

EXAMINERS NOTES – ADMINISTRATIVE LAW MARCH 2013**Question 1**

Mr Michael Stanley “Quixote” McMurphy is a serial student who wants to make the switch to running a university. He believes he has had enough experience as a consumer of education to make a successful leap to administrator and faculty member.

A position, “grounds and works officer”, in the university maintenance department is advertised, Michael sees his chance to climb the first rung of the ladder of his academic career. He is interviewed for the job but is not successful – in feedback he is told he is overqualified and does not have the appropriate skills of a groundsman.

Later Michael hears on the grapevine that the vice-chancellor’s nephew, Mr Smug, has been appointed Groundsman, Second in charge, Grounds and Works, and that this newly created position has been created by abolishing two of the lower level positions. In effect the job that Michael applied for no longer exists in the University’s organisation chart.

Michael seeks your advice on available legal avenues to pursue his quest for employment as maintenance and grounds worker in the University. Please respond to his specific questions, below:

- (a) Assume that the decision to abolish the “grounds and works” officer position that Michael applied for, is valid. Starting from this assumption, advise Michael how he can challenge the appointment of Mr Smug to the newly created position.
- (b) Assuming that the “grounds and works” officer position still exists, advise Michael whether he has been treated fairly, and if not, what his rights and avenues of review are in relation to any decisions that have been made.

Question 1(a) is asking students to discuss whether Michael can challenge an invalid decision which indirectly affects him but is more pertinent to another person. The challenge would be brought by Michael as an aggrieved person or affected person; that is, it is necessary to establish that Michael has standing to bring a challenge against Smug’s appointment.

Grounds of judicial review include that the appointment of Smug was illegal, having taken into account irrelevant considerations (namely his relationship to the Vice Chancellor), and failed to take into account relevant considerations, namely Michael’s skills and abilities to perform the duties and his application for the lower level position. Query whether Michael could also raise improper purpose / acting under dictation – that is, the university decision maker is not clear; if it was a person or persons influenced improperly by the Vice Chancellor to appoint Smug this would raise grounds of review for challenge.

Query also whether Michael is entitled to procedural fairness in the circumstances where he has not applied for the position. Assuming that procedural fairness will be implied in Michael's favour, the rule against bias is relevant. Once again, it is not clear who is the person who made the decision. If it was the Vice Chancellor, the rule against bias would be offended (either of the tests – actual or apprehended bias). If it was another person, query whether the connection between the decision maker and the Vice Chancellor is sufficiently close to offend the rule against bias (apprehended bias test).

In addition, (assuming that Michael is entitled to procedural fairness in these circumstances) the hearing rule has been offended as Michael was given no notice of the position nor the opportunity to apply for it. This is a complete breach of the hearing rule

Question 1(b) is asking students to discuss the rules of procedural fairness, the implication of the duty and how those rules should be applied to the facts in this case. Michael could argue that he has a right to be heard in relation to his skills and abilities to perform the position and that he has not been afforded an adequate opportunity to be heard, and that the rule against bias has been offended as demonstrated by the appointment of Smug. (Any students who assumed that 1(b) was premised on an assumption that Smug had not been appointed were not penalised).

Inadequate application of the hearing include that the concerns of the body that decided not to appoint Michael were not brought to his attention, and he was not afforded an opportunity to address the concerns.

Michael has a right to obtain reasons to more fully understand the decision not to appoint him. The "feedback" he has received is not adequate for this purpose.

Judicial review grounds are similar to 1(a). An additional ground here is taking into account an irrelevant consideration; namely Michael's "over qualification", and perhaps, his status as a "serial student". Failing to take into account relevant considerations may include not fully considering Michael's knowledge of the university and/or any skills or qualifications he possesses.

There is no need to discuss standing as Michael is clearly a person aggrieved/person affected by the decision not to appoint him to the position.

Remedies under merit review include having the decision to refuse Michael's appointment set aside, considering fresh evidence and appointing him to the position. Under judicial review, remedies including having the decision set aside and the decision maker order to remake it in accordance with law.

PART B

Question 2

Explain the purpose, and reason for delegated legislation. Discuss principles of validly making delegated instruments, and the challenges which may be brought if these laws exceed their mandate. Refer specifically to the following:

- (a) Which arm of government propogates delegated legislation? Which of the three constitutional powers is relied on?
- (b) Specific examples, that you are aware of from your text book and case law, of valid delegated legislation and invalid delegated legislation. What distinguishes valid from invalid delegated legislation?

Question 2(a) requires the student to state that the executive arm of government makes delegated legislation, as set out in legislation. This is the legislative power of the Commonwealth as defined in the Constitution, exercised by a person or body to whom this is delegated by legislation. Many provisions authorising delegated legislation also provide that it is disallowable in Parliament.

Question 2(b) requires the student to discuss the purpose and reason for delegated legislation. This includes the requirement for flexibility and the ability to set specific details which flesh out the higher level requirements of legislation.

What distinguishes valid from invalid delegated legislation is simply whether it is within the mandate of the delegated authority. Put simply, whether the delegated legislation is ultra vires or within the statutory remit.

Procedural requirements may not have been followed; these do not necessarily result in invalidity of the legislation.

It also requires students to discuss relevant case law including *Shanahan v Scott*, narrow ultra vires principles, and cases relevant to the principles of broad ultra vires.

Question 3

Explain the process for making a claim for documents or information from government agencies under the new FOI regime. In your answer, please refer specifically to Cabinet documents, and 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 subject of the request and a return address. Many departments now have forms on their websites; applications can also be submitted by email.

The 2010 reforms saw the abolition of conclusive certificates in relation to cabinet documents. An exemption still applies to cabinet documents but it must be established that the documents were created for the dominant purpose of submission to cabinet. Material attached to a submission is not automatically exempt. This is an absolute exemption if it is established; i.e. no public interest test is required.

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 information publication scheme and the Information Commissioner's more extensive powers to review action taken by agencies in relation to FOI applications.