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ARTICLES

Effect of privative clauses on judicial review of immigration decisions – *Alan Freckelton*

In this article I ask whether the privative clause in the Migration Act 1958 (Cth) has resulted in what might be almost the ultimate unintended consequence – has s 474 effectively re-opened grounds of judicial review available under the Administrative Decisions (Judicial Review) Act 1975 (Cth) or the former Pt 8 of the Migration Act? To this end, I examine the history and interpretation of privative clauses in Australia, noting the visceral academic response to the existence of privative clauses in this country. I examine the decision in Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476, and ask the question whether the Australian Government shot itself in the foot by enacting s 474 to begin with. I reach the conclusion that, although Plaintiff S157/2002 found that the privative clause is only ineffective in protecting jurisdictional errors, that no decided case has yet turned on distinguishing a jurisdictional from a non-jurisdictional error of law, and the difference between the two has effectively been abolished in practice, although not in theory. The end result is that there is little difference between the available grounds of judicial review today than existed under the Administrative Decisions (Judicial Review) Act. 87

Prosecutorial discretion and the decision to grant an occupational health and safety enforceable undertaking – *Dr Kristy Richardson*

This article considers the characterisation of the decision to accept or reject an enforceable undertaking in the occupational health and safety jurisdiction. The characterisation of the decision as prosecutorial because of its impact upon the prosecution for a breach of an occupational health and safety obligation has been rejected by the Queensland Court of Appeal. Whilst the decision of the court was made under repealed legislation the enforceable undertaking has been retained under a now harmonised legislative framework for occupational health and safety laws. It is suggested that under this framework the decision whether to reject or accept an enforceable undertaking remains administrative and capable of review. 102

The Future Fund: Peculiarities of the Future Fund Act 2006 (Cth) – *Franqui Stoschek*

The relatively new Future Fund Act 2006 (Cth) has been rarely examined and scrutinised, which is surprising given the sheer amount of public money involved. Despite claims of high levels of accountability and independence from the Australian Government, the actual governance arrangements of the Future Fund suggest something different. This article analyses the present governance, employment and financial arrangements for the

Future Fund. These arrangements provide for various degrees of intervention by the government that clearly undermine assertions of independence about the Future Fund. By exploring the governance, staffing and financial arrangements of the Future Fund, this article concludes that from its core the Future Fund lacks real independence. 110

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