

# PUBLIC LAW REVIEW

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COMMENT – *Editor: Dan Meagher*

<b>Chetcuti and Exclusion under the Australian Constitution – The Ongoing Story of Alien Status – <i>Elisa Arcioni</i></b> .....	3
<b>Fitzgerald v The Queen: Further Commentary on Rights-Consistent Statutory Interpretation in Aotearoa-New Zealand – <i>Sarah Jocelyn and Andrew Geddis</i></b> .....	8
<b>Referendums, Misinformation and the Law – <i>Graeme Orr</i></b> .....	13

## ARTICLES

### **The Constitutional Injunction and Jurisdictional Error – *Jonathan Tjandra***

This article argues that the injunction in s 75(v) of the Constitution available to restrain government action that is unlawful but does not amount to jurisdictional error through the application of the approaches to the interpretation of the constitutional injunction in the recent High Court decision, *Smethurst v Commissioner of Police*. Using cases from the United Kingdom and the United States prior to Federation, I will demonstrate that the injunction has historically been issued in the courts' equitable jurisdiction to prevent any and all breaches of the law by public officials. Further, the wide scope of the injunction also gives effect to Constitutional principles such as the rule of law and the long common law tradition of using private law principles to hold officials to account. Finally, I will discuss several consequences that derive from this conclusion, such as the relevance of discretionary factors, materiality, and any potential effects on the centrality of jurisdictional error to administrative law. ....

19

### **Necessity or Needless? A Distinct Doctrine of Executive Necessity in Australia – *Benjamin John***

*Rederiaktiebolaget Amphitrite v The King* has conventionally been recognised as the origin of the doctrine of executive necessity – that a government cannot fetter its freedom of action in matters which concern the State. Judges have since sought to clarify and narrow the application of the rule. Two Australian cases, *L'Huillier v Victoria* and *Searle v Commonwealth*, however, have broken with this convention and referred to a distinct doctrine of executive necessity without explaining its foundation. This article argues that there are two possible conceptions for a distinct doctrine of executive necessity. The first is that executive necessity enables the government to refuse to perform a contract in the public interest. The second is that the government can terminate a contract with impunity where there is a governmental power to do so. At the federal level, the only non-statutory power that could terminate a contract is the executive power. ....

40

**Why Div 105A of the Criminal Code 1995 (Cth) Is Incompatible with Human Rights (and What to Do about It) – Andrew Dyer and Josh Pallas**

The Independent National Security Legislation Monitor, Grant Donaldson SC, has recently announced that he will be reviewing *Div 105A of the Criminal Code Act 1995* (Cth), which allows continuing detention orders to be made against certain terrorist offenders whom the state can prove would pose an unacceptable risk of committing particular terrorist offences if they were to be released from prison (even if extended supervision orders were imposed on them). In this article, we argue that, because the *Div 105A* scheme seems unnecessary, it should be abolished. Alternatively, if that scheme remains in force, the government should ensure that it operates as consistently as possible with Australia’s human rights obligations. The reasoning of certain High Court Justices recently in *Minister for Home Affairs v Benbrika* tends to expose Div 105A’s incompatibility with human rights – and this situation should not be allowed to continue. .... 61

DEVELOPMENTS ..... 83