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The Jim Carlton Annual Integrity Lecture was given on 7 May 2021 for the Melbourne Law School, University of Melbourne. 195

ARTICLES

Structured Proportionality, Unreasonableness and Managing the Line between Executive and Judicial Functions – *Andrew Edgar*

In *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* the Federal Court applied a form of structured proportionality and more traditional unreasonableness review to determine that a regulation suspending live exports of cattle to Indonesia was invalid. The article considers the application of these forms of review to the highly polycentric context in which the challenged regulation was made. It argues that the Court’s application of substantive review made its assessment indistinguishable from the policy judgments made by executive officials. The Court assessed the same risks as the Government, but it weighed the risks in a different manner. The article argues for some additions to the principles of substantive review of regulations that involve consideration of the administrative context in which decisions are made and enables courts to adjust their review by reference to that context. 204

The Relationship between Federalism and Rights during COVID-19 – *Scott Stephenson*

During the early stages of the COVID-19 pandemic, a number of difficult issues involving rights arose for consideration, including with respect to freedom of movement, return to one’s country of citizenship, health care and education. Many of those issues had a federal dimension in Australia, with, for instance, different States adopting different responses to the issue or the Commonwealth and States sharing responsibility for taking action on the issue. This article argues that the response to COVID-19 implicated three aspects of the relationship between federalism and rights, with each yielding a different conclusion. First, federalism affected the protection of rights in a decidedly mixed manner. Second,

federalism affected deliberations on rights in a broadly positive manner. Third, the federal-based protection of freedom of movement in the Constitution proved not to be a substitute for a rights-based protection of freedom of movement. 222

The Interpretation and Application of Section 55 of the Constitution – Anne Twomey

Sections 53 and 55 of the Commonwealth Constitution form the basis of the political compromise that seeks to balance the interests of responsible government against federalism. Section 53 limits the powers of the Senate with respect to laws imposing taxation, while s 55 protects the Senate from the exploitation of this limitation. While s 53 was left to the Houses to apply, a breach of s 55 renders certain provisions of Commonwealth laws to be of no effect. This makes clarity about the interpretation and application of s 55 critical. This article addresses three areas in which this clarity is lacking – (1) whether s 55 applies to the making of delegated legislation; (2) whether provisions that set or increase the rate of taxation are laws “imposing taxation” for the purposes of s 55; and (3) whether s 55 applies to Commonwealth laws which provide for the imposition of taxation in a territory. 236

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