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

Immigration Litigation – Impact, Study and Reform 63

CURRENT ISSUES – *Editor: Katie Miller*

Finding Law in a Time of Emergency: COVID-19 66

ARTICLES

Migrating towards a Principled Approach to Reviewing Jurisdictional Facts – *The Hon Justice R Derrington*

Where the parliament has preconditioned the exercise of statutory power on the formation of a state of mind to be held by the power's repository, questions will necessarily arise as to whether the putative state of mind on which the repository has acted, satisfied the statutory requirement. This article identifies the emerging principles on which a court will examine whether an alleged defect in the formation of a state of mind has resulted in it not conforming to a statutory precondition. The principles identified are now mostly derived from cases involving *s 65 of the Migration Act 1958* (Cth). That is a somewhat unique provision in which the legislature has transposed the deliberative aspect of the executive's role to the jurisdictional fact stage. Despite some recurring confusion of thought, the principles applied to the review of subjective jurisdictional facts are distinct from those applicable to judicial review for jurisdictional error, even if not-insubstantial similarities exist. 70

Materiality: Marking the Metes and Bounds of Jurisdictional Error? – *Harry Aniulis*

The centrality of jurisdictional error to the High Court's constitutionally entrenched jurisdiction to conduct judicial review is now well accepted. Despite this acceptance, it was also explained in Kirk v Industrial Court (NSW) that "[i]t is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error". Consequently, uncertainty plagues understanding of when errors may be regarded as "jurisdictional" in the requisite sense. Disagreement in demarking the boundary between "jurisdictional" and "non-jurisdictional" errors has been recently evidenced in the decisions of Hossain v Minister for Immigration and Border Protection and Minister for Immigration and Border Protection v SZMTA. The prevailing approach requires satisfaction of a threshold of materiality before a conclusion of jurisdictional error may be reached. This development sits uncomfortably with existing authority, adds greater uncertainty due to its variable threshold, and is open to imprecise exceptions. Instead, addressing materiality considerations through courts' remedial discretion is preferable. 88

A Question of Capacity: Does the AAT Have the Power to Appoint Litigation Guardians? – *Matthew Paterson*

The Administrative Appeals Tribunal deals with some of the most vulnerable members of Australian society, including a considerable number of people who suffer from mental and physical impairments – especially in its National Disability Insurance Scheme jurisdiction. However, it was only in the recent case of Klewer and National Disability Insurance Agency (Klewer) that the Tribunal has been asked to consider whether it has the power to appoint a litigation guardian for a party before it. In this article, I take Klewer as the starting point for a broader discussion of whether the Tribunal has the power to appoint a litigation representative. After considering whether the Tribunal has any express or implied statutory authority to make such an appointment, I conclude that the Tribunal has no such power. 114

BOOK REVIEW – *Editor: Dr Janina Boughey*

Military Law in Australia, by Robin Creyke, Dale Stephens and Peter Sutherland (eds) – *Reviewed by Matthew Groves* 127