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A Typology of Materiality – *Paul Daly*

The question of when an error will be sufficiently "material" to justify the quashing of a tainted decision prompted discussion and debate on the High Court of Australia in Minister for Immigration and Border Protection v SZMTA [2019] HCA 3 and Hossain v Minister for Immigration and Border Protection [2018] HCA 34. This is a difficult issue, which causes conceptual confusion and obscures important underlying issues. By reference to comparative material, I argue that there are three distinct types of materiality. First, materiality can be used to denote whether an error is sufficiently serious to count as jurisdictional. Second, materiality can be used to denote a causal link between the error complained of and the decision under review. Third, materiality can be used to denote judicial discretion to refuse relief. I suggest that distinguishing between these types facilitates legal analysis and debate about the appropriate place of "material" error in judicial review of administrative action. 134

Failure to Adhere to Policy: A Category of Jurisdictional Error? – *Patrick McCabe*

Since the 1970s, the use of policy has proliferated and changed the face of Australian public administration. Consistent use of policy in administrative decision-making improves the objective quality of decision-making, improves public confidence in decision-making, and promotes and upholds rule of law values such as consistency and equality. Those benefits are undermined or lost, however, when decision-makers depart from their policies, whether by making a mistake, or because it is expedient or convenient to depart from a policy in a given case. In Australian administrative law, departure from policy may amount to a "failure to consider a mandatory consideration" in some circumstances. This is an inadequate safeguard against the problem of inconsistent or arbitrary application of policy, as it artificially treats a policy as merely one of numerous "considerations". It is also contended that there are doctrinal problems with accounting for policy in this way. With reference to the more-developed English jurisprudence on this issue, this article proposes an alternative paradigm for considering the place of policy in Australian administrative law,

whereby consistent adherence to policy would be considered to be a presumed condition of any conferral of wide discretionary power upon the executive by the legislature. 145

Creating a Framework for Evaluating the "Effectiveness" of the Commonwealth Ombudsman – *Jeremy (Wei Peng) Soh*

For many years the Commonwealth Ombudsman has been hailed as one of the most successful accountability bodies for upholding administrative justice in Australia. However, despite the almost unanimous praise for the Commonwealth Ombudsman's role in promoting the rule of law from legal circles, there is a lack of a systemic methodology in order to quantify and substantiate such claims. This article seeks to address that gap, by formulating and applying a tentative evaluation framework which seeks to test the claims of effectiveness from legal circles. In the process, I argue it is both pragmatic and valuable to create an evaluation framework for the Commonwealth Ombudsman. I also seek to support the contention that the Commonwealth Ombudsman is an effective institution for upholding administrative justice by drawing upon the analysis derived from the framework. 164

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