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LECTURE

Proportionality: A rule of reason – *The Hon Justice Susan Kiefel AC*

Sir Anthony Mason was a Justice of the High Court for 23 years, the last eight of which as Chief Justice. He presided over many landmark cases and was influential in many developments of the law. Lest this sound like a tribute to a person of the past, I should add that Sir Anthony now sits as a non-permanent member of Hong Kong's Court of Final Appeal. It is evident from a number of Sir Anthony's judgments in the High Court, and extra judicial writings, that he was a proponent of proportionality as a general legal principle to be applied in order to test the excessive use of legislative power. This has influenced my choice of topic for this lecture. 85

ARTICLES

Jurisdictional error after Kirk: Has it a future? – *The Hon Justice John Basten*

Courts, tribunals and other decision-makers may err in various ways. Judicial review of administrative decision-making depends upon identification of legal error. In the presence of a privative clause, review of any decision depends upon identifying "jurisdictional error", a category which is as difficult to define. It is now of constitutional significance because it identifies the limit of legislative power to diminish the supervisory jurisdiction of a State Supreme Court. A preferable course to the use of privative clauses to control judicial intervention may be to impose a leave requirement on the exercise of judicial review generally. That would allow the courts to adopt a nuanced approach (sometimes described as "functional and pragmatic") to achieving a balance between excessive intervention in decision-making from which there is no right of appeal and maintaining regularity in the administration of justice. Excess or want of jurisdiction can then return to a more limited role in guaranteeing the supervisory jurisdiction of a Supreme Court. 94

Judicial review of the administration of parliamentary elections – *Graeme Orr*

The integrity of parliamentary elections is of obvious importance. This article discusses the judicial role in overseeing the administration of electoral law. Although the question dates back over three centuries to the momentous case of *Ashby v White*, the jurisdiction of Australian courts to intervene, under general judicial review law, remains in doubt. The historical and doctrinal reasons for this doubt are explored here. The article also canvasses theoretical and practical arguments about judicial review of electoral administration, concluding in favour of a liberal approach to such jurisdiction. 110

An obituary for s 25 of the Constitution – *Anne Twomey*

The least controversial of the recommendations of the Expert Panel on the Constitutional Recognition of Indigenous Australians was that s 25 of the Constitution should be repealed. The provision is generally regarded as "racist" and no longer fit for inclusion in the Constitution. This article challenges that assumption. It discusses the anti-racist intent of s 25 and its derivation from the United States 14th Amendment. It analyses its relationship with other provisions of the Constitution and why it proved ineffective in discouraging discrimination against Aboriginal people. It considers the judicial use and misuse of s 25 and some of the misconceived grounds given for its repeal. It concludes that while it may yet be appropriate to repeal s 25, this should be done with due recognition of its intended role and that its time has simply passed. 125

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