MACQUARIE
LAW SCHOOL
Faculty of Arts

MACQUARIE
University

Macquarie Law Journal

VOLUME 19, 2019

TECHNOLOGY AND CIVIL DISPUTE RESOLUTION

The *Macquarie Law Journal* is currently published annually and is available exclusively online on an open access basis. Editions of the journal may be general editions or focused on a theme chosen by the Editor. The journal welcomes all contributions, and is especially interested in contributions of an interdisciplinary character.

Articles should be between 8 000 and 10 000 words in length, while shorter papers between 4000 and 6000 words may also be published. Case notes, reports on recent developments and book reviews should be approximately 1 500–2 000 words in length. References and footnotes are not included in the above word counts. All articles and shorter papers submitted for consideration are subject to a formal process of peer review by at least two academic referees with expertise in the relevant field.

All manuscripts should be submitted in Microsoft Word format only as email attachments addressed to The Editor, *Macquarie Law Journal* at law.publications@mq.edu.au. Manuscripts must be accompanied by a separate abstract of approximately 200 words together with a very short author biography. The format for referencing must comply with the style outlined in the most recent edition of the Australian *Guide to Legal Citation*. Submitted manuscripts should contain original unpublished material and are not to be under simultaneous consideration for publication elsewhere.

Editorial communications should be addressed to law.publications@mq.edu.au or:

The Editor
Macquarie Law Journal
Macquarie Law School
Macquarie University NSW 2109 AUSTRALIA

* * *

This issue may be cited as **(2019) 19 MqLJ**

ISSN [1445-386X]

© *Macquarie Law Journal* and contributors 2019
Design by Macquarie Law School, Macquarie University

Shared Identity Compliance Code: BC0791

Macquarie Law Journal

VOLUME 19, 2019

PATRONS

The Hon Michael Kirby AC CMG
Formerly Justice of the High Court of Australia

The Hon Deirdre O'Connor
Formerly Justice of the Federal Court of Australia

EDITOR

Ilija Vickovich

GUEST EDITORS

Felicity Bell
Michael Legg

STUDENT EDITORS

Aadidev
Jessica De Almeida E Silva
Emily Graham
Lisa Huang
Usman Naveed
Austin Wang

EDITORIAL BOARD

Upendra Baxi
University of Warwick
University of Delhi
Tony Blackshield AO
Macquarie University
Mitchell Dean
University of Newcastle
Anton Fagan
University of Cape Town
Desmond Manderson
Australian National University
Lawrence McNamara
University of York
Bingham Centre for Rule of Law
Leslie Moran
University of London
Ngaire Naffine
University of Adelaide
Paul Patton
University of New South Wales
Wuhan University
Stanley L Paulson
University of Kiel
Ian Ramsay
University of Melbourne
Alexander Reilly
University of Adelaide
Stephen A Smith
McGill University
Margaret Thornton
Australian National University

Macquarie Law Journal

VOLUME 19, 2019

CONTENTS

Editors' Note 1

Annual Tony Blackshield Lecture

Small Steps and Giant Leaps: Patterns in Australian Constitutional Adjudication 5
Justice Stephen Gageler AC

TECHNOLOGY AND CIVIL DISPUTE RESOLUTION

Articles

Just, Quick and Cheap? Civil Dispute Resolution and Technology 17
Tania Sourdin, Bin Li and Tony Burke

Digital Justice: Online Resolution of Minor Civil Disputes and the Use of Digital Technology in Complex Litigation and Class Actions 39
Peter Cashman and Eliza Ginnivan

The Current Landscape of Blockchain-Based, Crowdsourced Arbitration 81
James Metzger

Family Law, Access to Justice and Automation 103
Felicity Bell

Meeting the Access to Civil Justice Challenge: Digital Inclusion, Algorithmic Justice, and Human-Centred Design 133
Lisa Toohey, Monique Moore, Katelane Dart and Dan Toohey

The Automation Paradox in Litigation: The Inadequacy of Procedure and Evidence Law to Manage Electronic Evidence Generated by the 'Internet of Things' in Civil Disputes 157
David Caruso, Michael Legg and Jordan Phoustanis

Technology-Aided Learning in Dispute Resolution and Evidence: Combining Video with Online Annotation/Discussion in a Blended Learning Design 189
Kathy Douglas, Tina Popa, Christina Platz and Meg Colasante

Contributors 209

EDITORS' NOTE

Technology has been infiltrating the civil justice system for some time, providing efficiencies or conveniences that were not previously possible. There are now many instances of digital uplift: video-conferencing for witness testimony or argument by counsel; email and online portals for the filing and (in some cases) service of documents; real-time court transcripts; instant messaging for case management hearings; and webpages and social media by which courts communicate with the public. While important, these types of technological change are generally not characterised as transformative or disruptive.

More recently, though, with the advent of artificial intelligence (AI), blockchain and the Internet of Things, civil justice has started to see more significant changes. These offer the prospect of a great leap forward in advancing access to justice, yet simultaneously raise concerns about the nature of the justice provided. Such changes implicate the future of the legal profession itself, with forecasts both optimistic and pessimistic. The Chief Justice of the High Court of Australia, the Hon Susan Kiefel, in speaking on social change made reference to the impact of technology as follows:

> Technology is no longer seen merely as a tool to facilitate the delivery of legal services. It is also portrayed as a possible threat, particularly in the continuing development of artificial intelligence. This might be something of a distraction. Very few commentators with an understanding of legal advice, advocacy, adjudication and dispute resolution would suggest that they could be completely overtaken by AI.[1]

The Chief Justice's observations raise the question of where the dividing line between human and machine can, or should, be drawn in the various steps that comprise dispute resolution.

The articles collected in this volume both elucidate and critique the operation and effects of technological innovation on the civil justice system. This necessarily calls into question future roles for lawyers and the education and training required for lawyers and law students.

A common theme of many articles collected here addresses concerns about how technology may be harnessed to improve access to justice while maintaining the rule of law, or core values such as equality and fairness. Further, new technologies may assist courts but they have also facilitated dispute resolution competitors. Courts have always operated with alternative dispute resolution (ADR) as a possibility, but the range of ADR has broadened. Capabilities continue to expand as technology enables online dispute resolution that can connect legal advice, problem identification and problem resolution.

---

[1] The Hon Susan Kiefel, Chief Justice of the High Court of Australia, 'Aspects of the relationship between the law, economic development and social change and the importance of stability', *2019 Queensland Bar Association Conference*, Brisbane, 2 March 2019.

Tania Sourdin, Bin Li and Tony Burke examine how technology may impact on the now accepted civil justice system objective, or overriding purpose, of the just, quick and cheap resolution of the real issues in the proceedings. However, they first question what is 'justice' and indicate that it may be located outside the formal justice system in alternative dispute resolution. Technology may therefore facilitate access to justice in this broad sense through the provision of information and the resolution of disputes without resort to courts. The authors also question the 'innovation readiness' of lawyers, judges and consumers.

Peter Cashman and Eliza Ginnivan examine technology's impact on civil justice at the two ends of the civil justice spectrum: low value disputes unique to an individual and high value claims created through the aggregation of related individual claims. Their article details the development in numerous jurisdictions of online dispute resolution (ODR) for dealing with low value disputes and raises concerns about open justice and procedural fairness. The focus then turns to class actions and the use of technology to manage claims and evidence through to settlement distribution.

James Metzger also explores ODR but from a novel perspective – the rise of platforms that promise to use blockchain technology to decentralise dispute resolution by crowdsourcing the adjudication of disputes to a worldwide pool of willing juror-arbitrators. The particular conceptions of justice that they promote are explored by examining a number of platforms and how they operate.

Concern about fairness for parties in the family law sphere is examined in greater detail by Felicity Bell. Her article highlights the dangers for vulnerable parties and children when data that perpetuates historical biases is used to fashion a variety of resolutions. The article argues for differentiated case management that can harness efficiencies for parties, but also highlights the role that lawyers can play as a central protection for those at disadvantage.

Lisa Toohey, Monique Moore, Katelane Dart and Dan Toohey add to the debate by raising the issue of 'legal design' – the application of human-centred design to law – in order to assess and foster the creation of usable, useful, and engaging legal services. The authors also point to the need to consider algorithmic fairness and questions of accessibility and digital exclusion.

While technology can facilitate dispute resolution, it also changes how the rest of the world operates. These changes then permeate the justice system, through discovery and then evidence, when disputes arise. David Caruso, Michael Legg and Jordan Phoustanis examine the Internet of Things – objects, devices, machines and buildings that incorporate data gathering, handling and transmission technology – which is already widespread, and likely to be ubiquitous in both business and domestic settings of the future. This article examines the electronically stored information gathered by these everyday objects from the perspective of the discovery process, and the admissibility and authentication of this data for use in court.

Kathy Douglas, Tina Popa, Christina Platz and Meg Colasante address the use of technology in legal education as a way to prepare law students for practice. Their article focuses on the use of video to demonstrate dispute resolution skills such as

negotiation/mediation and advocacy, supported by online discussion technology to reflect on the skills demonstrated in the video. Technology offers an opportunity to articulate required legal skills through realistic exemplars.

This volume of the Macquarie Law Journal develops the current debates in civil justice and technology, while also putting forward possible solutions. It therefore adds to a growing literature that identifies technology as both opportunity and threat, and evidences the importance of scrutiny, informed debate, and research at the intersection of law, dispute resolution, and technology. The Chief Justice of the Supreme Court of New South Wales, the Hon T F Bathurst, in speaking about artificial intelligence, observed:

> Many of the concepts involved in these technologies are unfamiliar and difficult to get your mind around without the proper education and training. A slow and deliberate response to these technologies therefore makes a great deal of sense, since our legal system forms the bedrock of our society, and these technologies have the potential to introduce significant changes in how it operates. It is therefore incumbent upon us to understand how these technologies work and how they will affect our legal system.
>
> Whatever changes we might wish to make, we must always ensure that they do not compromise the fundamental values and principles which underpin our legal system.[2]

In the context of the justice system the opportunities and threats of technology are arguably magnified, because justice itself – including equality before the law, and its central role in a democratic society – is at stake.

We would like to express our gratitude to the authors who contributed to this special edition, as well as to the academics and experts who provided peer review of submissions. The breadth and quality of the published papers underpin the strength of this edition's contribution to the growing body of much needed research in the field of law and technology.

Our appreciation and thanks are also owed to Justice Stephen Gageler of the High Court of Australia, who kindly agreed to the publication in this edition of a revised version of the lecture he delivered at the Macquarie Law School's annual Tony Blackshield Lecture in November 2018.

Finally, we wish to express our thanks to, and commend the excellent efforts of, the Student Editors. They have laboured diligently to make this publication possible while working towards their degrees at Macquarie Law School.

Felicity Bell
Michael Legg
Ilija Vickovich

---

[2] Hon T F Bathurst, Chief Justice of the Supreme Court of NSW, 'Opening Remarks', *Law Society of NSW Future of Law and Innovation in the Profession (flip) Stream Seminar*, Banco Court, Supreme Court of NSW, Sydney, 10 May 2019.