be eliminated by the wrongdoer if it is permitted to intervene. The wrongdoer offers to do this at no charge to the victim. Nonetheless, the victim prefers to pay for the services of a third party. Assume also that its choice to do so was unreasonable. What, then, can the victim recover? Two different answers emerge. One is that the victim receives nothing, because it would not have incurred that loss if it had allowed the wrongdoer to act. The other answer is that the victim can recover compensation, limited to what it would have cost the wrongdoer to carry out its offer.

The seminar argued that both answers may be right.

6 Jun Trusts and the Statute of Frauds

Lunchtime presented by **Professor Robert Chambers**, Thompson Rivers University, Canada

The Statute of Frauds 1677 and its successors around the common law world dictate the formalities required to create contracts and trusts relating to interests in land. It is well understood that non-compliance with the statute makes a land contract unenforceable and it is commonly assumed that the same is true for trusts of land. However, non-compliance makes a trust unprovable. It does not exist and can have no legal significance. Nevertheless, an informal declaration of trust is a fact that can be used for purposes other than proving the existence of an express trust. It is also commonly assumed that the writing requirements for trusts of land are almost meaningless because of the judicial exception that prevents someone from relying on the statute to fraudulently deny the existence of the trust. While it is fraud to deny the trust after agreeing to be a trustee or receiving the land with knowledge or suspicion that the transaction is in breach of trust, it cannot be fraud to do so if the land was acquired honestly without knowledge of the trust. The honest recipient should be entitled to the protection provided by the statute.

10 Jul Unconscionable conduct and the 'bookup' system of credit provided to the Indigenous community in the remote APY lands in South Australia: *ASIC v Kobelt*

Evening Lecture co-hosted with the **Centre for Corporate Law**

Speakers: **Mr Nathan Boyle** (CEO, Icon), **Mr Gerard Brody** (CEO, Consumer Action Law Centre), **Dr Michelle Sharpe** (Barrister, Victorian Bar) and **Professor Jeannie Paterson** and **Professor Ian Ramsay** (Melbourne Law School)

In the decision of *ASIC v Kobelt* [2019] HCA 18, the High Court held that an informal, expensive and largely undocumented credit scheme known as 'book-up' provided by Mr Kobelt to the indigenous residents of the remote South Australian APY Lands, the Anangu people, was not unconscionable under the *ASIC Act*. The expert panel of speakers considered the decision and its legal and policy consequences.

22 Jul Justifying Primary Liabilities

Lunchtime Seminar presented by **Professor Ben McFarlane**, University College London, United Kingdom

The idea explored in this seminar was that if a particular claim takes the form of asserting a primary liability against a defendant (ie, a liability not arising from the commission of a wrong), rather than the form of asserting a pre-existing duty, then the justifications given for such a claim may be of a distinct and different kind, so that it may be an error, when considering such primary liabilities, to expect them to have the same sort of justification as a claim to assert a primary duty. This idea was explored chiefly in the context of equitable estoppel and unjust enrichment: two areas where there are ongoing and complex debates, in each of English and Australian law, as to the justification of the claim.

25 Jul Bad Bargains

Evening Lecture presented by **Professor Paul Davies**, University College London, United Kingdom

It is often said that the courts will not save parties from bad bargains: as Lord Nottingham observed, even “the Chancery mends no man’s bargain”. Courts should be reluctant to develop the law in a way which would allow sophisticated commercial actors to escape (bad) bargains. However, little attention has been given as to what is meant by a “bad bargain”, or why that might be significant. This lecture analysed how parties seek to escape from different types of bad bargain. This analysis was particularly timely since in the current economic climate a number of long-term contracts have become especially disadvantageous to one party, and one consequence of Brexit is likely to be an increase in instances where one party tries to escape a bad bargain. Sympathy for the party which finds itself subject to a bad bargain has led to pressure on courts to find that an agreement is not binding; to expand the scope of the vitiating factors; to liberalise the principles of interpretation and rectification; and to revisit the difficult divide between contract, tort and unjust enrichment when awarding remedies. It was argued that courts should not readily bow to these pressures.

8 Aug Illegality: Pleading, Proof and Presumptions

Lunchtime Seminar presented by **Professor William Swadling**, Oxford University, United Kingdom

Until the decision of the United Kingdom Supreme Court in *Patel v Mirza*, an exception to the defence of illegality to claims in private law arose where a claimant could by their pleadings make out the elements of their cause of action without having to rely on their own illegal conduct. The leading case was *Bowmakers Ltd v Barnet Instruments Ltd*, a common law claim in tort for the conversion of goods. However, this non-reliance exception was rejected in *Patel v Mirza* because it was seen to operate in an arbitrary fashion and *Bowmakers* was accordingly overruled. In its place was substituted a ‘range of factors’ approach. The seminar argued that the arbitrariness of the *Bowmakers* rule came not from anything in the case itself, but from the rule laid down in *Gascoigne v Gascoigne* and *Chettiar v Chettiar*, one interpreted by the majority of the House of Lords in *Tinsley v Milligan* as concerned with the admission of evidence in equity, and which was wrongly assimilated to the common law *Bowmakers* non-reliance rule. The argument which will be made is that while the Supreme Court was right in *Patel v Mirza* to overrule *Tinsley v Milligan*, the *Bowmakers* rule is not subject to same objection of arbitrariness and should not have been tarred with the same brush. The seminar did not purport to argue in favour of the *Bowmakers* non-reliance rule; its purpose was merely to remove one unjustified criticism.

8 Aug **Should the Courts be Pragmatic when Deciding Commercial Contract Cases? A Study of Practical Benefit**

Lunchtime Seminar presented by **Dr Mark Giancaspro**, The University of Adelaide, South Australia

Williams v Roffey Bros & Nicholls (Contractors) Ltd [1991] 1 QB 1 is one of the most controversial decisions in the modern history of Anglo-Australian contract law. It was a commercial contract case, the outcome of which was commercially sensible and morally just, though the means employed by the English Court of Appeal to reach that outcome was dubious. The court's reasoning reflects its attempt to avoid the controlling influence of precedent where this would have resulted in an objectively unfair and irrational consequence for the plaintiff. Using this case as an exemplar, the seminar queried whether the courts should be so pragmatic when deciding commercial contract cases. It was argued that, while a pragmatic approach may be prone to misuse and inconsistency and potentially cause as many problems as it resolves, it was still desirable for its capacity to temper the stout rigor of precedent and conform with the expectations of commercial parties.

28 Aug **Freedom of Contract or Denial of Justice: Consumer Arbitration in the EU and Australia**

Evening Lecture presented by **Professor Richard Garnett**, Melbourne Law School, and **Dr Denise Wiedemann**, Max Planck Institute for Comparative and International Private Law, Hamburg, Germany

United States companies commonly include arbitration clauses in their standard form contracts with consumers. Recently, also European companies such as Uber and Spotify have introduced arbitration clauses in their dealings with customers and some European authors argue that the law should recognise and enforce these clauses. The seminar outlines the European Union's guidelines on consumer arbitration and questions the desirability of replacing courts by private tribunals in disputes between businesses and consumers. Comparative reference will also be made to how Australian law treats arbitration clauses in consumer contracts.

19-20 Sep **Misleading Silence Colloquium**

Two day forum involving presentations by 22 speakers from Australia, Singapore, England, Scotland and the USA on the following topics:

- ▶ Critical pressure points in the regulation of silence in misleading conduct
 - ▶ Misleading silence under the Australian consumer law: Perspectives from linguistics
 - ▶ Historical perspectives on silence and deception in private law
 - ▶ The norm against misleading conduct and implications for the regulation of misleading silence
 - ▶ Silence and group litigation (statute and fiduciary obligations)
 - ▶ Silence and good faith
 - ▶ Misleading silence in mistake
 - ▶ Statutory regulation of misleading silence
 - ▶ Misleading silence as the basis for insider trading liability under the US federal securities laws
 - ▶ Misleading silence in vitiated consent transactions
 - ▶ Misleading silence and deceit
 - ▶ Misleading silence in unjust enrichment
 - ▶ Core issues in the regulation of misleading silence in corporate law and commercial law.
-

26 Sep The Transformation of Equitable Tracing

Lunchtime Seminar presented by **Dr Derek Whayman**, Newcastle University, United Kingdom

Trust and fiduciary law describes and justifies tracing better than seeing it as a process supporting a property claim absent aspects of obligation. It permits an effective scheme of separating the remedies of priority over creditors and taking any increase in value. This split is impossible if the claim is seen as one of property. This seminar examines how property view came to be and why it could fall out of favour.

The law of tracing grew alongside trust and fiduciary law and both were bound together in their formative years. As trust and fiduciary law were settled into strict rules, equitable interests came to be seen as a right or property, since their protections were broadly the same. Accordingly, tracing came to be seen as based in property too. This view of tracing is nowadays the conventional wisdom in England: *Foskett v McKeown* [2001] 1 AC 102 (HL); and perhaps this is true of Australia too: *Evans v European Bank Ltd* [2004] NSWCA 82.

This was a process of 'lumping' different facets of trust and fiduciary obligations law ill-defined but harsh 'trustees' duties' in the nineteenth century. By the 1990s, however, trust and fiduciary law was splitting: in England see *Bristol & West BS v Mothew* [1998] Ch 1 (CA); and in Australia see *Breen v Williams* (1996) 186 CLR 71 (HCA). It became more sophisticated and its obligations better defined and less beneficiary-sided.

Consequently, modern trust and fiduciary law is a better fit for tracing and yields fairer, more balanced, outcomes than the Foskett property model. Moreover, some new case law supports this proposition. The rules cohere around a central idea. The idea has changed from strict beneficiary-sided rules to more balanced ones. The rules once cohered around the old idea, and are now changing in order to cohere around the new one. This is happening to tracing as it is to fiduciary law in general.

This seminar's doctrinal aspect demonstrated how some of the questions from the first principles analyses of proprietary remedies in, eg, *Bant & Bryan* (2016) 6 J Eq 181 can be answered in the context of trust law. Its coherence argument assisted those wishing to counter the criticism in the literature that the new cases lack precedent and stray too far into obiter dicta discussing general principles. On the contrary, this is necessary given the shift in the central idea.

7 Nov Contractual Interpretation in English and French Law

Evening Lecture presented by **Associate Professor Solène Rowan**, Australian National University

Contract interpretation is at the core of commercial litigation in England. Yet there has been relatively little comparative analysis on this topic. This is surprising given the practical significance of interpretation and that it has dominated judicial debate over the last 30 years. The lecture analysed in a comparative light some problematic aspects of contractual interpretation in England and France. It explored the notable theoretical and practical differences, as well as contrasting policy choices, in the two systems. Comparison with France was particularly topical because the French Civil Code on contract law has recently been through a major reform.

28 Nov **Obligations Group Seminar with Marcus Roberts: Doing away with the case method: What could go wrong?**

Lunchtime Seminar presented by **Mr Marcus Roberts**, University of Auckland, New Zealand

In recent years there has been much discussion about the use and abuse of the 'casebook' method of teaching contract law. It has been alleged that the casebook method is out-of-touch with legal practice and that contract law teaching should be more skills-centred, problem-based and technologically savvy. The lecture argued that while there was merit to much of this discussion, that caution should be taken on a wholesale abandonment of the casebook method and a number of benefits to teaching via the in-depth study of cases may be lost. While the casebook method can always be improved, it is still a teaching method that has utility for contract law students of the twenty-first century.

4 Dec **Australia-New Zealand Consumer Law Roundtable**

Full day forum presented by 14 speakers and attended by over 40 registered attendees from across Australia and New Zealand. The roundtable was convened by **Professor Elise Bant** and **Professor Jeannie Paterson**, Melbourne Law School, and presentations were made on the following topics:

- ▶ Online payday lenders: Trusted friends or debt traps
 - ▶ Robo-debt 'consumers': Is Centrelink a model debt collector?
 - ▶ Addressing irresponsible lending in the New Zealand consumer credit market
 - ▶ Regulators, enforcement and lessons from the Banking Royal Commission
 - ▶ Section 67: Conflict of laws, consumer protection and mandatory rules
 - ▶ (Mis)Informed consent: Privacy, unfair contracts and unconscionable conduct
 - ▶ The unfair contract terms directive and pre-formulated declarations of data subject consent
 - ▶ Buying your genetic self online – consumer contracts and personal genomics
 - ▶ Hungry for change: The law and policy of food health labeling
 - ▶ The legal framework affecting restrictive practices in Australian residential aged care – a lack of fitness for purpose
 - ▶ Pre-disclosure for home insurance contracts
 - ▶ Unfair exception fees: where are we now?
-

5-6 Dec Annual Obligations Group Conference – Contracts

The 2019 Obligations Group Annual Conference involved 27 speakers and more than 50 registered attendees from across Australia, Japan, New Zealand, Singapore and the United Kingdom.

The two day conference was convened by **Professor Elise Bant** and **Professor Jeannie Paterson**, Melbourne Law School.

The aims of the Conference were to provide academics with an informal and supportive environment in which to present work in progress, and to facilitate a collegial discussion of issues related to teaching and publishing in this challenging field. Early and mid-career academics were encouraged to present on the contractual aspects of their work. Speakers presented on the following topics:

- ▶ **Interpretation**
 - Contractual interpretation in England and France
 - The cognition of contract interpretation
 - Contract formation, incompleteness and implied terms
- ▶ **Contract Terms**
 - “Hardening” soft law? Sustainability contract clauses and third party beneficiaries
 - Shedding light on terms implied by trade usage?
 - Implied negative stipulations: Unpacking an oxymoron?
- ▶ **Commercial Clauses**
 - Advance consent in the law of novation
 - What is a contractual indemnity? *Globe Church Incorporated v Allianz Australia Insurance Ltd* [2019] NSWCA 27
- ▶ **Estoppel**
 - The thread of promissory estoppel
 - Equitable estoppel in New Zealand: Where are the limits?
- ▶ **Understanding Contracts**
 - The protean law of contract
 - High Court of Australia decision in *Mann v Paterson*
 - Comparing contract law reforms in Japan: Glass half full or half empty?
- ▶ **Property and Contracts**
 - The benefits of contractual obligations as property rights
 - Property, therefore: Is an equitable jurisdiction to grant relief against the forfeiture of contractual rights justifiable?
- ▶ **Unconscionable Conduct**
 - Unconscionable, unjust and unfair conduct in contracting: Designing effective law reform
 - Unconscionable systems of conduct: proofs and standards
 - Tackling economic forms of domestic violence with the doctrine of undue influence
- ▶ **Impact of Technology**
 - Are online agreements readable?
 - Algorithmic contracts and the equitable doctrine of undue influence: Adapting old rules to a new legal landscape
 - The hidden impact of the internet on contract law
- ▶ **Public/Private**
 - Judicial review for breach of contract? The vexed question of the preferable approach to disputes concerning decisions by clubs and incorporated societies
 - Consumers in financial hardship: Exploring how the law and soft law responds to consumers who breach their payment obligations in a consumer credit contract



Melbourne Obligations Group, Melbourne Law School
law-obligations@unimelb.edu.au