Examiner's Comments

Part A: Answer BOTH parts of this question.

Question 1
Barry Manysseed seeks your advice on:

(a) A challenge to the Minister's regulations and the decision to refuse to grant him a premium licence.

This question was reasonably well answered.

Many students addressed the issues of the regulations being beyond power on a narrow "Shanahan v Scott" basis, and a broad "improper purpose" basis. Some failed to do so. The regulations were deliberately drafted close to or outside of the power of the Act. Students who made out arguments to strike them down on both broad and narrow grounds were more successful. In particular,

- Reg 1.1 – how is the "high value" of the goods to be determined and who will determine it? Is this regulation uncertain? Is this sub-delegation – the power to delegate cannot be delegated to another decision maker. Is it consistent with the Act that the goods are unique to Australia? What does this mean and how will it be determined – uncertainty?

- Reg 1.2 – is it ultra vires (narrow basis) that the goods must not be altered in value or quality by overseas producers? Who will determine what value or quality goods overseas are ascribed? Is this uncertain? Is it an improper purpose – not consistent with objects of the Act?

- Reg 1.3 – what is the ‘maximum number’ of people employed in Australia? How is this fostering Australian industry so as to promote consistency with the objects?

- Reg 2. 1-3 – probably ok

- Reg 2.4 – how is an increased number of jobs during the licence period fostering Australian industry consistent with the objects of the Act? What is the number of the increase in jobs? Uncertain?

- Reg 2.5 – ultra vires potentially on narrow grounds. How is this Reg consistent with section 7(2) of the Act, section 6 and section 4.

Some students missed the issue of procedural fairness in the granting of a licence, in short, does Barry have a legitimate expectation, based either on his years in business, or the representation by the Minister at the barbecue, that he will be granted a premium licence.

Rules of implication of procedural fairness are relevant.

Is the decision not to grant him a licence based on an irrelevant consideration – that the value of the merino fleece increases ten-fold when used overseas.

Does it consider relevant considerations – Barry’s record as an exporter, the quality of his fleece, the jobs that his farm creates in the local area.

Students discussed the available remedies including an order quashing her decision and an order compelling her to remake the decision.

Students were not penalised for answering in terms of merit review in the Administrative Appeals Tribunal although the question did not seek that this issue be addressed.

(b) The Minister's decision to grant him a basic licence on a conditional basis?

This question was also competently answered.
Students correctly identified the main grounds for review of challenging the regulations as potentially ultra vires on either narrow (not necessary and convenient etc) or broad (irrelevant considerations, etc) grounds.

Students correctly identified that the principal avenue of attack of the Minister's decision is a challenge on grounds of denial of procedural fairness, and on being based on an irrelevant consideration not permitted by the statute.

Some students failed to identify natural justice/procedural fairness as a ground for review of the decision to grant a conditional licence.

Most students correctly identified that the licence condition that Barry must create plans to create 500 new jobs within 6 months is unreasonable/ultra vires. Some pointed out that unless the plans already covered the issue of "value-add" to the fleece, a condition of the licence may not have been met. The tapestry off-cuts potentially do not go to this issue.

Students discussed the remedies of quashing & compelling the re-making of the decision (certiorari and mandamus), clearly and adequately.

Students were not penalised for answering in terms of merit review in the Administrative Appeals Tribunal although the question did not seek that this issue be addressed.

Part B – Attempt any ONE(1) question in this part.

Question 2

There are too many different tests for standing that apply in administrative law proceedings. Applicants who have to rely on the common law tests are disadvantaged in comparison to applicants who can apply under a statutory test.

Do you agree with these statements? Discuss with reference to applicable case law, legislation and relevant policy arguments.

Comparison of common law tests to statutory tests.

Discussion of policy issues of each – opening of floodgates versus access to justice, review of administrative decisions, etc.

Providing opinion, based on policy and statutory tests, whether common law applicants are disadvantaged in relation to statutory law applicants.

Question 3

The High Court of Australia in the migration law case Minister for Immigration and Citizenship v SZJSS set aside the Federal Court’s finding of unreasonableness and affirmed the decision of the Migration Review Tribunal. The High Court said the following about the Federal Court’s reasoning:

It has been recognised that to describe reasoning as irrational or unreasonable may merely be an emphatic way of disagreeing with it... In referring to "any rational, reasonable approach to the evaluation" and the need for "a proper, genuine or realistic evaluation" of the letters, the Federal Court was registering emphatic disagreement with the Tribunal's assessment of the factual matters ....

The conclusion that the Tribunal erred in giving "no weight" to the letters, with the implication that it should have given different, presumably determinative, weight to them, depended on the Federal Court reviewing the factual findings of the Tribunal rather than the process by which it arrived at its conclusions.

Further, the Federal Court's conclusion that the Tribunal erred in this way did not... require the further conclusion that the result in the Tribunal was manifestly irrational or unreasonable. Nor did it support a finding of any other failure [of the Tribunal] which might be characterised as jurisdictional error.

The High Court also referred to the following passage from the judgment of Brennan J in Attorney-General (NSW) v Quin (1990) 170 CLR 1 at 36

The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

In a paper delivered to a Young Lawyers Public Law seminar in 2008, Justice Garry Downes AM said this:

"Reasonableness as a ground of judicial review of administrative action is well established in Australia. It provides a safety valve permitting truly irrational decisions to be set aside, but not replaced." 2

In light of the above-cited remarks by the High Court and the extra-judicial views of Justice Downes above, discuss to what extent the judicial review grounds (whether generally or under statutory provisions) allow the courts to consider the merits of the decision under review.

The question asked for a discussion of the grounds of judicial review including no evidence, unreasonableness, relevant and irrelevant considerations.

Discussion as to whether these grounds permit Courts to review the merits of the case.

Discussion of the relevance to this issue of the most recent High Court case quoted in the question.

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