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PART III. SUMMARY TABLE OF EXAM LEGISLATION

PART I: HYPO STRUCTURE AND TEMPLATE

I. INTRODUCTION

- identify the administrative action that the applicant wishes to challenge;
- who made or purported to make the decision
- the source of power the decision-maker relied upon.

The Minister (decision maker)'s decision to **grant/suspend/revoke** Y (the plaintiff)'s application for **export licence** will be the subject of the following judicial review analysis. The decision was made in accordance with **the Minister**'s power under **Make Australia Clean Again Act 2022** (relevant regulation).

II. WHAT IS THE JURISDICTION?

A. High Court

s75(v) of the Commonwealth Constitution gives the HCA the jurisdiction in all matters 'In which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth, the High Court shall have original jurisdiction.'

- There is '**a matter**': 'A matter is a controversy about some immediate duty, right or liability which can be decided by the courts or quelled by the disposition of the proceedings' (Hayne J in *Re McBain; Ex Parte Australian Catholic Bishops Conference* (2002) 209 CLR 372).
- Application is being brought against an '**officer of the Commonwealth**'
 - ✓ public servants
 - ✓ community members appointed to statutory committees
 - ✓ federal judges (created by Parliament pursuant to s 71 Constitution) (not HCA judges)
 - ✓ Governor-General
 - ✓ Commonwealth DPP
 - ✓ Federal police officers
 - ✓ ASIO officers;
 - ✓ Members of statutory committees
 - ✓ Royal commissioners holding Commonwealth letters patent
 - ✓ Commonwealth ministers and their delegates
 - ✓ DO NOT include a body corporate or some contractors
- One of the listed **remedies** is available and appropriate
 - ✓ mandamus
 - ✓ prohibition
 - ✓ injunction
 - ✓ certiorari - 'it has long been accepted that certiorari may issue as ancillary to the constitutional writs of mandamus and prohibition'. (Gaudron, McHugh, Gummow, Kirby and Hayne, JJ in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476[80])

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| | <p>s75(iii) gives jurisdiction to the High Court to undertake judicial review in all matters in which 'the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party'</p> |
| B. Federal Court of Australia (FCA) | <p>S44 of the <i>Judicial Act</i> 1903 (Cth)</p> <p>the HCA may remit matters in which the HCA has original jurisdiction to one of the federal courts if: the matter is a run of the <u>mill judicial review application</u> and NOT a matter involves interpretation of the Constitution, or the Court is being invited to depart from one of its previous decisions, or the matter involves a principle of law of major public importance.</p> |
| | <p>S39B(1) of the <i>Judicial Act</i> 1903 (Cth)</p> <ul style="list-style-type: none"> • It gives the FCA concurrent jurisdiction for judicial review sought <u>against officers of the Commonwealth</u>. • Same remedies as for constitutional writs. |
| | <p>S39B(1A)(c) of the <i>Judicial Act</i> 1903 (Cth)</p> <ul style="list-style-type: none"> • It gives the FCA jurisdiction in 'any matter... <u>arising under any laws made by the Parliament</u>, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter' <ul style="list-style-type: none"> ✓ allows review of non-statutory executive powers ; ✓ allows review of the validity of delegated/subordinate legislation (also not reviewable under the ADJR Act; ✓ is not limited to matters involving 'an officer of the Commonwealth' |
| | <p>s8(1) of the ADJR Act</p> <ul style="list-style-type: none"> • it confers jurisdiction on the FCA to hear and determine <u>applications made to it under the Act</u> <ul style="list-style-type: none"> ✓ limited to the review of exercises of statutory power • subject of review <ul style="list-style-type: none"> ✓ decisions (s5) <ul style="list-style-type: none"> ❖ S3(1): decision to which this Act applies means 'a decision of an administrative character made or proposed to be made or required to be made': <ul style="list-style-type: none"> ❖ (a) <u>under an enactment</u> referred to in paragraph (a), (b), (c) or (d) of the definition of enactment; or ❖ (b) by a Commonwealth authority or an officer of the Commonwealth <u>under an enactment</u> referred to in paragraph (ca) or (cb) of the definition of enactment. ❖ S3(2): making of a decision includes a reference to various acts, including <ul style="list-style-type: none"> (a) making, suspending, revoking or refusing to make an order, award or determination; (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission; (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument; (d) imposing a condition or restriction; (e) making a declaration, demand or requirement; (f) retaining, or refusing to deliver up, an article; or (g) doing or refusing to do any other act or thing. ✓ conduct for the purpose of making such a decision (s6) |

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| | <ul style="list-style-type: none"> ✓ a failure to make such a decision – breach of a duty (s7) • Subject excluded ✓ decisions by the Governor-General from its definition of 'decision to which this Act applies': s 3 (1); ✓ classes of decision listed in Schedule 1 to the ADJR. |
| C. Federal Circuit and Family Court of Australia (FCFCA) | s 8(2) of the ADJR Act – same with FCA's jurisdiction under s8(2) of ADJR Act |
| D. Victorian Supreme Court | <ul style="list-style-type: none"> • Source of power – Victorian Constitution • Avenues of judicial review <ul style="list-style-type: none"> ✓ Order 56 of the Supreme Court Rules; or <ul style="list-style-type: none"> ❖ Proceeding for judicial review must commence within 60 days after the decision is notified ✓ <i>The Administrative Law Act 1978</i> (Vic) <ul style="list-style-type: none"> ❖ There needs to be a decision ❖ The nature of tribunal |
| <p>III. WHAT ARE THE REMEDIES SOUGHT? DOES Y HAVE STANDING?</p> <p>For Y to bring a judicial review claim, Y must first show that he/she has standing (the question is if Y is the appropriate one to have brought proceedings). The standing required depends on the remedy sought.</p> | |
| A. Common Law remedies | <ul style="list-style-type: none"> • Mandamus <ul style="list-style-type: none"> ✓ Y would like the court to issue a <i>writ of Mandamus</i> for the decision to compel the Minister to exercise its statutory power to remake the decision in relation to Y's export licence application (make a decision/remake a decision). It requires Y to demonstrate a sufficient interest or specific legal right in enforcing a public duty owed to the applicant (<i>Sinclair</i>). <ul style="list-style-type: none"> ❖ a public duty owned to Y <ul style="list-style-type: none"> ➤ No discretion: clause 19 provides that 'the Minister must decide to grant or refuse to grant the applicant an export licence'. The word is couched in mandatory terms and placed a public duty on the Minister to make decision. ➤ Discretion: clause 46 provides that 'the Minister may suspend an export licence' if the Minister forms his view on certain conditions. In absence of mandatory language, the common law imposes a duty to exercise a discretionary statutory power on the certain conditions. ❖ As the applicant whose interest will be affected by the outcome of the application, Y has the legal right under _____ (statute) in enforcing the exercise of the public duty. ✓ the successful claim requires jurisdictional error - the complete failure (or refusal) to perform a public (statutory) duty that is required by law to be performed; or the failure |

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| | <p><u>to perform a public (statutory) duty according to law.</u> (<i>Plaintiff S157</i>)</p> <ul style="list-style-type: none"> • Prohibition/Certiorari <ul style="list-style-type: none"> ✓ Y would like the court to issue <i>a writ of prohibition to prohibit the Minister from suspending his export licence</i> and/or <i>a writ of certiorari to quash the decision</i> made by <u>the Minister</u>. ✓ The remedy has an open standing requirement. It means <u>even</u> <ul style="list-style-type: none"> ➤ <u>a stranger (i.e., someone without a private legal right or a legal interest in the dispute) can institute proceedings</u>; however, the court has a discretion to refuse to hear the matter if the applicant does not also have a <u>special interest</u> (<i>McBain</i>). ➤ Here, Y is the applicant whose interest will be significantly affected by the decision, which is mostly a sufficient special interest comparing to other members of the public. ✓ The claim for prohibition requires Y to prove jurisdictional error (<i>Plaintiff S157</i>) <ul style="list-style-type: none"> ❖ the decision maker is acting outside his or her jurisdiction; AND ❖ the decision is having a continued effect on the rights of the applicant. ✓ The claim for certiorari requires the identification of either jurisdictional error OR a non-jurisdictional error on the face of the record (<i>Plaintiff S157</i>) AND the legal effect or legal consequence of the administrative act that is capable of altering rights, interests or liabilities, such that the act may be quashed. (<i>Ainsworth</i>) <ul style="list-style-type: none"> ❖ Jurisdictional error: if the decision-maker makes a decision outside the limits of the functions and powers conferred to them or does something which they lack the power to do (<i>Craig v SA</i>) ❖ Record <ul style="list-style-type: none"> ➤ ‘no more than the documentation that initiates the proceedings and thereby grounds the jurisdiction of the tribunal, the pleadings, if any, and the adjudication, judgement or notice of decision’; ‘reasons for a decision are ONLY part of the record where they are deliberately incorporated into the decision itself’ (<i>Craig v SA</i>) |
| B. Equity remedies | <ul style="list-style-type: none"> • Injunctions (constitutional injunction/equity injunction) <ul style="list-style-type: none"> ✓ Y would like to seek for injunction to restrain _____ from _____ (beginning or continuing an action)/ to prevent _____ from _____ (enforcing an invalid decision of an administrator)/ to compel X to _____ (carry out a certain act e.g. to carry out an administrative function according to law). |

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| | <ul style="list-style-type: none"> ✓ The constitutional/equitable injunction has wider scope than constitutional writs it does NOT require a jurisdictional error. (<i>Smethurst</i>) • Declarations <ul style="list-style-type: none"> ✓ Y would like to seek for declaration to conclusively affirms _____ (the rights/duties/obligations of one or more parties in a legal proceeding). ✓ It is an equitable remedy which does NOT require jurisdictional error. • Standing <ul style="list-style-type: none"> ✓ The equitable remedies of declarations and injunctions are available if Y can demonstrate that <u>he/she has a 'special interest' that is greater than the general public</u> (<i>Onus</i>). This test is a flexible one which can be varied depending on the litigated subject matter. (<i>Gibson J in Onus</i>) <ul style="list-style-type: none"> ❖ A person would have a 'special interest' if they will be <u>adversely affected</u> by the administrative action to a greater extent than the public generally (ACF); ❖ 'A person is not interested ... unless he is likely to <u>gain some advantage... if his action succeeds or to offer some disadvantage...if his action fails</u>' (ACF) ❖ Must be more than a mere 'emotional or intellectual concern' (<i>Gibbs CJ in Onus v Alcoa</i>) ❖ The interest does not need to be proprietary, possessory, legal or financial; <u>it can be cultural or spiritual</u> (<i>Stephen J in Onus v Alcoa</i>) <ul style="list-style-type: none"> ➤ The interest of the aboriginal group may differ from the one in ACF as the interest is cultural and goes beyond 'emotional and intellectual' interest. |
| C. ADJR remedies | <ul style="list-style-type: none"> • ADJR remedies – make an order to <ul style="list-style-type: none"> ✓ Quash or set aside the decision, or a part of the decision – s16(1)(a); ✓ Refer the matter for further consideration – s16(1)(b); ✓ Declare the rights of the parties – s16(1)(c), s16(2)(a) and s16(3)(b); ✓ Direct any of the parties to do, or to refrain from doing something – s16(1)(d), s16(2)(b) and s16(3)(c); ✓ Direct the making of the decision – s16(3)(a) • Section 5(1), 6(1) and 7(1) of the ADJR Act allow a 'person aggrieved' by a decision, conduct or failure to make a decision to apply for an order for review. <ul style="list-style-type: none"> ✓ According to s3(4) of the ADJR Act, a 'person aggrieved' includes <u>a person whose interests are, or would be adversely affected by the decision</u>, or the way of the making of a report or recommendation in a decision, or a failure to make a decision. <ul style="list-style-type: none"> ❖ It is sufficient that Y will 'suffer as a consequence of the decision beyond that of an ordinary member of the public' (<i>Right to Life</i>) <ul style="list-style-type: none"> ➤ This is often a 'judgment of fact and degree' |

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| | <ul style="list-style-type: none"> ➤ The 'interest must not be remote, indirect or fanciful' ➤ Merely an emotional, intellectual intellectual concern is not sufficient ❖ The term a 'person aggrieved' is not a restrictive one; it is of very wide import. It is a test of 'fact and degree' (Argos) ✓ Here, Y is an aggrieved person whose interests - _____ (need to identify what interest relied on) have been/will be adversely affected by the decision/conduction/failure to make a decision. |
| D. Victorian level | <ul style="list-style-type: none"> • Source of judicial review power – s85 of the <i>Constitution Act 1975 (Vic)</i> • Avenues to invoke judicial review <ul style="list-style-type: none"> ✓ Under order 56 of the Supreme Court (General Civil Procedure) Rules 2015 (Vic) <ul style="list-style-type: none"> ❖ Certiorari and prohibition – persons aggrieved test ❖ Mandamus – falls within class of persons to whom the duty is owed / 'legal specific right' test ❖ Injunction and declaration – special interest test ❖ NB: convergence on 'special interest' test ✓ Under the <i>Administrative Law Act 1978 (Vic)</i> <ul style="list-style-type: none"> ❖ 'Person affected' test |
| IV. DOES Y HAVE GROUNDS? | |
| For Y to bring a successful claim, he/she needs to establish the grounds for the judicial review. | |
| A. Error as to jurisdictional fact | <p>The fact _____ (e.g. X has made an error when establishing facts which constitute a precondition to making a decision) may give rise to the common law ground of review under _____ (jurisdiction: common law or ADJR s5(1)(c) – the person who purported to make the decision did not have jurisdiction to make the decision) in relation to error of jurisdictional fact. This ground requires: <u>the existence of a jurisdictional fact which constitutes a pre-condition to enlivens the power of the decision-maker to exercise a discretion</u>; and <u>an error to the satisfaction of the jurisdictional fact</u>. (Enfield)</p> <p>1 Does the relevant statute prescribe a pre-condition upon the satisfaction of which enlivens the discretionary power of X?</p> <ul style="list-style-type: none"> • Objective fact <ul style="list-style-type: none"> ✓ Statute interpretation: clause ____ of the statute provides that _____ e.g. if the condition is satisfied, the decision-maker <i>must</i> not be granted if...). it <i>stipulates in direct/mandatory terms a precondition which obliges a grant/refusal</i> of _____. (Enfield) <u>It is an objective fact which plays a determinative role in the overall decision-making process.</u> |

❖ *Enfield*: s35(3) – a development that is of a kind described as a *non-complying development* under the relevant DP *must not be granted* a provisional DP consent unless (a) where the relevant authority is the DAC, the Minister and, if the development is to be undertaken in the area of a council, that council, concur in the granting of the consent; (b) in any other case – the DAC concurs in the granting of the consent.

❖ *Plaintiff M70*: s198A(3)(a) gives the Minister power to declare a country as a ‘specified country’ if it meets four prescribed conditions.

❖ *Make Australia Clean Again Act (2025 exam legislation)*

➤ S19(4): all relevant Cth liabilities of the applicant have been paid unless exceptional circumstances are demonstrated

➤ S46(2) the Minister must not suspend licence unless a written notice has been issued to the holder of the licence in the form prescribed by s46(3).

➤ S47(1) prescribes that the Minister may suspend an export licence in the condition that a relevant commonwealth liability of the holder is more than 30 days overdue, and a written notice is given, and the debtor has not made arrangement for the payment of liability within the cure period.

- Subjective fact

✓ Statue interpretation: clause ____ of the statue provides that ____ (e.g. if X is satisfied that..., a visa will be granted). It is *a subjective fact which requires ‘the formation of an opinion or belief’* by X. The satisfaction of ____ is a precondition for the exercise of X’s power to ____ (e.g. grant a license).

❖ *SZMDS*: the *Migration Act 1958* (Cth) - if the minister (or review tribunal) is satisfied that a person is a refugee, they must grant a protection visa; if the minister (or review tribunal) is not so satisfied, a visa must be refused.

❖ *Make Australia Clean Again Act*

➤ S46(2) requires the Minister to reasonably believes any of the prescribed grounds to suspend the licence. The ground (e.g. the holder is not a fit and proper person) constitutes a subjective fact to be satisfied before the licence can be suspended.

➤ Ss 46(3)(c) and (4) provide that the Minister request a written statement showing cause why the licence should not be suspended unless the Minister forms the state of mind that the suspension is necessary to prevent or lessen a serious and imminent threat to human or environmental health.

2 Was there an error to the satisfaction of the jurisdictional fact?

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| | <ul style="list-style-type: none"> • Objective fact <ul style="list-style-type: none"> ✓ Whether there was an error depends on statutory construction. (<i>Enfield</i>) The question here is whether or not X's conclusion that _____ (the dissatisfaction/satisfaction of the precondition), was a factual finding whose correctness was a condition precedent to exercising its statutory power to _____ (e.g. to approve an application without someone's consent) ? • subjective fact <ul style="list-style-type: none"> ✓ The correctness of the finding of the subjective jurisdictional fact depends on '<u>whether the determination was irrational, illogical and not based on findings or inferences of fact supported by logical grounds.</u>' (SZMDS) <ul style="list-style-type: none"> ➤ The determination can be challenged on many grounds including i) misconstrued the statutory requirements, ii) failed to take into account some relevant information (i.e. relevant/irrelevant considerations), iii) accounted for facts which did not exist, iv) took account of something irrelevant, v) acted without good faith, vi) the finding was not open on the evidence, vii) there was serious irrationality or illogic in the reasoning ➤ Misconstrued statute (overweighting): an error as to jurisdictional fact will be established where the decision-maker misconstrues and therefore incorrectly applies the pre-conditions on his or her power (M70) ✓ A finding of illogicality or serious irrationality requires a court to find that the decision '<u>was one at which no rational or logical decision-maker could have arrived on the same evidence</u>' (SZMDS). <ul style="list-style-type: none"> ❖ 'it is NOT sufficient that there is merely a lapse in logic or that the Court might have reached a different conclusion (SZMDS). ❖ A decision might be said to be illogical or irrational if only one conclusion is open on the evidence, and the decision maker does not come to that conclusion; Or if the decision to which the decision maker came was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn. (SZMDS) ✓ When looking at the subjective state of satisfaction you don't look at new material because you are evaluating whether the decision maker made a rational decision based on what they knew at the time (SZMDS) |
| B. Procedural fairness | <p>The fact _____ (e.g. did not give opportunity to Y to present his/her case) may give rise to a ground of review under _____ (jurisdiction: common law or ADJR s5(1)(a) – breach of the rules of natural justice occurred in connection with the making of the decision) that X as the decision-maker breached the duty to act in accordance with procedural fairness in the making of the decision. The</p> |