

Administrative Law Sample Exam Notes

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Jurisdiction

ADJR: Does the Federal Court have jurisdiction to conduct judicial review under ADJR Act?

Model introduction: In order for the FCA to have jurisdiction under the ADJR Act, [Applicant] must be challenging a decision (s5 ADJR), or conduct in relation to a decision (s6 ADJR), of an 'administrative character made' 'under an enactment' to which the ADJR applies (s3(1) ADJR definitions of 'decision to which this Act applies' and 'enactment').

Mention if I have time: This decision is not 'a decision by the Governor-General' (s3(c) ADJR definition of 'decision to which this Act applies') and the decision is not one 'included in any of the classes of decisions set out in Schedule 1' (s3(d) ADJR definition of 'decision to which this Act applies')

Note if [Delegate]:

This includes delegated decisions (s 3(8)).

Q1.1 Is there a decision? (s3(1) ADJR)

Model response: The decision to [insert decision] is a reviewable decision as it is 'one for which provision is made by or under' s[X] HIA (Mason CJ in *Bond* at 337). [Further/ However] the [insert decision] [is/is not] 'substantive' (*Edelsten* at 70) and [possesses/lacks] an 'operative', 'final' or 'determinative' quality (Mason CJ in *Bond* at 337) and [does/does not] directly affect [applicant]'s rights or obligations (*Edelsten* at 68). This decision [is not/is] a stepping stone decision.

Note: A reviewable decision is 'generally is substantive, final and operative' (Mason CJ in *Bond* at 341)

Report or recommendation

S 3(3) ADJR defines 'decision' to include a report or recommendation that the HIA provides be made before the decision is made. Here, per *Edelsten* and *Kelson*, the recommendation under s 25(5)(a) is a decision which is required for

- a revocation of an applicant's approval as an APP (under s13(1)(b) HIA)
- a varying or revocation of a premises approval as an APL (under s16(4)(a) HIA)

Stepping stone decisions

Model response: 'A conclusion reached as a step along the way in a course of reasoning leading to an ultimate decision **would not ordinarily amount to a reviewable decision**' However, if 'the statute provide[s] for the making of a finding or ruling on that point ... the [steppingstone] decision, though an intermediate decision, might accurately be described as a decision under an enactment' (Mason CJ in *Bond* at 337). Applied here, the decision to [insert decision] [is/is not] an **intermediate decision** provided for

- under s[X] HIA.
- under the HIA.

Note, while judicial review cannot be brought against the stepping stone decision of [insert decision], the ultimate decision to [insert decision] can be challenged as [insert reason why stepping stone decision can be challenged e.g. Secretary took into account irrelevant consideration in determining stepping stone decision] (*Bond*).

Q1.2 Is there conduct related to a decision? (s6)

...

Q2. Is the decision of an 'administrative kind'? (s3(1) ADJR)

The [insert decision] involve an application of a general rule — that contained in s[X] HIA — to the specific circumstances of [insert applicant]'s application (*Central Queensland Land Council Aboriginal Corporation* at [59]). There is no public consultation; no parliamentary control; and section 30 HIA provides for merits review (*ibid*). The [insert decision] is of an administrative character.

Q3. Was the decision made 'under an enactment'? (s3(1) ADJR)

The two step test from *Tang* need be satisfied. The [insert decision] was expressly authorised by s[X] HIA (limb 1 of *Tang* at [89]). [Further/However], the [insert decision] [does/does not] 'confer, alter or otherwise affect [applicant's] legal rights' to [insert activity] (limb 2 of *Tang* at [89]). Hence, a decision [was/was not] 'made' 'under an enactment' (s3(1)(a) ADJR: definition of 'decision to which this Act applies').

Note:

- It is 'sufficient that the enactment requires or authorises decisions from which new rights or obligations arise' (*Tang* 130-131 [89])
- The preferable test for limb 2 is that it does *not have to be* the *applicant's* rights that are affected.

Q4. 'To Which This Act Applies' (s3(1) ADJR)

RED FLAG: Decisions made by the Governor General.

ADJR Schedule 1 exceptions do not apply.

Conclusion

Model response: The court has statutory jurisdiction to entertain [applicant]'s judicial review applications regarding the above decision and conduct.

Do the Courts have jurisdiction to conduct judicial review of this particular application under the common law?

- Judiciary Act s 39B (FCA)/Constitution s 75(v) (HCA)

The Federal Court and High Court have jurisdiction under [section 39B of the *Judiciary Act 1903 \(Cth\)*](#) and [section 75\(v\) of the *Commonwealth Constitution*](#), respectively, to conduct judicial review where prerogative writs are ‘sought against an Officer of the Commonwealth’ (**‘Officer’**) regarding justiciable matters.

Element 1: Is the ‘matter’ justiciable? ([s75\(v\) Constitution](#); [s39B Judiciary Act](#))

Yes—>See element 2

No—>Court does not have jurisdiction

Model introduction: Justiciability raises two separate but related questions. The **first** is whether a decision or controversy is amenable to judicial determination: in other words, **whether the court can resolve the case**. The second question is whether a decision or controversy *should* be resolved by a court,

Q1. Can the Court resolve the ‘matter’? ([s75\(v\) Constitution](#); [s39B Judiciary Act](#))

Whether [applicant]’s

- laboratory complies with the **HIA** ...
- application to be an approved pathology practitioner is approved (**s11(2)(a)**) or rejected (**s11(2)(b)**) ...
- approval as an approved pathology practitioner (**s13(1)**) is revoked ...
- laboratory is **approved** in principle (**s16(1)(a)**) or refused approval (**s16(1)(b)**) as an accredited pathology laboratory ...
- laboratory is **approved** as an accredited pathology laboratory (**s16(2)**) ...
- laboratory approval as an accredited pathology laboratory is ‘var[ed] or revoke[d]’ (**s16(4)**) ...

... is not 'hypothetical' (*Re McBain* at [242]). There is an actual dispute which involves a real and immediate 'controversy' about [applicant]'s rights to operate [as a approved pathology practitioner/a laboratory as an accredited pathology laboratory] which would be 'quelled' 'by the application of judicial power' (*ibid*).

If there is conduct or interim decisions

The [insert conduct] [has/has not] been 'overtaken by a subsequent decision'. Thus, it [is not/is] reviewable (*Ozmanian* at 20).

Q2. Should the Court resolve the matter? (s75(v) Constitution; s39B Judiciary Act)

Yes—>Court does have jurisdiction

No—>Court does not have jurisdiction

It does not relate to 'complex policy considerations', (*Peko* at 279) international relations (*Peko* at 307; *Hicks v Ruddock* at [5]) or national security (*Peko* at 306), such that the Courts should not review it

Sample shutdown:

Yes. There is nothing on the facts about the status of the decision-maker, source or nature of the power, or subject matter of the decision, analogous to the cases we studied that calls this into question.

Element 2: Has the decision been made by an 'officer of the Commonwealth'? (s75(v) Constitution; s39B Judiciary Act)

Yes—>See element 3

No—>Court does not have jurisdiction

Whether a person is employed or appointed to an office of the Commonwealth will determine if they are an 'officer', (*R v Murray and Cormie* at 45) not whether they exercise federal power. Applied here, the [**Secretary of the Department of Human Services**] (s3 HIA definition)//**Director** (s3 HIA definition)/**Minister** (*Church of Scientology v Woodward*)] is an officer of a government department and is presumably paid a salary (*Murray*). Hence, the [**Secretary/Director/Minister**] can be safely assumed to be officers of the Commonwealth.

What if the decision maker is a private contractor?

It is ambiguous whether [applicant]'s [insert decision maker e.g. private building surveyor] is an Officer of the Commonwealth. The English Court of Appeal has stated that decisions of private entities exercising public power may be judicially reviewed (*Datafin* at 852 (Nicholls LJ)), whereas the High Court has left this question open (*Plaintiff M61/2010E* at [51]).

Element 3: Prerogative Writs: Is the decision a decision under which one of the remedies listed in either s75(v) Constitution or s39B Judiciary Act is available?

[Applicant] can seek

- a certiorari to quash the [Director/Secretary/Committee]'s [insert decision] and a mandamus to compel the [Secretary/Director/Committee] to remake their decisions
- an injunction prohibiting the Committee's investigation.

For an extensive discussion on whether there are limitations to such remedies see discussion below on 'remedies'.

Conclusion

[Applicant] can apply for judicial review to the Federal Court and High Court.

Standing

Does [applicant] have standing to conduct judicial review?

Model introduction: Under the *ADJR*, a person has standing if they are ‘aggrieved’ by a decision or conduct (s5 *ADJR*). This occurs if their interests are ‘adversely affected’ by the decision to [insert decision] (ss 3(4)(a)(i)-(ii) *ADJR*). At common law, standing is established where a private right is interfered with or where the plaintiff suffers special damage peculiar to themselves (*Boyce* at 114; *ACF v Commonwealth* at 527). This special damage was reformulated into a broader test to show a special interest in the subject matter in *ACF v Cth* (at 530). Standing rules in the *ADJR* and at common law are substantially the same (*ACF v Minister for Resources* at 72)

Note: If the private interest model is clearly satisfied for an applicant, do not discuss public interest model

[Individual Applicant]

Private interest model

Model introduction: It need be determine whether **[applicant]** is 'likely to gain some advantage, other than the satisfaction of righting a wrong' or 'suffer some disadvantage, other than a sense of grievance or... costs' (*ACF v Cth*).

Accreditation

Without accreditation, **[applicant]**'s private right to run a pathology business is affected (*Boyce* at 114; See generally *Loiello* [144]).

Profitability

Additionally, the decision to **[insert decision]** would tarnish **[the laboratory's/insert applicant's]** reputation, impacting its profitability (*Loiello* [144]. See also *ACF v Cth* 530). A lack of 'precise evidence of financial loss' is not detrimental in light of this '[p]ossible commercial harm' (*Loiello* at [142]). **[Applicant]** 'would suffer a not insignificant loss of profitability' (*Argos* at [40]) affecting her 'economic' interests (*Argos* at [91]).

Mere intellectual or emotional concern

[Applicant]'s interest **[is/is not]** more than a 'mere intellectual or emotional concern' because the decision to **[insert decision]** will **[likely/be unlikely to]** affect the interests of **[applicant]** in a material way (*ACF v Cth*). However, **[applicant]** expressing emotional concern to **[insert subject matter e.g to cater to the healthcare needs of communities around Daly Waters]** does not limit, nor help, her standing to sue (*Onus* at 41-42)

Right to quiet enjoyment

...

Trade union members

...

Interest can be **cultural/spiritual interest** in the subject matter of the decision (*Onus*)
[Applicant], as [insert cultural interest e.g. Doingwell's oldest citizen and the honorary "Custodian of [it's] Heritage"], might have a cultural interest in [insert subject matter e.g. the laboratory's accreditation] (*Onus at 73*). [However/Further] this argument is weak because any cultural interest [applicant] may have is [nowhere near as/comparatively] significant as that of the Indigenous people in *Onus*. Thus, [applicant] is [unlikely/likely] to have standing.

Other interests:

- An interest in the 'environment' or 'historical heritage' (*Onus at 73*).

Sample conclusion:

As an approved practitioner, in conjunction with [applicant]'s likely status as the laboratory's Proprietor (**HIA s 3 definition of 'Proprietor'**), [applicant] is 'affected to a substantially greater degree [and] in a significantly different manner' by the decision than the general public (Brennan J at 74 in *Onus*; see also *Argos* at 414 [61]).

[Public interest group applicant]

Private interest model

Sample response: [Public interest group] has no direct link with [applicant]'s laboratory. Although [public interest group] is interested in [insert interest e.g. the socio-economic development of Indigenous people across Australia], its position is analogous to the position of ACF. Unlike *Onus*, there is no 'special interest' of [public interest group] in the operation of [applicant]'s laboratory.

Quick shutdown: [Insert applicant] will likely be [able/unable] prove that the decision to [insert decision e.g. grant the twins housing permits] affects them to a substantially greater degree than the general public) (Brennan J at 74 in *Onus*; see also *Argos* at 414 [61]). On balance, it is [likely/unlikely] that [applicant] will have standing concerning [insert the decision].

Public interest model

To be a 'person aggrieved' (s5 *ADJR*) the 'multifactorial approach' need be applied to ISG (*Animals' Angels* at [105]) No one factor is determinative. An overall assessment is required (*Australian Institute of Marine and Power Engineers* at 133).

Arguably, [public interest body] [has/lacks] standing as it

- [has/lacks] a sufficient Australian presence (*Animals' Angels* at [120])
 - [is not/is] a busy body - note if State is saying this but its Cth law it holds less weight
 - [has/lacks] been active at least since [insert year] (*Animals' Angels* at [120])
- ...
- [has/has not] disclosed receiving Commonwealth funding towards its projects (*NCEC* at 513). [Further/However], this funding [was/was not/is not clearly] dedicated to [insert public interest body interest]

Therefore, [public interest body] [has/lacks] Commonwealth recognition as a 'significant and responsible' organisation (*NCEC* at 513). The Commonwealth government consultation with [public interest body] [did/did not] concern [insert interest of public body] (*NCEC* at 514).

If a decision to [insert decision] [insert impact e.g. removes proper medical services for aboriginal communities], [public interest body]'s interest may be affected in a 'significantly different manner' (*Onus* at 74; *Argos* at [61]).

Side issue: Where the [applicant] is situated (to determine presence)

Having [insert public body]'s [insert member e.g. president] based outside of [insert town] will not preclude [insert public body] from having standing as even having a small number of members, like [insert other member], based in [insert town] may constitute a 'sufficient presence' (*Onus* (n 23) 38 (Stephen J)).

Narrow approach

[Applicant]'s purpose [does/does not] coincide with the HIA's object listed under s3 (*Right to Life* at 75). Thus, ...

Joinder

Model response: [Applicant 1] can apply to join [Applicant 2]'s application for review (or vice versa) (*ADJR Act s12(1)*). The court has discretion to grant or refuse this (*ibid s12(2)(b)*). However, if neither party have standing then joinder is unlikely. I advise joinder may be beneficial as stronger legal arguments may be made with a larger legal team.

Reasons

Do reasons have to be provided?

Common Law

No common law right to receive reasons exists (*Osmond* affd *Wingfoot*). Only [applicant] has an express right to the Committee's reasons under ss 25(3)(b) and (4). No such right exists requiring the Secretary (*s13; s16(4)*) or Director to give reasons, nor are there 'special' (*Osmond* at 670) or 'exceptional' (*Osmond* at 676) circumstances such that an implied right to receive reasons under the Act exists (*Osmond* at 676).

'The standard required of a written statement of reasons in order to fulfil the duty imposed on a [administrative decision maker by an Act] ... falls therefore to be determined as an exercise in statutory construction' (*Wingfoot* at 498 [44]).

ADJR

Option 1: Applicant lacks standing

As [applicant] lacks standing, it cannot request reasons for the [DM]'s [insert decision] (s13(1) ADJR). Instead, [applicant] can lodge an FOI request to access information relating to the [DM]'s [insert decision] (FOI Act ss3, 11).

Option 2: Applicant has standing

...

2: *Absence of Discretion Grounds*

....

2.3 *Improper purpose*

Was the improper purpose GOR breached?

Identifying the purpose for which a power may be lawfully exercised is a matter of statutory interpretation.

Three step process:

1. Identify the purpose(s) for which the power can lawfully be exercised.
2. Identify the purpose for which the power was actually (as a matter of fact) exercised.
3. If 2 is within 1, the exercise of the power is authorised.

NOTE: If beneficiary of improper purpose (i.e benefitting themselves) likely **bad faith** too

Model response: The ground of improper purpose is made out if the purpose for which the power was exercised is not a purpose for which it can be lawfully exercised (*Toohey*). The allegedly improper purpose being immoral is not pertinent to this inquiry.

Under the common law ultra vires ground of review and

- decision: ss 5(1)(e), 5(2)(c)
- conduct: ss 6(1)(e), 6(2)(c)

ADJR, arguably, the decision to [**insert decision**] was made for an improper purpose, specifically [**insert improper purpose** e.g. seeking to advance the Secretary's election prospects/political career, defeating a land claim as in *Toohey*, profit],

- long: which is a purpose other than a purpose for which the power was conferred (*Toohey*) ...
- short: which is not one authorised (*Toohey*) ...

... by the **HIA**. Identifying the purpose for which a power may be lawfully exercised is a matter of statutory interpretation. Here, the **HIA** objects does not mention anything about [**insert improper purpose** e.g. political considerations]. Accordingly, to the extent that

[DM] was motivated by [insert irrelevant consideration] in [insert decision], [DM] is likely to have been acting for an improper purpose.

Option 1: No other plausible explanation for [insert decision]

Objectively, improper purpose, can be inferred as there was no other plausible explanation for [DM] to [insert action], except that it was designed to [insert improper purpose e.g. advance the DM’s political position] (cf *Toohey*).

Option 2: Mixed purpose

...

Mention if relevant: Improper purpose was a means of achieving proper purpose

Further/However the alleged improper purpose of [improper purpose] [was/was not] merely a ‘means’ to achieving the proper purposes details in s3 HIA (*Samrein*).

Conclusion: **On balance**, the purpose [was/was not] improper. This GOR [is/is not] made out.

Samrein v Metropolitan Water	The board had the power to compulsorily acquire land for any purpose. Board acquired land to build offices to house its workers and as a retail space	The dominant purpose was to provide accommodation, ancillary purpose was the retail space	No unauthorised purpose
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2.4 *Bad faith*

Sub GOR 3: Was the bad faith GOR breached?

Option 1: Unauthorised purpose from above

From above, [DM] has acted for an improper purpose. [Applicant] could argue that, in construing the **HIA** as a whole and its objects (**PBS**), [DM] acted in bad faith by acting for this unauthorised purpose that had the effect of

- benefitting themselves personally by [insert facts e.g. having their own pathology practice have increased profitability]
- benefitting a third party being [insert third party] by [insert facts]
- causing detriment to a third party ([insert third party]) by [insert facts e.g. approving a practitioner as an approved pathology practitioner to harm a competitor]

([ss 5(1)(e) and 5(2)(d) - decisions / ss 6(1)(e) and 6(2)(d) - conduct]; and common law ground)...

Option 2: Unauthorised purpose is to benefit or detriment another

...

...Here, this aforementioned [benefit/detriment] [was the purpose for DM's decision/ was merely a consequence of their decision], as opposed to [being a mere consequence of their decision/being the purpose for it] because [insert reason why], therefore suggesting [bad faith/no bad faith]. [Albeit/In addition], bad faith has a higher threshold than improper purpose. This threshold will unlikely be made out.

...

2.6 Unreasonableness

GOR 4: Was the unreasonableness/irrationality GOR breached?

OFTEN PAIRED WITH: Relevant/Irrelevant consideration, No evidence, Abuse of Power

- If a decision was so unreasonable that no reasonable authority could have made it, the GOR is made out

Model introduction: [DM]'s decision will give rise to review for abuse of power, under

- decision: ss 5(1)(e) and 5(2)(g)
- conduct: ss 6(1)(e) and 6(2)(g)

ADJR and under the common law ultra vires ground of review (*Wednesbury; Li*), if the [decision/conduct] was 'so unreasonable that no reasonable person could have' made it (s5(2)(g) ADJR). The law of unreasonableness is in a state of evolution: some judges continue to apply *Wednesbury* (e.g., French CJ and Gageler J in *Li*); some apply an expanded concept of unreasonableness which includes the reasonableness of the process by which the decision is reached (see e.g., Hayne, Keifel and Bell JJ in *Li* and Kiefel CJ in *SZVFW*). On a policy note, this GOR offends the separation of powers doctrine and parliamentary sovereignty.

Sample response: Unreasonableness (but high threshold)

[Applicant] may contend, given the scope and purpose of the *HIA* in s3, that the decision here is irrational, such that 'no reasonable decision maker' in the Secretary's position would have come to the same decision to [insert decision] (see e.g., Hayne, Keifel and Bell JJ in *Li* and Kiefel CJ in *SZVFW*) (see 'mention if relevant' or 'conclusion')

Mention if relevant: Specific reason for unreasonableness

This is because the decision ...

Sample shutdown: Unreasonableness not satisfied

...

Conclusion:

This test is 'necessarily stringent' (*SZVFW* at 551) as unreasonableness is 'rare' (*Li* at 378), has an 'extremely confined scope' (*SZVFW* at 564) and 'Parliament did not manifest an intention that such a conclusion be lightly reach' (*SZVFW* at 586). [**Albeit a/ Given the**] high threshold, this ground is [**likely/likely not**] breached. The decision [**is invalid/remains valid**].

Associated Provincial Picture v Wednesbury	Permission of a local authority could be 'subject to any conditions'. Condition was that no children under 15 could attend, whether accompanied by an adult or not.	The decision was not so absurd that no sensible person could have reached it	Reasonable
Minister v Li	False information provided by migration agent without knowledge or consent. Applicant requested adjournment to resubmit genuine evidence.	The arbitrariness of the decision rendered it unreasonable	Unreasonable
Minister v SZVFW	Applicants applied for a protection visa but did not attend hearing or interviews with officials.	The applicant's unresponsiveness was a reasonable explanation for the decision	Reasonable

Privative/Ouster Clauses

Introduction

The decision to **[insert decision e.g. revoke accreditation]** was made under **[insert section/Part X]** of the **HIA**, so the privative clause is activated.

The effect of **[insert sub-section 1 of privative clause]** is to **[insert effect]** and the effect of **[insert sub-section 2 of privative clause]** is to **[insert effect]**.

Potential effects of privative clauses

- mandate external merits review for Part 3 decisions (see e.g. 2022 S1 s33(1)(a))
- prohibit judicial review (see e.g. 2022 S1 s33(1)(b))
- to remove judicial review (both common law and ADJR) and only allow a merits review
- **[prohibit/limit/remove]** the **[challenge/appeal against/review/quashing/questioning]** of a **[declaration/decision/direction]** (thereby purporting to oust judicial review).

Courts generally interpret privative clauses narrowly as these clauses seek to limit their capacity for judicial review (see e.g. *Plaintiff S157/2002*) - thus threatening government accountability, the separation of powers and rule of law. Courts are reluctant to give them effect (*Hockey v Yelland*).

2022 S1 Privative clause

33. No Judicial Review

(1) An application to challenge a decision made under Part 2 of this Act may only be made in the manner set out in section 31 of the Act (i.e. external merits review section)

(2) An application for judicial review cannot be made with respect to a decision made under Part 2 of this Act.

(3) To avoid doubt, and without limitation to sub-section (2) above, a decision made under Part 2 of this Act cannot be brought pursuant to:

(a) Section 75(v) of the Constitution (or any other provision of the Constitution);

(b) Section 39B of the Judiciary Act 1903 (Cth) (or any other provision of the Judiciary Act);

(c) the Administrative Decisions Judicial Review Act 1977 (Cth).

Step 1: ADJR judicial review

Example: (2) To avoid doubt, an application under s [X] of this Act cannot be brought pursuant to: (c) the Administrative Decisions Judicial Review Act 1977 (Cth).

[Privative clause section e.g. **ss 33(1), (2) and (3)(c) HIA**] are attempting to oust ADJR judicial review. ADJR jurisdiction is vested in the Federal Court (**ss 3, 8, 5 (for decisions) ADJR**).

Parliament cannot oust judicial review (**ss 4 and 10(1)(a) ADJR Act**). However, under **s 3 ADJR**, a decision that cannot be judicially reviewed is one made under an enactment listed under schedule **1 ADJR Act**. Here, **HIA [is/is not]** listed under schedule 1. As a matter of statutory interpretation, this highlights Parliament's intention to [**exclude/not exclude**] ADJR judicial review. I would advise [**applicant**] that [**privative clause section**] [**will/will not**] be effective to exclude their ADJR review.

Step 2: Common law judicial review

Model introduction: Common law jurisdiction is vested in the High Court (s 75(v) Constitution) and the Federal court (s 39B Judiciary Act).

Step 2a: Type of privative clause

1) Finality clauses ('no appeal' and 'final and conclusive')

...

2) 'No certiorari' (or refusing another remedy) or 'shall not be questioned' clauses

...

3) Denial of judicial review ('shall not be subject to judicial review')

Option 1: Denying JR for specific grounds

Section [number] Act denies judicial review for breaches of [specific grounds]. This is analogous to *Aala* which denied judicial review for specific grounds.

Example: Aala	<i>(2) The following are not grounds upon which an application may be made under subsection (1): (a) Breach of natural justice (b) Unreasonable exercise of power</i>
----------------------	---

Option 2: Denies JR entirely

Section [number] **HIA Act** denies judicial review entirely (analogous to *Plaintiff S157/2002*) because it states that

- judicial review [insert phrase e.g. 'cannot be made'] under common law.
- a [insert relevant decision e.g. **Part 3 decision**] must not be challenged, appealed against, reviewed, quashed or called in question in any court

Plaintiff S157/2002 v Commonwealth of Australia	(1) A privative clause decision: ... b) Must not be challenged, appealed against, reviewed, quashed or called in question in any court (no judicial review clause); and ...
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Section 75(v)

The *Plaintiff S157* approach need be taken when interpreting [**privative clause section**].

Does the decision satisfies the *Hickman* provisos?

- If no, then the privative clause does not protect that decision and the decision is subject to judicial review
- If yes, go to Step 2.

Model response:

No (see sub-steps discussed below). Thus, the privative clause does not protect that decision and the decision is subject to judicial review. Here, [**applicant**] would not be precluded from having their decision reviewed judicially by the High Court under Section 75(v). Assuming I am wrong, the following requires discussion (presumption discussion).

Yes (see sub-steps discussed below).

1. Has the decision maker made a bona fide attempt to exercise his or her power? Did [**DM**] exercise their powers, in [**insert decision e.g. refusing Rowan Air permission**], in good faith?

Arguably, because the standard of bad faith is high, so too should the standard for good faith.

Sample response: Yes. This is because [**DM**]'s exercise of power in [**insert decision e.g. refusing Rowan Air permission**] was not tainted by grounds of review such as acting under dictation etc.

Sample response: No. As discussed above, [DM]'s exercise of power in [insert decision e.g. refusing Rowan Air permission] was tainted by grounds of review discussed above such as [insert GOR that shows DM's intentions were bad]

1. Acting under dictation (GOR 4.2)
2. Improper purpose (GOR 2.2)
 - Bad Faith
 - Fraud
3. the bias rule (GOR 5.2)
4. Irrelevant consideration (GOR 2.1)
5. *Wednesbury* Unreasonableness (GOR 2.3)

2. Is the decision related to the subject matter of the legislation?

Yes. This is uncontentious because s[X] *HIA* confers the power onto [DM] to do what he/she did.

3. Is the decision reasonably capable of reference to the power given to [DM] to [insert power]?

Yes.

Understanding the presumptions from Plaintiff S157/2002 and a process of reconciliation

Courts will only find privative clauses effective to oust the High Court's jurisdiction to review non-jurisdictional errors of law. This is because under s75(v) *Constitution* there is a constitutionally entrenched right to review decisions made by officers of the Commonwealth for jurisdictional error. It is not possible for Parliament to validly restrict or remove that right (Gleeson CJ in *Plaintiff S157/2002*). So, if the clause cannot be interpreted in any way other than as inconsistent with s 75(v), then it will be invalid to the point of inconsistency.

...

From *Plaintiff S157/2002*, there is a presumption that Parliament does not intend to limit or oust High Courts' jurisdiction unless done so expressly or by necessary implication

and a presumption that Parliament did not intend to pass legislation in conflict with the Constitution. However, ...

Ultimately, the Court here, like in *Plaintiff S157*, will read down [**privative clause section**]

- to only apply to things validly done under the **HIA**, and would not include decisions attended by jurisdictional error
- so it denies decisions not attended by jurisdictional error only (i.e. decisions validly done under the **HIA**).

Therefore, ...

Section 39B Judiciary Act

Given the language here [**is/is not**] clear and unambiguous language excluding Federal Court jurisdiction, I would advise [**applicant**] that [**privative clause section**] [**will/will not**] be effective to exclude their common law review. This conclusion need be considered in light of Courts' hostility to these clauses.

Plaintiff S157/20 02 v Common wealth of Australia	<p>(1) <i>A privative clause decision:</i></p> <ul style="list-style-type: none">a) <i>Is final and conclusive (finality clause); and</i>b) <i>Must not be challenged, appealed against, reviewed, quashed or called in question in any court (no judicial review clause); and</i>c) <i>Is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.</i> <p>(2) <i>'Privative clause decision' means a 'decision of an administrative character, made, proposed to be made, or required to be made... under this Act...'</i></p>
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4) Time limit clauses

[**Privative clause section**] sets a time limit of [**number**] days for an application of judicial review to be brought. Time limit clauses are generally acceptable so long as it does not, directly or as a matter of practical effect, curtail or limit the right or ability of applicants to seek relief under [s 75\(v\) of the Constitution](#) - this is a question of substance over form (*Bodruddaza*). Here, ...

5) 'No invalidity' clauses

...