Adminstrative Law 2006
HD Exam Paper

Q1. There are potentially three decisions made which affect Hector, from the facts provided; the decisions all relate to Hector's separation and isolation from other prisoners, and one is made by each of the General Manager of Yatala, the CEO of the department and the General Manager acting under delegation applying the policy of the Attorney General. Since no appeal path is provided by the Correctional Services Act any legal action to review these decisions must be made to the state Supreme Court first under Order 98 of the Supreme Court rules. The operation of the privative clause in s52 of the Act, however, will need to be considered with each decision.

In the first decision by the General Manager of the Prison on 15 April, the power exercised is s36 of the Act. However, there is no evidence on the facts provided that the CEO delegated to the General Manager, with the approval of the Attorney General, the power to issue a direction under s36 of the Act. Indeed, the later clarification of the delegation of power under s24 suggests that no such delegation was in force for s36. This has two separate effects on the privative clause in s52. Firstly, since the clause will be construed narrowly, the fact that the decision maker is not an authorised delegate should render the clause inoperative for this decision. Secondly, since the decision maker is clearly operating without power, the decision itself will only be a purported one. Were this decision to be reviewed by the Court, the General Manager's decision would likely be found to be ultra vires. Certiorari could be sought to quash this (already-void) unlawful decision.

If delegation could be shown, it is apparent that the procedure of the Act in s36(4) has not been complied with: an interval of more than 24 hours passed before Hector received the copy of the direction made relating to him. However, given the lack of an alternative provision in the Act, this procedural ultra vires action would be unlikely to invalidate the decision (Project Blue Sky v ABA). So ultimately, to succeed with a review of this decision Hector will need to show that it was only a purported one made ultra vires.

The second decision which Hector may attempt to challenge is that of Angela Denman on 23 April. Here there is no evidence that the direction was provided personally to Hector or any of the other affected prisoners, but I would advise this procedural ultra vires point would be dealt with as in the first decision. The main focus of review in this question will be whether the CEO makes a jurisdictional error in deciding as evidenced by her reasons for deciding. While this matter, being decided at a state level, will not benefit from the Constitutionally-afforded judicial review avenue at Commonwealth level, the decision in Mitchforce suggests that privative clauses will be construed at a State level the same way they would be at the Commonwealth level. Accordingly the privative clause here should be construed to validly protect decisions which satisfy both the Hickman provisos and the jurisdictional error proviso in Plaintiff S157. The second Hickman proviso instructs us that the decision must relate to the subject matter of legislation. However, from the reasons given by the CEO it appears that her decision related more to the

industrial situation facing the prison and the potential for industrial action than the welfare of the prisoners or the administration of justice. If this is found to exceed an “inviolable limit” on power in the S157 sense, the privative clause will have no effect in preventing review on this jurisdictional error.

Following on from this, then, the CEO’s decision could be reviewed as the use of power for an improper purpose, or as ultra vires for taking into account the irrelevant considerations of industrial action. Certiorari could be sought to quash the decision, followed potentially by a declaration, and mandamus.

If the second decision is found to be invalid then the Attorney General’s confirmation of the decision would be void. However, the focus of the third decision is the application of the policy removing all privileges from prisoners who allegedly commit offences during incarceration. Hector could seek a declaration as to the validity of the policy in the first instance, given its broad and inflexible application to all prisoners accused of offending. The words “all prisoners...would be isolated” leaves little room for the exercise of discretion by the CEO or their delegate. It appears that the general discretion of the decision maker is fettered by the policy, which is tantamount to an ultra vires failure to exercise discretion, as in Riddel v DSS. It appears also that the decision contravenes s36(2)(b), given Hector’s poor state of health in isolation.

At all relevant times Hector will not have difficulty establishing standing given the rights and interests which are affected by these decisions.

Q2. To have the decision to terminate Mr Stephens' employment with the AFP reviewed, the decision will need to be appealed under the ADJR Act or the Judiciary Act. There is no exclusion of these decisions under the Schedule I to the ADJR Act, so this would be the first choice avenue for legal review. Under s39B(1A)(c) of the Judiciary Act, Mr Stephens could alternatively bring an action directly in the Federal Court's original jurisdiction, however an ADJR would be advised given the codification of remedies it contains.

There are a number of grounds upon which Mr Stephens could have the decision overturned. The first of these is procedural fairness, specifically pertaining to notice and the hearing rule. While Mr Stephens was informed of the date and time of his phone interview with the IIB, he was not given a specific reason for the interview, nor was any allegation or evidence presented to him before the interview actually took place. Ultimately the rule here will be determined according to the circumstances of Mr Stephens' case and what is fair under those circumstances (Kioa). However, it seems unfair on the face that he was not given an allegation before the first interview. Here we also see the lack of a reasonable opportunity to prepare for this interview, which would leave Mr Stephens at a disadvantage. Procedural fairness is allowed as a review reason under ss5(1)(a) and 6(1)(a) of the ADJR Act.

Further to this there is also the procedural fairness issue of the hearing rule allowing a person whose interests are going to be adversely affected the right to be heard on that matter. It may be possible to argue that such a low-volume inquiry (placing little administrative burden on the decision maker) should be afforded an oral hearing, particularly as personal rights and interests are being affected by the accusations. In addition there is also the issue of a lack of opportunity to prepare for the PSRT submission given the two-week timeframe and the difficulty of obtaining written references and legal assistance in that time.

Most concerning, however, is the fact that Mr Stephens' submission to the PSRT was instructed to be on the subject of his suitability for deployment in France, but the PSRT eventually decided the question of his eligibility for employment. It appears that the final decision of the PSRT was therefore a different one to that which it was charged to make. This is a simple ultra vires point which would allow Mr Stephens to have the decision quashed.

S50 of the Act says that the PSRT may only decide in a matter involving repeat serious breaches. Here Mr Stephens could argue that only one instance (or "kind") of breach has occurred, and that the breach was not serious enough to warrant PSRT attention under s50.

It may also be possible to challenge the Chair of the PSRT with apprehended bias in the decision making process, as it appears that the Chair was either biased against Mr Stephens or predecided the matter before fully considering the application.

In a new hearing before the PSRT, then, Mr Stephens would be allowed to present his case again. I would advise that he obtain further written character references and provide written documentation of his length of service with the AFP and work history during that time. According to s53 of the Act, the PSRT must take the employment history and performance record into account along with the report and file of the IIB, which appears to have been omitted or overlooked in the first decision on the facts given. It may be suggested that the original IIB review by telephone was not a fair hearing given Mr Stephens' inability to prepare in advance.

In terms of the "offences" alleged against Mr Stephens, it could be argued that the AFP policy guidelines pertained only to Mr Stephens' work usage of the internet and his work email account. This would reduce the number of apparent breaches of the policy to two: sending from Mr Stephens' AFP email address and emailing the Interpol colleague.

Given the relative isolation of the breaches of policy Mr Stephens committed, it may be possible to argue that they were not "serious breaches" according to the Commissioners' 18 March 2004 directive. Thus Mr Stephens would argue that termination of employment is not a possible outcome from the review of the PSRT.