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ARTICLES

Who Decides the Validity of Executive Action? No-Invalidity Clauses and the Separation of Powers – *Lisa Burton Crawford*

There is a constitutional guarantee of judicial review of executive action at the State and federal level – at least on the ground of jurisdictional error of law. Attention has now shifted to the range of devices by which parliaments could evade this guarantee, by altering the scope of executive power. One such device is the no-invalidity clause. This article confirms that such clauses are not inconsistent with s 75 of the Constitution. However, their efficacy is constrained by the separation of the judicial power. This article then explains how no-invalidity clauses should be interpreted by the courts. 81

Challenging Huynh: Incorrect Importation of the National Interest Term via the Back Door – *Jason Donnelly*

Section 501(2) of the Migration Act 1958 (Cth) provides the Minister for Immigration and Border Protection with a wide-ranging power to cancel a visa of a non-citizen who fails a carefully defined character test. This article argues that the decision of Minister for Immigration and Multicultural and Indigenous Affairs v Huynh should be overruled. Two central arguments are advanced. First, on its proper construction, the “national interest” concept is an irrelevant consideration for the purposes of s 501(2). Such a construction favours a narrow approach to s 501(2). The court in Huynh adopted a broad interpretation, holding that the national interest concept may be a relevant consideration when applying s 501(2). Secondly, it is contended that individual factors specific to a non-citizen are a mandatory relevant consideration under s 501(2). For the majority in Huynh, this latter construction was not open given the broad approach adopted in relation to s 501(2) of the Act. 99

Merits Review and the 21st Century Tribunal – Juliet Lucy

In the model of merits review developed as part of the “New Administrative Law” in the 1970s and 1980s, proceedings are inquisitorial, the government agency assists the tribunal to conduct its inquiry and the review process enhances the quality of public administration. The reality of merits review proceedings conducted in a super tribunal in the second decade of the twenty-first century may be quite different. This article examines the constraints on tribunal decision-makers which contribute to the disparity between the theory and practice of merits review, and considers whether tribunals’ flexible procedures can and should be used to achieve a greater departure from the adversarial model. 121

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