

March 2009
Administrative Law
Examiner's comments

Part A: Compulsory to attempt ONLY ONE question in Part A.

1. Frederick Flinstone's appeal to the AAT.

This question was poorly answered by the students who attempted it. Some students also failed to understand examination instructions to attempt only one of the questions in Part A, and attempted both questions one or two. Any student who attempted both questions was marked on the most competent answer provided.

In general, students failed to distinguish between merits review and judicial review. Students provided much discussion (largely irrelevant) of the principles of judicial review and grounds of review under the *Administrative Decisions (Judicial Review) Act 1977*.

For a full answer, students should discuss the pros and cons of AAT review as opposed to judicial review – the main advantage of judicial review in this case including the ability to challenge Regulation 10 as ultra vires. Very few students were able to provide this. Also, the claim of failure to provide procedural fairness, is a matter for judicial review not merits review in the Tribunal. Many students failed to grasp this point.

The question asked:

- What appeal? Students should discuss merits review and s43 of the AAT Act – Tribunal 'stands in the shoes' to make the 'correct or preferable' decision on the merits. Must lodge the appeal with 28 days of being provided with the decision.
- Grounds of success? The Tribunal has jurisdiction to affirm, vary, or set aside the original decision. Its decision to do so will depend on the evidence and submissions made to the Tribunal.
- How to prepare? By seeking reasons for decision under section 28 of the AAT and all documents relevant to the decision (the "T" or Tribunal documents provided under section 37 of the AAT within 28 days of the application for review being lodged in the Tribunal). Consider whether to obtain fresh evidence to persuade the Tribunal to set aside the decision. For example, evidence of Frederick's good character and repute, his reason for holding the licence, his lack of criminal record, and a response to the Commissioner of Police material on security issues, if this material is provided to Frederick.
- How would the Tribunal deal with an application by the Minister to deal with confidential information? This was well covered. Section 35(2) of the AAT Act states that the Tribunal may make an order for confidentiality in relation to material. This may include restricting material to legal representatives of the parties or from Frederick if he is unrepresented.
- What documents could Frederick obtain about drafting the regulation and the Minister's decision? Minister's decision: If not already discussed under 'how to prepare' students should refer to the FOI and Privacy Acts and provision to obtain information that relates to Frederick and the Minister's consideration of his application. Making of the Regulation: discuss the FOI Act and the possibility of obtaining information about the drafting of the documents. Also whether the Minister or her department has released any public material about the regulation for example in consulting the public about its making. Any 'explanatory notes' or other material to explain its intent.

2. Frederick Flinstone and Barney Rubble's judicial review challenge.

This question was well answered by the students who attempted it. In general most students missed the point about a challenge to the Regulation on the grounds that it may be ultra vires the statute on either broad or narrow ultra vires. Because so many students missed this point, they were not penalised for not referring to it; any students who discussed it were awarded extra marks.

The question asked:

- Court or courts and jurisdiction: Federal Court under ADJR or Judiciary Act, High Court under its original jurisdiction under section 75(iii) of the Constitution. Students correctly identified the Commonwealth courts and their respective jurisdictions to hear the challenges of Frederick and Barney.
- Remedies: section 16 of the ADJR Act which are the statutory equivalents of certiorari (quashing the decision), mandamus (compelling the Minister to remake the decision), prohibition (restraining the Minister from enforcing the quashed decision) and injunction (stay of decision pending judicial review), declaration (a statement of the correct application of the law to Frederick and Barney's situation). If referring to declaration should discuss how to enforce it usually by coupling it with other remedies.
- Grounds of review: challenge to the Regulation on grounds that it is ultra vires. Failure to provide procedural fairness to Frederick (does he have a legitimate expectation because he has been in transport business for a number of years?) and Barney (does he have legitimate expectation that licence will be renewed?). Adequacy of 'hearing' provided to Frederick (is there a requirement to tell Frederick of adverse information in the confidential report?) and/or Barney (is Barney's brief conversation with Minister sufficient? Is there a requirement to tell Barney of adverse information that affects the Minister's decision?). Minister's taking into account irrelevant considerations (Commissioner's report), acting under dictation (blindly following the Commissioner's report because of Regulation 10, without regard to the Explosives Act sections 5 and 6 which states that it is the Minister's decision whether someone is 'fit and proper' and, arguably, what weight to give the Commissioner's report), failing to take into account relevant considerations (Frederick and Barney's history in the transport business and their good character, etc). Failure to give reasons as required by the statute.

Part B: Choice of any two questions.

3. Discussion of locus standii.

This question was well answered by the students who attempted it. A discussion of the common law principles and their development over time, comparison to definition of 'aggrieved person' in the ADJR Act, 'person whose interests are affected' under section 27 of the AAT Act. Extra points awarded for policy discussions and references to relevant documents including the Law Reform Commission proposals and the pros and cons of the 'floodgates' arguments.

Finally students were required to provide their view on 'whether the courts or the legislature is best placed to bring about changes to the law on standing'. Students who did not express a view, based on their analysis of the case law and merits of reform proposals, were not awarded marks.

4. Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476 – discussion of a quotation setting out the presumption that legislation will not be construed as abrogating fundamental rights. The question asked: How can and should this presumption operate in judicial review proceedings.

This question was well answered by the students who attempted it. The main problem was too narrow a focus on privative clauses. Although Plaintiff S157/2002 is fundamentally a case about privative clauses the quotation and the question were aimed more broadly at abrogation of 'fundamental rights or freedoms' which must be manifested by the legislature by 'unmistakeable and unambiguous language'. An obvious parallel is with the principles of procedural fairness about which Judges have spoken in similar terms. Students who discussed the decision about privative clauses in its broader context of 'fundamental freedoms or rights' scored more highly in this question.

5. Discussion of grounds of judicial review allowing or encouraging consideration of the merits of a decision (quotation: description of a reasoning as illogical or irrational is emphatic way of disagreeing with it).

This question was well answered by the students who attempted it. Students ably discussed the relevant grounds of review including 'Wednesbury unreasonableness', failure to take into account relevant considerations, 'no evidence', irrelevant considerations, which may allow courts to consider the facts or merits of a decision.

6. Discussion of quote about privative clauses and whether they 'diminish accountability and prevent justice', with reference to case law and policy arguments.

This question was well answered by the students who attempted it. The question required students to express a view about the effect of privative clauses. Students in the main came to the view that privative clauses are not effective to oust judicial review and therefore disagreed with the quotation. For full marks in this question, students discussed the meaning and history of privative clauses, and recent case law including Plaintiff s157/2002, R v Hickman. Students should also refer to recent cases (eg Plaintiff s157/2002) that privative clauses do not prevent judicial review of decisions infected with jurisdictional error, that is, they may be challenged under the 'broad' ultra vires grounds. Plaintiff s157/2002 suggests that such grounds include failure to afford procedural fairness.