

# PUBLIC LAW REVIEW

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## COMMENTS

- Drafting a replacement for the races power in the Australian Constitution** – *Rosalind Dixon and George Williams* ..... 83
- New Zealand’s Parliamentary Privilege Bill: The empire finally strikes back** – *Andrew Geddis* ..... 89
- Fortescue Metals Group Ltd v Commonwealth: Discrimination and fiscal federalism** – *Amelia Simpson* ..... 93

## ARTICLES

**A power “singular and eccentric”: Royal commissions and executive power after Williams** – *Nicholas Aroney*

This article addresses two questions about royal commissions that have not been fully resolved in Australian constitutional law. The first concerns the legal nature of the power of the Executive to establish and conduct a royal commission of inquiry: is it a capacity that the Crown has in common with all natural persons or is it an aspect of the prerogative, understood as a power that is unique to the government? The second question concerns the kinds of topics that Commonwealth royal commissions can be authorised to investigate using compulsive powers granted by statute: are they limited to the topics in ss 51 and 52 of the Constitution, or can they address any topic that might potentially be the subject of a proposed constitutional amendment under s 128? This article argues that the High Court’s decision in *Williams v Commonwealth* has implications for both of these questions, first because of its insistence that the Crown in right of the Commonwealth does not possess the contracting and spending powers of a natural person, and secondly due to its emphasis on the relevance of the federal nature of the Constitution when considering the scope of Commonwealth executive power. .... 99

**Rethinking unreasonableness review** – *Leighton McDonald*

In *Minister for Immigration and Citizenship v Li*, the High Court reformulated the unreasonableness ground of judicial review, which had until then been understood in terms of the stringent standard of review associated with the *Wednesbury Corporation* case. The court’s new approach, however, rejects any default or generic standard of review in preference for a reliance on statutory context to determine the required standard of legal reasonableness. This article begins with an examination of the nature of unreasonableness review and considers how this relates to the legality/merits distinction. The article argues that the application of unreasonableness review may involve a consideration of the merits of decisions, including the weight attributed to relevant matters, and that this is accepted by the court in *Li*. The untethering of unreasonableness review from the *Wednesbury* standard raises the question of how unreasonableness review can be reconciled with the theory of legality review as developed in the context of the constitutional separation of judicial power in Australia. This question is explored by reference to (1) judicial conceptualisations of unreasonableness review prior to *Li*, and (2) two broad methodological orientations that may be used to identify reviewable error, namely, a focus on statutory

context and judicially articulated default rules. The article argues that the plurality's contextual approach to the unreasonableness standard of review fits somewhat awkwardly with the High Court's broader doctrine on the role and nature of jurisdictional error and the limited nature of review entrenched by the Constitution. .... 117

**Accountability of the judiciary – Hon Justice McGrath**

The *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) established a new regime for dealing with complaints about judicial misconduct in New Zealand and created the office of the Judicial Conduct Commissioner. This article describes the procedure established by the Act and assesses its operation to date. It identifies difficulties with the administration of the scheme in relation to the large number of complaints that are ultimately dismissed as frivolous, vexatious or beyond the Commissioner's jurisdiction. Further insight into the nature and effectiveness of the process is gained by considering the circumstances and complaints leading to the resignation of a Judge in 2010. This article presents the personal perspective of the author, a Judge of the Supreme Court of New Zealand, on New Zealand's statutory scheme for the accountability of judges. .... 134

DEVELOPMENTS ..... 148