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MONASH LAW

Unit study guide

LAW4331

Administrative Law (Sample)

*Exam study guide: merits review, judicial
review and its limits*

TOPICS

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TOPIC 00

The Administrative Law Method: Issue-Spotting and Answer Structure

1 Overview

An administrative-law problem supplies a statute, a decision made under it and a person who wants that decision undone, and asks what that person can do. The answer is a route, not an essay: read the statute, choose the avenue, clear jurisdiction and standing, prove a ground, classify the error, deal with any restrictive clause, then advise on the remedy. This chapter is the book's operating manual: each step names the chapter that owns the rule, and Figures 0.1 and 0.2 set out the two choices every answer makes, which avenue and in what order.

 **Reading Guide:** *First pass* — §§1–4, 8. *Deep revision* — §§5–7. *Critical thinking* — §7 Cross-Topic Traps.

 **Currency Check:** The Administrative Review Tribunal ('ART') replaced the Administrative Appeals Tribunal on 14 October 2024;¹ the Federal Circuit Court has been the Federal Circuit and Family Court of Australia (Division 2) ('FCFCOA (Div 2)') since 1 September 2021;² and Victorian review under Order 56 has run under the 2025 Supreme Court Rules since 8 September 2025, still with a 60-day limit.³ On doctrine, *LPDT* (2024) is the High Court's unanimous restatement of jurisdictional error and materiality.⁴ Notes that use the old names, or treat every error as automatically jurisdictional, are stale: since *Hossain* a statutory condition ordinarily carries a threshold of materiality.⁵

2 Read the Statute First

Every ground of review alleges that the decision-maker broke a limit, express or implied, set by the statute that confers the power.⁶ So the statute is read first, in this order:

ITEM	WHAT TO FIND	OWNER
Repository	Who holds the power; if another decided or directed, delegation or dictation	T06, T07
Power	A duty ("must") or a discretion ("may", read with the rule quoted below)	T01, T11
Conditions	Facts or states of mind the power depends on ("if satisfied")	T08
Considerations and purpose	What must or must not be weighed, and why the power exists	T07
Procedure	Notice, consultation, time to respond, hearing, reasons	T06, T09
Review provided	ART or VCAT review, reconsideration, a statutory appeal	T02
Restrictive clauses	"Final", "not to be challenged", time limits on review	T12
Who is affected	The subject of the decision, then competitors, neighbours, interest groups	T05

The default meaning of "may" comes from the *Acts Interpretation Act 1901* (Cth) ('AIA'):

AIA s 33(2A) Where an Act assented to after the commencement of this subsection provides that a person, court or body may do a particular act or thing, and the word "may" is used, the act or thing may be done at the discretion of the person, court or body.

2.1 A model reading

SCENARIO: The *Coastal Kelp Harvesting Act* (Cth) (an invented statute) provides in s 14(1) that 'the Harvest Controller may cancel a harvesting licence if satisfied that the holder has taken kelp from a reef closed under section 6', and in s 14(2) that 'before cancelling a licence, the Controller must give the holder written notice of the proposed cancellation and at least 14 days to respond'. Section 30 allows 'an application ... to the Administrative Review Tribunal for review of a decision under section 14'; s 31 provides that such a decision 'is final and is not to be challenged in any court'. The Controller cancels a harvester's licence three days after posting a notice, relying on a patrol log the harvester never saw.

The Act answers most questions before any case is opened:

- *Repository and power.* The Controller holds the power, and "may" makes cancellation discretionary (T06, T01).
- *Condition.* The Controller's satisfaction is reviewable for how it was formed (T08).
- *Procedure.* Whether a decision on day three is invalid turns on what the Act intended, not on calling s 14(2) "mandatory";⁷ the unseen log also engages the hearing rule (T06, T09).⁸
- *Review and clause.* Section 30 opens ART review (T02). Section 31 is a privative clause (T12); none can stop the High Court correcting jurisdictional error under s 75(v).⁹
- *Who is affected.* The harvester, perhaps its buyers (T05).

3 Choose the Avenue

Merits review asks what the right decision is and may substitute one; judicial review asks only whether the decision was lawful, and returns the matter to the repository.¹⁰

'The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.' — Brennan J, *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35–36.

The two do not exclude each other. Figure 0.1 sets out the order in which an answer tests the avenues;¹¹ an avenue marked "also test" leaves later rows open, so advice can recommend several routes in sequence.

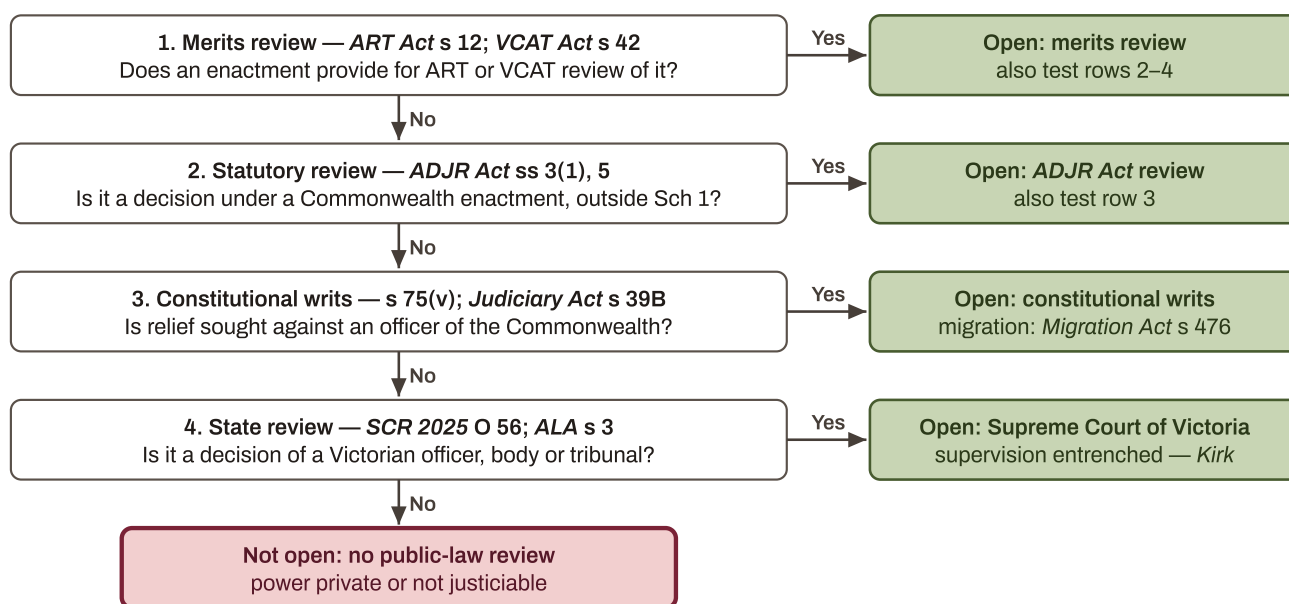


Figure 0.1: Which avenue of review is open to the client? Take the rows in order: a Yes opens the avenue beside it, and an avenue marked "also test" leaves the later rows open as well.

3.1 Merits review first, where an enactment provides it

- **Source.** The ART reviews only where an Act or instrument provides for it (*ART Act* s 12(1)), on application by a person whose interests are affected (s 17(1)); VCAT needs an enabling enactment (*VCAT Act* s 42(1)) (T02).
- **Power.** The ART exercises the decision-maker's powers (*ART Act* s 54) and affirms, varies, or sets aside and substitutes or remits (s 105); "correct or preferable" is a judicial gloss.¹²
- **Why first.** Only a tribunal can substitute a different outcome,¹³ and a court may refuse *ADJR Act* relief where adequate provision is made for review by another tribunal (*ADJR Act* s 10(2)(b)(ii)).
- **Further review.** Appeal on a question of law lies from the ART (*ART Act* s 172(1)), and from VCAT only with leave (*VCAT Act* s 148(1)) (T02, T10).

3.2 Judicial review of a Commonwealth decision

- **The *ADJR Act*.** It covers administrative decisions under an enactment, minus the Governor-General's decisions and the Sch 1 classes (s 3(1)), in the Federal Court or FCFCOA (Div 2) (s 5(1)). The enactment must require or authorise the decision, which must itself have legal effect, conferring, altering or otherwise affecting rights or obligations,¹⁴ and it must ordinarily be final or operative and determinative, not a step along the way (T03).¹⁵
- **The constitutional writs.** Mandamus, prohibition or an injunction against a Commonwealth officer issue from the High Court (s 75(v)) or the Federal Court (*Judiciary Act* s 39B(1)). Section 75(v) is an entrenched minimum, but the writs need jurisdictional error (T04, T10).¹⁶
- **Migration.** Schedule 1 para (da) takes most migration decisions outside the *ADJR Act*; the FCFCOA (Div 2) has the High Court's s 75(v) jurisdiction over them (*Migration Act* s 476(1)), listed decisions go to the Federal Court (s 476A), and limits are 35 days (ss 477, 477A, 486A) (T04, T12).

3.3 Judicial review of a Victorian decision

- **Routes.** The Supreme Court of Victoria reviews by originating motion under Order 56 (*SCR 2025* r 56.01) within 60 days (r 56.02(1)), extended only in special circumstances (r 56.02(3)), or by an *ALA* order for review of a "tribunal" decision (s 3) within 30 days (s 4(1)) (T04).
- **Entrenchment.** No State Parliament can remove the Court's power to correct jurisdictional error,¹⁷ and a Victorian privative clause must also satisfy s 85(5)–(6) of the Victorian Constitution (T12).¹⁸
- **Human rights.** The *Charter* adds a ground to a route already open, not a new route (T07, T11).¹⁹

3.4 Plead the *ADJR Act* and common-law routes together

Where the *ADJR Act* gateway is passed, plead both routes in one application; they differ:

FEATURE	<i>ADJR ACT</i>	<i>JUDICIARY ACT</i> S 39B; S 75(V)
Gateway	Decision, conduct or failure under an enactment; not Sch 1	Named writ against a Commonwealth officer
Error	Any listed ground, including any error of law (s 5(1)(f))	Jurisdictional error only
Reasons	On request (s 13), unless <i>ART Act</i> s 268 or Sch 2 applies	No common-law right
Orders	Quash from a set date, remit, declare, direct (s 16)	Mandamus, prohibition, injunction; certiorari with them
Removable by statute	Yes: Sch 1; regulations under s 19	Section 75(v) entrenched; s 39B statutory

With no general common-law duty to give reasons,²⁰ the statutory request may be the only window into the decision. The overlap is managed by discretion, not election (*ADJR Act* s 10(2)); each ground is argued once for both routes (§6).

4 The Answer Sequence

A judicial-review answer runs in a fixed order, as each stage can end the claim. Figure 0.2 sets out that order and the result of failing each stage; the list gives the eight steps an answer writes.

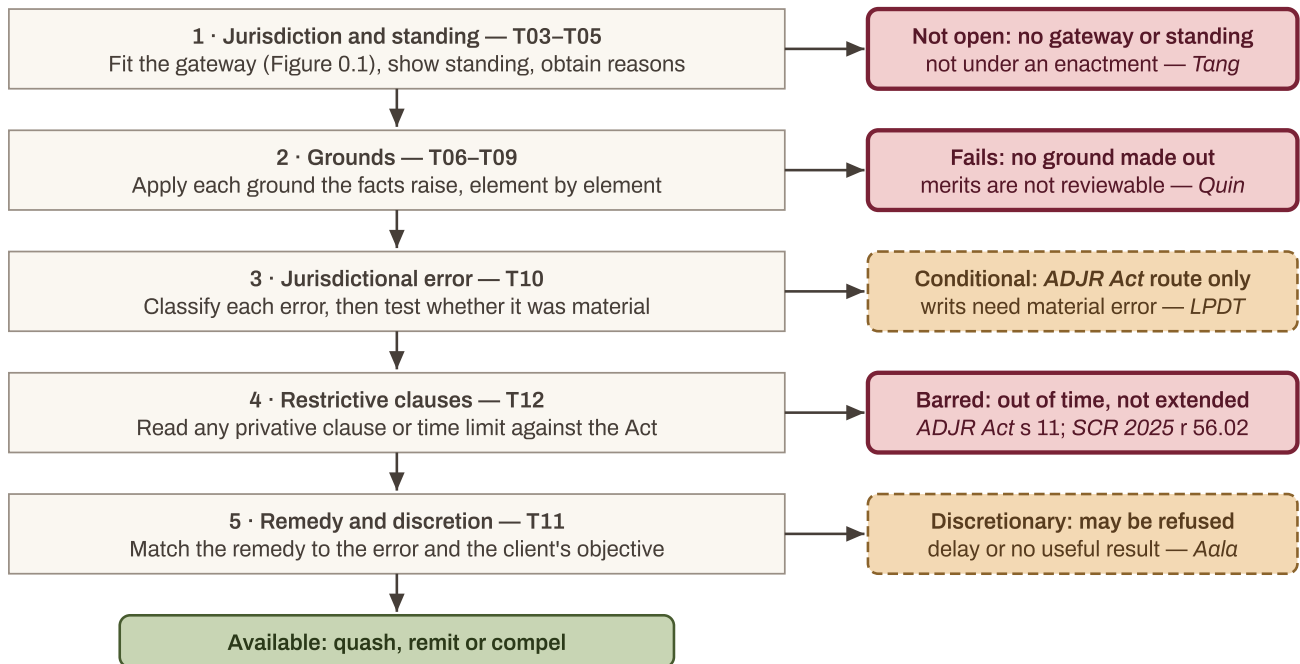


Figure 0.2: In what order does a judicial-review answer run, and where can relief fail? Work down the stages; the box beside each is the result of failing that stage, and the box at the foot the result if all hold.

- 1. Jurisdiction (T03, T04).** Name the court and the source of its jurisdiction; for the *ADJR Act*, apply *Tang*'s two criteria.²¹
- 2. Standing (T05).** A "person aggrieved" under the *ADJR Act* (s 3(4)); a "special interest" at common law.²²
- 3. Reasons (T05).** Find the source of any right (*ADJR Act* s 13; *ART Act* s 268; *ALA* s 8) and mine the statement for error.
- 4. Grounds (T06–T09).** Each ground the facts raise, element by element, with both sides argued.
- 5. Jurisdictional error and materiality (T10).** For the writs, ask whether the decision "could, not would" realistically have differed without the error; the applicant bears the onus. Bias and unreasonableness in the result need no such showing.²³
- 6. Restrictive clauses (T12).** Read a privative clause with the whole Act; it cannot shield jurisdictional error from s 75(v).²⁴ Check every time limit and its extension test.
- 7. Remedy and discretion (T11).** Fit the remedy to the client's objective, then meet the bars: delay, waiver, acquiescence, futility.²⁵
- 8. Advice.** Avenue or avenues, their order, the time limits and the remedy (§6.3).

5 Issue-Spotting Triggers

Problems signal their issues through recurring facts; one fact can raise several issues.

FACT IN THE PROBLEM	ISSUE	CHAPTER
A company, contract or non-statutory scheme is involved	Public or private power; "under an enactment"	T04, T03, T01
An enactment gives the ART or VCAT power to review	Merits review: standing, time, outcomes	T02
The complaint targets an interim step or report	"Decision" or "conduct" (<i>ADJR Act</i> ss 3(3), 6)	T03
The decision-maker will not decide, or delays	Failure to decide (<i>ADJR Act</i> s 7); mandamus	T03, T11
A competitor, neighbour or community group wants to sue	Standing on each route	T05
The client has only a bare outcome letter	Right to reasons; their adequacy	T05
Someone other than the repository decided	Delegation, agency, personal powers	T06
A regulation or by-law imposes the burden	Validity of subordinate legislation	T06
Notice, consultation or a waiting period was skipped	Procedural condition; effect of breach	T06
The decision-maker relied on, or ignored, a matter	Considerations	T07
A collateral motive appears (revenue, retaliation, a favour)	Improper purpose; bad faith	T07
A policy was applied "without exception", or an instruction obeyed	Inflexible policy; dictation	T07
A Victorian public authority overlooked a human right	<i>Charter</i> s 38 unlawfulness	T07
The outcome is disproportionate, or the reasoning illogical	Legal unreasonableness	T08
The power turns on "satisfied", "believes" or an objective fact	Jurisdictional fact; opinion condition; no evidence	T08
Adverse material was used but never disclosed	Hearing rule; practical injustice	T09
The decision-maker had an interest, a relationship or a public view	Bias; prejudgment	T09
The Act was misread, or the wrong question asked	Error of law; jurisdictional error	T10
An error is shown, but the same result looks likely anyway	Materiality	T10
The Act calls the decision "final", or the client delayed	Privative and time clauses; delay	T12, T11

6 Writing Each Step Under Time Pressure

6.1 Analyse each ground once, conclude twice

Where both the *ADJR Act* and the writs are open, give each ground one heading: the rule (the *ADJR Act* paragraph and the authority that gives it content), its application, and a conclusion on breach. Then add one sentence for the writs: is the breach jurisdictional, and material? The *ADJR Act* conclusion does not wait on that sentence, because its grounds reach non-jurisdictional errors.²⁶ On the kelp facts:

Hearing rule (*ADJR Act* s 5(1)(a), (b)). A power to cancel a licence affects the holder's rights, so it carries a duty of procedural fairness unless the Act clearly excludes one; s 14(2) confirms the duty rather than excluding it.²⁷ Credible, relevant and significant adverse material must be put to the person affected, and the patrol log was not.²⁸ The 14-day window was also cut to three days; whether that invalidates depends on what the Act intended, and a statutory right to answer a proposed cancellation points to invalidity.²⁹ Both paragraphs are made out. For the writs, the breaches are jurisdictional if the decision could realistically have been different: a harvester able to show the reef was open, or the log wrong, clears that undemanding threshold.³⁰ Prohibition and certiorari would follow, subject to discretion.

6.2 Cite efficiently

- **Names and paragraphs.** Short names (*Kioa*, *Tang*) suffice; cite statutes to the paragraph (*ADJR Act* s 5(2)(b)).
- **Pinpoints.** Give one where the answer tracks a test (*Tang* at [89]; *LPDT* at [14]), where the rule sits in one Justice's passage (Brennan J in *Quin* at 35–36), or where a split bench means only some Justices hold the view. Never cite a dissent as the Court's view (McHugh J in *Aala*).³¹

6.3 End with advice

Advice states which avenues to use and in what order, the time limit for each, and the remedy that meets the objective. A harvester who wants the licence back needs the cancellation quashed (certiorari with prohibition, or an *ADJR Act* s 16(1)(a) order), which removes its legal consequences; no court will decide on the merits whether to cancel, though the ART can.³²

ROUTE	TIME LIMIT	AUTHORITY
<i>ADJR Act</i> order of review	28 days after the decision document or reasons; extendable	<i>ADJR Act</i> s 11(1)(c), (3)
Migration judicial review	35 days; extendable in the interests of the administration of justice	<i>Migration Act</i> ss 477, 477A, 486A
Appeal from the ART	28 days after the statement of reasons; extendable	<i>ART Act</i> s 174(1)–(2)
Order 56 (Vic)	60 days; extended only in special circumstances	<i>SCR 2025</i> r 56.02
<i>ALA</i> order for review	30 days after notice of the decision or reasons, whichever is later	<i>ALA</i> s 4(1)

7 Cross-Topic Traps

- **Current bodies.** Cite the *ART Act*: standing s 17, merits power s 54, outcomes s 105, decision-maker's reasons s 268, Tribunal's reasons s 111, appeal s 172; "correct or preferable" comes from *Drake (No 1)*.³³ Never write "Federal Circuit Court" for an event after 1 September 2021.³⁴
- **The *ADJR Act*.** Schedule 1 lists decisions outside the Act; Schedule 2 lists decisions, still reviewable, for which s 13 reasons need not be given. There is no s 5(1)(i). Nor is it a mere code of the common law: it adds any error of law (s 5(1)(f)), reasons (s 13) and flexible orders (s 16), has its own gateway, and needs no jurisdictional error.³⁵
- **Jurisdiction follows the decision.** The *ADJR Act* reaches State law only where Sch 3 lists it, so it is not run against a Victorian decision; Order 56 and the *ALA* are not the route for a Commonwealth one.³⁶
- **Time.** Migration judicial review is 35 days and extendable, not the older 28-day High Court limit. Victoria's 2015 Rules are revoked, and the *ALA* s 8 reasons duty does not bind VCAT.³⁷
- **Materiality.** Not every error is jurisdictional. Bias and unreasonableness in the result always are; otherwise the applicant must prove a realistic possibility of a different decision.³⁸
- **Improper purpose.** The test is a substantial purpose, without which the power would not have been used; not a "dominant" purpose.³⁹
- **Legitimate expectation.** It is no longer the trigger or measure of fairness: recourse to it is "both unnecessary and unhelpful".⁴⁰ A court enforces the limits of a power, not an expected outcome.⁴¹
- **Unreasonableness.** State it through *Li* (discretions are presumed to be conferred on condition that they be exercised reasonably, and a decision lacking an evident and intelligible justification fails) and *SZVFW*, not *Wednesbury* alone.⁴²
- **Standing.** "Person aggrieved" (*ADJR Act*) and "special interest" (common law) are separate tests; courts do not graft limits onto the statutory words.⁴³

- **Remedies.** The injunction is not a prerogative writ: s 75(v) names mandamus, prohibition and an injunction, the "constitutional writs"; certiorari issues with them.⁴⁴
- **Misreadings.** *Hickman* was not "reversed": *Plaintiff S157* reads its provisos as part of reconciling the clause with the whole Act.⁴⁵ *Osland (No 1)* is privilege and FOI; *Osland (No 2)* is the appeal limited to a question of law.⁴⁶

8 Chapter Map

DOCTRINE	OWNER CHAPTER
Legality and merits; interpretation; sources of power, including s 61 of the Constitution	T01, Foundations
The ART and VCAT; tribunal appeals; Ombudsmen, FOI, the NACC and IBAC	T02, Merits Review
The ADJR Act gateway, exclusions, time and s 10; mapping its grounds	T03, ADJR Jurisdiction
Section 75(v) and Judiciary Act s 39B; the Supreme Court of Victoria; public power; justiciability	T04, Constitutional and State Review
Standing on every route; statutory reasons and their adequacy	T05, Standing and Reasons
Narrow ultra vires; subordinate legislation; procedural conditions; delegation and agency	T06, Acting Beyond Power
Considerations; improper purpose; bad faith; policy; dictation; Charter s 38	T07, Improper Exercise of Discretion
Legal unreasonableness; no evidence; jurisdictional facts	T08, Unreasonableness and Facts
Hearing rule; legitimate expectation's decline; bias	T09, Procedural Fairness
Jurisdictional error; materiality; error of law; law and fact	T10, Jurisdictional Error
Remedies; discretion; consequences of invalidity; damages	T11, Remedies
Privative, finality and no-invalidity clauses; time limits	T12, Privative Clauses
Cross-topic synthesis	T13, Revision

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FOOTNOTES

1. Administrative Review Tribunal Act 2024 (Cth) ('ART Act') s 2; Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024 (Cth) sch 17.

2. Federal Circuit and Family Court of Australia Act 2021 (Cth) s 8(2).

3. Supreme Court (General Civil Procedure) Rules 2025 (Vic) ('SCR 2025') rr 1.03, 56.02(1).

4. LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (2024) 280 CLR 321, [16].

5. Hossain v Minister for Immigration and Border Protection (2018) 264 CLR 123, 134 [29]; LPDT (n 4) [6]–[7].

6. LPDT (n 4) [2]; Craig v South Australia (1995) 184 CLR 163, 179.

7. Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355, 388–389 [91], 390 [93].

8. Kioa v West (1985) 159 CLR 550, 584 (Mason J).

9. Australian Constitution s 75(v); Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476.

10. Drake v Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577, 589; Attorney-General (NSW) v Quin (1990) 170 CLR 1, 35–36.
11. Administrative Decisions (Judicial Review) Act 1977 (Cth) ('ADJR Act'); Judiciary Act 1903 (Cth) ('Judiciary Act'); Migration Act 1958 (Cth) ('Migration Act'); Victorian Civil and Administrative Tribunal Act 1998 (Vic) ('VCAT Act'); Administrative Law Act 1978 (Vic) ('ALA').

12. Drake (n 10) 589.

13. ART Act s 105; Quin (n 10) 35–36.

14. Griffith University v Tang (2005) 221 CLR 99, [89].

15. Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321, 336–337 (Mason CJ).

16. Plaintiff S157 (n 9); Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82.

17. Kirk v Industrial Court (NSW) (2010) 239 CLR 531, [99].

18. Constitution Act 1975 (Vic) s 85(5)–(6).

19. Charter of Human Rights and Responsibilities Act 2006 (Vic) ('Charter') s 39(1).

20. Wingfoot Australia Partners Pty Ltd v Kocak (2013) 252 CLR 480, [43].

21. Tang (n 14) [89].

22. ADJR Act s 3(4); Australian Conservation Foundation Inc v Commonwealth (1980) 146 CLR 493, 530–531.

23. LPDT (n 4) [6]–[7], [10].

24. *Plaintiff S157* (n 9).
25. *Aala* (n 16).
26. *ADJR Act* s 5(1)(f); *Plaintiff S157* (n 9); *Aala* (n 16).
27. *Kioa* (n 8) 584 (Mason J).
28. *Kioa* (n 8) 629 (Brennan J).
29. *Project Blue Sky* (n 7) 388–389 [91].
30. *LPDT* (n 4) [14].
31. *Aala* (n 16).
32. *Wingfoot* (n 20) [25]; *Aala* (n 16); *Quin* (n 10) 35–36; *ART Act* s 105.
33. *ART Act* ss 17, 54, 105, 111, 172, 268; *Drake* (n 10) 589.
34. *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 8(2).
35. *ADJR Act* s 3(1) (definition of "decision to which this Act applies", para (d)), ss 5(1)(f), 13, 13(11)(c), 16, schs 1–2.
36. *ADJR Act* s 3(1) (definition of "enactment", para (ca)), s 9.
37. *Migration Act* ss 477, 477A, 486A; *SCR 2025* r 1.03; *ALA* s 8(6).
38. *Hossain* (n 5) 134 [29]; *LPDT* (n 4) [6], [10].
39. *Samrein Pty Ltd v Metropolitan Water, Sewerage and Drainage Board* (1982) 41 ALR 467, 468–469; *Thompson v Randwick Corporation* (1950) 81 CLR 87.
40. *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40, [30]; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 658 [65].
41. *Quin* (n 10) 35–36.
42. *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541; *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
43. *ADJR Act* s 3(4); *Argos Pty Ltd v Corbell* (2014) 254 CLR 394, [48]; *Australian Conservation Foundation* (n 22) 530–531.
44. *Australian Constitution* s 75(v); *Aala* (n 16).
45. *Plaintiff S157* (n 9); *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598, 615.
46. *Osland v Secretary, Department of Justice* (2008) 234 CLR 275; *Osland v Secretary, Department of Justice* (No 2) (2010) 241 CLR 320.

TOPIC 01

Foundations: Executive Power, Accountability and Statutory Interpretation

1 Overview

A foundations problem asks three questions before any ground of review is argued. What is the source of the official's power: an Act, an instrument made under an Act, or the Commonwealth's non-statutory executive power? What does that source allow, read by its text, context and purpose and with the courts' interpretive presumptions, chief among them the principle of legality? Is the complaint about legality or about merits? That classification chooses the forum: a court enforces legal limits, while a tribunal or the political process deals with the merits.¹

 **Reading Guide:** *First pass* — §§1–4, 6, 10. *Deep revision* — §§5, 7, 8, 9. *Critical thinking* — §5.9 Critical Perspectives.

 **Currency Check:** The latest High Court statement on the limits of non-statutory executive power in administration is *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 1 (6:1, Steward J dissenting): s 61 of the Constitution does not authorise action that a statute expressly or impliedly excludes. *Minister for Immigration and Multicultural Affairs v MZAPC* [2025] HCA 5 applied it. The *Acts Interpretation Act 1901* (Cth) ('AIA') is current at Compilation No 39 (28 March 2026). Older notes are stale: merits review now lies to the Administrative Review Tribunal ('ART'), which replaced the Administrative Appeals Tribunal on 14 October 2024, and the Administrative Review Council is re-established.² No general statute governs automated decision-making: Privacy Act APP 1.7–1.9 commence on 10 December 2026, and the 2026 ADM Bill is not law.³

2 Key Definitions

TERM	DEFINITION	AUTHORITY
Legality and merits	Legality: did the action stay within the limits the law sets? Merits: was it the right or preferable action? The merits are for the repository, subject to political control and any statutory merits review	<i>Quin</i> ; ART Act s 54
Prerogative, capacities, nationhood	The non-statutory heads of s 61: powers peculiar to the Crown; things any legal person may do; action appropriate to a national government	<i>Barton</i> ; <i>Clough v Leahy</i> ; <i>Pape</i>
Subordinate legislation	Instruments made under power delegated by an Act; subject to disallowance and sunseting	<i>Legislation Act 2003</i> (Cth) (' <i>Legislation Act</i> ') ss 42, 50
Quasi-legislation	Policies, guidelines and instructions; they may guide a discretion but cannot create a power or override the statute that confers one	<i>Plaintiff M64</i> ; <i>Davis</i>
Principle of legality	Fundamental rights are displaced only by unmistakable and unambiguous language, so general words are read down	<i>Coco</i> ; <i>Electrolux</i>

TERM	DEFINITION	AUTHORITY
Purposive construction	The construction that best achieves the Act's purpose, stated or not, is preferred	<i>AIA</i> s 15AA; <i>Interpretation of Legislation Act 1984</i> (Vic) (' <i>ILA</i> ') s 35(a)
Compatible interpretation	Victorian statutory provisions are read compatibly with human rights so far as possible consistently with their purpose	<i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic) (' <i>Charter</i> ') s 32(1)

3 Legislative Framework

Primary Legislation

ACT/RULES	KEY PROVISIONS	PURPOSE
<i>AIA</i>	ss 15AA, 15AB, 33(1)	Purposive construction; extrinsic material; powers exercisable from time to time
<i>Australian Constitution</i>	ss 61, 71, 75(v)	Executive power; judicial power in Chapter III courts; entrenched review of officers of the Commonwealth
<i>Legislation Act</i>	ss 42, 50	Disallowance and sunseting of legislative instruments
<i>Migration Act 1958</i> (Cth) (' <i>Migration Act</i> ')	ss 351, 495A, 499	A personal ministerial power (<i>Davis</i>); decisions by computer program; binding directions
<i>Administrative Decisions (Judicial Review) Act 1977</i> (Cth) (' <i>ADJR Act</i> ')	ss 3(1), 5, 16	Review of decisions under an enactment (T03)
<i>Administrative Review Tribunal Act 2024</i> (Cth)	ss 12, 54, 105	Merits review where an enactment provides for it (T02)
<i>Ombudsman Act 1976</i> (Cth) (' <i>Ombudsman Act</i> ')	ss 5, 14, 14A, 15	Investigation of administration, with 2025 entry and remote-access powers; recommendations only
<i>ILA; Charter</i>	<i>ILA</i> s 35; <i>Charter</i> ss 4(1), 32	Victorian interpretation; public authorities

Relevant Provisions in Full

Constitution s 61

The executive power of the Commonwealth is vested in the Queen and is exerciseable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

AIA s 15AA

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

AIA s 15AB(1)

Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material: (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or (b) to determine the meaning of the provision when: (i) the provision is ambiguous or obscure; or (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

4 Key Cases

CASE	CITATION	PRINCIPLE	APPLICATION
<i>Entick v Carrington</i>	(1765) 2 Wils KB 275; 95 ER 807	Interference with person or property needs positive legal authority	No source, no power
<i>Quin</i>	(1990) 170 CLR 1	Courts enforce the limits of power; the merits are for the repository (Brennan J)	Classify each complaint
<i>Pape</i>	(2009) 238 CLR 1	Executive power supported emergency payments (4:3)	The outer reach of s 61
<i>Williams (No 1)</i>	(2012) 248 CLR 156	Section 61 did not support a funding agreement and payments (6:1)	Programs need an Act
<i>CPCF</i>	(2015) 255 CLR 514	Detention at sea rested on statute (4:3)	Find the Act before s 61
<i>Davis</i>	(2023) 279 CLR 1	Section 61 cannot authorise what a statute excludes (6:1)	Screening of a personal power
<i>MZAPC (2025)</i>	[2025] HCA 5	Interlocutory injunction pending a <i>Davis</i> claim (6:1)	Interim relief (T11)
<i>SZTAL</i>	(2017) 262 CLR 362	The text, read with its context and purpose	Every construction point
<i>Coco</i>	(1994) 179 CLR 427	Rights yield only to unmistakable and unambiguous language	Read general powers down
<i>Makasa</i>	(2021) 270 CLR 430	Contrary intention to AIA s 33(1) (5:0)	Re-exercising a power
<i>Momcilovic</i>	(2011) 245 CLR 1	No majority test of <i>Charter</i> s 32	Victorian statutes

Case Summaries**| Pape⁴**

FACTS: The validity of a Commonwealth Act providing one-off bonus payments to taxpayers, as a response to an economic crisis, was challenged.

ISSUE: Did the Commonwealth have constitutional power to make the payments?

HELD: The Act was valid, 4:3. Executive power under s 61, with the incidental legislative power, supported the payments (French CJ; Gummow, Crennan and Bell JJ). Hayne and Kiefel JJ, jointly, and Heydon J dissented.

EXAM APPLICATION: *Pape* marks the outer reach of s 61, a national response to a national emergency; ordinary program spending falls under *Williams (No 1)*.

Williams (No 1)⁵

FACTS: The Commonwealth made a funding agreement for a school chaplaincy program and paid money under it. No Act authorised the program.

ISSUE: Did s 61 alone authorise the agreement and the payments?

HELD: No, 6:1 (Heydon J dissenting). Section 61 did not authorise the agreement or the payments without statutory authority.

EXAM APPLICATION: For any grants or services program, ask which Act authorises it. *Clough v Leahy* does not give the Commonwealth a natural person's capacity to contract.⁶

Davis⁷

FACTS: Section 351 of the *Migration Act* gives the Minister a personal, non-compellable power to substitute a more favourable decision for a tribunal's. Ministerial Instructions of 2016 told officers not to refer requests lacking 'unique or exceptional circumstances', and officers dealt with the requests in issue under them.

ISSUE: Did s 61 authorise the Instructions and the officers' decisions under them?

HELD: No, 6:1 (Kiefel CJ, Gageler and Gleeson JJ jointly; Gordon, Edelman and Jagot JJ separately; Steward J dissenting). Section 61 does not authorise action that a statute expressly or impliedly excludes, and the personal, non-compellable power excluded officer evaluation of the public interest.

EXAM APPLICATION: Use *Davis* whenever officers screen access to a power that Parliament gave a Minister personally. The target is the officer's act, not the Minister's inaction, and *MZAPC* (2025) shows that interim relief can hold the position (T11).⁸

Makasa⁹

FACTS: The former AAT set aside a delegate's cancellation of a visa under s 501(2) and substituted a decision not to cancel. The Minister then purported to cancel the visa again on the same factual basis.

ISSUE: Could the power be exercised again, given that *AIA* s 33(1) allows powers to be exercised from time to time?

HELD: No, 5:0. The scheme showed a contrary intention to s 33(1), and an earlier Federal Court decision was wrong to that extent.¹⁰

EXAM APPLICATION: When a decision-maker revisits a decision, start with s 33(1), then look for a contrary intention, especially a merits-review outcome.

5 Substantive Content

5.1 What Administrative Law Is For

Administrative law governs the executive's use of public power and supplies the means of holding it to account. An official who interferes with a person or with property must point to positive law that authorises the interference; without it, the act is unlawful however well-intended.¹¹ Judicial review is the enforcement of the rule of law over executive action: it keeps that action within the limits of the power conferred.¹² Section 75(v) of the Constitution entrenches that enforcement against officers of the Commonwealth (T04, T12).¹³

Courts are one accountability mechanism among several, and each mechanism checks something different with different powers.¹⁴ An answer must say which one serves the client; T02 holds the detail.

MECHANISM	WHAT IT CHECKS	CAN IT CHANGE THE DECISION?	CHAPTER
Courts	Legality	Yes: quash, remit, declare or restrain	T03–T12
ART	The merits, where an enactment provides (<i>ART Act</i> s 12)	Yes: affirm, vary, or set aside (s 105)	T02
Ombudsman	Administration, including unjust action (<i>Ombudsman Act</i> s 15(1))	No: recommends (s 15(2))	T02
Freedom of information	Access to government documents	No: it opens the record	T02
Parliament	Ministers; legislative instruments (<i>Legislation Act</i> s 42)	Politically, and by disallowance	T01, T06
NACC (Cth); IBAC (Vic)	Corrupt conduct	No: they investigate, not review	T02

5.2 The Structure of Government Administration

Section 61 vests the Commonwealth's executive power in the Crown, exercisable by the Governor-General, and in practice Ministers exercise it, administering departments and answering to Parliament under responsible government.¹⁵ Statutory authorities, created by an Act with their own powers, conduct much of the administration, and the Ombudsman investigates action by Departments and prescribed authorities.¹⁶ The *ADJR Act* excludes decisions of the Governor-General, but status alone does not put a statutory power beyond review at common law: the Governor in Council, exercising a statutory power, was held bound to accord procedural fairness (T04).¹⁷ Victoria's executive follows the same pattern, and its Ministers, public officials, statutory entities with public functions, police and councils are public authorities under the *Charter*.¹⁸ VCAT reviews the merits of Victorian decisions where an enabling enactment so provides; the Supreme Court reviews legality (T02, T04).¹⁹

5.3 Sources of Administrative Power

The source decides what the official may do and how the action is controlled (Figure 1.2, rows 1–3).

Statute. Most administrative power is conferred by an Act that names the repository, the power and its conditions. Every statutory discretion is confined by the scope, subject matter and purpose of its Act (T07), and action outside the Act is beyond power (T06).²⁰

Subordinate legislation. Legislative instruments are valid only within the enabling power (T06). Parliament controls them politically: either House may disallow an instrument on a notice of motion given within 15 sitting days after it is tabled, and an instrument sunsets on the first 1 April or 1 October falling on or after the tenth anniversary of its registration, subject to exceptions.²¹

Quasi-legislation. Policies, guidelines and instructions have no legislative force. A lawful policy may guide a discretion (T07), but it cannot create a power or override the statute that confers one: in *Davis*, instructions on which requests to refer to the Minister exceeded executive power.²² A statutory direction is different in kind. Directions under s 499 of the *Migration Act* bind decision-makers, but cannot be inconsistent with the Act or the regulations.²³

Non-statutory executive power. Section 61 (set out in §3) also carries power that does not depend on any Act. It has three conventional heads.

- **Prerogative:** powers peculiar to the Crown. It was within executive power, without statute, to request a foreign State to detain and surrender a person charged with Commonwealth offences.²⁴ Barwick CJ noted, however, that surrender itself needs statutory authority in common-law countries, so *Barton* supports no non-statutory power to detain.²⁵

- **Capacities:** what any legal person may do. The power to inquire is one every citizen has, so it carries no power to compel witnesses or documents; compulsion needs statute.²⁶
- **Nationhood:** action 'appropriate to the position of the Commonwealth' under the Constitution and within its spheres of responsibility.²⁷ In *Pape* a 4:3 majority held that executive power, with the incidental legislative power, supported emergency payments during an economic crisis.²⁸

The heads are limited. In *Williams (No 1)* s 61 did not authorise a school chaplaincy funding agreement, or the payments under it, without statute (6:1).²⁹ In *Ruddock v Vadarlis*, a Full Federal Court decision, French J (Beaumont J agreeing; Black CJ dissenting) held that the executive power to prevent non-citizens entering Australia was not displaced by the *Migration Act*.³⁰ The High Court decided interception at sea and offshore detention on statute: *CPCF* on s 72(4) of the *Maritime Powers Act 2013* (Cth) (4:3), and *Plaintiff M68* on a valid *Migration Act* provision (6:1, Gordon J dissenting).³¹ Find the Act first.

The statutory limit. The s 351 power 'may only be exercised by the Minister personally', and the Minister 'does not have a duty to consider' using it.³² *Davis* holds that s 61 cannot authorise action that such a statute excludes, including officers' evaluation of the public interest in the Minister's place (\$4).³³ *MZAPC* (2025) applied *Davis* to a request under the Minister's personal power in s 195A. The Court held, 6:1 (Beech-Jones J dissenting), that the Federal Court could restrain the applicant's removal by interlocutory injunction, despite the statutory duty to remove, while it decided the claim (T11).³⁴

SOURCE	TYPICAL FORM	PRINCIPAL CONTROL	WHERE TESTED
Statute	An Act conferring power on a Minister, officer or authority	Construction; beyond power and the other grounds	T06–T10
Subordinate legislation	Regulations and other legislative instruments	Validity; disallowance and sunseting	T06
Quasi-legislation	Policies, guidelines and instructions	No force of its own; inflexible application is a ground	T07
Section 61	Prerogative, capacities and nationhood	Only within s 61 and where no statute excludes it	T01, T04
Contract	Outsourced services; private schemes	Mainly private law	T03, T04

5.4 Contracting Out, Privatisation and Automated Decision-Making

Contractors, privatised bodies and computers strain the assumption of a statutory decision by an identifiable official.

Contracting out and privatisation. A bare statutory capacity to contract does not make later contractual decisions ones 'under an enactment' for the *ADJR Act* (T03).³⁵ A private company's statutory veto over exports was held not reviewable, because public-law obligations could not be imposed consistently with its commercial objects; the answer was confined to that legislation (T04).³⁶ Whether a private contractor can be an 'officer of the Commonwealth' was expressly left open.³⁷ Non-statutory processes undertaken to consider whether to exercise statutory powers must still be conducted fairly and according to law.³⁸ Since the 2025 Robodebt response legislation, the Ombudsman may also enter the premises of contracted service providers and remotely access records, though the Ombudsman still only recommends.³⁹

Automated decision-making. Section 495A of the *Migration Act* lets the Minister arrange for computer programs, under the Minister's control, to make decisions, and deems the program's decisions to be the Minister's.⁴⁰ Without such a provision an output may not be a 'decision' at all. A Full Federal Court majority (Kerr J dissenting) held that a computer-generated letter purporting to remit a general interest charge was not one, because a decision requires a mental process of reaching a conclusion and an

objective manifestation of it (T03).⁴¹ No whole-of-government statute regulates automated decision-making. Privacy-policy disclosure of automated decisions commences on 10 December 2026 and gives no review right, and the *Automated Decision-Making (Safeguards and Transparency) Bill 2026* (Cth) is not law.⁴²

5.5 The Constitutional Setting

Chapter III courts exercise the judicial power of the Commonwealth and no non-judicial power except incidentally, and no other body may exercise that judicial power; merits review is therefore an executive function (T02).⁴³ Section 75(v) entrenches a minimum of judicial review that Parliament cannot remove, and a privative clause does not protect a decision affected by jurisdictional error (T04, T12).⁴⁴ State Parliaments likewise cannot remove a State Supreme Court's supervisory jurisdiction to grant relief for jurisdictional error.⁴⁵ A statute's validity is a separate question from a decision's lawfulness: in *Farmer* the High Court (7:0) upheld a *Migration Act* character provision against the implied freedom of political communication and found no misconstruction in the visa refusal.⁴⁶

5.6 The Legality/Merits Distinction

The distinction between legality and merits organises the subject:

'The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.' — Brennan J, *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35–36.

The court declares and enforces the law that limits and governs the power, and it goes no further.⁴⁷ Three consequences follow for an answer.

1. A court that finds error does not substitute its own decision; under the *ADJR Act* it may quash the decision and refer the matter back for further consideration (T11).⁴⁸
2. A complaint that a decision is wrong or harsh is a merits complaint. Merits review exists only where an enactment provides for it; the ART then exercises the decision-maker's powers and decides afresh, seeking the correct or preferable outcome (T02).⁴⁹
3. Otherwise the checks are political: Parliament, the Minister and the Ombudsman, who may report action as unjust but cannot change it.⁵⁰

The line blurs where legal unreasonableness or a missed mandatory consideration is alleged, but the court asks only whether the decision lacks 'an evident and intelligible justification', or whether the statute bound the decision-maker to consider the matter, not whether the decision was right (T07, T08).⁵¹ Figure 1.1 sets out the classification and the forum for each class. In Victoria the same division holds between VCAT and the Supreme Court (§5.2).

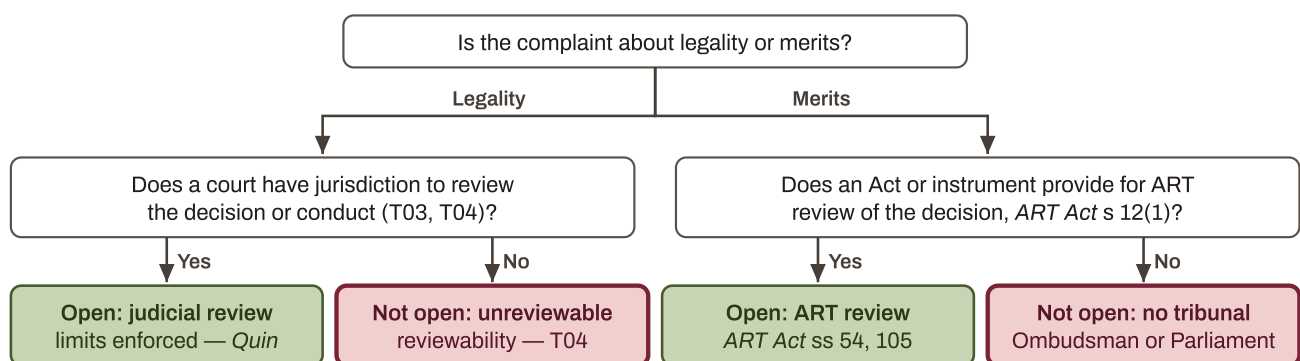


Figure 1.1: Where can a complaint about a decision be taken? Classify the complaint, then answer the question in its lane.

5.7 Statutory Interpretation as the Core Skill

Every administrative power is found in, and limited by, the words of a statute, so construction underlies every ground.

Text, context and purpose. The modern approach is settled:

'The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose.' — Kiefel CJ, Nettle and Gordon JJ, *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34 [14].

Context is considered in the first instance, not only once ambiguity appears, and in its widest sense.⁵² Construction begins with the text, but context and purpose, including the mischief the provision addresses, are also important to it.⁵³ Interpretation statutes reinforce the point by directing a preference for the construction that promotes the statute's purpose.⁵⁴ For Commonwealth Acts that preference is AIA s 15AA, and s 15AB(1) (both set out in §3) admits extrinsic material, such as explanatory memoranda and second-reading speeches, on the conditions it states.⁵⁵ In *Lacey* the High Court (6:1, Heydon J dissenting) construed a prosecution appeal power by its text, context and purpose, together with the principle of legality.⁵⁶

Two further rules recur. Whether breach of a statutory condition invalidates an act is itself a question of construction, and labelling the condition mandatory or directory marks 'the end of the inquiry, not the beginning' (T06).⁵⁷ And AIA s 33(1) lets a power be exercised from time to time unless the scheme shows a contrary intention, as the scheme did in *Makasa*.⁵⁸

The principle of legality. The courts presume that Parliament does not take away fundamental rights by general words:

'The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language.' — Mason CJ, Brennan, Gaudron and McHugh JJ, *Coco v The Queen* (1994) 179 CLR 427, 437.

The presumption is old: O'Connor J said that Parliament is presumed not to overthrow fundamental principles, or depart from the general system of law, without irresistible clearness.⁵⁹ Gleeson CJ described it as a working hypothesis known both to Parliament and to the courts, and as an aspect of the rule of law.⁶⁰ It is a rule of construction, not a ground of invalidity, so clear words prevail. General words of authority, such as powers to enter, take or dispose, are read as not reaching rights over person or property unless the statute deals with those rights in unmistakable terms (Figure 1.2, row 4).⁶¹

The Crown presumption. The presumption that general statutory words do not bind the Crown is not a rigid rule. Its strength depends on the content and purpose of the provision and on the identity of the entity concerned.⁶²

5.8 Victoria: Interpretation

Victorian statutes are construed under the *ILA*, not the *AIA*. Section 35(a) prefers the construction that promotes the purpose or object of the Act, stated or not, and s 35(b) admits any relevant matter or document, including reports of parliamentary proceedings, explanatory memoranda and law reform reports.⁶³ The *Charter* adds an interpretive obligation:

Charter s 32(1)

So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

Section 32(2) permits regard to international law and to domestic, foreign and international judgments on a right, and s 32(3) preserves the validity of incompatible provisions: the obligation is interpretive only.⁶⁴ *Momcilovic* produced six sets of reasons and no majority test of s 32, so each view must be attributed to the Justice who held it.⁶⁵ French CJ treated s 32(1) as requiring statutes to be construed against the background of *Charter* rights in the same way as the principle of legality, but with a wider field of application.⁶⁶ Section 38 is a separate Victorian ground (T07), and s 39 lets it be raised only where relief is available on another ground of unlawfulness, with no damages (T05, T11); neither the *ILA* nor the *Charter* governs a Commonwealth Act.⁶⁷

5.9 Critical Perspectives

PERSPECTIVE	PROPONENT / SOURCE	ARGUMENT	COUNTER-ARGUMENT
The legality/merits line keeps courts in their role	Brennan J in <i>Quin</i> ; Cane, McDonald and Rundle ⁶⁸	Courts enforce the limits Parliament set; the repository, answerable politically, decides the merits	The line is porous: unreasonableness and considerations grounds edge towards the merits (Aronson, Groves and Weeks) ⁶⁹
Executive action should rest on statute	The majorities in <i>Williams (No 1)</i> and <i>Davis</i>	Spending programs should rest on law Parliament has scrutinised, and s 61 yields to a statute that excludes it	Government needs room in a crisis and in its national role (<i>Pape</i> ; Mason J in <i>Barton</i>); Heydon J (<i>Williams (No 1)</i>) and Steward J (<i>Davis</i>) dissented
Automated decisions need legislated safeguards	The 2026 ADM Bill, not law; Creyke, Groves, McMillan and Smyth ⁷⁰	If an output is not a 'decision' (<i>Pintarich</i>), review may never attach; the Bill would require notice and human override	Deeming provisions such as <i>Migration Act</i> s 495A attribute outputs to the Minister, and APP 1.7–1.9 add transparency from 10 December 2026
The principle of legality protects rights	Gleeson CJ in <i>Electrolux</i> ; <i>Coco</i>	Parliament legislates knowing the presumption, so rights yield only to clear words	Clear words prevail; <i>Charter</i> s 32 goes further, without a single test (<i>Momcilovic</i>)

6 Procedural Steps / Decision Trees

Figure 1.2 is the answer framework for any problem that asks whether an official had power to act. Work through it before the grounds: rows 1 and 2 find and construe the source (§§5.3, 5.7), row 3 applies *Davis* where s 61 is relied on, and row 4 applies the principle of legality. Then classify each complaint with Figure 1.1 to choose the forum.

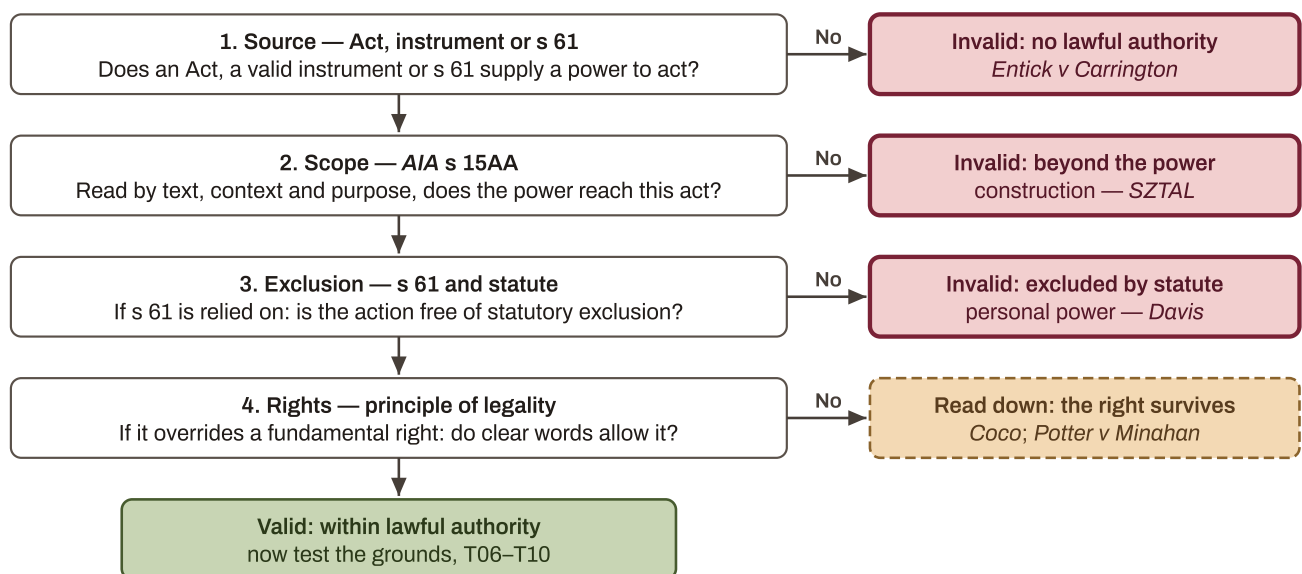


Figure 1.2: Is the action lawfully authorised? Read down while each element holds; a row whose If does not apply holds.

7 Applying the Rules: Problem-Question Practice

Common Fact Patterns

FACT PATTERN	GROUND / ISSUE TRIGGERED	KEY AUTHORITY
An official treats a manual, guideline or instruction as the source of a power	No lawful authority: guidance creates no power	<i>Davis; Entick v Carrington</i>
A department funds a program with no Act behind it	Limits of s 61	<i>Williams (No 1)</i>
Officers screen requests for a Minister's personal, non-compellable power	Action excluded by statute	<i>Davis; MZAPC (2025)</i>
General words (enter, take, dispose) are used against property or liberty	Principle of legality	<i>Coco; Potter v Minahan</i>
A decision-maker revisits a decision already made or reviewed	AIA s 33(1) and contrary intention	<i>Makasa</i>
The client says the decision is wrong, harsh or unwise	Merits, not legality: the ART if an enactment provides	<i>Quin; ART Act s 12(1)</i>
A computer system issues the outcome	Is there a 'decision', or a deeming provision?	<i>Pintarich; Migration Act s 495A</i>

Question Type 1: Non-Statutory Screening of a Personal Ministerial Power

SCENARIO: Section 30 of the *National Seed Vault Act* (Cth) (an invented statute) provides: '(1) If the Minister thinks that it is in the public interest to do so, the Minister may direct the Authority to release a sample from the reserve collection to any person. (2) The power in subsection (1) may only be exercised by the Minister personally. (3) The Minister does not have a duty to consider whether to exercise the power in subsection (1).' The Department's release guidelines tell officers to forward a request to the Minister only if it shows 'exceptional scientific value', and to answer every other request with a form letter. A university's request was assessed by an officer under the guidelines and never reached the Minister.

APPROACH:

- Identify the repository (the Minister, personally), the power (s 30(1)) and its conditions (s 30(2)–(3)).
- No Act authorises the guidelines, so they rest, if at all, on s 61.
- Apply *Davis*, then identify the relief: a declaration, with interim protection if needed (T11).

KEY POINTS TO INCLUDE:

- The university cannot compel the Minister to consider its request (s 30(3)), so it attacks the officer's screening.
- The consistency that guidelines promote does not make them lawful; s 61 must support them.
- No provision gives ART review of s 30, so the merits route in Figure 1.1 is closed.

SAMPLE PARAGRAPH:

The issue is whether the officer could lawfully decline to forward the university's request under the guidelines. No Act authorises the guidelines, so they can rest only on s 61 of the Constitution, which does not authorise non-statutory action that a statute expressly or impliedly excludes.⁷¹ Section 30(2) confines the power to the Minister personally, and s 30(3) removes any duty to consider using it. In *Davis* the High Court held, 6:1, that instructions directing officers to refer only requests showing 'unique or exceptional circumstances', and the decisions made under them, exceeded executive power, because the personal and non-compellable character of the power left no room for officers to evaluate the public interest in the Minister's place.⁷² The guidelines do the same: an officer decides whether a request has 'exceptional scientific value', a public-interest judgment reserved to the Minister, so the screening

decision lacked lawful authority. The university may seek a declaration to that effect and, if the sample is about to be released elsewhere, an interlocutory injunction to preserve the position.⁷³ It cannot obtain an order compelling the Minister to consider the request.

Question Type 2: Construing a General Power Against a Fundamental Right

SCENARIO: The Act's object, in s 3, is 'to conserve the genetic diversity of plant species for the benefit of present and future generations'. Section 22 provides: 'An authorised officer may, for the purposes of this Act, enter land on which deposited seed is grown and take samples of plant material on the land.' Without consent or a warrant, an officer entered a grower's farmhouse at night and removed the grower's entire stored harvest of a rare seed line.

APPROACH:

- Construe s 22 by text, context and purpose (*SZTAL*; *AIA* s 15AA).
- Ask whether entering a dwelling and taking a whole harvest interferes with fundamental rights, and whether s 22 deals with them in unmistakable language (*Coco*); then classify the result (T06, T11).

KEY POINTS TO INCLUDE:

- 'Land' and 'take samples' are general words.
- The conservation object supports sampling, not the appropriation of a grower's harvest.
- Clear words would displace the presumption, so the answer turns on the text.

SAMPLE PARAGRAPH:

The issue is whether s 22 authorised the night entry into the farmhouse and the removal of the whole harvest. Construction begins with the text, read with its context and purpose,⁷⁴ and the construction that best achieves the Act's purpose is preferred.⁷⁵ Section 22 authorises entry to 'land' and the taking of 'samples'. Read with the conservation object in s 3, sampling serves the Act's purpose; taking a grower's entire stock does not, because a sample is a part taken for study, not the whole. The principle of legality confirms that reading. An intention to interfere with fundamental rights must be 'clearly manifested by unmistakable and unambiguous language',⁷⁶ and executive interference with person or property needs positive legal authority.⁷⁷ Even if 'land' extends to buildings on it, s 22 says nothing about entering a dwelling without consent, and nothing about removing whole stocks. The power should therefore be read down so as not to authorise either step, and both were beyond power. The grower may seek judicial review and the return of the seed (T06, T11).

Worked Scenario 1: Multi-Issue Problem

SCENARIO: Section 9 of the Act provides that 'a deposited sample remains the property of its depositor'. Section 14 provides: '(1) The Authority may remove a deposited sample from the Vault if it is satisfied that the sample poses a biosecurity risk to the collection. (2) A removed sample is to be dealt with as the Authority directs. (3) An application may be made to the Administrative Review Tribunal for review of a decision under subsection (1).' A farmers' cooperative deposited samples of a heritage wheat line. The Authority's chief executive removed them under s 14(1) and directed under s 14(2) that they be incinerated in 30 days. The Authority's own biosecurity report rated the risk as low, and an email from the chief executive says the shelf space is needed for a new fee-paying commercial depositor. The cooperative received written notice of both decisions yesterday.

ISSUES IN ANSWER ORDER:

1. The source and reach of the power to remove and destroy (T01).
2. Legality or merits: which complaint goes where (T01, with T02).
3. Improper purpose (T07).
4. Merits review and interim protection (T02).

ANSWER PLAN:

Issue 1 — Source and reach of the power. The Authority acts under an Act, so the question is what s 14, construed by its text, context and purpose, allows (Figure 1.2, rows 1–2).⁷⁸ Removal is within s 14(1). Read literally, s 14(2) extends to any direction, but its general words do not deal with destroying a depositor's property, which s 9 preserves, so the principle of legality reads them down so as not to authorise incineration (row 4).⁷⁹ The direction is therefore likely beyond power.

Issue 2 — Legality or merits. The complaint that the risk was overstated is a merits complaint, and s 14(3) makes the removal decision reviewable in the ART (Figure 1.1).⁸⁰ The complaint that the space was wanted for a paying client alleges a breach of a legal limit and belongs in a court.⁸¹

Issue 3 — Improper purpose. A power conferred for biosecurity cannot be used to free space for a commercial client. Where purposes are mixed, the exercise is invalid if the improper purpose was substantial: but for that purpose, the Authority would not have used the power.⁸² The low-risk report and the email support that inference; classify the error and its materiality under T10.

Issue 4 — Merits review. The cooperative's interests are affected, so it may apply to the ART, which exercises all the Authority's powers and may set the decision aside and substitute its own.⁸³ An application does not stop implementation, so the cooperative must also seek a stay.⁸⁴

ADVICE: Apply to the ART at once under s 14(3) and seek a stay of the removal decision. Because s 14(3) does not reach the incineration direction under s 14(2), also seek judicial review of the direction under the *ADJR Act* for want of power and improper purpose, with an order suspending its operation (T03, T11).⁸⁵

8 Exam Tips & Traps

✓ Do:

- Open every answer by naming the repository, the power and its source, as Figure 1.2 does.
- When a department acts through guidelines, ask which Act authorises them; if none does, test them against s 61 and *Davis*.
- Classify each complaint separately as legality or merits, and send each to its own forum (Figure 1.1).

✗ Don't:

- Don't cite *CPCF* or *Plaintiff M68* as upholding a non-statutory power to detain: both rest on statute.
- Don't cite *Barton* for a non-statutory power to surrender or detain, or *Clough v Leahy* for a capacity to contract.
- Don't treat the 2026 ADM Bill as law, or APP 1.7–1.9 as in force, on 7 October 2026.

⚠ Watch Out For:

- *Ruddock v Vadarlis* is a Full Federal Court decision with a dissent (Black CJ), not a High Court authority.
- *Davis* condemns officer screening; it does not impose on the Minister a duty to consider a request.
- Give the splits exactly: *Pape* 4:3, *Williams (No 1)* 6:1, *CPCF* 4:3, *Davis* 6:1.
- An automated output may not be a 'decision' (*Pintarich*) unless a provision such as s 495A deems it a decision.

9 Connections to Other Topics

RELATED TOPIC	CONNECTION	CROSS-REFERENCE
Method	Repository, power and source open the answer	T00, Method
Merits review	Where merits complaints go; the ART's powers	T02, Merits Review
ADJR jurisdiction	'Under an enactment'; automated outputs	T03, ADJR Jurisdiction
Constitutional and State review	Reviewability of non-statutory power	T04, Constitutional and State Review
Acting beyond power	Scope of power; <i>Project Blue Sky</i>	T06, Acting Beyond Power
Improper exercise of discretion	Policy, purpose and <i>Charter</i> s 38	T07, Improper Exercise of Discretion
Unreasonableness and facts	The legality/merits boundary	T08, Unreasonableness and Facts
Jurisdictional error	Excess of power; materiality	T10, Jurisdictional Error
Remedies	Declarations and injunctions for <i>Davis</i> claims	T11, Remedies
Privative clauses	Section 75(v) and <i>Kirk</i> as entrenched minimums	T12, Privative Clauses

10 Quick Reference Card

Time Limits

ACTION	TIME LIMIT	AUTHORITY
Notice of motion to disallow an instrument	Within 15 sitting days after tabling	<i>Legislation Act</i> s 42(1)
Sunsetting of an instrument	First 1 April or 1 October on or after the tenth anniversary of registration	<i>Legislation Act</i> s 50(1)
Application for ART review	The period in the rules, ending no earlier than 28 days after the decision	<i>ART Act</i> s 18(1), (3)

Key Tests

TEST NAME	ELEMENTS	AUTHORITY
Lawful authority	Source; scope as construed; no statutory exclusion of s 61; clear words for any right overridden	Figure 1.2; <i>Entick v Carrington</i> ; <i>Davis</i>
Text, context and purpose	Text first; context from the outset; prefer the purposive construction	<i>SZTAL</i> ; <i>CIC Insurance</i> ; <i>AIA</i> s 15AA
Extrinsic material	Confirm ordinary meaning, or resolve ambiguity, obscurity or a manifestly absurd or unreasonable result	<i>AIA</i> s 15AB(1)
Principle of legality	Fundamental right affected? Unmistakable and unambiguous language?	<i>Coco</i> ; <i>Potter v Minahan</i>
Legality or merits	Legal limit to a court; merits to the ART where provided, otherwise political checks	<i>Quin</i> ; <i>ART Act</i> s 12(1)

11 Rule Statement Bank

- 1. Lawful authority.** An official who interferes with a person or property must show positive legal authority; without it the act is unlawful. — *Entick v Carrington* (1765) 2 Wils KB 275; 95 ER 807.
- 2. Statute first.** Detention at sea was lawful because s 72(4) of the *Maritime Powers Act 2013* (Cth) authorised it; the case decides nothing about a non-statutory power to detain. — *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514.
- 3. Section 61.** Non-statutory executive power extends to action appropriate to the Commonwealth's position under the Constitution and its spheres of responsibility. — *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J).
- 4. Programs need statute.** Section 61 did not authorise a program funding agreement, or payments under it, without statutory authority. — *Williams v Commonwealth* (2012) 248 CLR 156.
- 5. Statutory exclusion.** Section 61 does not authorise action a statute expressly or impliedly excludes; officers may not evaluate the public interest for a Minister's personal, non-compellable power. — *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 1.
- 6. Text, context and purpose.** Construction starts with the text, read at the same time with its context and purpose. — *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34 [14] (Kiefel CJ, Nettle and Gordon JJ).
- 7. Purposive preference.** The interpretation that best achieves the Act's purpose or object, stated or not, is preferred. — *AIA* s 15AA.
- 8. Principle of legality.** Fundamental rights are displaced only by unmistakable and unambiguous language, so general words of power are read down. — *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).
- 9. From time to time.** A power may be exercised again unless the scheme shows a contrary intention, as where a tribunal has substituted its own decision and the power is re-exercised on the same factual basis. — *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430.
- 10. Legality and merits.** The court enforces the limits of power; the merits are for the repository, subject to political control. — *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35–36 (Brennan J).
- 11. Victorian statutes.** So far as possible consistently with their purpose, Victorian statutory provisions must be interpreted compatibly with human rights. — *Charter* s 32(1).

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FOOTNOTES

1. *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35–36 (Brennan J).
2. *Administrative Review Tribunal Act 2024* (Cth) ('ART Act') ss 2, 246.
3. *Privacy Act 1988* (Cth) sch 1 APP 1.7–1.9, inserted by the *Privacy and Other Legislation Amendment Act 2024* (Cth) sch 1 pt 15; *Automated Decision-Making (Safeguards and Transparency) Bill 2026* (Cth).
4. *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1.
5. *Williams v Commonwealth* (2012) 248 CLR 156.
6. *Clough v Leahy* (1904) 2 CLR 139; *Williams (No 1)* (n 5) (Hayne J).
7. *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 1.
8. *Minister for Immigration and Multicultural Affairs v MZAPC* [2025] HCA 5 [1]–[3], [48]–[49].
9. *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430.
10. *Makasa* [2021] HCA 1 [1]–[3], [59].
11. *Entick v Carrington* (1765) 2 Wils KB 275; 95 ER 807.
12. *Church of Scientology Inc v Woodward* (1982) 154 CLR 25, 70 (Brennan J).
13. *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; [2003] HCA 2 [104].
14. Peter Cane, Leighton McDonald and Kristen Rundle, *Principles of Administrative Law* (Oxford University Press, 3rd ed, 2018).
15. *Australian Constitution* s 61; Cane, McDonald and Rundle (n 14).
16. *Ombudsman Act* s 5(1).
17. *ADJR Act* s 3(1) (definition of 'decision to which this Act applies' para (c)); *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342.
18. *Charter* s 4(1).
19. *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 42(1); *Constitution Act 1975* (Vic) s 85(1).
20. *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45, 49.

21. *Legislation Act* ss 42(1)–(2), 50(1).
22. *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173; *Davis* (n 7).
23. *Migration Act* s 499(1)–(2A).
24. *Barton v Commonwealth* (1974) 131 CLR 477.
25. *Ibid* (Barwick CJ), quoted by Kiefel J in *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514.
26. *Clough v Leahy* (n 6) (Griffith CJ), as explained in *Williams (No 1)* (n 5) (French CJ).
27. *Barton* (n 24) 498 (Mason JJ).
28. *Pape* (n 4).
29. *Williams (No 1)* (n 5).
30. *Ruddock v Vadarlis* (2001) 110 FCR 491.
31. *CPCF* (n 25); *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42.
32. *Migration Act* s 351(3), (7).
33. *Davis* (n 7).
34. *MZAPC* (n 8) [1]–[3], [48]–[49].
35. *Griffith University v Tang* (2005) 221 CLR 99; [2005] HCA 7 [82].
36. *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277.
37. *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319; [2010] HCA 41 [51].
38. *Plaintiff M61* (n 37) 350–351 [70]–[73].
39. *Oversight Legislation Amendment (Robodebt Royal Commission Response and Other Measures) Act 2025* (Cth); *Ombudsman Act* ss 14, 14A, 15.
40. *Migration Act* s 495A(1)–(2).
41. *Pintarich v Deputy Commissioner of Taxation* [2018] FCAFC 79.
42. *Privacy Act 1988* (Cth) sch 1 APP 1.7–1.9; *Automated Decision-Making (Safeguards and Transparency) Bill 2026* (Cth).
43. *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 296.
44. *Plaintiff S157* (n 13).
45. *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.
46. *Farmer v Minister for Home Affairs* [2025] HCA 38.
47. *Quin* (n 1) 35–36.
48. *ADJR Act* s 16(1)(a)–(b).
49. *ART Act* ss 12(1), 54, 105; *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 589 (Bowen CJ and Deane JJ).
50. *Ombudsman Act* s 15(1)–(2).
51. *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18 [76] (Hayne, Kiefel and Bell JJ); *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.
52. *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).
53. *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378, 388–389 [23]–[24] (French CJ and Hayne J).
54. *Mills v Meeking* (1990) 169 CLR 214, 223 (Mason CJ and Toohey J).
55. *AIA* ss 15AA, 15AB(1)–(2).
56. *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 591–593 [43]–[48].
57. *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 388–389 [91], 390 [93] (McHugh, Gummow, Kirby and Hayne JJ).
58. *AIA* s 33(1); *Makasa* (n 9).
59. *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J).
60. *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ).
61. *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Entick v Carrington* (n 11).
62. *Bropho v Western Australia* (1990) 171 CLR 1.
63. *ILA* s 35.
64. *Charter* s 32(2)–(3).
65. *Momcilovic v The Queen* (2011) 245 CLR 1.
66. *Momcilovic* [2011] HCA 34 [51] (French CJ).
67. *Charter* ss 32(1), 38, 39; *ILA* s 35; *AIA* s 15AA.
68. *Cane, McDonald and Rundle* (n 14).
69. Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 7th ed, 2022).
70. Robin Creyke, Matthew Groves, John McMillan and Mark Smyth, *Control of Government Action: Text, Cases and Commentary* (LexisNexis, 7th ed, 2024).
71. *Australian Constitution* s 61; *Davis* (n 7).
72. *Davis* (n 7).
73. *MZAPC* (n 8) [1]–[3].
74. *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362.
75. *AIA* s 15AA.
76. *Coco* (n 61) 437.
77. *Entick v Carrington* (n 11).
78. *SZTAL* (n 74); *AIA* s 15AA.
79. *Coco* (n 61) 437; *Potter v Minahan* (n 59) 304.
80. *ART Act* s 12(1).
81. *Quin* (n 1) 35–36.
82. *Samrein Pty Ltd v Metropolitan Water, Sewerage and Drainage Board* (1982) 41 ALR 467, 468–469; *Thompson v Randwick Corporation* (1950) 81 CLR 87.
83. *ART Act* ss 17(1), 54, 105.
84. *ART Act* s 32(1)–(2).
85. *ADJR Act* ss 5(1)(d)–(e), 5(2)(c), 15(1).

SAMPLE EDITION

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- 1.** The Administrative Law Method: Issue-Spotting and Answer Structure
- 2.** Foundations: Executive Power, Accountability and Statutory Interpretation
- 3.** Merits Review: The Administrative Review Tribunal, VCAT and the Wider Review System
- 4.** Statutory Judicial Review: Jurisdiction under the ADJR Act
- 5.** Constitutional, Common-Law and State Review: Jurisdiction, Public Power and Justiciability
- 6.** Standing and the Right to Reasons
- 7.** Acting Beyond Power: Statutory Authority, Subordinate Legislation, Procedures and Delegation
- 8.** Improper Exercise of Discretion: Considerations, Purpose, Bad Faith, Policy and Dictation
- 9.** Unreasonableness, Fact-Finding Errors and Jurisdictional Facts
- 10.** Procedural Fairness: The Hearing Rule and the Rule Against Bias
- 11.** Jurisdictional Error, Materiality and Error of Law
- 12.** Remedies, Discretion and the Consequences of Invalidity
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- 14.** Revision and Cross-Topic Synthesis