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Beyond “Validity” – The Effect of Legally Infirm Administrative and Judicial Decisions
– *Benjamin Coles*

Traditionally, the judicature and scholars have described legally ineffective administrative and judicial decisions as “invalid”, “void”, “voidable” and “nullities”. However, the High Court has said that those terms may lead to error as they do not readily admit the possibility that a decision may be valid in one context yet invalid in another. Sir William Wade described that possibility as the relative nature of validity. In the late 1990s, Professor Forsyth propounded a framework, which, with respect, correctly reflects this relativity. He suggests that the proper question to ask is “what are the legal powers of a second actor who relies upon the subject decision?” This article builds upon that framework. Its purpose is to provide practical and theoretical guidance on whether a particular legal consequence attaches to an administrative or judicial decision infected by legal error. It does so by examining the principles of statutory construction, which affect the class or classes of decisions infected by legal error to which a statutory provision attaches legal consequences, and examines the law of torts, as a case study in how common law principles attach legal consequences to certain classes of decisions infected by legal error. 158

How to Remain Relevant and Privileged: s 38AA of the Administrative Appeals Tribunal Act 1975 – *Kasper Maat, Dr Laura Hilly and Chelsea Brain*

Section 38AA of the Administrative Appeals Tribunal Act 1975 requires decision-makers in administrative review proceedings to lodge with the Tribunal any documents which come into their possession during those proceedings which are “relevant to the review” until the determination of the proceeding. The purported intention is to extend the operation of s 37 of the Act. This article considers two issues going to the scope and operation of the ongoing obligation imposed by s 38AA. The first is the meaning of the term “relevance” in s 38AA(1)(b)(ii). It is suggested the broad operation of s 38AA has the potential to disrupt

the orderly process of proceedings in the Tribunal. The second is whether s 38AA requires the disclosure of relevant information which is subject to legal professional privilege given that s 38AA does not expressly abrogate that privilege. The article concludes that there are good legal and pragmatic arguments supporting the view that not all information which could be relevant to a review is required to be lodged under s 38AA, and that s 38AA was not intended to abrogate a decision-maker’s ability to claim privilege. Nonetheless, because of the ambiguity presented by s 38AA and the potential for criticism by the Tribunal in the event of perceived non-compliance with the section, decision-makers should approach the obligation with caution. Where possible, steps should be taken to mitigate risks by making the existence of potentially relevant documents not intended to be lodged known to the Tribunal and other parties to the proceedings. 178

Accountability: A Core Public Law Value? – *Ellen Rock*

Accountability is a core public law, if not constitutional, value, with close ties to the rule of law and separation of powers. Despite this status, the Australian public law system presents only a thin reflection of accountability. This is because it provides control of public power but not restoration or punishment in cases of abuse of power. This article uses the concept of accountability as a lens through which to view the limitations of existing public law remedies and briefly outlines two of the potential explanations for these limitations: constitutional barriers and the availability of alternative remedies. 189

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