

FOREWORD

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The essays in this issue of the UNSW Law Journal are directed to the following question:

How, if at all, has the traditional distinction between ‘public’ and ‘private’ shifted or blurred in relation to law, legal practices and legal institutions? What recent developments have driven such changes, or are otherwise connected to them?

The public/private divide has been a prominent feature in legal, political and popular debate for a long time. This prominence disguises the fact that the distinction is little more than a generalisation. As Gleeson CJ said in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*: ‘There is no bright line which can be drawn between what is private and what is not. Use of the term ‘public’ is often a convenient method of contrast, but there is a large area between what is necessarily private and what is not.’¹

The generalisation has enabled us in the past, at least in a legal context, to differentiate between two bodies of law concerned mainly with, on one hand, the regulation of relations between individuals (and corporations) inter se and, on the other hand, the regulation and relations between individuals and the state. The distinction is so imprecise that it has contributed little to the construction of legal theory or to the formulation of rules to be applied by the courts.² It has, however, been deployed to suggest that there are two very different bodies of law each of which has been developed largely in isolation from the other,³ even if the public interest in freedoms, such as freedom of expression and freedom of competition, is a matter of which account is taken in the formulation of private law principles.

Although this organising concept may well have been influential in the past, its utility has been strongly challenged in recent times, as it has become apparent that neither law nor human activity can be neatly subdivided between that which is public and that which is private. This proposition has become more apparent as laws have come to play a large part in regulating, in the public interest, activities which were thought formerly to be of private concern.

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1 (2001) 208 CLR 199, 226.

2 Christopher D Stone, ‘Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?’ (1982) 130 University of Pennsylvania Law Review 1441, 1442.

3 Charles Sampford, ‘Law, Institutions and the Public/Private Divide’ (1991) 20 Federal Law Review 185, 188.

With the rise of the regulatory state, private activity has been increasingly regulated in order to protect the public from the harmful effects of that private activity, to protect scarce resources and in order to serve public interests such as safety when the threat to safety proceeds not so much from private activity as from the threat of violent criminal conduct. That conduct, sometimes comprising terrorism or the activities of criminal groups or drug syndicates, has been countered by surveillance techniques involving cameras and video footage which may intrude upon the privacy of individuals in public places and may be the subject of data processing systems which lead to the identification of the individual or the publication of personal information relating to the individual.

The six instructive essays in this Issue explore various aspects of the public/private divide. In doing so they identify some of the problems that arise from the interaction between the two and reveal that the boundary has ceased to be, if it ever was, a shark-proof net. They also show not only the uncertainties inherent in the divide but also the uncertainties which confront us when we attempt to define, in particular contexts, what we mean by the word 'public'.

The illuminating article on 'Law, Governance and Risk' makes a number of very important points. The first is the shift to the 'New Regulatory State', characterised by privatisation and marketisation of government functions, accompanied by an increase in regulation of private actors, producing a new hybrid role for government. The second is the pervasiveness of the risk management model in the governance of modern society. The third is that this model relocates risk across sectors – very often to the individual. The authors proceed to elaborate on these points in the context of climate changes, water governance, flooding and bushfires.

While risk management is seemingly required of all actors, including individuals, unresolved questions of who is responsible in particular situations call for answers. Is it, for example, the responsibility of the state, local authorities or individual landowners to deal with the threat of rising sea levels or flooding? How is insurance to be managed and what obligations, if any, should be imposed upon insurers? And what role does the tort of negligence have to play? The authors' discussion of *Delaware Trading Co Pty Ltd v Goulburn Murray Rural Water Corporation*⁴ on this topic makes interesting reading.

The authors conclude that the trends which they have identified have severely damaged whatever utility the public/private once had and have introduced a new era of complexity, the ramifications of which remain to be explored and resolved. These conclusions are compelling and they will require lawyers to re-examine existing legal structures, models and principles with a view to adaptation, or even constructing new legal regimes to replace those which are now in place.

As Jake Goldenfein's article in this Issue demonstrates, the judicial decisions on the right of privacy are less than satisfactory. In the United Kingdom and Europe the judicial decisions relate to the right of privacy protected by article 8

4 [2013] VCAT 21.

of the *European Convention on Human Rights* (the ‘*European Convention*’), while *Caripis v Victoria Police*⁵ relates to the right to privacy and reputation protected by section 13 of the Victorian *Charter of Human Rights and Responsibilities 2006*. The course of decisions shows a shift away from the ‘reasonable expectation of privacy’ test⁶ which was concerned with the nature of the information appropriated, to the use to which that information has been put. That is because the ‘reasonable expectation of privacy’ test related to photographs and video footage and what could be derived from them, whereas later cases are concerned with the processing of images and what that may entail. So the use becomes critical.

In Australia, apart from Victoria (and the ACT), we have no counterpart to article 8 of the *European Convention* and no statutory equivalent. So far the Australian common law has neither recognised a general right of privacy⁷ nor developed a suite of principles on the subject. It seems therefore that a legislative solution is required. The Australian Law Reform Commission has proposed such a solution but no action has been taken.

Cathy Sherry’s very interesting article on strata and community title traces the ways in which the legal concept of real property has proved adjustable to the changing needs of society over time. The flexibility of the concept has led to the creation of strata title and community title to meet particular needs which straddle both private and public purposes. But flexibility has come at a price because, as applied by the courts, the flexibility disregards two fundamental limitations which represent the distillation of centuries of judicial consideration of land markets and social relations. The first limitation came in the form of boundary rules which prevented too many people having rights of veto over the use to which land can be put. Breach of these rules leads to land becoming underused and unsaleable. The second limitation was the prohibition against annexing positive obligations to land. Breach of this rule has resulted in the imposition of unfair obligations on strata title owners where the collective entity, by means of power to make binding by-laws, imposes its collective will on individual owners in relation to matters which should be matters of private choice. These consequences require legislative amelioration.

Terry Carney and Fleur Beaupert discuss the construction of supported decision-making arrangements to replace traditional forms of adult guardianship for disabled persons, with a view to enhancing personal autonomy. The source of the impetus for adoption of supported decision-making is the *Convention on the Rights of Persons with Disabilities*. The authors suggest that, in the debates about what is the optimal approach, strange assortments of forms of public and private are being joined together. That may well be so. The authors’ main point, however, is that current proposals are confused and may well involve the

5 [2012] VCAT 1472.

6 *Campbell v MGN Ltd* [2004] 2 AC 457.

7 See the discussion in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 226-7, 248-57 (where it is acknowledged that an existing remedy for breach of confidence covers part of the area to which a tort of invasion of privacy would relate).

potential for use and even abuse to the detriment of the disabled person. With that comment I agree. I also agree with the authors' conclusion that proposals for supported decision-making must be based on empirical evidence-based research and pilot programs which are presently lacking. As things currently stand, the proposals seem to reflect little more than ideals that have not been carefully thought through, with the risk that they will result in experimental law-making.

Andrew Edgar's article on 'Public and Private Interests in Australian Administrative Law' grapples with the three models of judicial review – the private rights and interests model, the enforcement model and the public interest model – and explores the advantages of Australia moving towards the adoption of the public interest model. The author sees some disadvantages in this model, notwithstanding that it would result in greater access to the courts through an expanded concept of standing and the development of public consultation in administrative decision-making. The main disadvantage of the public interest model is the possibility that it will blur the distinction between law and politics, a view which the author doubts and for my part I would reject. Nevertheless the author concludes that we should adopt the public interest model through legislation, even though it will 'raise large questions for the relationship between law and politics.'

Judicial review of outsourced administrative decisions is instructively discussed in the article by Janina Boughey and Greg Weeks. The discussion centres on the *Datafin* case⁸ and its successors and explores the consequences, if they are adopted here, for Australia's constitutional jurisprudence, in particular the jurisdiction conferred by section 75(v) of the *Constitution*.

Datafin enunciated the 'public function' test by which the availability of judicial review of decisions of a private body is determined. It asks whether the body is in effect performing a public duty or whether the power exercised has a 'public element'. This test prevails in the United Kingdom and it has been approved or applied in state and territory courts in Australia. The authors point out, however, that intermediate appellate courts have questioned its application in Australia.

There are good reasons for doing so. As the authors say: 'It has proven to be notoriously difficult to find a coherent method of delineating public from private power.' Of particular concern is the unsuitability of the test for the purposes of section 75(v). That provision confers jurisdiction by reference to the identity of the decision-maker ('officer of the Commonwealth'), not by reference to the character of the power being exercised. Section 75(v) does not ask the question whether a body has a public function, serves a public purpose, is funded by government or operates in the public interest.

The authors argue persuasively that existing High Court decisions are not definitive and are by no means satisfactory. In the light of the accepted accountability purpose of the provision, they suggest that, construed purposively,

8 *R v Panel on Take-overs and Mergers; ex parte Datafin plc* [1987] 1 QB 815 ('*Datafin*').

it can accommodate decisions made by persons to whom decision-making has been 'outsourced' by the Commonwealth. This interpretation would depart from the natural and ordinary meaning (and in all probability the originalist meaning) of the expression 'officer of the Commonwealth', as identified by Isaacs J in *R v Murray & Cormbie; Ex parte The Commonwealth* when he said:

It has a real meaning that the person referred to is individually appointed by the Commonwealth; and therefore the Constitution takes his Commonwealth official position as in itself a sufficient element to attract the original jurisdiction of the Commonwealth High Court.⁹

It is legitimate, however, to give a strained interpretation to words in order to give effect to a purpose, particularly a constitutional purpose. The authors also suggest that Canadian jurisprudence which permits judicial review of bodies exercising public power may provide a model for non-constitutional review. There is in addition the Canadian view that a private body that is 'an agent of government or is directed, controlled or significantly influenced by a public entity' may be subject to public law that the authors contend could be useful in the application of section 75(v). Certainly there is a case for saying that a decision-maker who is an agent of the Commonwealth falls within the purview of section 75(v).

In conclusion, one can say that the public/private divide does little to throw light on the problems which arise with the rise of the regulatory state and its emphasis on risk management, involving relocation of responsibilities, mainly to individuals. Whether existing legal structures and arrangements are adequate to deal with those emerging is a critical question. It may even be that we should re-think some of our rigid views about aspects of the separation of powers.

9 (1916) 22 CLR 437, 453.