

# PUBLIC LAW REVIEW

Volume 29, Number 2

2018

COMMENTS – *Editor: Dan Meagher*

<b>The Constitutional Price of Justice</b> – <i>Matthew Groves and Jill Murray</i> .....	97
<b>State Tribunals, Judicial Power and the Constitution: Some Practical Responses</b> – <i>Anna Olijnyk and Stephen McDonald</i> .....	104
<b>The French Court and the Kable Doctrine</b> – <i>Fiona Wheeler</i> .....	111

ARTICLES

**Evading Scrutiny: Orders for Papers and Access to Cabinet Information by the New South Wales Legislative Council** – *Sharon Ohnesorge and Beverly Duffy*

The Egan cases confirmed the power of the New South Wales Legislative Council to order the production of state papers, with the exception of documents revealing the actual deliberations of cabinet – “true” cabinet documents. At present, the Council remains largely unaware of how many documents are being withheld by the Executive on this basis, let alone whether the documents withheld are “true” cabinet documents. With this scrutiny gap in mind, this article examines the manner in which courts and tribunals deal with cabinet documents in the context of public interest immunity claims, before making a case, on constitutional grounds, for the Council to have access to all cabinet documents. Finally, while acknowledging that there is no easy solution, the article proposes some potential options for reform, such as a role for the independent legal arbiter, to ensure that the Council is able to exercise fully its constitutional role holding the Executive to account. Recent controversies regarding cabinet documents in other Australian jurisdictions, as well as the publication of “The Cabinet Files” by the ABC in February 2018, make this discussion particularly relevant. ....

118

**After Kong Yunming v Director of Social Welfare: The Status of Socioeconomic Rights in Hong Kong** – *Pok Yin S Chow*

In the 2014 landmark case of *Kong Yunming v Director of Social Welfare* the highest court in Hong Kong recognised the justiciability of socioeconomic rights enshrined in the city’s “mini-constitution”. However, the case left crucial questions unanswered — one of which relates to the standard of review to be adopted for adjudicating on socioeconomic rights, given the traditional concern for the separation of powers. This article appraises the development of constitutional reviews in relation to socioeconomic rights post-Kong Yunming. It explores the attempt by the Hong Kong courts to impose coherence on this area of law and how they sought to avoid the dangers of transgressing into the realms of the Executive through the application of the concept of proportionality. Such attempts bring to light novel perspectives and may prove valuable in those parts of the common-law world where the justiciability of socioeconomic rights is not currently recognised. ....

133

**Parliamentary Appointment or Popular Election? Breaking the Impasse on Models for an Australian “Westminster Republic”** – *Michael Duffy, Steve Perryman and Anthony Cianflone*

The question of creating an Australian head of state is a symbolic, constitutional and governance issue that remains unresolved. The lesson of the 1999 referendum is that for the current constitutional arrangements to be modified, there will need to be some consensus on a model. Yet at present the movement is deadlocked between a direct election model and a parliamentary appointment model with substantively different implications. There is therefore a great challenge to create a model that satisfies both the desire for popular electoral input and the desire to retain an essentially ceremonial and politically neutral non-executive head of state. After reviewing extant models (including relevant overseas models) and historical and conceptual issues, the problems of a full popular vote are discussed. The article then responds by introducing new concepts to the debate. These are: (1) “Tri-partisan Endorsement” (or “Three-way Support”) being a three-party endorsement of a single candidate to face the voters along with any other nominees in an open popular election; (2) “Fifty-Fifty” being a method for appointment of an Australian head of state which involves aggregating the results of a parliamentary and a popular vote. The first seeks to achieve a politically neutral candidate while the second seeks to moderate the parliamentary vote for such head of state with a popular vote and vice-versa. The two concepts are separate but might also be utilised in combination in a single model. Finally, the article proposes a partial response to the unresolved “1975” dilemma through “Concurrent Expiration” where a head of state who removes a Prime Minister against the will of the House of Representatives will see the former’s own tenure expire 75 days after the holding of the ensuing election (subject to possible re-election). The article concludes that such concepts offer hope for the development of a judicious consensus model capable of achieving the support of the Australian people at a referendum. .... 147

BOOK REVIEW – *Editor: Janet McLean*

**Political Jurisprudence** – *Reviewed by Edward Willis* ..... 173

DEVELOPMENTS ..... 176