

EDITORIAL

SRUTHI SIVAKUMAR*

Thirteen years ago, the Hon Sir Anthony Mason penned the Foreword to Issue 36(1) of the *University of New South Wales Law Journal* ('*Journal*'), in which he highlighted how the rise of the regulatory state has seen increasing intervention in private activity 'in order to protect ... [and] serve public interests'.¹ Private law has always been concerned with the interests of individuals.² But as Sir Anthony recognised, in a time where laissez faire no longer reigns supreme,³ understandings of what those interests are have changed. The concept now goes far beyond the protection of private property and enterprise, and encompasses principles of social justice, equality and fairness.⁴ In this light, pursuit of the common good has become an unmistakeable feature of private law in Australia.⁵

Private law is traditionally understood to adjudicate horizontal relations between people, and in turn, structure their private, social and economic lives.⁶ But it is remiss to focus on the trees and forget the forest. The sum of those interactions comes to represent the behaviour we collectively tolerate and the values we commonly hold. On a tangible level, private activity has implications for the community's broader economic, social and environmental infrastructure.⁷ Over time, the state's recognition of these implications has led it to intervene

* Editor, Issue 49(3).

1 Sir Anthony Mason, 'Foreword' (2013) 36(1) *University of New South Wales Law Journal* 170, 171.

2 *The Digest of Justinian*, tr Charles Henry Monro (Cambridge University Press, 1904) vol 1, 3: 'Public law is that which regards the constitution of the Roman state, private law looks at the interest of individuals'.

3 See *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549, 566–7 (Rogers AJA).

4 See generally Michael J Whincop, 'Liberalism, Conservatism and Economic Efficiency: Tradition and Change in the Values of Corporate Law' (2000) 23(2) *University of New South Wales Law Journal* 111; Edward L Glaeser and Andrei Shleifer, 'The Rise of the Regulatory State' (2003) 41(2) *Journal of Economic Literature* 401 <<https://doi.org/10.1257/jel.41.2.401>>.

5 It should be acknowledged that the 'common good' and 'public interest' are elusive concepts. They cannot be objectively defined, and their meanings depend entirely on the context in which the concepts are employed, and the 'cultural roots, ideological convictions and political circumstances' of the lawmakers employing them: Christoph Bezemek and Tomáš Dumbrovský, 'The Concept of Public Interest' in Luboš Tichý and Michael Potacs (eds), *Public Interest in Law* (Cambridge University Press, 2021) 3, 4 <<https://doi.org/10.1017/9781839701337.002>>. That being said, the 'public interest' generally refers to the 'long-term welfare and well-being of the general population': Bob Douglas and Jo Wodak, 'Foreword' in Bob Douglas and Jo Wodak (eds), *Who Speaks for and Protects the Public Interest in Australia: Essays by Notable Australians* (Australia21, February 2015).

6 Hanoch Dagan and Avihay Dorfman, *Relational Justice: A Theory of Private Law* (Oxford University Press, 2024) 3 <<https://doi.org/10.1093/9780191987762.003.0001>>.

7 Ralf Michaels, 'Toward Sustainable Private Law Theory' in Paul B Miller and John Oberdieck (eds), *Oxford Studies in Private Law Theory* (2025, Oxford University Press) vol 3, 115, 115.

further in private activity,⁸ such that it now plays two roles: first, establishing legal frameworks that aim to reflect the best interests of the community; and second, enforcing those frameworks.

It follows that private law cannot be viewed separately from the ‘big political and existential questions of our times’.⁹ Private law is more than a mere recipient of public law responses to contemporary challenges like climate change, economic inequality and geopolitical disruption.¹⁰ Rather, it is central to generating solutions to those challenges.¹¹ This Issue of the *Journal* takes up that endeavour. Notwithstanding the diverse subject matter of the articles contained in this general Issue, they are tied together by a shared concern for governance in pursuit of the public interest. It is through this common tie that the launch theme of this Issue emerges: ‘Private Law in the Public Sphere’.

Opening the Issue, Luke Nottage draws out learnings from the Takata airbag saga. Nottage finds that coronial inquests into product-related fatalities provide insights into the risks and failures of regulatory design and enforcement, and should be further integrated into consumer product safety regulation. Product-related regulation is also a theme in Margherita Feleppa’s examination of current regulatory approaches to planned obsolescence in Europe and Australia. The article revisits historical and scholarly debates surrounding planned obsolescence, and proposes a broader understanding of the concept as part of the circular economy transition.

Anita Foerster, Phillipa C McCormack and Justine Bell-James’ article highlights the leadership of Australian states and territories in their ambitious reforms to address the biodiversity crisis. The article charts the novel regulatory mechanisms implemented in subnational jurisdictions, highlighting their potential in addressing legal shortfalls and advancing new imperatives in federal nature law.

Pursuit of the public interest not only anchors the state’s role in private law, but can also inform the enforcement actions of private parties. This is demonstrated in Vicki Wayne, Vince Morabito and Michael Duffy’s review of High Court jurisprudence on class actions. The authors provide useful insights into the ideas, themes and principles which have informed the Court’s treatment of class action law and practice.

Stepping into the corporations law space, Jodie Boyd and Marina Nehme trace the development of the proprietary limited company in Victoria between 1896 and 1938. The authors examine the progression of parliamentary and public debates that have shaped the proprietary company, and identify a persistent tension between the concepts of corporate privacy and public interest reform. Nicholas Cokis then looks overseas, considering the reasons for the use of aggregation as a model of attribution for corporate wrongdoing. Cokis concludes that the objectives of aggregation could be better achieved through organisational models

8 Glaeser and Shleifer (n 4) 407.

9 Michaels (n 7) 116.

10 Ibid.

11 Ibid.

like systems intentionality, which may present a more principled framework of capturing culpability.

Tina Popa, Christina Platz, Kayleigh Young and Kate Jackowski's article takes a look inside the profession, exploring how lawyers perceive and respond to claimants' emotional needs during mediation. They propose that reform is required to integrate emotional and psychological considerations into dispute resolution processes, such that client-centric outcomes can be achieved more effectively.

The public interest also guides criminal law reform. This is clear in Hannah McGlade, Stella Tarrant and Julia Tolmie's article, which considers the effect of recent reforms to the *Evidence Act 1906* (WA). Those reforms include provisions which permit the introduction of evidence of family violence in all criminal proceedings. The authors consider the case of *YZA v Western Australia Police* to illustrate the impact of the reforms in supporting defences,¹² and conclude that there is an urgent need to train lawyers and decision-makers on the nature of intimate partner violence, as understood within the new framework.

In the Issue's penultimate article, Madeleine Perrett explores the aspiration of Nationhood as a basis for advancing Indigenous rights. Perrett clarifies the concept of Nationhood as one grounded in Indigenous authorities and an enduring relationship to Country, and highlights the need for interpretive practices which are attentive to Indigenous political language. The Issue closes with Stephen Gray, Xena Atkins, Maria O'Sullivan and Tania Penovic's call for the recognition of Indigenous peoples' sovereign right to protest. The authors ground their argument in legal philosophy, Anglo-Australian law, and the concept of protest itself, finding that a sovereign right to protest arises from Australia's foundational history and must be understood as a form of decolonisation.

I sincerely thank these 23 authors for their valuable contributions, and for their kind words and patience throughout the publication process. I hope to have done justice to the passion and expertise evident in every page of this Issue. I extend my gratitude to the numerous peer reviewers involved in this Issue, whose willingness to anonymously offer their time and knowledge has undoubtedly contributed to the quality of the articles contained within it.

Further, I thank the *Journal's* premier sponsors – Mallesons, Allens, Corrs Chambers Westgarth and Herbert Smith Freehills Kramer. The *Journal* would not be in a position to produce high quality scholarship without their support. In particular, I thank Mallesons for generously hosting the launch of this Issue. I also extend my appreciation to Adjunct Professor Peter Cashman, the keynote speaker of this Issue's launch. Adjunct Professor Cashman's leadership in consumer law and class actions, both at the Bar and in policy reform, will be sure to make for an insightful address.

The *Journal* is indebted to our talented typesetter, Kerry Cooke, and cover designer, Peta Lee. I thank them for their tireless efforts and careful attention to each detail.

12 [2024] WASC 187.

I also thank our Faculty Advisors, Professor Gary Edmond and Associate Professor Harry Hobbs, for their valued guidance in navigating every challenge we encounter. Further, I extend my gratitude to the members of the Faculty of Law & Justice, who are always willing to assist the *Journal* in any way they can. I especially thank the Faculty's Dean, Professor Andrew Lynch, for his fervent support of the *Journal* and its student editors.

My greatest thanks go to the Editorial Board. I feel incredibly lucky to have worked with such intelligent, hard-working and dependable individuals, who are always willing to go the extra mile to ensure the *Journal* continues to live up to its long legacy of excellence. I thank them for the many hours they have spent checking and re-checking every sentence, source and punctuation mark in this Issue. Beyond their commendable pedantry, they are also kind and generous individuals, from whom I have learnt so much.

I am especially appreciative of the *Journal's* Executive Committee. In particular, to the Issue Editors before me – Sophie Nguyen, Bisesh Belbase, Grace Leow and Dean Cheong Foo – thank you for answering every silly question and for your constant willingness to lend a helping hand. To Victoria Hong, Tom Liu and Nathan Choi – thank you for your steadfast encouragement and support. I am excited to see all the *Journal* will do in your capable hands. I also thank Rowan Gray, Lucy Crawford, Christine Ruff and Luca Butterworth, whose tireless work often goes on behind the scenes, but is undoubtedly vital to the *Journal's* success.

Finally, I thank my family and friends. I am endlessly grateful for your patience, encouragement and unwavering belief in me. I hope I have made you all proud.

I am immensely proud of the *Journal*, and will forever be thankful for the community it has offered me throughout my university life. I look forward to seeing it flourish for many years to come. For now, my hope is that the readers of Issue 49(3) walk away with new perspectives, fresh insights and a renewed appreciation of the ultimate purpose of law reform: pursuit of the common good. I certainly will.