The exam comprised one compulsory question (Part A) and a choice of one question from two available questions (Part B) in a closed book format. The required number of questions was therefore one compulsory question in Part A and one question from two options in Part B, a total of 2 questions. The exam included the subject case list from the subject guide and an authority Battison v Melloy [2014] NZHC 1462 on which the factual scenario in Part A was based.

Part A required students to give advice having regard to a factual scenario and the choices in Part B required students to answer in essay form based on case law, texts and other material.

All candidates answered two questions in accordance with the instructions. Although most candidates presented their answers in a clear and legible way, the handwriting of some candidates was difficult to read. Students are advised to leave line spacing and to print rather than write in cursive where possible. Students are also advised to make their points succinctly with reference to the issues raised – a long discussion of principles and case law is not necessary in order to apply them to the issues and concerns raised by the problem / essay for discussion.

PART A

Question 1

Question 1 was the compulsory question in which students were asked to advise on a hypothetical factual scenario. Students were asked to advise Jennifer in relation to avenues for review. Jennifer, a student with disability, had been affected by a decision to terminate her placement and a subsequent decision to cancel her enrolment.

Most students made a very good attempt at question 1 and very few students failed this question which raised issues of procedural fairness, grounds of review under judicial review and jurisdiction.

The issue is whether Jennifer had judicial review options. Looking at CAR’s decision to cancel Jennifer’s enrolment, the issue is whether CAR as a body or any of its members meet the definition of ‘officer of the Commonwealth’ to establish a review right under s75(v) of the Constitution and the Judiciary Act 1903 (Judiciary Act).

Many students assumed that the constitutional jurisdiction was available. Jurisdiction to review CAR’s decision as an ‘officer of the Commonwealth’ is not available (under the Constitution and section 39B(1) of the Judiciary Act). An ‘officer of the Commonwealth’ has been defined as a person with an office earning a salary paid by the Commonwealth of Australia. An ‘officer’ does not extend to contracted service providers or to a non-individual entity. CAR’s status is not absolutely clear but it would be more likely that it is a corporate entity. Further it seems to fall
into the category of contracted service provider rather than an entity of the Commonwealth. This is not the end of the jurisdictional issue. Subsection 39B(1A)(c) refers significantly extends judicial review under the Judiciary Act to any matter:

“arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.”

This seems to be at least as broad as the statutory test of a decision of ‘administrative character’, made ‘under an enactment’ (see below). It would seem that CAR’s decision is arguably arising from a law of the Parliament of the Commonwealth of Australia. Therefore it may be arguable that Jennifer can pursue an avenue of review under s39B(1A)(c) of the Judiciary Act. This is of benefit particularly if students argue that Jennifer should challenge CAR’s college charter for uncertainty. The Charter, in referring to “freedom of choice” in choice of attire and grooming, subject only to “duty of care requirements”, may well be said to give no adequate guidelines for students such as Jennifer undertaking vocational pursuits which apply stringent safety requirements. Many students made an argument concerning the Charter’s status as delegated legislation and its potential for challenge under the Judiciary Act. It would not be possible to challenge the Charter under the alternative ADJR avenue because of the legislative status of the Charter.

Other than the Charter this model answer will focus on avenues of review under the Administrative Decisions (Judicial Review) Act 1977 (ADJR Act). The grounds (other than the ‘no evidence’ ground which is only explicitly available under ADJR) are in substance the same as are the remedies, allowing for translation from the common law to statutory parlance.

Most students had no difficulty in establishing grounds of review to challenge CAR’s decision under statutory grounds of judicial review under the ADJR Act. The ADJR legislation provides an avenue of review to a ‘person who is aggrieved’ in relation to a ‘decision to which this Act applies’.

A reviewable decision as defined in section 3 is:

- a decision
- of administrative character
- made under an enactment.

Grounds of review in relation to a decision are set out in section 5 for a decision and section 6 for conduct.

Cancellation of Jennifer’s enrolment – is it a ‘decision to which the Act applies’?

Case law (Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321) has established that a ‘decision’ refers to a final and operative decision not a step along the way. In the circumstances applicable to Jennifer a decision to cancel her education means her education ceases unless and

---

1 Section 5, 6 and 7 of the ADJR Act.
2 Section 3 of the AJDR Act.
until Jennifer is re-instated. The decision to cancel therefore meets the test of a final and operative decision.

The decision to cancel Jennifer’s enrolment is clearly of an administrative character as it applies a set of rules to Jennifer’s case.

[Many students successfully argued that the Charter has the characteristics of delegated legislation. Most students did not make the consequential argument that the only available avenue to seek review of the Charter is under s391B(1A)(c) of the Judiciary Act – see above).

It is arguable that the cancellation decision was made under the IPD Act as it relates to providing adult education to achieving IPD objects, for example, supporting a person with disability’s vocational pursuits and independent living (s3(1)(c) of the IPD Act); and it enables a person with disability to pursue a career goal (s3(1)(d) of the IPD Act). Most students were able to craft an argument that the decision meets the test of being made under an enactment. The test for standing (person aggrieved) need not be discussed as Jennifer has a direct personal connection to the decision to cancel her enrolment with CAR.

Grounds of review – section 5 of the ADJR Act

Similarly to the case of Battison v Melloy [2014] NZHC 1462 it is clear that Jennifer has not been adequately afforded procedural fairness. Most students had no difficulty in identifying this. The common law grounds of procedural fairness established by Kioa v West (1985) 159 CLR 550 and subsequent cases are:

- notice of the decision
- an opportunity to put the case before the decision-maker
- a decision-maker who is not biased.

The first two elements, notice and an opportunity to be heard, have clearly been infringed by CAR. CAR gave no notice to Jennifer of its intention to cancel her enrolment, nor was Jennifer afforded any opportunity to make submissions in support of her choice (‘dignity of risk’) to wear a cape and wig during her placement. Had Jennifer been able to put submissions it may have been possible to reach a compromise which supported her dignity of risk as part of her disability (for example, permitting her to wear her cape and wig while completing administrative duties in the office) and which also cared for her safety during work-side placements out of the office.

The third ground bias, is less certain. The termination of Jennifer’s placement at FIONA occurred without notice or an opportunity to be heard. It is arguable that this error was repeated and compounded by the CAR decision maker who in suspending Jennifer merely ‘affirmed’ FIONA’s decision. It may be arguable that CAR’s failure to give any real consideration to the merits of Jennifer’s case amounts to apprehended bias – could it be said that CAR is pro-Magenta/FIONA and anti-Jennifer, to a reasonable observer? Is adopting Magenta’s statement without analysis or submission from Jennifer, demonstrative of a closed mind?

Other grounds
Similarly to the Battison case, other grounds are evident from the factual scenario. These include the fact that CAR had no evidence to support the decision to cancel Jennifer’s enrolment – merely repeating Ms Magenta’s opinion is not evidence. Evidence concerning safety issues relevant to Jennifer’s placement and Jennifer’s issues as a person with disability to be afforded ‘dignity of risk’ while also being kept safe, should have been considered. Some students did not adequately discuss this.

CAR failed to take into account relevant considerations for example the objects of the IPD Act which support Jennifer’s right to inclusion in mainstream society and achievement of career goals through education. Jennifer’s disability and how it will affect her during placement, and the safety considerations of her placement as a trainee fairy should also have been considered. Many students adequately grasped this.

It is arguable that merely accepting Ms Magenta’s untested opinion that ‘capes and wigs are not for fairies’ is giving weight to an irrelevant consideration. It is clear that CAR did not consider Jennifer’s case on its merits but merely followed the precedent set by Ms Magenta / FIONA – is this acting under dictation? Many students raised this issue.

All of these issues together particularly the complete failure to afford procedural fairness to Jennifer, may amount to unreasonableness (Li v Minister for Immigration [2013] HCA 18). Many students were able to identify this.

**Remedies under s16 of the ADJR Act**

Some students discussed prerogative writs available under the Constitution and the Judiciary Act as an alternative to ADJR Act remedies. Such remedies are particularly useful in challenging the Charter (on the argument that it is delegated legislation).

The most flexible remedy is s16 of the ADJR Act. Section 16 of the ADJR Act provides a flexible remedy which combines all of the common law remedies such as declaration, injunction, certiorari, prohibition and mandamus. Here Jennifer could seek a declaration that CAR erred in law by failing to consider the appropriate statutory criteria (outlined above) and an order quashing the decision to suspend Jennifer and a direction to consider the matter afresh.

**FIONA – decision to terminate Jennifer’s placement**

Most students correctly identified that FIONA’s decision was not reviewable by Jennifer under ADJR administrative law remedies and grounds of review. This is because the decision made by FIONA to terminate Jennifer’s placement was not made under the IPD Act. Therefore although it is a ‘decision of administrative’ character’ it was not made under an enactment. As such, FIONA’s decision to terminate Jennifer’s placement is not reviewable under the ADJR Act.

It is clear that neither Ms Magenta nor FIONA is not an ‘officer of the Commonwealth’. It is also difficult to argue that FIONA and Ms Magenta’s decisions “arise under a law of the Commonwealth”. Therefore Magenta’s direction and FIONA’s decision to terminate Jennifer’s placement are not separately reviewable.
For these reasons although it is clear that FIONA also failed to afford procedural fairness to Jennifer before terminating her placement, this decision is not reviewable under the constitutional writs nor under the ADJR Act.

As discussed above the main relevance of the FIONA decision, and Ms Magenta’s direction, is the fact that both preceded and set up the subsequent decision by CAR to terminate.

**Question 2**

*It is too easy to satisfy tests for standing in Australian courts and tribunals. Tribunals in particular are too willing to apply statutory tests that ignore traditional common law restrictions on access to justice.*

Discuss whether this is correct with reference to applicable case law and relevant policy arguments.

The question asked for a discussion of the different tests of standing under the common law and under statutes. Most students made a reasonable attempt at this.

A discussion of the common law principles and their development over time, was then followed by a comparison to the test of an ‘aggrieved person’ in the ADJR Act, and a ‘person whose interests are affected’ under section 27 of the AAT Act. Extra points awarded for policy discussions and references to relevant documents including the Law Reform Commission proposals and the pros and cons of the ‘floodgates’ arguments.

The question also asked for a consideration of the differences between the tests and whether these materially affect a person’s right of access to review, and advantages and disadvantages of the common law when compared to expanded statutory tests. Most students completed this review and analysis reasonably well.

**Question 3**

**Merit review is a fundamental mechanism of administrative law. What are the main principles? In your view is it an effective mechanism? In your answer give examples from case law.**

Question 3 requires students to analyse the features merits review, and to make an assessment of the effectiveness of merits review. In doing so, many students discussed the establishment and operation of the Administrative Appeals Tribunal. Although not strictly required, in assessing its effectiveness many students did compare merits review to other mechanisms such as judicial review, the Ombudsman review mechanisms and Freedom of Information. Some students discussed specialist tribunals such as the NCAT.

What is ‘merits review’? How does it compare to judicial review? The question calls detailed analysis of the system of merits review including a decision maker considering a matter afresh, being able to “stand in the shoes” of the original decision maker, exercising the same powers and functions, to reach the correct or preferable decision. The question asks for an evaluation of the effectiveness of merits review from an applicant’s perspective. This involves considering different objectives that applications may be seeking to achieve. This includes discussion of the
features of merits review Tribunals. The question assumes that the student will provide a reasoned and researched opinion on merits review.

Features of a merits review in a tribunal include more flexible rules of ‘evidence’, flexibility, speed, merits review or the re-making of a decision. These are generally regarded as advantages. Disadvantages include enforceability, costs orders, many of the ‘legalistic’ feature of court hearings are now part and parcel of tribunal review.