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ARTICLES

Migration Act and the constitutionality of privative clauses – *Scott Guy* and *Barbara Hocking*

Privative clauses became an increasingly frequent instrument utilised by the Howard Government – particularly in the context of asylum-seekers and the associated Pt 8 of the Migration Act 1958 (Cth) – to exclude or oust the jurisdiction of courts to review the decisions of the Minister for Immigration and his delegates (or alternatively decisions of executive agencies, such as the Refugee Review Tribunal). This article explores the constitutionality of privative clauses and whether, in fact, they do offend the provisions of Ch III of the Constitution which vests certain types of review jurisdiction in the High Court, Federal Court and Federal Magistrates Court. This issue has become all the more relevant in the light of the enactment of the Migration Litigation Reform Act 2005 (Cth), which has sought to impose time limitations upon application on the part of asylum-seekers to the Federal Magistrates Court, the Federal Court and the High Court. 21

Review of the proscription of terrorist organisations: What role for procedural fairness? – *Nicola McGarrity*

The Commonwealth Attorney-General has a broad discretion under the Criminal Code Act 1995 (Cth) to proscribe a group as a “terrorist organisation”. To prevent this discretion being exercised arbitrarily, it is imperative that proscription decisions are subject to review. The Criminal Code ostensibly provides for self-review, parliamentary review and judicial review of proscription decisions. However, this article identifies fundamental

problems with each of these review mechanisms. This article does not suggest wholesale reform of the review mechanisms. Instead, it proposes that an obligation on the Attorney-General to accord procedural fairness to an affected group and its members should be expressly incorporated into the Criminal Code. This obligation would not prejudice national security or undermine operational effectiveness as previously suggested by the Attorney-General's Department. And it would substantially improve both the transparency of the proscription decision-making process and the accountability of the Attorney-General for proscription decisions. 45

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