

**PREFACE: CARTELS, OPTIMAL ENFORCEMENT AND THEORIES IN  
COMPETITION LAW**

This special issue of the *University of Queensland Law Journal* commemorates the research of a former outstanding University of Queensland (UQ) PhD candidate and recipient of prestigious American Bar Association and UQ scholarships, Laura Guttuso. Laura fell sick unexpectedly and passed away in 2016 while conducting research in the United States of America (US) for her PhD thesis entitled ‘In pursuit of cartels — a critical analysis of the dynamics between public and private enforcement’. Her unfinished thesis had the potential significantly to contribute to competition law at the global level as recognised by the contributors to this special issue. The articles by leading national and international scholars contained in this issue develop and analyse elements of Laura’s unfinished PhD research. The contributors all influenced Laura, were in contact with her, and are familiar with her research.

The variety of topics demonstrated throughout this special issue shows that Laura took a broad approach to her PhD topic on optimising private and public enforcement of anti-cartel law, and that she was inclusive of many views, theories and ideas which were multijurisdictional and went beyond competition law itself. This special issue deals with various theoretical and practical aspects of Laura’s PhD thesis, looking at certain issues from the Australian, European Union, US or global perspectives. A number of articles draw on research based in fields other than competition law, such as tort law, criminal law and corporate law, applying them to competition law enforcement.

In her PhD thesis, Laura proposed to conceptualise a novel and holistic approach for the public and private enforcement of anti-cartel law which would ‘move beyond a conventional outlook purely based on utilitarian theories of optimal deterrence and economic efficiency’. This special issue begins with articles which look at this overriding theme more broadly while using specific expert lenses. It then continues with articles analysing concrete sub-topics and other elements within the ambit of Laura’s thesis.

The opening article is written by Professor Kit Barker, who takes a general approach to enforcement hybridity by exploring it in various fields of law. He argues that the public and private enforcement hybridity is rather a rational practice, which has a legitimate place in the modern law. The second article, written by Associate Professor Chris Noonan, analyses the public and private enforcement of anti-cartel law within multi-jurisdictional settings and its application to cartels operating internationally. He argues that private enforcement in one jurisdiction impacts public enforcement in another jurisdiction and vice versa and thus that anti-cartel law enforcement involves both pluralism in approaches and in jurisdictions. The third article, written by me, provides arguments for a pluralistic approach to substantive competition law in general. It concludes the theme common to all three articles postulating that a pure utilitarian approach is not sufficient, and a pluralistic approach is better suited to competition law.

Professor Ross Grantham’s article expands on an aspect of regulatory theory relevant to Laura’s thesis. He starts from the assumption that the enforcement of law is more effectively achieved when the strategy of self-execution is incorporated in law. The principal precondition for this strategy is that legislation effectively communicates to the participants the regulatory goals in the form of rights, duties, processes and procedures. Grantham analyses these regulatory-strategy attempts in Australian corporate and consumer laws and concludes that this strategy has not been sufficiently achieved in the relevant legislation. In the fifth article Professor

Simon Bronitt and Alessia D'Amico also reflect on regulatory theory and draw some conclusions for competition law enforcement from an anti-corruption law and policy perspective.

The sixth and seventh articles continue to explore a number of topics related to Australian competition-law enforcement and are written by leading scholars on anti-cartel law in Australia. Honorary Professor Brent Fisse argues for and proposes an integrated public and private enforcement order in the form of redress facilitation orders in competition law. Professor Caron Beaton-Wells and Associate Professor Julie Clarke focus on the criticism of the low level of penalties in Australia as outlined in a report prepared by the Organisation for Economic Development and Cooperation (OECD) and published in March 2018. They extend the OECD analysis by highlighting 'significant differences between the Australian and international methods of penalty-setting'. They call for revisions to the method in Australia arguing for increasing penalty levels and strengthening deterrence of cartel conduct.

The next three articles, written by experts from the United Kingdom, focus on private enforcement in the European Union. Professor Renato Nazzini analyses whether cartel damages claims can be subject to arbitration under EU law. Nazzini discusses several conflicting cases and concludes that the EU law and international arbitration law allow the arbitrability of EU cartel damages claims. The two other articles, one by Dr Albertina Albors-Llorens and the other by Professor Andreas Stephan, analyse the EU Damages Directive, 2014/104/EU. Albors-Llorens explains that while the Directive is significant as it constitutes a novel legal instrument not only in EU competition law, but also in EU law in general, it also encompasses significant difficulties. Stephan argues that the EU aspiration to promote private enforcement in competition law lacks a coherent purpose and that the Directive can damage rather than enhance enforcement of EU competition law.

The issue ends with an article written by Professor Spencer Weber Waller who pays a fitting tribute to Laura's research on the intersection of private and public enforcement of anti-cartel law. He discusses in further detail one of her principal areas of research, the role of the leniency policy, paying particular attention to the US experience.

I would like to thank all the contributors for joining in and expanding Laura's excellent research. Earlier drafts were presented at the international symposium 'Cartels, Optimal Enforcement and Theories in Competition Law' in Brisbane in March 2018. I would like to thank the sponsors, the Ian Potter Foundation,<sup>1</sup> the Australian Institute for Business and Economics, the TC Beirne School of Law, law firms: Herbert Smith Freehills, Ashurst, and King and Wood Mallesons, and Laura's family and friends for financially supporting the symposium. Finally, I am very grateful to the journal's General Editor, Professor James Allan, for his ongoing support and editorial expertise.

*Rest in peace, Laura.*

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The University of Queensland.

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<sup>1</sup> *The Ian Potter Foundation is one of Australia's major philanthropic foundations. The Foundation makes grants nationally to support charitable organisations working to benefit the community across a wide range of sectors including the arts, environment, science, medical research, education and community wellbeing. The Ian Potter Foundation aims to support and promote a healthy, vibrant and fair community for the benefit of all Australians.*