

# AUSTRALIAN JOURNAL OF ADMINISTRATIVE LAW

Volume 25, Number 3

2018

## EDITORIAL

**Fairness, Chance and Discretion in Judicial Review** – *Greg Weeks and Matthew Groves* ..... 147

CURRENT ISSUES – *Editors: Justin Davidson, Katie Miller and Stephen Tully*

**Self-Preservation And Tribunal Processes: Some Recent Cases** – *Justin Davidson and Tom Colwell* ..... 150

CASENOTES – *Editor: Nathalie Ng*

**Plaintiff M174/2016 v Minister for Immigration and Border Protection (2018) 92 ALJR 481; [2018] HCA 16** – *Stephen Tully* ..... 154

**BGH16 v Minister for Immigration and Border Protection [2018] FCCA 1009** – *Nathalie Ng* ..... 156

## ARTICLES

**Commonwealth Government Contracts, the “Common Assumption” and Statutory Backing** – *Nick Seddon*

The aftermath of the Williams cases was a very large number of articles and commentaries which indicated that a major upheaval for Commonwealth Government contracting had occurred. Despite this, there have so far been no repercussions reflected in case law. Nevertheless, there is serious uncertainty facing practitioners and public servants about Commonwealth contracts and grants. This uncertainty stems from the apparent message that some Commonwealth contracts must be backed by legislation. This requirement, in turn, stems from executive power being insufficient. This insufficiency is itself uncertain because four judges in *Williams v Commonwealth* (2012) 248 CLR 156; [2012] HCA 23 (Williams 1) abandoned the “common assumption” test of the scope of executive power. It is not clear what test replaced the previous linking of executive power to legislative power. This article argues for restoration of the common assumption test. It also demonstrates that the idea of legislative backing for government contracts is not straightforward and that it does not meet the concerns about responsible government expressed in the Williams cases. .... 157

**The Victorian Civil and Administrative Tribunal and the Rules of Evidence** – *Duncan Wallace*

Administrative tribunals are not usually bound by the rules of evidence. But they may be assisted by those rules, and this possibility is anticipated by the legislation governing the Victorian Civil and Administrative Tribunal. The legislation says that the Tribunal is not bound by the rules of evidence, except to the extent that it “adopts” those rules. This proviso has not yet been studied closely by the Tribunal or the courts, and so some basic questions about it remain to be answered. A few such questions are posed in this article.

They relate both to the manner in which the Tribunal adopts the rules of evidence and to the consequences of it doing so. Of these questions, the most important is whether a failure by the Tribunal to correctly apply the rules of evidence, in the event that it adopts the rules, will result in some kind of legal error. To this, the surprising answer seems to be sometimes, but not always. .... 171

**Declaratory Relief and Public Law Litigation in the 21<sup>st</sup> Century – Leigh Howard**

Given the advantages of declaratory relief, one would expect the remedy to be more widely utilised than present experience suggests. This is especially so in the case of public and regulatory litigation, which is often dominated by institutional or sophisticated litigants. This article attempts to discover why declaratory relief is not the dominant remedy in our system of administrative justice by precisely identifying its limitations. It is submitted that the vagaries of discretion have served to undermine the flexibility of declaratory relief, and that once the framework underpinning that discretion is properly understood, there is little in the way of the remedy becoming more prominent in litigation culture. Through declaratory relief, there is enormous potential to economise litigation through which regulators, administrators, courts, litigants and the general public all stand to benefit. .... 181

**BOOK REVIEWS – Editor: Janina Boughey**

**The Principle of Legality in Australia and New Zealand, by Dan Meagher and Matthew Groves (eds) – Reviewed by Bruce Chen** ..... 190

**The Rule of Law and the Australian Constitution, by Lisa Burton Crawford – Reviewed by James Stellios** ..... 192