

## EDITOR'S NOTE

The Call for Papers for this 16th volume of the *Macquarie Law Journal* invited general submissions on a wide variety of legal topics and, in the view of the editorial team, it delivers to the high standard expected of this publication. Included are some of the best peer-reviewed results of current research being conducted by Australian academics and researchers in the fields of contract law, international law, civil justice, constitutional law and history, and human rights. If it is acknowledged that one of the traditional functions of a university law journal is to showcase at least some of the research conducted at that university (a function under pressure in the current research funding model), then this volume delivers in that sense as well.

We thank Professor Gillian Triggs, President of the Australian Human Rights Commission, who delivered the Annual Tony Blackshield Lecture in November 2015. This is an event held under the auspices of the Macquarie Law School in recognition of Emeritus Professor Tony Blackshield AO, a distinguished member of this journal's Editorial Board. Professor Triggs reminded the audience of the constant vigilance required to monitor and curtail any overreach by the executive branch of government that may conflict with fundamental human rights. She argued that recent challenges posed by the perceived threats to public safety and national sovereignty have in recent times provoked excessive executive discretion by governments of all political hues, putting human rights at risk and undermining freedoms that Australian citizens expect. A timely reminder indeed, and one that is perennial and relevant to all cultures and political systems.

Dr Kate Chetty of the University of Canberra provides a useful survey and exegesis of the body of law that addresses the scope and application of the defence power in the Australian Constitution. Her article traverses key historical decisions relevant to the power and organises them according to themes that are critical to its understanding. Her contention is that the defence power is uniquely placed to expand and contract in its executive application, but that it has at times been used to limit the rights of individuals. She points to recent defence power underpinnings in the pursuit of anti-terrorism measures that challenge common understandings of human rights, an issue that echoes the concerns of Professor Triggs' address.

Professor David Clark of Flinders University offers a fascinating insight into constitutional law and history by addressing the extent to which the Commonwealth Parliament was independent of the British Parliament with the passage of the Statute of Westminster in 1931. This highly specialised research on the decade following the proclamation of the famed statute seeks to present a convincing argument, based on the opinions of judges, commentators and senior legal officers in the 1930s, that the Commonwealth remained dependent on the British Parliament in important ways and that the legal restrictions that remained between 1931 and 1942 could not be ameliorated by constitutional conventions. In this article, Professor Clark pits himself against the well-published views of some of Australia's leading constitutional historians.

Associate Professor Michael Legg of the University of New South Wales addresses a pressing issue, and provides a timely update on law and practice, concerning the distribution to group claimants of settlement proceeds in Australia's rapidly developing class action jurisdiction. He raises the inherent tension between the competing demands

of efficiency and compensation on the merits. Citing from most recent empirical evidence of class action resolutions, the article contends that a difficult balancing act is constantly required, and argues that the compensation principle should act as a guide only, but that too ready an acceptance of efficiency or 'rough justice' threatens to harm group members and class actions alike.

Professor Peter Radan of Macquarie Law School revisits the *Gouriet* case, in which the House of Lords addressed the proper role of the Attorney-General in relator proceedings for the enforcement of public rights. The case serves as a template illustration of the tension between the Attorney-General's political role as a member of the government, and his or her duty to protect and enforce the legal order. Emerging as it did in a Britain that was about to embark on the Thatcher era, the decision is placed in vivid historical and political context. The article attempts to set parameters around the justiciability of the fiat rule, and directs attention to the consequences for practical politics of the question of where the decision-making line between the executive and the courts is to be drawn.

Ava Sidhu of the University of Notre Dame, Australia, sets out in her contribution to evaluate, and provide a principled framework for, betterment in the law of damages. Ms Sidhu addresses the predicament it poses as to whether an account for betterment should be allowed or not, and if so when and why. In doing so, she provides a useful summary of the existing law, as well as a practically workable method of solving problems that may arise in this important doctrinal and commercially practical field of law. The article's recommended framework for dealing with betterment, drawing on distributive justice and corrective justice criteria, aims to lead to more consistent, reasoned and just outcomes in disputes where betterment is alleged.

Two student contributions from the Macquarie Law School are also featured in this edition. Emerging with plaudits from the peer review process, Eliza Fitzgerald's research thesis on countermeasures in international law and practice provided the backbone for her published submission. The author offers an original and interesting comparative analysis of how countermeasures have been used in different legal contexts and engages in critical legal analysis to call for more discourse in the international legal community about the failings of the doctrine, but also its potential as a self-help tool of peaceful enforcement. The case note by Max Turner analyses the the High Court's 2016 decision in *Victoria v Tatts Group Limited*, which demonstrates the risks associated with private dealings with government, calls into question the inadequacy of the current remedial framework for sovereign risk, and sheds light on important issues of contractual construction.

I have to especially commend the Student Editors whose names appear on the title of this edition of the Macquarie Law Journal. Despite some planned, but also unplanned, absences of the Editor during the editorial and production process, these eager and capable students of the Law Journals unit in the LLB program of Macquarie Law School took control of the task and volunteered time and effort over and above what would reasonably be expected from a senior cohort. Congratulations to them for the timely and efficient production of Volume 16.

Ilija Vickovich

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