FOREWORD

THE HON ROBERT FRENCH AC*

It is not easy to discern and encapsulate the function of a Foreword or indeed to justify its existence. Its composition tests the author in more than one way. There is a motivation threshold – why go to the trouble of writing a Foreword given that most sensible people will turn past it to the substantive part of the publication. That is particularly the case when the Foreword stands at the beginning of a law journal containing a collection of articles reflecting, as in this Issue, the exciting diversity of contemporary societal questions with which its contributors have engaged.

An example which should engage the immediate attention of anyone interested in public institutional functioning and accountability, is the piece by Yee-Fui Ng, Maria O'Sullivan, Moira Paterson and Normann Witzleb entitled 'Revitalising Public Law in a Technological Era: Rights, Transparency and Administrative Justice'. Its discussion of the use of automation in official decision-making points us to a dystopian future of inscrutable exercises of statutory power by artificial intelligences deep learning their skills through the discernment of patterns in big data and developing unreadable algorithms to apply that pattern learning to individual cases. The recent 'Robodebt' disaster is a pointer to the downside of the efficiency benefits sought from the exercise of public power by or guided by machines. Moreover, legal accountability for automated exercises of official power may face some challenges. In a recent judgment of the Full Federal Court, *Pintarich v Deputy Commissioner of Taxation*,[1] discussed in the article, Moshinsky and Derrington JJ held that a 'decision' amenable to review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) requires a mental process of deliberation. A passage from the dissenting judgment of Kerr J highlighted the problem:

> The hitherto expectation that a 'decision' will usually involve human mental processes of reaching a conclusion prior to an outcome being expressed by an overt act is being challenged by automated 'intelligent' decision-making systems that rely on algorithms to process applications and make decisions.[2]

Set against that content, the Foreword is a mere amuse-bouche, serving only to delay access to the feast.

Beyond self-doubt about the value of Forewords, the Foreword writer may face ethical challenges. Does the probability that the Foreword will be read by few, if any, justify him or her in skimming the contents page and the abstracts and making plausible references to randomly selected passages? As to that I can say that I have

* Former Chief Justice of Australia; Chancellor, University of Western Australia.

1 (2018) 262 FCR 41.

2 Ibid 48 [46].

reviewed each of the pieces in this Issue of the *University of New South Wales Law Journal* ('*Journal*'). That leaves the problem of devising something appropriate to say about such a diverse collection. The last occasion on which I penned a Foreword for this *Journal* was in 2017. That was an Issue focussed across a number of articles on the judiciary in its human rather than institutional dimensions. It is somewhat harder to reflect with some overarching comment upon what, on its face, is a heterogeneous collection of articles.

There is, of course, a stock of well used phrases to which any Foreword writer can resort when desperate. So a publication with worthy but turgid prose, ultimately unreadable as a whole, may attract the encomium – a 'rich resource'. The publication that contains intellectually unsustainable propositions may be variously described as provocative, challenging or confronting. For the truly tedious text, the anodyne 'thought provoking' may suffice – albeit the thought it provokes may be 'I have just wasted several hours in the twilight of my life reading this stuff'. None of these phrases need to be deployed on this occasion.

This Issue of the *Journal* offers a theme under the title 'Revitalising Legal Authorities'. The Editor's letter of invitation to write the Foreword told me that the articles 'explore how legal authorities may be, or have been, "revitalised" to introduce new vigour or direction into the law and legal practice'. That rubric provides adequate accommodation for diversity which is reflected in the selection of the articles. And truth be told each of the articless engages with questions at the intersection of important changes in our society and in our laws.

The first article considers the interaction between international and municipal law in Australia. The indefatigable Michael Kirby returns to the lists to joust with High Court jurisprudence, in some of which he was at odds with his former colleagues, concerning the applicability of international human rights law to the interpretation of the *Constitution* and other legal texts. What the article throws up is the challenge, in a dualist system, of bringing international law and, in particular, that aspect of it relating to fundamental human rights and freedoms, to bear upon the Australian legal order. The author's dissent in *Al-Kateb v Godwin*[3] is revisited. In that case the High Court held, by four votes to three, that the mandatory detention requirements applicable to unlawful non-citizens under the *Migration Act 1958* (Cth) permitted indefinite detention where the detainee could not be returned to the country of origin or a third country. The divisions were essentially interpretive depending on differing views of the intractability of the statutory language. In revisiting the decision, Michael Kirby offers a tantalising glimpse into the small 'p' politics associated with the circulation of draft judgments within the Court. It may be doubtful whether we will see in the near future any change in the direction of the High Court's jurisprudence which would enable constitutional interpretation to be informed by international human rights law. That said, a point of entry for international law or conventions into the Australian legal system, apart from specific adoption or application by statute, is through the common law. The rights and freedoms traditionally recognised by the common law reflect in significant part the fundamental human rights and freedoms which have become

3 (2004) 219 CLR 562.

part of customary international law. And customary international law itself can be incorporated by adoption into the common law. In that way through the application of the common law to the interpretation of statutes, in particular by the way of the principle of legality, international law principles may be brought to bear on statutory interpretation. Indeed, to the extent that the common law requires interpretation of statutes consistently, so far as possible, with fundamental rights and freedoms, it resembles the statutory interpretive rules found in the human rights legislation of Victoria, Queensland and the Australian Capital Territory.[4] The topic is one of ongoing significance and it is good to see it reactivated in Michael Kirby's article in his typically engaging way.

In the second article by Alysia Blackham and Jeromey Temple, the authors engage with one of the more difficult areas of discrimination law – discrimination by reason of intersecting attributes and vulnerabilities. The issue of intersectional disadvantage generally is a large and important one. In its *The Justice Project: Final Report*, released in 2018, the Law Council of Australia identified 13 groups experiencing serious disadvantage in access to justice – 'access' defined broadly and not limited to legal advice and representation in tribunal or judicial proceedings. The 13 groups included people under economic disadvantage, homeless people, victims of family violence, Indigenous people, disabled people, recent arrivals in Australia and the elderly.[5] Plainly enough one person may be subject to more than one area of disadvantage or vulnerability and may suffer operational or intentional discrimination by reason of more than one of them.

The authors in this article evaluate the extent to which discrimination laws accommodate the case of persons who suffer discrimination on more than one ground. It might be thought that obvious candidates for intersectional discrimination would be race, age, disability and gender. The authors conclude that the problem is one which has to be addressed by law reform and a greater understanding by equality agencies of the extent of this complex phenomenon. They call for empirical analysis of its consequences which fall heavily upon the most disadvantaged groups within our society. It is a useful contribution, not least because it reminds its readers to move out of a mindset that unconsciously puts discrimination laws and their enforcement into silos.

Moving up to the big end of town, Vivienne Brand tackles the subject of corporate whistleblowing. She considers the role of whistleblowers as surrogate regulators, not necessarily inflicting reputational damage on the company for which they work:

> The regulatory role of the whistleblower … may be just as important in relation to internal tip-offs that prompt corrective internal action as it is in the context of external disclosures to corporate regulators.[6]

From the role of the human whistleblower the reader is then taken to the technologically enhanced human interpretation and application of regulatory

4 See *Human Rights Act 2004* (ACT); *Human Rights Act 2019* (Qld); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

5 See Law Council of Australia, *The Justice Project: Final Report* (Report, August 2018) pt 1.

6 Vivienne Brand, 'Corporate Whistleblowing, Smart Regulation and RegTech: The Coming of the Whistlebot?' (2020) 43(3) *University of New South Wales Law Journal* 801, 810.

compliance requirements. This technological enhancement is brought under the unappealing sounding rubric of RegTech. RegTech itself, however, may have only a short time in the sun for it is now 'predicted to be disrupted by the arrival of AI-powered RegTech solutions that use predictive technologies and deep learning to facilitate improved regulatory compliance outcomes'.[7] It is from there a short step to the author's suggestion that one day whistleblowers may be supplemented, or replaced, by '"whistlebots", with the ability to report autonomously within a corporation and/or to external regulators, and to dramatically enhance internal corporate transparency'.[8]

Where breach reporting to a regulator is made mandatory by legislation, it is not beyond imagination that someone will suggest that risk is reduced if there is an AI to detect the breach and communicate it to a regulatory AI which can deliver the appropriate sanction within nanoseconds of notification. This is an interesting and forward-looking piece and it should not be thought that the imagined prospects are unlikely to be realised in the short to medium term.

Azadeh Dastyari takes the reader in a different direction in her consideration of the fundamental freedom of expression evidently not enjoyed by Commonwealth public servants to the same extent as the rest of the population. She takes, as her starting point, the case of Michaela Banerji, a public servant in the Department of Immigration who tweeted, under a pseudonym, thoughts critical of Australia's human rights record, among other things, and was dismissed for her troubles. The regulatory scheme under which she was dismissed was held by the High Court of Australia not to infringe the implied freedom of political communication which, it will be remembered is a limitation on legislative power and not a right or freedom vested in the individual.[9]

The case was a disturbing one and the critique offered by Ms Dastyari is thoughtful, making the persuasive point that:

> The criticism of anonymous public servants has no more damaging impact on representative and responsible government than criticism from any other person in the Australian community.[10]

The article goes on to discuss international human rights law and particularly article 19 of the *International Covenant on Civil and Political Rights* and article 10 of the *European Human Rights Convention* and their potential application to cases such as that of Ms Banerji.

From over-speaking public servants we are taken to judges' law and the application of the principle stated in *Australian Securities Commission v Marlborough Gold Mines Ltd*[11] and *Farah Constructions Pty Ltd v Say-Dee Pty*

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7 Ibid 811, citing Giangiacomo Olivi and Francesco Armaroli, 'European Union: Bridging the Gap between RegTech and Artificial Intelligence', *Mondaq* (Web Page, 17 December 2018) <http://www.mondaq.com/italy/x/764606/fin+tech/Bridging+the+gap+between+RegTech+and+Artificial+Intelligence+an+Italian+perspective>.

8 Brand (n 6) 825.

9 *Comcare v Banerji* (2019) 372 ALR 42.

10 Azadeh Dastyari, 'Vitalising International Human Rights as Legal Authority: Freedom of Expression Enjoyed by Australian Public Servants and Article 19 of the *International Covenant on Civil and Political Rights*' (2020) 43(3) *University of New South Wales Law Journal* 828, 843.

11 (1993) 177 CLR 485.

Ltd[12] that Australian courts in one jurisdiction must follow the decisions of intermediate appellate courts in other Australian jurisdictions on questions of law of national operation unless the other courts are 'plainly wrong'. If I may offer a personal perspective, the term 'plainly wrong' seems to be more of an epithet than a useful standard. It may be reflective of the strength of the opinion of those who voice it but sometimes little more than that. The article examines the development and practical application of the rule and, in particular how often it has been applied and where divergences in decision-making have emerged. In the 25 years surveyed, 20 decisions have applied the rule, 10 of them emerging from the Supreme Court of New South Wales.

The purpose of the proposition is entirely legitimate – to encourage national consistency in the elements of what is properly regarded, by reference to Chapter III of the *Constitution*, as an integrated national judicial system. The formulation of the test, in my opinion however, leaves much to be desired. It is more likely to engender inter-jurisdictional resentment than a collective commitment to consistency across State and Territory borders. The latter comes from considerations of comity and the desirability of uniformity of the law in a federation.

Catherine Greentree explores the protean lineaments of non-statutory Commonwealth executive power and argues strongly for its interpretation through an historical lens focussing on the common law and the historical prerogatives of the Crown. In this she joins the ranks of the great late Australian constitutional scholar, George Winterton, and his former colleague Peter Gerangelos. She critiques the High Court's approach to the non-statutory powers. As one complicit in that approach, I will not engage with that critique beyond saying that this article presents a helpful discussion for all engaged in advising or making decisions in this difficult area. As one who has never rejected the historical lens, I welcome it. The question is how case-by-case will the definition and scope of non-statutory executive power emerge with greater clarity? The instrumental point of Ms Greentree's argument, reflecting those of Winterton and Gerangelos, is that the prerogative can inform the process of delineation. It will be interesting to see when and to what extent non-statutory executive power again requires the attention of the High Court. Unlike Messrs Pape and Williams,[13] there is not a long line of litigants seeking to challenge public expenditure by the Commonwealth in the exercise of non-statutory executive power.

Rosemary Langford provides two pieces on corporations. The first article, entitled 'Purpose-Based Governance: A New Paradigm', directs attention to the legitimacy of the corporate pursuit of purposes other than the maximisation of profit. As she observes, the topic has been the subject of debate for a number of years. Corporations espousing socially progressive positions while talking about climate change tend to attract denunciation from cultural warriors on the right who seem to regard such activity as ultra vires. In her first article Ms Langford directs

12 (2007) 230 CLR 89.

13 See *Pape v Commissioner of Taxation* (2009) 238 CLR 1; *Williams v Commonwealth* (2012) 248 CLR 156; *Williams v Commonwealth [No 2]* (2014) 252 CLR 416.

attention to proposals to give purpose more of a role in the corporate sphere. She points to perceived failures of company roles in society leading to increased mistrust in business and propositions for 'a radical reconceptualisation of business, encompassing changes to ownership, stewardship and regulation'. Those proposals require companies to articulate their purposes, not in terms of the production of profits but in terms of the production of profitable solutions to problems of people and planet. The fiduciary responsibilities of directors should be centred on promoting the corporate purpose. This is a debate whose time has definitely come. Certainly a concept of corporate purpose larger than shareholder returns may be in the long term interest of shareholders. That which enhances public trust and confidence may also keep over-intrusive regulation at bay.

The second piece, on a related theme, is titled 'Use of the Corporate Form for Public Benefit: Revitalisation of Australian Corporations Law'. Ms Langford here analyses the feasibility of purpose-based companies from the perspective of Australian corporations law. The second article builds on the first in providing the detail of relevant aspects of the corporations law regime and focusses more closely on particular issues that arise in the facilitation of purpose-based companies. She seeks to demonstrate that revitalisation of Australian corporations law to allow purpose-based companies is feasible and opportune. It does not require a fundamental shift, particularly given the malleability of directors' duties. Ms Langford concludes that this evolution of the corporate form is a natural adaptation rather than a radical reformulation.

Julian Murphy addresses the question of the use of Indigenous language in the law and the legislative process. He describes and defends the trend towards Indigenous law-making in Australia and refers to comparative examples of multilingual parliamentary debate in legislation in Canada, Wales, South Africa and New Zealand. The article concludes with a discussion of the interpretation of multilingual legislation. Issues which he identifies are the interpretive authority of an English language court faced with non-English statutory text, the way in which questions of irreconcilable inconsistency between multilingual statutory texts is to be resolved and the weight to be given to Indigenous language in statutory text.

The notion of multilingual legal texts is, of course, not novel; nor is the problem of reconciling interpretations which are in tension with each other. The issue arises in treaties and in multilingual communities. In the United Arab Emirates, for example, laws may be found in both English language and Arabic texts. In Hong Kong the recently enacted *Law of the People's Republic of China on Safeguarding National Security in Hong Kong Special Administrative Region*[14] which has attracted much debate, has both an (unofficial) English language and an (official) Chinese language version.

I have already mentioned the article on 'Revitalising Public Law in a Technological Era: Rights, Transparency and Administrative Justice' in the context of administrative justice.

14 《中華人民共和國香港特別行政區維護國家安全法》 [Law of the People's Republic of China on Safeguarding National Security in Hong Kong Special Administrative Region] (People's Republic of China) Standing Committee of the National People's Congress, Order No 49, 30 June 2020.

The last article by Ronli Sifris, Tania Penovic and Caroline Henckels is concerned with the advancement of reproductive rights through legal reform, focussing on the example of abortion clinic safe access zones. The authors regard the introduction of safe access zones as a significant legal reform implemented across Australia to support and promote women's reproductive rights. In so doing they draw on empirical research conducted by two of the authors and consider that research against the background of the decisions of the High Court in *Clubb v Edwards*; *Preston v Avery*.[15] Those decisions upheld the validity of Victorian and Tasmanian safe access zone provisions against the implied freedom of communication on political and governmental matters. They relate the High Court's findings on the constitutionality of the laws as reflective of empirical findings, particularly the proportionality of the laws to the legitimate objective of protecting the health, safety, wellbeing, privacy and dignity of Australian women.

As they say in their concluding section of the article, the law in most Australian jurisdictions has progressed to a position where abortion is viewed within the paradigm of health and medical treatment, rather than falling within the criminal law framework. Not only has it moved to health law, but laws have been enacted to protect women from those who wish to continue the discreditable but age-old practice of naming, shaming and blaming. There still remain, however, non-legal barriers to access faced by women seeking abortion in Australia. These are the areas of intersectional disadvantage, financial and geographic and variability in practitioner attitudes and training.

The preceding overview of this collection lends support to the general rubric under which it is issued, 'Revitalising Legal Authorities'. There are those who will select particular articles of interest to them. My own view is that it is well worth reading the whole Issue to get a sense of the moving wavefronts of the law in intersection with societal change.

15 (2019) 366 ALR 1.