

EDITORIAL

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What exactly is the public/private divide, and how is our understanding of it changing? This interaction goes to the very heart of our social, political, and legal discourse. The rise of the New Regulatory State, with its emphasis on privatisation and marketization, has accompanied the concomitant rise of regulation of private actors. The result is a veritable bricolage of laws, legal practices, and legal institutions, touching upon every aspect of public and private life.

Despite its fundamental doctrinal importance, the public/private divide has received little critical examination in light of these changes. It is hoped this Issue will cast a lens on several aspects of this fundamental shift in law and governance, and in so doing, contribute to debate on how our legal regime needs to evolve to grapple with this new reality.

The impetus for this thematic Issue came from the realisation that bright-line distinctions generally serve to confuse and constrain legal reform based on multi-factoral policy development; the public/private divide being one such distinction. For this reason, contributions were purposely sought from a wide range of areas of law. The aim was to provide a platform for timely exegeses of the evolution of this fundamental concept.

Terry Carney and Fleur Beaupert's article looks at the rise of assisted decision making in light of the *Convention on the Rights of Persons with Disabilities*, and ways in which the current 'bricolage' of public and private forms – and the absence of empirical research – has created a platform for potential abuse of disabled persons. This discussion is particularly timely given the pending rollout of the NDIS Scheme. It remains to be seen whether the new regime will merely contribute to this bricolage.

The 'public interest' test gets centre stage in Andrew Edgar's crisp analysis of Australia's recent move toward the public interest model. His contention that such a test should be adopted through legislation, despite its uneasy relationship between law and politics, is of interest given recent focus on the test in the migration context. Greg Weeks and Janina Boughey take up the public/private divide in the context of s 75(v) of the *Constitution*, and discuss ways in which the section may be used to regulate private bodies exercising public powers. They persuasively argue that the current 'public function' test of *R v Panel on Take-*

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overs and Mergers; *ex parte Datafin plc*¹ is unhelpful, and propose a ‘control’ test based on Canadian human rights jurisprudence.

Strata and community title are the fastest growing forms of property title in Australia. Cathy Sherry discusses the fascinating development of this novel form of property, and illuminates the inherently ‘public’ values that this distinctly ‘private’ right sought to embody. More importantly, her article highlights the limitations that these values create when they ignore centuries of legal development.

Lee Godden and others take up the pressing question of risk management in relation to climate change and insurance, evaluating the effectiveness of the New Regulatory State in managing evolving public and private forms. They persuasively argue that with the current schizophrenic neoliberal framework, risk is ultimately relocated to the individual, and question the utility of the public/private divide in light of these changes.

Jake Goldenfein’s illuminating historical analysis of the right to privacy highlights the lack of any such discernible right in Australia. His article points out that in the case of *Caripis v Victoria Police*,² such a right was not recognised, despite its presence in the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*. He ultimately concludes that while Caripis unsuccessfully invoked data protection to avoid retention of her images, that regime seems likely to play a role in the future regulation of criminal intelligence gathering, especially in Australia.

The dedication and enthusiasm of a large number of people have made this publication possible. I thank my colleagues on the Editorial Board from the bottom of my heart for their time and effort in editing the issue, and particularly to the Executive Committee for their constant wise counsel and commitment throughout the production process. I am sincerely grateful to Greg Weeks for his aid in the initial planning of the thematic component of this Issue; to Michael Handler and Lyria Bennett Moses, the *Journal’s* faculty advisors, and David Dixon, Dean of the UNSW Law Faculty, for their constant and much-appreciated support of the *Journal*. Most importantly, I would like to thank the anonymous referees (whom if it weren’t for the nature of their role, we would thank personally), and the contributors to this thematic Issue, whose intellectual rigour and incredible patience made editing this Issue a pleasure.

1 [1987] 1 QB 815 (*Datafin*).

2 [2012] VCAT 1472.