

BOOK REVIEW

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HS Grow and AF Armstrong (eds) *Governance and Law: Contemporary Views* (Governance Research Program, Victoria University, 2020) – 230pp plus xvii including index.

This publication collects papers from two international conferences held in the Colleges of Business and Law & Justice in 2015 and 2016. The research included in it reflects the continuing influence of the Centre for International Corporate Governance Research ('CICGR'), which existed at Victoria University from 2002 to 2009, on research in law and business in the university. It also reflects the challenges research in these disciplines have faced in Australia in the last two decades. Its publication at the end of 2020 marked the 20th anniversary of the establishment of Victoria Law School ('VLS') in the then renamed Faculty of Business and Law in 2000, with the first classes for its own degree programs starting in 2001. It reveals the success of the school and its members in being able to sustain research and research collaborations over two decades.

The book is broken into nine parts. These include the keynote addresses and eight parts which show the diversity and interdisciplinarity of contemporary governance and also legal research. There are five parts on governance and the public sector, the corporate sector, the law, small business, sport and three on ethics, corruption and human rights; leadership, corporate governance and boards; and corporate social responsibility and sustainability. An extensive introduction precedes these and summarises the contents of each of the parts. It is a very helpful guide to the extensive research covered. A limitation of the book is that most of the papers, apart from the keynotes, have only abstracts. A number indicate links to full copies of the papers.

Of particular significance for legal scholars is part 5 which deals with governance and law. It includes two papers by John Farrar, the distinguished academic lawyer who has made significant contributions to corporate policy making in Australia, the United Kingdom and New Zealand. He examines the uncertain law on what duties shareholders owe to the company and its other shareholders. This is a significant question in Australia and its pattern of controlling shareholders. They

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can have significant consequences for other shareholders and communities as the shareholdings of James Packer in Crown Resorts through CPH Crown Holdings have shown in the report of the recent inquiry under the *Casino Control Act 1992* (NSW).¹ The same report also shows the continuing topicality of the second paper, the role of independent directors, and that continuing to believe in them may be as useful as believing in the mythical Hercules. The paper in the same section by Sheng Xuan Guo from Northwest University of Political Science and Law, Xian discusses the lack of legal principles for intervening in the internal governance of companies in the law of the People's Republic of China but as the Crown Holdings report reveals there appear to be also significant limits on those used in Australian law.

Law also turns up as central themes in many other papers. Its presence is strong in the part on governance and the public sector. In its international form it appears in Charles Sampford's research. Sampford discusses the problem in the post-Westphalian world of the loss of power of states and their ability to deal with health issues including pandemics and the transition of this government by states to governance integrity systems controlling cross border health impacts. Michael Longo returns to government and governance issues in the context of the European Union in two papers in this part. In the context of Australia, Ian Killey considers the claims that the police are independent of their minister based on beliefs around Sir Robert Peel's model for the London Metropolitan Police. He shows that it is inconsistent with Peel's ideas and also ministerial accountability to parliament under the principles of responsible government. In the same area of law enforcement and protection of the community Ian Rix considers the extent to which the Australian Security Intelligence Organisation's internal governance is similar to that of other public sector bodies and whether it ought to be. Chris Brien returns to the source of company law, equity, the law administered in the Court of Chancery and also one of the challenges in a legal form stretched over so many activities, statutory interpretation. Law is also a major theme in Thomas Clarke's paper in the part on governance and the corporate sector. It addresses the issue of the financialisation of companies, the short termism this promotes and its role as one of the causes of the global financial crisis ('GFC').

Some of the papers are perhaps more dated than others. The keynote of the then Minister for Resources, Energy and Northern Australia, the Hon Josh Frydenberg MP, is a reminder of the brief life of ministerial speeches and also the short existence of ministers in portfolios and of the combinations of activities in those portfolios since the 1950s. Frydenberg is mindful of the consequences for climate change of

1 Patricia Bergin, *Inquiry under Section 143 of the Casino Control Act 1992* (NSW) (Report, February 2021).

the massive oil, coal and gas projects and associated infrastructure involved and the need to balance economic development with sustainability. The economic pressure to change and the adaptation of the sector to renewable sources has come more quickly than the paper anticipates. The governance body, the North Australian Strategic Partnership made up of the prime minister and the premiers of Queensland and Western Australia and the chief minister of the Northern Territory continues. Recent additions to the activities it oversees have been Northern Australia Indigenous Development accord. Its associated Cooperative Research Centre for Developing Northern Australia now has programs for traditional owner-led development research.²

The part on governance in sport is particularly significant, partly because of its parochial – even by Melbourne standards – tendency to identify Australian football ('AFL') as the only sport. But mainly because the increasing commodification and financialisation of sport makes it a current example of the disruption to older norms and existing laws. The articles provide evidence of points of tension in this transition brought about by winning and its pressures and rewards. In two papers in this part Matt Harvey covers the legal failures of the AFL to properly deal with the issues raised – perhaps an example of how powerful institutions ignore that they are bound both by civil and criminal law – and also the breaches of underlying norms in drug experiments with human subjects. In a second paper he follows the regulatory and legal trail through the AFL, the Australian Sports Anti-Doping Authority and the Court of Arbitration for Sport to the Swiss Federal Tribunal. Drawing on his experience as President of the Footscray Football Club, Peter Gordon reflects on the club's development of a zero-tolerance approach to racism. This is of continuing relevance as the recent report on the systemic racism at Collingwood Football Club.³ No paper reflects on the economic and political power of AFL club board members in the network of connections in Australia's major companies and political parties, again revealed in the Victorian premier's support for the former president of the Collingwood Football Club.⁴

2 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 October 2020, 8580 (Keith Pitt, Minister for Resources, Water and Northern Australia).

3 Emma Kemp and Lorena Allam, 'Collingwood Establishes Anti-Racism Group Following Resignation of Eddie McGuire', *The Guardian* (online, 17 February 2021) <<https://www.theguardian.com/sport/2021/feb/17/collingwood-establishes-anti-racism-group-following-resignation-of-eddie-mcguire>>; Larissa Behrendt and Lindon Coombes, 'We Were Told 'Go Your Hardest' Examining Racism at Collingwood. Here's What We Found', *The Guardian* (online, 18 February 2021) <<https://www.theguardian.com/commentisfree/2021/feb/18/we-were-told-go-your-hardest-examining-racism-at-collingwood-heres-what-we-found>>.

4 Claire Saracusa and Kate Lahey, 'Running From Challenges is Not Leadership': Andrews Says McGuire Should Not Step Down Immediately', *The Age* (online, 2 February 2021) <<https://www.theage.com.au/sport/afl/running-from-challenges-is-not-leadership-andrews-says-mcguire-should-not-step-down-immediately-20210202-p56ypf.html>>.

The publication reflects the continuation of the activities of CICGR in 2002 a decade after its winding up. Its establishment was driven by the new dean of the new Faculty of Business and Law, Professor Roman Tomasic and Professor Anona Armstrong. It developed considerable momentum quickly. Partly because it incorporated ongoing research activities such as those represented by the units which supported its foundation: Business Ethics, Small Business and Electronic Commerce. In respect of the last the collection being reviewed includes two papers on the context and processes for online dispute resolution by Fatimeh Abedi, John Zeleznikow and Chris Brien. The law school and its associated Comparative Commercial Law Research Unit represented a new field. It rapidly developed relationships with other law schools in the region, including the International Islamic University Malaysia in Kuala Lumpur and the University of Political Science and Law in Beijing. It was the home of two journals: the *Australian Journal of Corporate Law* published by LexisNexis and the *Journal of Law and Governance* (formerly the *Journal of Business Systems, Governance and Ethics*).

The introduction to the book notes that the impetus for the Governance Research Program was the corporate collapses of Enron and WorldCom in the United States ('US') and HIH insurance, OneTel and Ansett in Australia in the GFC, but these occurred in 2001 and 2002 as the dot-com bubble burst. CICGR was wound up by the time of the GFC in 2008, which left Australian companies less affected than those in other advanced economies because of the small size of its financial sector and lack of complex financial products. As the preface observes, the 2019 report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry showed the significant lapses in ethical behaviour. However, it indicates the short memory and attention span which appears to mark governance and regulation of large companies by the Treasurer.

The research included fits with the original objectives of CICGR. These included improving corporate governance in Australia and East Asia including research and research training. A number of the papers indicate the continuing Australian and Asian focus with authors from a number of Asian jurisdictions. Several are by research graduates in law and business. The proposed strength of CICGR was claimed to lie in its combination of disciplines and multidisciplinary approach: law, management, political science, economics, information technology and psychology.

The history of the Australian law school and its education and research doings is yet to be written and a book review is not a place to do it. If history is written by winners it may never be written.⁵ The two decades since VLS and CICGR were established

5 Nickolas J James, 'A Brief History of Critique in Australian Legal Education' (2000) 24(3) *Melbourne University Law Review* 965.

have been challenging for legal and business researchers and those leading research in these disciplines. To appreciate their achievement in this collection of papers, two key developments should be noted. Within five years of CICGR's establishment the funding of universities through student fees was to be revised and the use of managerialist metrics based on science journal rankings were more intensively used to measure success and research funding. These have a continuing impact.

The revision of government funding led to universities revisiting the budgets for law and business schools. Business schools with their large number of foreign fee-paying students were significant sources of income which could supplement funding for research in the more expensive research activities and which were more consistently accepted and more highly rated in increasingly significant university rankings. The importance of this income in subsidising research became clear in late 2020 when COVID-19 migration restrictions cut it off leading to an Australian Government grant of AUD 1 billion to sustain some research activities. Law and business schools found increasing restrictions in investing in themselves and their disciplines. These forces led to the end of CICGR in 2007.

As a post-Pearce law school, the VLS was open to wider and interdisciplinary approaches to law. The Pearce Review 13 years before had been critical of the technical and black letter approach to legal education and research which had excluded the social, political and economic dimensions of law and its impact.⁶ Like the newer law schools it was also more focused on research. Staff in older schools had often ignored research or worked as consultants with law firms on client matters but sometimes on law reform and legal policy development. The importance of competitive grants in university rankings has changed that.

The increasing use of metrics based on the model of science journal rankings were being more widely used to measure success and research funding. Disciplines like law and business found this a more hostile environment. Law deans came under pressure to define and justify legal research.⁷ They subsequently refused a request from the Australian Research Council ('ARC') to rank journals so that journal-based metrics could be applied to legal research. Faced with the ARC's decision to use a US-based law journal ranking system, which failed to recognise that like many disciplines law has

6 Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Australian Government Publishing Service, 1987); Daniel Goldsworthy, 'The Future of Legal Education in the 21st Century' (2020) 41(1) *Adelaide Law Review* 243.

7 Council of Australian Law Deans, *Statement on the Nature of Legal Research* (Report, October 2005) 3 <<https://cald.asn.au/wp-content/uploads/2017/11/cald-statement-on-the-nature-of-legal-research-20051.pdf>>; Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83.

a focus on national life and culture, it agreed to a list.⁸ When it became clear that the metrics were distorting research and scholarship journal rankings was abandoned by the ARC. In law the highly ranked journals were the generalist academic law journals so legal research again became more focused on a single discipline. In spite of the ARC's abandonment of journal rankings university research managers found them a useful proxy for quality so their use continued although the formal list could no longer be amended. Specialist law journals read by both practitioners and academics were ranked lower with predictable consequences for them and the research which was intended to have an impact on practice. In responding to this foreseeable but unintended consequence the ARC introduced a method to assess impact in 2016.⁹

One of the editors of the book, and also the leader of the Governance Research Program which led to the two conferences, is the former director of CICGR, Professor Anona Armstrong AM. Her ability to successfully navigate and to lead others through the changes in higher education funding and research policies and their impact within the university, to network with scholars with similar interests across the university and in the government, corporate and community sectors was largely responsible for both maintaining the governance research focus within the school and the university. She also attracted, sustained and encouraged over 80 research students to their successful completion.¹⁰ Most are from Asia. One former student, Mukti Mishra, has established and leads a new university, Centurion University of Technology and Management in Odisha, in India, which is recognised for its skills-integrated approach to teaching and its programs to alleviate poverty. Like many other unrecognised research leaders it is difficult to over-estimate the impact her leadership and work has had on the present and on the future as they continue with their teaching and research careers.

8 Kathy Bowrey, 'Audit Culture: Why Law Journals Are Ranked and What Impact This Has on the Discipline of Law Today' (2013) 23(2) *Legal Education Review* 291.

9 Joanne Doyle, 'Reconceptualising Research Impact: Reflections on the Real-World Impact of Research in an Australian Context' (2018) 37(7) *Higher Education Research & Development* 1366; Andrew Gunn and Michael Mintrom, 'Measuring Research Impact in Australia' (2018) 60(1) *Australian Universities' Review* 9; Christopher Arup, 'Research Assessment and Legal Scholarship' (2008) 18(1) *Legal Education Review* 31.

10 See HS Grow, *The Armstrong Records* (Governance Research Program, Victoria University, 2017) 55–9.