

## EDITORIAL

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It has been exactly 30 years since Sir Anthony Mason gave a lecture about his ‘serious misgivings’ towards the value of economic reasoning in resolving legal disputes.<sup>1</sup> During this time, economic analyses of the law have very much been relegated to the dustbins of Australian legal history. Perhaps there is some merit in this hesitancy to accept this quaint marriage of law and economics.<sup>2</sup> Economist John Kenneth Galbraith mused that ‘the only function of economic forecasting is to make astrology look respectable’ so the charge that economists are often famously guilty of excessive self-confidence holds some water.<sup>3</sup>

It is, however, impossible to deny the indelible touch economics has on public policy. Economists influence the way children are cared for,<sup>4</sup> the way countries regulate industry and confront the current climate crisis,<sup>5</sup> and the way citizens are housed and nursed.<sup>6</sup> Australia established a ‘nudge unit’ which aims to use insights from behavioural economics to improve policy outcomes<sup>7</sup> and the existing Productivity Commission ensures microeconomics will always have a seat at the

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1 Sir Anthony Mason, ‘Law and Economics’ (1991) 17(2) *Monash University Law Review* 167, 181.

2 For recent books and articles criticising economics as a discipline, see David Graeber, ‘Against Economics’, *The New York Review* (online, 5 December 2019) <<https://www.nybooks.com/articles/2019/12/05/against-economics/>>; Elizabeth Popp Berman, *Thinking like an Economist: How Efficiency Replaced Equality in US Public Policy* (Princeton University Press, 2022); Binyamin Appelbaum, *The Economists’ Hour: False Prophets, Free Markets, and the Fracture of Society* (Little, Brown and Company, 2019).

3 John Kenneth Galbraith, quoted in ‘A Mean Feat’, *The Economist* (online, 9 January 2016) <<https://www.economist.com/finance-and-economics/2016/01/09/a-mean-feat>>.

4 Julie Sonneman and Angela Jackson, ‘Childcare Reforms Will Deliver Economic Benefits for Decades to Come’, *Australian Financial Review* (online, 19 June 2022) <<https://www.afr.com/policy/health-and-education/childcare-reforms-will-deliver-economic-benefits-for-decades-to-come-20220617-p5aul5>>.

5 James Fernyhough, ‘Australia Emissions Trading Scheme Ends “10 Years of Policy Dysfunction”’, *Financial Times* (online, 1 July 2022) <<https://www.ft.com/content/0a453f5c-e859-4300-9355-46822c45172b>>.

6 Ronald Mizen, ‘Labor Housing Policy Could Spark Buyer Battles in Affordable Suburbs’, *Australian Financial Review* (online, 31 May 2022) <<https://www.afr.com/policy/economy/labor-housing-policy-could-spark-buyer-battles-in-affordable-suburbs-20220530-p5aphj>>; Stephen Duckett, ‘Labor Has a Huge Health Agenda Ahead of It: What Policies Should We Expect’, *The Conversation* (online, 22 May 2022) <<https://theconversation.com/labor-has-a-huge-health-agenda-ahead-of-it-what-policies-should-we-expect-182764>>.

7 Andrew Frain and Randal Tame, ‘Government Behavioural Economics “Nudge Unit” Needs a Shove in a New Direction’, *The Conversation* (online, 4 July 2017) <<https://theconversation.com/government-behavioural-economics-nudge-unit-needs-a-shove-in-a-new-direction-80390>>.

policy table.<sup>8</sup> Mathematical models of great beauty and often inscrutability, cost-benefit analyses and budgets dominate the lexicon of public policy.

It is thus a shame that the field of law and economics has been neglected. Economic analysis offers a scientific theory that can predict the effects of legal sanctions on behaviour.<sup>9</sup> Economists have developed empirically sound methodologies (statistics and econometrics) and mathematically precise theories (price theory and game theory) to provide quantitative assessments.<sup>10</sup> Recent advances in behavioural economics and cognitive sciences have also offered a theory on how people respond to changes in law. Importantly, economics specifies a normative standard for evaluating law and policy: efficiency. Quantitative reasoning and empirical research are the bread and butter of an economist, and tools from which lawyers can learn from to enrich their understandings of the law.

The articles in the thematic component of this Issue aim to vitalise this field by demonstrating the profound insights economics can offer to the law. Huang, Finch and Patrick employ big data analysis to identify a gender disparity that may arise due to recent recommended changes to Australia's patent laws. With the assistance of game theory, Crawford argues property is not merely an exclusive construct of the law, but that it emerged from a set of norms resulting in spontaneous order. Chen and Di Lernia engage behavioural economic insights and supply-demand regulatory analysis to posit a way to curb humanity's meat production and consumption. James proffers a stimulating critique of law and economics and its embrace of efficiency as a normative principle through the case study of the campaign to abolish Australia's luxury car tax. Ghezlbash, Dorostkar and Walsh employ jurimetric analysis – a close cousin of law and economics – to reveal potential cognitive and social biases in judicial decision-making affecting the acceptance of refugee applications in the Federal Circuit Court of Australia.

Issue 45(3) also features a stellar selection of six general component articles: Chin, Lagisz and Nakagawa discuss the role of open science and synthesis in improving evidence-based law reform; Bhatia and Tibballs argue for the need to redefine death as an irreversible cessation of brain function to prevent the contravention of the dead donor rule; Hochstrasser analyses the privilege against self-incrimination in the face of a court order to produce a password to an encrypted device; Kotzmann and Stonebridge advocate for the need to reconceptualise the interdependence of human, animal and environmental health to combat zoonotic disease emergence; Gray explores the doctrine of command responsibility and its compatibility with Australian criminal law; and Weng outlines the development of directors' duty of care in China.

I would urge you to read the Foreword penned by Sir Anthony Mason who offers a far more incisive and in-depth commentary on this suite of articles. Reading the Foreword is like having a pleasant appetiser before a meal and represents a

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8 Productivity Commission, 'A Guide to the Productivity Commission' (Guide, Australian Government, 2020).

9 Thomas Ulen and Robert Cooter, *Law and Economics* (Addison-Wesley, 3<sup>rd</sup> ed, 2000) 3.

10 *Ibid.*

tasty morsel of what is to come. The *Journal* is honoured to have someone of his standing introduce the ideas and discussions raised in this Issue.

Of course, there are many people I also must thank. In *King Lear*, Cordelia once said ‘I cannot heave my heart into my mouth’;<sup>11</sup> a struggle I also sympathise with for I feel anything I write will only seem contrived. So please know that the words written in the forthcoming paragraphs only represent a fraction of my gratitude.

First, I must thank the authors for entrusting the *Journal* with their thought-provoking and carefully crafted work. It has been a delight working with you and I am appreciative of your patience and kindness through the process.

I must also thank our volunteer, anonymous peer reviewers for their generosity with their time and energy. As a student-run journal, we rely on the invaluable expertise and commentary of esteemed members of the profession to make difficult publication decisions. I would like to thank especially those reviewers with dissenting opinions who made our final publications far more persuasive and robust.

Without the continuous support of our premier sponsors Allens, Herbert Smith Freehills, King & Wood Mallesons and Corrs Chambers Westgarth, the publication of the *Journal* would not be possible. In particular, I would like to thank King & Wood Mallesons for not only hosting the launch of Issue 45(3) but also for the mentorship and support I have received from my colleagues at the firm over the past few months.

I would also like to thank the *Journal*’s Faculty Advisers. Thank you Professor Gary Edmond for your patience and guidance as I was first drafting my call for submissions. Special thanks must go to Professor Rosalind Dixon who, in an otherwise wintry and much-too-early morning class, introduced me to the intriguing world of law and economics which inspired the conception of this thematic.

To the *Journal*’s Editorial Board, your herculean efforts were the backbone of this Issue. Your meticulous attention to detail, the hours spent on legal research and the ruthless deletion of every superfluous comma met the *Journal*’s exacting standards. Miguel de Cervantes in *Don Quixote* once made the cynical observation that only a naïve fool would ‘believe you have consulted all of [the citations] in your plain and simple’ article.<sup>12</sup> The Editorial Board would prove him wrong. I am so fortunate to have the pleasure of working with all of you and I am so immensely appreciative of your efforts.

My warmest thanks must go to my fellow Executive Committee members. I am incredibly grateful for your support and friendship. From creative uses of reaction gifs to very impressive reply games to freshly-baked sourdough lathered in butter shared during hours-long meetings, my time on the Executive felt like a warm hug. Thank you to our Executive Editors Darius Dadgostar and Tina Wu for your calming presence and thoughtfulness. To Forum Editors Isobelle Wainwright and Arani Sivakumar and 2021 Digital Editor Caitlin Goutama: thank you for your companionship, words of encouragement and friendly reminders of ‘you’re almost there!’ To the motley crew of Issue Editors Georgia Fink-Brigg, Aakriti Shoree,

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11 William Shakespeare, *The Tragedy of King Lear*, ed Barbara A Mowat and Paul Werstine (Folger Shakespeare Library, 2015) 13.

12 Miguel de Cervantes, *Don Quixote*, tr Edith Grossman (Vintage Books, 2005) 7.

Karie Mayman, Enrico Mainas, Hayden Clift and Alisha Mathias, I am so lucky to have had the opportunity to work with you. Your ever-present support, affirmation and humour made every day on the *Journal* worthwhile. I must also thank our 2022 Digital Editor Calum Brunton. A friendship that started from 8am pancake breakfasts before Latin America history classes and the not-infrequent skipping of Japanese history classes has continued over four years. Thank you for always being there when I needed to commiserate about the most minor inconveniences, for having my back and always being up for a good yarn.

Last but not in any way the least, I owe an incommensurable debt to my parents Jack Cheng and Carol Liu, younger sister, Christina, and friends who have been a constant supportive force in my life. A few special mentions are needed. Mum – you would remind me about how you sacrificed pursuing a doctorate to give birth to me. This was often used as the ultimate guilt trip to inspire more outward displays of filial piety. So to memorialise this in a publication – thank you for telling me hard truths no one else would, for pushing me to work harder, and also for believing that I could achieve *something* in the world. To Marin Cao, David Wu, James Manton-Hall, Jeremiah Edagbami, Mark Rothery, Eugene Bakker and Jacky Chai, affectionately described as ‘the fellas’, thank you for your interest in my work and your patience in listening to my murmurings about *Journal* life. Your wit, humour and warmth have always been uplifting. Thank you in particular to Arin Torny-Adin for your economics wizardry; I am, after all, a self-professed economics dilettante. Without your tutelage, I would remain hopelessly statistically illiterate, pondering what the significance of a *p*-value is. Hopefully, the launch of this Issue will mean all of you will no longer have to listen to my discombobulated voice on Discord paired with the recognisable clacking of a broken keyboard.