

PUBLIC LAW REVIEW

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ARTICLES

The neurobiology of judicial decision-making: Indigenous Australians, native title and the Australian High Court – *Hayley Bennett and GA (Tony) Broe*

This article reviews the scientific literature on the neurobiology of decision-making, with particular emphasis on the role of emotion and how the processing of emotional information relates to decisions with utilitarian outcomes, as opposed to decisions that benefit an individual or minority group. This information is then applied to the decision-making approaches taken in two Australian native title cases, the 1992 High Court decision in *Mabo* and the later decision in *Yorta Yorta*. While the majority in *Mabo* recognised the native title rights of indigenous Australians and framed the decision in emotive terms, *Yorta Yorta* has been seen as narrowing those rights, with the majority decision being framed in ultra-clinical and under-emotional terms. The results of this analysis are discussed in terms of the complexity of judicial decision-making, and of the role and responsibility of the court, as opposed to the Parliament, in protecting the rights of weak and vulnerable individuals or minority groups. 112

Semi-presidentialism and stability: Evaluating the constitutional design of the Executive in Timor Leste – *Nicholas Duff*

Political upheaval in Timor Leste since independence has frequently been described in terms of tension between the President and Prime Minister, such tension coming to a head in the 2006 crisis which culminated in the Prime Minister's resignation. Violence, instability and authoritarian tendencies in Timor Leste have been attributed, at least partly, to the "semi-presidential" character of the country's political system. This article qualitatively assesses the East Timorese experience to test the proposition that semi-presidentialism causes instability or the breakdown of democracy. Is political turmoil in Timor Leste evidence of semi-presidentialism's weaknesses, and are there features of either pure presidentialism or pure parliamentarism that might have prevented or ameliorated such instability? The article concludes that the dual nature of the Timorese Executive has been the source of both stabilising and destabilising tendencies. There is no firm basis for concluding that either pure presidentialism or pure parliamentarism would have produced better results in the same social, historical and economic circumstances. Indeed, there are good reasons to infer that democratic functioning and stability have been better served under semi-presidentialism. Accordingly, political strife in Timor Leste cannot be attributed to the constitutional drafters' choice of a semi-presidential model. 129

Fault lines in the autochthonous expedient: The problem of State tribunals – Geoffrey Kennett

Section 77 of the <i>Constitution</i> permits the investment of State courts with federal jurisdiction, but such jurisdiction cannot be conferred on a body which is not a “court”. Problems arise when a matter that comes within one of the categories in s 75 or s 76 (and would therefore engage federal jurisdiction under s 39(2) of the <i>Judiciary Act 1903</i> (Cth) if it came before a State court) comes before a State tribunal that is not a “court” in the relevant sense. The New South Wales Court of Appeal and a judge of the Federal Court (obiter) have held that in such circumstances the tribunal cannot deal with the matter. It is argued that, while this result is probably correct, the reasoning by which it has been reached is flawed. Alternative approaches are tentatively proposed.	152
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