

Table of Contents

TOPIC 1: CONSTITUTIONAL CONTEXT	2
TOPIC 2: NEW ADMINISTRATIVE LAW INSTITUTIONS	3
TOPIC 3: AUTHORISATION TO DECIDE: DELEGATION AND AGENCY	6
TOPIC 4: SUBSTANTIVE CONDITIONS ON ADMINISTRATIVE DECISIONS	8
TOPIC 5: PROCEDURAL CONDITIONS: PROCEDURAL FAIRNESS	18
TOPIC 6: PRECONDITIONS TO POWER	29
TOPIC 7: DELEGATED LEGISLATION	32
TOPIC 8: SUPERVISORY JURISDICTIONS	35
TOPIC 9: REMEDIES IN JUDICIAL REVIEW	40
TOPIC 10: STANDING	43
TOPIC 11: JURISDICTIONAL ERROR	47
TOPIC 12: ENTRENCHED JUDICIAL REVIEW	50
TOPIC 13: INVALIDITY	53
TOPIC 14: PUBLIC FUNCTIONS AND THE SCOPE OF JUDICIAL REVIEW	56
TOPIC 16: ADMINISTRATIVE REASON-GIVING.....	61

TOPIC 11: JURISDICTIONAL ERROR

Jurisdictional error links an identified legal error to the remedy. It refers to a material breach of an express or implied condition of a statutory conferral of decision-making authority, resulting in a decision that lacks the legal force attributed to exercise of that authority. The materiality requirement (LPDT) is crucial: the breach must create a realistic possibility the decision could have been different.

Exam focus: *The key structural concept connecting grounds of review (Topics 3-7) to remedies (Topic 9) and entrenched review (Topic 12). In every exam answer, after establishing a ground: (a) is the error jurisdictional? (b) is it material (LPDT)? Bias and unreasonableness are inherently material. For other grounds, apply the realistic possibility test.*

11.1 Meaning and Elements

LPDT v Minister for Immigration [2024] HCA 12, [2]

Jurisdictional error can refer to breach of an express or implied condition of a statutory conferral of decision-making authority which results in a decision made in the purported exercise of that authority lacking the legal force attributed to exercise of that authority by statute.

The two-step analysis for jurisdictional error (LPDT [4]): Step A asks whether an error has occurred (breach of an express or implied condition). Step B asks whether the error is jurisdictional (whether it exceeds the limits of the statutory authority, rendering the decision lacking in legal force).

11.2 Materiality: The LPDT Test

LPDT v Minister for Immigration [2024] HCA 12, [14]

Whether the decision that was in fact made could, not would, 'realistically' have been different had there been no error.

Key points: the onus on the applicant to establish materiality is undemanding, requiring only 'reasonable conjecture' (LPDT [14]). Materiality asks whether the decision 'could' (not 'would') have been different. Bias and unreasonableness are inherently material: no separate materiality inquiry is required where either is established (LPDT [7]).

LPDT v Minister for Immigration [2024] HCA 12

Facts

The AAT affirmed revocation of a spouse visa for drug offences, but failed to comply with Ministerial Direction 90 as required by Migration Act s 499(2A). The Full Federal Court held the error was not material.

- **Legal reasonableness as JE (Li; SZVFW):** Reasonableness is an 'essential condition' of the exercise of power (French CJ, Li [29]). A legally unreasonable decision is made 'beyond jurisdiction' (Hayne, Kiefel and Bell JJ, Li [85]; Gageler J, Li [89]; confirmed in Minister for Immigration and Border Protection v SZVFW (2018) 264 CLR 541, [53]). Unreasonableness is inherently material and does not require a separate materiality inquiry (LPDT [7]).

The significance of this section is that it provides the doctrinal link between the grounds established in Topics 4-5 and the remedy. Once procedural fairness or unreasonableness is established as a ground, it is automatically a jurisdictional error (subject to materiality for procedural fairness; inherently material for unreasonableness). This matters because constitutional writs are only available for jurisdictional error, and the entrenched minimum provision in s 75(v) / Kirk protects against their exclusion by privative clauses only for jurisdictional errors.

11.4 Breach of Enacted Conditions (Project Blue Sky)

An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid. Whether it is invalid depends on whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition (Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355, [91]). The three relevant factors are: (a) whether the provision is an essential preliminary or merely regulates the exercise of functions already conferred; (b) whether the obligations are expressed in clear and determinate ('rule-like') language; and (c) whether there would be public inconvenience or hardship to innocent third parties if the act is invalid.

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355	
Facts	The ABA made an Australian Content Standard requiring 50% Australian programming, inconsistent with Australia's free trade obligations under the Broadcasting Services Act s 160(d).
Held	An act in breach of a condition regulating statutory power is not necessarily invalid. Section 160 was not an essential preliminary; it merely regulated how already-conferred functions were to be exercised. Breach did not make the Content Standard invalid.
Principle	Provides the three-factor test for whether breach of a statutory condition renders an act invalid: (1) essential preliminary or regulation of existing functions? (2) clear and determinate language? (3) public inconvenience if invalid? Parliament's intention to invalidate must be discerned.

Forrest and Forrest Pty Ltd v Wilson (2017) 262 CLR 510	
Facts	A mining lease application failed to include a mineralisation report as required by Mining Act 1978 (WA) s 74(1)(ca).

Held	In mining legislation, compliance with procedural requirements for applications is mandatory unless there is a contrary intention. Section 74 imposed essential conditions of a valid application. Non-compliance was invalidating.
Principle	In the context of mining (and by extension other statutory licensing schemes), procedural requirements for applications are presumptively mandatory. The Project Blue Sky analysis typically favours invalidity in these contexts.

Miller v Minister for Immigration [2024] HCA 13

Facts	An AAT application failed to include a statement of reasons as required by AAT Act s 29(1)(c). The agent later provided the statement after the AAT requested it.
Held	The absence of a statement of reasons was a defect that activated the AAT's power to request amendment. The agent's subsequent provision of the statement cured the defect. The AAT had jurisdiction once the statement was provided.
Principle	Where a procedural requirement for an application can be subsequently cured (as authorised by the statute), doing so restores jurisdiction. Not all procedural defects are incurable.

Exam note: *Project Blue Sky is essential for any question involving statutory procedural requirements. Always analyse: (a) essential preliminary or regulation of existing functions? (b) clear, rule-like language? (c) public inconvenience if invalid? Forrest and Forrest confirms that procedural requirements for applications in licensing schemes are generally mandatory.*

TOPIC 12: ENTRENCHED JUDICIAL REVIEW

The Constitution entrenches a minimum provision of judicial review that Parliament cannot remove or substantially impair. For Commonwealth powers, this derives from s 75(v) of the Constitution (Plaintiff S157). For State powers, it derives from s 73(ii) and the essential characteristics of State Supreme Courts (Kirk). Attempts to oust or impair judicial review are invalid to the extent they conflict with this minimum provision.

Exam focus: *Sequence for privative clause questions: (1) identify the clause; (2) Cth or State clause? (3) apply Plaintiff S157 (Cth) or Kirk (State) -- JE cannot be excluded; (4) are non-JE grounds still available? (5) are there impairment measures (Bodruddaza time limits; Graham secrecy clauses)?*

Principle	jurisdiction is an essential characteristic of a court answering the description of a 'Supreme Court' for the purposes of s 73(ii).
	State privative clauses cannot exclude review of jurisdictional error by State Supreme Courts. This jurisdiction is constitutionally entrenched under s 73(ii). Note: certiorari for ELFR is not entrenched and may be validly excluded by a State privative clause.

Commonwealth Privative Clauses	State Privative Clauses
Cannot exclude review of JE by the High Court under s 75(v) (Plaintiff S157)	Cannot exclude review of JE by State Supreme Courts (Kirk)
Can protect non-JE errors from ADJR Act review	Can protect non-JE errors from Supreme Court review
Certiorari for ELFR may be excluded by valid Cth privative clause	Certiorari for ELFR is not entrenched; may be validly excluded by State privative clause

12.3 No Impairment of Entrenched Review

Even without completely ousting judicial review, Parliament cannot 'hollow out' the entrenched minimum provision so as to prevent courts from performing their supervisory function.

Bodruddaza v Minister for Immigration (2007) 228 CLR 651	
Facts	Migration Act s 486A imposed a 28-day time limit (extendable by 56 days) on applications to the High Court for review of RRT decisions. The time limit did not allow flexibility based on vitiating circumstances.
Held	A time limit clause impairs the entrenched minimum provision if it does not accommodate the range of vitiating circumstances that may affect administrative decision-making. Section 486A's rigid time limit without flexibility was invalid.
Principle	Impairment test: a time limit clause that prevents the court from accommodating the range of circumstances that may delay a challenge impairs the entrenched minimum provision. The clause must allow for flexibility based on vitiating circumstances.

Graham v Minister for Immigration (2017) 263 CLR 1	
Facts	Migration Act s 503A prevented courts and tribunals from requiring disclosure of confidential information from security and law enforcement agencies. Issue: did s 503A impair entrenched judicial review?
Held	Prohibiting a court from receiving information necessary to conduct judicial review impairs the entrenched minimum provision. Section 503A was read down to exclude courts exercising original jurisdiction under s 75(v).

Principle

Secrecy clauses that prevent a court from accessing information necessary to meaningfully review a decision for jurisdictional error impair the entrenched minimum provision. Reading down is the appropriate remedy.

Exam note: *Impairment test: The entrenched minimum provision cannot be hollowed out by procedural mechanisms that prevent courts from meaningfully exercising supervisory jurisdiction. Time limits, secrecy clauses, and procedural barriers all constitute invalid impairment if they effectively prevent access to the court.*

TOPIC 13: INVALIDITY

Invalidity is distinct from unlawfulness. A decision may be unlawful without being treated as invalid (Project Blue Sky), or treated as a nullity without a court formally declaring it so (Bhardwaj). Understanding the consequences of invalidity, the distinction between nullity and decision in fact, and the effect of 'no invalidity' clauses are critical synthesis concepts.

Exam focus: *Topic 13 appears in questions involving: (a) the effect of a jurisdictional error (nullity from the start or must a court declare it invalid?); (b) what happens when an invalid decision has been acted upon (Bhardwaj; Oakey Coal); (c) whether a 'no invalidity' clause shields a statutory breach (Palme; Futuris).*

13.1 Legal Consequences of Invalid Decisions: Three Models

Understanding when and how a decision becomes invalid requires distinguishing three situations that produce different legal consequences. The key variable is whether the error is a jurisdictional error, a non-JE legal error, or a breach of a statutory requirement to which a 'no invalidity' clause applies.

Model 1: Nullity from the Start (JE)	Model 2: Decision in Fact (Non-JE Error)
Decision tainted by JE is legally ineffective from the date of making	Unlawful but non-JE decision continues to have legal effect until set aside
No court order needed; the decision was never valid in law (Bhardwaj)	Court must make an order (certiorari; ADJR Act s 16) to set it aside
Duty remains unperformed; statutory function can be re-performed	Decision continues to operate, and quashing has only prospective effect
Constitutional writs (s 75(v)/Kirk) are available and cannot be excluded by privative clause	Certiorari for ELFR, ADJR s 16 orders, and declarations are available but may be excluded by privative clause

Principle	The Minister's later decision based on LC2's valid recommendation was properly supported.
	A biased decision-making body cannot make a valid recommendation that satisfies a statutory precondition. The invalid recommendation is not a 'recommendation in fact' and the precondition remains unsatisfied until a valid recommendation is made.

13.2 No Invalidity Clauses

A 'no invalidity clause' provides that breach of a particular requirement does not affect the validity of the decision. Key principles: a no invalidity clause targeted at a specific statutory requirement is effective to indicate that breach of that requirement does not, by itself, constitute jurisdictional error (Palme; Futuris). It does not, however, protect against other jurisdictional errors such as procedural fairness, unreasonableness, or misinterpretation of the Act. A broadly framed no invalidity clause applying to all statutory requirements is also effective, but does not protect against conscious maladministration of the Act (Futuris).

Re Minister for Immigration; Ex parte Palme (2003) 216 CLR 212	
Facts	Migration Act s 501G required written notice of visa cancellation including reasons. Section 501G(4): failure to comply does not affect the validity of the decision.
Held	The no invalidity clause (s 501G(4)) was effective. It put beyond argument that breach of the reason-giving requirement did not constitute jurisdictional error. The decision remained valid despite inadequate reasons.
Principle	A no invalidity clause targeted at a specific statutory requirement is effective to prevent invalidity for breach of that requirement. It does not protect against other grounds of JE (eg procedural fairness, unreasonableness).

Commissioner of Taxation v Futuris Corporation (2008) 237 CLR 146	
Facts	Income Tax Assessment Act s 175: the validity of any assessment shall not be affected by non-compliance with any provision of the Act.
Held	A broadly framed no invalidity clause is effective to prevent invalidity for breach of any statutory requirement. However, it does not protect against: (a) other recognised JE grounds; and (b) conscious maladministration of the Act (knowingly misapplying the Act with knowledge of the error).
Principle	A broadly framed no invalidity clause can protect against invalidity for any statutory breach but cannot protect against JE arising from other recognised categories, including conscious maladministration.