

AUSTRALIAN JOURNAL OF ADMINISTRATIVE LAW

Volume 26, Number 2

June 2019

EDITORIAL – *General Editors: Matthew Groves and Greg Weeks*

Climate Change as a Relevant Consideration 49

CASENOTE – *Editor: Nathalie Ng*

Jurisdictional Error and Materiality: Hossain v Minister for Immigration and Border Protection (2018) 359 ALR 1; [2018] HCA 34 – *Larissa Welmans, Evan Leslie Taylor and Loretta Foran* 52

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

Recent Judgments from the High Court: SZVFW and SZMTA 58

ARTICLES

Duties to Consider – *Geoffrey Kennett SC*

Administrative decision-makers are sometimes required, by identical statutory language, to “consider” (“or have regard to” or “take into account”) both issues, factors or principles and submissions, representations, comments or other specified documents. This article considers whether the content of the duty to consider is the same in each situation. It does so by reference to recent case law and in the context of the limited and diminishing role of the traditional “grounds” of review in Australian law. It argues that, while the “relevant considerations” ground of review is related to application of the correct decision-making framework, duties to consider documents are related to procedure. 60

Remedial Invalidity in Australia, the United Kingdom and the United States of America: A Legislative Solution to a Common Law Problem – *Anthony Hall*

Invalidity in administrative law remedies (remedial invalidity) is a notoriously challenging concept in administrative law systems across the common law world. This article explores remedial invalidity from a comparative perspective by examining how it has been dealt with in Australia, the United Kingdom and the United States. A comparison of the three jurisdictions shows that Australia takes a “statutory” approach, while the United Kingdom adopts a “common law” response, and the United States adheres to a sui generis “equitable discretion” approach. The article argues that the best way of responding to remedial invalidity is to amend judicial review or civil procedure statutes to provide courts with a discretionary power to issue prospective remedies. It is further argued that in Australia this can be achieved by amending the *Judiciary Act 1903* (Cth) to provide federal courts with a discretionary power to issue prospective remedies in Commonwealth judicial review proceedings. 78

Finding Fairness in Fact Finding: Material Mistake of Fact Review in Asylum Cases –
Esther Pearson

Refugee status determination is a highly factually driven process and an incorrect finding of fact may be at the expense of the life or liberty of the claimant. While courts in the common law countries of England, Ireland, New Zealand, and South Africa have accepted material mistake of fact as a ground of judicial review, courts in Australia continue to quarantine errors of fact from re-determination. Courts in those common law countries apply several limiting criteria to determine whether the ground is made out and prevent the floodgates being opened to excessive litigation. It is suggested that such limiting criteria also be adopted in Australia. Case law emerging from those common law countries also illuminates the benefits of pragmatism and fairness that the ground of review entails and reinforces the case for accepting material mistake of fact in Australia. 100