

# AUSTRALIAN JOURNAL OF ADMINISTRATIVE LAW

Volume 17, Number 1

November 2009

## EDITORIAL

<b>A return to proper case management .....</b>	<b>5</b>
<b>Privative clauses .....</b>	<b>5</b>
<b>Judges and democracy .....</b>	<b>6</b>
<b>Judges and public service .....</b>	<b>8</b>

## TRADE, COMMERCE AND REVENUE – *Tim Moe*

<b>The clear light of day: Ombudsman investigations and normative values of public administration .....</b>	<b>9</b>
---	----------

## CASENOTES – *Rebecca Heath*

<b>SZMKG v Minister for Immigration &amp; Citizenship .....</b>	<b>13</b>
---	-----------

## WORK AND EMPLOYMENT – *Graeme Orr and Joo-Cheong Tham*

<b>Law-making and temporary migrant labour schemes: Accountability and the 457 visa scheme .....</b>	<b>18</b>
--	-----------

## DISCRIMINATION AND REFUGEES – *Edward Santow*

<b>The Brennan Committee Report: Reform of discrimination law .....</b>	<b>21</b>
---	-----------

## ARTICLES

### **The use of administrative law to enforce human rights – *Janina Boughey***

In the absence of specific or adequate laws designed to enable individuals to enforce their human rights, it is inevitable that human rights claims will be made through other, established legal avenues. Some academics have suggested that administrative law is particularly susceptible to its principles being used to pursue human rights claims because of the similarity between the underlying principles of administrative and human rights law. This article considers the success of such attempts, some conceptual limitations of using administrative law to advance human rights in certain circumstances, the impacts of using administrative law principles to achieve human rights on the “integrity” of administrative law and the effect of statutory rights protections on this process. ....	25
---	----

### **ASIO, adverse security assessments, and a denial of procedural fairness – *Keiran Hardy***

Adverse security assessments play an important role in ASIO’s mandate, yet they are largely immune to merits and judicial review. This article examines the limits of merits

and judicial review of adverse security assessments by comparing the rights of non-citizens and citizens. Non-citizens cannot seek merits review of these assessments, and face immense difficulties when seeking judicial review. Citizens are ostensibly given a statutory right to merits review in the Security Appeals Division of the AAT, but this right is tainted by a statutory abrogation of common law procedural fairness. The Attorney-General's unconfined statutory discretion to issue public interest certificates means that citizens are effectively given no more rights than non-citizens when seeking review of an erroneous assessment. This irregularity requires legislative change if citizens are to be given a meaningful chance of holding ASIO accountable in law. .... 39

**Inferences against Ministers who fail to give evidence in judicial review proceedings – Anthony Papamatheos**

There has been a tendency in judicial review cases for government lawyers representing Ministers to maintain that such Ministers are “never expected to give evidence”. A number of decisions say this is not the case and are worthy of comment. The rule with respect to inferences against Ministers who fail to give evidence, modelled on *Jones v Dunkel* (1959) 101 CLR 298, applies with equal force as it would in ordinary civil proceedings between two private litigants. This article shows that the availability of such inferences is tempered by the usual factors considered in civil proceedings and there is no special rule against inferences in judicial review cases. .... 50

**BOOK REVIEWS – Matthew Groves**

*The Immigration Kit* by Suhad Kamand, Rowena Irish, Peter Bollard, Kerry Murphy and Mark Webster ..... 53

*A Simple Common Lawyer – Essays in Honour of Michael Taggart* by David Dyzenhaus, Murray Hunt and Grant Huscroft ..... 54

# Submission requirements

All contributions to the journal are welcome and should be emailed to the Production Editor, *Australian Journal of Administrative Law*, at [LTA.ajadminl@thomsonreuters.com](mailto:LTA.ajadminl@thomsonreuters.com) for forwarding to the Editor.

## Licences

- It is a condition of publication in the journal that contributors complete a licence agreement. Licence agreements can be downloaded at [http://www.thomsonreuters.com.au/support/as\\_contributors.asp](http://www.thomsonreuters.com.au/support/as_contributors.asp) and emailed with the submission or mailed separately to the Production Editor, *Australian Journal of Administrative Law*, Thomson Reuters (Professional) Australia Limited, PO Box 3502, Rozelle, NSW 2039.

## Letters to the Editor

- By submitting a letter to the Editor of this journal for publication, you agree that Thomson Reuters, trading as Lawbook Co, may edit and has the right to, and may license third parties to, reproduce in electronic form and communicate the letter.

## Manuscript

- Manuscript must be original, unpublished work that has not been submitted or accepted for publication elsewhere, including for online publication.
- Personal details (name, qualifications, position) for publication and a delivery address, email address and phone number must be included with the manuscript on a separate page.
- Manuscript must be submitted electronically via email in Microsoft Word format.
- Manuscript should not exceed 15,000 words for articles or 3,000 words for section commentary or book reviews.
- An abstract of 100-150 words must be included at the head of articles.
- Authors are responsible for the accuracy of case names, citations and other references. Proof pages will be emailed to contributors but excessive changes cannot be accommodated.
- **Graphics** (diagrams and graphs) to be grayscale; in .jpeg format; no more than 12 cm in width; within a box; of high resolution (at least 300 dpi); font is to be Times New Roman, no more than 10pt. The heading for a graphic should be placed outside the box.

## Peer review

- This journal complies with the Higher Education Research Data Collection (HERDC) Specifications for peer review. Each article is, prior to acceptance, reviewed in its entirety by a suitably qualified expert who is independent of the author.

## Style

1. **Levels of headings** must be clearly indicated (no more than four levels).
2. **Unpointed style** is to be used – there are no full stops after any abbreviation or contraction.
3. **Cases:**
  - Where a case is cited in the text, the citation follows immediately after the case name, not as a footnote.
  - Authorised reports must be cited where published, and one other reference can be used in addition.
  - For “at” references use media-neutral paragraph numbers within square brackets whenever available.
  - For international cases best references only should be used.
4. **Legislation** is cited as follows:
  - *Trade Practices Act 1974* (Cth), s 51AC (including in full within footnotes).
5. **Books** are cited as follows:
  - Ross D, *Ross on Crime* (3rd ed, Lawbook Co, Sydney, 2006) pp 100-101.
  - In footnotes do not use *ibid* or *op cit*. Repeat author surname and add footnote reference to first mention.
    - <sup>1</sup> Hayton D, “Unique Rules for the Unique Institution, The Trust” in Degeling S and Edelman J (eds), *Equity in Commercial Law* (Lawbook Co, Sydney, 2005) p 284.
    - <sup>2</sup> Hayton, n 1, p 286.
6. **Journals** are cited as follows:
  - Kirby M, “The Urgent Need for Forensic Excellence” (2008) 32 Crim LJ 205.
  - In footnotes do not use *ibid* or *op cit*. Repeat author surname and add footnote reference to first mention.
    - <sup>3</sup> Trindade R and Smith R, “Modernising Australian Merger Analysis” (2007) 35 ABLR 358.
    - <sup>4</sup> Trindade and Smith, n 3 at 358-359.
  - Wherever possible use official journal title abbreviations.
7. **Internet references** are cited as follows:
  - Ricketson S, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Lawbook Co, subscription service) at [16.340], <http://www.thomsonreuters.com.au/default.asp> viewed 25 June 2007. Underline the URL and include the date the document was viewed.

## SUBSCRIPTION INFORMATION

The *Australian Journal of Administrative Law* comprises four parts a year.

The Journal is available for subscription via paper and/or online. An online subscription can include access to archived volumes of the Journal dating back to 1993 and has the following benefits: content is fully searchable; PDF versions are provided for convenience; users can subscribe to an RSS feed to be instantly informed of updates.

### **For further information on how to subscribe:**

Visit [www.thomsonreuters.com.au](http://www.thomsonreuters.com.au)

Tel: 1300 304 195

Email: [LTA.Service@thomsonreuters.com](mailto:LTA.Service@thomsonreuters.com)

### **Advertising inquiries:**

Contact Andrew Parsons on (02) 8587 7462 or email [a.parsons@thomsonreuters.com](mailto:a.parsons@thomsonreuters.com)

**Editorial inquiries:** Tel: (02) 8587 7000

### **Customer service and sales inquiries:**

Tel: 1300 304 195 Fax: 1300 304 196

Web: [www.thomsonreuters.com.au](http://www.thomsonreuters.com.au)

Email: [LTA.Service@thomsonreuters.com](mailto:LTA.Service@thomsonreuters.com)

### **HEAD OFFICE**

100 Harris Street PYRMONT NSW 2009

Tel: (02) 8587 7000 Fax: (02) 8587 7100



**THOMSON REUTERS**

© 2009 Thomson Reuters (Professional) Australia Limited  
ABN 64 058 914 668

Lawbook Co.

Published in Sydney

ISSN 1320-7105

Typeset by Thomson Reuters (Professional) Australia Limited, Pyrmont, NSW

Printed by Ligare Pty Ltd, Riverwood, NSW