FOREWORD

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The articles in this issue of the *University of New South Wales Law Journal*, the first five thematic and the rest general, discuss some fascinating questions. The thematic essays relate to research topics on the problem of bias and how to counter bias, inevitably involving the role of economics and law.

The first article by Vicki Huang, Sue Finch and Cameron Patrick, 'Patents and Gender: A Big Data Analysis of 15 Years of Australian Patent Applications', demonstrates that female participation in the Australian patent system is low. The authors suggest that this gender effect could be related to examiner bias, patentee gender effects or a combination of both. The authors' study also shows that female inventors cluster in the life sciences including medical technology, pharmaceuticals, organic fine chemistry and biotechnology. Policies that encourage mixed gender teams of inventory in these fields may be one way of increasing female participation overall.

The 2016 Report of the Productivity Commission found that the Australian patent system was tipped in favour of rights holders and against the interests of the broader community. The Commission proposed reforms, including the insertion of a statutory objects clause and amending the test for 'inventive step'. The proposed reforms would make it more difficult to secure a patent. The objects clause was introduced on 26 February 2020 stating that the object of the Act 'is to provide a patent system in Australia that promotes wellbeing through *technological innovation* and the transfer and dissemination of technology'.[1] Many stakeholders saw the addition of 'technological innovation' as a means to narrow patent-eligible subject matter. There was concern that life sciences and software patents would be affected. The authors agree that a narrow interpretation of 'technological innovation' could affect the life sciences more than archetypal mechanical fields and that a narrow concept of 'technological' will have a larger impact on female inventorship. But it is still unclear as to how examiners and courts will interpret the objects clause in relation to patentability.

Michael JR Crawford in 'Property as Emergent Order: Explanations and Limitations' seeks to show that the belief mainly by lawyers that positive law is the dominant, if not the sole, source of norms in society is mistaken. The author claims,

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1 *Intellectual Property Laws Amendment (Productivity Commission Response Part 2 and Other Measures) Act 2020* (Cth) s 2A.

controversially, that most norms in society that constitute order are abstract rules of conduct that allow for most basic social interactions by ensuring, in the words of Hayek, 'the correspondence of the expectations concerning the actions of others'.[2]

The system of order so arising does not necessarily find its origin in the design of some thinking mind. An alternative explanation is that order arises spontaneously through the immensurable actions of self-interested individuals concerned only with achieving their own ends. An example given is that, there are no rules of the footpath but people seldom collide with one another. The example may not be apposite because pedestrians may well owe another a legally enforceable duty of care and their actions are subject to the law of trespass to the person. There are other customs, not backed by a legally enforceable duty. Customs such as these are, in the view of the author, property norms in the broad sense that they solve potential disputes over the distribution of a scarce and rival resource. However, while such norms are the result of human action, but not the execution of any human design, they are subject to fundamental structural limitations and, in many cases, can be improved upon by the 'made order' of positive law. Positive law, apart from disseminating information about rights, also abstracts rights in ways that could never be achieved spontaneously. Many examples are given.

'Climate and Carnism: Regulatory Pathways towards a Sustainable Food System' by Victoria Chen and Cary Di Lernia is probably the most important article in this issue of the *Journal*. The pervasive societal preference for meat products, particularly red meat products, is accelerating climate change and compromising planetary health. A landmark report from the Intergovernmental Panel on Climate Change ('IPCC') in 2019 found that the global food system accounts for approximately 25–30% greenhouse gas ('GHG') emissions, the majority being attributable to animal agriculture.

The consumption and production of meat in Australia is a deeply entrenched cultural norm. Australia's consumption of meat per capita is the second highest in the world, double the world average and three times the recommended healthy intake. The preference for meat products is referred to as *carnism.* Carnism is now a significant driver of GHG emissions, soaring deforestation rates, disruptions to water systems and biodiversity loss. Yet little regulatory attention has been paid to addressing the negative implications of meat production and consumption.

Despite a scientific consensus that economic and social activities are exceeding scientifically determined safe 'planetary boundaries' and accelerating the threat of climate change, political action targeting the issue has been markedly inadequate.[3] This, notwithstanding the fact that the global middle class is rising and will lead to an increase in GHG emissions. It is predicted that by 2050 global meat production will double on present levels to meet rising demand. A transition to much less harmful plant-based diets has not taken place.

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2 FA Hayek, *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Routledge & Kegan Paul, 1973) vol 1, 36.

3 See, eg, Will Steffen et al, 'Planetary Boundaries: Guiding Human Development on a Changing Planet' (2015) 347(6223) *Science* 1259855:1–10 <https://doi.org/10.1126/science.1259855>.

A number of factors have inhibited an open policy debate aimed at moderating excessive meat consumption. Significant factors driving inaction include low consumer awareness surrounding the issue, vested interests from the private sector (Australia's red meat and livestock industry comprises over 80,000 farming businesses and approximately 200,000 workers) and fears of political backlash from constituents. Yet adequate climate mitigation requires robust policies which address public attitudes, social values and practices.

A fundamental conflict exists between business interests and broader public goals – between short-term profit maximisation and climate objectives, governments may need to adopt more coercive forms of regulation targeted at the emissions produced by the meat industry. One form of regulation would be a carbon price levied on agricultural emissions.

Recent research has demonstrated that supply-side mitigation measures alone will not be sufficient to drive food system sustainability or security, making a transformational shift in dietary patterns critical to meeting emissions reduction targets. A tax on meat is one of the most coercive means of achieving lower emissions. It is estimated that 80% of the emissions reduction effect of a meat tax can be achieved by taxing beef and lambs alone. The demand for beef and lamb is significantly more price sensitive than poultry.

There are many objections to a meat tax and it will meet fierce opposition from industry and civil society. On the other hand, research has demonstrated that a tax on meat is far less unpalatable than government perceives. Yet it is unlikely that a meat tax will be implemented in the near future. In the meantime, along with the removal of meat from the list of products exempt from the goods and services tax ('GST'), the authors propose that recourse should be made to less coercive forms of regulation to begin the transition towards less emissions-intensive production.

'Cultured meats' represent the most recent foray into technological efforts aimed at generating a 'cultivated meat revolution'. Cell-cultured meat involves growing animal tissue and flesh in a laboratory and has been marketed as an eco-friendly alternative to conventional meat. Yet the future of cultured meat appears to be uncertain. One analysis demonstrates that the current levels of GHG emissions generated by cultured meat are similar to conventional meat due to the amount of energy required in production. There are, however, according to the authors, reasons why the costs of production of cultured meats will decrease.

The authors suggest that the alignment of cultured meat with the dominant structural paradigm of carnism may contribute to its success in reducing the environmental footprint of meat consumption.

Kathryn James' article 'The Fast and the Furious: Exploring the Limits of Law and Economics through a Campaign to Repeal the Luxury Car Tax' begins by making the point that the conjunction of law and economics has come to be regarded as 'the most important development in legal scholarship in the twentieth century'.[4] The author also points out that efficiency has risen to become the pre-

4 Robert Cooter and Thomas Ulen, *Law and Economics* (Addison-Wesley, 3rd ed, 2000) 2.

eminent organising principle in tax policy reflecting the growing influence of (neoliberal) economics in tax policy.

The author says that law and economics is premised on three fundamental assumptions: first, that human beings are rational maximisers of their self-interest; second, that the objective of the legal system should be to maximise social welfare viewed as an aggregation of the welfare of each member of society; and third, markets are the best way to maximise social welfare because they permit individuals to enter into voluntary exchanges thereby allowing resources to go to their most valuable use.

Although these assumptions are contestable, they are not surprising. The primacy accorded to efficiency (in the narrow sense of non-distortive) has been taken up enthusiastically in tax policy. The author points out that, whereas there is a need to balance equity with efficiency, efficiency has come to predominate. But, according to the author, perhaps the most devastating critique of law and economics comes from optimal tax theory. The point made by the author is that laws mediate economic concepts and translate them from ideas to action. The laws which give effect to economic ideas are the subject of judicial interpretation so that outcomes can be as much (if not more) a product of the legislators, the administrators and the judiciary rather than the underlying logic of the idea.

It is against this background that the author considers the campaign against the luxury car tax ('LCT'). Two major reviews have expressed misgivings about the tax, with the Henry Review recommending its abolition in 2009. There were a number of factors motivating the introduction of the LCT, including protectionism, which ceased to apply when Australia no longer manufactured cars. The Henry report had three main objections to the LCT. First, the tax is inefficient by design – as a select impost on a narrow base (luxury cars) it generates minimal revenue at too great a cost. Secondly, the tax is inefficient and ineffective because it distorts market outcomes. Thirdly, the tax is unfair and discriminatory in its impact, targeting people of equal means based purely on their tastes. For example, the LCT falls on people with a taste for relatively expensive cars but not on those with a preference for diamonds, fur coats or yachts.

True it is that the yield of the LCT is small and it does not generate significant revenue, but the tax is well designed and administered as part of the GST system and generates revenue from an increasing tax base for low costs and it is relatively easy to collect. The author concludes that there is a qualified case for the retention of the LCT due to the decline in the redistribution capacity of the income tax.

The author states that the campaign to repeal the LCT offers an ideal example of the law and economics approach to one which embraces efficiency as a principle of legal design, either on the narrow definition of efficiency espoused by law and economics or on the broader definition of optimal tax theory, the approach has limitations. Efficiency does not afford a suitable guide to govern the complex normative issues of economic justice that taxation gives rise to. Notable is the failure of law and economics to give sufficient priority to redistribution.

Daniel Ghezelbash and his co-authors in 'A Data Driven Approach to Evaluating and Improving Judicial Decision-Making' analyse over 6,700 applications for judicial review of refugee applications in the Federal Circuit Court

of Australia. The data reveals that the rate at which applications are accepted varies widely, based on the judge who hears the case and other factors. The findings raise questions of potential influence of cognitive and social biases in judicial decision-making. The authors outline how statistics of the nature collected in their study could inform interventions and reforms which would increase public confidence in the judicial system. The authors acknowledge the very sensitive nature of this form of quantitative analysis of judicial behaviour and the risk of mistake or misinterpretation of the data.

The Full Federal Court dismissed an attempt to use statistical data to make out a case of apprehended bias in *ALA15 v Minister for Immigration and Border Protection*.[5] In its reasons for decision the Court questioned whether any form of statistical data alone could make out a claim of apprehended bias. The authors criticise the Court's approach. At the same time, they assert that the heavy reliance on *ex tempore* judgments by some judges leads to them having the highest caseloads and lowest success rates. Further, the authors claim that there is more risk of cognitive and social biases when judges make *ex tempore* judgments.

Further research is needed to establish these points. As it is, they present a challenge to the widely held belief that *ex tempore* judgments represent the best and most cost-effective means of deciding cases which are not so complex as to require further consideration. The cost of litigation is now so burdensome that increasing emphasis must be given to crucial procedures that are cost-effective. It is recognised that there must be economic and financial limits to what can be done in the pursuit of justice.

This article discusses a very important topic which has not received the attention it deserves, partly by reason of a belief that judges, by reason of their training and experience are immune to cognitive and social bias. This belief is questionable, to say the least of it, and fails to take account of the fact some judges may not be aware that they are subject to a bias or apprehended bias. It is important that further research be undertaken in this area, as impartial decision making is at the very core of our system of justice and there are disturbing signs, not only in the United States but also in Australia that the value of impartial decision-making is no longer a fundamental feature of the judicial appointment process.

Jason M Chin and his co-authors, in their article 'Where Is the Evidence in Evidence-Based Law Reform?' note that although law reform bodies frequently endorse a commitment to evidence-based law and policy recommendations and assert the importance of the transparency of their processes, law reform bodies do not connect the two goals of evidence-based policy and transparency. The authors contend, correctly, in my view, that open science synthesis can make evidence gathering and synthesis processes more reliable and less susceptible to bias, as well as improving efficiency by reducing waste which is bound to occur if the transparency of research undertaken is not known by later researchers. Both law and economics support the principle of efficiency, economics more so than law. But economics offer less assistance in the identification and selection

5 [2016] FCAFC 30.

of welfare goals. The authors make five suggestions for open law reform, all of which have merit.

Neera Bhatia and James Tibballs discuss the question whether organ procurement of the heart and transplantation contravenes the dead donor rule ('DDR') and the Australian legislative definitions of death as an irreversible cessation of circulation. The procurement of vital organs has always been conducted after the death of the donor under the DDR. According to the DDR, organ procurement should not occur until the patient is dead and the procurement of organs should never be the proximate cause of death.

The legal definition of cessation of circulation began with attempts to define brain death and culminated in two definitions of death, 'brain death' and 'circulatory death', a bifurcated definition, which was enshrined in legislation. These legislated definitions proceeded on the notion that the relevant cessation of functions was irreversible. The problem is that, pursuant to the DDR, procurement of organs for the purpose of transplantation must occur only after withdrawal of life-sustaining treatment, yet the donor's organs are still capable of recovering function in the recipient. This problem gives rise to the question – how can there be an irreversible cessation of cardiac function, when it can later be reversed.

The authors consider three possible solutions to the challenges posed by heart transplantation after circulatory death ('DCD'):

(1) Abandon the practice of DCD; or
(2) Abandon the DDR; or
(3) Alter the legal definition of death.

The authors favour solution (3) and propose that the bifurcated legal definition related to cessation of brain function, but that physicians be required to prove that the patient's brain has at least cortical function before procurement of organs – this is to be accomplished by surveillance of electroencephalographic recordings.

In 'Encryption and the Privilege against Self-Incrimination: What Happens When a Suspect Refuses to Divulge a Password', Daniel Hochstrasser discusses the role of the privilege in the face of a court order to produce the password to an encrypted advice. The author examines how the privilege is understood in Australia and comparable jurisdictions, and concludes that the express abrogation of the privilege is an appropriate legislative response to this issue in Australia.

According to the author, where a compelled production order is sought under statute, the privilege cannot bar the granting of the order. What is retrieved from the encrypted device is *pre-existing evidence* of the type that has always been retrievable under a search warrant until the availability of encryption. The purpose of a compelled production order is not to broaden law enforcement powers but to restore them to the position they were in a little more than a decade ago. The author's view is correct.

Jane Kotzmann and Morgan Stonebridge's article on zoonotic disease risk in Australia makes the point that the way we relate to animals has a considerable impact on public health and that intense animal agriculture creates conditions which favour the emergence of zoonotic diseases, that is, diseases transmissible from animals to humans, such as COVID-19. The authors rightly contend that Australia's regulation

of intensive animal agriculture is deficient in instigating the risk of zoonotic disease. This is because the prevailing view has been that animals are property and exist only to meet human needs so that methods of farming that maximise production and efficiency are encouraged with little regard for animal welfare. The authors argue that animal welfare and public health are inextricably linked.

Of two different approaches to the animals-human relationship – One Health and Wild Law – the authors prefer the latter. Wild Law contends that our law fails to recognise the interdependence in the human-earth relationship. In reality, human health is interdependent on the health of the earth. Wild Law would require an acknowledgment that rights are derived, not from legal systems, but from the universe. Intense animal agriculture does not operate within the limits of the earth system and would be inconsistent with Wild Law. The consequence would be that intensive animal agriculture would be replaced by small-scale farming that prioritises animal and environmental health. The problem then is to persuade governments and the people to support such an approach.

Anthony Gray's article 'The Doctrine of Command Responsibility in Australian Military Law' has been prompted by the release of the *Brereton Inquiry Report* which found that there was credible evidence that members of the Australian Defence Force were involved in war crimes in Afghanistan. The article examines the question, assuming the allegations are proved to be true, to what extent, if any, are those in command of those who committed the crimes responsible for them. The doctrine of command responsibility has been recognised in Australian law in section 268.115 of the *Criminal Code Act 1995* (Cth) a provision so far not utilised.

The doctrine has been accepted as part of customary international law and treaty law. However, customary international law is not clear on the issue. There is support for the view that those in command of the perpetrators are liable on the basis of dereliction of duty, but there is also support for the view that the commanding officer is deemed to have committed the crimes actually perpetrated by those who committed the war crimes. The Australian provision calls for causation between the commander's failure to control and war crimes committed by more junior officers in requiring that the commander either knew of the subordinates' commission of an offence or was *reckless* as to whether they were doing so.

The author points out that there are at least three aspects of the doctrine of command responsibility that appear to run against generally accepted features of the common law. This is significant because it has been considered important that, where possible, the Australian provisions reflecting command responsibility should be congruent with both established principles of customary law and the general domestic criminal law provisions in related context.

The author concludes, correctly, that the wording of section 268.115 leaves no doubt that the law in Australia makes the commander liable for actions of subordinates, not for a separate duty that commanders owe. On the other hand, the author concludes that, consistent with fundamental criminal law principles such as culpability, something more than unreasonableness is required to make a commander liable. The 'something more' should be proof of intent or knowledge that the relevant activity is occurring or probably will occur and is wilfully blind to that fact. The

author claims, with some justification, that this position enjoys support in various sources of international law and is not antagonistic to the fabric of Australian criminal law. It is unlikely that the authorities will take action against the commanders under section 268 unless there is culpability on the part of the commanders.

In ‘A Promising Path or Dead End? A Director’s Duty of Care in China’, Charles Xiao-Chuan Weng points out that Chinese statutory directors’ duties have evolved into two segments, the duty of care and the duty of loyalty. Of the two, the duty of care is the more difficult to enforce due to opaque standards and hindsight bias. China first adopted directors’ duties in 1993. The development of the duty has attracted increasing criticism over the past two decades. The Chinese judiciary and market supervisory agencies have developed rules for enforcement of a director’s duty of care in practice which have become influential, notwithstanding the absence of supporting equity principles. The development of the duty of care has occurred not only in statute but also in judicial decisions, as judges are encouraged to refer to similar cases before making a decision.

Unfortunately, section 148 of the *Company Law 2005* enunciated that directors are legally obliged to demonstrate fidelity and diligence and made no mention of the duty of care. Chinese statutes appear to be more concerned with how diligently directors are working rather than whether they are exercising reasonable care in fulfilling their duty. The vagueness of the duty of care may allow for parties with powerful political connections to put pressure on judges to ‘interpret’ the law in their favour. In these circumstances the author is clearly correct in calling for the Chinese legislature to consider introducing a statutory duty of care standard.