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SPEECH

Rights and Freedoms and the Rule of Law – *The Hon Robert French AC*

There is a general belief that the rule of law is a guarantor of rights and freedoms. However, in the Victoria Law Foundation Oration for 2017, the Hon Robert French AC explored whether rights and freedoms could be eroded by the system which is supposed to be protecting them. 109

ARTICLES

Towards Indigenous–Settler Federalism – *Dylan Lino*

For more than a decade, Australians have been debating whether and how to "constitutionally recognise" the continent's first peoples, the Aboriginal and Torres Strait Islander peoples. As these debates have evolved, Indigenous people have increasingly demanded that their identities as peoples be better recognised. The claims of Indigenous peoplehood, with their internationalist dimensions, present both a conceptual challenge – of reconciling Indigenous peoplehood with an ongoing Indigenous–settler constitutional association – and a justificatory challenge – of justifying the recognition of Indigenous peoplehood within Australia's liberal–democratic constitutional traditions. This article argues that federalism, understood as self-rule combined with shared rule, provides a way of conceptualising and justifying the recognition of Indigenous peoplehood that falls between settler and Indigenous traditions. The article also shows how three major contemporary proposals to recognise Indigenous peoplehood – Indigenous parliamentary representation, treaties and the establishment of Indigenous States and Territories – can all be productively understood in federal terms. 118

The Masking of Judicial Power Values: Historical Analogies and Double Function Provisions – *James Stellios*

It is well established that courts exercising Commonwealth judicial power cannot exercise non-judicial power unless it is incidental to the exercise of judicial power. The establishment of that principle reflects a deep-seated commitment to a range of constitutional values. However, in determining whether a power is judicial or non-judicial in character, the High Court uses two analytical techniques to expand judicial power: reliance upon historical analogy and viewing provisions as performing a "double function". This article seeks to explain that this treatment of judicial power runs the risk of forestalling important questions about the content and purpose of judicial power and the orientation of the separation of judicial power principles. 138

Adequacy of Risk Assessment in the Exercise of the Character Cancellation Power under the Migration Act 1958 (Cth) – *Joel Townsend*

Australian public law seeks to distinguish between the legality and the merits of executive decision-making. Australian judges have in the past been reluctant to interfere with the decisions by the Minister for Immigration to cancel or refuse visas on "character" grounds. This deference has been tested in the context of judicial review of cancellation and refusal decisions, as judges have become concerned about the use of the "character cancellation" power and increasingly aware of developing social science in relation to the prediction of future behaviour. This article considers the developments in a number of recent judgments in challenges to visa cancellation decisions, with a focus on *Tanielu*, *Moana* and *Cotterill*. These cases grapple with the question of when a decision-maker will fall into jurisdictional error by way of failing to conduct an adequate assessment of risk of reoffending. They also demonstrate the overlap between categories of jurisdictional error, and the continuing development of "legal unreasonableness" arguments in judicial review proceedings. 158

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