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August 2018

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Many thanks to all those who made possible the production and publication of this semester's edition of Law in Society.

We would like to thank Baker McKenzie and the Sydney law School for their continued support of SULS and its publications.

ACKNOWLEDGEMENT OF COUNTRY
We would like to acknowledge and pay respect to the traditional owners of the land on which we meet, the Gadigal people of the Eora Nation. It is upon their ancestral lands that the University of Sydney is built. As we share our own knowledge and learning within this University may we also pay respect to the knowledge embedded forever within the Aboriginal Custodianship of Country.

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fore-word

Sydney University Law Society is delighted to present this edition of the bi-annual Law in Society Journal, centring on the theme of 'Legalisation and Control'. This theme invites contributors to explore the complexities which lie along the spectrum from legalisation to control, and even to reach beyond this to lacunae: those vacant and ungovernable islands where no law exists at the frontiers of human enterprise.

Many contributors have valiantly confronted this theme, where legislators are still yet to catch up to rapid changes in technology, science, and industry. Among these is Liam Ogburn's captivating exploration of human cloning legislation, and Connor Jarvis' enquiry into whether copyright can subsist in the original works of Artificial Intelligence Systems.

Confronting our brave new world, Aleks Pasternacki devises a rational way forward for integrating bit-coin technologies into the Australian taxation schema, while Pranay Jha challenges the adequacy of current laws to meet the challenges of autonomous vehicles in the future. Isabelle Buchanan and Benjamin John ask: although the Australian government can regulate the shop-front, can it regulate the slavery which thrives in the recesses of commercial supply chains?

At the other end of the legislative spectrum, our contributors also question, challenge and seek redress from the worst excesses of government control. Natan Skinner interrogates the high-handed regulation of public space, while Anastasia Radievska posits the idea of the welfare system as a 'web of control'. At a fundamental level, Joy Chen investigates whether Parliament has usurped core judicial functions through the seminal Lazarus decision.

Ultimately legislation is shaped by the normative universe we all live in. Grace Lovell-Davis examines this in the context of sex work regulation, which is so often grounded in moral imperatives, while Deaundre Espejo explores the rise of DeepFakes. Remy Numa takes a commercial perspective, and investigates how the market shapes anti-siphoning legislation.

As ever, the antidote to the imperfect, sometimes sobering, decisions our governments make, is rigorous intellectual enquiry. Therefore, I would like to thank all of our writers for their thought-provoking contributions.

On behalf of the Law in Society team, I would also like to thank Publications Director Aleks Pasternacki for her invaluable assistance as well as Design Director Christina Zhang for setting out the Journal so wonderfully. Personally, thank you to my team of Editors including Tara Janus, Tahlia Petersen, Jess Everingham and Llewellyn Horgan. Most importantly, thank you to all of our readers.

Brigitte Samaha
Editor-in-Chief

contents

FALLING INTO THE SAME TRAP?

An Analysis of the Modern Slavery Bill 2018 (NSW) and Achieving Business Accountability for Slavery in Supply Chains

Isabella Buchanan & Benjamin John
LLB III **LLB III**

First, they take identification papers and anything else that could connect a person to their family. Then, after several weeks, the wages disappear. Threatened with violence and far from home, the hands continue to sew, construct and pick. In several weeks, the products of slave labour will arrive in Australia, adorning shop windows and filling the shelves of supermarkets.

Introduction

Slavery in 2018 thrives in the recesses of commercial supply chains. Slave traders and organised criminals prey on the hopes and aspirations of the most vulnerable members of the global community, promising victims the chance to flee poverty and persecution and to provide for their families. Instead, victims are confronted with elaborate systems of coercion and control that help to strip them of all legal and human rights by forcing them to work for little or no return.[1] Although not the only narrative of modern slavery, it is one that the Australian business and consumer community are complicit in. Modern slavery therefore exists as an extreme form of inequality within a complex matrix of political, economic, social and cultural pressures.

In May this year, the New South Wales Parliament introduced the Modern Slavery Bill ('the Bill'). With an estimated 40 million people living in slavery, slavery contributes $150 billion to the global economy, posing an ethical dilemma for commercially driven companies, particularly those that source materials from or rely on manufacturing in developing nations.2 Whilst many have adopted the "slavery-free" and "sweatshop-free" manufacturing labels as an ethical badge of honour in certain industries, the trend is inconsistent across all goods and services providers. The Modern Slavery Bill (NSW) aspires to extend corporate accountability, prescribing a standard of due diligence across commercial organisations with an individual annual turnover above $50 million.3 The Bill creates a 'chain of enforcement', as companies with employees in New South Wales are required to become their own watchdogs against slavery in their supply chains. The mandatory reporting obligations are designed to instigate fundamental changes in companies' cultures, encouraging them to move away from high risk suppliers and ultimately reduce the profitability of criminal slave-exploiting contractors and manufacturers.

The Modern Slavery Bill 2018 (NSW)

The absence of a comprehensive human rights framework in Australia has left the obligations of commercial organisations unclear in regards to slavery in supply chains. The current legal and legislative framework is centralised on *The Commonwealth Criminal Code*, however criminal provisions have to date had little bearing upon companies who simply turn a blind eye to exploitation overseas.[4] With supply chains becoming ever more global and complex, the potential for organised criminals to operate out of legal blind spots has also increased, meaning legislative reform is essential in the Australian jurisdiction.

An appropriate definition of 'Modern Slavery'?

The proposed definition of 'Modern Slavery' under section 5 (a) of the Bill exists with reference to Divisions 270 and 271 of The Commonwealth Criminal Code, being "any conduct constituting a modern slavery offence".[5] The Bill defers definition to Division 270.1 which states slavery is "the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised,

including where such a condition results from a debt or contract made by the person".[6] However, the definition in the NSW Bill goes further and adds that forced labour to exploit children or other persons will also be deemed modern slavery.[7]

The term 'Modern slavery' has become a formidable advocacy tool and rallying call to arms for human rights and consumer groups. It functions as a catch-all term describing and conveying the seriousness of severe exploitative practices ranging from human trafficking to child abuse and other slavery-like practices.[8] However, there is not always consistency between legal definitions across jurisdictions. The Interim report of the Joint Standing Committee on Foreign Affairs, Defence and Trade's *Inquiry into a Modern Slavery Act for Australia* endorsed a definition where modern slavery encompassed "forced labour, child labour, bonded labour, human trafficking, domestic servitude, orphanage trafficking, sex trafficking, forced marriage, slavery and other slavery-like offences."[9] UNICEF Australia sought to extend this definition in their Submission Number 129 to the Joint Standing Committee by calling for the specific inclusion of the worst forms of child labour within the scope of the Criminal Code's definition. Whilst this recommendation is not explicitly incorporated by the words of the Code, it is captured by broader references to offences such as debt-bondage and the production of child abuse material. The definition's specificity therefore deserves praise when compared to the more restricted definition provided by the *Modern Slavery Act 2015* (UK) ('the UK Act') which does not require entities to specifically report on the use of forced child labour when found in supply chains. Compelling companies to report on child exploitation as defined by the NSW Bill is therefore a significant advancement on the legislation that has preceded it. The definitional basis of the Bill, found in the *Criminal Code Act 1995*, has a contemporary understanding of the forces that perpetuate modern slavery, such as exploitative child labour.

Today's 'Supply Chains'

Supply chains can generally be defined as "vertically integrated contractual systems of production"[10], whereby raw materials are converted into finished products and delivered to consumers. The globalised world has seen supply chains expand into multiple tiers meaning the manufacturing of a single product can span several countries and contractors. Part 3 of the Bill recognises the dependency of companies on global outsourcing, and that to mitigate exploitation risks, companies should themselves identify risks to human rights.[11] Under subsection 54(4) of the *Modern Slavery Act 2015* (UK), a slavery and human trafficking statement must involve an analysis of any of a business' supply chains.[12] The legislation, however, does not provide a definition of 'supply chain' or a clear explanation on how deep into the supply chain a company must report. Similarly, subsection 25(4) of the Modern Slavery Bill 2018 (NSW) states:

> *The statement is to contain such information as may be required by or under the regulations for or with respect to steps taken by the commercial organisation during the financial year to ensure that its goods and services are not a product of supply chains in which modern slavery is taking place.*[13]

Like the UK legislation, the Bill provides no further clarification on specific reporting requirements for companies with multiple tiered, complex supply chains. This has the capacity to create significant problems for regulation and enforcement since it can be argued that too much discretion is given to the commercial organisations themselves to self-regulate. The most favourable interpretation of 'supply chains' in the Bill is that it includes every business that comes into contact with a product before it reaches a customer. However, as Laura McManus, Ethical Supply Chain Management Consultant at Konica Minolta, asserted in evidence to the Select Committee on Human Trafficking in New South Wales, large companies may find it exceedingly difficult to review and source information beyond the first or second tier of their supply chains.[14] For example, sportswear company Nike manufactures products out of 554 different factories across 42 different countries,[15] meaning their supply chains could be multiple tiers deep. It is imperative that strict clarification and guidance on the definition of supply chains is provided to avoid companies missing, or worse, intentionally omitting, key information in their modern slavery statements. The Bill does attempt to tackle some of this uncertainty by introducing Regulations to support the Bill, and by also encouraging the anti-Slavery Commissioner to develop further guidelines for businesses to prepare a slavery and human trafficking statement.[16] The success of the future legislation thereby falls on these additional regulations and guidelines, however these are yet to be drafted.[17] The NSW Regulations to the Bill should recommend that businesses perform due diligence on all tiers of their supply chains, and then isolate high-risk areas and focus resources on investigating and verifying suppliers in those high risk areas.

Such an approach could be based on existing OECD (Organisation for Economic Co-operation and Development) Guidelines for Multinational Enterprises.[18] For example, the guidelines for conflict minerals, applies to companies that supply minerals from the Democratic Republic of Congo, and outlines due diligence and verification steps for the head company.[19] If information can be gathered and shared about specific areas and industries known to be at a high risk of modern slavery offences (such as the sea food industry in Asia),[20] businesses are more likely to make better choices about current and future contractors. Greater cross-border communication between New South Wales businesses and authorities where the supply chains are located will be required to achieve this. A principle addition to the NSW Bill could then be to include a provision that requires companies to report each time a modern slavery offence is identified in one of their supply chains to authorities within the jurisdiction where the offence occurred.[21]

Penalties and enforcement

So far, it appears that the NSW Bill has taken certain steps to improve on the framework provided by the 2015 UK Act. The key difference however is the imposition of penalties for non-compliance under the NSW Bill.

Legislation in other jurisdictions deals with the issue of punishment and compliance in differing ways with varying degrees of successes. For example, companies in Denmark may be fined for not complying with the disclosure requirements under their equivalent legislation. The penalties have seen 66 percent of companies fully comply.[22] In contrast, the UK Act only allows for injunctive relief, whereby the State may bring civil proceedings for failure to produce a modern slavery statement in accordance with the statute.[23] Preliminary research shows significant instances of non-compliance, which suggests that, in the absence of penalties, the legislation has failed to incite a serious and proactive response from businesses operating in the United Kingdom.[24] In California, purchasers may bring an action for damages under the Transparency in Supply Chains Act 2010 where a business makes misleading statements in a modern slavery statement. However, research also shows compliance has been low, with estimates suggesting the number to be below 20 percent.[25]

In light of the above international standards and methods for achieving

compliance, the Bill imposes a pecuniary penalty of 10,000 penalty units when organisations do not make their modern slavery statements in public,[26] or knowingly provide information that is false or misleading.[27] As the aim of the NSW Bill and the other acts discussed is to achieve transparency in supply chains, no penalties currently exist under the Bill (or any of the other statutes) for businesses that identify modern slavery in their supply chains and continue to use the supply line nonetheless. It is yet to be seen whether any action could, or would, be taken against companies under *The Commonwealth Criminal Code*; however as practice has shown this would be an unprecedented response. Compared to existing legislation, the NSW Bill positively imposes penalties under the Bill for non-compliance. However, the next step for New South Wales is to impose penalties where companies blatantly disregard human rights abuses in their supply chains and take no action to alleviate the offence. The Bill must help companies recognise that the eradication of modern slavery is not exclusively a legal issue, but one that requires a more proactive attitude towards human rights by companies more generally. Companies must reconsider their relationships with suppliers and ensure their own internal risk management systems can serve as the first identifier of issues of adverse human rights conditions, at home and abroad.

Success of the Bill and corporate accountability

Globally, Australia is seen as a leader in the fight against modern slavery.[28] Despite the proactive action of New South Wales, the Bill's lasting impact will depend on enacting cultural changes within the business and consumer community. True transparency requires businesses cooperating with the New South Wales Independent Anti-Slavery Commissioner and Modern Slavery Committee in an open and proactive way. The 'know and show framework' of identifying risks to the committee and the public will require businesses incorporating the new requirements into their existing due diligence and risk management frameworks. Discussion papers suggest that big business supports anti-slavery legislation and aspires to create positive change across the economy.[29] The real test will come when the costs of compliance begin to build for businesses, both at the big end of town and for SMEs (small and medium sized enterprises). To avoid penalties under the Bill, a business could essentially do the bare minimum by providing known information about their supply chains to the anti-slavery committee. Instigating change through due diligence therefore relies heavily on public pressure, brand image and reputation. Scholars have pointed to the power of the consumer on this issue but they have also suggested that modern slavery legislation could adopt elements from the *Illegal Logging Prohibition Act 2012* (Cth), such as imposing both due diligence requirements and direct penalties for knowingly or recklessly importing items that have been sourced illegally.[30] The "hybrid legislation" approach,[31] combining due diligence requirements with penalties for profiting from illegal conduct in supply chains, has had a noticeable impact in the Australian logging industry. In Europe, similar hybrid legislation has also been successful in instigating change, with businesses actually opting to find new suppliers in order to remain compliant.[32] Where corporations have not been held accountable under *The Commonwealth Criminal Code*, there should be direct action against companies that knowingly or recklessly continue to use suppliers or manufactures that are proven to engage in modern slavery. Direct action through litigation and penalties would also involve greater media attention, amplifying pressure on companies to comply.

Conclusion

Now assented to by parliament, the Bill has become the *Modern Slavery Act 2018* (NSW) and has the potential to become a formidable tool in Australia's fight against modern slavery. Despite the possibility of taking further measures against companies, the strength of the new Act is highlighted when compared to the federal Modern Slavery bill introduced by parliament in June 2018, which only applies to companies in Australia with $100 million consolidated revenue and proposes no direct penalties for non-compliance.[33] As with all new legislation, there still remain unanswered questions and problematic provisions within the NSW Bill (as it was). However, in a world that is constantly shifting and changing, the Bill, now an Act of parliament, forces greater attention to human rights and their protection by some of the most powerful and wealthiest corporations in Australia. As a leader in the Asia-Pacific region, the *Modern Slavery Act 2018* (NSW) is an essential first step for Australia to not only illustrate its position on modern slavery but to encourage other countries in the region to follow suit.

CAPITAL GAINS TAX & DISPOSALS OF BITCOIN: A MISMATCHED PAIR

Aleksandra Pasternacki
LLB V

Government regulated markets are no longer the sole markets for trade. In 2009, the first established cryptocurrency, "Bitcoin", was introduced into the market.[1] Since then there have been thousands of variations of cryptocurrencies released that trade on the market; some substantially mimicking the properties of bitcoin, others copying some of its properties while adding new characteristics, such as incorporating 'smart contract' functions into their decentralised computer platforms.[2] In March 2017, the cryptocurrency market capitalisation reached almost USD 25 billion.[3]

What does the cryptocurrency market look like in 2018? Despite the cryptocurrency 'bubble' bursting, resulting in Bitcoin losing over half its value since 2017, market capitalisation of cryptocurrency reached just over USD 303 billion in May 2018.[4] This means that since 2017, cryptocurrency capitalisation has increased 25 times over. It therefore remains a lucrative market for governments to levy capital gains tax upon the assets traded within it. Bitcoin continues to remain the dominant form of cryptocurrency, retaining almost 40% of cryptocurrency market capitalisation in May 2018.[5]

Given the extraordinary capitalisation of cryptocurrency in the modern market, it is unsurprising that the Australian Tax Office ('ATO') seeks to tax Bitcoin through their various tax regimes. In 2014, the Commissioner issued a number of determinations concerning the operation of Bitcoin and the Australian income tax regimes. The rulings found that bitcoin was subject to the operation of the *Income Tax Assessment Acts* 1936, the *Income Tax Assessment Act* 1997 (the 1997 Act) and *The Fringe Benefits Tax Assessment Act* 1986, including that the provision of bitcoin to an employee from an employer is a property fringe benefit,[6] and that bitcoin can be held as trading stock and thus be subject to the trading stock regime in the 1997 Act.[7] Tax Determination 2014/26 (TD 2014/26) determined that bitcoin is an 'asset' for the purposes of s 108-5(1) of the 1997 act, making dispositions of bitcoins subject to Capital Gains Tax (CGT).[8]

Capital Gains

The CGT regime set out in the 1997 act taxes gains made on dispositions of capital assets. Under the regime, gains made on disposal of capital assets form part of the total sum of a taxpayer's assessable income for the financial year, and are taxed according to the rates set out under the *Income Tax Rates Act* 1986.[9] According to the Commissioner's determination that bitcoin is an asset for capital gains tax purposes, dispositions of bitcoin will trigger an A1 Event. An A1 event is triggered when a capital asset is disposed of.[10] As such, the taxpayer will accrue a capital gain if the disposal price (or sale price) exceeds the cost base (the amount paid by the taxpayer to originally acquire the bitcoin).[11] The difference between the sale price and the purchase price thus forms the capital gain upon which tax is levied.

In order to trigger the operation of the capital gains tax regime, the thing disposed of must be a 'CGT asset'. A "capital asset" is defined as either (a) any kind of property or (b) a legal or equitable right that is not property.[12] The Commissioner has determined that Bitcoin satisfies this definition.[13] However, it must be borne in mind that a Commissioner's determination is not law but rather the Commissioner's interpretation of it. Although taxpayers must comply by the Commissioner's determinations, his determinations may be challenged and overturned.

Is a Bitcoin 'a kind of property' as determined by the Commissioner?

To determine whether bitcoin is property, the starting point is an analysis of what

Bitcoin actually is. While it is understood by some of its users as being a form of unregulated currency, it is extraordinarily complex and its nature challenges ideas of currency and property as understood in Anglo-Australian law. Under Australian law, currency will only be property if it is capable of physical existence, in that "the right to money is inseparable from the possession of it."[14] Bitcoin clearly falls outside this understanding of currency.

For a discussion of whether Bitcoin is property, Bitcoin as it is 'traded' in the market comprises of the following 3 elements.[15] First, it is a record of a transaction on a decentralised and encrypted register. Secondly, this transaction is registered to an address being an alphanumeric string. Thirdly, a Bitcoin user – the person colloquially understood as the "owner" of the Bitcoin – has access to the intangible 'public/private' keys related to the address on the register. Access to that private key allows the user to 'trade' in Bitcoin.

Bitcoin is transferred between users by a new record being added to the blockchain. This records the transaction after the transaction is signed off with the user's private key, validated by the process of 'mining'. This transaction on the blockchain is registered to the new address, and the purchaser is issued a public/private key with an alphanumeric code that corresponds to that address.[16]

These three components – the recorded transaction, the registered address and access to the keys related to the address – form 'bitcoin'.

Anglo-Australian conceptions of property

An analysis of the nature of Bitcoin fits uncomfortably with Anglo-Australian conceptions of property. As such, the Commissioner's determination that Bitcoin is 'property' may be open to challenge.

In the leading Australian case of *Yanner v Eaton*, the High Court of Australia held that property is not a thing per se but is rather a person's legal *relationship* with a thing. "Property", the High Court held, "refers to a degree of power that is *recognised in law* as power permissibly exercised over the thing."[18] The ATO quoted from this judgment to substantiate their determination that Bitcoin is property.[19] A crucial oversight by the ATO was the High Court held that the power exercised over the thing must *be recognised in law*.

The issue is that Bitcoin and a user's relationship with it is not recognised by Australian case law or statute, nor does the Australian Government (or any government) possess any regulatory power over Bitcoin given its encrypted, decentralised nature. Further, if the government did legislate to recognise a relationship between a user and their Bitcoin, it is unclear how this legal regulation would be enforced given the decentralised nature of the ledger.

In Anglo-Australian law, property is generally understood as being either real or personal property.[20] If Bitcoin were to align with a category, it would be personal property. Personal property is further divided into two categories: corporeal (being tangible property) and incorporeal property.[21] Since it has no tangible existence, Bitcoin aligns more closely with incorporeal property (a 'chose in action'). A chose in action is a right to sue in relation to the thing that emerges from the relationship to the thing itself.[22]

Intangible property rights are created by law. A historical inquiry into choses in action confirms this. A chose in action - or the right to sue in relation to the intangible thing – is underpinned by recognition of such a right in case law or in statute.[24] For example, patent or trademark owners source, recognise and regulate these property rights in statute. Similarly, the right to enforce performance of contractual obligations is a chose in action recognised by case law and codified by statute.[26]

Bitcoin holders often compare their 'rights' as being similar to the rights of shareholders in a company. It is argued that Bitcoin, being a recorded transaction which is registered to an address on the blockchain, is comparable to the rights of shareholders, whose share holdings are recorded on the share register. However, shareholder rights are recognised by law.[27] Long before the *Corporations Act 2001* (Cth), a company was recognised as having a legal personality distinct from that of its owner(s) (the shareholders) and the shareholders' rights were recognised under various statutes dating back to the 1800s.[28] The share register acts as a mere record and is not a basis for the shareholder's rights. By contrast, the ability to obtain value in a trade of Bitcoin is contingent on there being a record of a transaction on the blockchain. Even if parliament legislated to recognise Bitcoin as 'property', courts would be unable to enforce transfers of Bitcoin.

Thus, it may be that Bitcoin is incapable of being recognised as 'property' under Australian law. There is no right 'recognised by law' which a user may enforce in court as a chose in action in respect of Bitcoin. Rather, a user of Bitcoin has mere access to a key which allows them to transact on a decentralised register.

The Commissioner argued that to determine whether something constitutes property is a matter of evaluating the various proprietary characteristics inherent to using the thing. He listed qualities found in Bitcoin which are also evident in other forms of property relationships, such as the right to control the property as evident in the user's ability to transact with Bitcoin. However, the Commissioner argued the determinative proprietary characteristic of Bitcoin is that it is treated as a valuable, transferable item of property by the community.[29] With respect, this argument possesses little force. Whether or not a thing has value when traded on a market is not a necessary or sufficient characteristic of property. For example, a person's relationship with a used paper tissue is tangible personal property under the law as it is capable of ownership and possession, despite the paper tissue having no value on the market.

A Global Initiative?

Earlier this year, the ATO established a taskforce to 'crack down' on Bitcoin dispositions.[30] It is the Government's intention that dispositions of bitcoin are not immune from taxation, which is not surprising given the vast sum of tax that could slip through the cracks in this active cryptocurrency market. The ATO is not alone in its attempt to tax Bitcoin dispositions. Taxing Bitcoin has become a common concern to governments worldwide. Australia has followed the UK and USA, whose government tax bodies have recognised cryptocurrency as subject to their capital gains tax regimes.

In the USA, the Internal Revenue Service issued a notice in early 2014 declaring that cryptocurrency should be treated as property for capital gains tax purposes if the cryptocurrency is held as an asset.[31] A notice has a similar effect to the Commissioner's Ruling in that it must be followed by the taxpayer but it is not law. However, the capital gains regime in the USA works differently to Australia's system. Whilst short-term capital gains are taxed at the same rate of ordinary income, long-term capital gains are taxed according to different rates.[32]

In the UK, Her Majesty's Revenue and Customs (HMRC) released a policy brief in 2014, with a similar effect to the Commissioner's Ruling in that it is not binding as law but binding upon the taxpayer.[33] The HMRC declared that income relating to Bitcoin will be taxed depending on the taxpayer's use and

relation with the Bitcoin. Sale of Bitcoin in the course of business will be subject to income tax, whereas a capital disposal will be subject to capital gains tax.

These countries' governments, like Australia, have refused to recognise bitcoin or other cryptocurrencies as property through legislation. As such, the governmental agencies have been forced to rely on their own powers to levy tax on Bitcoin holders. The inaction of the legislature reveals a stark irony: that governments are willing to benefit from the Bitcoin market through their taxation systems, but are hesitant to afford recognition or protection to Bitcoin holders through legislation.

HUMAN CLONING PRACTICES IN AUSTRALIA

A regulatory chimera or is it time to reconsider?

Liam Ogburn
LLB III

"Define: Chimera

1. (Biology) An organism containing a mixture of genetically different tissues, formed by processes such as fusion of early embryos, grafting, or mutation.

2. A thing which is hoped for but is illusory or impossible to achieve."

I. Introduction

It has been almost 50 years since Windeyer J in *Mount Isa Mines*[1] characterised the law as *"marching with medicine, but in the rear and limping a little"*[2]. In respect of Australia's current regulatory framework for human cloning, one could argue this limp to be more of a nonplussed stagger. Australia's regulatory efforts concerning human cloning have lain dormant under the veil of Federal and State legislative schemes enacted over 15 years ago, however, a recent biomedical breakthrough at the Chinese Academy of Science's Institute of Neuroscience[3] has elicited genuine concern. Biologists have successfully cloned two long-tailed macaques named Zhong Zhong and Hua Hua, marking the first time in history that primates have been cloned. With cloning experts considering this advancement as overcoming the last real obstacle to human cloning, the scientific watershed has prompted sober reflection vis-à-vis the adequacy of Australia's current human cloning regulatory framework. It is contended that Australia's legislative scheme regulating human cloning, on both the Federal and State level, is host to two principal issues that have arisen as a result of poor legislative maintenance. First, the current legislation fails to address emerging cloning methods that do not fall neatly within the definition or nomenclature of the statutory offences. Second, medical practices of significant social utility are being caught by blanket prohibitions despite their longstanding acceptance in society. By reference to the features of the regulatory model adopted by the United Kingdom (UK), it is argued that Australia must take decisive steps to ensure responsive regulation is prioritised as a core feature of its model. While human cloning practices pose a complex Gordian Knot to regulatory bodies who may forever bear the caricature of playing 'catch up' with science, the effective regulation of human cloning practices in Australia is by no means a chimera.

II. The emergence of human cloning

Despite its locus in science-fiction for many years, human cloning only emerged on the horizon of scientific possibility in 1996 when biologists of the Rosilin Institute at University of Edinburgh cloned "Dolly" the sheep[4] - the first ever mammal to be cloned in history. Through a process known as somatic cell nuclear replacement (hereafter 'SCNT'), the team sliced out the nucleus of a somatic cell – the microscopic depot that stores an animal's genome – and inserted it into a nucleus from the cell of the individual they wished to clone. By using an electric current to fuse the donor somatic cell genetic material and the host cell, the resulting unified embryo possessed genetic material identical to the donor cell, allowing it to be placed into a surrogate for reproduction.[5] Dolly, while relatively innocuous as far as farm animals go, incited fierce debate across scientific, religious, cultural and ethical sectors. Proponents of the practice appealed to freedom of scientific inquiry and rebuked the idea of prohibiting scientific innovation, particularly for burgeoning specialist practices of medical and therapeutic utility. Such benefits included using the SCNT method to supplant expensive and inefficient methods of assisted reproductive technology (ART), such as in-vitro fertilisation (IVF). However, these were met with resolute objections, namely concerning the ethical implications for human dignity, the volatility of the procedures (Dolly marked the 278th attempt), or simply a fear that the cloning prophecy presaged in Huxley's *Brave New World*[7] would become all too real. The United Nations (UN) acted swiftly in response to the outcry, with its subsidiary organ, the United Nations Educational, Scientific and Cultural Organization (UNESCO), issuing the *Universal Declaration on the Human Genome and Human Rights*[8] in its 29th session in 1997. The Declaration sought to ensure, *inter alia*, the safeguard of human values by prohibiting practices *"contrary to human dignity"*[9] and promoting the objective of *"not reduc[ing] individuals to their genetic characteristics and respect[ing] uniqueness and diversity"*[10].

III. Australia's regulation of human cloning

Australia followed suit by introducing the *Research Involving Embryos and Prohibition of Human Cloning Bill 2002* into the House of Representatives in 2002. The Bill's unification of human cloning and embryo research under the same Act was hotly contested, as many members of Parliament wished to make a 'conscience vote' against human cloning but supported certain forms of embryo research.[11] In turn, the Federal scheme eventually took a bipartite form, consisting of the *Prohibition on Human Cloning for Reproduction Act 2002* (Cth) (the 'PHCR Act') and Research Involving Human Embryos Act 2002 (Cth) (the 'RIHE Act'). New South Wales, alongside the other States[12], enacted their own dual legislation, designing the *Human Cloning for Reproduction and Other Prohibited Practices Act 2003* (NSW) with the purpose of *"mirror[ing] offences"*[13] found in the PHCR Act. These Acts cooperated to prohibit practices, such as the placement of a human embryo clone into a human or animal body, the creation of a human embryo for a purpose other than a pregnancy in a woman[15], the creation or development of a human embryo containing the genetic material of more than two persons[16], the creation or development of a hybrid embryo[17], and the intentional alteration of the human genome so that the altered characteristics are heritable.[18] The *Research Involving Human Embryos Act 2003* (NSW) was also enacted to establish a Federal licensing scheme, which aims to promote *"a uniform Australian approach to the regulation of activities"*[19]. The National Health and Medical Research Council (NHMRC) Embryo Research Licensing Committee[20] is primarily responsible for governing this scheme, and can allow authorised license holders to lawfully undertake practices that involve the creation of embryos, ART-created embryos, and hybrid embryos[21] – all practices ordinarily prohibited under the PHCR Act.

IV. Traversing the gap through responsive regulation

So, why is the birth of Zhong Zhong and Hua Hua cause for concern?

This is a case where the devil is very much in the detail. Although the team embarked on the same SCNT method used to create Dolly, the research journal detailed a new technique of using two different sources of nuclei: cells from an aborted macaque foetus and cells surrounding the eggs of an adult macaque. Through exposure to various chemical signals to assist in reprogramming the cells, the team were able to produce newly formed embryos.[22] With these primates sharing 98% identity with the human genome[23], the Institute's director, Dr Mu-ming Poo, had no reservations in addressing the elephant in the room, stating, *"there is now no barrier for cloning primate species, thus cloning humans is*

closer to reality"[24]. Even for those sceptical of human cloning ever transcending the silver screen, the events in Shanghai have an undeniable domestic relevance: it offers Australia an opportunity to turn its neglectful gaze to its unkempt human cloning laws. It is argued that serious consideration needs to be given to a more 'responsive regulation'[25] model, in order to ensure that these landmark moments for science can be met with incremental legislative adjustment, rather than regulatory hysteria. Granted, this approach was clearly envisaged when introducing the legislative scheme, as both the Federal and New South Wales Acts contain 'Review of Act' provisions.[26] Under the Federal Act, the Minister is required to initiate an independent review of the operation of the Act every two years, with a report written every three years. This review is to account for developments in technology in relation to ART, medical and scientific research, and community standards.[27] True to form, a comprehensive report was produced in the Lockhart Review of 2005, with substantive amendments to the Federal Acts taking effect in 2006.[28] But if science and Australian human cloning laws ever did enjoy marching instep, it was certainly short-lived. The 2006 amendments to the Federal Acts marked the last substantive reconsideration of its provisions, with both New South Wales Acts lacking amendment of *any kind* since 2007.[29] This 10-year legislative dormancy carries especial weight when one considers the strides science has taken in this time: the discovery of enzymes that can turn any blood type to Type O[30], the landing of NASA's Curiosity Rover on Mars[31], and perhaps the paramount indicia of scientific progress over the last decade, the advancement in our knowledge of the human genome.[32]

As a consequence, a core issue has arisen in the increasingly outdated statutory definitions, as new nomenclatures for scientific practice are beginning to produce statutory misnomers. This (unanswered) concern is unfortunately a trite one, as the House of Representatives Standing Committee on Legal and Constitutional Affairs expressed concern over the *"narrowness and technicality"*[33] of the draft definitions as far back as 2001. These were echoed again in the 2005 Lockhart Report, which referred to a NHRMC review[34] criticising the overly restrictive definitions of 'human embryo',[35] 'natural fertilisation', and 'artificial fertilisation'. With considerable foresight, the NHRMC noted that there were a number of emerging technologies that produced a human embryo but did not fit the procedural definition enunciated in the Acts of involving DNA contribution from both sperm and egg.[36] In light of the Shanghai team's unique technique of sourcing nuclei from an aborted foetus, the ability for new scientific procedures to circumvent statutory definitions is clearly possible. Henry Greely suggests that an ongoing regulatory authority must be implemented to pass regulations and change definitions as new technologies in human cloning are discovered or current legislative provisions are deemed inadequate.[37] And yet, when the belated Heerey Review was finally triggered in 2010, the Report's amendatory recommendations to the legislature seemed to be more soporific than a call to action.[38] It is clear that legislative review needs to occur more frequently, and more significantly, the legislature must be prepared to act on these recommendations.

A second major issue arises from the unrevised legislative scheme: the provisions overregulate practices that no longer deserve to fall within the ambit of the Acts, notably innovative scientific methods that have earnt acceptance in society. The most recent example of this is the 2017 "three-person-baby" campaign for mitochondrial donation in Australia to combat life-threatening mitochondrial disorders. The process involves replacing the mother's unhealthy mitochondria with a donor's healthy mitochondria, thus ameliorating the chances of the baby suffering from potential debilitating mitochondrial diseases. The UK implemented this practice in 2015 after twelve years of intensive research and diligent amendatory efforts to their human cloning laws. The UK Parliament were able to modify their cloning prohibitions for mitochondrial donation with relative ease through the 'statutory window' that was deliberately left open in their *Human Fertilisation and Embryology Act 2008* (UK). However, under Australia's legislative framework, the mitochondrial donation continues to obstinately violate the s 15 Federal offence of developing a human embryo containing genetic material provided by more than two people. The Revised Explanatory Memorandum expounds the operation of s 15 as principally addressing cytoplasmic transfer, however, opaquely addresses the possibility of third party mitochondrial donation as *"posing ethical concerns"* that are *"not totally clear at this stage"*.[39] Thus, the legislative modus operandi has been to ensure the *"the prohibition is drafted sufficiently broadly to include other techniques, current or emerging"*[40]. Such a strategy would be auspicious if the s 15 prohibition was ever reconsidered in light of these emerging techniques, however, without revision, it appears as an outmoded plenary ban that is framed far too broadly. As David Thorbun of Murdoch Children's Research Institute notes, the mitochondrial donation process *"is not human cloning by any means, but the procedures that are used overlap."*[41] On 27 June 2018, the Senate Standing Committee on Community Affairs finally released their anticipated Report titled 'Science of mitochondrial donation and related matters'.[42] The Report is replete with submissions from various experts of medicine, biology, philosophy and ethics confirming much of what was already known: the inflexible Federal regulation has created a *"legislative barrier"*[43] through its *"blanket prohibition"*[44] that unjustifiably catches mitochondrial donation, despite it being a *"conceptually distinct"*[45] practice to human cloning.

The Committee's mere four recommendations are a frightening testament to the huge regulatory gap that must now be traversed before legislative change can occur. This involves consulting the public on the prospect of mitochondrial donation, forming a consultation paper, referring the matter for advice to the National Health and Medical Research Council, and then having the Committee's report referred to the Council of Australia Governments (COAG) Health Council for implementation into States and Territories. What of those facing life-threatening consequences from lack of treatment presently? The Report's final recommendation is that, in the interim (not forgetting this was a matter that the UK invested twelve years into researching), Australia should *"initiate dialogue with the relevant authorities in the United Kingdom to facilitate access for Australian patients to the United Kingdom treatment facility"*[46]. Criticised by submissions in the Report as advocating a form of "medical tourism"[47], this proverbial 'passing the buck' to the UK, who is yet to agree to the proposal, arguably represents the nadir in Australia's legislative accountability. A rejoinder to this criticism may justify the processes of public consultation and medical administrative approval as necessary to ensure regulation is legitimised by the community and the medical profession. Moreover, our courts and regulatory bodies are well equipped to apply the legislative purpose of the Acts in lieu of steadfast compliance to statutory deficiencies. In response to this, two points are worth making. First, the Australian community have expressed a general consensus in favour of mitochondrial donation for some time now. A recent survey indicated that 78% of candidates answered 'yes' or 'yes with conditions' to Australia allowing children to be born from mitochondrial donation.[48] Consensus in support of this practice has remained in this range for the last decade and has increased in recent times - a result

of the Australian public becoming more informed of these procedures as the phantasmagoria fades away from stigmatized phrases such as 'three-person-baby'. Second, insofar as our judiciary can assist in the matter, we must ask the question: do we really want our courts exposed to situations where they must apply the 'spirit of the law' on tenuous policy grounds? For anyone who has cursorily skimmed the *Boilermakers' Case*[50], or is even remotely familiar with the notion of the separation of powers, the answer is clearly a resounding 'No'. Given the disparate common law outcomes in IVF and ART law[51], one would have hoped this to serve as a cautionary tale for the legislature re-entering the same medical domain; for in this area, it is true, that such issues are seldom elementary. The task involves navigating legal, ethical and scientific fields with a sensitivity to the values contained within each. To that end, Australia's regulatory efforts should be commended for presenting a united front between its State and Federal schemes as to what values it has chosen to prioritise.

However, as has been argued here, the aim of the game is *contemporaneity*. A responsive regulatory model must be adopted to ensure the merits of our legislation are not tarnished simply because they address a different time on the scientific continuum. As Sonia Allan[52] observes, the past reports and reviews have involved an expensive[53] and overly bureaucratic process that has yielded nominal legislative change. On the rare occasions that reform has occurred, it has implemented regulation that *"emphasise[d] fear rather than a balanced, responsive approach to regulation"*[54]. While 'perfect' regulation may be a chimera, responsive and effective regulation certainly is not. For instance, Ayres and Braithwaite's model of responsive regulation emphasises the importance of regularly updated educational guidelines and policies to ensure self-regulation is achieved at a base level.[55] By clearly defining the legal landscape for scientific research, compliance with the national licensing scheme is strengthened and ethical boundaries for developing research are fortified. Objectors to this approach may see an impossibility in regulating issues that are still emerging or yet to exist. However, the current regulatory framework in the UK offers a sound example of a system that balances the features of flexibility and stability. Characterised as progressive and scientifically liberal[56], the *Human Fertilisation and Embryology Act 1990* (UK) has been commended for its forward-facing approach to embryo research, while maintaining effective regulation of the prohibited practices associated with human cloning under the *Human Reproductive Cloning Act* (UK). The Act has been subject to regular amendment at least every two years, with a major revision of the Act undertaken in 2008 to ensure contemporaneity with modern views on the topic. Gorgarty and Nicol conceive the UK's regulatory approach as one that *"accept[s] that the traditional legal paradigm of prescriptive legislation is incapable of adequately regulating technologies that are in a constant state of flux. In this arena, flexibility is warranted because it means the legislation is not encumbered by myopic emphasis on process rather than outcome"*.[57] The control mechanisms on this flexibility are largely ones of risk and proportionality, which decrease undue administrative and bureaucratic costs and prioritise up-to-date regulation.[58] If one silver lining can be gleaned from Windeyer J's observation of trailing from the rear, it is having the way forward laid out for you. Australia only need look to the UK for an example of smart regulation in the area of cloning practices, and accordingly has no excuse for not following such steps in an effort to improve its own.

Conclusion

Human cloning practices pose a steep task to our legislature. However, the events in Shanghai demonstrate that for as complex and schismatic as cloning regulation can be, the issue is an important one deserving of our continued attention. Given the inadequacies outlined herein, it has been argued that Australia's current regulatory framework for cloning practices has become manifestly outdated. This is seen in the challenges new scientific practices pose to outmoded statutory definitions and nomenclatures, and the unaltered sweeping prohibitions that now serve as a catch-all for socially accepted medical procedures. Viewed from the Antipodes, the United Kingdom offers a front-running example of a responsive regulatory model that Australia must look to in creating a legislative scheme that is agile to science's perpetual flux. In doing so, Australia removes 'regulatory chimera' from its vocabulary and ensures that if the birth of Zhong Zhong and Hua Hua truly does mark the epoch of human cloning, its laws are not a relic of days gone by.

CONSTITUTIONAL LIMITATIONS ON THE LEGISLATURE'S ABILITY TO CHANGE THE LAW?

Joy Guang Yu Chen
LLB V

In 2010 and 2011, the Independent Commission Against Corruption ("ICAC") conducted an inquiry into alleged corruption in NSW hospitals known as "Operation Charity". This led to the convictions of sisters, Sandra and Michelle Lazarus, in 2014 for the offences of fraud and giving false and misleading evidence during an ICAC inquiry, respectively.

In 2015, the High Court's decision in *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1 ("*Cunneen*") found that ICAC only had the power to investigate corrupt conduct which affected the *probity* of a public function, not general corrupt conduct. Consequently, investigations where there was no wrong doing on the part of the public official were beyond ICAC's powers and therefore invalid.[1] This included Operation Charity,[2] and Sandra and Michelle Lazarus immediately appealed their convictions in the District Court.

The NSW Parliament acted quickly and passed the *Independent Commission Against Corruption (Validation) Act 2015* ("*Validation Act*") which retrospectively authorised all acts done or purported to have been done by ICAC, including Operation Charity.

The *Validation Act* required the District Court, who would determine Sandra and Michelle's appeal against conviction, to ignore the High Court's decision in *Cunneen* and to retrospectively treat an otherwise invalid ICAC operation as valid. Sandra and Michelle's primary submission before the Court of Appeal of NSW in *Lazarus v Independent Commission Against Corruption* (2017) 94 NSWLR 36 ("*Lazarus*") was that the *Validation Act* purported to affect pending criminal proceedings, and so was invalid because it interfered with the court's judicial independence and institutional integrity under the Constitution.

At the core of Parliament's legislative power is the ability to make and amend laws, including laws which change the law to retrospectively affect the substantive rights in pending criminal proceedings.[3] Mason J in *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 unambiguously stated: "Chapter III contains no prohibition, express or implied, that rights in issue in legal proceedings shall not be the subject of legislative declaration or action."[4] Further, in *Lazarus*, Leeming JA noted that requiring courts to apply retrospective laws is not inherently repugnant to the judiciary's institutional integrity: "[t]o the contrary, it would be strange if the legislature were not empowered to enact a law to undo the effect of a narrow construction of a statute by the High Court." [5]

The critical question is whether the *Validation Act* is a genuine substantive change in the law, which is valid – or whether Parliament had purported to direct the Courts' exercise of its judicial discretion in pending proceedings, which is unconstitutional because it usurps a function belonging to the judiciary.

In one view, it is arguable that the *Validation Act* is a genuine change in the law which seeks to redress *Cunneen's* narrow construction of "corrupt conduct" in *ICAC Act* s 8(2). In another view, in determining Sandra and Michelle's appeal against conviction, the *Validation Act* required the District Court to treat Operation Charity as valid – even though the investigation was beyond ICAC's powers.

Outside the issue of retrospectivity, there are two main considerations to determine whether the *Validation Act* was an impermissible direction to the courts: firstly, whether the law applies *ad hominem* and has been tailored to the issues in the pending proceedings; and secondly, whether the law interferes with or usurps judicial discretion.[6]

Ad hominem application

Ad hominem legislation identifies, impliedly or expressly, the person or persons to which the law applies and also affects the specific issues in the pending case. The case of *Liyanage v The Queen* [1967] 1 AC 259 ("*Liyanage*") provides a clear example of *ad hominem* legislation. After a failed military coup, the Parliament of Ceylon[7] passed temporary legislation ("the 1962 Acts") to deal with the prosecution of the coup participants. A Parliamentary White Paper specifically named the coup participants who would be prosecuted under the 1962 Acts.

A less obvious example is found in *Nicholas v The Queen* (1998) 193 CLR 173 ("*Nicholas*") where the High Court majority upheld the impugned legislation. Whilst criminal proceedings against Nicholas were pending, the High Court in *Ridgeway v The Queen* (1995) 184 CLR 19 found illegality in the conduct of law enforcement officers during a heroin importation operation – the same operation which led to Nicholas' prosecution.

Soon after, the Commonwealth Parliament inserted s 15X into the *Crimes Amendment (Controlled Operations) Act 1996* (Cth) which provided that "the fact that a law enforcement officer committed an offence in importing the narcotic goods ... is *to be disregarded*". The enactment of s 15X would have affected around half a dozen defendants in NSW and Victoria.[8] In dissent, Kirby J found that s 15X was "highly selective and clearly directed at a particular individual or individuals", both with respect *to who* and *how* the provision applied. The other judgments in *Nicholas* placed less emphasis on this consideration.

In contrast, the Validation Act lacks this ad hominem quality. It does not single out particular defendants, nor does it apply specifically to the pending proceedings of the Lazarus sisters. Instead, Parliament's intended for the *Validation Act* to apply universally because it retrospectively authorised *all* acts done or purported to have been done by ICAC before 15 April 2015 (the date *Cunneen* was decided), rather than any specific investigation.[9]

Interference with judicial discretion

Whilst the *ad hominem* nature of a law is relevant as a threshold concern, it has not been treated as determinative to invalidate legislation. The 1962 Acts in *Liyanage* singled out the coup participants, but it also substantially affected the Courts' ability to conduct their trials in the usual course. The 1962 Acts changed the admissibility of evidence, altered the length of sentencing, and retrospectively legalised the imprisonment of the participants as they awaited trial. The Privy Council found that the 1962 Acts amounted to "a legislative plan to secure the conviction and severe punishment" of the coup participants, which was an impermissible interference with judicial power.[10]

Whilst the legislature has power to create or affect existing substantive rights in pending proceedings by changing the law, the conclusive *determination* of those rights is an exclusive judicial function. McHugh J's dissent in *Nicholas* focused on the extent to which s 15X purported to remove the court's discretion to exclude evidence gathered during illegal law enforcement operation. The effect of s 15X on the applicable rules of evidence was likened to a purported direction as to the outcome of the proceedings.[11] This undermined the institutional integrity of the court and was impermissible.

The High Court majority disagreed that s 15X amounted to an impermissible legislative interference because it did not in fact interfere with the court's conclusion of the defendant's guilt or innocence.[12] Distinct from the fundamental separation of powers doctrine, here the constitution limitation is intended to protect the institutional integrity of the court and therefore has been limited to interference with the central element of judicial power; the final determination of guilt or innocence.

Despite the general application of the *Validation Act*, the Court of Appeal in *Lazarus* nevertheless considered the extent to which the *Validation Act* interfered with the judicial determination of Sandra and Michelle's rights.

Sandra was convicted of fraud. As a result of *Cunneen*, the evidence obtained from Operation Charity would be unlawfully obtained and so Sandra could ask the court, pursuant to *Evidence Act 1995* (NSW) s 138, to exclude that evidence. The Court of Appeal applied *Nicholas* and found that the *Validation Act* was not an impermissible judicial interference merely because it prevented the court from exercising a discretion to exclude evidence.

The Court of Appeal also noted that the *Validation Act* is a State law. Whilst the institutional integrity of State courts is protected,[13] any limitation on the legislature's ability to change the law would be less than the federal separation of powers doctrine applied in *Nicholas*[14]. Hence Sandra's case was relatively uncomplicated, and there was no basis to distinguish the application of *Nicholas*[15].

The *Validation Act's* effect on Michelle's case was very different. Michelle was convicted of giving false or misleading evidence during an ICAC inquiry – the very inquiry which Cunneen found was unauthorised. Therefore, the result of *Cunneen* meant that the prosecution was unable to make out the first element of Michelle's offence; that she attended a compulsory ICAC inquiry.[16]

The difficulty in Michelle's case is that, but for the Validation Act, the prosecution must fail in establishing the offence. However, as Leeming JA cautioned[17], this does not necessarily mean the *Validation Act* was "determinative" of Michelle's guilt or innocence in a way that was an impermissible interference with the judicial process such as contemplated in *Nicholas*. The *Validation Act* merely changed the legal characterisation of the facts which comprise the first element of the offence, and it does not "deal with ultimate issues of guilt or innocence" because the prosecution must satisfy the other elements of the offence.[18] Therefore, the *Validation Act* was also valid in its application to Michelle.

Conclusion

Compared to the 1962 Acts in *Liyanage* or even s 15X in *Nicholas*, the *Validation Act* is far from an obvious case of legislative interference with the judicial function. Rather, it appears to be a genuine exercise of legislative power to change the law, especially because it applies generally to affect the substantive rights of *all* defendants who were involved in ICAC inquiries before 15 April 2015, one of which was Operation Charity.

The starting position must be that the legislature has the power to change the law, even if that change retrospectively affects substantive rights in pending criminal proceedings. The question of whether such a change is an unconstitutional interference with judicial power is complicated by the "indefinable character of judicial power, which is a core problem besetting the formulation of firm principles regulating the exercise of judicial and what is an illegitimate interference with it."[19] For now, it may be sufficient to say that if and when an essential or core judicial function has been usurped by the legislature, such a change will be unconstitutional.

MORAL PANIC AND ECONOMIC GAIN:

How the decriminalisation of solicitation and brothel-keeping turned sex work into an industry

Grace Lovell-Davis
JD III

I went to school in Kings Cross, which meant that for six years on my walk to school, I passed one of the most infamous brothels in Sydney, the Golden Apple. As with anything that you are exposed to from a young age, I didn't think much of it. To most of my peers and I, brothels were just small local businesses that evoked a bit of a shocked giggle as we grew to understand what occurred behind their doors. New South Wales has some of the most progressive regulations with regards to sex work of any jurisdiction in the world. Since the radical reforms of 1979 decriminalising sex work, the legislation controlling prostitution in New South Wales has incurred significant controversy. In recent decades, legal frameworks regulating sex work have been amended a number of times in reactionary response to the conflicting priorities of both the people and politics of New South Wales. Over time, it has become apparent that legal sanctions regulating what is commonly referred to as 'the oldest profession in the world' do not eradicate or reduce the extent of prostitution, but rather, shape the striction of the sex industry and the conditions under which sexual services are sold.[1] This article shall explore the tumultuous history and ongoing debate surrounding the legislative framework governing sex work. Such reform has been marked by oscillation between neo-liberal motivations for legalisation and the conservative impetus for control resultant of moral outrage associated with prostitution.

The History of Legislation Regulating Prostitution in New South Wales

Sex work in New South Wales has had a long and complex history framed by the continual push and pull between the conservative desire to control prostitution, and the liberal desire to legalise it in the hope of securing better protections and conditions for sex workers. Until 1979, the legislative framework in New South Wales was similar to that of other Australian jurisdictions and Great Britain. In 1908, legislation was passed under the now repealed *Vagrancy Act 1902* (NSW) that made 'soliciting by women' an offence. Under this Act, any woman found to be 'a common prostitute' was liable to imprisonment with hard labour for a term not exceeding six months.[2] Under the same Act, it was an offence for a male person to live knowingly off the earnings of prostitution, and for any person running a brothel.[3]

In 1979, the *Summary Offences Act 1970* (NSW) was repealed and superseded by the *Prostitution Act 1979* (NSW), which contained provisions deemed by the Government necessary to control the more sordid aspects of prostitution not otherwise subject to criminal law. Under the Prostitution Act 1979, it remained illegal to; knowingly live wholly or in part on the earnings of the prostitution of another person, operate a brothel under the guise of a massage parlour, sauna or bath house, allow such a business to be used for solicitation, and publish any advertisement indicating that a premises were being used, or that any person was available, for the purposes of prostitution. The offences created by the *Prostitution Act 1979* reflected the view that the purpose of the criminal law should be to punish those who organised, promoted or profited from prostitution rather than sex workers themselves.[4] Soliciting and loitering offences were repealed because they discriminated against sex workers in comparison to their customers.[5]

Between 1979 and the promulgation of most recent reforms regarding prostitution and brothel-keeping in 2007, the legislative framework of New South Wales has oscillated between the pursuit of control through limitation of the liberal reforms of 1979, and the promotion of sex worker rights. Throughout this time, contention primarily focussed on the act of brothel keeping. The 1988 case of *Sibuse Pty Ltd v Shaw* (1988) 13 NSWLR 98

held that the *Disorderly Houses Act 1943* (NSW) enabled the Supreme Court to declare a premises a 'disorderly house' where those premises were habitually used for prostitution, whether or not those premises were 'disorderly' in the ordinary sense of the term.[6] In 1995, the *Disorderly Houses Amendment Act* 1995 was passed, including provisions that legalised brothels and living off the earnings of a prostitute.[7] The Act also amended the *Crimes Act 1900* (NSW) to abolish the common law offence of keeping a brothel and related offences. Following the passage of the amendments, a brothel became a commercial business requiring local council approval under the *Environmental Planning and Assessment Act 1979* (NSW). Nevertheless, in 2007 the New South Wales government passed the *Brothels Amendment Act 2007* (NSW). This legislation expanded the powers of councils and the Land and Environment Court to close 'disorderly and unlawful brothels', and allowed councils to make brothel closure orders that could be effective within five working days as opposed to the previous 28 days.[8]

The decriminalisation of sex work in New South Wales as a mechanism of control: Effects and Areas for Reform

The scheme currently in place New South Wales has been characterised as a 'predominantly liberal or laissez-faire approach' to the regulation of sex work.[9] Nevertheless, the aim of the scheme has been to regulate and control the industry; the location and size of outlets, the conditions under which workers are employed, and the health and industrial safety standards obligated.[10] Whilst most policy typically characterised as neo-liberal tends to limit the ambit of control that the state has over a particular industry, the New South Wales framework places sex work under the strict purview of regulatory actors. Whilst the decriminalisation of solicitation and brothel keeping has freed the market to a certain extent, a degree of tension between neo-liberal ideals and the moral panic of regulating prostitution remains, impairing the genuine promotion of sex worker rights. Accordingly, the central areas in need of reform pertain to the substantive conceptualisation of prostitution as a legitimate profession, such as the introduction of a standardised award for sex workers, greater emphasis on occupational health and safety and adequate anti-discrimination laws.

Significant ambiguity in the current legislative framework has created substantial difficulty in prescribing the status of the law and demarcating the responsibilities of relevant regulatory bodies with regards to the regulation of sexual services. This is especially true in relation to sex work operating out of a brothel, as regulation depends heavily on the discretionary directives of local councils in the design of their Local Environmental Plans (LEP) and control of local town planning, meaning that attitudes and standards of workplaces in the sex industry can vary drastically across New South Wales.[11]

Despite the difficulties that arise as a result of the different standards of restriction across each local council, there are a number of benefits that have arisen as a result of the current structure. While local councils may introduce stringent regulations with regards to regulating businesses selling sexual services, they do not possess unfettered discretion in the form or content of their LEP. Rather, local councils are required to take into consideration the perspectives of the local community and any authorities affected. Further, the Planning Minister has a right to veto the implementation of LEPs as they see fit, and are compelled to ensure councils are not able to issue undue blanket prohibitions on brothels operating within their area. As such, there are clear protections to ensure that any overly restrictive planning policies can be appealed to the Land and Environment Court, thus reducing the opportunity for the arbitrarily restrictive control of sexual services premises.[12] Further, by moving sexual services premises into existing regulatory planning schemes, local councils are better able to care for sex workers in their jurisdiction by imposing health and safety requirements as well as security measures on particular premises.[13] Finally, and most significantly, the framework now in place conceives brothels or 'disorderly houses' as legitimate places of business.

Further, as with any place of business, sexual services premises must comply with the *Occupational Health and Safety Act 2000* (NSW), entitling sex workers to minimum safety standards and worker's compensation.[14] Nevertheless, there are significant issues with regards to the legal employment status of sex workers. The primary model used in the industry classifies sex workers as independent contractors.[15] Financial arrangements are often made by sex industry businesses to reflect this relationship, for instance, by charging 'rent' for the use of rooms in the workplace with the expectation that the sex worker will cover the overhead costs.[16] As independent contractors, sex workers are precluded from certain entitlements and legal protections provided to employees, such as sick leave, annual leave, WorkCover, and superannuation.[17] Additionally, as independent contractors, sex workers are not covered under the *Fair Work Act 2009* (Cth), precluding them from the benefits enjoyed by employees under this framework.

As the decriminalisation and legalisation of sex work in New South Wales has developed as a result of neo-liberal ideals, framing sexual services as a revenue-creating industry, concern for the health and safety of those providing services has been relegated to the sidelines in practice. The system in place has legitimised sexual services as an industry, but not those working in it. Critics contend that the areas in most need of reform relate primarily to the vulnerability of sex workers to exploitation by organised crime and human trafficking, as well as public health concerns and discrimination.

Sex work is an industry that has long been tied to the dangers of organised crime and exploitation of vulnerable individuals. Whilst there is no doubt that some people working in the sexual services industry are doing so voluntarily, there are certainly individuals within the sector vulnerable to exploitation. Significant concerns have been raised regarding the threat of human trafficking in the sexual services industry. However, this area is difficult to reform as the regulation of human trafficking is the legislative responsibility of Federal rather than State government.[18] As such, effective regulation requires commitment and understanding from multiple levels of government.

With regards to public health concerns, sex workers in New South Wales are better placed than most. A 2010 study showed that New South Wales enjoyed the widest reach of health services targeting sex workers throughout Australia.[19] Furthermore, New South Wales developed fairly robust mechanisms to ensure the health of sex workers during the AIDS epidemic of the 1980-1990s. In 1989 the *Public Health (Proclaimed Diseases) Amendment Bill* was passed, introducing fines of $1,000 or up to 6 months jail time for persons found to be recklessly endangering others by spreading disease.[20] In response to the AIDS crisis, condom use became more widespread. By 1991, 97.5% of female prostitutes reported that they insisted on the use of condoms at work.[21] Notwithstanding the significance of the State's protection of sex workers during the AIDS epidemic, much of the regulation with regards to public health and prostitution in New South Wales has centred on 'protecting' the 'mainstream' population as opposed to the workers themselves. This view seems to operate on the incorrect stereotyped perception of

sex workers as "…creature[s] of the gutter and darkened back streets, with links to disease and vice". Not only is this view damaging and dismissive of sex workers, it does not represent reality. Sexually transmitted infections are increasingly common across all cross-sections of Australian society. As an inherent workplace risk in the sex industry, reform is needed in order to protect sex workers as well as their clients.[23]

Sex workers often suffer from discrimination as a result of their career choice. This issue was extremely prevalent during the 1980s AIDS crisis as prostitutes were often blamed for spreading AIDS to the 'mainstream' population despite there being clear evidence that the majority of sex workers were not HIV positive.[24] Currently in New South Wales, there is an absence of anti-discrimination protections for sex workers. Whilst the Queensland *Anti-Discrimination Act 1991* (Qld) makes it unlawful to discriminate against someone on the basis of lawful sexual activity, the New South Wales and Federal Acts do not. As such, there is a need to reform and consolidate the protections made available to people under the *Anti-Discrimination Act 1977* (NSW).[25] In 2012 Prime Minister Kevin Rudd announced the enactment of a 'Human Rights Action Plan', which aimed to consolidate the disparate discrimination laws across Australia.[26] Submissions in response to this plan included that of the Scarlett Alliance, a national organisation for the promotion of sex worker rights, who recommended the implementation of federal anti-discrimination laws on the basis of occupation in order to decriminalise sex work across Australia and address the barriers to access to human rights by sex workers.[27] Despite such submissions, the only changes made regarding sex work in the Human Rights Action Plan related to child pornography, forced prostitution, and trafficking, and did not attempt to address the high levels of discrimination faced by sex workers.[28] The only amendments made to Federal anti-discrimination laws concerned 'sexual orientation or gender identity', which does not protect people from discrimination on the basis of their sexual activity, behaviour or labour.[29] As such, the fight to legitimise not merely the industry, but those who work within it, is clearly far from over.

Conclusion

Although prostitution is now legal in New South Wales, it is contained in ways that seek to limit its operation as a normal economic activity.[30] Namely, the sexual services industry is controlled on the basis of the state's need to ensure that sexual behaviour outside of the nuclear family norm accords with the moral values of the day. In consideration of the hodgepodge of legislation and regulation in New South Wales, it is clear that the state is uncertain of how to balance its moral concerns with its desire to create fiscal turnover, and is uncomfortable with breaking away from traditional, conservative views with regards to sex work.

AI AND CREATIVE WORKS

Controlling the beast through IP law

Connor Jarvis
LLB V

Introduction

Works created by artificial intelligence systems do not satisfy the authorship requirements under current Australian copyright law, and thus copyright is incapable of subsisting in such works. Despite this fact, the technology behind the creation of computer generated works has improved beyond what was considered possible merely a decade ago. Poetry produced by computer programs has repeatedly passed the Turing Test, proving that "creative" and "original" work can originate from mere computer code. Artificial intelligence has been applied to widely disparate fields including creative industries, banking and finance, scientific research, social policy making, weapons development, espionage, health industries, transport and even the legal profession. The creation of new IP rights in computer generated works can drive investment and innovations through the creation of economic incentives in AI produced works and reward the creative endeavours of artists who use computer programs. Computer generated works contribute to the cultural value of society, as do other creative works produced in a more traditional manner. In addition, assigning responsibility to the actions of AI systems can address growing concern about the unregulated actions of AI systems, without involving questions of AI personhood. Modification of existing copyright law, whilst maintaining coherence with the underlying rationales supporting copyright can achieve these goals and reflects the general trajectory of copyright law reform internationally.

Computer generated works under Australian copyright law

The conceptual foundations underlying modern copyright law can be traced to the ideas of Romantic artists: individually creative people who are the source of consistent creative content.[1] From the Statute of Anne and onwards, copyright law has been designed to afford rights to such an author in accordance with natural law. As per the writings of Hegel, Foucault and Locke, an artistic work is emanation of the personality of the artist.[2] In addition, rights conferred under copyright law incentivise an author to create more works, which ultimately benefits the public and rewards the work and creativity of the author.

Australian copyright law continues to require human authorship for copyright to subsist in works. In the *IceTV*[3] case the use of "author" in sections 32, 33 and 35 of the *Copyright Act* 1968 was held to require human authorship. However where a person controlling a computer program directs and fashions the material form of a work, copyright will subsist in the work, and be owned by that person.[4] However, where a work is produced autonomously through a computer program, copyright will not subsist in the work.[5]

In addition, for a work to be original, the author must exercise "independent intellectual effort" toward the final representation of the work.[6] The originality requirement in IceTV have been held to be well below the novelty requirements in Patent law.[7] However, merely expending labour and skill has been held to be insufficient for copyright to subsist in a work.[8] Hence where a computer program exercises this independent intellectual effort, copyright will not subsist.[9]

Australian copyright law has held that CGWs fall into two distinct categories, depending on the level of independence of the AI system.[10] Where an author utilises a computer program as a tool to produce the final representation, the computer program has been thought of as analogous to an artist's brush, a musician's violin or a photographer's camera. Works created by such computer programs have been accepted as being authored by the human using the program.

However, CGWs that are produced by AI systems which act independently, autonomously, and create works with no direction from a human have been held not to subsist copyright. An AI system utilises machine learning programs, which deduce connections within a data set presented to it and produces an output that iteratively improves to some metric. Using this technique, AI systems have been able to deduce connections within data sets that may not have been discernible by humans, and produce works and create solutions to problems surpassing the ability of human authors. Where this occurs, the human author has no input into the final representation of the material form of a work.

As such, CGWs that are produced by AI systems that are genuinely novel, beyond the originality requirements of "independent intellectual effort", will not subsist copyright. I will limit further discussion to this type of CGW. Whilst there has not been a case that has dealt directly with such CGWs created by intelligent AI systems, it is likely that the High Court will continue to limit copyright to human produced works in line with the direction it has taken above. For CGWs to subsist copyright it will be necessary for legislative intervention on the subject.

The proliferation of artificial intelligence, computer generated works now and into the future

The continued development of the technological capabilities and applications of AI systems have seen an incredible growth in its application across a vast array of industries. AI systems have been implemented in the development of poetry,[11] music[12] and artwork,[13] the banking and finance industry,[14] social policy making,[15] weapons development,[16] espionage,[17] health industries,[18] transport[19] and even the legal profession.[20] In Australia the percentage of businesses spending over $1 million AUD on AI systems is forecast to increase from 6% to 13% in 5 years.[21] Similarly, the AI industry in the US is forecast to be increase from $8.2 billion USD in 2013 to $70 billion USD by 2020.[22]

AI systems have proven that they are able to produce artistic, musical and literary works, as creative as that of humans. The *Next Rembrandt* project by ING is an example of the complexity in subsisting copyright in CGWs. A computer program analysed over 300 artworks of Rembrandt Harmenszoon van Rijn, in incredible detail, including the dimensions of the subject of the portrait, height of the paint on the canvas and the pattern imprinted through the brushstrokes. Experts in engineering, history and art were involved in the creation of the computer program. The output of the program was an independently produced, original work that mimicked the style of the late baroque master. Considering the large monetary investment in the project, it is unclear in whom any rights to the work should vest.[23] No issues with any copyright which may subsist in the artwork has arisen.

The *Cybernetic Poet* program is a computer code composed by Raymond Kurzweil that is able to independently compose poetry.[24] The program is given an input of poems written by an author. From this, the program deduces connections between the structure, rhythm and lexical choice of poems and produces poetry in the style of the author shown to it. The poetry over the *Cybernetic Poet* was able to pass a Turing Test, where the poetry of the poet is presented to adult and children judges of different levels of poetry experience, who attempt to identify the *Cybernetic Poet's* work from works produced by human authors. They were unable to do so.[25] Whilst the Turing test is not a definitive criterion for creativity, CGWs have proven to be indistinguishable with human works with regard to their creativity. This indicates that they are viewed by humans as

possessing the same degree of creativity as human produced works. David Cope produced a music generator that functioned in a similar manner to the *Cybernetic Poet*.[26]

Finally, within the legal profession the general consensus within the profession is that, like other professions, certain roles within the profession would be susceptible to automation. However, the creation and presentation of oral argument to a jury or judge is arguably the most human element of the profession, and has been thought to be incapable of automation. However, Douglas Walton has posited that this may not be so.[27] As with any task, where evidential argument can be decomposed into a logical structure to be analysed by AI systems, he opined that it is possible use structural mapping as a means of teaching an AI system to argue by analogy. With such a system, AI systems will be able to produce legal argument for a given case.

AI systems are capable of producing works and performing tasks, previously thought to be solely the domain of human intellectual endeavour. The growing scale and proliferation of the use of AI and the value of the works they produce necessitates certainty in this growing industry. This can be achieved through subsisting rights in CGWs.

Incentives for subsisting rights and responsibilities in AI produced works

Copyright law undertakes a balancing process between the rights of authors, economic incentives and the benefit of the public. As such, for rights in CGWS to be granted to any entity, there must be a positive reason for doing so.

Under a natural law analysis of copyright, rights should be granted to the author of a work, as the author should have control of their own creation and the sole right to the fruits of their own labour, consistent with the idea of the Romantic author. Under this analysis, the rights associated with CGWs should be assigned to the AI system itself. A programmer composes the code that brings the AI system into existence. From there, the AI system is the source of the creative thinking and production of the work. It is more natural to think of the programmer as the facilitator of the CGW, rather than the author of the work.[28]

Under Australian and International law, no AI system has achieved personhood, or has been granted the rights associated with personhood.[29] This can be explained due to the difficulty in defining AI consciousness, the limited value in granting AI systems such rights and how novel the technology is. It would be strange if the first set of rights to be granted to an AI system were based in copyright, as opposed to more widely suggested human rights proposals under discussion. As such, there is a stronger argument that the rights associated with CGWs should vest in the person facilitating the production of the work.

Currently CGWs are protected under the law of trade secrets and confidentiality, which prevents the spread and use of information and works by persons who gain access to commercially sensitive information. This system of protection evolved to protect business interests and is designed to protect information and works that are not publicly available. This is an unsatisfactory method of protecting CGWs, as publishing a CGW to the world prevents protection under this system. This prevents the dissemination of CGWs.

Dissonance under a natural law framework within the Australian copyright system is tolerated in the context of the assignment of works in employment relationships.[30] Despite the fact that an employee is the person who creates the work through exercising their own independent intellectual effort, an employer is the owner of copyright in works produced during the course of an employee's employment. Assigning the copyright in works produced by an employee in the course of their employment provides incentives for employers to produce works. In addition, where a large number of people are required to produce a work, this allows the work to be disseminated, as a large number of persons entitled to the exclusive use of a work can prevent its effective exploitation.

Allowing the rights in CGWs to vest in the author of the computer code provides an economic incentive to implement AI systems to produce works and aligns with the notion that the person responsible for the creation or facilitation of a work deserves to reap the benefits of doing so. Currently individuals or corporations who produce CGWs have no means to prevent other parties exploiting their works. Subsisting rights in CGWs will continue to drive innovation in this rapidly growing field and create certainty where individuals or corporations seek to exclusively exploit produced CGWs, as per natural law notions. In addition, complex AI systems are normally written by many programmers, commonly in an employment setting, and involve large initial costs to implement. As such, it is coherent with the purposes of copyright law to reward the entity that facilitates the creation of an AI system, and subsequently the work, as the entity which brought the work into existence.

AI produced works have proven highly valuable to the public. Such works are culturally valuable, as other type III copyright works are. The production of CGWs should be incentivised for the same reasons as other type 3 works.

Another issue posed by the growth of AI systems, is the responsibility attached to their actions. If CGWs do not subsist copyright, they cannot infringe copyright by the same reason. This has been the position held under US copyright law.[31] Assigning both the rights and the responsibilities of AI systems, will give recourse to persons with rights in copyright works that are infringed by AI systems. This will ensure that AI systems are not implemented to avoid copyright law as it currently exists.[32]

However, creating copyright in CGWs may inhibit the growth of the AI industry. Because of the high initial cost to producing AI systems, copyright that prevents the spread of new techniques and ideas may create monopolies within the industry. As such, the rights granted over CGWs must be limited if they are created. The rights in AI systems could be limited both in their scope and duration to encourage innovation and prevent the creation of monopolies.[33]

International approaches to copyright in CGWs

The position with respect to CGWs under US copyright law is similar to the Australian position. *The Feist*[34] decision held that copyright protection will only be extended to works that are original to the author and possess a modicum of creativity. Under the US copyright system, voluntary registration is necessary to enforce copyright, however it is not a prerequisite for the subsistence of rights. The US Copyright Office has indicated that, on application, it will register an original work of authorship, provided the work was created by a human being.[35] Whilst this is only the practice of the US Copyright Office, *Feist* places importance on human authorship in CGWs, and it unlikely that copyright will subsist in CGWs in the US.

The position of CGWs is similar under European and Canadian copyright law. Within European copyright law, copyright will subsist in a work that is an author's own intellectual creation.[36] Within Canadian copyright law, copyright will subsist in a work that is the product of an

author's exercise of skill and judgement.[37] Statutory schemes under European copyright law have placed emphasis on a human requirement for authorship. The importance of moral rights in European law may have influenced this decision. This is the position in the Canadian Copyright Act.[39]

The only country that has extended copyright protection to CGWs is the UK. Under the UK Copyright Act[40] the author of a CGW is the person who undertakes the necessary arrangements for the creation of the work. The provision is quite clear and is yet to generate much case law, however it is clear that copyright protection is available for CGWs.[41]

Considering the proliferation of CGWs and their value, legislatures across the world will have to define the rights associated with CGWs to promote certainty within this emerging industry. I predict that as this occurs, more states will assign rights in CGWs, as in the UK. This will require a principled approach that balances the rights of all stakeholders and maintains coherence with current Australian copyright law.

A framework to adequately protect the intellectual property rights of human and machine authors

Thus, I posit that providing an economic incentive to produce AI systems and CGWs would benefit the public by improving consistency within Australian copyright law, increasing certainty in producers of CGWs and increasing the proliferation of such systems. Rights under CGWs should fall under part IV of the *Copyright Act*[42], as such rights do not currently require human authorship. By assigning rights as though an AI system is the employee of the programmer, the copyright system does not have to radically change to adapt to changing technology and does not create a dissonance within the assignment of rights under the copyright system.[43] In addition, such rights should be limited to a disseminator's rights. These rights would incorporate a right to copy the work, and a right to communicate the work to the public. This would avoid the unsatisfactory system of protection currently utilised under the law of trade secrets and confidentiality.

Rights to CGWs would vest in the person who facilitates the work being produced, that is the programmer. This could also be a business which provides the necessary employees, resources and direction to produce large scale AI systems. This will provide incentives for businesses to invest in AI system by allowing the exclusive exploitation of produced works, increasing the production of CGWs and improving economic efficiency were AI systems can be deployed.

Limiting rights in CGWs to disseminators rights would only protect the final output of an AI system rather than the method of producing CGWs beyond a computer systems protection as a literary work.[44] This will limit the stifling of innovation in the AI industry and promote the dissemination of CGW themselves.

Finally, the duration of the disseminator's rights suggested for CGWs should be relatively short. I suggest a term of 20 years from the date of publication of the work. The shorter time scale of the right reflects the pace at which AI industry is innovating, and is likely to innovate into the future. The works produced may be quickly superseded and their value may diminish with time, faster than other part III works.

The rights scheme can be summarised as follows:

Ownership	A person who facilitates the production of a CGW is the owner of any copyright subsisting in the work.
Duration	20 years
Rights	1. To make a copy of the CGW, whether manifested physically or digitally; 2.To communicate the CGW to the public.

Conclusion

The current position of CGWs under Australian copyright law is unsatisfactory. The focus on authorship in Australia is the only impediment to copyright subsisting in CGWs, as CGWs have proven to satisfy the originality requirements under Australia, US, Canadian and European law. The creation and proliferation of CGWs into the future is only going to increase. A principled approach to the assignment of rights in CGWs is required to balance the interests of stakeholders in the AI industry.

I suggest that legislative intervention should create rights in CGWs and should be assigned as per the assignment of rights in employment relationships. This maintains coherence with the assignment of rights under current Australian copyright law. In addition, limiting the rights assigned to disseminators rights will promote investment and innovation in the AI industry, while limiting the formation of monopolies that may result from assigning the wide rights associated with part III works in CGWs. ●

SAFETY NET OF SUPPORT OR WEB OF CONTROL:

Discursive dimensions of Australia's social security law

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Australia prides itself on its welfare system – few months go by without a public figure invoking their pride in 'our generous safety net'. Indeed, our welfare spending constituted 9.5% of GDP in 2015-16,[1] representing 35 per cent of the Australian government's expenses.[2] Generosity, however, is defined by more than expenditure. It is also a matter of attitude and values, a framework through which individuals are perceived. Thus, to determine whether we truly possess a welfare system that is generous to the people whom it aims to protect we must assess the language we use in assigning value and meaning to the various actors that constitute this system.

Language gives us something financial figures can't – the specific ideologies that we use to constitute the world around us. Representations of welfare recipients in Parliamentary speeches, legislation, and case law have a performative dimension, creating the very idea of a 'welfare subject'.[3] To comprehend a thing we must name it, and in naming it we activate our preconceptions and assumptions about the way the world works. The group that does the naming is significant as it is their assumptions that come to structure the language we use to talk about something and therefore the way we understand it.[4]

It is from this foundation that we can begin to explore the discourse applied to welfare recipients. As a group that does not wield public power, recipients are the subjects of discourse rather than its creators – they are constituted as an objective, fixed category through the 'elite framing' applied by legislators.[5] When we examine this framing, the predominance of generosity seems to fade. Rather, as I explore in this article, it is a rhetoric of control and punishment that dominates the framing of social security law, a rhetoric that is exemplified in the Social Services Legislation Amendment (Welfare Reform) Bill 2018 ('the Bill') that was passed by both houses in March this year.

Foundational framing - dependency and burden

Alongside 'generous safety net', 'welfare dependency' is perhaps the most common phrase in Australian welfare rhetoric. In the last year, the term has appeared in the Senate and House of Representative Hansard over 60 times. In the debate leading up to the passage of the Bill, reducing intergenerational welfare dependency was explicitly invoked as a driving force behind reform. The 'cycle of welfare dependency' was framed in these debates as a force which will 'rot' recipients unless the government helps them 'break free'.[7] These metaphorical concepts create a powerful image – that of dependency as a kind of prison. The implication is that as prisoners of dependency, recipients lack agency; they are 'encouraged', 'helped', and ultimately passive.[8] Implicit in this framework is the assumption that recipients are disempowered through the disincentivizing effects of welfare payments and it is the role of the government to help them rediscover their agency by providing the combination of nudge factors that will result in employment.[9] This in turn implies that it is not structural or societal factors which prevent people from exiting welfare, but rather the agency-reducing effects of welfare itself. Those in receipt of income support are therefore cast as inherently devoid of agency and in need of government control. Citizens are therefore treated as powerless 'until they have acted in a way that the government feels is 'active''.[10] The first act of agency activation is the labelling of recipients themselves – in the Amendment and in case law, they are 'jobseekers', defined by the pursuit of work. Where they fail in this pursuit, they are failing the taxpayer, a discursive category cast as separate from the jobseeker despite the fact that those on welfare continue to pay taxes such as the GST. The implication of 'jobseeker' is that there are jobs that will be found, that it is just a question of actively seeking them – when no job is

found, the above discourse leaves no room for the consideration of structural effects, instead individualizing all responsibility.

Why does this positioning matter? To answer this question we must return to the constitutive power of discourse. If the way we talk about something frames our understanding of it, it also frames the way we approach it. In the realm of welfare, discourse doesn't exist solely in Parliament or in legislative instruments – it is powerfully present in the everyday interactions between recipients and the representatives of the safety net.[11] In Australia, those on unemployment payments are managed by independent employment service providers (ESPs), who are contracted by Centrelink to oversee obligation enforcement. Recipients sign an Employment Pathway Plan agreement with the ESP that outlines the activities that they are obligated to pursue in seeking work. Working within a specific legislative and cultural framework, ESP case managers reproduce the assumption that the agency-disincentivizing effects of welfare will cause recipients to have an attitude of work-avoidance. The foundational distrust towards recipients is reflected in then-Minister for Family and Community Services Kevin Andrews' direction that case managers should no longer accept medical certificates as sufficient evidence of a health problem that prevents recipients from achieving a requirement, doubling the rate at which medical certificates were rejected from 2003-2004.[12] The experiences of recipients further illuminate the suspicion they face – as one recipient recalls:

> *'...there was a presumption... that you are not wanting to do anything, you're a lazy person or you're a dole bludger... I came away really, really angry.'*[13]

The cases brought by recipients to the Administrative Appeals Tribunal reveal this sense of distrust and disrespect as foundational in the disputes that arose between them and the ESP. In *Housego*[14], the claimant ended an interview with the case manager after she was accused of deliberately missing a job interview; in *Butler*[15], the claimant, who the Tribunal accepted was 'keen to work', pointed to a number of actions by officers where were 'unhelpful and insulting'. In both of these cases, the escalation of tensions led to recipients missing interviews with their case managers and incurring financial penalties as a result. Here, the influence of the work-avoidance presumption is starkly highlighted. Although 63% of those receiving Newstart exit the payment within 12 months[16] and job-search motivation can remain high even in conditions of generous welfare receipt[17], the dominant discourse treats income support recipients as inherently unworthy of trust.

Creating agency, destroying agency

In designing the welfare system on the basis of preventing welfare dependency, the assumed lack of recipient agency is made central to benefit provision. This is reflected in the high level of conditionality welfare recipients face, with those on the Work for the Dole stage of the unemployment benefit subject to up to 50 hours of activities per fortnight and stringent reporting requirements. The justification is that these conditions enable recipients to obtain gainful employment, as exemplified in the amendment that makes income support payable only from the date a recipient attends an interview with an ESP case manager rather from the date of qualification.

Referring to the right to gain a living by work which the job seeker freely chooses or accepts, considered an inherent part of human dignity under Article 6 of the ICESCR[18], the Bill states that the measure encourages unemployed Australians 'to engage with their right to work by connecting quickly with employment services providers that are there to help them obtain gainful employment'. The crucial shift from the original ICESCR wording is the omission of the word 'freely'. Indeed, recipients' freedom to choose their employment is significantly restricted through the effects of agency-denying discourse.

The requirements to which recipients are subject under their Employment Pathway Plan (EPP) are determined in reference to what the Secretary regards as suitable for them.[19] Further, an 8 week non-payment penalty applies for recipients who voluntarily leave a job the Secretary regards as suitable.[20] Recipient requirements are therefore at the discretion of the Secretary, who must nevertheless take into account matters such as education, skills, age, the local labour market and length of travel time needed to comply with the requirements.[21] The presumption that recipients must be cajoled into work, however, comes up against their real-life agency in practice. Select AAT cases reveal the way in which Secretary-determined activation requirements in fact constrain the drive of certain recipients to become financially independent through their own business. In *Craven*,[22] a 62-year-old man who spent most of his time working to expand a not-yet profitable, but growing flower company sought to have this self-assigned activity taken into account in his EPP, as it had previously been prior to legislative changes introduced in 2009. His new EPP sought to impose weekly voluntary work and fortnightly attendance at a ESP – despite admitting that Mr. Craven 'may be right when he claims that visiting the [ESP] was not a productive use of his time',[23] as they showed no interest in assisting him with his self-employment aspirations. The Tribunal Member nevertheless concluded that such visits were justified by the 'needs of society, which requires an appropriate expenditure of public money be spent on social security benefits'.[24] In this phrase, the 'needs of society' and 'appropriate expenditure' are given as neutral terms capable of an objective definition that supports the presupposition that ESP activities are a more appropriate form of participation than attempts at growing one's own business. The perceived neutrality of the phrase therefore masks its symbolic ordering of the recipient's agency and initiative as less 'appropriate' or worthy than that of the decision-maker.

Although EPP requirements are subject to the Secretary's discretion, the Social Security Act provides that a plan that is in force may be varied in negotiation with the person.[25] This seems to give the recipient some agency, in allowing them to negotiate the conditions that will be applied to them through the change of an already-signed plan. In Kronen, however, the Tribunal confirmed that in the scheme the right to negotiate 'could be illusory in quite come degree'.[26] This illusory nature becomes especially important in the context of the practice history of many ESPs. Although contractually obligated to provide services that increase recipients' employment prospects, ESPs have been found to engage in 'cherry picking', in which hard-to-place recipients are offered the minimal or cheapest services by providers while money is re-directed towards those more likely to generate an employment outcome, by which ESPs are paid.[27] For many recipients, such a practice would be difficult to prove – directly challenging it, meanwhile, could lead to an accusation of refusing 'suitable' activities and thus the incurring of a participation failure. *Stearman and Secretary*[28] confirms that a high level of dissatisfaction with the quality of the service of an ESP is not relevant in examining whether a recipient took reasonable steps in complying with an activity agreement. In *Artner*[29], the applicant sought to challenge a participation failure. The failure was recorded after he attended a workshop in which he realised that 99% of the information was identical to a jobseeker course he had done 12 months ago. He

requested a copy of the further material to be handed out over the two-day period, but the presenter refused. Artner was subsequently kicked out of the workshop for having his (unconnected and unobtrusive to his hearing) earphones in during the presentation. In considering his behaviour, the Tribunal concluded that the irrelevance of the content of the workshop did not amount to a 'reasonable excuse' for the participation failure.[30] The presumption in this application of the legislative framework is that the activity of the ESP is worthwhile and the recipient thus has no right to object to it – indeed, only 20% of frontline staff report that the jobseeker's preferences are very influential in their choice of activation measure.[31] Both in its drafting and practical application, the Act therefore leaves little room for the agency of recipients.

What does this framework mean for the 2018 Bill and its attendant goal of supporting the vulnerable, encouraging those capable of work or study to do so, and reducing intergenerational welfare dependency? The key reforms of the Bill only further constrain the agency of recipients, with provisions barring those aged 55-59 from submitting their volunteering activities as part of required participation.[32] A new 'targeted compliance framework' will mean that for every failure to meet a requirement, job seekers will have their income support payment suspended[33] – suspensions will apply to failure to attend or be punctual for an appointment, failing to follow up on a job referral or unreasonable behaviour that prevents the purpose of the appointment. Certain studies corroborate the claim that these measures will bring a higher level of compliance, with the threat of sanctions found to be instrumental in increasing work programme participation[34] and job search activities.[35] Other studies, however, find that effectiveness is contingent on the provision of intensive and multi-faceted support[36] – sanctions alone can result in the 'diversion' of vulnerable individuals into dangerous places and activities, making them a 'high risk strategy'.[37]

The stated aim of the Amendment, however, is not to simply increase compliance – rather, it is to encourage greater workforce participation and self-support through work.[38] In regards to encouraging work or study, the data is less than promising. A 2009 Swiss longitudinal analysis found that sanctions lowered the probability of sustainable employment over time.[39] A comprehensive 2018 review of welfare conditionality,[40] finds that such conditionality was largely ineffective in promoting personal responsibility and paid employment. Alongside the structural limitations that prevent its effectiveness, the authors point to the unintended effects of conditionality – in considering the specific impact on agency, they signal the importance of intrinsic motivation. In contrast to extrinsic motivation based on coercion, intrinsic motivation stems from autonomous desire – this form of behaviour driver fosters long-term engagement by meeting individuals' psychological need for autonomy and competence.[41] Evidence suggests that when interactions with an agency are perceived as threatening and highly controlling, the agency loses legitimacy in the eyes of the individual, undermining intrinsic motivation to engage.[42] In applying a legislative regime that considers all welfare recipients as lacking intrinsic motivation, the current framework of extrinsic punishment risks destroying the intrinsic motivation to pursue employment that many welfare recipients in fact possess.[43] Where individuals are treated as lacking basic agency, it is likely that they will act as such. On the level of motivation and supporting the vulnerable, it is hard to disregard the way an attitude of disrespect is woven into the welfare framework. As we have seen, the fundamental assumption that the agency and decision-making of recipients is inherently less worthy filters down into the everyday interactions and decisions of the system. Honneth[44] argues that the experience of being devalued has profound psychological effects, including the reduction of what individuals see themselves as capable of achieving. AAT cases seem to confirm this effect – in *Roberts*[45], for example, the recipient felt that the ESP arrangements were wrong for him, tried to get them changed without success, and felt 'messed around' and 'hounded' by Centrelink to the point where he become discouraged and defeated. The fact that a number of AAT cases suggest the presence of undiagnosed mental illness as a contributor to participation failures indicates that individuals with mental illness are especially put at risk by this devaluation, with 45 per cent of respondents reporting mental ill health found to be sanctioned in a UK study.[46] With competence and autonomy being key both in self-worth and labour market achievement,[47] it is difficult to see how the systematic devaluing of welfare recipients' agency will transform them into responsible and active citizens.[48]

Conclusion

What can we then make of the original question of Australia's welfare generosity? On a discursive level, it is difficult to describe the welfare attitudes of the Australian safety net and its attendant social security law as generous. In fact, as we have seen, the principles shaping the design of the welfare system are those of control and punishment, aimed at guiding what is seen as an inherently 'failed' population to the right mode of behaviour. Indeed, the Bill's expansion of payment suspensions to every participation failure further establishes the threat of government punishment as central to the lives of welfare recipients. This 'secret penal system'[49] applies harsh penalties to minor offences with little transparency, oversight or accountability. The Bill confirms that beneficiaries will not receive payment pending the outcome of any judicial review regarding cancellation[50]– for many, such a financial burden would prove too heavy, encouraging unquestioning compliance. It seems inevitable that we will continue to call ourselves a generous nation and pride ourselves on the financial extent of our safety net. However if we wish to do so honestly, we must consider the way the nation speaks about its most vulnerable individuals. It is these words that become the Australia encountered by welfare recipients – an Australia that increasingly distrusts, controls and punishes, rather than supports.

SOCIAL SERVICES LEGISLATION AMENDMENT (WELFARE REFORM) BILL 2018

The most important thing
is that these changes support those
living in hardship
and help them break free
of the cycle of welfare dependency[51]

See, I am damned both ways,
I've already worked a lifetime
brought up a family
it's degrading[52] --

Should they fail
they may be subject to the targeted
compliance framework
payment suspension has proved effective
in ensuring re-engagement[53]

I mean, it's like being bullied
If you don't do that, we'll sanction,
everything is sanction, sanction, sanction[54]
never has the government asked me what I need[55]

There will be no waivers for non-payment
or preclusion periods
serious penalties waived
provide no deterrent[56]

Rent, bills - something had come up,
like I have got an elderly mother and all the rest of it
and you are doing other stuff and you think
Oh, I haven't reported[57]

They have chosen not to engage
with the specialist employment services
that are there to help them
obtain gainful employment

Mentally, they really hold it over you[59]
when you walk into that office
I've always felt like a second-class citizen[60]
I know I shouldn't probably internalise it, but you can't help
it[61]

The vast majority of Australians support it62
But they don't support simple redistribution
to those who will not apply their own effort
will not improve their own lives[63]

Like recognition that I have a brain
and I can make choices[64]
and I don't have to respect you but I chose to respect you
and I have just made it my personal goal
to get the person I have to deal with to smile
'Isn't it hot or aren't you glad it's nearly the weekend or
nearly four o'clock?'
and then to laugh[65]
and even if one's efforts
to maintain self-esteem are successful
the question of justice
is whether the burden is fair[66]

WHEN THE CAR STARTS TO DRIVE YOU:

Privacy Rights and Government Control in Autonomous Vehicles

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Autonomous vehicles are no longer exclusive to the realm of science fiction, but rather are an impending reality. The introduction of autonomous vehicles, which are vehicles capable of navigating their surroundings without human input, will inevitably carry significant social implications – radically changing the landscape of society from macroeconomic issues of employment to the every-day flow of traffic. This imminent change raises a range of legal questions that must be answered before the large-scale implementation of autonomous vehicles. This paper will focus on one such question; the relationship between state regulation of autonomous vehicles and the freedoms of their users. It will argue in favour of a cautious approach to the implementation of autonomous vehicles that gives adequate consideration to individual privacy.

I. Autonomous Vehicles and Privacy Concerns

Although there is no constitutional 'right to privacy' in Australia, Australian law gives significant consideration to individual privacy interests. Most notably, limitations are placed on Australian and Norfolk Island governments' 'and private corporations' collection of data through the *Privacy Act 1988* (Cth), which *"focuses on the access and control a person has over their own personal information"*.[1] The *Privacy Act* contains a list of 'Australian Privacy Principles' (APPs), which outlines how government agencies (amongst other entities), must handle personal information.[2] These APPs include individual's rights to access and control of their personal information as well as emphasising the importance of keeping personal information secure. Therefore, it would appear consistent with the established principles of Australian law for Parliament to give serious attention to privacy rights when regulating autonomous vehicles.

There are two major privacy interests relevant to discussions about autonomous vehicles. Firstly, there are practical concerns about the ways in which personal information is being shared and stored.[3] The introduction of autonomous vehicles is likely to bring with it the storage of unprecedented amounts of personally data, including an individual's present location, the routes they have travelled, and their intended destination. Of particular concern is the likelihood of large-scale collection of data, which has the capacity to use frequently visited locations to construct a realistic image of the individual's tastes and preferences.[4] If the creation of such "user profiles" were allowed, the infringement on individual privacy would not be limited merely to the collection and transfer of the routes an individual travels, but would also extend to accessing more intimate details about the users of autonomous vehicles – ranging from their hobbies, to their favourite type of cuisine. Whilst, on the surface, such technology seems similar to the data collection systems of technology such as Google maps; there are important distinctions to be made. Most importantly, whilst most existing technology allows you to periodically enable data sharing, data collection in autonomous vehicles is likely to be constant. Given their capacity to collate information from all autonomous vehicles, it is feasible for government agencies or corporations to access an unforeseen "concentration of information" about users and subsequently exercise "power over large numbers of individuals".[5]

Secondly, autonomous vehicles impact privacy interests from the perspective of personal autonomy.[6] The capacity to control who is aware of an individual's location and their intended movements are closely related to the exercise of autonomy. Insofar as autonomous vehicles share information about intended destinations with third parties and with other vehicles (e.g. for the purposes of traffic co-ordination), they

constitute an infringement of 'autonomy privacy'. The consequence is the individual no longer has absolute control over the freedoms associated with their own movement.

Of course, those in favour of the introduction of autonomous vehicles may argue that an individual can easily be given the choice as to whether they want their information shared or not. However, as the functioning of autonomous vehicles relies on information sharing both between cars and (most likely) some central government system, in reality the choice posed to the individual is between having their autonomy privacy violated or simply not using the autonomous vehicle to begin with. In the foreseeable future autonomous vehicles may be so heavily integrated into society, that they become a necessary part of people's lives akin to an iPhone. If this actualises, then the choice posed to individuals would be between having their autonomy violated or not using an essential feature of modern society. Subsequently it is arguable that, by the nature of these circumstances, the individual would be coerced into opting to share their information.

II. Autonomous Vehicles and Public Interest

The implementation of self-driving cars will undeniably constitutes an infringement into individual privacy. Importantly however, rights to privacy are not absolute and laws surrounding autonomous vehicles should also be sensitive to public interest concerns. Therefore, the aim for legislators should be a framework of laws which both respects the idea of individual privacy, whilst also allowing autonomous vehicles to serve a vital public interest.

A. Surveillance and Cyber-Terrorism

The recent use of vehicles in terrorist attacks has also lead to concerns about the cyber-security of autonomous vehicles.[7] If terrorists are able to hack numerous self-driving cars, there is the possibility of subjecting society to large-scale terrorist attacks. As a countermeasure to this concern (amongst others), cyber security experts have sought to develop methods of anticipating and preventing cyber attacks on autonomous vehicles. Problematically, most of the existing cyber-security methods require the body responsible for dealing with security attacks to *constantly* access personally identifiable data.[8] This leads to two intrusive forms of government surveillance.[9]

1. Targeted Surveillance

Firstly, measures allowing for this form of data collection significantly increase the capacity of governments to engage in the targeted surveillance of individuals.[10] Although the purpose of constant access to data may be to prevent terrorist attacks, it can also be quite easily used by governments "for invisible targeted surveillance". In recent times, Western governments have been widely criticised for their arbitrary and excessive use of cyber surveillance (see e.g. surveillance programs run by the Five Eyes Intelligence Alliance/Snowden NSA scandal).[11] Given this, there are legitimate concerns about any technology that would further empower government surveillance of citizens.

Proponents of the aforementioned cyber-security measures may argue that individuals travelling by car are already subjected to widespread surveillance through, for example, CCTV and speed cameras. Additionally, governments already have access to GPS tracking, which serves a similar purpose in terms of accessing an individuals travel history and current location. Therefore, the additional surveillance powers provided by autonomous vehicles will be marginal at best.[12]

However, surveillance through CCTV or GPS trackers, which require law enforcement to locate an individual's vehicle and attach a tracker, are not comparable to the constant and unrestricted surveillance of autonomous vehicles. Moreover, the concern for autonomous vehicles is not only related to the degree of additional power that governments have but how users of autonomous vehicles *feel* about that additional power. In *United States v Jones*, Justice Sotomayor argued, "awareness that the Government may be watching chills associational and expressive freedoms".[13] Whilst it may be true that autonomous vehicles do not grant governments a noticeably larger power to surveil citizens, they certainly have an impact on how "free" those citizens feel.

2. Mass Surveillance

As stated above, effective mitigation of cyber-terrorism will require governments to have the capacity to constantly access personally identifiable data. This creates the possibility of governments engaging in mass surveillance involving the indiscriminate and comprehensive collection of data of all users.[14] This form of surveillance is suggested to have a panopticon-like effect on individual behaviors. A significant amount of behavioral philosophy suggests that where individuals are aware of the constantly possibility of being watched, they are more likely to conform to "expected" social behaviors – regardless of whether they are actually under surveillance or not.[15] **Subsequently**, the constant surveillance of individual's amounts to exercising power and control over them.

3. Balancing of Rights

Whilst individuals have interests in movement and association free from government control, there is also a collective interest in a secure society. Arguably, the threat of cyber-terrorism would restrict individuals' abilities to move and act freely and thus similarly shape their behaviors by, for instance, making them fearful of travelling freely or to certain areas. If this is the case, both the overuse of surveillance and its complete abandonment would lead to intrusions on users' freedoms. Therefore, legislation relating to autonomous vehicles should not merely be 'weighing up' the trade-off between individual privacy rights and collective safety. Rather, it should aim to enhance both sets of rights by limiting government access and use of information to what is absolutely necessary in providing a sense of security for users.

4. Traffic Coordination and Misuse of Data

As the global population rapidly increases, metropolitan cities have borne to consequences of increased traffic on underdeveloped infrastructure. The consequence of this, particularly in Sydney, has been an exponential rise in traffic, which poses significant inconvenience to local citizens. In this context, autonomous vehicles are appealing, as they provide governments with the capacity to undercut congestion by coordinating vehicles on the road.[16] However, this process would require autonomous vehicles to share data with each other about intended routes, preferred arrival times etc. Hence traffic coordination would require governments to engage in large-scale data collection that might subsequently be used to construct consumer profiles. Allowing third-party access to such information could lead to situations where individual's movements are manipulated based on their tastes and preferences.[17] For example, providing a fast-food company with information about an individual's visits to similar restaurants would allow them to target advertising to that individual, or even pay to have that autonomous vehicle take routes that go past their restaurants.

Importantly, the aforementioned harm does not arise merely from data collection. Rather, it is the consequence of how that data may be used. As various government services (such as Medicare or tax) have moved online, governments have become responsible for the collection and storage of personally identifiable data. If governments opt not to privatise traffic coordination and place strict limitations on third party access to large-scale data, it is unlikely that autonomous vehicles will necessarily cause harmful intrusions into privacy.

III. The Path Forward

Existing privacy legislation is insufficient to cover the wide range of privacy interests that are infringed upon from the unrestricted introduction of autonomous vehicles.[18] Whilst some elements of autonomous vehicles resemble existing, permissible intrusions into privacy (such as speed cameras or CCTV), the comprehensive nature of data collection and its powerful capacity to create user profiles is largely unprecedented. Given this, specific legislation would be required to deal with issues of data collection and storage in autonomous vehicles. This paper makes the following recommendations for any such legislation:

- Personally identifiable information should be encrypted to ensure basic anonymity;
- Except where absolutely necessary, governments should carry out the task of collecting and storing personally identifiable data;
- Strict and specific conditions should be established for governments to engage in practices of surveillance. Such conditions should require some sort of overwhelming public interest; and
- The commercial trading of user information should be prohibited.

FAKE PORN: 'FAKE NEWS' TAKES A DYSTOPIC TURN

Deaundre Espejo
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A video has been circulating around the internet as of late. It features a young woman, completely undressed, running her fingers suggestively through her bleached blonde hair. She turns around to face the camera and instantly, her face is recognisable. It's actress Scarlett Johannsson. Only, it isn't, it's a digital reconstruction of her. With the upsurge of the 'fake news' phenomenon, where the line between what is fact and fabrication is becoming increasingly ambiguous, we can still rely on the old comfort that only seeing is believing. However the emergence of digital impersonation technology threatens this age-old adage and is a sign that the unwavering threat of information warfare cannot be so easily controlled.

What are deepfakes?

"FakeApp" is an application that uses Artificial Intelligence technology to superimpose individuals' faces into pre-existing videos. How it works, put simply, is that you input photographs and footage of a person's face at multiple angles. The program then grafts that face onto another face in every still frame of a video. With enough material, the program is capable of 'learning' facial habits such as blinking patterns and eyebrow movements, generating plausible options for each data point at any one time.[1] The result, known as a "deepfake", is astoundingly realistic. Traditionally, such a task was impossible without expertise in computer-generated imagery. But the machine-learning algorithm has condensed the editing process and democratised access, making it possible for virtually any person with computer access to produce their own fake videos.

As one would predict, this technology has been quickly leveraged for distasteful ends. The production of fake and non-consensual pornographic videos featuring celebrities has amassed considerable popularity. Deepfakes of actresses Scarlett Johansson and Emma Watson are among the most watched, attracting over a million viewers.[2] But we're now beginning to see deepfakes being utilised as a mode of political criticism. In January 2018, an actor's portrayal of Adolf Hitler was superimposed onto the face of Argentine President Mauricio Macri.[3] Although the use of deepfake technology is very much still in its early stages, the often crude and sardonic results of deepfake technology has a menacing potential to destabilise democracy and national security on the national and world stage. Deepfakes could feature government officials taking bribes, police officers shouting racial slurs, or news anchors announcing impending missile strikes. While a well-executed deepfake might spark public outrage or panic in a particular instance, there are also long-term systemic implications.[4]

A threat to democracy and national security

Fake videos threaten to erode public trust, which is vital for democratic systems to function. Today, when footage is uncovered of a person committing a crime or a celebrity starring in a sex tape, viewers can safely assume that the depicted events have occurred (provided, of course, that the video is clearly unedited and of a certain quality). But when tools for producing fake videos become faster, more accessible to the ordinary user, and perform at a higher quality, the information ecosystem will be substantially injected with a particularly dangerous form of falsehood.[5] As deepfakes become widespread, the public will have difficulty believing what they see or hear – even when the information presented is indeed true. The expansion of such technology would completely disrupt and destabilise the legitimacy of fact and evidence in domains across journalism, testimony in criminal justice, and government communications with disastrous consequences for the very notion of truth.[6]

Combined with cyberattacks, deepfakes threaten the stability of economies and government regimes. In April 2013, hackers took control of the US Associated Press' official Twitter account and tweeted "BREAKING: Two Explosions in the White House and Barack Obama is injured". In the two minutes following that tweet, the US stock market temporarily lost almost $136 billion in value until the hack was revealed. A more disturbing incident occurred in January when an alert was sent through Hawaii's Emergency Management Agency, notifying residents of an impending ballistic missile. While the alert was promptly retracted, the government released contradictory statements in a negligent attempt to diffuse tension. Hawaii's governor, David Ige, announced that someone had "pushed the wrong button" during an employee shift change, while The White House claimed that the alert was an "emergency management exercise".[7] With Trump's volatile presidency and the advent of fake news, there is simply no room for such errors in communications. One could easily envisage the consequences of a deepfake video of Trump authorising nuclear actions, and it's not a stretch of the imagination to consider the disastrous responses that could arise from the dissemination of such deepfake content.

Can the law protect us?

But what is the appropriate legislative response to deepfakes? It is evident in today's era that the law is struggling to adapt to the exponential growth in technology. Legislators are still trying to grapple with an array of tech-related issues including autonomous vehicles, drones, and cyber security. But despite the absence of direct Australian laws to specifically address deepfake technology, there are existing bodies of law that may possibly address the potential harms resulting from the publication of deepfake videos. Owners of copyright in films, sound recordings, broadcasts and published editions have the exclusive right to copy their material under the *Copyright Act 1987* (Cth).[8] Undoubtedly some deepfake videos, particularly those that are derived from copyrighted photos and videos, will infringe these laws based on their modification and republication. The tort of defamation also protects the publication of any false imputation concerning a person whose reputation or self-esteem is likely to be injured. Where a deepfake video is found to be defamatory, the targeted person may be entitled to damages. In addition, where deepfake videos are used for illicit purposes such as blackmailing or fraudulent purposes, this would clearly fall under criminal provisions against extortion or fraud under the *Crimes Act 1900* (NSW).[9] The Commonwealth Criminal Code, sets out in the schedule to the *Criminal Code Act 1995* (Cth) provides the offence of cyber-harassment, if fake videos are posted online to "menace, harass, or cause offence."[10] Whilst the current law would potentially play a deterrent and compensatory role, it is a rather 'band-aid' approach that provides little assurance in preventing the dissemination of deepfakes before the fact.

Potential solutions?

t this stage, there is no applicable law to prevent the creation and proliferation of fake videos, and it's likely that there won't be. This is because the regulation of fake content is an extraordinarily slippery concept. Burdened with the danger of criminal penalties, regulation would merely achieve what it intended to avoid: chill freedom of communication and substantially diminish the marketplace for ideas. There are also severe implications for legal institutions. How would we, as a society, manage the discrepancy between facts and

fabrication? Who would be the adjudicator to determine what is fake when a dispute arises? Regulation would turn judges into fact-checkers for potentially millions of fake content cases. Each news item or social media post would need to be assessed individually – a burden that would undermine the quick and just resolution of proceedings.[11]

Already, these problems are imminent in South-East Asia. The Malaysian Parliament attempted to regulate fake content by passing the *Anti-Fake News Act* 2018, which defines fake news broadly to include "any information, data and reports, which is or are wholly or partly false, whether in the form of features, visuals or audio recordings or in any other form capable of suggesting words or ideas".[12] However, the Act has had supressed society's willingness to criticise government, which is particularly concerning in light of the corruption scandal involving Malaysia's former Prime Minister Najib Razak. The vague definition of what constitutes fake news has also created significant problems for the courts. The Act doesn't define where the line is between mistakes and intentional falsehoods (given the 'partly false' caveat). Nor does it specify the distinction between what can be considered as online gossiping and actual reporting, or how Malaysia intends to apprehend foreign suspects not living in the country. As a result, the courts have become too reliant on the ruling party's wishes, exacerbating the risk of a censorship state.[13]

The most viable solution to the deepfake threat would be the development of software capable of rapidly and reliably flagging these videos, but such technology has been unable to keep pace. Currently, a video hosting and editing platform known as Gfycat can run AI over videos to pick out fakes by searching for identical videos. But the problem is that it won't work for videos that aren't publicly available, such as police body camera feeds or private footage. If no one in the original video is famous and the footage isn't available elsewhere online, it would be impossible for the algorithm to discover whether the content had been altered. Professor Henry Farid at Dartmouth College warns that "we're decades away from having forensic technology that… [could] conclusively tell a real from a fake". He suggests an alternative solution: to install a number of different protocols designed to detect fraudulent activity, so that it becomes extremely difficult to create a deepfake that can overcome all the safeguards in place; "I can't stop you from creating fakes, but I can make it really hard and really time-consuming". While this does provide some hope, it is clear that an increase in the resources being devoted to the development of such technologies is vital is needed.[15]

Conclusion

Deepfakes have the devastating potential to destabilise governments, national security and erode the very notion of public trust – and it seems that there's very little the government can do to control it. Legislative responses are restrained to deterrence and compensation, as regulation would have adverse consequences on freedom of communication and legal institutions. The most practicable solution would be to focus on detection technology. In the meantime, deepfakes remain mostly in the realm of pornography. It's difficult to tell at this point whether such technology will indeed cause a total information warfare to break loose, but if there's one thing to be sure about, it's that this dystopian technology has become a reality and there's no going back. ●

CONTROLLING MOVEMENT:

Public Space and the Law

Natan Skinner
JD I

Encounters with unassimilated difference are essential to the functioning of a healthy and diverse democracy. The great soapbox of public space is where such encounters are possible – where deep differences can be mutually dwelled in, and tolerated, by strangers. Yet public space in the contemporary city falls far short of this cosmopolitan ideal. Rather, urban public space functions as a tool by which the movements of the citizen-subject are controlled and the possibility of encounters delimited to assimilated difference – or, sameness. Social boundaries have become policed by a series of legal and architectural processes fortifying the built environment. This mediates all experiences of life in the public realm, militating against the existence of any real difference. This effect is not a failure of design. Rather, an aim of design facilitated by the law. In analysing the importance of public space in modern democracy, this essay attempts to clarify the relationship between law and space. Beginning by considering the role of law, property and the value judgements inherent in legal processes, I proceed by considering how these values become manifest in the urban landscape through defensive architecture. Following, I explore how this operates to dominate bodies in public space the law has deemed as 'undesirable' – namely, the homeless. It will become clear that control over bodies deemed illegitimate serves a double function to control legitimate subjects. The barred city functions to induce a fear of difference, which creates a certain model of atomic citizenship at odds with democracy.

Law is a territorial endeavour delimiting legitimate uses for certain spaces. In bestowing property rights, of possession or ownership, the boundaries of space are determined. Private property has become the 'organising idea' of modern society. It operates as a double movement which dichotomously demarcates public space from private space while simultaneously constituting public space as private territory public space as private territory requiring legal defence and border regulation.[1] This process determining the boundaries of space also functions to constitute the legitimate public subject in relation to the territory they occupy – thereby the law, as the legitimating force, becomes the mechanism of defending this space and punishing unauthorised users.[2] Law determines who can be where, when, and how space can be used – even space it declares as 'public'.

Urban public space is the typification of democratic politics, the melting pot of people, cultures, and ideas, where politics itself can take shape. Within such space, there is a presumption of encountering difference – of leaving the ordinary safety of the private home where the individual owner determines the rules and can conduct their affairs in privacy to the system of societal regulation requiring adherence to the social contract. It is the physical site where strangers may simply dwell in their differences on "civilised but essentially dignified and reserved terms".[3] The tension of pluralism and individual liberty apparently avoided altogether by Mill's classical liberalism – the idea that interference in the lives of others is only legitimate when used for "self-protection"[4] against harms in the public sphere, and therefore that none are "amenable to society" in private.[5] What is legitimate in public space then delimits the boundaries of what political actions are possible, and what forms of citizenship it allows to take shape.[6]

The criminal law operates as a language of meaning to imbue certain actions with legal and political significance – categorising acts into binaries to determine the limits of acceptable behaviour. Simply, criminal law ascribes blameworthiness on a spectrum of seriousness[7] – delineating the boundaries of criminality, and therefore what is punishable and valued as 'good' behaviour.

This process discursively declares a "public meaning" to all conduct and experiences, infusing all actions with political significance towards either the 'good society' or the 'bad' one.[8] The effective subsumption of all behaviour into a dichotomy of lawful and good or unlawful and bad promulgates a norm to be adhered to, which regulates the legal subject. It is an operation which presupposes and reinforces groups of bodies as desirable or undesirable and places them in categorical opposition to one another.[9] Criminal law "creates the problem it addresses"[10] and thereby determining what is problematic through value judgements.

The contemporary criminal law is imbued with normative values of capitalist society, privileging the productive capitalist over all else. Criminalising behaviour is an interpretive practice on the part of the politically powerful, judging what behaviour is accepted in certain spaces.[11] Judgements are characterised by moral, prudential, economic, and aesthetic considerations arising from dominant values – neoliberalism. With consumer cultures emphasis on productivity and growth, those existing in public and quasi-public space but do not significantly contribute to the economy find their presence criminalised.[12] This is a disavowal of all difference that challenges the dominant neoliberal ideology – the intolerable becoming what is threatening. Consumerism 'orchestrates public space' as 'retail space' and 'civic centres' are conflated – the presumption of using public space resting on a capacity for productivity. The intolerable is construed on a polarising class basis permeating through urban space and instituting a kind of 'spatial apartheid' based on socio-economic status.[13] In this neoliberal model, public space is analogous to public identity and must therefore be vigilantly defended.[14] One conspicuous threat clearly at odds with neoliberal ideology is homelessness. Homelessness threatens the meaning and value of public space by appropriating space and challenging its meaning through unauthorised use.[15] Homeless people are forced to "conduct their lives in public space".[16] By regulating the necessities and enjoyments of life – urination, defecation, sex, drunkenness – in the name of maintaining a certain 'quality' of city life, the homeless are forced into a criminogenic existence where crimes must be committed to survive.[17] The criminal law becomes corporeal in this forced performance of crime without recourse[18] – the homeless body beginning to exist only through a 'certain idea of psychology'[19] which labels it as anathema to neoliberal values.

Value-laden criminal law is inscribed into the architecture of the contemporary city, defending the consumerist purpose of public space. Defensive architecture in the cityscape functions to articulate movements and thereby defining public space.[20] Architecture becomes hostile, used to defend against undesirable bodies such as the homeless and delimit legitimate use of public space to consumer practices. Mechanisms of 'designing out' undesirable bodies involve limiting the use of objects to their 'intended purpose'. This includes metal spikes where the homeless may appropriate beds, reducing the size of public benches so as they cannot be laid upon,[21] and securitising the shopping mall through surveillance technologies and a language of ownership allowing legitimate exclusion.[22] This punitive regulation renders public space uninhabitable and insecure for the homeless body,[23] it is the "spatial structuring of inequality"[24] ensuring challenges to the norm are not readily encountered.[25]

Control over public space functions to serve legitimate subjects in allowing them to easily avoid confrontational encounters with true difference – the spectre of the homeless body. Regulatory mechanisms imposed upon the homeless body ensure the 'progress' of the ideal, consuming, citizen-subject

go undisturbed in urban environments.[26] Neoliberal 'responsibilising' of the homeless body to standards it physically cannot uphold[27] places it in a position of permanent otherness. Homelessness has become a 'figure of the unlawful', leading to a "uniformity of response"[28] when encounters do occur – shunned for its incapacity to contribute to the economy and uphold the values of the law. This approach, which appears to be "figured in advance",[29] seems to maintain the integrity of urban space in simultaneously reinforcing difference as intolerable and excluding it. Regulating encounters with difference has substantial implications for civic engagement by sacrificing the diversity of the majority through negating the capacity of subjects to challenge their preconceptions about difference[30] and eliminates the "possibility of agency"[31] in determining what is believed about the 'other' and what is believed about the self as distinct from that. Fear of difference and the threat it poses to the dominant ideology precludes the effective operation of democratic politics by leading to an atomic form of citizenship[32] whereby movements are barred to defend against encounters – whether it be through insidious architectural manipulations, or an acquiescence to the current values of the criminal law.

The criminal law appears to exhibit an exclusionary logic of regulation functioning to mediate all encounters with difference in public space, thereby inducing fear and foreclosing the capacity for democratic politics to take place. By exploring the relationship between law and territory, the values of the modern criminal law were revealed to be centred on capitalism. Following was an engagement with the specific mechanisms of regulation the criminal law uses in the scene of the contemporary consumer focused city. Specifically, the codification of the criminal law and its values within legislation and architecture that produces specific crimes. Public space is revealed as an illusory ideal, serving the idea of a homogenous public free from *real* difference. The criminal law becomes a double mechanism wherein it regulates both the undesirable bodies who are different, and its ideal subjects – by way of determining the specifications of their encounter.

Game over: why it is time to retire the anti-siphoning list

Rémy Numa, LLB V

Conflict of interest disclosure: the author has previously been employed by Foxtel Management Pty Ltd, 21st Century Fox, Inc., and NBCUniversal, Inc., all of which hold interests in the free and subscription-based sports broadcasting industries.

Laws are only effective when they reflect the market they seek to control. If a market changes but regulations do not change with it, they cease to serve their community, and should be abolished.

Australia's anti-siphoning laws are a perfect example of this problem. The legislation, which was introduced in 1992 and has seen little reform since then, ostensibly bars subscription television providers from acquiring the exclusive rights to major sporting events like the Olympics, as well as certain rugby, football, cricket, tennis, and other sporting events.[1] However, because the legislation fails to regulate internet-based streaming platforms, it no longer reflects the market.

The stakes are high in enacting reform. The three commercial broadcasters are heavily reliant on advertising revenue from major sports events, and the licensing fees they pay rights holders are a driving factor in the sports industry's $5.2 billion of annual revenue.[2] At the same time, Australian viewers' love for sports is unwavering: sports programming consistently dominates television ratings across every demographic and on every platform.[3] It is therefore important that reform accounts for industry needs and viewer preferences.

In order to satisfy both of those key groups, the Federal Government should abolish the anti-siphoning list. While this is a radical approach, doing so will ensure that the law does not discriminate against local industry; reflects the new platform preferences of Australian audiences; and gives viewers a choice in whether they pay a fee for televised sports, or accept a free product at the expense of their values.

The discriminatory effect of the current legislation on local industry

Australia's anti-siphoning legislation consists of two key provisions. Firstly, the Broadcasting Services Act authorises the Minister for Communications to create a list of events, at their discretion, which they believe should be available to the public for free, unless the rights to the program remain unsold 26 weeks before the event begins.[4] Secondly, the act imposes a condition on subscription television broadcasting licensees which prohibits them from bidding for the exclusive rights to any event on that list.[5]

At the time the laws were enacted, this achieved the desired outcome of making certain events available for free. Rather than directly giving free-to-air broadcasters the right to bid for events, the legislation simply imposes restrictions on subscription broadcasting licensees. Events named on the anti-siphoning list were (and still are) valuable,[6] so they were certain to be purchased by a commercial broadcaster before the deadline. This effectively guaranteed their availability on free-to-air television.

Today, this leaves a major loophole open for non-traditional broadcasters. Video streaming platforms such as Netflix, YouTube, and Facebook have millions of users across Australia and are expected to grow in popularity over the next five years.[7] However, regardless of whether an internet-based streaming service is a subscription product (such as Netflix, or Amazon Prime Video) or a free service (such as YouTube, Facebook, or Twitter), neither are considered to be subscription broadcasters by the law.[8] As such, they are not required to hold a license,[9] and are not prohibited from bidding for these events.

The result is legislation which discriminates against the local subscription television industry. The dominant local subscription television provider, Foxtel, is available online but also broadcasts through traditional cable and satellite television platforms,[10] so it must hold a subscription television license. Consequently, Foxtel is unable to bid for the same rights as internet-based paid streaming platforms. While consumers pay either way, the law gives a substantial advantage to foreign and domestic companies which operate exclusively online, over those which operate Australian television services.

This is not a hypothetical concern. The subscription sports streaming market is nascent, but the United States provides an example of how companies are investing in this space aggressively. In 2017, Amazon struck a major deal with the NFL which saw weekly games broadcast on its subscription Prime Video service.[11] AT&T now owns the internet streaming rights to several major sports events through their HBO and Turner divisions.[12] Last week, ESPN debuted exclusive Wimbledon coverage on its subscription ESPN+ service.[13] And industry observers expect Apple, Google, and Netflix to enter the sports market in the near future.[14] These companies have the financial resources and expansion plans needed to outbid local industry.

It is therefore untenable that the legislation continue to exist in its current form. By abolishing restrictions on Australian subscription licensees, the Government would remove the unintentional bidding advantage which internet-based streaming platforms enjoy. This allows local subscription platforms the opportunity to buy any event, levelling the playing field before powerful foreign technology companies own the market.

The shifting platform preferences of Australian viewers

Leaving the above loophole aside, the anti-siphoning legislation presumes that major sporting events are only accessible to a wide viewing audience if they are broadcast on free-to-air television. However, recent shifts in viewer preferences suggest otherwise. Audiences, particularly younger viewers, are watching less free-to- air television, while simultaneously embracing internet-based devices. They are also showing a willingness to pay for streaming services.

Firstly, while it remains popular, free-to-air television continues to experience declines in viewership. The average Australian spends 43 fewer minutes watching free-to-air television each day than they did in 2010,[15] and 22% of Australians now say they do not watch free-to-air television at all during an average week.[16] The drop-off is even more substantial among younger viewers, with 57% of viewers aged 18-24 avoiding free-to- air television altogether.[17] Even when watching sports, only 45% of Australians say they consider TV to be their preferred device,[18] and just 29% most often watch sporting events live.[19]

At the same time, Australians are adopting alternative devices and platforms. 86% of all Australian households have an internet connection.[20] The average viewer has seven screens in their home, ranging from internet-enabled televisions and connected devices, to phones, tablets, and computers.[21] Television audiences are proving adept at using streaming platforms, with 51% of all Australians using at least one video- streaming platform.[22] This figure rises to 70% among viewers under 30.[23] Finally, while the sports streaming market is young, just under 11 million Australians already access sports content regularly online.[24]

Australians are also showing a widespread willingness to pay for television. 50% of all households in Australia now pay for television services, compared to just 29% one decade ago.[25] Much of the growth riven by Netflix, with 32% of all Australian households subscribed to the

service today.[26] Netflix is now more popular among online video users than free streaming services from any Australian broadcaster, despite only entering the local market three years ago.[27] Facing a much larger and more competitive landscape, Foxtel has also recently launched an online subscription television product, despite being hamstrung by anti- siphoning laws.[28] Meanwhile, challengers including Stan and Amazon Prime Video collectively reach over one million Australians.[29] The notion that Australians will not pay for television is a myth.

These shifts in viewing prove that the anti-siphoning legislation is no longer relevant to many Australian television viewers. Audiences have become much more willing to embrace alternatives to free-to-air television, including subscription services. The Government should therefore reflect those shifts by abolishing the list.

The increasing cost of 'free' services

The anti-siphoning legislation also presumes that free television services are inherently better for Australian viewers, because they can be accessed without paying a fee. This concept is outdated in the modern television era. Today, using a free service also means consenting to intrusive data collection policies and controversial advertising, especially from major gambling companies. By prohibiting the local subscription television industry from bidding for these rights, the legislation ignores viewers who value privacy and wish to limit their exposure to ads.

Firstly, many Australians must now consent to data collection in order to watch sports for free. Unlike when the anti-siphoning legislation was first enacted, broadcasters including Seven, Nine, Ten, and a variety of free services, now employ personal data collection technologies to increase their advertising revenue.[30] Australians who watch sports programming from these broadcasters online, and particularly those who watch sports exclusively online, are therefore required to consent to these technologies and the highly targeted advertisements they enable.

The consequences of mass personal data collection are extensive and well known. The media, telecommunications, and technology sectors have often misused personal data, leaving millions of customers around the world exposed to identity theft, fraud, and non-consensual invasions of privacy.[31] Most notably, Facebook, which despite large investments in sports rights does not fall under the anti-siphoning legislation, admitted that as many as 87 million users worldwide were compromised in the Cambridge Analytica scandal earlier this year.[32] The Australian Government subsequently launched an investigation into data sharing.[33] Given these reasonable concerns, anti-siphoning laws should no longer favour free services.

Even when free services do not collect extensive personal data, they rely on advertising from companies that conflict with audience values. Free-to-air broadcasters have become infamous for their extensive partnerships with online betting outlets, including frequent on-air advertisements and integrated promotions during sporting events.[34] Following calls from the news media to ban these ads, the Federal Government recently implemented a restriction on gambling promotions before 8:30PM, but this still exposes viewers, including children, to ads during primetime coverage.[35] By contrast, Foxtel broadcasts many major sporting events, including NRL and AFL matches, ad-free on their networks.[36] By prohibiting subscription licensees from bidding on the full suite of sports rights, the anti-siphoning legislation forces Australians to engage with gambling companies, even when it conflicts with their values. The problem with the existing anti-siphoning legislation is that it makes choices for Australians who want robust alternatives to free sports broadcasts. Sports viewers who want to avoid invasions of privacy and gambling advertisements should be able to 'vote with their wallets' and embrace subscription broadcasters instead of free services. Yet the anti-siphoning list makes it impossible for those broadcasters to buy exclusive rights, thus removing the incentive for them to broadcast the program at all. The Government must remove the advantage that free services have over the traditional subscription broadcasting industry.

Conclusion

When the Australian Government introduced the anti-siphoning list in 1992, it could hardly have been expected to foresee a transformation in sports broadcasting. Nonetheless, that change has come, and it is now essential for those laws to reflect the new landscape. The Government should relinquish control over sports broadcasting to avoid discriminating against local industry, and for the sake of viewers, who have shifted their viewing preferences and should be given a choice in data collection and advertising exposure. The legislation should be abolished.

references

Falling Into The Same Trap? An Analysis of the Modern Slavery Bill 2018 (NSW) and Achieving Business Accountability for Slavery in Supply Chains

Isabella Buchanan and Benjamin John

[1] Sophie Dawson, Anita Cade and Marlia Saunders, 'Shifting the Goal Posts: Anti-Siphoning Report and Reforms Announced' (2010) 29(3) Communications Law Bulletin 8.

[2] IBISWorld, Sports Administrative Services - Australia Market Research Report (2018) <https://www.ibisworld.com.au/industry-trends/market-research-reports/arts-recreation-services/sports-administrative-services.html>.

[3] See, eg, Roy Masters, 'NRL on Course for TV Ratings Victory over AFL', The Sydney Morning Herald (online), 28 May 2018 <https://www.smh.com.au/sport/nrl/nrl-on-course-for-tv-ratings-victory-over-afl-20180527-p4zhsd.html>; Georgina Robinson, 'Super Ratings up but Cricket Mega Deal a Blow for Rugby, Expert Says', The Sydney Morning Herald (online), 18 April 2018 <https://www.smh.com.au/sport/ rugby-union/super-ratings-up-but-cricket-mega-deal-a-blow-for-rugby-expert-says-20180418-p4zact.html>.

[4] Broadcasting Services Act 1992 (Cth) s 115; Broadcasting Services (Events) Notice (No 1) 2010 (Cth).

[5] Broadcasting Services Act 1992 (Cth) sch 2 cl 10.

[6] Paul Smith, 'The Regulation of Television Sports Broadcasting: a Comparative Analysis' (2015) 37(5) Media, Culture & Society 728; Stephen Letts, If Sports Broadcasts Lose So Much, Why Does TV Keep Bidding up the Rights? (16 April 2018) ABC News <http://www.abc.net.au/ news/2018-04-15/the-economics-of-tv-sport/9654004>.

[7] Deloitte, Media Consumer Survey (2017), 13, 17 <http://landing.deloitte.com.au/rs/761-IBL-328/images/tmt-media-consumer-survey-final-report.pdf>.

[8] Broadcasting Services Act 1992 (Cth) sch 2 cl 10.

[9] Ibid; Max Mason, 'Technology, Telecommunications Players May Face Anti-siphoning Rules', The Australian Financial Review (online), 10 September 2017 <https://www.afr.com/business/media-and-marketing/tv/technology-telecommunications-players-may-face-antisiphoning-rules-20170907-gyct6y>.

[10] Mason, above.

[11] Bryn E Sandberg, 'Amazon Lands Streaming Rights to NFL's 'Thursday Night Football'', The Hollywood Reporter (online), 4 April 2017 <https://www.hollywoodreporter.com/live-feed/amazon-lands-streaming-rights-nfls-thursday-night-football-991246>.

[12] Brent Kendall and Drew FitzGerald, 'AT&T Beats U.S. in Antitrust Fight Over Time Warner', The Wall Street Journal (online), 12 June 2018 <https://www.wsj.com/articles/judge-is-set-to-decide-whether-at-t-and-time-warner-can-merge-1528832942>.

[13] Jon Lafayette, 'ESPN Sets April 12 For Launch of ESPN+ Service', Broadcasting & Cable (online), 2 April 2018 <https://www.broadcastingcable.com/news/espn-sets-launch-date>.

[14] See, eg, Arjun Kharpal, Amazon Will be a 'Major Disruptive Force' to Live Sports Rights in the Next Few Years, Analyst Says (13 March 2018) CNBC <https://www.cnbc.com/2018/03/13/amazon-will-be-major-disruptive-force-to-live-sports-rights-analyst.html>.

[15] Nielsen, Australian Video Viewing Report Quarter 4 (2017), 10 <http://www.oztam.com.au/documents/Other/AVVR-Q4-2017-Med%20Res%20Final.pdf>.

[16] Ibid 4.

[17] Ibid.

[18] Deloitte, above n 7, 11–12.

[19] Ibid.

[20] Australian Bureau of Statistics, Household Use of Information Technology, Australia, 2016-17 (2018) <http://www.abs.gov.au/ausstats/abs@.nsf/mf/8146.0>.

[21] Nielsen, above n 15, 3.

[22] Sensis, Social Media Report (2017), 17 <https://irp-cdn.multiscreensite.com/535ef142/files/uploaded/Sensis_Social_Media_Report_2017-Chapter-1.pdf>.

[23] Ibid.

[24] Nielsen, 10.9 Million Adult Australians Accessed Online Sports Content in January 2018 (2018) <http://www.nielsen.com/au/en/press-room/2018/january-2018-digital-ratings.html>.

[25] Telsyte, Streaming Video on Demand a Hit in Australia: Subscribers Up More Than 30% (August 8 2017) <https://www.telsyte.com.au/announcements/2017/8/8/streaming-vod-a-hit-in-australia-subscribers-up-30-per-cent>; Matthew Knott, Why Less than a Third of Australians Have Pay-TV in their Homes (10 July 2012) Property Observer <https://www.propertyobserver.com.au/forward-planning/investment-strategy/ market-trends/17364-what-foxtel-is-really-worth.html>.

[26] Roy Morgan Research, Netflix Hits New High in Australia – 7.6 million (28 September 2017) <http://www.roymorgan.com/findings/7343-netflix-subscriptions-june-2017-201709270713>.

[27] Screen Australia, Online & On Demand: Trends in Australian Online Viewing Habits (2018), 2, 17 <https://www.screenaustralia.gov.au/getmedia/f06697b8-07be-4a27-aa8b-bc3ad365238c/online-on-demand-2017>.

[28] Dana McCauley, 'New Foxtel Chief Delany in Hunt for Millennials', The Australian (online), 1 February 2018 <https://www.theaustralian.com.au/business/media/new-foxtel-chief-delany-in-hunt-for-millennials/news-story/d0aff3f8dc4bf225d5045eaab4d6c496>.

[29] Justin Burke, 'Netflix, Stan, Amazon: Streaming Services Capture Audiences', The Australian (online), 29 December 2017 <https://www.theaustralian.com.au/arts/television/netflix-stan-amazon-streaming-services-capture-audiences/news-story/8535219dac90c6e29a9d0fb9dc062418>.

[30] Tim Burrowes, Seven Set to be First to Market with Addressable Advertising (23 October 2017) Mumbrella <https://mumbrella.com.au/seven-set-first-market-addressable-advertising-479117>.

[31] See, eg, Ethan Zuckerman, 'This Is So Much Bigger Than Facebook', The Atlantic (online), 23 March 2018 <https://www.theatlantic.com/technology/archive/2018/03/data-misuse-bigger-than-facebook/556310/>.

[32] Sandberg, above n 11; Nicholas Confessore, 'Cambridge Analytica and Facebook: The Scandal and the Fallout So Far', The New York Times (online), 4 April 2018 <https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html>.

[33] Vanessa Teague and Chris Culnane, Data Privacy and Power (28 March 2018) The University of Melbourne Pursuit <https://pursuit.unimelb.edu.au/articles/data-privacy-and-power>.

[34] Hannah Pitt et al, "It's Just Everywhere!' Children and Parents Discuss the Marketing of Sports Wagering in Australia' (2016) 40(5) Australia & New Zealand Journal of Public Health 480.

[35] Nick Toscano and Jennifer Duke, 'Betting Ads Banned During Live Sport Broadcasts', The Sydney Morning Herald (online), 16 March 2018 <https://www.smh.com.au/business/companies/betting-ads-banned-during-live-sport-broadcasts-20180316-p4z4qq.html>.

[36] Fox Sports, What's a Weekend Without Ads? (21 February 2016) YouTube <https://www.youtube.com/watch?v=_8pDYnyl0N0>.

Capital Gains Tax and Disposals of Bitcoin: A Mismatched Pair

Aleks Pasternacki

[1] Bernard Marr, A Short History of Bitcoin and Crypto Currency Everyone Should Read (December 6 2017) Forbes <https://www.forbes.com/sites/bernardmarr/2017/12/06/a-short-history-of-bitcoin-and-crypto-currency-everyone-should-read/#245b54013f27>.

[2] Garrick Hileman and Michel Rauchs, Global Cryptocurrency Benchmarking Study (2017) Cambridge Centre for Alternative Finance <https://www.jbs.cam.ac.uk/fileadmin/user_upload/research/centres/alternative-finance/downloads/2017-global-cryptocurrency-benchmarking-study.pdf>.

[3] CoinMarketCap, Global Charts: Total Market Capitalization (2018) CoinMarketCap <https://coinmarketcap.com/charts/>.

[4] Ibid.

[5] Ibid.

[6] Australian Taxation Office, Fringe benefits tax: is the provision of bitcoin by an employer to an employee in respect of their employment a property fringe benefit for the purposes of subsection 136(1) of the Fringe Benefits Tax Assessment Act 1986?, TD 2014/28, 17 December 2014.

[7] Australian Taxation Office, Income tax: is bitcoin trading stock for the purposes of subsection 70-10(1) of the Income Tax Assessment Act 1997?, TD 2014/27, 17 December 2014.

[8] Australian Taxation Office, Income tax: is bitcoin a 'CGT asset' for the purposes of subsection 108-5(1) of the Income Tax Assessment Act 1997?, TD 2014/26, 17 December 2014.

[9] Schedule 6.

[10] Income Tax Assessment Act 1997 (Cth) s 104-5.

[11] Ibid.

[12] Income Tax Assessment Act 1997 (Cth) s 108-5(1).

[13] TD 2014/26, 1.

[14] Travelex Limited v Commissioner of Taxation [2008] FCA 1961, 23-4 (Emmett J).

[15] Australian Tax Office, Income tax: is bitcoin a 'foreign currency' for the purposes of Division 775 of the Income Tax Assessment Act 1997?, TD 2014/25, 17 December 2014, 7-11.

[16] Ibid; Bill Maurer, Taylor C. Nelms & Lana Swartz, 'When perhaps the real problem is money itself!: the practical materiality of Bitcoin' (2013) 23.2 Social Semiotics 261, 264-5.

[17] Yanner v Eaton (1999) 201 CLR 351, 365-7.

[18] Ibid.

[19] TD 2014/26, 6.

[20] Australian Law Reform Commission, Traditional Rights and Freedoms—Encroachments by Commonwealth Laws, Interim Report 127 (3 August 2015) ch 7.

[21] Ibid.

[22] Torkington v Magee [1902] 2 KB 427.

[23] W. S. Holdsworth, 'The History of the Treatment of "Choses" in Action by the Common Law' (1920) 33 Harvard Law Review 997, 1000-1.

[24] Australian Law Reform Commission, Traditional Rights and Freedoms, ch 7.

[25] Patents Act 1990 (Cth); Trade Marks Act 1995 (Cth).

[26] Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales Pty Ltd (1974) 131 CLR 321; Contracts Review Act 1980 (NSW).

[27] Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame [1906] 2 Ch 34.

[28] Companies Act 1862 (25 & 26 Vict. c.89).

[29] TD 2014/26, 7-9.

[30] Duncan Hughes, ATO creates specialist task force to tackle cryptocurrency tax evasion (10 January 2018) Financial Review < https://www.afr.com/news/policy/tax/ato-creates-specialist-task-force-to-tackle-cryptocurrency-tax-evasion-20180109-h0fyaz>.

[31] Internal Revenue Service, Notice 2014-21 (25 March 2014), A-7.

[32] Tax Policy Center, How are Capital Gains Taxed (2016) Tax Policy Center < https://www.taxpolicycenter.org/briefing-book/how-are-capital-gains-taxed>.

[33] Her Majesty's Revenue and Customs, Revenue and Customs Brief 9 (2014): Bitcoin and other cryptocurrencies, 3 March 2014.

Human Cloning Practices in Australia: A Regulatory Chimera or is it Time to Reconsider?

Liam Ogburn

[1] Mount Isa Mines v Pusey (1970) 125 CLR 383.

[2] Ibid 395 (Windeyer J).

[3] Ben Guarino, 'Two macaque monkeys cloned in a Shanghai Research lab', Australian Financial Review (Australia), 25 January 2018, <http://www.afr.com/news/two-macaque-monkeys-cloned-in-a-shanghai-research-lab-20180124-h0nzyu>.

[4] Gina Kolata, 'Scientist Reports First Cloning Ever of Adult Mammal', The New York Times (online), 23 February 1997, <https://www.nytimes.com/1997/02/23/us/scientist-reports-first-cloning-ever-of-adult-mammal.html>.

[5] Ian Wilmut et al, 'Viable offspring derived from foetal and adult mammalian cells' (1997) 385 Nature: International Journal of Science 810-813.

[6] Arlene Judith Klotzko, 'The Debate About Dolly' (1997) 11 Bioethics 427.

[7] Aldous Huxley, Brave New World (Penguin: Vintage Classics, 2018).

[8] Universal Declaration on the Human Genome and Human Rights 1997, UNESCO Res 29 C/17, UNESCO General Conference, 29th sess, (11 November 1997).

[9] Ibid art 11.

[10] Ibid art 2(b).

[11] Commonwealth, Parliamentary Debates, House of Representatives, 21 August 2002, 5388 (Mr Clausey).

[12] Human Cloning and Embryo Research Act 2004 (ACT); Research Involving Human Embryos and Prohibition of Human Cloning for Reproduction Act 2003 (Qld); Research Involving Human Embryos Act 2003 (SA); Human Cloning for Reproduction and Other Prohibited Practices Act 2003 (Tas); Prohibition of Human Cloning for Reproduction Act 2008 (Vic); Research Involving Human Embryos Act 2008 (Vic); Human Reproductive Technology Act 1991 (WA).

[13] Human Cloning for Reproduction and Other Prohibited Practices Act 2003 (NSW), s 3.

[14] Prohibition of Human Cloning for Reproduction Act 2002 (Cth), s 9.

[15] Ibid s 12.

[16] Ibid s 13.

[17] Ibid s 23B.

[18] Ibid s 15.

[19] Research Involving Human Embryos Act 2003 (NSW), s 3.

[20] Research Involving Human Embryos Act 2002 (Cth), s 13.

[21] Ibid s 23(1)(a) – (f).

[22] Zhen Liu et al, 'Cloning of Macaque Monkeys by Somatic Cell Nuclear Transfer' (2018) 172 Cell 4, 881 – 887, <https://www.cell.com/cell/fulltext/S0092-8674(18)30057-6>.

[23] James Bourne, The need for monkey cloning requires careful consideration (25 January 2018), StemCells Australia <http://www.stemcellsaustralia.edu.au/News---Events/News/The-need-for-monkey-cloning-requires-careful-consideration.aspx. >.

[24] Michael Greshko, Monkey Clones Created in the Lab. Now What? (24 January 2018) <https://news.nationalgeographic.com/2018/01/monkey-clones-dolly-sheep-china-medicine-science/>.

[25] Ian Ayres and John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (Oxford University Press, 1992).

[26] Prohibition on Human Cloning for Reproduction Act 2002 (Cth), s 25A; Research Involving Human Embryos Act 2002 (Cth), s 47; Human Cloning and Other Prohibited Practices 2003 (NSW), s 19; Research Involving Human Embryos Act 2003 (NSW), s 22.

[27] Prohibition on Human Cloning for Reproduction Act 2002 (Cth), s 25(4).

[28] Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Act 2006 (Cth).

[29] Human Cloning and Other Prohibited Practices Amendment Act 2007 (NSW).

[30] David H. Kwan et al, 'Towards Efficient Enzymes for the Generation of Universal Blood through Structure-Guided Directed Evolution' (2015), 137 Journal of the American Chemical Society, 5695 – 5705.

[31] Janet Raloff, Curiosity lands on Mars! (8 August 2012) <https://www.sciencenewsforstudents.org/article/curiosity-lands-mars.>

[32] Brenda J Wilson and Stuart G Nicholls, 'The Human Genome Project, and recent advances in personalized genomics' (2015), 8 Risk Management Health Policy, 9-20.

[33] House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Human cloning: scientific, ethical and regulatory aspects of human cloning and stem cell research (2001), [8.35].

[34] J.K. Findlay et al, 'Human Embryo: A Biological Definition' (2007), 22 Human Reproduction 4, 905 – 911.

[35] Prohibition on Human Cloning for Reproduction Act 2002 (Cth), s 8; Research Involving Human Embryos Act 2002 (Cth), s 7.

[36] J.K. Findlay et al, 'Human Embryo: A Biological Definition' (2007), 22 Human Reproduction 4, 907.

[37] Henry Greely, 'Banning Human Cloning: A Study in the Difficulties of Defining Science' (1998), 8 Southern California Interdisciplinary Law Journal 131.

[38] Legislation Review Committee, Parliament of Australia, Report of the Independent Review of the Prohibition of Human Cloning for Reproduction Act 2002 and Research Involving Human Embryos Act 2002 (2011).

[39] Prohibition on Human Cloning Bill, Revised Explanatory Memorandum Clause 15.

[40] Prohibition on Human Cloning Bill, Revised Explanatory Memorandum Clause 15.

[41] Aisha Dow and Melissa Cunningham, 'Call for a change to human cloning law to prevent genetic disorder', The Age (Australia), 21 September 2017, (https://www.theage.com.au/national/victoria/call-for-change-to-human-cloning-law-to-prevent-genetic-disorder-20170920-gylgyo.html).

[42] Senate Standing Committee on Community Affairs, Parliament of Australia, Science of mitochondrial donation and related matters (2018).

[43] Ibid [5.14].

[44] Senate Standing Committee on Community Affairs, Parliament of Australia, Science of mitochondrial donation and related matters (2018), [5.14].

[45] Ibid [5.19].

[46] Ibid Recommendation 4: [5.104].

[47] Ibid [5.14].

[48] Ibid [5.88].

[49] Australian Mitochondrial Disease Foundation, Australian Mitochondrial Disease Foundation 2017 Services Survey Report (2017).

[50] R v Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254.

[51] MAW v Western Sydney Area Health Service (2000) 49 NSWLR 231; Re Edwards (2011) 4 ASTLR 392; [2011] NSWSC 478; AB v Attorney-General (Vic) (2005) 12 VR 485; [2005] VSC 180; Y v Austin Health (2005) 13 VR 363; Bazley v Wesley Monash IVF Pty Ltd [2010] QSC 118; Baker v Queensland [2003] QSC 2; Re Denman [2004] 2 Qd R 595; [2004] QSC 70.

[52] Sonia Allan, 'Regulatory design strategies and enforcement approaches for research involving human embryos and cloning in Australia and the United Kingdom: time for a change' (2010), 32 Sydney Law Review 4.

[53] The Lockhart Committee reported that the Australian Government Portfolio Budget Statement for the financial year 2003-04 indicated a total commitment of $3.3 million per year.

[54] Better Regulation Commission, 'Risk, Responsibility and Regulation: Whose Risk is it Anyway?' (2006), Better Regulation Commission Report, 5.

[55] Ian Ayres and John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (Oxford University Press, 1992), 53.

[56] Jody Schechter, 'Promoting Human Embryonic Stem Cell Research: A Comparison of Policies in the United States and United Kingdom and Factors Encouraging Advancement' (2010), 45 Texas International Law Journal 603.

[57] Brendan Gogarty and Dianne Nicol, 'The UK's Cloning Laws: A View from the Antipodes' (2002), 9 Murdoch University Electronic Journal of Law 2., [23].

[58] Better Regulation Task Force, 'Regulation-Less is More: Reducing Burdens Improving Outcomes: A BRTF Report to the Prime Minister' (2005).

Constitutional Limitations on the Legislature's Ability to Change the Law?

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[1] The majority in Cunneen held that "corrupt conduct", in Independent Commission Against Corruption 1988 (NSW) s 8(2) ("ICAC Act"), does not include criminal conduct that adversely affects or could adversely affect the efficacy of the exercise of an official function. Rather, ICAC only has power to investigate conduct that affects the probity of an official function, that is, when the official themselves had acted corruptly. See Anthony Lo Surdo and Aruna Sathanapally, 'Reining in ICAC's power: are non-public officials off limits?' 11 Law Society of NSW Journal 72.

[2] This was common ground between the parties: see Lazarus [3].

[3] BLF (NSW) v Minister for Industrial Relations (1986) 7 NSWLR 372, 378. See also Professor Peter Gerangelos, 'The Separation of Powers and Legislative Interference in Pending Cases' (2008) 30(1) Sydney Law Review 61.

[4] R v Humby; Ex parte Rooney (1973) 129 CLR 231, 250.

[5] Lazarus v Independent Commission Against Corruption (2017) 94 NSWLR 36, 66 [133]—[135].

[6] See Gerangelos, above n 2, 92—94.

[7] As Sri Lanka was known then.

[8] See Nicholas v The Queen (1998) 193 CLR 173, 191 [27] (Brennan CJ).

[9] Lazarus v Independent Commission Against Corruption (2017) 94 NSWLR 36, 67 [137] (Leeming JA).

[10] Liyanage v The Queen [1967] 1 AC 259, [283].

[11] Nicholas v The Queen (1998) 193 CLR 173, 222 [115].

[12] Nicholas v The Queen (1998) 193 CLR 173, 193 [28] (Brennan CJ), 203 [57] (Toohey J), 277 [249] (Hayne J), 207—8 [70]—[71] (Gaudron J), 232 [144] (Gummow J). See e.g. BLF (NSW) v Minister for Industrial Relations (1986) 7 NSWLR 372.

[13] Wainohu v State of New South Wales (2011) 243 CLR 181, 208 [44], 210 [46] (French CJ and Kiefel J). See also Kable v Director of Public Prosecutions of NSW (1996) 189 CLR 51; Fardon v Attorney-General for the State of Queensland (2004) 223 CLR 575.

[14] Lazarus v Independent Commission Against Corruption (2017) 94 NSWLR 36, 62—3 [116] (Leeming JA).

[15] Lazarus v Independent Commission Against Corruption (2017) 94 NSWLR 36, 62—3 [115], [116], [119] (leeming JA).

[16] Lazarus v Independent Commission Against Corruption (2017) 94 NSWLR 36, 63 [121] (Leeming JA). The three elements of the offence: 1) the defendant attended a compulsory ICAC inquiry, 2) the defendant gave false or misleading evidence, and 3) the defendant knew that the evidence was false or misleading, or not true: Lazarus v Independent Commission Against Corruption (2017) 94 NSWLR 36, 64 [128].

[17] Lazarus v Independent Commission Against Corruption (2017) 94 NSWLR 36, 64—5 [125], [129]—[130] (Leeming JA).

[18] Lazarus v Independent Commission Against Corruption (2017) 94 NSWLR 36, 64—5 [130] (leeming JA).

[19] Sir Anthony Mason, 'Comment' (2008) 30(1) Sydney Law Review 96, 99.

Moral Panic and Economic Gain: How the Decriminalisation of Solicitation and Brothel-keeping Turned Sex Work Into an Industry

Grace Lovell Davis

[1] Marcia Neave, 'Prostitution Laws in Australia – Past History and Current Trends' in Roberta Perkins, Garrett Prestage, Rachel Sharp and Frances Lovejoy (eds), Sex Work and Sex Workers in Australia (University of New South Wales Press, 1994) 68.

[2] Stewart Smith, New South Wales Government, The Regulation of Prositution: A Review of Recent Developments Briefing Paper No 21/99, (November 1999), 1.

[3] Ibid.

[4] New South Wales, Parliamentary Debates, 23 April 1979, 4917 cited in Marcia Neave, above n 1, 78.

[5] Stewart Smith, above n 2, 3.

[6] Sibuse Pty Ltd v Shaw (1988) 13 NSWLR 208.

[7] Stewart Smith, above n 2, 5.

[8] Penny Crofts, Jane Maree Maher, Sharon Pickering and Jason Prior, 'Ambivalent Regulation: The Sexual Services Industries in NSW and Victoria- Sex Work as Work or as Special Category?' (2012) 23(3) Current Issues in Criminal Justice 393, 402.

[9] Dr Sandra Egger and Christine Harcourt, 'Prostitution in NSW: The Impact of Deregulation', Women and the Law.

[10] Ibid.

[11] Penny Crofts et al. above n 10, 403.

[12] Penny Crofts et al. above n 10, 403.

[13] Ibid, 404.

[14] Costa Avgoustinos, Penny Crofts, Deborah Henwood, Jo Holden, Adam Knobel, Maria McMahon, Andrew Miles, Maggie Moylan, Wendy Parsons, Jane Sanders, Melissa Woodroffe, for SWOP, 'Sex Work is Work', Sex Industry Legal Kit, (June 2010), 13

[15] Drugs and Crime Prevention Committee, Parliament of Victoria, Inquiry into people trafficking for sex work (June 2010) Melbourne; K. Murray, 'Labour Regulation in the Legal Sex Industry in Victoria' (2003) 16 Australian Journal of Labour Law 138; cited in Australian Institute of Criminology , The Australian Sex Industry (3 November 2017) <https://aic.gov.au/publications/rpp/rpp131/australian-sex-industry>.

[16] Ibid.

[17] Ibid.

[18] Erin O'Brien, 'Against the Trend: Resistance to Neo-abolitionism in Australian Anti-trafficking Policy Debates' in Ward E and Wylie G (eds) Feminism, Prostitution and the Statte: The Politics of Neo-Abolitionism, (Routledge, 2017) 121.

[19] C Harcourt, J O'Connor, S Egger et al, 'The Decriminialisation of Prostitution is Associated with Better Coverage of Health Promotion Programs for Sex Workers' (2010) 35(5) Australian and New Zealand Journal of Public Health.

[20] John Scott, 'Prostitution and Public Health in New South Wales', (2003) 5(3) Culture, Health and Sexuality, 283.

[21] F. Lovejoy, R Perkins, Y Corduff, M.J. Deane and A. Wade, AIDS Preventative Practices Among Female Prostitutes and their Clients and Private Risk (University of New South Wales, 19991), 5.

[22] John Scott, above n 20, 285.

[23] Denton Callender, 'Sexually Transmissible Infections: Why are STIs on the rise in Australia?' ABC Health and Wellbeing (online), 16 August 2017 <http://www.abc.net.au/news/health/2017-08-16/why-are-stis-on-the-rise-in-australia/8774378>.

[24] John Scott, above, n 20, 283.

[25] ACON, Submission to The Attorney-General's Department Human Rights Action Plan Baseline Study (September 2011), 3.

[26] Zahra Stardust, 'Protecting Sex Worker Human Rights in Australia' (2014) 2 Human Rights Law Working Group Newsletter, 31.

[27] Ibid.

[28] Ibid.

[29] Ibid; Human Rights and Anti-Discrimination Act 2011 (Cth).

[30] Spike Boydell, Penny Crofys, Jason Prior, Andrew Jakubowicz and Glen Searle, 'Sex in the City: Regulations, Rights and Responsibilities in Sydney' (2009) People, Place, Property and Planning- Sex Industry dynamics in New South Wales, 7.

[31] Spike Boydell et al. above n 19, 8.

[1] Statute of Anne 1710 (8 Anne, c 19).

[2] Annemarie Bridy, Coding Creativity: Copyright and the Artificially Intelligent Author, 2012 Stanford Technology Law Review 5, 3-4.

[3] IceTV Pty Ltd v Nine Network Australia Pty Ltd (2009) 239 CLR 458, 494.

[4] Acohs Pty Ltd v Ucorp Pty Ltd (2012) 201 FCR 173.

[5] Ibid.

[6] IceTV Pty Ltd v Nine Network Australia Pty Ltd (2009) 239 CLR 458, 474.

[7] IceTV Pty Ltd v Nine Network Australia Pty Ltd (2009) 239 CLR 458, 474, [33]; See generally, Ryan Abbott, I Think, Therefore I Invent: Creative Computer and the Future of Patent Law, Boston College Law Review 2006, Vol. 57, 1079.

[8] IceTV Pty Ltd v Nine Network Australia Pty Ltd (2009) 239 CLR 458, 474, [33].

[9] Acohs Pty Ltd v Ucorp Pty Ltd (2012) 201 FCR 173.

[10] Jani McCutcheon, The Vanishing Author in Computer-Generated Works: A Critical Analysis of Recent Australian Case Law, 36 Melbourne University Law Review 915, 967 (2013).

[11] U.S. Patent No. 6,647,395 (filed Nov. 1, 2000).

[12] David Cope, Facing the Music: Perspectives on Machine-Composed Music, 9 Leonardo Music Journal 79, 79 (1999).

[13] Steve Schlackman, The Next Rembrandt: Who Holds the Copyright in Computer Generated Art, Art Law Journal (2016), http://artlawjournal.com/the-next-rembrandt-who-holds-the-copyright-in-computer-generated-art.

[14] Nizan Geslevich Packin & Yafit Lexv-Aretz, Big Data And Social Nettbanks: Are You Ready To Replace Your Bank?, 53 Houston Law Review 1211, 1222.

[15] Rob Kling, Automated Information Systems as Social Resources in Policy Making, ACM (1978), http://dl.acm.org/citation.cfm?id=810109.

[16] Rebecca Crootof, The Killer Robots Are Here: Legal and Policy Implications, 36 Cardozo Law Review 1837, 1840-3, 1863-71, 1894-1901 (2015).

[17] Jasper Hamill, Eyes In The Sky: CIA Training Artificial Intelligence to Spy on Earth from Space Using Computer Vision, The Sun, Aug. 25, 2016, https://www.thesun.co.uk/news/1673802/cia-training-artificial-intelligence-to-spy-on-earth-from-space-using-computer-vision

[18] Jolene Creighton, AI Saves Woman's Life by Identifying her Disease When Other Methods (Human) Failed, Futurism, Aug. 5, 2016, http://futurism.com/ai-saves-womans-life-by-identifying-her-disease-when-other-methods-humans-failed; Jonathan Amos, Love Lab Predicts Marital Outcome, BBC News, Feb. 13, 2004, http://news.bbc.co.uk/2/hi/science/nature/3484981.stm.

[19] David Szondy, University of Oxford Develops Low-Cost Self Driving Car System, New Atlas, Feb. 18, 2013, http://newatlas.com/oxford-robot-car/26282.

[20] Douglas Walton, Argument from Analogy in Legal Rhetoric, Artificial Intelligence Law (2013).

[21] David Binning, https://www.daisee.com/daisee-2017-australian-ai-report/, Feb. 21, 2018.

[22] Tech CEOs Declare This The Era Of Artificial Intelligence, Fortune, June, 3, 2016, http://fortune.com/2016/06/03/tech-ceos-artificial-intelligence.

[23] Steve Schlackman, The Next Rembrandt: Who Holds the Copyright in Computer Generated Art, Art Law Journal (2016), http://artlawjournal.com/the-next-rembrandt-who-holds-the-copyright-in-computer-generated-art.

[24] Ibid U.S. Patent No. 6,647,395 (filed Nov. 1, 2000).

[25] Annemarie Bridy, Coding Creativity: Copyright and the Artificially Intelligent Author, 2012 Stanford Technology Law Review 5, 16.

[26] David Cope, Facing the Music: Perspectives on Machine-Composed Music, 9 Leonardo Music Journal 79, 79 (1999).

[27] Douglas Walton, Argument from Analogy in Legal Rhetoric, Artificial Intelligence Law (2013).

[28] Annemarie Bridy, Coding Creativity: Copyright and the Artificially Intelligent Author, 2012 Stanford Technology Law Review 5, 16.

[29] James Boyle, Endowed by their Creator? The Future of Constitutional Personhood, The Brookings Institution Future of the Constitution Series, No. 10 (Mar. 9, 2011) 70 North Carolina Law Review 1231 (1992).

[30] Redrock Holdings Pty Ltd v Hinkley (2001) 50 IPR 565.

[31] Sega Enters. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992).

[32] James Grimmelmann, Copyright for Literate Robots, Iowa Law Review, 2016, Volume 101, 657; Shlomit Yanisky Ravid and Samuel Moorhead, Generating Rembrandt: Artificial Intelligence, Accountability and Copyright - The Human-Like Workers are Already Here - A New Model (April 24, 2017), Michigan State Law Review, Award Winning: The 2017 Visionary Article in Intellectual Property Law, Forthcoming.

[33] Ana Ramalho, Will Robots Rule the (Artistic) World? A Proposed Model for the Legal Status of Creations by Artificial Intelligence Systems (June 13, 2017), SSRN: https://ssrn.com/abstract=2987757.

[34] Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991).

[35] U.S. Copyright Office, Compendium of U.S. Copyright Office Practices (2014) 3rd Edition, at 306.

[36] Infopaq International A/S v Danske Dagblades Forening (C-5/08) EU:C:2009:465.

[37] CCH Canadian Ltd v Law Society of Upper Canada 2004 SCC 13, 236 DLR (4th) 395.

[38] Ryan Abbott, Artificial Intelligence, Big Data and Intellectual Property: Protecting Computer-Generated Works in the United Kingdom (November 2, 2017). Research Handbook on Intellectual Property and Digital Technologies (Tanya Aplin, ed), Edward Elgar Publishing Ltd, Forthcoming.

[39] Rex M Shoyama, Intelligent Agents: Authors, Makers and Owners of Computer-Generated Works in Canadian Copyright Law, Canadian Journal of Law and Technology, Vol 4, No. 2, pp. 129-140, 2005.

[40] Copyright, Design and Patents Act 1988 (UK) s9(3).

[41] Ryan Abbott, Artificial Intelligence, Big Data and Intellectual Property: Protecting Computer-Generated Works in the United Kingdom (November 2, 2017). Research Handbook on Intellectual Property and Digital Technologies (Tanya Aplin, ed), Edward Elgar Publishing Ltd, Forthcoming.

[42] Copyright Act 1968 (Cth).

[43] A similar provision to Copyright Act 1968 (Cth) s35(6) could be implemented.

[44] Data Access Corporation v Powerflex Services Pty Ltd (1999) 202 CLR 1.

[1] AIHW (Australian Institute of Health and Welfare) 2017, Australia's welfare 2017, Australia's welfare series no. 13 AUS 214. Canberra: AIHW.

[2] Australian Federal Government 2016, Budget 2016-17 Budget Paper No. 1, Statement 5: Expenses and Net Capital Investment.

[3] Paul Hoggett, Hen Wilkinson and Phoebe Beedell (2013). 'Fairness and the politics of resentment' (2013) Journal of Social Policy, 42(3), 567–585.

[4] Michel Foucault, Power/Knowledge: Selected Interviews and Other Writings 1972- 1977 (ed. C. Gordon). (Harvester, 1980)

[5] Micheal W. Gruszcynski & Sarah Micheals, 'The evolution of elite framing following enactment of legislation' Policy Science (2012) 45, 359–384.

[6] Social Services Legislation Amendment (Welfare Reform) Bill 2017 (Cth).

[7] Cth. Parliamentary Debates. House of Representatives, 6 September 2017, Vol. 13 2017, 9517.

[8] Matthew Donoghue, 'Welfare and cohesion contested: A critical discourse analysis of New Labour's reform programme', (2013) British Politics, 8(1), pp. 79-100.

[9] Sheila Shaver, 'Australian Welfare Reform: From Citizenship to Social Engineering', Australian Journal of Social Issues (2001), 36(4), 277-93.

[10] Above n. 8.

[11] Megan Blaxland, 2009, Everyday negotiations for care and autonomy in the world of welfare-to-work: The policy experience of Australian mothers, 2003-2006, (2008).

[12] Patricia Karvelas, 'Centrelink rejects 45,000 sick forms' 28 April 2004 The Australian.

[13] Above n. 11, 137.

[14] Housego and Secretary, Department of Social Services [2017] AATA 146.

[15] Butler and Secretary, Department of Family and Community Services [2004] AATA 735.

[16] Department of Social Services, Annual Report 2015-2016, Part 2 Annual performance statement, 53.

[17] Thomas Biegert, 'Welfare Benefits and Unemployment in Affluent Democracies: The Moderating Role of the Institutional Insider/Outsider Divide' (2017) 82 American Sociological Review 1037.

[18] International Covenant on Economic, Social and Cultural Rights, entered into force 3 January 1976, United Nations Treaty Series vol. 993, 3.

[19] Social Security Act 1991 (Cth), s606(1)(b).

[20] Guide to Social Security Law 3.1.13.8 Unemployment Non-payment Periods http://guides.dss.gov.au/guide-social-security-law/3/1/13/80.

[21] Social Security Act 1991 (Cth), s606(4).

[22] Craven and Secretary, Department of Education, Employment and Workplace Relations [2010] AATA 459.

[23] Ibid, [15].

[24] Ibid, [15].

[25] Social Security Act 1991 (Cth), s606(5)(a).

[26] Kronen v Secretary, Department of Education, Employment and Workplace Relations [2009] FCA 1268, 39.

[27] Catherine McDonald & Greg Marston, 'Re-visiting the Quasi-Market in Employment Services: Australia's Job Network', Asia Pacific Journal of Public Administration, (2008), 30(2), 101-117.

[28] Stearman and Secretary, Department of Employment and Workplace Relations [2006] AATA 1046.

[29] Artner and Secretary, Department of Education, Employment and Workplace Relations [2008] AATA 1072.

[30] Artner and Secretary, Department of Education, Employment and Workplace Relations [2008] AATA 1072, 18.

[31] Considine, Mark, Phuc Nguyen and Siobhan O'Sullivan, 'New Public Management and the Rule of Economic Incentives: Australian Welfare-to-Work from Job Market Signalling Perspective' (2018) 20 Public Management Review 1186.

[32] Parliament of the Commonwealth of Australia, Senate, Social Services Legislation Amendment (Welfare Reform) Bill 2017 Revised Explanatory Memorandum, Schedule 9, 52.

[33] Parliament of the Commonwealth of Australia, Senate, Social Services Legislation Amendment (Welfare Reform) Bill 2017 Revised Explanatory Memorandum, Schedule 15, 92.

[34] Evaluation of Basic Skills Mandatory Training Pilot and National Enhancements: Interim Report. Department for Work and Pensions, (2005) Research Report No. 307. Norwich: Her Majesty's Stationery Office.

[35] Mark Peters and Lucy Joyce, A Review of the JSA Sanctions Regime: Summary Research Findings (2005) DWP Research Report No. 313. London: DWP.

[36] Batty, Elaine and John Flint, 'Conceptualising the Contexts, Mechanisms and Outcomes of Intensive Family Intervention Projects' (2012) 11 Social Policy and Society 345.

[37] Johnsen, Sarah, Suzanne Fitzpatrick and Joseph Rowntree Foundation, The Impact of Enforcement on Street Users in England (Policy Press for the Joseph Rowntree Foundation, 2007), ix.

[38] Parliament of the Commonwealth of Australia, Senate, Social Services Legislation Amendment (Welfare Reform) Bill 2017 Revised Explanatory Memorandum, 172.

[39] Patrick Arni, Rafael Lalive, Jan C Van Ours, How Effective are Unemployment Benefit Sanctions? Looking Beyond Unemployment Exit. IZA (2009) Discussion Paper No. 4509. Bonn: Institute for the Study of Labor (IZA).

[40] Beth Watts and Suzanne Fitzpatrick, 2018 Welfare Conditionality, (Routeldge 2018); Stewart, Alasdair and Sharon Wright Final findings: jobseekers May 2018 http://www.welfareconditionality.ac.uk/wp-content/uploads/2018/05/40426-Jobseekers-web.pdf.

[41] Edward L Deci, Richard M Ryan, 'Self-determination theory: A macrotheory of human motivation, development, and health' 2008 49(3) Canadian Psychology/Psychologie Canadienne.

[42] Jacqueline Homel, & Chris Ryan, Department of Families, Housing, Community Services and Indigenous Affairs. (2010). Incentives, rewards, motivation and the receipt of income support. (No. 32.). Canberra: Australian Government Dept. of Families, Housing, Community Services and Indigenous Affairs, 11; Tyler, T.R. 2004, "Enhancing Police Legitimacy", The Annals of the American Academy of Political and Social Science, vol. 593, no. 1, pp. 84-99.; Wenzel, Michael, 'A Letter from the Tax Office: Compliance Effects of Informational and Interpersonal Justice' (2006) 19 Social Justice Research 345, Murphy, Kristina, Tom R. Tyler and Amy Curtis, 'Nurturing Regulatory Compliance: Is Procedural Justice Effective when People Question the Legitimacy of the Law?' (2009) 3 Regulation & Governance 1.

[43] Ruth W Grant, Strings Attached: Untangling the Ethics of Incentives, (Princeton, NJ: Princeton University Press 2012).

[44] Axel Honneth, The Struggle for Recognition: The Moral Grammar of Social Conflicts, (Cambridge: Polity Press 1995).

[45] Roberts and Secretary, Department of Education, Employment and Workplace Relations [2010] AATA 273, 17.

[46] Lindsey McCarthy, Elaine Batty, Christina Beatty, Rionach Casey, Micheal Foden and Kesia Reeve, Homeless People's Experiences of Welfare Conditionality and Benefit Sanctions (London: Crisis 2015).

[47] Above n. 40, 182.

[49] David Webster, Benefit sanctions: Britain's secret penal system. Centre for Crime and Justice Studies, 26th January 2015 www.crimeandjustice.org.uk/resources/benefitsanctions-britains-secret-penal-system.

[50] Parliament of the Commonwealth of Australia, Senate, Social Services Legislation Amendment (Welfare Reform) Bill 2017 Revised Explanatory Memorandum, Schedule 15, 94.

[51] Above n. 7, 9517.

[52] Above n. 11, 1.

[53] Parliament of the Commonwealth of Australia Senate, Social Services Legislation Amendmen (Welfare Reform) Bill 2017 Revised Explanatory Memorandum, Schedule 15, 92.

[54] Sharon Wright & Alasdair B R Stewart, First Wave Findings: Jobseekers. Welfare Conditionality: Sanctions, Support and Behaviour Change. (York: University of York 2016), 7.

[55] Above n. 11, 4.

[56] Parliament of the Commonwealth of Australia Senate, Social Services Legislation Amendmen (Welfare Reform) Bill 2017 Revised Explanatory Memorandum, Schedule 15, 94.

[57] Above n. 11, 77.

[58] Above n.11, 152.

[59] Above n. 11, 125

[60] Teresa Grahame & Greg Marston, 'Welfare-to-work Policies and the Experience of Employed Single Mothers on Income Support in Australia: Where are the Benefits?', (2012) 65(1) Australian Social Work, 73-86, 82.

[61] Above n. 11, 1.

[62] Above n. 7, 9517.

[63] Above n. 7, 9531.

[64] Above n. 11, 4.

[65] Above n. 11, 82.

[66] John Philip Christman & Joel Anderson, 'Autonomy, vulnerability, recognition and justice' In J. Christman & J. Anderson (Eds.), Autonomy and the challenges to liberalism (New York, NY: Cambridge University Press 2005), 131.

[1] Galloway, Kate, 'Big Data : A Case Study of Disruption and Government Power' (2017) 42Alternative Law Journal 89, 90; The Privacy Act (Privacy Act) 1988 (Cth).

[2] The Privacy Act (Privacy Act) 1988 (Cth) s14.

[3] Glancy, Dorothy J., 'Privacy in Autonomous Vehicles' (2012) 52 Santa Clara Law Review 1171, 1195-1206.

[4] Ibid, 1196.

[5] Ibid, 1197.

[6] Ibid, 1188-1195.

[7] Griffin, Melissa L. 'STEERING (OR NOT) THROUGH THE SOCIAL AND LEGAL IMPLICATIONS OF AUTONOMOUS VEHICLES' (2018) 11 J. Bus. Entrepreneurship & L 81, 94.

[8] See eg, Oham, Chuka et al, 'B-FICA: BlockChain Based Framework for Auto-Insurance Claim and Adjudication' (2018).

[9] Above n-3, 1209-1211.

[10] Above n-3, 1209-1211.

[11] See eg, Peterson, Andrea, 'A Year After Snowden Revelations, Government Surveillance Reform Still a Work in Progress', The Washington Post (online) 2014.

[12] Wills, Geoffrey, 'TO PROTECT AND SERVE, BUT NOT DRIVE: POLICE USE OF AUTONOMOUS VEHICLES' (2015), 31 Syracuse Sci. & Tech. L. Rep. 158, 161-169.

[13] United States v. Jones, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring).

[14] Above n-3, 1212; Gillespe Matthew, 'Shifting Automotive Landscapes: Privacy and the Right to Travel in the Era of Autonomous Motor Vehicles' (2016), 50 Wash. U. J.L. & Pol'y 147, 159-161.

[15] See eg, Foucault, Michel, Discipline And Punish: the Birth of the Prison. New York: Pantheon Books, 1977. Print.

[16] See eg, Fulbright, N. R. (2018, April 27). The Privacy Implications of Autonomous Vehicles. Retrieved July 8, 2018, from https://www.dataprotectionreport.com/2017/07/the-privacy-implications-of-autonomous-vehicles/

[17] Chasel Lee, 'Grabbing the Wheel Early: Moving Forward on Cybersecurity and Privacy Protections for Driverless Cars' (2017), 69 Fed. Comm. L.J 25, 41.

[1] Jesse Hawley-bot, Distorted truths: the disturbing boom of 'deepfakes' (24 April 2018) CSIROscope <https://blog.csiro.au/distorted-truths-the-disturbing-boom-of-deepfakes/>.

[2] Damon Beres, Pornhub continued to host 'deepfake' porn with millions of views, despite promise to ban (13 February 2018) Mashable <https://mashable.com/2018/02/12/pornhub-deepfakes-ban-not-working/#JLeCDyP1APqV>.

[3] Bryan Clark, Deepfakes algorithm nails Donald Trump in most convincing fake yet (21 February 2018) The Next Web <https://thenextweb.com/419869162460194>.

[4] Robert Chesney and Danielle Citron, Deep Fakes: A Looming Crisis for National Security, Democracy and Privacy? (21 February 2018) Lawfare <https://www.lawfareblog.com/deep-fakes-looming-crisis-national-security-democracy-and-privacy>.

[5] Greg Allen and Taniel Chan, Artificial Intelligence and National Security (July 2017) Belfer Center for Science and International Affairs <https://www.belfercenter.org/sites/default/files/files/publication/AI%20NatSec%20-%20final.pdf>.

[6] Greg Allen, Artificial Intelligence Will Make Forgoing Anything Entirely Too Easy (1 July 2017) WIRED <https://www.wired.com/story/ai-will-make-forging-anything-entirely- too-easy/>.

[7] Amy Wang, 'Ballistic Missile Threat Inbound to Hawaii', the alert screamed. It was a false alarm (13 January 2017) The Washington Post <https://www.washingtonpost.com/news/post-nation/wp/2018/01/13/hawaii-residents-get-ballistic-missile-threat-messages/?utm_term=.84caaa1a457d>.

[8] ss 85-88

[9] ss 249k, 192B.

[10] Criminal Code Act 1995 (Cth) sch, s 474.17.

[11] Sandeep Gopalan, Outlawing fake news will chill the real news (5 April 2018) The Guardian <https://theconversation.com/outlawing-fake-news-will-chill-the-real-news-94407>.

[12] Anti-Fake News Act 2018 (Malaysia) s 2.

[13] David Hutt, The Real Problem with Malaysia's Fake News Law (5 April 2018) The Diplomat <https://thediplomat.com/2018/04/the-real-problem-with-malaysias-fake-news-law/>.

[14] Louise Matsakis, Artificial Intelligence is Now Fighting Fake Porn, (14 February 2018) WIRED <https://www.wired.com/story/gfycat-artificial-intelligence-deepfakes/>.

[15] Chesney and Citron, above n 4.

[1] Andreas Mubi Brighenti, 'Lines, Barred Lines. Movement, Territory, and the Law' (2010) 6(3) International Journal of Law in Context 217, 217-9.

[2] Andreas Mubi Brighenti, 'Lines, Barred Lines. Movement, Territory, and the Law' (2010) 6(3) International Journal of Law in Context 217, 233-4.

[3] Iris Marion Young, Justice and the Politics of Difference (Princeton University Press, 1990), 250.

[4] John Hampton, Political Philosophy (Westview Press, 1997).

[5] John Stuart Mill, On Liberty (Oxford University Press, 2015), 13-5.

[6] Don Mitchell, 'The S.U.V. Model of Citizenship: Floating Bubbles, Buffer Zones, and the rise of the "Purely Atomic" individual' (2005) 24(10) Political Geography 77.

[7] James Boyd White, 'Making Sense of the Criminal Law' (1978) 50(1) University of Colorado Law Review 1, 8-9, 17.

[8] James Boyd White, 'Making Sense of the Criminal Law' (1978) 50(1) University of Colorado Law Review 1, 19.

[9] Iris Marion Young, Justice and the Politics of Difference (Princeton University Press, 1990), 169.

[10] James Boyd White, 'Making Sense of the Criminal Law' (1978) 50(1) University of Colorado Law Review 1, 9.

[11] Andrew Millie, 'Value Judgements and Criminalisation' (2011) 51(24) British Journal of Criminology 278, 289-91.

[12] Andrew Millie, 'Value Judgements and Criminalisation' (2011) 51(24) British Journal of Criminology 278, 284.

[13] Rob White, 'No-Go in the Fortress City: Young People, Inequality, and Space' (1996) 14(1) Urban Policy and Research 37, 39.

[14] KJ Hayward, City Limits: Crime, Consumer Culture, and the Urban Experience (Glasshouse Press, 2004), 5-9.

[15] Don Mitchell, 'The S.U.V. Model of Citizenship: Floating Bubbles, Buffer Zones, and the rise of the "Purely Atomic" individual' (2005) 24(10) Political Geography 77.

[16] L Adams, 'A Glass Half Empty: Perspectives on Criminalising Homelessness and Alcohol Dependence' (2012) 25(2) Parity 15.

[17] Samira Kawash, 'The Homeless Body' (1998) 10(2) Public Culture 319.

[18] DPP v Priestley [2014] NSWCA 25.

[19] Ibid.

[20] Anne Bottomley, and Nathan Moore, 'From Walls to Membranes: Fortress Polis and the Governance of Urban Space in 21st Century Britain' (2007) 18 Law and Critique 171.

[21] Designs Against Humanity, Hostile Designs, http://www.hostiledesigns.org/

[22] Rob White, 'The Making, Shaking and Taking of Public Spaces' in C Jones, E Barclay, and R Mawby (eds), The Problem of Pleasure: Leisure, Tourism and Crime (Routledge, 2012) 32, 33.

[23] Loïc Waquant, 'The Punitive Regulation of Poverty in the Neoliberal Age' (2012) 89(1) Criminal Justice Matters 38.

[24] Rob White, 'The Making, Shaking and Taking of Public Spaces' in C Jones, E Barclay, and R Mawby (eds), The Problem of Pleasure: Leisure, Tourism and Crime (Routledge, 2012) 32, 37.

[25] Mike Davis, 'Fortress Los Angeles: The Militarization of Urban Space' in Matthew Sorkin (ed), Variations on a Theme Park: The New American City and the End of Public Space (Hill & Wang, 1990) 154.

[26] Don Mitchell, 'The S.U.V. Model of Citizenship: Floating Bubbles, Buffer Zones, and the rise of the "Purely Atomic" individual' (2005) 24(10) Political Geography 77.

[27] Samira Kawash, 'The Homeless Body' (1998) 10(2) Public Culture 319, 320

[28] Samira Kawash, 'The Homeless Body' (1998) 10(2) Public Culture 319, 330

[29] Samira Kawash, 'The Homeless Body' (1998) 10(2) Public Culture 319, 334

[30] Andrew Millie, 'Value Judgements and Criminalisation' (2011) 51(24) British Journal of Criminology 278, 280.

[31] Samira Kawash, 'The Homeless Body' (1998) 10(2) Public Culture 319, 332

[32] Don Mitchell, 'The S.U.V. Model of Citizenship: Floating Bubbles, Buffer Zones, and the rise of the "Purely Atomic" individual' (2005) 24(10) Political Geography 77.

[1] Sophie Dawson, Anita Cade and Marlia Saunders, 'Shifting the Goal Posts: Anti-Siphoning Report and Reforms Announced' (2010) 29(3) Communications Law Bulletin 8.

[2] IBISWorld, Sports Administrative Services - Australia Market Research Report (2018) <https://www.ibisworld.com.au/industry-trends/market-research-reports/arts-recreation-services/sports-administrative-services.html>.

[3] See, eg, Roy Masters, 'NRL on Course for TV Ratings Victory over AFL', The Sydney Morning Herald (online), 28 May 2018 <https://www.smh.com.au/sport/nrl/nrl-on-course-for-tv-ratings-victory-over-afl-20180527-p4zhsd.html>; Georgina Robinson, 'Super Ratings up but Cricket Mega Deal a Blow for Rugby, Expert Says', The Sydney Morning Herald (online), 18 April 2018 <https://www.smh.com.au/sport/ rugby-union/super-ratings-up-but-cricket-mega-deal-a-blow-for-rugby-expert-says-20180418-p4zact.html>.

[4] Broadcasting Services Act 1992 (Cth) s 115; Broadcasting Services (Events) Notice (No 1) 2010 (Cth).

[5] Broadcasting Services Act 1992 (Cth) sch 2 cl 10.

[6] Paul Smith, 'The Regulation of Television Sports Broadcasting: a Comparative Analysis' (2015) 37(5) Media, Culture & Society 728; Stephen Letts, If Sports Broadcasts Lose So Much, Why Does TV Keep Bidding up the Rights? (16 April 2018) ABC News <http://www.abc.net.au/ news/2018-04-15/the-economics-of-tv-sport/9654004>.

[7] Deloitte, Media Consumer Survey (2017), 13, 17 <http://landing.deloitte.com.au/rs/761-IBL-328/images/tmt-media-consumer-survey-final-report.pdf>.

[8] Broadcasting Services Act 1992 (Cth) sch 2 cl 10.

[9] Ibid; Max Mason, 'Technology, Telecommunications Players May Face Anti-siphoning Rules', The Australian Financial Review (online), 10 September 2017 <https://www.afr.com/business/media-and-marketing/tv/technology-telecommunications-players-may-face-antisiphoning-rules-20170907-gyct6y>.

[10] Mason, above.

[11] Bryn E Sandberg, 'Amazon Lands Streaming Rights to NFL's 'Thursday Night Football'', The Hollywood Reporter (online), 4 April 2017 <https://www.hollywoodreporter.com/live-feed/amazon-lands-streaming-rights-nfls-thursday-night-football-991246>.

[12] Brent Kendall and Drew FitzGerald, 'AT&T Beats U.S. in Antitrust Fight Over Time Warner', The Wall Street Journal (online), 12 June 2018 <https://www.wsj.com/articles/judge-is-set-to-decide-whether-at-t-and-time-warner-can-merge-1528832942>.

[13] Jon Lafayette, 'ESPN Sets April 12 For Launch of ESPN+ Service', Broadcasting & Cable (online), 2 April 2018 <https://www.broadcastingcable.com/news/espn-sets-launch-date>.

[14] See, eg, Arjun Kharpal, Amazon Will be a 'Major Disruptive Force' to Live Sports Rights in the Next Few Years, Analyst Says (13 March 2018) CNBC <https://www.cnbc.com/2018/03/13/amazon-will-be-major-disruptive-force-to-live-sports-rights-analyst.html>.

[15] Nielsen, Australian Video Viewing Report Quarter 4 (2017), 10 <http://www.oztam.com.au/documents/Other/AVVR-Q4-2017-Med%20Res%20Final.pdf>.

[16] Ibid 4.

[17] Ibid.

[18] Deloitte, above n 7, 11–12.

[19] Ibid.

[20] Australian Bureau of Statistics, Household Use of Information Technology, Australia, 2016-17 (2018) <http://www.abs.gov.au/ausstats/abs@.nsf/mf/8146.0>.

[21] Nielsen, above n 15, 3.

[22] Sensis, Social Media Report (2017), 17 <https://irp-cdn.multiscreensite.com/535ef142/files/uploaded/Sensis_Social_Media_Report_2017-Chapter-1.pdf>.

[23] Ibid.

[24] Nielsen, 10.9 Million Adult Australians Accessed Online Sports Content in January 2018 (2018) <http://www.nielsen.com/au/en/press-room/2018/january-2018-digital-ratings.html>.

[25] Telsyte, Streaming Video on Demand a Hit in Australia: Subscribers Up More Than 30% (August 8 2017) <https://www.telsyte.com.au/announcements/2017/8/8/streaming-vod-a-hit-in-australia-subscribers-up-30-per-cent>; Matthew Knott, Why Less than a Third of Australians Have Pay-TV in their Homes (10 July 2012) Property Observer <https://www.propertyobserver.com.au/forward-planning/investment-strategy/ market-trends/17364-what-foxtel-is-really-worth.html>.

[26] Roy Morgan Research, Netflix Hits New High in Australia – 7.6 million (28 September 2017) <http://www.roymorgan.com/findings/7343-netflix-subscriptions-june-2017-201709270713>.

[27] Screen Australia, Online & On Demand: Trends in Australian Online Viewing Habits (2018), 2, 17 <https://www.screenaustralia.gov.au/getmedia/f06697b8-07be-4a27-aa8b-bc3ad365238c/online-on-demand-2017>.

[28] Dana McCauley, 'New Foxtel Chief Delany in Hunt for Millennials', The Australian (online), 1 February 2018 <https://www.theaustralian.com.au/business/media/new-foxtel-chief-delany-in-hunt-for-millennials/news-story/d0aff3f8dc4bf225d5045eaab4d6c496>.

[29] Justin Burke, 'Netflix, Stan, Amazon: Streaming Services Capture Audiences', The Australian (online), 29 December 2017 <https://www.theaustralian.com.au/arts/television/netflix-stan-amazon-streaming-services-capture-audiences/news-story/8535219dac90c6e29a9d0fb9dc062418>.

[30] Tim Burrowes, Seven Set to be First to Market with Addressable Advertising (23 October 2017) Mumbrella <https://mumbrella.com.au/seven-set-first-market-addressable-advertising-479117>.

[31] See, eg, Ethan Zuckerman, 'This Is So Much Bigger Than Facebook', The Atlantic (online), 23 March 2018 <https://www.theatlantic.com/technology/archive/2018/03/data-misuse-bigger-than-facebook/556310/>.

[32] Sandberg, above n 11; Nicholas Confessore, 'Cambridge Analytica and Facebook: The Scandal and the Fallout So Far', The New York Times (online), 4 April 2018 <https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html>.

[33] Vanessa Teague and Chris Culnane, Data Privacy and Power (28 March 2018) The University of Melbourne Pursuit <https:// pursuit.unimelb.edu.au/articles/data-privacy-and-power>.

[34] Hannah Pitt et al, ''It's Just Everywhere!' Children and Parents Discuss the Marketing of Sports Wagering in Australia' (2016) 40(5) Australia & New Zealand Journal of Public Health 480.

[35] Nick Toscano and Jennifer Duke, 'Betting Ads Banned During Live Sport Broadcasts', The Sydney Morning Herald (online), 16 March 2018<https://www.smh.com.au/business/companies/betting-ads-banned-during-live-sport-broadcasts-20180316-p4z4qq.html>.

[36] Fox Sports, What's a Weekend Without Ads? (21 February 2016) YouTube <https://www.youtube.com/watch?v=_8pDYnyl0N0>.

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