

**EVOLVING RULES OF THE GAME IN CORPORATE GOVERNANCE  
REFORM**

Jennifer Hill  
Professor of Law  
School of Law  
University of Sydney

Prepared for presentation at

ESRC/GOVNET Workshop

The Dynamics of Capital Market Governance:

Evaluating the Conflicting and Conflating Roles of  
Compliance, Regulation, Ethics and Accountability

Australian National University  
Canberra  
14-15 March 2007

DRAFT: DO NOT CITE WITHOUT PERMISSION

# EVOLVING RULES OF THE GAME IN CORPORATE GOVERNANCE REFORM

Jennifer Hill\*

## 1. Introduction

At the beginning of this decade, some scholars claimed that convergence of corporate governance regimes was both inevitable and imminent (Hansmann & Kraakman 2001, p.468). A background assumption to this argument was that a cohesive Anglo-American governance model would form the point of convergence. Scholars on the opposite side of this theoretical debate (Roe 1997, p.165) often appeared to share the assumption of a unified common law governance model (Gordon & Roe 2004),<sup>1</sup> while disputing the view that civil law jurisdictions would inevitably adopt these rules.

The convergence/divergence debate was complicated by the fall-out from international corporate scandals, epitomized by Enron. Conflicts of interest in differing guises lay at the heart of many of these scandals, including, for example, gatekeeper conflicts and conflicts of interest in the structure of many executive compensation packages.

Common law jurisdictions, such as the US, UK and Australia introduced a variety of regulatory responses to the corporate scandals (Hill 2005a). Similar motivations underpinned these reforms, potentially providing evidence of the convergence hypothesis at work. Nonetheless, there are several factors which challenge such a straight-forward regulatory picture. In spite of the existence of common themes in the international post-scandal reforms, significant differences emerged in terms of focus, structure and regulatory detail.

Some of the common law post-Enron reforms are interesting from the perspective of what they did *not*, rather than what they did, address. Thus, for example, there is an

---

\*Professor of Corporate Law, Sydney Law School; Visiting Professor, Vanderbilt University Law School (spring, 2006-2007). I am grateful to Lucian Bebchuk and Robert Thompson for providing me with helpful information concerning some recent developments. My thanks to Alice Grey for her excellent research assistance. Funding for this research was provided by the University of Sydney and the Australian Research Council.

<sup>1</sup> Who pose the question “Is the Anglo-American model of shareholder capitalism destined to become standard or will sharp differences persist?”

interesting dichotomy between strengthening of shareholder participatory rights versus protection of shareholder interests evident in the reforms. Strengthening of shareholder participatory rights was a significant theme in the Australian and the UK reforms, but not in the US reforms. The shape of these reforms has also affected subsequent corporate law debates in the US, UK, and Australia which address quite different policy concerns.

Scholars have noted that, even where similar motivations underpin various reforms, it is unlikely that their long-term effects will coincide (Langevoort 2006). Another aspect of this long-term regulatory unpredictability is the impact of backlash, currently exemplified by the Report of the Committee on Capital Markets Regulation (Paulson Committee 2006) (“the Paulson Committee Report”).

One criticism of convergence theory is that it engaged in overgeneralization, which could obscure significant differences within the common law world (Toms & Wright 2005, p.267). The post-scandal developments discussed in this paper support the view that interesting differences in regulatory approach exist within the common law world itself, and challenge any assumption of an orderly, seamless progression towards a uniform model of good corporate governance. The regulatory picture they present is a more dynamic, complex and unpredictable one.

## **2. Background Issues in Comparative Corporate Governance**

Although in the early 1990s, a central issue in comparative corporate governance was whether the US should adopt governance mechanisms from other jurisdictions, such as Germany and Japan,<sup>2</sup> the comparative corporate governance debate did a u-turn later in the decade. With interest in globalization then at its peak, the new focus of debate became the export of US-style corporate governance principles internationally (Pinto 2005; Hill 2005b).

Comparative corporate governance literature posits a divide between jurisdictions with dispersed ownership structures, such as the US, and those with concentrated ownership structures, such as those traditionally found in continental Europe and Asia

---

<sup>2</sup> Cf Roe (1993); Romano (1993).

(Bratton & McCahery 1999; Cheffins 2001; Coffee 1999, p.707; Visentini 1998). This formed the backdrop to the convergence-divergence debate, in which the scholarship of La Porta, Lopez-de-Silanes, Shleifer and Vishny proved so influential (La Porta et al 1998; La Porta, Lopez-de-Silanes & Shleifer 1999). La Porta *et al* argued that jurisdictions with a high level of minority shareholder protection would develop dispersed ownership structures, such as those existing in the US and UK. According to the study, law (and legal origins) matter. The normative subtext was that common law legal protections were superior to those found in civil law legal systems (Skeel 2004, pp.1544-1545). This message provided strong support for a convergence theory of corporate governance, via a quasi-evolutionary progression towards the superior legal rules, presumed to exist in the common law world (Jordan 2005, pp.985-990).

Not all commentators were convinced of La Porta *et al's* hypothesis. Comparative law scholarship contains a long tradition of scepticism about the feasibility of transplanting elements of one legal system to another (Kahn-Freund 1974; Licht 2004; Paredes 2004; Teubner 1998). Within this general theoretical tradition, contemporary scholars such as Mark Roe have identified historical, political and social “path dependence” factors, which may create, or perpetuate, differences in legal regimes (Roe 1997).

The convergence and “law matters” hypotheses have been challenged from a range of perspectives. Some commentators, while accepting the strong homogenising influences of globalization, challenged the view that convergence would be a continuous and steady process (Milhaupt 2004, p.213). Indeed, it has been argued that the very concept of “convergence” is ambiguous, in that it is sometimes unclear whether it relates to form or substance (Gilson 2004, p.158). Other commentators disputed the presumed link between transplantation and efficiency gains, warning that transplantation may disrupt the internal balance and consistency of a regulatory system, creating a newly minted, but now dysfunctional, governance system (Bratton & McCahery 1998, p.219; Schmidt & Spindler 2004, pp.119, 122). Also, the intended consequences of regulation are often subverted by the underlying social environment (Langevoort 2006; Parker, Scott, Lacey & Braithwaite 2004, p.7)

Finally, the methodology and background assumptions in the “law matters” study have been criticized. One strand of criticism focuses on the broad generalizations underlying the “law matters” hypothesis, some scholars arguing that the presumed differences between civil law and common law systems adopted by many convergence theorists are too sharply defined and often inaccurate (Jordan 2005, p.1005; Pistor et al 2002, p.799; Skeel 2004, p.1546). On the other hand, regulatory differences which sometimes exist between common law countries are simply obscured or ignored (Aguilera et al 2006, pp.147-148; Davies & Hopt 2004, p.172; Toms & Wright 2005). Takeover law, where fundamental differences exist between, for example, US, UK and Australian law, is a good example of this problem (Armour & Skeel 2007; Davies & Hopt 2004, p.172). It has also been argued that the primary focus in the law matters study on “law on the books” (Pistor & Xu 2003; Skeel 2004, p.1543) was misguided, since it concealed important dynamic features of legal systems, such as the operation of social norms (Coffee 2001) and law enforcement (Hertig 2004, p.328).

The 2004 book, *The Anatomy of Corporate Law* (Kraakman et al 2004) provides a more nuanced approach to regulatory difference than the convergence and “law matters” hypotheses. The book charts a comprehensive regulatory landscape, identifying a wide range of regulatory and governance strategies used to control opportunism and conflicts of interest between corporate participants (Skeel 2004). In contrast to the approach of La Porta *et al*, the methodology adopted in *The Anatomy of Corporate Law* focuses on “substantive results rather than on mere legal origin” (Kraakman et al 2004, p.221), avoiding the normative subtext of the convergence debate. The picture presented in the book is, therefore, one in which different jurisdictions address common corporate governance problems with the aid of a diverse range of regulatory tools. It is a picture that allows us to see regulatory paradigm shifts both within, and between, common law and civil law jurisdictions.

### **3. The Post-Scandal Regulatory Responses: Norms, Laws and Politics**

The international corporate scandals elicited a range of regulatory responses in common law jurisdictions, such as the US, UK and Australia. These included legislative reforms<sup>3</sup> and governance changes by self-regulatory organizations.<sup>4</sup> At one level, the corporate law reforms addressed similar governance concerns, particularly with respect to gatekeeper conflicts of interest (Coffee 2002; Coffee 2004; Gordon 2002), and potentially provided more evidence of the convergence hypothesis at work (Von Nesson 2003). Although similar concerns and motivations prompted the reforms, there are several matters that challenge such an ordered regulatory picture and highlight significant differences between the various regulatory responses.

First, in spite of globalizing influences, many of the reforms responded specifically to local issues. In the US, the *Sarbanes-Oxley Act* 2002 closely tracked the contours of Enron (Ribstein 2002, pp.4-18). Local issues were also prominent in UK reforms (Ferran 2005, p.25) and, in Australia, aspects of the *CLERP 9 Act* 2004 were directly linked to the failure of HIH Insurance, which was the largest collapse in Australian corporate history (HIH Royal Commission, 2003).

Convergence sceptics have highlighted the importance of politics and the fact that “corporate law rules are the products of collective action”, in support of the proposition that convergence is highly unlikely (Charny 2004, p.296). Localized political pressures are revealed in several aspects of the post-scandal reforms, including their timing and evolution. The most immediate legislative response to the corporate scandals occurred in the US, where a full-scale regulatory overhaul was achieved in 2002.<sup>5</sup> The speed with which the reforms were introduced became a focal point in academic discussion. It has been argued that the real impetus for reforms emanated not from Enron, but from the US

---

<sup>3</sup> These legislative reforms include the *Sarbanes-Oxley Act*, Pub. L. No. 107-204, 116 Stat. 745 (2002) [hereinafter *Sarbanes-Oxley Act*]; the Combined Code on Corporate Governance (2003) (UK) (an updated version of the Combined Code, with limited amendments, was released in June 2006 and is available at <http://www.frc.org.uk/corporate/combinedcode.cfm>) [hereinafter UK Combined Code]; the *Companies Act* 2006 (UK); the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act* 2004 (Cth) [hereinafter *CLERP 9 Act*].

<sup>4</sup> For example, NYSE, Inc., Listed Company Manual § 303A (2003) (corporate governance rules approved by the SEC on Nov. 4, 2003); ASX Corporate Governance Council (2003).

<sup>5</sup> Via the *Sarbanes-Oxley Act* 2002 and the NYSE Corporate Governance Rules and NASDAQ listing requirements.

political climate which developed after the WorldCom scandal, when investor protection became a major issue in looming elections (Langevoort 2006, p.6). Unusual bipartisan cooperation enabled the swift passage of reforms that effectively reshaped the allocation of regulatory power between the states and federal law in the US (Chandler & Strine 2003, p.973; Thompson 2003, p.100). Critics of the *Sarbanes-Oxley Act* have linked the perceived defects of the legislation to its hasty passage, describing it as “emergency legislation” (Romano 2005, p.1528), which was enacted in an overheated political environment without the benefit of careful deliberation and policy assessment (Romano 2005, pp.1549ff, 1602). Others, while acknowledging that the Act came into existence quickly as a result of political expediency, argue that it delivered real benefits and improvements in the corporate governance process (Brown 2006).

Reforms in other common law jurisdictions were enacted at a far more leisurely pace. Australia’s parallel legislative response, the *CLERP 9 Act*, which commenced operation in mid-2004, was the subject of extensive public debate and integrated the recommendations of the HIH Royal Commission, which itself lasted for 18 months (HIH Royal Commission, 2003). In the UK, reform processes were already underway several years prior to the corporate scandals and advanced by degrees (Ferran 2005), only recently culminating in the passage of the massive *Companies Act 2006* (UK).<sup>6</sup>

There are also philosophical differences between the US reforms and those introduced in the UK and Australia, in terms of reliance on norms and rules. Norms, embodied in self-regulatory codes of corporate governance,<sup>7</sup> have become an increasingly important regulatory tool in recent years. Enforcement of self-regulatory codes is obviously an important issue, and one which will vary depending on the relevant legal and social culture (Wymeersch 2005, p.408).

The international scandals resulted in a hardening of norms in both Australia and the UK. There has also been a global trend for stock exchanges to be more involved in corporate governance regulation, and although the Australian Securities Exchange (ASX)

---

<sup>6</sup> The *Companies Act 2006* (UK) received Royal Assent on 8 November 2006. All parts of the Act will be operational by October 2008 (DTI (UK), 2006).

<sup>7</sup> For a comprehensive guide to international corporate governance codes, see the European Corporate Governance Institute website at [http://www.ecgi.org/codes/all\\_codes.php](http://www.ecgi.org/codes/all_codes.php).

had been tangentially involved since 1996, that involvement intensified after the corporate collapses. In 2003, following public pressure and criticism about its credibility as a regulatory body, the ASX introduced its *Principles of Good Corporate Governance and Best Practice Recommendations* (“the ASX corporate governance principles”; ASX Corporate Governance Council, 2003), which adopted a UK-style “comply or explain”<sup>8</sup> regulatory model that was more stringent than the previous disclosure requirement in Australia (Bird & Hill 1999, pp.598-600).<sup>9</sup>

Corporate governance norms were also enhanced in the United Kingdom as a result of the *Review of the Role and Effectiveness of Non-Executive Directors* (Higgs Report, 2003). The Higgs Report recommended strengthening the independence of the board from management within the preexisting “comply or explain” regulatory framework, and these recommendations were subsequently incorporated into the UK Combined Code on Corporate Governance 2003 (“the Combined Code”).

Traditionally, the development of self-regulatory codes has tended to be either a response to the lack of specific governmental regulation in particular areas, or, in some cases, a justification for the absence of such regulation. A number of the post-scandal reforms in Australia and the UK fall into the latter category. They also reflect a strong preference for the flexibility offered via regulation by norms rather than mandatory legal rules, and recognition that inadequate enforcement of good governance practices could result in the imposition of onerous government regulation (Humphry 2003, p.3).

In contrast to the reforms in Australia and the UK, the US reforms reflected the process of “juridification” (Wymeersch 2005, p.418), in their decisive shift towards a rules-based approach to corporate governance with a higher level of mandatory governance standards. The final NYSE corporate governance rules, for example, introduced a range of mandatory requirements concerning board structure to reflect generally accepted best practice in corporate governance,<sup>10</sup> the substance of which is

---

<sup>8</sup> The preferred terminology under the Australian model, however, appears to be an “if not, why not” model (ASX Corporate Governance Council, 2004).

<sup>9</sup> Previously, it had only been necessary for a company to disclose in the annual report its main corporate governance practices, if any.

<sup>10</sup> NYSE, Inc., Listed Company Manual s 303A (2003).

often stricter than its counterparts in other jurisdictions, such as Australia (Hill 2005a, p.383). The *Sarbanes-Oxley Act* 2002 also imposed many new prescriptive rules, thereby affecting the balance of regulatory power between the states and federal law. The Act has been described as creating a “shadow corporation law” (Chandler & Strine 2003, p.973), and criticized for deviating from the traditional US model of corporate law, under which state-based law is viewed as facilitative and competitive (Romano 2005, pp.1523, 1528-1529). The *Sarbanes-Oxley Act* also laid greater emphasis on criminal liability in corporate governance<sup>11</sup> than reforms in the United Kingdom and Australia. Nonetheless, some commentators have viewed the Act’s criminal provisions as adding little to pre-existing US law, and unlikely to be an effective form of deterrence (Perino 2002).

While some countries in continental Europe, such as France and Germany, adopted reforms based on the *Sarbanes-Oxley Act* (Enriques 2003, pp.918ff), there was an explicit rejection in Australia and the UK of the rules-based regulatory approach to corporate governance which underpinned the Act. At the time the ASX corporate governance principles were introduced in Australia, for example, the then-Managing Director and CEO of the Australian Stock Exchange stated that “[t]hrough a disclosure based approach, the ASX is keen to avoid a US style *Sarbanes-Oxley* legislative solution” (Humphry 2003, p.3). The Chair of the Higgs Committee, Derek Higgs, was similarly direct in his preference for regulation by norms over rules, commenting that the “brittleness and rigidity of legislation cannot dictate the behaviour, or foster the trust, I believe is fundamental to the effective unitary board and to superior corporate performance” (Higgs Report, 2003, p.3).

The dichotomy between rules and norms, and between rigidity and flexibility, is relevant to the issue of regulatory amendment. Roberta Romano, in her criticism of the *Sarbanes-Oxley Act*, notes that “legislation drafted in a perceived state of emergency can be difficult to undo” (Romano 2005, p.1602). By contrast, the norms embodied in the ASX corporate governance principles appear to be extremely fluid. The principles have been the subject of almost continual assessment and consultation since their introduction in 2003, including two reports by the Implementation Review Group (ASX Corporate

---

<sup>11</sup> See, for example, the *Sarbanes-Oxley Act*, Title VIII (“Corporate and Criminal Fraud Accountability”); Title IX (“White Collar Crime Penalty Enhancements”); Title XI (“Corporate Fraud and Accountability”).

Governance Council IRG, 2004; ASX Corporate Governance Council IRG, 2005). Following a twelve month review, in November 2006 the ASX Corporate Governance Council released an Explanatory Paper and Consultation Paper on proposed changes to the principles (ASX Corporate Governance Council, 2006). A consistent message in these reviews has been the inherent flexibility and non-prescriptive nature of the ASX corporate governance principles. The reviews have stressed the fact that “the only *compliance* required is disclosure”(ASX Corporate Governance Council IRG, 2004, p.1) and that corporations are free to depart from the principles, provided they explain why (ASX Corporate Governance Council, 2006, p.6). Reflecting this underlying philosophy, the reviews have also recommended removal of the term “best practice” from the title of the ASX corporate governance principles, on the basis that it might imply that other practices are inferior (ASX Corporate Governance Council IRG, 2004, p.1; ASX Corporate Governance Council, 2006, p.9).

In its Explanatory and Consultation Paper, the ASX emphasizes the evolving nature of the corporate governance debate, and the interrelation of the principles with other parts of the corporate governance ecosystem (ASX Corporate Governance Council, 2006, p.5). Several proposed changes to the ASX corporate governance principles are due to the need to update them in light of recent developments in related areas, such as risk management and corporate responsibility and sustainability. For example, the ASX Corporate Governance Council notes that recent developments have emphasized the broad scope of the term “risk” and explicitly incorporates this expansive interpretation into the concept of “material business risks” in its revised draft of the principles (ASX Corporate Governance Council, 2006, p.17ff).

#### **4. Shareholder Interests *versus* Participatory Rights - What the Post-Scandal Reforms Did and Did Not Address**

Enhancing managerial accountability for the benefit of shareholders was a common goal in various reforms adopted in the wake of the international corporate scandals. On one interpretation, gatekeepers, such as auditors, and boards of directors, bore much responsibility for the scandals (Coffee 2002; Coffee 2004; Gordon 2002), with

shareholders seen as innocent victims (Coffee 2005, pp.2, 15).<sup>12</sup> Although not all commentators accept this benign view of shareholder involvement in the scandals (Karmel 2004, p.4; Strine 2006, pp.1764, 1772-1773), it is an image that underlies many of the post-scandal reforms in common law countries. However, the reforms differ in the manner in which they seek to achieve the goal of enhanced managerial accountability vis-à-vis shareholders. Specifically, there is an intriguing dichotomy between strengthening of shareholder participatory rights versus protection of shareholder interests.

Strengthening shareholder participatory rights in corporate governance was an explicit governance objective in the Australian reforms (McConvill & Bagaric 2004, p.131). The Explanatory Memorandum to the *CLERP 9 Act* contains numerous references to the desirability of increasing shareholder activism<sup>13</sup> and improving shareholder participation and influence in the companies in they which invest.<sup>14</sup> A clear example of this is in the reforms relating to executive remuneration (Hill 2006, pp.67-68). The *CLERP 9 Act* permits greater shareholder participation in remuneration issues by requiring shareholders to pass an advisory resolution at the annual general meeting approving the directors' remuneration report (Chapple & Christensen 2005).<sup>15</sup> Although non-binding, the explicit goals of the procedure are to provide shareholders with greater voice in relation to remuneration issues,<sup>16</sup> and encourage greater consultation and information flow concerning remuneration policies between directors and shareholders.<sup>17</sup> The reform also seeks to constrain excessive compensation by "shaming" and censure, and from this perspective may be a potentially powerful governance mechanism (Hill 2006, pp.69-71).

---

<sup>12</sup> Although *cf* Coffee (2005), pp.9-10, where he identifies the preference of institutional investors for equity-based executive compensation as indirectly influencing the US corporate scandals.

<sup>13</sup> See, for example, Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003, *Explanatory Memorandum*, paras [1.4] and [4.71].

<sup>14</sup> *Id*, paras [4.174], [4.271]-[4.280].

<sup>15</sup> See ss 250R(2) and 249L, *Corporations Act* 2001 (Cth).

<sup>16</sup> Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003, *Explanatory Memorandum*, paras [5.434]-[5.435].

<sup>17</sup> *Id*, paras [4.353] and [5.413].

In one particular respect, however, the Australian government has attempted to wind back shareholder activism. This is in relation to the so-called “100 member rule”, which permits 100 shareholders to convene a general meeting of the company.<sup>18</sup> The rule, which is remarkably generous to shareholders compared to many other jurisdictions, has attracted criticism as being open to possible abuse by activist shareholders with a social agenda (CASAC, 2000, p.15). In 2005, the federal government announced that it intended to remove the 100 member rule (Pearce 2005),<sup>19</sup> however its proposal to this effect was rejected by state leaders at a meeting of the Ministerial Council for Corporations in July 2006 (Gettler 2006; Pearce 2006).

Increased shareholder participation and influence was a theme in the UK reforms (which included a version of the non-binding shareholder vote on the directors’ remuneration report)<sup>20</sup> and the UK government has issued strong rhetoric about the need to encourage greater shareholder democracy and activism (Ferran 2005, pp.27-28). This policy goal was also reflected in the UK Combined Code, which included recommendations of the Higgs Report (2003) specifically aimed at strengthening the position of both institutional investors and independent directors, through a range of techniques designed to establish a close relationship between the two groups (Hill 2005a, p.391). The UK Combined Code stressed the need for the board to communicate with investors generally and to encourage their participation in the annual general meeting.<sup>21</sup>

The US reforms present an interesting contrast in this regard. Protection of shareholder interests was a clear priority (Karmel 2004, p.2) and part of the legislative intent of the reforms. The preamble to the *Sarbanes-Oxley Act* states, for example, that the aim of the Act is “[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes”. Yet,

---

<sup>18</sup> Section 249D *Corporations Act* 2001 (Cth).

<sup>19</sup> Corporations Amendment Bill (No 2) 2005, *Explanatory Memorandum*, Exposure Draft.

<sup>20</sup> The Director’ Remuneration Report Regulations 2002, S.I. 2002/1986 (UK). The provision requiring shareholder approval of the directors’ remuneration report is now found in section 439 of the recently passed UK *Companies Act* 2006.

<sup>21</sup> See generally Combined Code on Corporate Governance, Principle D.2 (“Constructive Use of the AGM”) (June 2006).

in spite of this focus on protection of shareholder interests, enhancement of shareholder participatory rights and power vis-à-vis management was conspicuously absent in the US reforms (Hill 2005a, p.392).

Commentators have described the refusal of the *Sarbanes-Oxley Act* to grant shareholders greater governance power and participatory rights in, for example, the director election process, as “notable” (Langevoort 2006, p.16) and “the forgotten element” of the Act (Chandler & Strine 2003, p.999).

Another potentially forgotten element in the US reforms was the issue of executive compensation. Executive compensation was deeply implicated in Enron and other corporate scandals. Conflicts of interest were evident in the structure of many executive compensation packages, which, rather than aligning managerial and shareholder interests, often appeared to create perverse incentives for executives to manage earnings and share price to enhance the value of options and pursue short-term goals (Anabtawi 2004, pp.839ff; Bolton, Scheinkman & Xiong 2006; McClendon 2004; Yablon & Hill 2000, pp.86-88). Indeed, this misalignment of interests in executive pay is one possible interpretation of the corporate collapses (Coffee 2004b). Yet, in spite of its prominence in the scandals, executive compensation received virtually no attention in the US reforms (Hill 2005a, p.412).

Also, US reforms on board independence arguably had quite different implications for shareholder power than parallel reforms in the UK. The UK Combined Code sought to strengthen the position not only of independent directors, but also institutional investors, by fostering active dialogue between the two groups and encouraging greater participation in governance issues by institutional investors. However, the strict definition of director “independence” under the US 2002 reforms suggests that US directors should generally be independent, not only from management, but also from major shareholders (Hill 2005a, pp.388-390). It has been argued that this aspect of the US reforms can be seen as contributing to an emerging concept of independent directors as “public” directors in America, potentially shifting the *Sarbanes-Oxley Act* towards a model of public accountability rather than its stated intent of shareholder protection (Langevoort 2006, p.18).

Thus, even where reforms are unified by similar goals, this is no guarantee that their ultimate effects will coincide. Professor Langevoort has recently noted this gap between motivation and regulatory outcome, due to variability in compliance and enforcement decisions, in relation to the *Sarbanes-Oxley Act* (Langevoort 2006). Unpredictability in the long-term effects of legislation is compounded in the case of an array of international legislation, where “legal irritants” and underlying differences in regulatory ecosystems can create new divergences (Teubner 1998).

## 5. Current Policy Debates and Regulatory Backlash

The shape of current academic and policy debates in the US, UK and Australia has been determined to a considerable degree by what was, and what was not, incorporated into the various post-scandal reforms. These recent policy debates, like the earlier regulatory responses themselves, have a distinctly local flavour. Thus, for example, the lacuna in the US reforms concerning shareholder participation rights has had a clear influence on the direction of subsequent academic debate on the need to increase shareholder power in the US. Professor Bebchuk, a leading proponent of increased shareholder power and participation, has identified two key areas of corporate governance need. First, he has argued strongly for the reform of US proxy rules to allow shareholders greater power in the director nomination process (Bebchuk 2003), a reform for which the Securities and Exchange Commission (SEC) originally exhibited some enthusiasm (SEC, 2003). Bebchuk’s second set of reform proposals focuses on increasing shareholder power, by permitting shareholders to initiate and effect changes to the corporate charter (Bebchuk 2005; Bebchuk 2006).

These reform proposals would significantly alter the current balance of power between shareholders and the board of directors in the US. It is, as yet, unclear how much traction the proposals will ultimately have. They have provoked intense debate in academic circles.<sup>22</sup> While few US scholars doubt that there is plenty of scope for increasing shareholder power (Anabtawi 2006, p.569), many doubt the wisdom of doing so, particularly when it would be at the expense of managerial autonomy and power

---

<sup>22</sup> For example, a recent issue of the *Harvard Law Review* is devoted to the issue of shareholder empowerment (see Bainbridge (2006); Bebchuk (2006); Strine (2006)).

(Anabtawi 2006; Bainbridge 2006; Strine 2006). In addition, the SEC's reformatory zeal concerning the director nomination process has waned (Strine 2006, pp.1776-1777).

However, the issues raised by this academic debate are now undeniably in the US corporate ether. One example of this attitudinal shift is in relation to the issue of executive compensation. In spite of the surprising lack of attention given to executive compensation in the 2002 US reforms, regulatory momentum on this issue has gathered pace since that time. In early 2006, the SEC announced that it would introduce a significant overhaul of its disclosure rules on executive compensation (SEC, 2006) and political rhetoric on the topic of excessive executive pay has recently intensified (Rutenberg 2007). Activist investors, such as AFSCME,<sup>23</sup> have submitted shareholder proposals seeking an advisory vote on executive pay, comparable to the non-binding shareholder vote introduced in the Australian and UK post-scandal reforms. The issue of an advisory vote for shareholders on executive remuneration is currently the subject of Democrat-instigated Congressional consideration (White & Patrick 2007), with the likelihood that hearings will be held on the issue in mid-February 2007 to consider possible legislative reform in this regard.

Another aspect of long-term regulatory unpredictability is the impact of backlash.<sup>24</sup> Backlash can operate in either direction on a convergence-divergence axis. A striking current example of backlash is the Report of the Committee on Capital Markets Regulation (Paulson Committee 2006), which lays to rest any interpretation of common law post-scandal legislation as representing a unified, homogeneous regulatory response. Rather, a central tenet of the Paulson Committee Report is that the regulatory approach of the *Sarbanes-Oxley Act* was idiosyncratic and unduly stringent by international standards, and has reduced the competitiveness of US markets (Paulson Committee 2006, p.xi). Similar concerns regarding the declining preeminence of New York and US financial markets are evident in another recent report, *Sustaining New*

---

<sup>23</sup> American Federation of State, County and Municipal Employees.

<sup>24</sup> On the political role of backlash generally, see Roe (1998).

*York's and the US' Global Financial Services Leadership* (Bloomberg & Schumer 2007).<sup>25</sup>

This feature of the Paulson Committee Report is interesting from the perspective of the debate on cross-listing, which emerged at the high-point of the convergence-divergence controversy in comparative corporate governance. At that time, it was often assumed that the marked trend towards cross-listing of foreign firms in the US during the 1990s constituted a desirable form of regulatory competition (Coffee 2002b), in which companies incorporated in jurisdictions with weak minority shareholder protection could voluntarily adopt higher standards. This trend was seen as further possible evidence for the convergence of corporate governance practices towards a US model (Jordan 2007; Licht 2004, pp.196-198). The Paulson Committee, however, suggests that the stringency of the *Sarbanes-Oxley Act* and increased associated compliance costs (Asare, Cunningham & Wright 2007) has resulted in the opposite phenomenon, whereby foreign companies are now avoiding cross-listing on US markets (Lew & Ramsay 2006, pp.9-12; Licht 2003; Maitland 2004; Piotroski & Srinivasan 2007).

Whereas a central goal of the *Sarbanes-Oxley Act* was to restore investor confidence via rule-based regulation (Asare, Cunningham & Wright 2007, p.82), the Paulson Committee stresses the need to protect shareholders *from* excessive regulation which may impair the competitiveness of US markets (Paulson Committee 2006, p.xi). This shift in the regulatory pendulum is arguably reflected in the recent rejection of greater oversight for hedge funds in the US (Labaton 2007).

The issue of shareholder empowerment, prevalent in recent US academic debate, is also a subtext in the Paulson Committee Report. The Committee suggests that increased shareholder rights could themselves achieve greater board accountability, thereby reducing the need for heavy-handed formal regulation (Paulson Committee 2006, pp.xi-xii) and recommends enhancement of shareholder rights across several areas.<sup>26</sup>

---

<sup>25</sup> See also Anderson (2007).

<sup>26</sup> Key proposals of the Paulson Committee relating to enhancement of shareholder rights include:- (i) the requirement that classified boards gain the approval of shareholders prior to implementing a poison pill (ii) the adoption of majority, rather than plurality, voting for board directors (iii) clarification of the rights of shareholders with respect to gaining access to the company proxy to nominate directors for election (iv) enhancing shareholders' ability to access alternative means of dispute resolution (Paulson Committee 2006, pp.xii-xiii, 93-114).

While issues of efficiency and firm value underpin much of the Paulson Committee's discussion, the fundamental power imbalance between managers and shareholders is also a clear concern.<sup>27</sup>

Shareholder empowerment, now permeating the US corporate law debate, provides an interesting contrast to current policy concerns in Australia and the UK, which are strongly focused, not on shareholder rights, but on the interests of stakeholders.

The plight of stakeholders, such as employees, and corporate responsibility generally, were major themes of the corporate scandals (Langevoort 2006, p.15). Nonetheless, the *Sarbanes-Oxley Act* in the US and the *CLERP 9 Act* in Australia were mainly concerned with protection of shareholders and their interests.<sup>28</sup> In the UK, however, "a third way", advocating a long-term, enlightened shareholder value approach to corporate governance issues, was already gaining momentum (Williams & Conley 2005). Political issues, including concern by the EU to harmonize the laws of member states, contributed to this development in the UK (Williams & Conley 2005, pp.498-499). This enlightened shareholder value principle has been given legislative force under s 172 of the recently enacted UK *Companies Act 2006*, which imposes a new duty on directors to "promote the success of the company", requiring them to consider stakeholder interests and the long-term effects of their decisions (Austin 2007).

Corporate social responsibility has also become a major issue in Australia, largely as a result of two high-profile local corporate scandals. The first was the James Hardie saga. This involved a corporate reconstruction whereby asbestos-related liabilities were separated from other assets in the company through the creation of a foundation,<sup>29</sup> which was subsequently found to have insufficient funds to meet legitimate compensation claims (Dunn 2005). The second concerned AWB Ltd, one of the world's largest wheat marketing and management companies, which was found to have made corrupt payments

---

<sup>27</sup> According to the Committee, "When firms have a choice of legal regime, any policy proposal should adopt as a default the option most favorable to shareholders, given the fundamental asymmetry of power between managers and shareholders" (Paulson Committee 2006, p.103).

<sup>28</sup> Cf however, Langevoort (2006), pp.15, 20, claiming that although the *Sarbanes-Oxley Act* was, by its terms about investor protection, its long-term effects may ultimately be about public accountability.

<sup>29</sup> The Medical Research and Compensation Foundation.

to Iraq under the Oil-for-Food program. These scandals were responsible for generating not only heated public debate about corporate social responsibility, but also two recent governmental reports on the topic – reports by the Parliamentary Joint Committee (“PJC Report”)<sup>30</sup> and the Corporations and Markets Advisory Committee (“CAMAC Report”).<sup>31</sup>

A central issue in these reports was the scope of directors’ duties, and the extent to which the current legal framework permits directors to consider the interests of stakeholders or the broader community. This issue arose directly from the James Hardie scandal, where James Hardie executives and directors sought to justify their conduct by arguing that current law essentially required them to privilege shareholder interests “at all costs” (PJC, 2006, pp.47, 181). The PJC Report observed, however, that “rampant corporate irresponsibility certainly decreases shareholder value” (PJC, 2006, p.19). Scrutiny of the actions of the James Hardie directors will inevitably persist, with the announcement by the Australian Securities and Investments Commission (ASIC) in mid-February 2007 that it would bring civil penalty proceedings against the entire board of directors (Durie 2007; Priest & Skulley 2007).

Both the PJC Report and the CAMAC Report rejected legislative change to directors’ duties in Australia to embody “enlightened shareholder value” explicitly as in s 172 of the *Companies Act 2006* (UK). The PJC Report was critical of the UK amendment to directors’ duties (PJC, 2006, pp.54-56), on the basis that it was overly prescriptive and would result in confusion, while the CAMAC Report considered that a comparable statutory amendment in Australia would provide “no worthwhile benefit” (CAMAC, 2006, p.111). Overall, there is a degree of overlap between the tone and ultimate conclusions of the PJC Report and the CAMAC Report, with both demonstrating a preference for industry-based regulation and initiatives, rather than formal legislative change, to address corporate social responsibility issues. The CAMAC Report, in particular, acknowledged the limits to the law’s ability to control corporate decision-

---

<sup>30</sup> The PJC announced its Inquiry into Corporate Responsibility in June 2005 and released its Report in June 2006 (PJC, 2006).

<sup>31</sup> CAMAC received a reference in March 2005 and issued its Discussion Paper in November 2005 (CAMAC, 2005). Its Final Report was released in December 2006 (CAMAC, 2006).

making by prescription, portraying corporate responsibility as a fluid part of a company's operations, not a legislative "add-on" (CAMAC, 2006, pp.3-4).

## 6. Conclusion

While post-scandal reforms in the US, UK and Australia were prompted by similar motivations, interesting differences in terms of their focus and structure still resonate in current corporate governance debate. The unique contours of the various regulatory responses challenge not only the traditional convergence hypothesis, but also the idea that a unified common law corporate governance model exists. Rather, a fluid and dynamic picture of corporate governance has emerged, whereby various jurisdictions are able to test regulatory techniques and learn by their own trial and error, and that of other jurisdictions. If any long-term convergence can be gleaned from these developments, paradoxically, it would appear to be away from the US post-scandal regulatory model.

## References

- Aguilera, R, Williams, C, Conley, J & Rupp, D 2006, 'Corporate Governance and Social Responsibility: A Comparative Analysis of the UK and the US', *Corporate Governance: An International Review*, vol. 14, pp. 147-158.
- Anabtawi, I 2004, 'Secret Compensation', *North Carolina Law Review*, vol. 82, pp. 835-889.
- Anabtawi, I 2006, 'Some Skepticism About Increasing Shareholder Power', *UCLA Law Review*, vol. 53, pp. 561-599.
- Anderson, J 2007, 'U.S. financial sector is losing its edge, Report says', *New York Times*, 22 January, p. 3.
- Armour, J & Skeel, DA 2007, 'Who Writes the Rules for Hostile Takeovers, and Why? The Peculiar Divergence of US and UK Takeover Regulation', *Georgetown Law Journal* (forthcoming).
- Asare, SK, Cunningham, LA & Wright, A 2007, 'The Sarbanes-Oxley Act: Legal Implications and Research Opportunities', *Research in Accounting Regulation*, vol. 19, pp. 81-105.
- Austin, RP 2007, *Company Directors and Corporate Social Responsibility: UK and Australian Perspectives*, The Ross Parsons Centre of Commercial, Corporate and Taxation Law, Faculty of Law, University of Sydney (forthcoming).
- ASX Corporate Governance Council 2003, *Principles of Good Corporate Governance and Best Practice Recommendations*, Australian Securities Exchange, Sydney (available at <http://www.shareholder.com/visitors/dynamicdoc/document.cfm?documentid=364&companyid=ASX>).
- ASX Corporate Governance Council 2004, *Response to the Implementation Review Group Report*, Australian Securities Exchange, Sydney.

- ASX Corporate Governance Council 2006, *Explanatory Paper and Consultation Paper*, Australian Securities Exchange, Sydney.
- ASX Corporate Governance Council Implementation Review Group 2004, *Principles of Good Corporate Governance and Best Practice Recommendations: Report to the ASX Corporate Governance Council*, Australian Securities Exchange, Sydney.
- ASX Corporate Governance Council Implementation Review Group 2005, *Second Report to the ASX Corporate Governance Council*, Australian Securities Exchange, Sydney (available at [www.asx.com.au/about/pdf/Second\\_IRG\\_report\\_final.pdf](http://www.asx.com.au/about/pdf/Second_IRG_report_final.pdf)).
- Bainbridge, SM 2006, 'Director Primacy and Shareholder Disempowerment', *Harvard Law Review*, vol. 199, pp. 1735-1758.
- Bebchuk, L 2003, 'The Case for Shareholder Access to the Ballot', *Business Lawyer*, vol. 59, pp. 43-66.
- Bebchuk, L 2005, 'The Case for Increasing Shareholder Power', *Harvard Law Review*, vol. 118, pp. 833-914.
- Bebchuk, L 2006, 'Letting Shareholders Set the Rules', *Harvard Law Review*, vol. 119, pp. 1784-1813.
- Bird, J & Hill, J 1999, 'Regulatory Rooms in Australian Corporate Law', *Brooklyn Journal of International Law*, vol. 25, pp. 555-606.
- Bloomberg & Schumer – see McKinsey & Company (2007).
- Bolton, P, Scheinkman, JA & Xiong, W 2006, 'Executive Compensation and Short-Termist Behavior in Speculative Markets', *Review of Economic Studies*, vol. 73, pp. 577-610.
- Buffini, F 2006, 'AWB scandal erodes line in sand hopes', *Australian Financial Review*, 16 February, p. 12.
- Bratton, WW & McCahery, JA 1999, 'Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross Reference', *Columbia Journal of Transnational Law*, vol. 38, pp. 213-297.
- Brown, JR 2006, 'Criticizing the Critics: Sarbanes-Oxley and Quack Corporate Governance', *Marquette Law Review*, vol. 90, pp. 309-335.
- CAMAC – see – Corporations and Markets Advisory Committee (2005); Corporations and Markets Advisory Committee (2006).
- CASAC – see – Corporations and Securities Advisory Committee (2000).
- Chandler, WB & Strine, LE 2003, 'The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State', *University of Pennsylvania Law Review*, vol. 152, pp. 953-1005.
- Chapple, L & Christensen, B 2005, 'The Non-Binding Vote on Executive Pay: A Review of the CLERP 9 Reform', *Australian Journal of Corporate Law*, vol. 18, pp. 263-287.
- Charny, D 2004, 'The Politics of Corporate Convergence', in JN Gordon & MJ Roe (eds), *Convergence and Persistence in Corporate Governance*, Cambridge University Press, New York.
- Cheffins, BR 2001, 'Does Law Matter? The Separation of Ownership and Control in the United Kingdom', *Journal of Legal Studies*, vol. 30, pp. 459-484.
- Coffee, JC 1999, 'The Future as History: The Prospects for Global Convergence of Corporate Governance and its Implications', *Northwestern University Law Review*, vol. 93, pp. 641-707.
- Coffee, JC 2001, 'Do Norms Matter? A Cross-Country Evaluation', *University of Pennsylvania Law Review*, vol. 149, pp. 2151-2177.
- Coffee, JC 2002a, 'Understanding Enron: 'It's About the Gatekeepers, Stupid'', *Business Lawyer*, vol. 57, pp. 1403-1420.
- Coffee, JC 2002b, 'Racing Towards the Top?: The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance', *Columbia Law Review*, vol. 102, pp. 1757-1831.
- Coffee, JC 2004a, 'Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms', *Boston University Law Review*, vol. 84, pp. 301-364.
- Coffee, JC 2004b, 'What Caused Enron? A Capsule Social and Economic History of the 1990s', *Cornell Law Review*, vol. 89, pp. 269-309.
- Coffee, JC 2005, 'A Theory of Corporate Scandals: Why the US and Europe Differ', *Columbia Law and Economics Working Paper No. 274*, The Centre for Law and Economic Studies, Columbia, New York.
- The Committee of Sponsoring Organizations of the Treadway Commission 2004, *Enterprise Risk Management – Integrated Framework: Executive Summary* (available at [www.coso.org](http://www.coso.org)).

- Committee on Capital Market Regulation 2006, *Interim Report of the Committee on Capital Market Regulation*, November 30.
- Companies and Securities Advisory Committee 2000, *Shareholder Participation in the Modern Listed Public Company: Final Report*, CASAC, Sydney.
- Corporations and Markets Advisory Committee 2005, *Corporate Social Responsibility: Discussion Paper*, CAMAC, Sydney.
- Corporations and Markets Advisory Committee 2006, *The Social Responsibility of Corporations: Report*, CAMAC, Sydney.
- COSO – see – Committee of Sponsoring Organizations of the Treadway Commission (2004).
- Davies, P & Hopt, K 2004, 'Control Transactions', in R Kraakman, P Davies, H Hansmann, G Hertig, K Hopt, H Kanda & E Rock (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach*, Oxford University Press, Oxford.
- Dunn, E 2005, 'James Hardie: No Soul to be Damned and No Body to be Kicked', *Sydney Law Review*, vol. 27, pp. 339-353.
- Durie, J 2007, 'ASIC treads fine line on Hardie', *Australian Financial Review*, 16 February, p. 84.
- Enriques, L 2003, 'Bad Apples, Bad Oranges: A Comment from Old Europe on Post-Enron Corporate Governance Reforms', *Wake Forest L Rev*, vol. 38, pp. 911-934.
- Ferran, E 2005, 'Company Law Reform in the UK: A Progress Report', *ECGI Working Paper No 27/2005*, European Corporate Governance Institute, Faculty of Law, Cambridge.
- Gettler, L 2006, 'IFSA censures states over 100-member rule', *The Sydney Morning Herald*, 21 June, p. 37.
- Gilson, RJ 2004, 'Globalizing Corporate Governance: Convergence of Form or Function', in JN Gordon & MJ Roe (eds), *Convergence and Persistence in Corporate Governance*, Cambridge University Press, New York.
- Gordon, JN & Roe, MJ (eds) 2004, *Convergence and Persistence in Corporate Governance*, Cambridge University Press, New York.
- Gordon, JN 2002, 'What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections', *University of Chicago Law Review*, vol. 69, pp. 1233-1250.
- Hansmann, H & Kraakman, R 2001, 'The End of History for Corporate Law', *Georgetown Law Journal*, vol. 89, pp. 439-468.
- Hertig, G 2004, 'Convergence of Substantive Law and Convergence of Enforcement: A Comparison', in JN Gordon & MJ Roe (eds), *Convergence and Persistence in Corporate Governance*, Cambridge University Press, New York.
- Higgs Report – see – Higgs, D (2003).
- Higgs, D 2003, *Review of the Role and Effectiveness of Non-Executive Directors*, Report to the UK Department of Trade and Industry, London.
- HIH Royal Commission 2003, *The Failure of HIH Insurance: Volume 1: A Corporate Collapse and Its Lessons*, Commonwealth of Australia, Canberra (available at <http://www.hihroyalcom.gov.au/finalreport/index.htm>).
- Hill, JG 2005a, 'Regulatory Responses to Global Corporate Scandals', *Wisconsin International Law Journal*, vol. 23, pp. 367-416.
- Hill, JG 2005b, 'The Persistent Debate about Convergence in Comparative Corporate Governance', *Sydney Law Review*, vol. 27, pp. 743-752.
- Hill, JG 2006, 'Regulating Executive Remuneration: International Developments in the Post-Scandal Era', *European Company Law*, vol. 3, pp. 64-74.
- Humphry, R 2003, 'If Not, Why Not?', address to the Australian Institute of Company Directors Forum, Sydney, 2 April 2003.
- Jordan, C 2005, 'The Conundrum of Corporate Governance', *Brooklyn Journal of International Law*, vol. 30, pp. 983-1027.
- Jordan, C 2007, 'The Chameleon Effect: Beyond the Bonding Hypothesis for Cross-Listed Securities', *New York University Journal of Law & Business* (forthcoming) (available at <http://ssrn.com/abstract=907130>).
- Kahn-Freund, O 1974, 'On Uses and Misuses of Comparative Law', *Modern Law Review*, vol. 37, pp. 1-27.

- Karmel, RS 2004, 'Should a Duty to the Corporation be Imposed on Institutional Shareholders?', *Business Lawyer*, vol. 60, pp. 1-21.
- Kraakman, RS, Davies, P, Hansmann, H, Hertig, G, Hopt, KJ, Kanda, H, Rock, EB 2004 *The Anatomy of Corporate Law: A Comparative and Functional Approach* (New York, Oxford University Press)
- Labaton, S 2007, 'Officials reject more oversight of hedge funds', *New York Times*, 23 February, p. 1.
- La Porta, R, Lopez-de-Silanes, F & Shleifer, A 1999, 'Corporate Ownership Around the World', *Journal of Finance*, vol. 54, pp. 471-517.
- La Porta, R, Lopez-de-Silanes, F, Shleifer, A & Vishny, R 1998, 'Law and Finance', *Journal of Political Economy*, vol. 106, pp. 1113-1155.
- Langevoort, DC 2006, 'The Social Construction of Sarbanes-Oxley', *Michigan Law Review* (forthcoming) (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=930642](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=930642)).
- Lew, N & Ramsay, I 2006, 'Corporate Law Reform and Delisting in Australia', *University of Melbourne Legal Studies Research Paper No. 202*, The Centre for Corporate Law and Securities Regulation, Faculty of Law, University of Melbourne.
- Licht, AN 2003, 'Cross-Listing and Corporate Governance: Bonding or Avoiding?' *Chicago Journal of International Law*, vol. 4, pp. 141-163.
- Licht, AN 2004, 'Legal Plug-ins: Cultural Distance, Cross-Listing, and Corporate Governance Reform', *Berkeley Journal of International Law*, vol. 22, pp. 195-239.
- Maitland, A 2004, 'BT chairman criticises U.S. governance', *Financial Times*, 23 November, p. 22.
- McClendon, JK 2004, 'Bringing the Bulls to Bear: Regulating Executive Compensation to Realign Management and Shareholders' Interests and Promote Corporate Long-Term Productivity', *Wake Forest Law Review*, vol. 39, pp. 971-1031.
- McConvill, J & Bagaric, M 2004, 'Towards Mandatory Shareholder Committees in Australian Companies', *Melbourne University Law Review*, vol. 28, pp. 125-168.
- McKinsey & Company 2007, *Sustaining New York's and the US' Global Financial Services Leadership*, Report to MR Bloomberg & CE Schumer (available at [http://www.senate.gov/~schumer/SchumerWebsite/pressroom/special\\_reports/2007/NY\\_REPORT%20\\_FINAL.pdf](http://www.senate.gov/~schumer/SchumerWebsite/pressroom/special_reports/2007/NY_REPORT%20_FINAL.pdf)).
- Milhaupt, CJ 2004, 'Property Rights in Firms', in JN Gordon & MJ Roe (eds), *Convergence and Persistence in Corporate Governance*, Cambridge University Press, New York.
- Paredes, TA 2004, 'A Systems Approach to Corporate Governance Reform: Why Importing U.S. Corporate Law Isn't the Answer', *William and Mary Law Review*, vol. 45, pp. 1055-1157.
- Parker, C, Scott, C, Lacey, N & Braithwaite, J 2004, 'Introduction', in J Braithwaite, N Lacey, C Parker & C Scott (eds), *Regulating Law*, Oxford University Press, Oxford.
- Parliamentary Joint Committee on Corporations and Financial Services 2006, *Corporate Responsibility: Managing Risk and Creating Value*, Commonwealth of Australia, Canberra (available at [http://www.aph.gov.au/senate/committee/corporations\\_ctte](http://www.aph.gov.au/senate/committee/corporations_ctte)).
- Paulson Committee – see – Committee on Capital Market Regulation (2006).
- Pearce, C (Parliamentary Secretary to the Treasurer) 2005, 'Government consults on proposed corporate governance reforms', Press release, issued 7 February.
- Pearce, C (Parliamentary Secretary to the Treasurer) 2007, 'Key Corporate Governance Reforms in Jeopardy', Press Release, issued 27 July.
- Perino, MA 2002, 'Enron's Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes-Oxley Act of 2002', *St Johns Law Review*, vol. 76, pp. 671-698.
- Piotroski, JD & Srinivasan, S 2007, 'The Sarbanes-Oxley Act and the Flow of International Listings' (available at <http://ssrn.com/abstract=956987>).
- Pinto, AR 2005, 'Globalization and the Study of Comparative Corporate Governance' *Wisconsin International Law Journal*, vol. 23, pp. 477- 504.
- Pistor, K, Keinan, Y, Kleinheisterkamp, J & West, MD 2002, 'The Evolution of Corporate Law: A Cross-Country Comparison', *University of Pennsylvania Journal of International Economic Law*, vol. 23, pp. 791-871.
- Pistor, K & Xu, C 2003, 'Incomplete Law', *New York University Journal of International Law & Policy*, vol. 35, pp. 931-1013.
- Pistor, K, Keinan, Y, Kleinheisterkamp, J & West, MD 2002, 'The Evolution of Corporate Law: A Cross-Country Comparison', *University of Pennsylvania Journal of International Economic Law*, vol. 23, pp. 791-871.

- Priest, M & Skulley, M 2007, 'ASIC seeks bans for Hardie asbestos directors', *Australian Financial Review*, 16 February, p. 1.
- Ribstein, LE 2002, 'Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002', *Journal of Corporation Law*, vol. 28, pp. 1-67.
- Roe, MJ 1997, 'Path Dependence, Political Options, and Governance Systems', in K Hopt & E Wymeersch (eds), *Comparative Corporate Governance: Essays and Materials*, Walter de Gruyter, Berlin.
- Romano, R 2005, 'The Sarbanes-Oxley Act and the Making of Quack Corporate Governance', *Yale Law Journal*, vol. 114, pp. 1521-1611.
- Rutenberg, J 2007, 'Bush tells Wall St. to rethink pay practices', *New York Times*, 1 February, p. 11.
- Schmidt, RH & Spindler, G 2004, 'Path Dependence and Complementarity in Corporate Governance', in JN Gordon and MJ Roe (eds), *Convergence and Persistence in Corporate Governance*, Cambridge University Press, New York.
- SEC – see – US Securities and Exchange Commission (2003); US Securities and Exchange Commission (2006).
- Skeel, DA 2004, 'Corporate Anatomy Lessons', *Yale Law Journal*, vol. 113, pp. 1519-1577.
- Strine, LE 2006, 'Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America', *Harvard Law Review*, vol. 119, pp. 1759-1783.
- Teubner, G 1998, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences', *Modern Law Review*, vol. 61, pp. 11-32.
- Thompson, RB 2003, 'Corporate Governance After Enron', *Houston Law Review*, vol. 40, pp. 99-117.
- Toms, S & Wright, M 2005, 'Divergence and Convergence within Anglo-American Corporate Governance Systems: Evidence from the US and UK, 1950-2000', *Business History*, vol. 47, pp. 267-295.
- UK Department of Trade and Industry 2006, 'Bill to Save Business Millions Receives Royal Assent', Press release, issued 8 November.
- US Securities and Exchange Commission 2003, *Review of the Proxy Process Regarding the Nomination and Election of Directors*, Division of Corporate Finance, US Securities and Exchange Commission, Washington.
- US Securities and Exchange Commission 2006, 'SEC Votes to Propose Changes to Disclosure Requirements Concerning Executive Compensation and Related Matters', Press release, issued 17 January.
- Visentini, G 1998, 'Compatibility and Competition Between European and American Corporate Governance: Which Model of Capitalism?', *Brooklyn Journal of International Law*, vol. 23, pp. 833-851.
- Von Nessen, P 2003, 'Corporate Governance in Australia: Converging with International Developments', *Australian Journal of Corporate Law*, vol. 15, no. 3, pp. 1-36.
- White, E & Patrick, AO 2007, 'Shareholders push for vote on executive pay', *Wall Street Journal*, 26 February, p. B1.
- Williams, CA & Conley, JM 2005, 'An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct', *Cornell Internationall Law Journal*, vol. 38, pp. 493-551.
- Wymeersch, E 2005, 'Implementation of the Corporate Governance Codes', in K Hopt, E Wymeersch, H Kanda, H Baum (eds), *Corporate Governance in Context: Corporations, States and Markets in Europe, Japan, and the US*, Oxford University Press, Oxford.
- Yablon, CM & Hill, JG 2000, 'Timing Corporate Disclosures to Maximize Performance-Based Remuneration: A Case of Misaligned Incentives?', *Wake Forest Law Review*, vol. 35, pp. 83-122.

