

## EXAMINERS NOTES – ADMINISTRATIVE LAW MARCH 2014

Janet Li (Janet) runs a business assisting students to apply for university scholarships. She requires a licence under the *Student Scholarship Assistance Act 2009*, a Commonwealth Act, (SSAA) (see below). Janet has been a licensee for many years. There is stiff competition for university scholarships, and in recent years, allegations of racism and bullying have been made by university students against universities and against service providers.

The SSAA provides:

Section 3: The objects of the Act are:

- (a) to license persons of good character to provide services to students;
- (b) to encourage highly skilled service providers to students;
- (c) to ensure integrity and professionalism in providers of student services.

Section 4: A person is eligible to hold a license only if the Minister is satisfied that the person:

- (a) is of good character; and
- (b) has and maintains relevant skills and qualifications.

SSA Regulations (Commonwealth legislation) provide:

1. All applicants for licence or renewal of licence must apply on or before the last business day of June in any year to be eligible for licence or renewal on or before 1 September of the same year. No extensions of time will be granted and no late applications will be accepted or considered under any circumstances.
2. Applicants for licence or renewal of licence must complete a minimum of 30 hours continuing professional education by the last business day of March in any year to be eligible for licence or renewal on or before 1 September of the same year.

Janet is diagnosed with a serious illness in March 2013 and has hospital and outpatient treatment over March- mid June 2013. Janet falls behind in continuing professional education, and fails to submit her license application before 30 June. She attempts to submit an application on 1 July 2013. The Minister's office rejects her application, referring Janet to SSA Regulations 1 and 2.

A student complains to the Minister about Janet, stating she is rude, unqualified and lacking in knowledge of scholarship application procedures. The student's blog is picked up by mainstream media as well as generating a large online following. The Minister's office, on receiving the complaint, writes to Janet to say

that she should not ever apply again as her application for licence will be rejected on the grounds that she is not of good character and does not have the required skills to provide the licensed services.

- (a) **Advise Janet 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. For the purposes of this question, you should assume that there is a review right to the Administrative Appeals Tribunal. Which review route would you advise Janet to take, and why?**
- (b) **What remedies are available to Janet, if she takes the challenge route that you advise, assuming that her challenge is successful?**

Question 1(a) is asking students to discuss two aspects of unfair treatment that Janet may have experienced:

*Firstly*, the Minister has refused to accept her late application. *Secondly*, the Minister's office has informed Janet that no future applications from Janet will be considered or received as it has been decided she is not of good character and does not have the required skills.

The first of these is a decision, the second may amount to conduct or a declaration but probably falls short of a decision. Whether it is conduct or a decision it is reviewable under judicial review and the *Administrative Decisions (Judicial Review) Act 1977*.

The refusal to accept Janet's late application may be open to judicial review on the basis that it is unreasonable in the *Wednesbury* sense, based on the High Court's 2013 decision of *Minister for Immigration v Li*. To challenge the Minister's refusal to accept her late application it is probably necessary to challenge the inflexibility of the SSA regulations under the broad or narrow ultra vires doctrine. The regulations go beyond the requirements of the Act (narrow) and do not promote the objects of the Act (broad).

Grounds of judicial review include that the refusal to accept the application took into account irrelevant considerations (the arguably invalid regulations, her non-compliance with the regulations, query whether the student's complaint was considered for the refusal?), and failed to take into account relevant considerations, namely Janet's record as a licensee over a number of years, her inability to meet the full requirements specified in the regulations because of her illness, and whether or not her late application was caused by her serious illness. Query whether Janet could also raise improper purpose— for example, if this decision was influenced by the student's complaint and the media furore which has resulted. Janet has not been given notice of the Minister's decision, nor has she had the opportunity to present relevant facts and circumstances about her illness, nor to the opportunity to quantify the shortfall in continuing professional education nor her plans to make this up. Therefore the hearing rule has been breached and she has not been afforded procedural fairness. Query whether the

Minister has acted with bias - if the Minister has considered the student's complaint in relation to the refusal, apprehended bias may be arguable.

Query whether Janet has been treated fairly in relation to the student complaint and the letter written as a result of the Minister's consideration of that complaint. The Minister is in effect pre-empting any application Janet may submit in future years based on an irrelevant consideration (the media furore and online comment). Janet has not been afforded procedural fairness as she has not been given the opportunity to hear the specific nature of the complaint or to put her side of the story, and this would seem to be a clear case of bias, arguably actual bias, if not apprehended. Janet has not had the opportunity to present relevant details of her character and record as a licensee, and the nature of her compliance with continuing professional education requirements in this and in previous years. This is a further breach of the hearing rule given the Minister's pre-emptive determination of her character and skills.

Because of the need to challenge the validity of the SSA regulations and their consistency with the Act, the most appropriate avenue of review would therefore be judicial review. AAT review has the advantage that Janet could lead evidence about her strong record as a licensee, student testimonials, her illness, her record of continuing education. Query however, whether the AAT could set aside the decision to refuse her late application. Although it can make the best decision on the facts and the law applicable to the case, it probably could not set aside the regulations and may therefore be obliged to follow their requirements. Therefore it may have no option but to affirm the decision. The Federal Court, by contrast, under judicial review can declare that the regulations are not consistent with the Act and therefore invalid. Having set aside the regulations the Federal Court can consider other procedural flaws and grounds of review as outlined above.

Question 1(b) is asking students to discuss remedies under the chosen avenue of review.

There is no need to discuss standing as Janet is clearly a person aggrieved/person affected by the decision to refuse to accept her application, and the declaration that future applications will be refused.

Remedies under merit review include having the decision to refuse Janet's application set aside, considering fresh evidence and, probably, granting her licence. Under judicial review, remedies including having the decision set aside and the decision maker order to remake it in accordance with law. Note: if the decision is set aside, Janet will not automatically revert to being fully licensed as she is required to regularly renew her licence. Based on the facts of the case, as Janet is due for renewal if her application is refused she will be unlicensed. This is the main disadvantage of judicial review in these circumstances - if Janet is successful, she will need to re-submit her application for consideration by the Minister. However, an advantage of judicial review is the Court's declaration power: if Janet succeeds she should ask the court to declare that the regulations are invalid, and to declare that the Minister's statement of intention for

prospective decisions (that Janet should never apply again) is unlawful, and restrain any action on the basis of that statement.

Students who simply quoted long slabs of case law with judicial pronouncements on procedural fairness, without applying these to the facts of the case, did less well. Many students also failed to raise bias as an issue.

## **PART B**

### **Question 2**

**What determines the content of the hearing rule? By reference to decided cases, explain the rationale for different applications of the hearing rule in different contexts.**

Question 2 required students to analyse the hearing rule and judgments about the general application of that rule, beginning with *Kioa v West*.

Students who discussed procedural fairness without a more detailed analysis of specific aspects of the hearing rule did less well in this question. The hearing rule is the first rule of procedural fairness. Case law has stated that the content of the hearing rule is determined by "the nature of the inquiry, the subject matter, and the rules which the decision maker is acting". Of great importance in any case is therefore the requirement to analyse the statutory power being exercised and to consider what is required for the fair exercise of that statutory power.

*Kioa v West* is the High Court's explanation of procedural fairness and the hearing rule. The High Court in that case refers to the "common law duty to act fairly"... in accordance with the circumstances of the particular case and by reference to the statutory power being exercised. Other cases include *Lam*, *Aala*, *Teoh*, etcetera. Content of the hearing rule has been expressed in various cases, depending on particular fact circumstances, to include:

- The right to receive notice of a hearing.
- The right to receive notice of matters to be dealt with at a hearing,
- The right to legal representation.
- The right to an interpreter.
- The right to make submissions, call evidence, cross examine witnesses.
- The right to receive a transcript and/or other evidence.

Legal representation, oral evidence and submissions, notice of matters to be dealt with (similar to pleadings) all increase the formality of a proceeding making the conduct of the hearing similar to a court hearing. This is not required in every instance and in some cases written submissions may be sufficient to provide "practical" fairness. The point to emphasise is that the nature of the statutory power and any requirements specified in that statute, the nature of the affected interests and the particular circumstances, must be examined to determine what is fair for a particular case.

### Question 3

**Explain the process for making a claim for documents or information from government agencies under the new FOI regime. How does the new regime apply to information that is available through an agency's information publication scheme? 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*?**

Question 3 requires students to discuss the mechanism for making a valid application under the FOI Act. Under the Act as amended no fee is payable; all that is required is an application in writing specifying the document the subject of the request and a return address. An email address may be specified and an applicant need not be resident in Australia. Many departments now have forms on their websites; applications can also be submitted by email.

The 2010 reforms saw the creation of the formal requirement to publish specified material under the information publication scheme. This is to be made available on an agency's website. The IPS requires proactive publication of documents released under a request, statutory appointments and the like. To some extent the onus is therefore placed on applicants, as any material which is publicly available is not required to be released under a request.

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.

Other reform measures include the revision of the public interest test, that is, an agency must demonstrate the public interest of not disclosing documents outweighs the interest in releasing the document, before it can rely on the conditional exemptions. In addition, the Information Commissioner now has more extensive powers to review action taken by agencies in relation to FOI applications.

Students who discussed the reforms in general without a specific focus on the procedure for making an FOI request, and the interaction of the regime with the information publication scheme, did less well in this question.