

## Centre for Comparative Constitutional Studies Newsletter

*Number 6 / March 2009*

Welcome to the sixth issue of the Centre for Comparative Constitutional Studies Newsletter, a guide to news and events at the centre and a spotlight on issues in constitutional law nationally and globally.

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### Centre Update

#### HISTORIC GATHERING OF JUDGES: JUDICIAL ROUNDTABLE ON TRANSNATIONAL JUDGING



Left to right: Justice Weinberg, Justice Vickery, Chief Justice French, Professor Dr Jimly Asshiddiqie, Justice Hayne, Chief Justice Black.

On Friday 13 March 2009 the Centre for Comparative Constitutional Studies and the Asian Law Centre hosted 6 leading jurists – including 3 Chief Justices – in a Judicial Roundtable. The Roundtable occurred during the visit of Professor Dr Jimly Asshiddiqie, the foundation Chief Justice of the Constitutional Court of the Republic of Indonesia. Professor Asshiddiqie was joined by Chief Justice French and Justice Hayne of the High Court of Australia, Chief Justice Black of the Federal Court, Justice Weinberg of the

Court of Appeal of Victoria and Justice Vickery of the Supreme Court of Victoria. The theme of

the Roundtable was "Transnational Judging: A Judicial Conversation on Foreign and International Law in Domestic Courts".

The Roundtable was observed by a small invited audience drawn from the profession and the academy. The use of foreign and international materials is highly topical – and occasionally controversial – in Australia. Each judge offered a unique perspective on the practice including Justice Asghidie who, among many innovations made as Chief Justice of the Constitutional Court, encouraged the extensive reference to foreign sources. A robust discussion followed the presentations by the panel Judges.

**Professor Adrienne Stone**, CCCS Director, chaired the Judicial Roundtable on Transnational Judging on Friday 13 March. Also in March, Professor Stone chaired a meeting of the CCCS Advisory Board. Professor Stone reinstated the Constitutional Law Discussion Group meetings and chaired meetings on [K-Generation Pty Limited v Liquor Licensing Court \[2009\] HCA 4](#) (2 February 2009), [Wong v Commonwealth of Australia; Selim v Lele, Tan and Rivett constituting the Professional Services Review Committee No 309 \[2009\] HCA 3](#) (2 February 2009) and [Wurridjal v The Commonwealth of Australia \[2009\] HCA 2](#) (2 February 2009) (The Northern Territory Intervention Case).

Professor Stone was quoted in *MX (Melbourne)* 'Censor requires tuning' (22 January 2009) about iTunes censors and the *Sydney Morning Herald* 'States likely to intervene in bonus court case' (20 March 2009) regarding the High Court hearing about the legality of the planned tax bonus.

**Associate Professor Carolyn Evans**, CCCS Deputy Director, spoke on the *Sunday Nights on ABC radio* programme with John Cleary, a live national discussion from 10pm to 11pm, on the proposed Bill of Rights, with particular emphasis on the religious dimensions of such an issue. The link is: <http://www.abc.net.au/sundaynights/stories/s2446068.htm>

In February Associate Professor Evans travelled to Nepal to participate in a workshop on Constitution Building. Nepal is in the process of writing a new Constitution and the workshop brought together local constitution drafters, law professors, NGOs and international experts. She participated in sessions on federalism, secularism and women's rights.

In March Associate Professor Evans made several presentations in the United Kingdom and the United States. On 17 March she presented a paper on 'Religious Freedom under the European Convention: Cracks in the Intellectual Architecture?' to the human rights group at the Oxford Law School and later participated in a roundtable on the same theme with the Law and Religion group. She presented the same paper to the Law and Religion programme at the Emory Law School in Atlanta on 25 March. On 20-21 March she participated in an invitation-only roundtable on Rescuing Rights at King's College, London where she presented a paper on 'Enhancing Parliamentary Scrutiny of Human Rights'. On 23 March she presented a Distinguished Public Lecture on 'Constitutional Narratives: the Religion Clauses in the Australian and Malaysian Constitution'. The public lecture was one in a series of four to launch the new Centre for International and Comparative Law at Emory.

**Professor Cheryl Saunders**, CCCS Foundation Director, is spending 6 months carrying out research in Oxford, United Kingdom.

**Associate Professor Jeremy Gans** co-wrote a chapter on evidence law (with Andrew Palmer) in a commemorative book on Michael Kirby: Freckleton & Selby (eds), 'Appealing to the Future', Thomson 2009.

**Associate Professor Kris Walker** has a recent publication: Mark Bromley & Kristen Walker, "The Stories of *Dudgeon* and *Toonen*: Personal Struggle to Legalize Sexual Identities" in Hurwitz, Satterthwaite and Ford, eds, *Human Rights Advocacy Stories*, published by Foundation Press in its Law Stories series. The book is a selection of the personal stories

behind some of the major human rights battles of the last century. A recent review stated: "Most of the book's cases fall outside the casebook canon, and they reflect the diversity of human rights triumphs. We read of worldwide campaigns to ban torture; recognise rape as a genocidal crime; and curb World Bank support for megadams; regional campaigns to end sodomy prosecution in Europe and Australia or to promote indigenous rights in the Americas and socioeconomic rights in South Africa; U.S. campaigns to end juvenile capital punishment, to advance the case law on corporate human rights, and to close a forgotten detention camp for Haitian refugees at Guantanamo Bay. Even the regional or national campaigns recounted here have worldwide implications, and most fit the pattern of what Yale Law School's Harold Koh, who helped to free the Guantanamo Haitians, calls "transnational public law litigation": establishing global norms through the ferment of civil society and institutional dialogue."

**Associate Professor Pip Nicholson** was on sabbatical at Monash University from 14 July 2008 until 2 December 2008. On 2 November 2008 she co-chaired an 'Independent Adjudication in Vietnam' Roundtable in Hanoi, Vietnam. She was overseas from December 2008 to January 2009 and visited 4 Institutes in the United Kingdom to present on a range of topics including Asian Legal Studies in a Changing World: Challenges and Opportunities; Analysing Asian Courts: A Vietnamese Case-study; and The Under-explored Challenges of Court-oriented Legal Reform: A Southeast Asian Account.

Associate Professor Nicholson's new book *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (published by Brill, Martinus Nijhoff Publishers, 2008) co-edited with Associate Professor and Reader Sarah Biddulph, was launched by The Hon Justice Susan Kenny, of the Federal Court of Australia, on Monday 16 March, 2009. A link to the flyer is [here](#).

Associate Professor Nicholson has recently submitted a manuscript to Routledge for an edited collection with Professor Andrew Harding on 'New Courts in Asia'. (forthcoming 2010).

In January 2009 **Dr Michelle Foster** was invited to attend the International Association of Refugee Law Judges' 8<sup>th</sup> World Conference, Cape Town where she provided a commentary on a paper entitled 'Violations of Socio-economic Rights as a Form of Persecution and as an Element of Internal Protection' by Kate Jastram, Anne Mactavish, and Penelope Mathew.

On 24 February Dr Foster participated in a roundtable discussion with the United Nations High Commissioner for Refugees, Mr António Guterres in Melbourne, in which she presented a short paper on 'Interception and Reception in the Asia-Pacific Region'.

Recent publications include 'Refugee Law' in Ian Freckelton and Hugh Selby, *Appealing to the Future: Michael Kirby and his Legacy*, 686-720 (Sydney: Thomson, 2009); 'Responsibility Sharing or Shifting? "Safe" Third Countries and International Law', (2008) 25 (2) *Refuge* (forthcoming), and 'Obstacles on the road to protection: Assessing the treatment of sex-trafficking victims under Australia's migration and refugee law' (with Anna Dorevitch) (2008) 9 *The Melbourne Journal of International Law* 1-46.

**Dr Joo-Cheong Tham** recently accepted an invitation to join the IFES' Advisory Group on Global Standards in Political Finance. IFES, the International Foundation for Electoral Systems, is the world's premiere election assistance organization. The Advisory Group comprises 100 internationally recognized experts, regulators and civil society practitioners in political finance (see generally <http://www.ifes.org/about.html>).

Together with Professor Brian Costar, Swinburne University and Dr Sally Young, Melbourne University, Dr Tham recently received a grant worth \$19,000 by the Melbourne University Social Justice Initiative for a project entitled 'Electoral Regulation and the Prospects for Australian Democracy'.

Dr Tham recently had an opinion piece 'Public has a right to know who give how much to whom', published in *The Age*, 2 February 2009 and he was also quoted on the topic of

political funding regulation in Matt Johnston and Ben Butler, 'Mayor faces pub crawl', *Herald Sun*, 4 February 2009.

Dr Tham made a 72-page submission on the federal government's *Electoral Reform Green Paper: Donations, Funding and Expenditure* in February 2009.

We are pleased to welcome two new CCCS Members: **Dr Margaret Young** and **Dr Kirsty Gover**. **Dr Margaret Young** joined the Law Faculty as Senior Lecturer in 2009. She was previously the William Charnley Research Fellow in Public International Law at Pembroke College and the Lauterpacht Centre for International Law, University of Cambridge. She holds a PhD and an LLM from the University of Cambridge and a BA/LLB (Hons) from the University of Melbourne and has been a Visiting Scholar at Columbia Law School. Her graduate studies were supported by a number of awards, including the Gates Scholarship, the Commonwealth Scholarship and a scholarship from the *Modern Law Review*. Dr Young is currently working on a book on 'Trade Related Aspects of Fisheries: Fragmentation and Regime Interaction in International Law'. She has lectured in Cambridge's LLM course on WTO law and is the Assistant Editor of the *British Year Book of International Law*. She has worked at the World Trade Organisation (Appellate Body Secretariat), the United Nations International Law Commission and at Greenpeace International, and is a former associate to the Chief Justice of the Federal Court of Australia. Here at Melbourne Law School she is teaching Principles of Public Law in the JD, International Law and International Dispute Settlement in the LLB, and Principles of International Law in the LLM. In June 2009, she is organizing a conference on "Regime Interaction: Theoretical and Practical Challenges" at the Lauterpacht Centre for International Law.

**Dr Kirsty Gover** also joined the Law Faculty in 2009 as a Senior Lecturer and is affiliated to both the Centre for Comparative Constitutional Studies and the Institute for International Law and the Humanities. Her research and publications address the law, policy and political theory of indigenous land claims and self-governance. She has a particular interest in tribal constitutionalism. Her most recent work examines the ways in which recognised tribes govern membership, by reference to the criteria used in tribal constitutions.

Dr Gover received her B.A./LL.B., from the University of Canterbury, New Zealand, and her LL.M. from Columbia University, United States. She was a Columbia University School of Law Human Rights Fellow and James Kent Scholar, and was the first full-time Institute Fellow at NYU Law School's Institute for International Law and Justice (IILJ). She received her doctorate from NYU Law School, where she was a Graduate Institute Scholar of the IILJ, and a New Zealand Top Achiever Doctoral Fellow. Dr Gover was a Senior Advisor and then consultant to the New Zealand government on international and domestic policy on indigenous peoples, and taught in this field at the Canterbury Law School. She represented the New Zealand government at intergovernmental drafting sessions of the U.N. Declaration on the Rights of Indigenous Peoples.

She is currently working on a book project, based on her thesis, entitled "Constitutionalizing Tribalism: States, Tribes and Membership Governance in Australia, Canada, New Zealand and the United States." Other work addresses the friction between tribal and settler state laws on the status of adopted children, and the participation of indigenous communities in international trade and investment dispute resolution fora. Her article "Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules" (*American Indian Law Review*, 33-1, 2009) looks at changes in the way United States tribes have determined membership since the 1930s, with an emphasis on the increased tribal use of blood quantum rules.

## Forthcoming events

A detailed schedule of forthcoming events at the Centre for Comparative Constitutional Studies in 2009 will be available shortly. Please check the CCCS [website](#) for further details.



**Speaker:** Professor Peter Strauss, Columbia Law School, New York  
**Topic:** Politicians' Influence over Regulatory Decisions Ostensibly Ostensibly Based on Sound Science.  
**Date:** Tuesday 7 April 2009  
**Time:** 1.00 pm – 2.00 pm  
**Venue:** Melbourne Law School

**In the seminar** Professor Strauss will argue that common to all developed legal systems is the frequency with which agencies (ministries, departments, independent commissions) are legislatively authorized to adopt subsidiary legislation that, if valid, enjoys statutory force. In areas such as health, safety and environmental regulation, these authorizations typically imagine that decisions using this authority will be based on sound scientific judgment, and judicial inquiry into their validity will be considerably more exacting than any inquiry that might be made for legislation. The political responsibility of legislators, their "will", answers for their decisions, but for subsidiary legislation political responsibility is more attenuated and "judgment" is expected - and its exercise may be enforced on judicial review.

In the United States, one may observe an increasing pattern of presidential control over these matters, whose premises and procedures are now being closely considered by the new Obama administration. The Bush administration, accused of waging a "Republican War on Science", exercised tight political controls over regulatory judgments and in at least one well-publicized incident directed the Environmental Protection Agency to adopt standards different than its science-bureaucrats had determined were best supported by good science; the White House judgment was widely thought to rest on economic considerations outside the agency's legal authority to consider. President Obama has repeatedly promised to restore integrity to governmental science, but how, concretely, should this be reflected in his oversight of activities as significant for the nation's economy as contemporary rulemaking?

The seminar paper will lay out the American dilemma, and invite discussion from an Australian (and parliamentary) perspective. There are notable differences between presidential and parliamentary systems to be explored, but it is submitted that the accommodation of the problem of political will and scientific judgment is a common one. The acceptability of rulemaking practice, that is, inheres in its demonstrable legality as well as considerations of political answerability.

**Peter Strauss** Peter L. Strauss is Betts Professor of Law at Columbia Law School, teaching courses in Administrative Law, Legal Methods, and Legislation. He joined the faculty in 1971. After graduating Harvard College (1961) and Yale Law School (1964), he had spent two years clerking for federal judges in Washington, D.C., two years lecturing on criminal law in the national university of Ethiopia, and three years as an attorney in the Office of the Solicitor General, briefing and arguing cases before the United States Supreme Court. During 1975-77, Professor Strauss was on leave from Columbia as the first General Counsel of the United States Nuclear Regulatory Commission. His published works include *Administrative Justice in the United States* (1989 and 2002); *Gellhorn's & Byse's Administrative Law: Cases and Comments* (most recently, 2003, with Rakoff and Farina); *Legal Methods: Understanding and Using Cases and Statutes* (2005 and 2008); *Legislation, Understanding and Using Statutes* (2006), *Administrative Law Stories* (2006) and numerous law review articles, generally focusing on issues of rulemaking, separation of powers, and statutory interpretation.

In 1987 the Section of Administrative Law and Regulatory Practice of the American Bar Association presented to Professor Strauss its third annual award for distinguished scholarship in administrative law. In 1992-93, he served as Chair of the Section. He has been reporter for rulemaking on its APA and European Union Administrative Law projects, and was a member of its E-Rulemaking task force. He has twice been Vice Dean at Columbia. Professor Strauss has visited at the European University Institute, Harvard and NYU, and lectured widely on American administrative law abroad, including programs in Argentina, Belarus, Brazil, China, Germany, Italy, Japan, the Netherlands, Mexico, Turkey and Venezuela. In 2008, the American Constitution Society awarded him the first Richard Cudahy prize for his essay "Overseer or 'The Decider'? The President in Administrative Law." During 2008-09 he is Fernand Braudel Senior Fellow at the European Law Institute and Parsons fellow at the University of Sydney Law School.

**Joint CCCS and Australian Human Rights Commission Public Seminar:  
The Constitution and a Human Rights Act**

**Chair:** The Hon. Catherine Branson QC, President, Australian Human Rights Commission  
**Speakers:** Mark Moshinsky SC, Professor Adrienne Stone, Associate Professor Kristen Walker  
**Date:** Tuesday 28 April 2009  
**Time:** 5:30-7:00 pm  
**Venue:** Melbourne Law School, 185 Pelham Street, Carlton

**Forthcoming National Conference on Australian and Comparative Constitutional Law:  
Friday 27 November 2009**

This year the Centre for Comparative Constitutional Studies will mark its 21<sup>st</sup> Birthday with a major Conference on 27 November.

The conference is a public event which we expect to be attended by constitutional law scholars from Australia and the region as well as leading practitioners and judges. Consistently with the Centre's focus on Australian and comparative constitutional law, the Conference will provide a forum for reflection on major recent cases in Australian and foreign courts as well as the central themes of comparative constitutional law.

The conference will be followed in the evening with a dinner which will provide an occasion for a celebration of the Centre's contributions to comparative constitutional studies and for some acknowledgment of the work of its founding Director, Professor Cheryl Saunders, and others associated with the Centre.

The program is still being finalised, but will feature a small number of leading scholars of constitutional law from Australia and overseas and one or two eminent judges. The Chief Justice of Australia, the Hon. Robert French, will be a keynote speaker and the program will also feature Professor Sujit Choudhry of the University of Toronto.

More information will be provided on the CCCS website <http://cccs.law.unimelb.edu.au> in due course.

## Recent CCCS Events



### Real Constitutional Dialogue: From Canada to Australia.

**Speaker:** Assistant Professor Rosalind Dixon, University of Chicago Law School

**Date:** Tuesday 16 December 2008

**In the seminar** Rosalind Dixon discussed her recent paper on Canada, and the implications of the approach developed in this paper for constitutional design and the bill of rights debate in Australia. The idea of dialogue has become ubiquitous in Canadian constitutional discourse, yet still largely fails to persuade skeptics about the compatibility of judicial review under the Charter with broader constitutional commitments to democracy. The reason for this was the subject of this paper, which argues that existing accounts of dialogue tend to take either radically too “strong” or “too weak” an approach to the scope of judicial review: they assume either much too narrow a scope for reasonable disagreement about court decisions, or take too narrow a view of the proper role for courts in enforcing the Charter, from a Canadian perspective. This paper offers an alternative “real” theory of dialogue, based on a truer compromise between these extremes.

**Rosalind Dixon** is Assistant Professor at the University of Chicago Law School. She earned her B.A. in government and economics, and her first law degree (with highest honors) from the University of New South Wales, Sydney, in 2001. She earned her L.L.M. and S.J.D. from Harvard Law School in 2004 and 2008, respectively. While at Harvard, Rosalind served as a Fellow in the Justice, Welfare, and Economics Program, and a Teaching Fellow in Constitutional Law, Constitutional History, Comparative Constitutional Law, and Comparative Constitutional Engineering. Before her time at Harvard, she clerked for the Chief Justice of Australia, the Hon. A. M. Gleeson A.C., taught at the University of New South Wales, and practiced as a solicitor in the dispute resolution group at Mallesons Stephen Jaques. Her teaching and research interests include constitutional law, comparative constitutional law and design, international human rights, and law and gender.



### Legislating Like Judges? A Preliminary Assessment of Parliamentary Bills of Rights.

**Speaker:** Professor Janet Hiebert, Department of Political Studies, Queen's University, Canada

**Date:** Tuesday 10 February 2009

**In the seminar** Professor Hiebert discussed her findings from a comparative project that examines recently introduced bills of rights in Canada, New Zealand, the United Kingdom and Australia, and what impact they are having on governing, broadly defined. More specifically, she addressed the conditions that influence bureaucratic and governmental willingness to draw upon case law when developing and evaluating legislation.

**Janet Hiebert** has been teaching in the Department of Political Studies at Queen's University since 1991, having received a B.A. (Hons.) from UBC in 1985 and M.A. (1986) and Ph.D. (1991) from Toronto. She is the author of two books about the Canadian Charter of Rights and Freedoms, *Charter Conflicts: What is Parliament's Role?* (McGill-Queen's University Press, 2002), and *Limiting Rights: The Dilemma of Judicial Review* (McGill-Queen's University Press,

1996), along with numerous papers and chapters on the politics of rights and on campaign finance laws in Canada. She has served as a member of the Ontario Electoral Boundaries Commission, an independent, non-partisan body with responsibility to readjust the electoral boundaries in the province of Ontario. Her current research project examines how the recent adoption of bill of rights in several parliamentary jurisdictions affects political practices, policy development and legislative behaviour (Canada, NZ, UK, Australia).



Mr Fritz Edward Siregar, Professor Tim Lindsey (Director, Asian Law Centre), Professor Dr Jimly Asshiddiqie, Associate Professor Simon Evans (Deputy Dean) and Professor Adrienne Stone (Director, CCCS).

### Creating a Constitutional Court For a New Democracy

Seabrook Chambers Lecture  
CCCS/Asian Law Centre Public Lecture

**Speaker:** Professor Dr Jimly Asshiddiqie, the foundation Chief Justice of the Constitutional Court of the Republic of Indonesia, Jakarta.

**Date:** Wednesday 11 March 2009

Indonesia's dramatic transition to democracy after the fall of Soeharto in 1998 led to the creation of a new court to safeguard the new system. At this lecture, Prof Dr Jimly

Asshiddiqie spoke on the major challenges he faced as Indonesia's first Chief Justice of the Constitutional Court, covering new approaches pioneered in relation to protecting human rights, writing judgments and the role of dissent, judicial reasoning, defining constitutional powers and combating judicial corruption.

Please find a link to Professor Asshiddiqie's paper here: [Creating a Constitutional Court for a New Democracy](#).



Dr Madeline Grey, The Hon Maxine Morand MP, (Minister for Women's Affairs), Professor Joy Damousi (Head, School of Historical Studies), Professor Adrienne Stone (Director, CCCS).

### CCCS Book Launch: "Challenging Women" by Dr Madeline Grey

**Launch:** The Minister for Women's Affairs, Maxine Morand MP

**Date:** Tuesday 24 March 2009

**Venue:** Melbourne Law School

The Centre for Comparative Constitutional Studies, together with the School of Historical Studies, was pleased to host the launch of Dr Madeline Grey's book *Challenging Women:*

*Towards Equality in the Parliament of Victoria* (Australian Scholarly Publishing 2009) by the Victorian Minister for Women's Affairs, the Hon Maxine Morand MP.

**Madeline Grey** is an Honorary Fellow in the School of Historical Studies at the University of Melbourne. She has a PhD in history on 'Second-wave feminism and women's political representation in Victoria, 1972-1997' and an MA in women's studies. She is the Administrator of the Centre for Comparative Constitutional Studies, Melbourne Law School, the University of Melbourne.

## Centre Visitors

### Professor Graeme Austin

*J Byron McCormick Professor of Law, University of Arizona, USA.*

08/09/2008 – 28/02/2009

Professor Austin's principal project is a book-length study, *Human Rights and Intellectual Property: Analysis and Sources* (co-authored with Prof. Larry Helfer (Vanderbilt); under contract with Cambridge University Press). The study examines the integration of international human rights norms into the international law of intellectual property - both at the systemic/institutional level, and also through a number of case studies, including: freedom of expression, education rights, the right to an adequate standard of health, and the right to participate in cultural life.

### Professor Janet Hiebert

*Department of Political Studies, Queen's University, Canada*

15/12/2008 – 16/2/2009

Professor Hiebert conducted research on Bills of Rights and developments in Australia.

### Professor Peter Strauss

*Betts Professor of Law, Columbia Law School*

5/04/2009 - 12/04/2009

During his stay, Professor Strauss will be researching the ways various legal systems, including Australia's, have attempted to keep politics and regulatory science apart.

### Professor Bill Buss

*O.K. Patton Professor of Law, University of Iowa*

1/06/2009 - 13/07/2009

Professor Buss' research project is a study of the influence of the American constitution on the Australian constitution. A series of articles will include a detailed analysis of what the Australian framers said at their conventions; how they understood and agreed about the meaning of the American constitution: how their choices of what to adapt for Australia have played out compared to developments in American law. Professor Buss' current focus is on the Judicature; during his time in Australia he expects to be working on interstate commerce and interstate freedom of movement.

## Comparative Constitutional Law News Update

### Australia – High Court - *Wurridjal v Commonwealth* – s 122 – ‘just terms’

The plaintiffs claimed that legislation purporting to create five-year leases in favour of the Commonwealth over certain townships in the Northern Territory within traditional lands acquired ‘property’ without ‘just terms’ contrary to s 51 (xxxii) of the *Constitution*. A majority (6:1, Kirby J dissenting) upheld the legislation, finding that just terms had been provided for any property acquired. Two aspects of the judgments are particularly notable.

First, a majority of the Court held that s 122 of the *Constitution* is subject to the ‘just terms’ requirement in s 51(xxxii). In doing so, the Court overturned *Teori Tau v Commonwealth* (1969) 19 CLR 564 (see French CJ ([73]-[86]), Gummow and Hayne JJ ([175]-[189] and Kirby J ([287])) and ameliorated the ‘disparate and non-federal’ nature of s 122.

Second, Kirby J in dissent suggested that ‘just terms’ might require more than mere monetary compensation. ‘At least arguably, “just terms” imports a wider inquiry into fairness than the provision of “just compensation” alone’ ([307]). In particular, the nature of property belonging to traditional Aboriginals might not be susceptible to monetary quantification ([308]).

See: [\*Wurridjal v Commonwealth\*](#)

### Australia – High Court – *K-Generation Pty Ltd v Liquor Licensing Court* – *Kable* doctrine

In *K-Generation Pty Ltd v Liquor Licensing Court*, the High Court revisited the principle in *Kable* that State courts vested with federal jurisdiction cannot act in a way incompatible with their role in the integrated Australian judicial system. The case again demonstrated the narrow scope of application of the principle; the Court unanimously held that the obligation on the courts to maintain the confidentiality of 'criminal intelligence' about an applicant for a liquor licence from that applicant did not contravene the *Kable* doctrine because an applicant could challenge the classification of material as 'criminal intelligence'.

Of special interest is the Court's consideration of what constitutes a 'court of a State' for the purposes of s 77(iii) of the *Constitution* and s 39(2) of the *Judiciary Act 1903* (Cth). This issue has confronted several lower courts recently. In *K-Generation*, the Court endorsed the relevance of 'history and "instrumental arrangements and safeguards"' (*Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85). Thus, the fact that the Licensing Court had no contempt power did not render it a tribunal for that reason alone, because historically, some courts did not have such a power. French CJ and Kirby J also deferred to the legislature's designation of the Licensing Court as a 'court' ([85] French CJ; [219] Kirby J).

See: [K-Generation Pty Ltd v Liquor Licensing Court](#)

### **Australia – High Court – Challenge to \$900 tax bonus**

Bryan Pape has challenged the constitutional validity of Prime Minister Kevin Rudd's proposed \$900 tax bonus, which forms part of the government's stimulus package. The case is to be heard from 30 March 2009. It appears that Pape will challenge the bonus on the basis, inter alia: (1) that it is not a law with respect to taxation because it is a gift; and (2) that 'for the purposes of the Commonwealth' in s 81 should be construed narrowly..

See: [Bryan Pape, 'Chapter Nine: The Use and Abuse of the Commonwealth Finance Power'; High Court directions hearing; Sydney Morning Herald article](#)

### **United States – Supreme Court - *Pleasant Grove City, Utah v Summum* – First Amendment – display of a permanent monument**

Pleasant Grove City had a permanent monument of the 10 Commandments in a public park, but the local government wished to reject a religious monument donated by the Summum religious group. This raised issues of freedom of speech under the First Amendment. (For further details see CCCS Newsletter No 5).

The Supreme Court found that the city could justifiably refuse the Summum monument whilst keeping the monument of the 10 Commandments without infringing freedom of speech in the First Amendment. Alito J characterised public monuments as government speech: 'Governments have long used monuments to speak to the public' (p 8). Since, under US doctrine (*Rosenberger v Rector and Visitors of University of Virginia*), governments are free to choose their speech, no issue of freedom of speech in fact arose.

Scalia J noted that the approach to freedom of speech thus potentially threw up an issue under the Establishment Clause, but he stated that 'there are very good reasons to be confident that the park displays do not violate *any* part of the First Amendment' (p 1).

See [Pleasant Grove City, Utah v Summum](#)

### **South Africa – Supreme Court of Appeal – Hlophe and Constitutional Court judges**

On 23 March 2009, the Supreme Court of Appeal of South Africa heard argument in *Constitutional Court of South Africa v Hlophe*. In earlier proceedings, Hlophe had successfully claimed in the High Court that the judges of the Constitutional Court unjustifiably infringed his right to be heard, right to dignity and right to equality, when those judges released a press statement claiming that Hlophe had tried to influence the Court in a pending case. (For further details see CCCS Newsletter No 4).

It appears that Hlophe's main argument in oral submissions (which departed from the submission on the papers) was that the press statement compromised the judicial independence of the Constitutional Court judges, and that the press statement infringed

Hlophe's right to dignity because it implied that he was guilty of the allegation. The denial of a right to be heard was only an additional circumstance.

See: [All Africa article](#)

### South Africa – Constitutional Court – *Richter v Minister for Home Affairs* – Right to Vote

The Constitutional Court of South Africa has recently considered the nature of the right to vote. Section 33 of the *Electoral Act 73 of 1998* limited the capacity for citizens outside South Africa on polling day to vote. O'Regan J, writing for the Court, reiterated that '[t]he right to vote, and the exercise of it, is a crucial working part of our democracy' ([53]), and that the right 'imposes an obligation upon the state not merely to refrain from interfering with the exercise of the right, but to take positive steps to ensure that it can be exercised' ([54]). The right to vote will be infringed where a citizen is precluded from voting despite his or her willingness to 'take reasonable steps' to vote ([57]-[58]). Section 33 was invalid for restricting the classes of people who could make 'special votes' when absent on polling day.

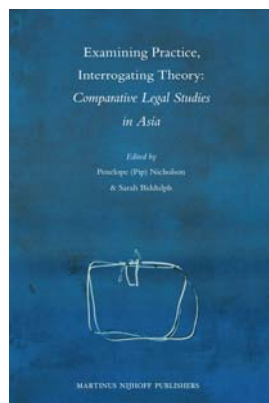
See: [Richter v Minister for Home Affairs](#)

### Ecuador – September 2008 – Constitutional Amendment –rights of the environment

In September 2008 a constitutional amendment passed by a wide majority of voters, Ecuador amended its constitution to grant '[n]atural communities and ecosystems' the 'unalienable right to exist, flourish and evolve'. The amendment imposes the 'duty and right of all Ecuadorian governments, communities, and individuals to enforce those rights'.

See [Guardian article](#)

## Recent Publications



### *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia*

Edited by Penelope (Pip) Nicholson and Sarah Biddulph

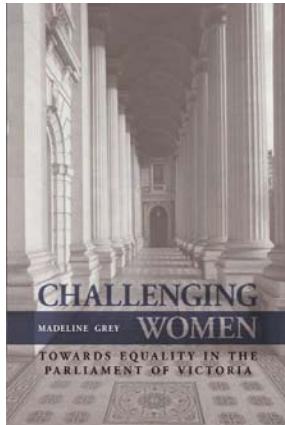
Legal transplantation and reform in the name of globalisation is central to the transformation of Asian legal systems. The contributions to *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* analyse particular legal changes in China, Indonesia, Malaysia, Singapore, Thailand, Taiwan, and Vietnam. The contributions also concurrently critically analyse the utility of scholarly developments in comparative legal studies, particularly discourse analysis; regulatory theory; legal pluralism; and socio-legal approaches, in the study of Asian legal systems. While these approaches are regularly invoked in the study of transforming European legal systems, the debate of their relevance and explanatory capacity beyond the European context is recent. By bringing together these diverse analytical tools and enabling a comparison of their insights through Asian empirical case studies, this book makes an invaluable contribution to the debates concerning legal change and the methods by which it is analysed globally, and within Asia.

**Associate Professor Pip Nicholson** directs the Comparative Legal Studies Program of the Asian Law Centre, Melbourne Law School, Australia where she is Associate Director (Vietnam). Her current research focus is on aid, development and Vietnamese legal reform. Her most recent publication is *Borrowing Court Systems: The Experience of Socialist Vietnam* (2007).

**Dr Sarah Biddulph** is Associate Director (China) of the Asian Law Centre in the Melbourne Law School. Sarah's research focuses on legal change in China, and in particular to police

coercive powers, labour regulation and administrative law. Her most recent publication is *Legal Reform and Administrative Detention Powers in China* (2007).

Please click [here](#) for an order form.



### *Challenging Women: Towards Equality in the Parliament of Victoria*

**Madeline Grey (ASP 2009)**

In 1972 the Women's Electoral Lobby (WEL) politicised a new generation of feminists. One of their aims was to increase the number of women in parliament and make a difference to the culture and practice of politics. Did this happen?

For the first time, the history of getting women into the Parliament of Victoria and their experiences once there is explored in *Challenging Women*. From the foundation of WEL to the launch of EMILY's List, this book analyses historical sources, archival material, original in-depth interviews and primary speech material to chronicle a key twenty-five year period, 1972 to 1997, in the journey towards equality of political representation.

In 1972 there was only one woman in the Parliament of Victoria, today there are forty. In Victoria women have now held the role of Premier, Cabinet and Ministerial roles and the Parliament's most senior parliamentary positions as Speaker of the Legislative Assembly and President of the Legislative Council. For the first time in the history of the State, women MPs now form a critical mass of just over thirty per cent in both Houses, the percentage at which they can potentially influence and make a difference to the culture and practice of politics.

The book presents new historical perspectives on theories of women's political representation including the preselection process, the feminisation of politics, the contested expectation that women will change politics for the better, the challenge to cross-party work of Australian political partisanship and the question of whether women's increased political presence will make a difference.

**Madeline Grey** is an Honorary Fellow in the School of Historical Studies at the University of Melbourne. She has a PhD in history on 'Second-wave feminism and women's political representation in Victoria, 1972-1997' and an MA in women's studies. She is the Administrator of the Centre for Comparative Constitutional Studies, Melbourne Law School, the University of Melbourne.

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