LAWS2201
Administrative Law
1st Semester 2010

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.

Question 1 – 17/20

The decision that the AWBI's decision could not successfully be challenged under the ADJR Act was justified differently by the majority and Gleeson. In order to assess which justification for the result is preferable, regard must be had to each decision in turn.

The majority's decision rested on the central assumption that a body is either public or private, and if the latter, clearly a decision could not be reviewable under the ADJR Act because it was not made 'under enactment'. This assumption was arrived at after 3 observations were made by the majority:

1. The majority stated that it was neither necessary nor appropriate to say the AWBI's decision was made under the Act because:
    a. It was the WEAs decision to consent that was the operative legislative requirement, and
    b. AWBIs capacity to consent came from its corporate personality

2 & 3. Given the private nature of AWBI, it would be inconsistent to impose public law obligations on AWBI which would prevent it from pursuing its private obligations (profit). [✓]

Gleeson on the other hand solved the issue on administrative law substance, and said that AWBI had made no legal error and so was not out of jurisdiction. [✓]

Which approach is the best justification for the result comes down to the implications for policy. The majority's judgement sets a precedent that Australian law does not recognise a grey area between the public and private sector, which seems unrealistic in today's world – where there are private companies contracted to provide services or have bearing on public law decisions, there should be some degree of accountability under public law. In effect, the majority's decision is unrealistic and doesn't recognise the complexity of today's world. [but see [49]-[50]]

Gleeson's judgement on the other hand is more aware of this complexity, and recognises the grey area – his assumption that private companies can perform public functions, but that not all public law norms will apply, is a better approach. For it seems justified that if the legislature saw fit to confer some level of public law obligation on a private body, that body should be accountable to some extent under the public law.

Therefore, the better justification for the decision is Gleeson's approach, because it regonises the complexity of the current world.

Question 2 – 17/20

Kirk demonstrates this difficulty in recognising the legislative context, and jurisdictional error ("JE") is central to judicial review because it mediates the relationships between members of the Commonwealth.

First, *Kirk* made it clear that the rigid categorisation of JEs in *Craig* was "neither necessary nor appropriate" because the existence of a JE is highly dependent on the context and legislative context. [✓]
In light of this, the concept of JE is far more difficult to group than made out in *Craig*, because *Kirk* states that whether or not an error exists depends on judicial assessment of the severity of the error [✓]. The rationale for this is the lack of distinction between inferior courts and tribunals at State level because of the separation of powers not being present.
In sum, *Kirk's* statement that the concept of JE is difficult is implicit in the court's recognition that *Craig's* categories doesn't cover the field because of the lack of distinction between courts and tribunals at State level, and in granting judges significant discretion to determine whether an error is severe enough to ground a JE.
Kirk also tells us that JE is central to judicial review because it mediates relationships. The first relationship it mediates is between citizens and decision makers. This is because judicial review under the common law is only available where there is a JE. [also available for non-JE on face of the record, subject to privative clause] Thus JE serves a purpose of protecting individuals against abuse of power by public officials.
Second, the JE mediates the relationship between the judiciary and the legislature. This is because where a privative clause exists, the court has found in *S157* and *Kirk* that the clause has the effect of excluding review up to the point of a JE [✓]. Thus the JE serves as a line between what checks the court can and can not keep on the legislature.
Thus, the difficulty in application is shown by *Kirk* in rejecting the categories of *Craig* partly as inappropriate given the impact of statutory context, and its importance is shown by *Kirk* in that JE acts as the line up to which judicial review can be excluded.

Question 3 – 16/20

The crux of Kirby J's dissent in *Jia* was that the more attributes given to the 'fair minded lay observer', te harder it is to prove apparent bias. Further, Kirby J believed that the approach of the majority was too 'judicial', in that an ordinary 'lay observer' wouldn't engage in analysis to the depth the court did, as they wouldn't be trained lawyers. [✓]
This argument is persuasive because the test is whether an informed and fair-minded lay observer might reasonably apprehend. This perceives a low threshold – "lay observer" and 'might reasonably apprehend'. The approach the majority took was classic legalistic analysis, ascribing too many attributes to the lay observer. Such an observer would not engage in such legalistic analysis as they wouldn't be legally trained, so the attributes attributed should be that of the lay-observer, i.e. if a normal, average person off the street would, on the face of it, see or perceive there may have been bias (in the form of not having an impartial mind). [✓]
Therefore, Kirby's view that the lay-observer shouldn't have many attributes attached and a lay-observer wouldn't analyse the situation in *Jia* as legalistically as the majority did makes sense.

The test is whether an informed and fair-minded lay observer. The standard should therefore be just that.

Question 4 – 15/20

The application of government policy in the AAT has been more pronounced than judicial review because of the awkward constitutional position the AAT sits in.

This awkward position is that the AAT was set up as an independent check on government decision-making, but it also constitutes part of the executive. [✓]

For the judiciary [the question asks about primary DMs] the place of policy is simple: it may act as a guideline to the exercise of power, but may not dictate the exercise of power, as this would remove a discretion, and courts ensure discretion is maintained.

At tribunals however, their role is contemporaneous review, and this entails taking into account the most recent facts and policies (*Shi*). But should AATs always apply policy? Are they bound to apply policy, being part of the executive? These types of issues were reconciled in *Drake No 2*.

It is sufficient to say then that the place of policy in the AAT has been difficult because of the awkward constitutional position it sits in, mainly it acts as a check on government, but is also part of the executive. The implication of this position was of course demonstrated in *Drake No 2*, which said that AATs are not bound to apply policy, but should apply it unless cogent reasons to the contrary exist.

Question 5 – 15/20

The proposition may well on the face of it lead to a large extent into judges undertaking merits review, because it makes a statement on good administration and forces judges to (an extent) determine whether the decision maker made a correct decision.

First, it is well established that judges should not make statements as to what constitutes good decision making, as this is merits review, and a function for the legislature to decide. In *Peko*, Mason has however made a statement of what constitutes good administration by saying that implicit in every decision is an obligation to do so on the latest information available. [✓]

This is and of itself is not going to lead other judges to consider the merits of a case, as only Mason made the comment on good administration. What will however do this is the effect: it encourages judges to determine whether or not the latest material was consulted in making a decision.

If it is the role, as a result of Mason's statement, of the courts to determine whether a decision was made on the latest material available, this is merits review and a breach of the separation of powers doctrine. Indeed, on its face, Mason has implicated created a precedent that judges make comment and investigations into whether the 'correct' decision was made, as established on analysis of whether the most recent material was consulted.

In practise however, it is unlikely that judges will undertake merits review of such nature because courts maintain a strict separation between merits review and judicial review, leaving the former to the executive (*AAT*). [✓]
[Fact review?]