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EXAMINERS NOTES – ADMINISTRATIVE LAW SEPTEMBER 2013

Question 1

Stella McMurphy is an applicant for elective health services under the *Public Access to Cosmetics Act 2013* (PAC Act). The objects of the PAC Act are: "public funds and resources will be devoted to cosmetic procedures that are deemed to be necessary, reasonable, and efficient. A panel will grant access to services based on these principles".

Due to her busy lifestyle Stella has difficulty meeting deadlines and following application procedures. *Public Access Cosmetics Regulations* state:

1. **All applicants for cosmetic procedures must apply on or before the first business day of July in the year preceding the year in which services are desired to occur;**
2. **No late applications will be considered.**
3. **Only one application will be processed in an 18 month period.**

Stella has an important social event on her calendar as she will be step-mother of the bride at the end of 2014. She submits an application for cosmetic procedures on 15 July 2013.

She receives a letter stating that her application will be considered for the intake year 2015, having been submitted on or before 1 July 2014.

Stella speaks by telephone to a clerk in the PAC office. She enquires whether there has been a typographical error and whether it was intended to refer to an intake year of 2014. The clerk says "Oh, not you again! You applied last year for a knee lift and we rejected your application because you didn't give us all the necessary information. This year, you're out of time for 2014. In any case, you're barred from submitting a claim for 2014 under regulation 3. We've told you over and over what the procedures are, and have given you every chance. I've a good mind to have the 2015 application thrown out for nuisance value".

Stella can barely remember that she attempted to submit an application in 2012, when her application, for a knee lift, was rejected as being incomplete. For the present application, she prepares a full suite of documents in support. This includes copies of the wedding invitation, photos from her family album, and testimony from her family and friends telling of the important role which Stella will play at her step-daughter's wedding and her need to look her best at this event. She submits a statement saying that as the wedding is in 2014, it is imperative that she be granted an extension of time to submit the application, and that the intake year of 2015 is too late for her to meet this pressing need.

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Stella receives a letter from the Convenor, PAC panel headed: "Prelimina[ry] decision concerning your application under the PAC":

> **Dear Ms McMurphy, the panel under the PAC Act has convened, and has determined that you have submitted a valid application for the 2015 intake year. The panel notes that your previous application in 2012 was processed and therefore you are not eligible to submit an application for the 2014 intake year. In any case, having regard to regulation 3, the panel never extends the time for an application and you are out of time for the 2014. This decision is final and no correspondence will be entered into.**

(a) Advise Stella whether she has validly submitted an application as prescribed under the Act and Regulations. Is it correct that her application in 2012 "was processed"?

(b) Assuming that Stella has a valid application before the PAC office, advise her whether she has been treated fairly, and if not, what are her rights and avenues of review in relation to any decisions that have been made.

Question 1(a) is asking students to discuss whether Stella has validly submitted an application. It is clear that she has validly submitted an application for the 2015 year, so the issue is whether she can be considered for a procedure in the 2014 year.

In relation to her exclusion under regulation 3 (one application in an 18 month period) it seems that the panel has taken into account her attempt to apply in 2012. Stella's contention is that the application was not accepted or processed, as it was rejected for being incomplete. Therefore regulation 3 should not exclude her from consideration for the 2014 year as her current application is the only one in the relevant 18 month period.

In relation to the refusal under regulation 2 and her failure to submit an application by the first business day of July 2013: her contention is that it unreasonable to refuse to consider whether she should be granted an extension. Therefore it is necessary to argue that the regulations themselves are ultra vires the Act, either on broad or narrow ultra vires grounds. It is difficult to see how the regulations promote the objects of the Act by their strict time limits. They are also unreasonable as the requirement to have only one operation in an 18 month period may not be what is needed as "necessary and reasonable" from medical advice. Some forms of surgery for cosmetic procedures would require multiple operations and procedures to address certain conditions.

Having set aside the regulations preventing consideration of her late application, Stella's contention is that her procedures must be considered for the 2014 for the reasons stated in her application, to attend her step-daughter's wedding. She should be allowed to make submissions as to why her application should be considered for 2014. This includes that she has not missed the deadline (first business day) by much.

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Question 1(b) moves to consideration of the substantive decision to refuse Stella's application in 2014. It is to be assumed Stella could challenge in the Administrative Appeals Tribunal or by judicial review.

Grounds of judicial review include that the panel has not considered the merits of her application as it has referred only to procedural and timing issues. It has taken into account an irrelevant consideration, namely the invalid regulations, and has failed to take into account relevant considerations, namely what is necessary, reasonable and efficient as this applies to Stella in considering the matters referred to in her application.

Query also whether Stella is entitled to procedural fairness. Assuming that procedural fairness will be implied in Stella's favour, the rule against bias is relevant. It is implied that the clerk in the PAC office is not part of the panel which refused Stella's application. However, the clerk's comments to Stella about her application may mean that the rule against bias has been offended (either of the tests – actual or apprehended bias). It would necessary to demonstrate that the connection between the decision maker and the clerk is sufficiently close to demonstrate that Stella has not been afforded procedural fairness.

It is also clear that Stella has not been "heard", therefore the hearing rule has not been validly applied to her. This is because her application has not been read or considered for the 2014 year. Further, Stella was given no notice of the decision to refuse to consider her application for the 2014. This is a complete breach of the hearing rule

There is no need to discuss standing as Stella is clearly a person aggrieved/person affected by the decision not to consider her application in the 2014 year.

Remedies under merit review include having the decision to refuse to consider her application set aside, considering fresh evidence and granting her application. Under judicial review, remedies including having the decision set aside and the decision maker ordered to remake it in accordance with law.

Question 2

Explain the nature and purpose of privative clauses. What are the pros and cons of such clauses, from the government's perspective, and from the perspective of affected parties? Cite examples and case law in your answer.

This question required discussion of privative clauses 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, their benefits and disadvantages. Students in the main came to the view that privative clauses are not effective to oust judicial review. Students scored more highly when they looked at benefits on both sides of the fence, ie benefits and disadvantages for the government, and for applicants. Benefits on both sides include finality of decision making and certainty. A disadvantage to governments

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is that courts usually find a way round, sometimes in reliance on the Hickman principles. A disadvantage for applicants is the greater difficulty in challenging a flawed decision, and the prevention of taking up review rights without expense, time and effort in external review.

Other policy arguments include Parliamentary supremacy, the ability of Courts to uphold the rule of law, the 'irresistable 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.

Question 3

How important is freedom of information to the wider administrative law regime? In your answer, please refer to the objects and purpose of the FOI Act, as these have been amended by the *Australian Information Commissioner Act 2010* and the *Freedom of Information Amendment (Reform) Act 2010*. What other avenues exist to obtain government information? When would FOI access be preferable to alternative avenues?

Question 3 requires students to consider FOI procedures and proceedings in the wider context of administrative law. Many students discussed the introduction of FOI and its evolution of its 30 plus year history including cases on conclusive certificates.

The 2010 reforms saw the abolition of conclusive certificates and many other reforms including the information publication scheme, abolition of fees, and re-casting of the public interest test. The objects and purpose of the Act as amended by the 2010 reforms require agencies to opt in favour of releasing documents rather than exempting; the "push" rather than "pull" reforms.

Other reform measures include the Information Commissioner's more extensive powers to review action taken by agencies in relation to FOI applications.

Many students omitted the final part of the question, a comparison of FOI with other avenues to obtain information. Thus FOI could be compared to requesting documents, applying under the Privacy Act, obtaining documents under compulsion (eg subpoena, discovery), approaching the Ombudsman etc. FOI is in many ways easier and cheaper as it is a right of access; other forms of access for example require the applicant to first bring litigation proceedings or to rely on the government's goodwill.

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