

# LAWS1160 FINAL EXAM NOTES

## ANSWERING ESSAY QUESTIONS

Be careful to answer the question asked;

Demonstrate knowledge and understanding of the course content;

Demonstrate critical engagement with the course content (particularly critical analysis of and opinions on content, understand implications/significance/rationales/principles of doctrines.

### CONSTITUTIONAL ISSUES – JUDICIAL REVIEW AND JURISDICTIONAL ERROR

French 2014

Judicial review is concerned with constitutional consistency in a way that does not arise in merits review.

Cane and McDonald 2012

Legality mechanisms of accountability aim to respond to **illegality**. Administrative mechanisms of accountability aim to respond to **substantive mistakes or errors**.

Cane and McDonald 2012

There is an **entrenched minimum provision** of judicial review under s 75(v) – Parliament cannot deprive the High Court of jurisdiction to issue the constitutional remedies (writs of mandamus or prohibition, or injunctions) on the basis of jurisdictional error in appropriate cases (*Plaintiff S157/2002 v Commonwealth*).

State legislation similarly cannot deprive state Supreme Courts of jurisdiction to review decisions, as to do so would violate an essential characteristic of the state Supreme Courts whose existence and nature is implied by s 73(ii) (*Kirk v Industrial Relations Commission of NSW*).

Not all grounds of judicial review are constitutionally entrenched – e.g. procedural fairness can be excluded by statute, although there is a presumption against exclusion (*Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*)

Groves and Boughey 2014

The twin Constitutional conceptions of separation of powers and jurisdictional error are the heart of administrative law.

The guiding principle for courts in determining constitutional limits upon the jurisdiction of executive decision-makers is jurisdictional error (*Craig v South Australia*).

The central role of jurisdictional error in judicial review was upheld by *Plaintiff S157/2002 v Commonwealth*, where the High Court confirmed its constitutional entrenchment in order

## HISTORICAL CONTEXT

### Groves and Boughey 2014

Before the reforms creating the modern system of administrative law, there were three avenues of government accountability:

- Constitutionally entrenched judicial review – a system of which it was said that “an imaginary system cunningly planned for the evil purpose of thwarting justice and maximising fruitless litigation would copy the major features”;
- Responsible government – although this provides no help to aggrieved individuals, nor do Parliament have time or resources to review erroneous administrative decisions;
- The existence of specialised boards and tribunals, which were “far from universal”, and which followed diverse and inconsistent procedures.

Reforms created the following further avenues:

- *ADJR Act 1977* (Cth)
  - o Simplifies, codifies, and expands common law judicial review;
  - o Quickly became the primary vehicle for federal judicial review, but when migration cases were largely excluded focus shifted back to constitutional judicial review;
  - o Major benefits of the Act are:
    - Established a single simple procedure for judicial review, regardless of grounds or remedy and with a unified standing test. However, application of the jurisdictional test has been particularly complex, and amendments made to the *Judiciary Act 1903* (Cth) confused the issue further. The result is that as the scope of the *ADJR Act* has been narrowed through statutory interpretation, the *Judiciary Act* has overtaken it in usage and practical importance.
    - Established a right to reasons – the “most significant right introduced into law” by the Act. This allows decisions to be realistically challenged and “changes the balance of authority between the citizen and the state”.
    - Codified grounds of review, the most controversial feature of the Act. Criticised as possibly frustrating “judicial development of additional grounds” – the grounds also included two “catch all” grounds, but these are rarely used which may lend weight to the criticism. However, in the short-term codification of a broad number of grounds has made judicial review more accessible.
- Administrative Appeals Tribunal: by combining multiple specialist tribunals (described as “inefficient, confusing and inequitable”) into a single generalist tribunal, the reforms created a body designed to be “fair, just, economic, informal, and quick”. Although the AAT is court-like, its role is fundamentally distinct from judicial review. Courts consider legality, while the AAT considers merits. The AAT also

No-invalidity clauses state that the **statutory power shall be valid despite errors made in the course of exercising it** – albeit such errors do not constitute failure to validly exercise the power. E.g. *Migration Act* s 501G(4): “failure to comply with a specific duty imposed by the Act to provide reasons to cancel a visa does not affect the validity of the decision”.

A decision or act vitiated by JE is not authorised by law and lacks legal force. Determining a JE involves statutory interpretation – there is no “rigid taxonomy of JE”. Principle of procedural fairness is a fundamental common law right which courts will presume to apply (and failure to meet it constitute a JE) in absence of unmistakable language to the contrary.

Mandamus compels performance of a duty that remains unperformed in law or fact (JE), prohibition applies for actual or threatened excess of power (JE), and injunction applies to any threatened infraction of law (JE or NJE). s 75() does not guarantee judicial review for jurisdictional error per se – it guarantees that the High Court can hear applications for mandamus, prohibition, or injunction.

No-invalidity clauses have the potential to hollow out s 75(v) jurisdiction, but not to oust or obstruct access to it. They do not prevent the High Court from enforcing statutory limits on executive power, but **inform** the court as to what those limits are. “Parliament can define power or jurisdiction of an executive officer and determine the content of law. But it cannot deprive the High Court of its constitutional jurisdiction to enforce the law” (Gleeson CJ in *Plaintiff S157/2002 v Commonwealth*).

No-invalidity clauses can be read down (e.g. *Commissioner of Taxation v Futuris*, where the clause was read down to not apply to decisions made in bad faith or fraud). Additionally, the legal meaning of the no-invalidity clause may be interpreted to not apply to the law in question, or an apparent no-invalidity clause may not legally operate as a no-invalidity clause.

No-invalidity clauses cannot conclusively determine the validity of executive action (breach separation of powers), but **instead** assist the court in interpreting Parliament’s intention as to the scope of valid action. However, they usually carry great weight: jurisdictional error is identified by statutory interpretation of whether an error of law was intended to lead to invalidity, and an express statement that it was not is very powerful.

The validity of executive action is determined by Chapter III courts. This does not mean that courts have “untrammelled authority” to determine jurisdictional limits of executive power. No-invalidity clauses can validly curtail jurisdictional review, even under s 75(v).

The relative **strengths** of internal review and tribunals are the following:

- Reviews are significantly faster and cheaper than tribunals;
- Reviews, from a policy perspective, provide further savings by discouraging applicants to apply for external review (in this way “the imperatives of government have prevailed over the interests of claimants”);
- Tribunals, unlike reviews, are impartial and independent of the influence of the original decision-maker;
- Tribunals, unlike reviews, provide opportunities for participation of the applicant in the accountability process.

## **STANDING**

### Groves 2016

Lower courts are slowly chipping away at the context of standing, utilising discretionary and unclear rules. Standing can preclude litigants from gaining remedies against unlawful decisions (e.g. *Argos*: businessman suffering loss due to greater competition resulting from an unlawful administrative decision).

**Justifications** for standing rules include:

- “To ensure applicants litigate their own business. For an applicant to have standing demands a connection between the applicant’s interests and the relief sought...courts will not recognise busybodies” (Graham J in *Hussein*).
- Standing rules are ameliorated by the traditional role of the Attorney-General as the guardian of the public interest. In that role, the Attorney-General need not show special interest to establish their standing (*ADJR Act s 18(1), Judiciary Act s 78A*).
  - o This argument is limited by the different nature of the Attorney-General in Australia as opposed to the United Kingdom, both due to constitutional structure and role in government. Australian Attorneys-General are members of Cabinet, heads of a government department, and nominal administrators of statutes within that portfolio. These functions imply that it is “somewhat visionary” to expect that the public could rely upon the Attorney-General to grant a fiat to protect the public interest “for the administration of which a ministerial colleague is responsible” (Gaudron, Gummow and Kirby JJ in *Batemans Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund*).

**Benefits** of standing include:

- Standing can improve the quality of public law litigation because parties with a clear personal stake in a case are more likely to gather and present the best possible case (Murphy J in *Attorney-General (Cth) ex rel McKinlay v Commonwealth*).

**Drawbacks** of standing include:

## JUDICIAL RESTRAINT AND JUSTICIABILITY

Non-doctrinal approaches	Formalist approaches	Institutional approaches
Judges have broad discretionary power	Idea is objective approach – law v policy	Focus on rectifying uncertainty
Case by case basis	Limited discretion – rigid – bright line between politics and law	Significant impact (beyond just that one case) – is concerned with consequences
Judicial flexibility (but there is still constraints)	Not concerned with consequences of their decisions on scope	Incrementalist – building on other cases (but also being prepared to deviate, if there is good reason)
Trusts judges – good sense, good judgement as to when restraint is needed	Nuclear option – all or nothing – creates areas of non-accountability. Once you have drawn these lines they are hard to erase (an inflexible approach).	Principles of restraint: polycentricity (competing interests), expertise, flexibility, democratic legitimacy (separation of powers)
No 'set standard' – inconsistency of decisions makes us question rule of law and also means we don't know what arguments to put forward	Really this approach is subjective, but the reasoning is covered up by a cloth of seeming objectivity. False pretence of objectivity.	Comparative approach – looking to see which branch of the separation of powers is the most appropriate in the circumstances. "Inter-institutional courtesy"
	Justiciable vs non-justiciable	Balance – weighing up issues like rights
		Underlying sense of judicial fallibility

Statutory powers may be non-justiciable if their subject matter is unsuitable for review, depending on the nature of the power but **not** its source (*CCSU v Minister for the Civil Service* – the prerogative power is justiciable, but not powers concerning matters such as national security).

Hypotheticals are non-justiciable – there must some immediate right, duty or liability to be established by the Court (*Re McBain; Ex parte Australian Catholic Bishops Conference*).

Cabinet decisions are non-justiciable (*Minister for Arts v Peko-Wallsend Ltd*).

Although decisions of external sovereigns are non-justiciable, matters concerning military or foreign policy are not automatically excluded from review (*Hicks v Ruddock*).