

September 2009

Administrative Law

Examiner's comments

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

### Question 1

**Advise Frederick Flintstone on what appeal (if any) he should take to the AAT and its prospects of success. How should he prepare for such an appeal? How would the Tribunal deal with an application by the Minister to have confidential evidence given by the Commissioner of Police?**

Frederick Flintstone's appeal to the AAT.

This question was well answered by the sizable number of students who attempted it.

In general, students distinguished clearly between merits review and judicial review. Students this session mostly avoided irrelevant discussion 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. Most students were able to state this. Also, the claim of failure to provide procedural fairness, is a matter for judicial review not merits review in the Tribunal. A few 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.

Prospects 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.

The main challenge with an AAT appeal will be the difficulty in persuading the Tribunal to go behind the Police Commissioner's report and come to a different decision than the Minister, given that Regulation 10 states that it must be taken into account by the decision maker (ie

the Tribunal on review, standing in the shoes of the Minister). Prospects of success will depend on whether Frederick is able to put forward evidence to challenge the report if he or his legal advisers can obtain access to it or otherwise.

## Question 2

**Advise Frederick Flintstone on which court or courts would have jurisdiction to hear a challenge to the Minister's decision and what remedy or remedies Frederick Flintstone should seek.**

**What documents or information could Frederick Flintstone obtain about the drafting of the regulation and the Minister's decision?**

**Note: Do not discuss Frederick Flintstone's possible grounds of judicial review, as this issue is covered in another question.**

Frederick Flintstone challenge– court or courts, jurisdiction and remedy, documents.

This question was well answered by the small number of students who attempted it. 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) and 75(v) of the Constitution. Students correctly identified the Commonwealth courts and their respective jurisdictions to hear the challenges of Frederick and Barney.

For a full answer: refer to the advantages of relying on jurisdictions of both the Judiciary Act and the ADJR Act. This means that the legislative decision (ie Regulation) can be challenged at the same time as the Minister's administrative decisions (Frederick: refusal of licence; Barney: revocation of licence).

The rules of standing (person aggrieved, etc) should be referred to. Certiorari and prohibition traditionally require that the decision maker has a duty to act judicially – the 'constitutional writ' cases indicate that these rules may be more flexibly applied by federal administrative law courts.

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 or acting on 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. Certiorari would usually also be accompanied by other remedies eg mandamus, compulsion to remake the decision, and prohibition or injunction re the quashed decision.

Documents or information about the drafting of the Regulation and the Minister's decision.

Minister's decision: Frederick should seek a statement of reasons under section 13 of the ADJR Act. This request need not be coupled with a challenge under the ADJR section 5 or section 6. What exclusions apply – are any relevant to Frederick?

Students should refer in general terms to the FOI and Privacy Acts and provision to obtain information that relates to Frederick and the Minister's consideration of his application. Note: DO NOT discuss FOI Act (grounds of exclusion etc) in detail: it is sufficient to state that the

FOI Act may give an avenue to obtain any documents which have not been provided in the reasons.

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.

### Question 3

**Advise Frederick Flintstone and Barnaby Rubble of the grounds on which they could seek judicial review of the Minister's decisions.**

Frederick Flintstone and Barney Rubble's judicial review challenge.

This question was well answered by the students who attempted it. In general most students made 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.

- Grounds of review: challenge to Regulation 10 on grounds that it is ultra vires. Narrow and broad grounds. Narrow: Shanahan v Scott – it goes further than the Act. Broad / narrow: It takes away the Minister's discretion to grant a licence and purports to delegate this to the Commissioner of Police who can effectively veto a person in his/her report. This is arguably an improper purpose and also arguably contrary to the words of section 5 (Minister's power to grant) and section 6 of the Act (matters to be covered in Police Commissioner's report).
- A few students argued that it may be possible to challenge Regulation 9, the declaration of ammonium nitrate (AN) as an explosive substance. AN is a fertilizer, not explosive unless combined with other substances. Does the Regulation go beyond power of the Act?
- 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?). Many students did not elaborate on the difference in the rules of implication of procedural fairness and missed the point that in an application for a licence, Frederick may have more difficulty in implying the rules of PF than Barney. Conversely it is not necessary to cite undigested chunks of case law concerning implication rules for procedural fairness. What is important is to focus on the situation faced by Frederick: he is applying for the first time for a licence to operate a business which he has been running successfully for a number of years, prior to the requirement being imposed for a licence.

Another argument for Frederick is the damage to his reputation from the refusal, to the extent that his other business is suffering. Much of the common law states that this is the type of situation in which an applicant can successfully rely on procedural fairness.

Students should ensure that case law quoted focuses on these issues in Frederick's situation.

- Failure to provide procedural fairness to Barney (does he have legitimate expectation that licence will not be revoked and continue for its term?). Many students did not read the question facts sufficiently and referred to an expectation that Barney's licence would be 'renewed'. In fact the question states that the Minister revoked his licence. Is there any difficulty in relying on the rules of PF in this case?

- 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?). Rule requiring notice of the hearing? Should Frederick and/or Barney have opportunity to cross examine, put forward their own evidence etc.
- Minister's 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. This ground follows on from having successfully argued that Regulation 10 is invalid for inconsistency with section 6 of the Act), failing to take into account relevant considerations (Frederick and Barney's history in the transport business and their good character, etc);  
For Barney: no evidence – what does the Minister rely on when revoking Barney's licence?  
For Barney: unreasonableness: is there an implied condition that Barney's licence will continue for the full term of his grant and that it will not be revoked without explanation or an opportunity to be heard?
- Failure to give reasons to Frederick only (for refusal of licence) as required by the statute. Note that the Statute does not require that Barney be given reasons for a revocation of the licence.

**Part B: Choice of any two questions.**

**Question 1**

***“The time has arrived for Freedom of Information in Australia to return to its intended roots.”***

**Discuss the many attempts of FOI reform which have been attempted in Australia over the last ten years and the proposed legislative changes.**

This question was well answered by the students who attempted it. The question called for discussion of FOI reform over the last 10 years and the current proposed legislative changes.

Refer to Australian law reform commission reports, views of framers of the original legislation and the reason it was enacted, criticisms stating that Act has not achieved its aims.

Some students did not fully elaborate on the proposed legislative changes for example the proposal to abolish conclusive certificates and the reason for this proposed reform.

## Question 2

***“The Ombudsman has demonstrated that it is quite a different institution to the courts and tribunals in a number of ways. Some would say that it has more pluses than minuses.”***

### **Discuss.**

This question called for comparison and contrasting of the Ombudsman with courts and tribunals. Students should summarise the main differences including no need for standing, no need for written request, decisions are recommendatory only, Ombudsman controls proceedings, hearings are usually private etc.

The question also called for evaluation of the advantages and disadvantages of the Ombudsman's procedures. Evaluation can be included in the elaboration of the differences. The question called for students to give a view. In support of any view other opinions could be referred to, including the well-known view that if Ombudsman's decisions were binding (not recommendatory) this would substantially alter its approach and functions including its persuasive ability with Ministers and Departments. An alternative view is the well-known view that the Ombudsman, because its decisions are non-binding, is a 'toothless tiger'.

## Question 3

***“The establishment of the AAT in 1975 and the subsequent creation of similar tribunals in most States, represented a radical departure from the existing system of judicial review. The tribunals are a hybrid, combining the features of both courts and administrative agencies.”***

### **Discuss.**

The question calls for comparison of the existing system of judicial review to the new system of merits review. The question asks for an evaluation of whether this is a 'radical departure'. Discussion of the features of Tribunal, comparison to a court's procedure. What is 'merits review'? How does it compare to judicial review?

## Question 4

***“Privative clauses diminish accountability and ultimately, they prevent justice.”***

**Discuss whether this is correct, with references to applicable case law and relevant policy arguments.**

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.

The question also requires reference to 'relevant policy arguments'. Many students failed to do so. Relevant policy arguments include finality of decisions, Parliamentary supremacy, the

ability of Courts to uphold the rule of law, the 'irresistible force' meeting the 'immovable object'.

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.