LAWS2201
Administrative Law
1st Semester 2009

How to Use this Script:
These sample exam answers are based on problems done in past years. Since these answers were written, the law has changed and the subject may have changed. Additionally, the student may have made some mistakes in their answer, despite their good mark.

Therefore DO NOT use this script by copying or simplifying part of it directly for use in your exam or to supplement your summary. If you do so YOUR MARK WILL PROBABLY END UP BEING WORSE! The LSS is providing this script to give you an idea as to the depth of analysis required in exams and examples of possible structures and hence to provide direction for your own learning.

Please do not use them for any other purposes - otherwise you are putting your academic future at risk.

This paper is provided solely for use by ANU Law Students. This paper may not be redistributed, resold, republished, uploaded, posted or transmitted in any manner.
Question 1

75/100

Part 1.
Austral can seek review under the ADJR Act as there has been a decision (s3) which is an administrative determination made under an enactment with final and operative characters. (Bond).

I) Austral can seek review for breaches of the no abdication/fettering rule; acting for unauthorised purposes; and perhaps unreasonableness.

A) Rule for non-fettering/abdication
Under s5(2)(e) and s5(2)(f) of the ADJR Act, the power of discretion cannot be exercised at the behest of another or according to rules or policy without regard to merits of particular case. This is reflected in the common law which establishes that discretion must be exercised personally if the power is so granted (Rendell; British Oxygen).

The tribunal has openly declared that it would follow the policy as outlined by the minister in most circumstances. This is an breach of the rule to exercise discretion personally and not in accordance with some external government policy. Although the policy was helpful for Austral, the point may still be a catalyst to argue against the conditions.

B) Acting for unauthorised purpose
S5(2)(c) of the ADJR Act outlines that a decision cannot be made for purposes ‘other than a purpose which the power is conferred”. The purpose for which the power was given be gleaned from the construction of the statute (Toohey; Schlieske). Where multiple reasons can be given for a decision maker’s decision, the dominant decision should be taken (Thompson v Randwick Corp).

The purpose of the Act appears to be to ‘foster Australian shipbuilding’ as stated in the Act’s long title. Condition 1 set out by the tribunal requires that the crew be Australians. The purpose of that condition is to stimulate employment in the Australian shipping industry and not for stimulating the shipbuilding and the technological and procedural benefits therein.

Similarly condition 3 requires that the ships be used for training young Australians for 2 months a year. This purpose appears to be educating young Australians and not for fostering Australian shipbuilding industry and ability.
It thus appears that the purpose for which a power was granted was used for an unauthorised purpose. As such, the decision in challengeable under s5(2)(c) of the ADJR Act.

c) Unreasonableness
s5(2)(g) of the ADJR Act requires that decisions made must not be so unreasonable that no reasonable authority would reach the decision. Thus is a very weak argument and something overwhelming (Wednesbury) would be required.

d) Will s4 of the Act displace the right to challenge?
S4 contains privative clauses which aim to prevent courts from pronouncing on the lawfulness of administrative action.

- “Called into question”: This clause in effect denies judicial review generally. The common law has observed that such clauses will be ineffective (Osmond; Coldham).
- “Decision can’t be quashed”: This is a denial of a specific remedy and will usually be given effect by the court (Houssein). However if reviewed successfully, other remedies such as declaration or injunction may be available.

Part 2.
For Green Alliance to bring proceedings for review, it must first have standing to come to court.

Under s5 of the ADJR Act, a person must be a person ‘aggrieved’ as defined in s3. Case law has shown that this test is virtually indistinguishable from the ‘special interest’ test developed in ACR (Marine & Powers; North Coast). Furthermore, the interest must be more than a mere intellectual or emotional concern (Right to Life).

In many ways, the current facts are analogous but distinguishable from North Coast (NC). NC Council was a peak environmental body recognised by both state and federal government. The Green Alliance is one of several such associations and has never been consulted by the federal government. NC Council regularly made submissions on the matter and were regularly invited to represent environmental concerns on committees. Green Alliance has made one submission on the matter.

It thus seems unlikely that the Green Alliance will have standing to commence proceedings under the ADJR Act.

Neither does it seem possible to commence proceedings under s75(v) of the Constitution under the High Court’s original jurisdiction; nor under s39(B)1 of the Judiciary Act. This is because
Green Alliance fails the initial hurdle of having a controversy about rights, duties or liabilities that can be quelled by exercise of judicial power (McBain).
Part 1.
Ishmael can seek review under the ADJR Act as there has been a decision (s5;3) which is an administrative determination made under enactment with final and operative character (Bond).

The AAT has given 3 reasons for the decision. Let us deal with each in turn.

1. Subjective Test
Legislation, even if conferring discretionary powers must be exercised according to the rules of reason and justice…and within those limits which as ordinary man, competent to discharge the duties of his office (Sharper v Wakefield). Further, government action will be unlawful without legal authority as established by key cases (Entick; Hayden No 2).

Thus, just because s1 is a subjective test with discretionary powers does not entitle the minister unfettered and arbitrary power. His decision must still abide by the rule of law.

2. Deference to the minister
S5(2)(e) ADJR Act outlines that a decision maker cannot exercise discretion at the direction of behest of another. This is supported by the common law principle of non-fettering/abdication (Rendell; Tagle; British Oxygen). Thus it appears that the tribunals belief that they should defer to the viewpoint of the minister is in breach of s5(2)(e).

However, it should be noted that in Drake No2., Brennan J observed that the importance of consistency in decision making and thus believed that the AAT should act consistently with executive policy. Nonetheless, currently there is no clear policy except a belief held by the minister.

3. Definitions in reasons ‘fall within s3’
Under s5(1)(f) of the ADJR Act, a decision is reviewable if there is an error of law. Pozzalanic states that although ordinary meanings are questions of fact; the question of whether the facts fall within words/phrases properly construed is generally a question of law (Hope v Bathurst).

Thus whether Ishamael’s conduct falls within s3 of the Act is a point of contention and therefore a question of law. It is thus reviewable under s5(1)(f). Furthermore, while ordinary words such as
‘political’ and ‘foreign’ may individually have ordinary meanings; the effect of or construction of those terms is a question of law (Pozzalanic). Thus challengeable.

Other than the reasons given, other conduct by the minister and affirmed by the AAT may attract grounds of judicial review under the ADJR.

The detention for purposes of evidence
Decisions must be for an authorised purpose [s5(2)(c)]. The purpose of the detention of the Act is to allow for deportation. The detention of Ishmael was partly lengthened to allow for evidence. Although the detention was not substantially for the evidence (Samrein), the principles of upholding established freedoms (CoCo) mean that the additional detention is likely illegal. Like in Park Oh Ho, the decision may give rise to a claim of unlawful detention in tort.

Based on all the above, it seems likely that Ishmael can challenge the decision of AAT to uphold the minister’s decision.

Part 2.
Challenging regulations.

To challenge regulations we must use the basic ‘straight jacket’ test of McEldowney; which has been applied in Australian cases (Bradbury ; Turner).

We must first construe the meaning of the original Act; then the effect of the regulations and finally see if the latter complies with the former.

Scope of the parent Act.
The scope and purpose of the Act can be gleaned by construction of the Act as a whole [s15(1)AA of the Acts Interp Act]. It thus appears that this Act aims to eliminate or prevent terrorist activity on Australian soil. The words ‘destruction of property’ is conjunction with ‘loss of life’ indicate that the scope of the Act is limited to destruction of property of great scale which could case death.

Unauthorised purpose; s5(2)(c)
The purpose of the Act is outlined in the Act and gleaned by applying rules in s5(1)AA. Ishmael does not fall within the scope of this definition.

Scope of the Regulations
‘Necessary and convenient’ is the same words used in Shanahan v Scott; in which the court held that regulations must complement but not supplement the original Act.
The regulation 2, which authorises a pecuniary charge for detention is outside the scope of the purpose of the Act. According to Wilts, financial burdens can only be placed by specific and clear words or necessary implications. It is no defence to argue that the $30 fee is of ‘economic convenience’ (*Kent v Johnson*).

Although R2 appears to be invalid, R1 is still within the scope of the parent Act. Thus severance is possible, as R1 can stand alone without R2 (*Bank of NSW*).

Thus R1 would remain valid and R2 would be severed from the regulation.