
Sydney University Law Society
Amicus
Courier
Welcome Week 1st Edition

Acknowle

Acknowledgement of Country

We acknowledge the traditional owners of the land that the University of Sydney is built upon, the Gadigal People of the Eora Nation. We acknowledge that this was and always will be Aboriginal Land and are proud to be on the lands of one of the oldest surviving cultures in existence. We respect the knowledge that traditional elders and Aboriginal people hold and pass on from generation to generation, and acknowledge the continuous fight for constitutional reform and treaty recognition to this day. We regret that white supremacy has been used to justify Indigenous dispossession, colonial rule and violence in the past, and in particular, a legal and political system that still to this date doesn't provide

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Editorial

There is a prevailing perception that law is at odds with whimsy. We associate the discipline with an image of lofty eminence, of the judge's pensive face framed with a wig's white curls, of the emotionless barrister meeting clients.

During my first Foundations of Law tutorial, I was swiftly exposed to the world of WAMs, Honours acceptances and University Medals. I spent the rest of the afternoon fretting. Was I willingly signing up for a 5-year sentence of imprisoning sterility, imposter syndrome and onerous study schedules?

SULS' main endeavour is to help students avoid such an ordeal. From stimulating socials to cordial competitions, SULS adds a splash of colour to the law school experience. As much as it is up to students to dip from this diverse palette, SULS must continuously strive to provide them with a large range of distinctive hues to suit their needs and niches.

For this reason, the SULS Publications portfolio has been looking to diversify its opportunities. Whilst it boasts an impressive tradition of publishing journals that house skillful longform pieces, it is time for students to be able to pontificate with concision. Time is the formidable enemy of many law students, and thus Amicus Courier poses the opportunity to write a short piece despite looming responsibilities and assignments.

Regardless of what is up your alley: bitesize legal news, slashing satire or a carefully crafted haiku, the Amicus Courier has space for you. Best of all, the Amicus Courier is not fettered by tradition. It will inevitably evolve over the year as different students take on the editorial reins; I positively welcome this change! Here's to hoping that your whimsy ideas about the law (and definitely your more serious ones) can find their home here.

Ariana Haghighi
Publications Director 2022;
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Table of Contents


News

Ridd v James Cook University [2021] HCA 32 – Intellectual Freedom in the Australian Context

Amelie Roediger

On the 13th of October 2021, the High Court delivered a unanimous judgement dismissing an appeal Dr Peter Ridd brought against James Cook University (JCU). The appeal challenged various disciplinary actions taken against Dr Ridd. These disciplinary actions constitute two categories, the first for breaching the university's code of conduct in failing to treat others with courtesy and respect when critically discussing research in the public fora. The second was in response to Dr Ridd's contravention of confidentiality obligations under cl 54.1.5 of the JCU code of conduct. JCU's disciplinary actions, which commenced in 2016, resulted in a termination of Dr Ridd's employment in 2018, at which point he was the head of Physics.

JCU Code of Conduct

"...treat fellow staff members, students and members of the public with honesty, respect and courtesy, and have regard for the dignity and needs of others;"

Enterprise Agreement

Clause 13
13.3. ...the Code of Conduct is not intended to detract from Clause 14, Intellectual Freedom.

Clause 14
14.1. JCU is committed to act in a manner consistent with the protection and promotion of intellectual freedom within the University and in accordance with JCU's Code of Conduct.

14.3. All staff have the right to express unpopular or controversial views. However, this comes with a responsibility to respect the rights of others and they do not have the right to harass, vilify, bully or intimidate those who disagree with their views...

In an 'all or nothing' case, Dr Ridd submitted that all his impugned actions were protected under the intellectual freedom clause, cl 14, in JCU's (now superseded) enterprise agreement and thus did not breach the code of conduct. JCU maintained that no disciplinary actions were contrary to the enterprise agreement, which existed alongside the code of conduct.

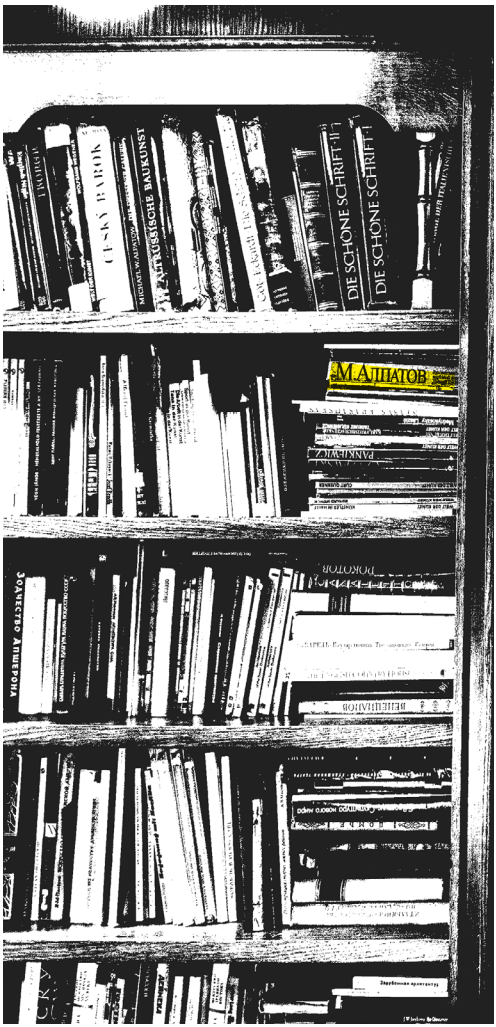
The central issue for the High Court to determine was whether Dr Ridd's conduct amounted to an exercise of intellectual freedom. If so, his actions would be protected under cl 14 of the enterprise agreement and the disciplinary action taken in supposed breach of the code of conduct would be unlawful.

The High Court specifically addressed the conflicting clauses in JCUs enterprise agreement, which detailed select delimitations for intellectual freedom within the University, and the code of conduct requiring staff and volunteers to act with 'respect and courtesy' toward others. The

High Court held that enterprise agreements and codes of conduct do not inherently function alongside one another, as each serves a distinct purpose in outlining disciplinary expectations for differing exercises of 'free speech'. In this case, the more general stipulations in the code of conduct to act respectfully and courteously could not be used to discipline an exercise of intellectual freedom which was free from such constraints in the enterprise agreement.

Dr Ridd was issued with two formal censures, the first regarding critical comments he sent to a journalist on 'bad science' about climate change and the Great Barrier Reef. Although this was deemed disrespectful and discourteous, it was found to be an exercise of intellectual freedom protected by cl 14, as the comments were true in the eyes of Dr Ridd and within his area of expertise. The second censure was considered valid as it responded to critical comments outside the bounds of intellectual freedom that were found to damage the reputation of JCU. All disciplinary actions taken by the university in response to Dr Ridd's breach of confidentiality obligations were undisputed and not considered an exercise of intellectual freedom. Therefore, the High Court held that the termination of Dr Ridd's employment was held to be justified.

Despite the appeal's dismissal, Ridd v James Cook University has established marked precedent pertaining to the recognition and importance of academic and intellectual freedom as concepts in Australian universities and similar institutions. The High Court distinguished intellectual freedom to include "anyone engaged in scholarly work" as opposed to the narrower bounds of academic freedom, which specifically applies to academic staff in universities or those employed in higher education. The court also noted that "critical and open debate and inquiry", and "participation and discussion in university governance" were considered two essential elements of intellectual freedom, in reference to the 2019 Review of Freedom of Speech in Australian Higher Education Providers by the Hon Mr Robert French AC.



In its reasoning, the High Court engaged in more philosophical discussion concerning the importance of preserving intellectual freedom. In this, we find reiterations of the instrumental importance of intellectual freedom in the pursuit of truth, noted by the High Court to have been previously seen in Sweezy v New Hampshire (1957) 354 US 234, alongside Dworkin's ethical justification for intellectual freedom which defends the "duty to speak out for what one believes to be true". However, completely unimpeded liberty is not necessary to speak out under the protection of intellectual freedom. Several delimitations exist, including libel, the incitement of violence, and in cl 14.3 of JCU's enterprise agreement, speech that harasses, vilifies, bullies, or intimidates those who disagree with others' views. Further caveats set out by the enterprise agreement include the right to express controversial views while respecting the rights of others, and under cl 14.5, necessary adherence to high standards of research and professional practice.

However, these delimitations do not dictate the manner in which intellectual freedom must be expressed. Indeed, in quoting Dworkin the High Court suggested that such restraint would "[subvert] the central ideals of the culture of independence and [deny] the ethical individualism that that culture protects."

As such, it was concluded that a departure from respect and courtesy is warranted in expressions of intellectual freedom. This position gives academics and those involved in scholarly work greater liberty to criticise and challenge research within their respective fields and supports the newly adopted 'French Model Code' on intellectual freedom of expression in all Australian universities.

Updates on the Religious Discrimination Bill

Mikaela Nguyen

A final report on the Religious Discrimination Bill is due on February 4 after being referred to the Senate Legal and Constitution Affairs Legislation Committee. The Bill was published on November 23 last year and was first referred to the Parliamentary Joint Committee on Human Rights on November 26. Over the course of its conception, the Bill received over 13,000 written submissions and has been met with both controversy and support.

This Bill is constituted of three parts: the Religious Discrimination Bill 2021; the Religious Discrimination Bill (Consequential Amendments Bill) 2021; and The Human Rights Legislation Amendment Bill 2021. The drafting of these bills represents an effort to amend the Human Rights Commission Act 1986. As its summary holds, the bills aim to "prohibit discrimination on the basis of a person's religious belief" indicating that Australians should be protected from all forms of discrimination against their religious identity. The Bill also establishes the office of the Religious Discrimination Commissioner who would sit within the Human Rights Commission, acting as "protection from civil actions and a review of the operation of the Act."

Why is Parliament passing this Bill?

To its supporters, the Religious Discrimination Bill is important as it recognises the significance of religion in both the formation and expression of identity, and thus the harms of discriminating against it. The Bill aims to outlaw religious discrimination in a "range of areas of public life, including in relation to employment, education, access to premises and the provision of goods, services and accommodation."

Controversies surrounding the Bill

Critics of the Bill argue it could be used to justify discrimination based on sexuality, pointing specifically to the 'Folau clause' of the Bill, which seeks to limit the control that employers have over their employees' expression of their beliefs. The Bill and this clause could cause complications regarding workplace inclusion, as religious employers may be permitted to discriminate against their LGBTQIA+ workers under the guise of disallowing religious discrimination.

Furthermore, the Bill could be used to strengthen the ability of religious employees or institutions to act in accordance with their faith without consequence. For instance, the passing of the Bill could justify discriminatory actions such as the expulsion of students from religious schools due to their sexuality or religious backgrounds, the refusal of religious health practitioners to carry out procedures or to distribute medical care, or the dismissal of workers from religious institutions. Thus, although the Bill appears inclusive in theory, its passing could encourage increased marginalisation.

Will the Bill achieve its aims?

Considering the complex and ingrained nature of discrimination, the Bill alone could be ineffective in eradicating all forms of religious discrimination. exism and racism are still pervasive within Australian society, despite existing legislation outlawing discrimination based on gender and race. Crucially, the potential consequences of the Bill justifying discrimination against the LGBTQIA+ community, rather than encouraging inclusion, indicates that the Bill should be released alongside amendments to the Sex Discrimination Act that bolsters protections against gender discrimination.

Mandatory Disease Testing Laws in NSW

Ariana Haghighi

June 17 2021 saw the legislation of the Mandatory Testing Disease Act in NSW after significant parliamentary controversy, with Independent MP Alex Greenwich arguing the Bill was “draconian”. A similar Act was legislated in Western Australia in 2014.

This Act can force a person to undergo blood testing for HIV and Hepatitis B and C if they assault a health or public sector worker and that worker is at risk of a blood-borne disease as a result. An order can be made after the transmission of any bodily fluid, including saliva; and Clause 8 stipulates that the worker must consult with a medical professional before making an application for a mandatory testing order. The Act thus compels a person aged above 14 years to attend blood testing 2 business days after the incident. However, the blood extracted must only be used for screening, and cannot be used by the NSW Police Force for any other purpose.

If the patient deliberately contacted the health worker against their consent, the Act authorises blood to be taken from the patient, even if they do not consent to the procedure. The Government members who proposed the Bill justified the mandation of disease testing as crucial for frontline workers at risk. In the Second Reading Speech, Minister for Police, David Elliot, justified this Bill in saying that transmissions as a result of assault can lead to long periods of stress and anxiety for emergency workers and their families, especially considering there is a window of up to six months where the disease cannot yet be detected in the worker’s blood.

However, some MPs such as Greenwich stress this Act could be used as a weapon of discrimination against marginalised groups such as gay men, and further stigmatises HIV.
Hepatitis NSW also released a statement in opposition to the Bill, stating that the prevalence of Hepatitis B and C in the population is minute, and thus they present “an ever diminishing health risk”. Hepatitis NSW believes this legislation further entrenches and “validates… unwarranted fear and worry” surrounding blood-borne diseases. Notably, there is no avenue for statutory appeal in Act, as lengthy court processes may delay the urgent medical screening. There is thus no path for recourse for victims of unjust blood testing orders.

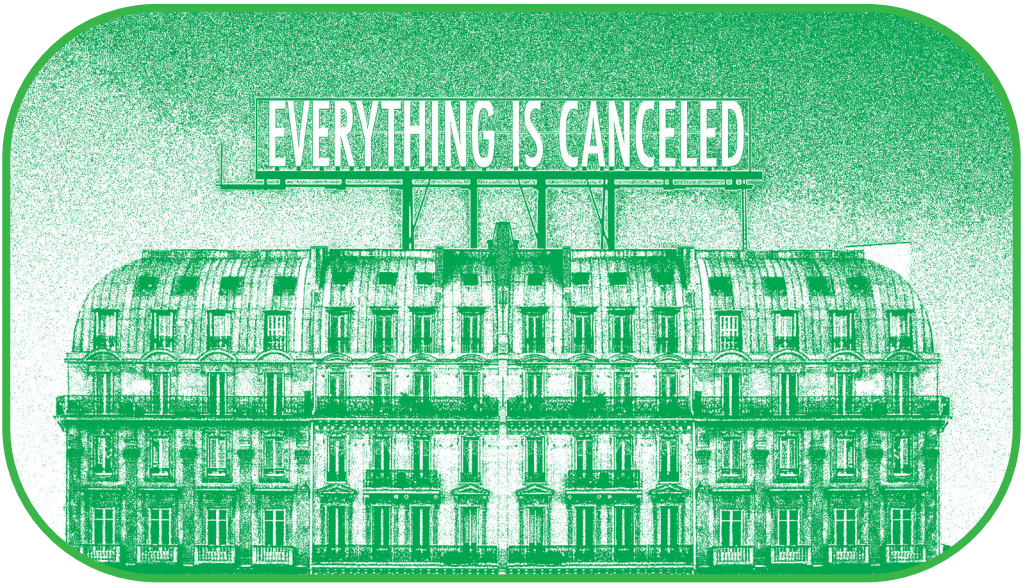
Time will tell how this Act operates in practice, given its successful passing despite mounting controversy.


Opinion

The Implementation of Pandemic Laws in Victoria: What Does it Mean Going Forward?

Clara Suki

Victoria is the first and only state in Australia to have legislated specifically for a pandemic. The Public Health and Wellbeing Amendment (Pandemic Management) Act 2021 *was discussed for a total of 21 hours in parliament, and has now been in effect since the 16th of December.*



Whilst the Human Rights Law Centre has said that the bill "improves transparency and accountability", critics have raised other concerns. Mass protests occurred in Melbourne CBD opposing the vaccine mandate and the pandemic bill. United Australia Party leader Craig Kelly said that mandatory vaccinations were an "abuse of human rights" and called Parliament an "insane cult of vaccinists". Such efforts did little and only resulted in COVID cases rising further, with one protester being hospitalised.

In an effort to see if any criticisms were made on an educated basis, a summary of the main issues that the Act covers has been provided below. From there we can assess the validity of any critiques, such as Craig Kelly's tweets, and see if there are any inadequacies in the main sections of the Act.

Main changes made:

Declaring a pandemic:
The Chief Health Officer will no longer have the power to declare a pandemic and issue health orders, with this power now resting with the Health Minister and Premier. Both the Health Minister and Premier must consult the Chief Health Office and justify the reasoning of all their decisions to parliament. The Health Minister is also now required to publish changes online within 14 days and must provide justification for any limitations imposed on any human rights.

Another key change is that there is now no outer time limit for a pandemic declaration; in theory the Premier would be able to declare a state of public emergency indefinitely.

Victoria's opposition leader has called the bill "an incredible attack on democracy" and an "extreme" development. He has further declared that giving power to the Premier to declare a pandemic is "unprecedented".

Whilst the actions of both individuals can be held accountable by the public through elections, we must question whether this is enough. There is always a risk that such health issues become more politicised and that the people's best interest are not at heart.

The SARC:
The Act also establishes a scrutiny committee called the Scrutiny of Acts and Regulations Committee (SARC). This body has the power to review all health orders made by the Health Minister and is able to assess how these orders impact human rights. However, its power is limited to proposing recommendations, and so there is always a chance that such concerns will be ignored.

Privacy:
The Act also ensures that data collected by QR codes will only be used for public health purposes. After recommendations made by the Human Rights Law Centre, it has been made clear that the Victorian Charter of Rights applies to pandemic orders and any other decisions made under the new law. This will help ensure the maintenance of public trust, especially in times where restrictions are tight.

New offences:
The Act has now also deemed it an aggravated offence if individuals fail to comply with a pandemic order, with offenders facing up to 2 years in jail. Whilst the policy rationale of creating such an offence is obvious, this section of the bill has been written broadly, and thus poses serious risk to overly policed areas and marginalised groups.

This pandemic has been difficult to navigate, and this Act seems to represent the continual yearning governments have for both structure and stability. While on the surface these laws and amendments seem to be a step in the right direction, it is also important to recognise and be cognizant about how quickly laws can get out of hand. These laws have only just been recently put into effect and we shall have to wait to see if these pandemic laws are applied in the manner they were intended to be.

Taking out the trash: should directors be responsible for environmental crimes committed by corporations?

Edward Ford

Environment Legislation Amendment Bill 2021 (NSW) (ELAB)

The ELAB makes significant changes to numerous statutes regarding environmental protection, most notably to the *Protection of the Environment Operations Act 1997* (NSW) *(POEO* Act). Among many other changes, the Bill considerably expands the exposure and liability of directors and other 'responsible persons' for the criminal conduct of corporations.

The Bill proposes to grant the Environmental Protection Authority (EPA) the power to issue both current and former directors with personal clean-up notices *if* a corporation does not comply with a notice issued under the *POEO* Act. For a director, this could carry a significant initial fine of $250,000 and an additional $60,000 for each day the notice is not complied with. The impact of this Bill on a director's legal exposure has been discussed briefly by some big law firms and other commentators. Yet, it is important to consider how the proposed "personal" clean-up notices interact more broadly with the controversies surrounding derivative liability.

What is derivative liability and why is it justified?

Derivative liability is where a person is held personally responsible for the conduct of another person, including corporate bodies.

There are clear justifications for derivative liability in the context of corporate violations of environmental regulations. Illegal dumping of waste and other environmental crimes are violated in both systemic and sustained practices of corporations, as well as through sporadic and convoluted methods, such as illegal dumping committed by the corporations' contractors and sub-contractors. In these contexts, corporate bodies

have opportunities to unfairly avoid criminal responsibility by taking advantage of their ontological ambiguity and complex composition. Combined with the genuine responsibility of the state to protect the public from harm and the desire to enhance corporate compliance and ethics, some level of derivative liability is clearly justified.

Do the reforms over-extend a director's derivative liability and criminality?

The amendments extend far greater than their argued purpose to further criminalise environmental crimes and place responsibility for cleaning up criminal waste, as the Second Reading Speech for the Bill claims, on those who "circumvent the law". Lawmakers are clearly not ignorant of the dangers in broadening derivative liability while drafting the Bill—both existing and amended provisions in the POEO grant blameless directors who have complied with clean-up notices issued by the EPA with the ability to retrieve the costs of complying with the notice from the real culprit(s) as a debt in a court of appropriate jurisdiction. On one view, this is a fair system that insulates legal and financial responsibility for environmental crimes such as illegal dumping to private entities rather than innocent land-owners or the state.

However, the Bill appears to solve one issue by creating another—broadening the possibility of blameless directors being issued clean-up notices. The problem with this scenario is that criminal penalties carry not only financial penalties, but have significant moral and ethical implications for individuals. As a result, lawmakers should exercise caution when legislating to broaden the derivative liability of individuals for crimes such as waste dumping committed by corporations where the criminal intent of a director is partly or wholly neglected. Yet, the Second Reading Speech for the Bill reflects a clear and potent resentment for devious corporations shifting responsibility for cleaning illegal waste to the state. The difficulty of this scenario for lawmakers is clear and understandable, but their resulting priority to protect the state from bearing the cost of cleaning illegal waste in the Bill is unsurprising. Indeed, the legislature seems adamant on shifting responsibility for most illegal waste dumping to private entities and associated individuals, collaterally reducing the state's responsibility for the costs of cleaning illegal waste, regardless of whether this could unfairly criminalise individual directors.

New regulations instil little confidence in the fight against RAT price gouging

Patrick McKenzie

The regulations implemented this year by the Federal government to combat price gouging of COVID-19 Rapid Antigen Tests (RATs) pose issues of enforceability and are likely to be ineffective in the critical short term.

In March 2020, at the onset of the COVID-19 pandemic, the Federal Minister for Health Greg Hunt enacted the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Essential Goods) Determination 2020* under powers granted by section 477 of the *Biosecurity Act 2015* (Cth). The determination, which was later repealed on January 25 2021, included a prohibition against individuals and corporations selling or offering to sell essential goods – such as hand sanitiser and personal protective equipment – for more than 120% of the price the goods were first purchased for. On January 8 2022, these measures were reintroduced with reference to the excessive pricing of RATs, alongside penalties of up to five years imprisonment, a fine of up to $66,000, or both.

Under the *Competition and Consumer Act 2010* (Cth), increasing the pricing of goods in response to changing market conditions is not unlawful. However, excessive pricing may constitute unconscionable conduct, a concept that does not have a precise legal definition but generally refers to practices that may be unjustifiably harsh or oppressive.

In each instance, the Health Department's determinations have sought to reactively curb price increases that had resulted from supply crises in the absence of Federal Government regulation or a subsidised distribution model. However, despite the harshness of the aforementioned penalties, the determinations fail to effectively incentivise compliance.

By imposing deterrence solely at the level of individual consumers on-selling tests – often in online settings such as eBay, Gumtree or Facebook Marketplace – the parameters of the determinations present significant challenges as to how the legal system will be able to monitor and respond to individual instances of the offence, given the scale at which they are likely to occur.

Additionally, their non-applicability to excessive pricing from retail outlets such as chemists and supermarkets, while consistent with broader legislation, has placed a greater burden upon pre-existing frameworks. In particular, the Australian Competition and Consumer Commission (ACCC) – which can investigate price gouging – has needed to be over-reliant on consumer reporting to respond in a timely manner. This has already proven to be a problem since, as of January 17 2022, the ACCC has received and analysed over 1,800 reports on the pricing of RATs, which have trended upwards to as high as $100 per test in extreme cases.

"The inadequacy of pre-existing frameworks and temporary regulations... does very little to consider the systemic issues surrounding their supply"

The ACCC's ongoing strategy of cautioning against businesses making false or misleading statements to justify high prices and threatening to name and shame contravening suppliers and retailers has also been an arguably ineffective deterrent, given the Australian Federal Police's need to launch investigations into price gouging following an ACCC referral as of January 21 2022.

The inadequacy of pre-existing frameworks and temporary regulations to respond to RAT price gouging reinforces their commercialisation as an essential good, and does very little to consider the systemic issues surrounding their supply and availability at a time of peaking COVID-19 cases.

Who Gets the Dogs Out?: Family Law in Spain, and Domestic Animals

Eamonn Murphy

When a marriage ends, a life is cleaved in two. In his collection of short stories, *What We Talk About When We Talk About Love,* Raymond Carver imagines the divorced mind…

"What happened to that love? What happened to it, is what I'd like to know. I wish someone could tell me."
Amidst the emotional turmoil, assets are divided. The family house is sold. In a suburban solicitor's office, the aircon doesn't work, and papers stick to clammy palms that sign on dotted lines. It's over.

However, sprawled among the packed boxes, there is often a pet. Peppa, the excitable year-old puppy, an attempt to rekindle the romance. Nancy, the old girl, poised and proper, who watched as the kids grew up and played until she could no longer. Rupert, the scowling cat for whom, despite his temperament, everyone has a soft spot. But who gets whom?

In Australia, this "whom" is exclusively a "what". Pets are considered personal property, objects that are divvied up like the china, the armoire and the Thermomix. Before the Courts, there is no relevant legislation: the notion of custody does not apply. If negotiations fall through, a party can apply for consent or property orders to retain the animal — though in these circumstances, the beloved family pet is still considered chattel.

Yet, across the globe, a trend is emerging. Following cases in France and Portugal, Spain has decided to consider a pet's welfare when couples separate. Judges must treat pets as sentient beings, rather than objects: Peppa, Nancy and Rupert get the respect they deserve. As with children, the Courts will consider the pet's best interests, including any need to protect the pet from harm, the pet's relationship with each separating party, practical considerations, and other relevant factors.

Spain's consideration of animal welfare extends even further. Joint custody of children can be denied if one parent has mistreated the family pet, or threatened animal abuse. This decision was justified by a strong correlation between the mistreatment of animals and animal abuse, and ultimately serves to prevent possible harm to children.

By respecting our furry friends, we allow legislation to reflect societal norms. Animals have long been considered part of the family, and cruelty offences garner severe penalties. Since our pets hold such value in our lives, and since they are sentient beings capable of attachment, they should be properly recognised by the Courts. Who gets the dogs out (of a divorce settlement)? Whoever can take proper care of them.


Analysis

It's Time to Look Across the Tasman for a Regulatory Solution to the Sydney Housing Crisis.

William Price

As we face a deepening crisis of housing affordability, the dream of home ownership is rapidly turning into a nightmare for many Australians. And we are not alone: across the Tasman residents in Auckland, New Zealand, are facing many of the same pressures. In 2021 alone, median house prices rose 30.4% and 27% in Sydney and Auckland respectively. Median Sydney home buyers will need to save for over 16 years to afford even a 20% deposit for a home. In New Zealand, the number of people waiting for public housing has quadrupled since 2017, and as far back as 2018 2.2% of the national population were classified as 'severely housing deprived', with almost half being under 25.

Clearly, both bubbles are approaching breaking point, and despite a multitude of underlying factors there is one common problem: a lack of housing density. Globally, megacities house many times our population in a comparatively small land area, but both Auckland and Sydney are lagging behind primarily due to outdated and contradictory planning regulations, which in turn influence practices within the property development industry.

There is no principled reason why the overhaul of counterproductive regulations isn't achievable. Yet reform in both Australia and New Zealand has been incredibly difficult. Housing policy is often left up to local councils beholden to NIMBY ratepayers who oppose intensification, or 'building up', for fear of losing their property values – or in the words of one Auckland councillor, the "special character" of their city. Even progressive leaders have traditionally tolerated urban sprawl, or 'building out,' as an alternative and temporary solution to housing crises, often paying little regard to the devastating effects of sprawl on the environment, transportation networks, and communities.

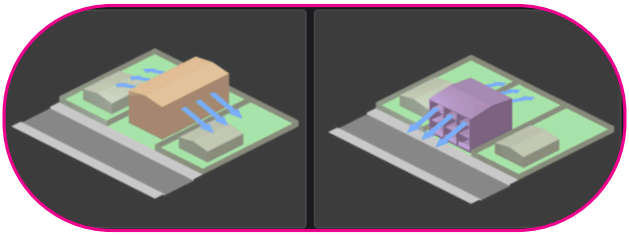
Sprawl, historically caused by population growth, advancements in transportation, and the economic manifestation of the dream of home ownership, is usually justified on two fronts. First, that it provides housing cheaply because empty land is cheaper to develop and because a strong rural-urban boundary pushes prices up. Yet this ignores the cost of building and maintaining infrastructure to new areas, which are often borne by separate agencies and government departments to those responsible for housing development. OECD analysis shows that for Auckland a policy shift away from urban sprawl in favour of more compact development could reduce the expected

30-year growth in house prices from a threefold increase to just 57%. The second justification is that sprawl is more democratic than intensification as home owners have a 'right' to object to development near them. However this right is not absolute, and in current housing markets governments and councils are essentially trading off the rights of young and disadvantaged people locked out of home ownership or affordable rent against those of older property owners.

However, in the face of near-unanimous opposition from councils, the New Zealand central government recently passed sweeping legislative reforms to the *Resource Management Act*, overhauling intensification requirements with bipartisan parliamentary support. These new standards allow people in major cities like Auckland to develop up to three homes of up to three stories on most residential sites without the need for a resource consent. Smaller, taller developments will hopefully ease much of the housing capacity pressure that Auckland has been seeing in recent years. Unsurprisingly, local councillors have criticised it as an unnecessary addition to their own density housing policies, and others have questioned whether it goes far enough to incentivise intensification, but on the whole the policy has been met with broad-based support from a public desperate to release some of NZ's housing pressure.

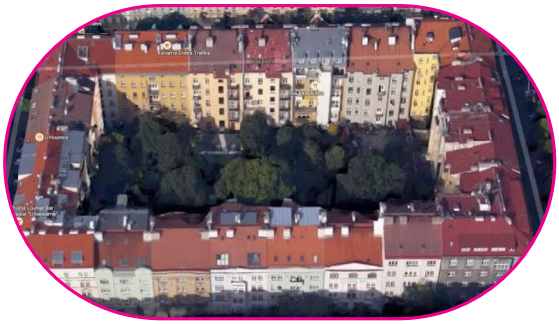
The comparative legislation in New South Wales is the *Low Rise Housing Diversity Code* under the *Environmental Planning and Assessment Act 1979*. Under the code, the maximum height for complying developments is 8.5m, essentially only enough for two stories. In addition, there are restrictions on how far the 'setback' of a new development must be from the road, which depends on the average setback of surrounding properties. Similar setback restrictions also still exist in New Zealand, and while in some cases they exist for legitimate reasons such as to protect sight lines at a driveway or an intersection, all too often they are championed by wealthy homeowners aiming to protect their views and property values.

New South Wales regulations need to be overhauled if we are to build ourselves a sustainable way out of the Sydney housing crisis. New Zealand has shown that there is voter appetite for change, and that local opposition can feasibly be overcome by State or Federal powers. What then are the next steps for Sydney? First, a similar reform to the amount of stories and subdivisions per development. Beyond this, a reduction or removal of the setback distances from the road would help pave the way for more European-style perimeter block housing, which would better maximise and utilise both housing and green spaces across Sydney. Such legislative reform may seem radical, but such radical changes have worked countless times overseas and are doubtless necessary to combat the sheer scale of the housing crisis. This isn't merely an academic question; the impacts of housing policy today will affect the home ownership dreams of generations to come.



The effect of removing set-back restrictions. Both highlighted properties use 50% of the property area.

‘Sausage flat’ style housing in Auckland: a low-intensity consequence of outdated planning regulations



Perimeter block housing in Prague, which maximises both apartment and green spaces.

IQ Testing The (Smart) Contract

Mae Milne

Smart contracts are often touted as the future of the legal profession, eliminating the need for traditional dispute resolution procedures, and for drafting contracts. But, what are they really? Is there any truth to these claims?

What Are Smart Contracts?

The term "smart contracts", originally coined by computer scientist Nick Szazbo in 1997, is used to describe a computer code which automatically executes agreements between parties, once a set of conditions is met. For example, a smart contract may trigger automatic payment to a supplier following the delivery of required goods. However, if those goods are not delivered, payment will not be acquired.

This computer code is supported by blockchains: types of distributed ledgers that store information across multiple computers, or nodes. As information is stored across many devices, smart contracts can therefore provide records of each transaction in a secure, transparent and accessible manner. Smart contracts are additionally immutable: once the code has been enacted, the agreement cannot change.

Are Smart Contracts Contracts?

Whether or not these smart contracts actually constitute as contracts must be determined on a case by case basis. On the one hand, certain smart contracts may be considered legally valid so long as they satisfy the traditional elements of a binding contract, such as offer, consideration and acceptance. However, other elements of a contract, such as certainty of terms, may be more difficult to prove given that these agreements are often written exclusively in code.

Nonetheless, it has been argued that it is not necessary that smart contracts gain legal recognition. This is because smart contracts are "self-enforcing" and preclude any breach of contract by nature. In other words, if a requirement is not fulfilled, payment will not be delivered. Furthermore, some smart contracts contain pre-determined dispute processes. They consequently minimise their reliance on the legal system for dispute resolution.

Legal Limitations

Despite these features, it is unlikely that smart contracts will replace traditional legal processes. This is because their capacity to resolve disputes is limited to the simple if/then commands upon which the contract is predicated. Issues residing outside this narrow scope, such as whether or not parties had legal capacity, or who is the rightful "owner" of a particular asset, are unable to be automatically resolved.

Furthermore, although the deterministic nature of smart contracts is often marketed as a benefit which eliminates ambiguities in contractual arrangements, it is unable to accurately express complex relationships between parties. Legal concepts such as reasonableness, and good faith, are inherently ambiguous and therefore require the flexibility of natural language rather than the rigidity of code. In addition, given the statistical likelihood of errors in coding, and the immutability of these contracts, it is likely that the contracts themselves may invite litigation, should they not accurately reflect the terms of the agreement.

Although smart contracts may prove a useful tool in streamlining payment methods and in documenting who has fulfilled what elements of an agreement, in their current capacity they remain insufficient to resolve a variety of issues.

The Future of Contracts

Nonetheless, it is clear that smart contracts will continue to shape the future of contract in law. In the digitised age, it is increasingly likely that businesses will begin to adopt a hybrid model of algorithmic and traditional contracts, in what is called a "Smart Legal Contract", or "SML". Under the model posed by Natascha Blycha and Ariane Garside, SMLs are legally binding agreements in which part or all of the agreement is intended to be executed as an algorithmic instruction. They remove many of the ambiguities and uncertainties which surround the conventional model of smart contracts, pairing natural language clauses with the coded expressions of obligations. This consequently ensures the certainty of terms, and allows parties to better manage risks associated with automation.

Overall, it is unlikely that at their present technological capability, smart contracts will obviate the need for lawyers or judicial systems. They will however continue to play a central role in the development of contract resolution claims, particularly with the rise of newly developed SMLs and as such, they will further accelerate the legal technological revolution.

Help! My AI doctor committed medical negligence

Brianna Ho

There are around 140 000 Australians misdiagnosed by trained doctors every year. Hence, it is no wonder we see a push to implement artificial intelligence diagnoses, which has already proved to be more accurate and more efficient than consulting your specialist. To contextualise their level of accuracy, Google's AI algorithm can detect diabetic retinopathy (a form of vision loss) with an accuracy of up to 97.5%.

But what if you're part of the 2.5%? What if your AI doctor gets it wrong?

Who is liable?

At best, laws regulating AI are broad and underdeveloped. At worst, they are non-existent. If a misdiagnosed patient wants to claim damages for AI negligence, they are forced to rely upon regular negligence case law and legislation. As it stands, there are three main parties who might be sued in such a case.

First, the supervising doctor could be sued for medical malpractice. For the time being, it is likely that AI algorithms will assist, not replace, doctors in their diagnoses. Hence, if the doctor fails to adequately verify or interpret the results of their AI tool, they have deviated from their professional standard of care.

Secondly, as in regular tort cases, the hospital or employing practice could be held vicariously liable for their doctors' errors. They could potentially also be held liable for implementing AI software that has not been properly error-checked. As the law stands, causes of action against the doctor or their employer are most likely to succeed, given the high level of precedent for typical medical negligence cases.

However, a potential suit also arises against the algorithm developers under products liability law. In Australia, *The Competition and Consumer Act 2010* (Cth) places a strict liability on any suppliers of a defective good that has caused personal injury

to the consumer. If an AI misdiagnosis leads to a death or exacerbates the disease, such a suit may succeed. However, while Australian legislators have added "computer software" to the definition of "goods", legislators overseas have been reluctant to expand their definitions. One such example is the *Consumer Protection Act 1987* (US), which has been interpreted as constraining the definition of "goods" to physical items. This creates obvious complications for US plaintiffs who wish to sue an intangible algorithm for the damage it has caused.

This may be the suit plaintiffs are forced to defer to when AI software advances beyond human understanding. As machine learning is introduced into the medical field, the "black-box problem" arises. It is often incredibly difficult, if not impossible, to understand why advanced computational algorithms make the decisions or diagnoses that they do. They draw from enormous datasets and make links between the most obscure variables – at some point, they will surpass human medical expertise if they are left unrestrained.

For this reason, many are advocating for clearer legislation and further regulation, which we are beginning to see in examples such as the EU's preliminary *Artificial Intelligence Act* or the *California Privacy Rights Act.* However, the more specific liability and transparency laws governing AI become, the less incentive there is to develop. After all, no one likes being held responsible.

Thus, drafting legislation for AI matters, even beyond medical negligence, will be a delicate balance. It *is* essential that clarity and protection is provided for consumers. However, these algorithms hold the potential to save millions of lives and often, the only thing holding them back is the law.

Bringing the LLBII to WWII

Marlow Hurst

During the Second World War, the University of Sydney Law School suffered a striking dip in enrolments. Between 1941 and 1942, they plummeted by a staggering 70%. 1943 saw a measly 61 students enrolled, compared to the halcyon days of 1937's 330 student strong cohort. The prime culprit for this dizzying decline was none other than the Australian military. Ditching admin lectures for a spot in the Imperial Force, Sydney students were leaving the Law School in droves. So with many of the faculty's continuing students and even more of their prospective students serving in the military, they only had one choice: bring the LLBII to WWII.

Starting in 1942, lecture notes, reference books, case digests, and specimen examination questions were being dispatched by Law School staff to students deployed in the forces. While an Honi Soit article from the time noted that "men in preliminary training camps have no time to spare (for the course)," it appeared that those at "battle stations have enthusiastically taken up the work." It wasn't just limited to study though. When students felt adequately prepared, they could be examined either while on leave or under the supervision of a "competent person in camp" if they were somewhere inaccessible. Supplemented with monthly parcels from the Law School Comforts Fund, which usually contained two Penguin books, a copy of Blackacre, and a professional/faculty gossip rag called Legal Digest, a great deal of effort went into replicating as traditional a legal education as possible.

So with the shadow of two years of remote learning looming large, if a world war couldn't stop Sydney Law School, a pandemic never stood a chance.


Satire

Sportsbet offers new multi on Novak Djokovic's Visa

Anson Lee

Covid aside, no key phrase has dominated the headlines quite like 'Novak Djokovic', whose troubled relationship with vaccines has jeopardised his spot in this year's Australian Open. Sportsbet has decided to take advantage of this trend by offering multi-bets on the outcomes of crucial steps in Djokovic's visa battle with the government.

"We found that punters were hesitant to put money behind Djokovic's chances in the Australian Open given the uncertainty about whether he'd actually be playing, so we decided to shake things up."

"From today, punters will be able to place bets at every stage of Djokovic's journey through the judicial and executive arms of government as he fights for his spot to play."

Punters will be able to design custom tabs, placing bets not only on the outcomes of Djokovic's court cases and the discretionary decisions of the Executive arm, but also aspects as detailed as the admissibility of pieces of evidence under the *Evidence Act 1995* (Cth) and matters of statutory interpretation relating to the *Migration Act 1958* (Cth).

For its plethora of betting options, the new multi-bet has attracted a wide fanbase, ranging from the average punter who watches Suits on the weekend, to full-time law students and professors at prestigious universities. One source told the Courier that placing bets on the platform had become a compulsory assignment in their Immigration Law unit, and their multi had earned them a High Distinction, not to mention a year's tuition. "What really distinguished me from my peers was my bet that the respondent's written submissions would have upwards of 75 paragraphs and 20 footnotes." On the other hand, their professor was not so lucky, having gone 'all-in' on Djokovic's defeat in Federal Court. The Courier understands that the professor is now challenging the outcome in court.

However, some have designed multis in ways that Sportsbet allows, but appear contradictory altogether. One punter placed bets both on Djokovic's visa being cancelled by the Minister, and on him winning the entire Australian Open. When asked about this puzzling choice, he proffered that "well, I guess he could appear remotely…"

Suffice it to say that the new multi option has ignited the inner lawyer in many a punter, as a nation eagerly awaits the Serb's fate.

In wake of Sharma, Lorax to launch case against Minister of Environment

Justin Lai

In the wake of the decision laid down in the Federal Court in Sharma v Minister for the Environment [2021] FCA 560, a new group has expressed interest in entering the legal playing field.

In Sharma, the litigants were a group of adolescents who successfully applied for an injunction for the expansion of a coal mine in regional New South Wales. In the decision, Bromberg J identified the existence of a common law duty of care on behalf of the Minister to protect the children from the various harms posed by climate change.

In the present situation, the litigant may accurately be described as the environment itself. An individual referring to himself as the "Lorax" is believed to be bringing the case on behalf of a group known as the "Truffula trees", for whom the former is believed to speak. The group is allegedly pleading various harms, including personal injury and property damage, particularly regarding the cultivation and harvesting of "Thneed", and resulting deforestation and pollution of the land. Thneed, a popular local product at the heart of a thriving industry, is primarily produced by Once-ler Inc., identified as a key lobbyist in New South Wales. In granting Once-ler Inc. a felling licence for Truffula land, the Lorax is alleging a breach in the duty of care reliant on that determined by Bromberg J.

A number of issues have arisen in the pre-trial process, namely the Lorax requesting an extension of time to file the statement of claim in order to make the entire document rhyme.

The Minister declined a request for comment.

Morrison Government to hire Sphinx to process FOI requests

Justin Lai

In wake of increasing public pressure for greater government transparency and integrity - most notably spearheaded through various campaigns for a federal Independent Commission Against Corruption - the Morrison government has made what can only be described as an atypical decision; sources disclose that the Government intends to hire the Sphinx, a legendary creature from Greek and Egyptian mythology, to help process freedom of information requests. Individuals wishing to file a freedom of information request will now be met with life-or-death stakes.

In forecasting such a decision, individuals wishing to file a request will have to, first, answer a riddle of choosing from the Sphinx. Bizarrely, this move will be consistent across the types of documents covered under FOI, meaning that individuals may need to risk their lives to access personal information.

Critics of the move believe that the Morrison Government is attempting to further obscure the process of withdrawing information, highlighting the Sphinx's intentions to kill those who incorrectly answer its riddles. Many Opposition members believe, in what can only be described as the understatement of the decade, that such a decision "might lower the amount of freedom of information requests...this may not be the greatest confidence-builder".

When asked about the Sphinx's documented history of explicitly criminal behaviour, Morrison replied "I don't agree with the premise of the question...I can appreciate the public's concern but we really need to shore up our procedures...who knows what could be uncovered?". When pressed further on the issue of people potentially being killed for passable mistakes in an administration procedure, Morrison noted "they chose to do so...they should be taking personal responsibility for their actions."

When asked for comment, the Sphinx responded "What goes on four feet in the morning, two feet at noon, and three feet in the evening?".

Law student belatedly attempts to explain Novak Djokovic situation at family dinner

Justin Lai

In the ever-changing, washing-machine-filled-with-bricks of a world in which we currently have the displeasure of living in, one thing is for certain - law students will attempt to explain anything to anyone, so long as it is remotely legal or intersects with something that they read for university. On Christmas Day, Jeremy Born, a third year Arts/Law student studying at the University of Sydney, reportedly attempted to explain the situation regarding the world No. 1 tennis player, and the cancellation of his visa to his family at the Born home dinner table.

According to his sister Erika, Jeremy had recently completed LAWS1021 (Public Law), and was eager to demonstrate his understanding of state and national border regulations. Witnesses at the scene note that Jeremy began his account by observing the parallels between the present situation and that prescribed in his Public Law exam. He reportedly made statements such as, "Well, the first step that you have to ask is whether the Australian Border Force is a federal agent" and "It is unlikely Tennis Australia satisfies the requirements of a Chapter 3 court as per the Constitution".

According to Jeremy, the Commonwealth and the States "have been a bit pissy with each other" ever since the turn of the 20th century, and that "the Federation is to blame" for the issues regarding Djokovic's visa. Regarding the powers of the Government, Jeremy observed that "they can basically detain whoever they want", referring to cases such as Lim's Case (1992), Falzon v Minister for Immigration and Border Protection (2018), and Al-Kateb v Godwin (2004). He noted on the latter that "Justice Kirby's judgment is apparently pretty good, but I haven't read it yet."

When asked about his stance on the matter, Jeremy stated that "Public really just wants you to examine both sides of the issue, so you don't really need to come to a conclusion or anything." He did not adjudge further. His father, Mark, noted that Jeremy had previously attempted to explain the logistics of border restrictions and closures as a result of the COVID-19 pandemic in early 2020 - with, as the family noted, relatively little success. When asked to elaborate on any points raised, Jeremy responded by noting that Public Law "was merely an introduction to Fedcon" and that he could not properly explain until "like around Sem 2 next year".

What we learn from Premium LinkedIn

Grace Roodenrys

What is the real benefit of a Premium LinkedIn? When you hear a friend chatting about the upgrade one day, you wonder. Perhaps it's the quality of the 'Online Learning Courses,' or the little gold icon at the top of your page. Perhaps it's the power of the 'InMail Credits,' that amorphous feature you're assured is '2.6x more effective than emailing.' Yes, any of these things might compel the desperate user to make the Premium upgrade. Times are tough for graduates, after all. But really you wonder if there is not, in fact, one reason for the Premium LinkedIn. Whether we simply can't admit to ourselves the real – the only – sell. For of course, the Premium user can view who has looked at them. The Premium user can see.

The power to see who has viewed you.

The more you contemplate this prospect, the more terrible, lawless, deranged, it becomes.

Why, *why*, would anyone need to see who has looked at their profile? What possible legitimate purpose could this serve? You lie awake at night tallying your mistakes, the many classmates who might have seen you looking, the friends who could have noticed you on their profile at 1am and registered the incident with vague alarm. You marvel that the feature is explained in such agreeable corporate terms

(*'turn views into opportunities'!*),

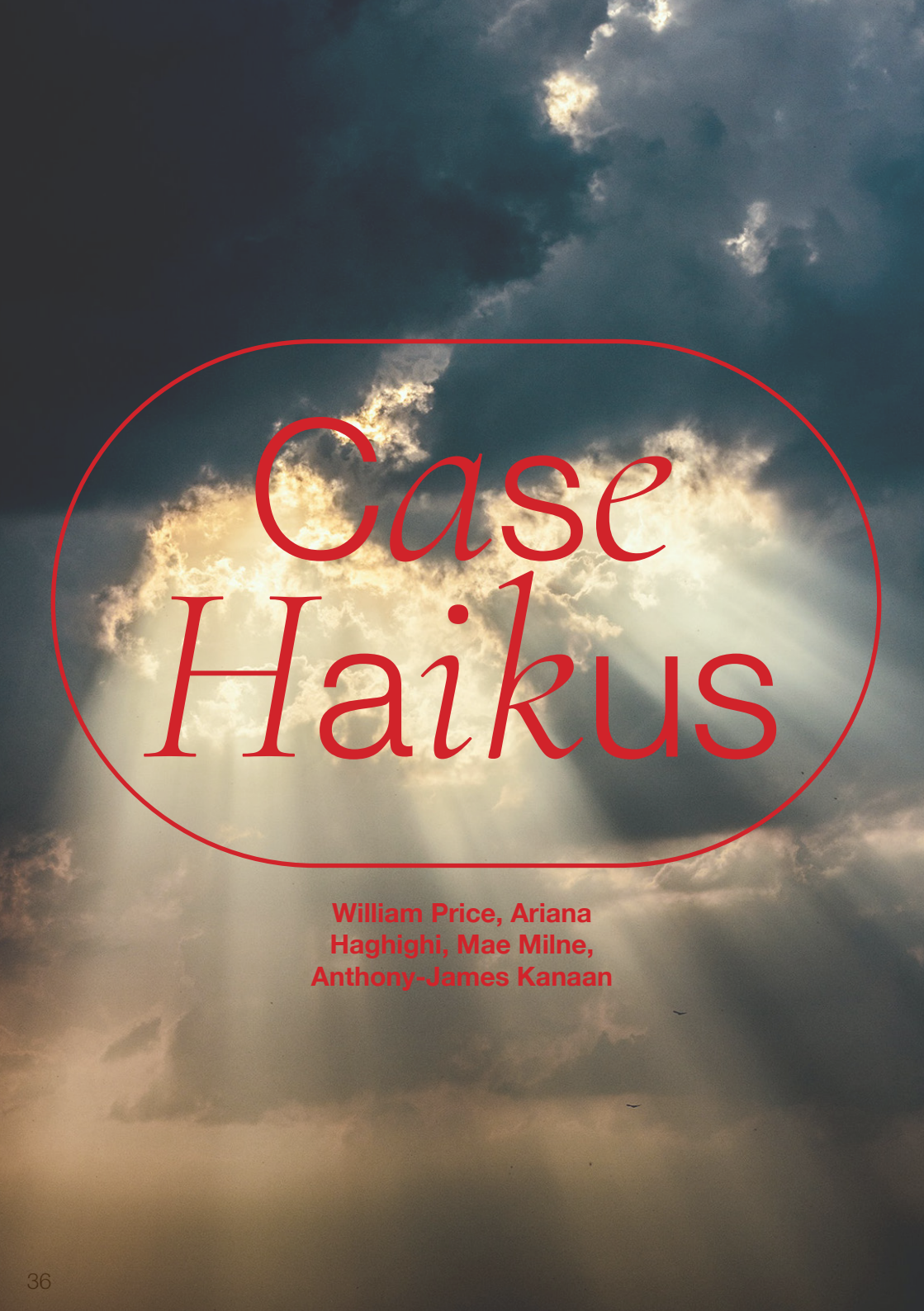
as if anyone could deny that its most basic satisfaction is so much more cheap, so base. For isn't it surely about the ego? About being seen? More than that – isn't it about seeing oneself being seen, in the way you are compelled to check in on who has viewed an upload, or to stare at yourself in the mirror for ten minutes in the middle of your day? This is American Psycho territory, you think, this is modern-day Patrick Bateman. You picture the Premium users scrolling their views with unfeeling expressions, these shells of shells, these copies of copies of copies. You imagine them pinning their faces on Zoom for two hours, watching themselves move, wondering, always, who may be looking.

And so the Premium User is, you conclude, a psychopath. They are also annoying, intent on ruining the party for those of us who only want to enjoy this site's two redeeming pleasures – to envy others and hate yourself – in peace. But you should also raise a glass to Premium User. The truth is, you owe them a debt. The fact of their existence is the only thing that gives you cause to hesitate before comparing your achievements with every person in your Zoom class; theirs is the presence that regulates you when your impulse to destroy yourself is at its worst. But most of all, Premium User is so much like the rest of us. They are trying a little too hard, betraying a little too much of their desperation. Sometimes, curating your LinkedIn to add this job and that prize, you wonder if this is a kind of death, if we are dying. Premium User, in the bareness of their need, consoles you. We aren't dead, just human. And this is what we have always done – looking into the gaze of others to count how many are looking, to assure ourselves, as we sometimes need to, that we are there.

Patrick Bateman

Specialist in Mergers and Acquisitions @ Pierce & Pierce.

Connect



Case Haikus

William Price, Ariana Haghighi, Mae Milne, Anthony-James Kanaan

Bribery Commissioner v
Ranasinghe (1965)
Ranasinghe bribed
He was convicted of it
He took court to court

Croucher v Cachia (2016)
From ancient grudge break
To throwing shears in his face
Unclean hands and blood

Strong v Woolworths (2012)
A chip on the ground
And a failure to clean it
Is there causation?

Scott v Shepherd (1773)
Do not throw a squib
Through a market square or else:
Liability.


Donoghue v Stevenson (1932)
Always pour a glass
Of your favourite bottled drinks
Or you'll eat a snail!
Myer Stores v Soo (1991)
I love shopping at
Myer! It's my favourite store.
Oh no wait, I'm trapped!
Graham Barclay Oysters Pty Ltd
v Ryan (2002)
Oysters are a treat
To celebrate, but beware:
Hepatitis A.
Home Office v Dorset Yacht Co Ltd (1970)
Someone stole my yacht!
This is what I get when I
Live near a juvy.
Perre v Apand (1999)
Experimental
Potato seeds are risky!
And Unsellable!