

AUSTRALIAN JOURNAL OF ADMINISTRATIVE LAW

Volume 29, Number 1

2022

EDITORIAL – *General Editors: Matthew Groves and Greg Weeks*

Three Giants of Australian Administrative Law Honoured 3

CURRENT ISSUES – *Editors: Nathalie Ng, Steven Gardiner and Sarah Lim*

Government Policy: Compulsory Consideration or Discretionary Decision – *Michael Gvozdenovic* 6

Stanley v Director of Public Prosecutions: NSWCA Grapples with Jurisdictional Error in Sentencing – *Steven Gardiner* 10

Game, Set But No Match - Irrationality, Visa Cancellations and Novak Djokovic: A Commentary on Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (2022) – *Maria O'Sullivan* 13

ARTICLES

Proportionality in Administrative Law and Its Application to Victoria's Proposed Pandemic Legislation – *Anthony Gray*

This article describes the use of proportionality in United Kingdom and Australian administrative law. There remains uncertainty regarding use of the doctrine, particularly in Australia. The article defends proportionality on the basis it reflects the rule of law. Its flexibility is an asset. Arguments against proportionality are considered weak. The use of proportionality reflects a culture of justification for the use of government power in a way that impacts an individual's human rights, which reflects Australia's liberal democracy. The article then considers application of proportionality principles to Victoria's mooted pandemic laws. It finds that proportionality principles provide a more fertile ground for effective judicial review of the proposed extreme measures than *Wednesbury* unreasonableness. 21

The Precautionary Principle and Judicial Decision Making in the COVID-19 Pandemic – *Katie Webber*

The precautionary principle prescribes that, in situations involving serious risk of harm, scientific uncertainty should not preclude responsive government action. This article examines the role of the precautionary principle in judicial decision-making in Australia and Canada during the COVID-19 pandemic. The principle has, in some cases, supplanted more rigorous legal standards of review of government action and justified a stance of judicial non-intervention. In this respect, reliance on the precautionary principle risks subverting the critical role of an independent judiciary in upholding the rule of law in times of emergency. The article offers guidance for developing a cautious approach to the precautionary principle in these contexts. 43

The Administrative Appeals Tribunal and The Drake Doctrine: How the AAT Treats Government Policy in NDIS Decisions as to “Reasonable and Necessary Supports” – Javier Cross

In the seminal case of *Drake v Minister for Immigration and Ethnic Affairs (No 2)* (Drake (No 2)), Brennan J laid out how the new Administrative Appeals Tribunal (AAT) should approach government policy when it encountered it. Noting the value of consistency in decision-making, his Honour wrote that the AAT should exercise caution in overruling government policy. This article examined AAT cases which considered government policy in National Disability Insurance Scheme decisions as to whether a disability support was “reasonable and necessary” and compared each case which overruled it against the standard laid out in Drake (No 2). 60

BOOK REVIEW – *Editor: Dr Janina Boughey*

Information Rights, by Phillip Coppel QC – Reviewed by Moira Paterson 82