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 for a total of 2 required questions.

The exam included the subject case list from the subject guide.

Part A required students to argue a hypothetical problem scenario. Most candidates answered Part A and Part B 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.

PART A

Question 1

Question 1 was the compulsory question in which students were asked to advise on a hypothetical factual scenario based on the High Court case of Wei v Minister for Immigration and Border Protection [2015] HCA 51 (Wei).

Students are asked to advise Tom Tearaway on avenues to challenge the Minister’s decision to cancel his student rental subsidy. A statutory procedural fairness requirement is prescribed in relation to any proposed cancellation decision. Section 105 states that it is an ‘exhaustive statement’ of the hearing rule. The question therefore requires students to consider if compliance with s105’s procedural requirements is all that must be done or whether Tom can rely on the common law rules of procedural fairness as embodied in Kioa v West (1985) 159 CLR 550 and subsequent cases.

The recent case of Wei considered a very similar provision and the High Court had no difficulty in moving around such a provision, when applied to similar facts. The Court did so however without ruling on whether the statutory provision achieved its desired effect of exhaustively stating requirements of the hearing rule. The Court quashed the cancellation decision on other grounds:

- the majority on the basis of an ‘imperative duty’ of the third party to supply correct information to the Minister, in circumstances where the duty was breached;

- Nettle J in minority in reliance on a line of authority finding a duty to inquire about a particular matter direct relevantly to the exercise of jurisdiction where to inquire is not onerous.

The majority in Wei summed up as follows:
33. The "satisfaction" required to found a valid exercise of the power to cancel a visa conferred by s 116(1)(b) of the Migration Act is a state of mind. It is a state of mind which must be formed reasonably and on a correct understanding of the law[30]. Equally, it is a state of mind which must be untainted by a material breach of any other express or implied condition of the valid exercise of that decision-making power. The imperative duty imposed on a registered provider by s 19 of the ESOS Act is such a condition.

In other words, the court did not directly comment on the effectiveness of the statutory provision and did not invoke principles of procedural fairness. It came closer to invoking principles of ‘reasonableness’ and appears to find the decision is unreasonable, as the basis for the finding that the delegate’s decision was affected by jurisdictional error. In applying this authority it is important to not go beyond its boundaries. It is not a common law authority on procedural fairness.

In the circumstances of this case, where it is clear that Tom did not in fact receive notice of the intention to cancel his student rental subsidy despite compliance with the statutory requirement mandated in s105, the grounds on which the High Court in Wei set aside the Minister’s decision can be considered.

It is clear that where too rigid compliance with statutory procedure has not resulted in actual notice being afforded to the ‘person aggrieved’, common law principles as expressed in Wei may be invoked to found jurisdictional error. If a decision is tainted by jurisdictional error it must be set aside. Wei appears to state that such a decision is unreasonable. Section 105 is in effect a privative clause and therefore it will not withstand a challenge in these circumstances.

It is clear that Tom is a person aggrieved and therefore has standing. As this is not a live issue for this scenario, the best answers only lightly referred to it only to dismiss it.

Similarly, it is clear that merits’ review is not available in this scenario as there is no statute specifically investing jurisdiction in a tribunal. Again the best answers touched lightly on this issue for the purpose of setting it aside.

The time limit set by the ADJR Act is in effect also a privative clause and in the circumstances of this case, having established jurisdictional error, will also be overcome. In Wei, the High Court states: “We are satisfied that is necessary in the interests of the administration of justice to make the order which the plaintiff seeks under s486A(2) extending the period for the making of the application.” The High Court stated, that having found the decision was affected by jurisdictional error, and that the plaintiff’s delay in making the application could be satisfactorily explained, that it is appropriate to extend the time for making an application.

The Wei grounds alone are sufficient to establish Tom’s right to have the decision set aside and appropriate remedies to be ordered. Other grounds could also be relied on, for example, that the Minister’s delegate failed to take into account the relevant consideration of Tom’s enrolment as a student.
The final issue is remedies. The Court may make an order of prohibition to prevent the Minister from acting. The Minister’s decision should be quashed and an order of mandamus should compel the Minister to backdate Tom’s entitlement to the student rental subsidy to the relevant date.

**PART B**

**Question 2**

Most students selected question 3 in preference to question 2 from the two choices available from Part B. Students who chose question 2 it answered it well.

Question 2 required students to consider the main mechanisms and features of administrative law. Students were asked to review the mechanisms of administrative law and analyse their purpose and effectiveness in controlling government action and abuses of power.

Mechanisms include internal review, tribunal review [which may be review on the merits and may include specialist decision makers] and judicial review, the laws of standing are relevant as is the Ombudsman, schemes to access information include Freedom of Information and the Privacy Act are relevant, as is the statutory right to obtain reasons for decision.

Structural mechanisms include the separation of powers which results in each separate arm of government acting as a check on the other, thereby holding the system as a whole in balance.

The question required an analysis of the effectiveness of one or more of the mechanisms in countering excess of power and maladministration.

In reality the mechanisms may achieve more than one of purpose. For example, mechanisms which encourage exposure and openness may lead to the checking or reversing of adverse decisions and judgments from judicial review decisions hold in check the legislative enactments of Parliament. This may assist in achieving a fine balance of rights of citizens against the different arms of government.

Students were asked to give a view. Relevant arguments here mirror those relevant to policy considerations concerning the courts’ approach to privative clauses. For example, the doctrine of Parliamentary supremacy, when weighed against the courts’ role in upholding the rule of law.

**Question 3**

Question 3 was answered by a majority of students. It required students to describe the process for making a claim for access to information under Commonwealth Freedom of Information (FOI) legislation, and to comment on whether 2010 reforms had achieved their intended purpose.

Students were asked to describe the intended purpose of reforms and give an opinion about whether these had the intended effect of making it easier to obtain access to government information.
Students should describe the process for making an FOI application. This includes that if an agency makes information publicly available such information will not be provided in response to an application.

Students discussed the 2010 reforms to freedom of information which had the purpose of allowing greater access to government information as a public resource.

The Information Publication Scheme introduced by the 2010 reforms requires agencies to publish material on its website including any material released under a request (subject to privacy considerations).

Students should refer to the fact that FOI legislation does not require an applicant to state a purpose for seeking access.

The 2010 reforms saw the abolition of conclusive certificates and many other reforms including abolition of fees, and re-casting of exemptions and the public interest test. 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; the "push" rather than "pull" reforms.

Other reform measures include the Information Commissioner’s more extensive powers to review action taken by agencies in relation to FOI applications.

Most students were able to construct a factual and well-reasoned opinion in response to the question concerning whether FOI reforms had achieved their intended purpose.