



THE UNIVERSITY OF
MELBOURNE

Conference Programme

Melbourne Law School

The Ninth Biennial Conference on the Law of Obligations

Form and Substance in the Law of Obligations

Melbourne

17-20 July, 2018




Obligations Conference
A biennial conference on the law of obligations



FORM AND SUBSTANCE IN THE LAW OF OBLIGATIONS

We are very pleased to welcome you to *The Ninth Biennial Conference on the Law of Obligations*, which is proudly hosted by Melbourne Law School and the Faculty of Law in the University of Oxford.

The biennial Obligations conferences bring together scholars and practitioners from across the common law world to discuss current issues in contract law, the law of torts, equity and unjust enrichment. The series originated at Melbourne Law School, where the first conference was held in 2002 and the second in 2004. We are delighted to be bringing the series back to its place of origin this year.

Obligations IX will consider the relationship between form and substance in this field of law, both at a general level and at the level of specific subject areas and doctrines. Form and substance are distinguished in various ways and for various purposes in the law of obligations. A distinction is sometimes drawn between the form of a legal instrument, transaction or relationship and its intended or actual legal effect. For other purposes, a distinction is drawn between the form of a legal or equitable doctrine and its substantive effect. In a landmark study published just over thirty years ago, Patrick Atiyah and Robert Summers explored the relationship between form and substance of a different kind, namely formal reasoning (the application of rules without reference to the justifications that underlie them) and substantive reasoning (direct reference to considerations of purpose, justice or convenience). This conference will consider the distinctions and relationships between form and substance in the law of obligations in all of those manifestations.

We note with great sadness the passing of Patrick S Atiyah earlier this year at the age of 87. His contribution to the law, particularly the law of contract and the law of torts, was immense.

Andrew Robertson
Professor of Law
University of Melbourne

James Goudkamp
Professor of the Law of Obligations
University of Oxford

Day 1: Tuesday 17 July

4.30–5.30pm	Registration	Melbourne Law School, first floor
5.30–7.30pm	Plenary 1	David P Derham Theatre Welcome Professor Pip Nicholson, William Hearn Professor of Law and Dean of Melbourne Law School Opening plenary session Chair: Professor James Goudkamp (Oxford) The Hon Justice Michelle Gordon (High Court of Australia), ‘Analogical reasoning by reference to statute: what is the judicial function?’ The Hon Justice James Edelman (High Court of Australia), ‘The role of form in written contracts’
7.30pm		Drinks and light meal, first floor

Day 2: Wednesday 18 July

All day	Registration	Melbourne Law School, first floor
9.00–10.00	Plenary 2.1	<p>Plenary session: David P Derham Theatre Chair: Ms Jennifer Batrouney QC (Victorian Bar) Professor Andrew Burrows QC (Hon) FBA (Oxford), ‘Form and Substance: Fictions and Judicial Power’</p>
10.15–11.15	Parallel 2a	<p>Panel I: Room 108 Chair: Phillip Morgan (York) Desmond Ryan (Trinity College Dublin), ‘Form and Substance - A “Close Connection” in Vicarious Liability?’ Christine Beuermann (Newcastle UK), ‘The Abstraction of Form and the Associated Dangers for the English Courts: The Case Study of Vicarious Liability’</p> <p>Panel II: Room 109 Chair: John Mee (Cork) Andrew Robertson (Melbourne), ‘The Form and Substance of Equitable Estoppel’ Ying Khai Liew (Melbourne), ‘Prima Facie Expectation Relief in the Australian Law of Proprietary Estoppel: Formal or Substantive?’</p> <p>Panel III: Room 102 Chair: Katy Barnett (Melbourne) Steve Hedley (Cork), ‘How can we make private law better?’ Frederick Wilmot-Smith (Oxford), ‘Legal Disagreements’</p>
11.45–1.15	Parallel 2b	<p>Panel I: Room 108 Chair: Matthew Dyson (Oxford) Paula Giliker (Bristol), ‘Severing the plant from the root: Political change and the interpretation of transplanted law’ Jason W Neyers (Western Ontario), ‘Form and Substance in the Tort of Deceit’ Greg Bowley (Toronto), ‘Steampunk Liability? Form, Substance, and Nothingness in Conspiracy to Injure’</p> <p>Panel II: Room 109 Chair: Michael Rush (Victorian Bar) Niamh Connolly (UCL), ‘Is the balance between formal rules and substantive justice in English unjust enrichment law shifting?’ KV Krishnaprasad (Oxford), ‘Unjust Enrichment and Countervailing Legal Obligations: From Rules to Reasons’ Ajay Ratan (London Bar), ‘Reason Reloaded: How to Inform the Unjust Enrichment Formula’</p> <p>Panel III: Room 102 Chair: Matthew Harding (Melbourne) James Lee (KCL), ‘Tort Law in Top Courts: Bad Form and Addictive Substance?’ Dan Priel (Osgoode Hall), ‘Two Forms of Formalism’</p>

Day 2: Wednesday 18 July (cont)

1.15–2.15		Lunch, first floor
2.15–3.15	Parallel 2c	Panel I: Room 108 Chair: Wayne Courtney (NUS) Joanna McCunn (Bristol), ‘Contra Proferentem: The Chameleon of Contract Law’ Kelry Loi (NUS/Oxford), ‘The Heart of the Matter: The Substance of Contracts and Exemptions’
		Panel II: Room 109 Chair: Kylie Burns (Griffith) Ellen Rock (UTS), ‘Misfeasance in public office: a tort of substance’ Neil Foster (Newcastle NSW), ‘Form, Substance and Sheep Overboard: The “Type of Harm” Rule in the Civil Action for Breach of Statutory Duty’
		Panel III: Room 102 Chair: Pey-Woan Lee (SMU) Rosemary Langford (Melbourne), ‘Form and Substance in Fiduciary Law - Directors and Corporate Opportunities’ Joshua Getzler (Oxford), ‘Preemption and Crown fiduciary duties’
3.15–3.45		Afternoon tea, first floor
3.45–4.45	Parallel 2d	Panel I: Room 108 Chair: Steve Hedley (Cork) Caspar J F Bartscherer (UCL), ‘The Primary/Secondary Chimera’ Peter Jaffey (Leicester), ‘Remedial Consistency in Private Law’
		Panel II: Room 109 Chair: David McLauchlan (Wellington) Simon Connell (Otago), ‘Consensus, correction and conscience: formal and substantive reasoning in the requirements for rectification’ Timothy Liao (Oxford), ‘Re-forming privity: third party rights, or third party standing?’
		Panel III: Room 102 Chair: Hanna Wilberg (Auckland) Kumaralingam Amirthalingam (NUS), ‘Negligence and the False Dichotomy of Substance and Form’ Craig Purshouse (Liverpool), ‘The Form and Substance of the Breach Element of Negligence: A Utilitarian Explanation’
5.00–6.00	Plenary 2.2	Plenary session: David P Derham Theatre Chair: The Hon Justice Julie Ward, Chief Judge in Equity, Supreme Court of New South Wales Professor Matthew Harding (Melbourne), ‘Trusts and Purposes’
6.00pm		Drinks and light meal, first floor

Day 3: Thursday 19 July

9.00–10.00	Plenary 3.1	<p>Plenary session: David P Derham Theatre Chair: Associate Professor Jason Varuhas (Melbourne) Professor Birke Häcker (Oxford), ‘Substance Over Form — Has the Pendulum Swung Too Far?’</p>
10.15–11.15	Parallel 3a	<p>Panel I: Room 108 Chair: Lusina Ho (Hong Kong) Mark P Gergen (UC Berkeley), ‘Equitable Wrongs’ TT Arvind (Newcastle UK) and Ruth Stirton (Sussex), ‘Form, substance, and institutions: revisiting the restitutionary critique of equity’</p> <p>Panel II: Room 109 Chair: Paula Giliker (Bristol) Nicole Moreham (Wellington), ‘Deconstructing the privacy tests in English and New Zealand tort law’ Luke Rostill (Oxford), ‘Formal and Substantive Reasoning and Strict Liability in Conversion’</p> <p>Panel III: Room 102 Chair: Solène Rowan (LSE) Jason Varuhas, (Melbourne), ‘Contractual Discretion’ Krish Maharaj (Manitoba), ‘To run in thin air – Why Bhasin v Hrynew and “good faith obligations” need a firmer footing’</p>
11.15–11.45		Morning tea, first floor
11.45–1.15	Parallel 3b	<p>Panel I: Room 108 Chair: James Lee (KCL) Robyn Honey (Murdoch), ‘The Relationship between Form and Substance in Equity in the 21st Century: Learning from “the Mess” that is the Law of Undue Influence’ Prue Vines (UNSW), ‘Undue Influence in the probate court – a turnaround?’ Jodi Gardner (Cambridge), ‘Beyond Procedural Fairness: Reconceptualising Freedom of Contract’</p> <p>Panel II: Room 109 Chair: Ian Malkin (Melbourne) Eli Ball (NSW Bar), ‘Advocate’s Immunity in Australia: Private Law Form, Public Law Substance’ David Capper (Queen’s Belfast), ‘Can the Advocate’s Immunity Rule be Justified?’ Phillip Morgan (York), ‘The Case for Volunteer Protection’</p> <p>Panel III: Room 102 Chair: Dan Priel (Osgoode) Chaim Saiman (Villanova), ‘Form & Substance in Anglo-American Law: Reassessing Atiyah and Summers one generation later’ Ben Chen (Sydney) & Jeffrey Gordon (Columbia), ‘Interpretive Formalism in the Law of Obligations: Thirty Years After Form and Substance’</p>

Day 3: Thursday 19 July (cont)

1.15–2.15		Lunch, first floor
2.15–3.15	Parallel 3c	Panel I: Room 108 Chair: Birke Häcker (Oxford) Pey-Woan Lee (SMU), ‘Form, Substance and Recharacterisation’ Kelvin Low (City U of Hong Kong), ‘Intangible Property: A Chose by Any Name?’
		Panel II: Room 109 Chair: David Capper (Queen’s Belfast) David McLauchlan (Wellington), ‘Form and Substance in Contract Damages’ Giuseppe Bellantuono (Trento), ‘Beyond Form and Substance in Multi-Level Contract Law’
		Panel III: Room 102 Chair: Eric Descheemaeker (Melbourne) Sandy Steel (Oxford), ‘The Concept of Loss’ Václav Janeček (Oxford/Prague), ‘A Theory of Public Damages’
3.15–3.45		Afternoon tea, first floor
3.45–4.45	Parallel 3d	Panel I: Room 108 Chair: Sirko Hader (Sussex) Solène Rowan (LSE), ‘The “Legitimate Interest in Performance” in the Law on Penalties’ Nicholas Tiverios (UCL), ‘Engaging the New Australian Law of Penalties: When does a contractual clause attract judicial scrutiny?’
		Panel II: Room 109 Chair: TT Arvind (Newcastle, UK) Craig Rotherham (Nottingham), ‘The Death of Waiver of Tort’ James Goudkamp (Oxford) and Eleni Katsampouka (Oxford), ‘Punitive Damages Across the Common-Law World’
		Panel III: Room 102 Chair: Jessica Hudson (UNSW) Tobias Barkley (La Trobe), ‘Judicial Review of Trustee Discretion and the Courts’ Preference for Formal Rules’ Mark Bennett (Wellington), ‘Trusts law – Form over Substance or substance over form?’
5.00–6.00	Plenary 3.2	Plenary session: David P Derham Theatre Chair: Associate Professor Jeannie Paterson (Melbourne) Professor Liam Murphy (NYU), ‘The Formality of Contractual Obligation’
6.00 for 7.00 dinner		Conference Dinner
		Woodward Conference Centre Melbourne Law School, tenth floor

Day 4: Friday 20 July

9.00–10.00	Plenary 4.1	<p>Plenary session: David P Derham (Theatre) Chair: Professor Simone Degeling (UNSW) The Hon Justice Mark Leeming (New South Wales Court of Appeal), ‘Statutes in the Law of Obligations — The Multidimensional Form/ Substance Distinction’</p>
10.15–11.15	Parallel 4a	<p>Panel I: Room 108 Chair: Kit Barker (Queensland) Matthew Dyson (Oxford), ‘Times a-changin: the relative appeal of formalism and substance in tortious legal development’ Kylie Burns (Griffith), ‘Substance and Social Facts in Tort Cases in the UK Supreme Court’</p> <hr/> <p>Panel II: Room 109 Chair: Ben McFarlane (UCL) Chee Ho Tham (SMU), ‘Is the rule in <i>Dearle v Hall</i> a mandatorily formal rule?’ John Mee (Cork), ‘Justifying Restitutionary Liability for Mistaken Payments: Autonomy, Property and Nullity’</p> <hr/> <p>Panel III: Room 102 Chair: Kelvin Low (City U of Hong Kong) Elise Bant & Jeannie Paterson (Melbourne), ‘Form and Substance in Misleading Conduct’ Rachel Leow (NUS), ‘The Unity of Agency?’</p>
11.15–11.45		Morning tea, first floor
11.45–1.15	Parallel 4b	<p>Panel I: Room 108 Chair: William Swadling (Oxford) Lusina Ho (Hong Kong), ‘The Substance of Equitable Accounting and Proprietary Claims’ Samuel Williams (Oxford), ‘Non-Counterfactual Claims Against Trustees’ Katy Barnett (Melbourne), ‘Constructive Trusts over Bribes - Substance over Form Should be Preferred’</p> <hr/> <p>Panel II: Room 109 Chair: Kelly Loi (NUS) Nick Sage (LSE), ‘The Significance of Contracting Inter Absentes’ Sirko Harder (Sussex), ‘The Requirement of Consideration for One-Sided Contract Modifications’ Tim Rogan (Cambridge), ‘Form, Substance and Fairness in Contract’</p> <hr/> <p>Panel III: Room 102 Chair: Kumaralingam Amirthalingam (NUS) Hanna Wilberg (Auckland), ‘The Interplay Between Formal and Substantive Reasoning in the Duty of Care Enquiry in Negligence’ Sarah Fulham-McQuillan (Trinity College Dublin), ‘Is there a Sufficient Balance Between Substance and Form in Duty of Care and Damage in Negligence Law?’ Kay Young & Michèle Ducharme (Dept of Justice, Canada), ‘Public authority liability in Canada – bringing substance back into formal duty of care analysis’</p>

Day 4: Friday 20 July (cont)

1.15–2.15		Lunch, first floor
2.15–3.15	Parallel 4c	<p>Panel I: Room 108 Chair: David Winterton (UNSW) Zhong Xing Tan (NUS), ‘From Form to Substance: The Cautious Emergence of the Proportionality Principle in Contract Law’ Judith Skillen (KCL), ‘Proportionality in Private Law’</p> <hr/> <p>Panel II: Room 102 Chair: Joshua Getzler (Oxford) Ben McFarlane (UCL), ‘Substance and Form in Equity’ Yip Man (SMU), ‘Modern Equity: At the Edge of Formal Reasoning?’</p>
3.15–3.45		Afternoon tea, first floor
3.45–4.45	Plenary 4.2	<p>Plenary session: David P Derham Theatre Chair: Professor Elise Bant (Melbourne) Mr William Swadling (Oxford), ‘In Defence of Formalism’ Professor Robert Stevens (Oxford), ‘The Priority of Form over Substance’</p> <hr/>
5.00–6.00	Plenary 4.3	<p>Closing plenary panel: David P Derham Theatre Chair: Professor Andrew Robertson (Melbourne) Reflections on form and substance in the law of obligations The Rt Hon Sir Jack Beatson FBA (formerly Court of Appeal of England and Wales) Professor Lusina Ho (Hong Kong) Professor Barbara McDonald (Sydney) Professor Kit Barker (Queensland)</p>
6.00–7.00		Closing drinks, first floor

ADDITIONAL INFORMATION

Wireless Internet Access

Wireless internet is available to delegates throughout the conference.

Wifi network: Visitor
Username: obligationsconf
Password: e#6mRe

Assistant convener

Georgia Davis

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