THIS IS A SAMPLE OF THE ACTUAL NOTES AND ONLY DISPLAYS A FEW PAGES IN A FEW SECTIONS! I made these as I was going and managed a HD! These will save you so much time so you can follow and hopefully get through easily!

Included in these notes is the following:

- Comprehensive notes of every topic
  - Textbook readings
  - Casebook readings
  - Theoretical article readings
    - These readings are compulsory and are VERY to answering essay questions for the final exam.
- Exam tips
- Past Paper Practice (WITH WORKED ANSWERS FOR OVER 25 ESSAY QUESTIONS THAT ARE LIKELY TO APPEAR IN EXAM)

The aim of these notes is to make your life A LOT easier, covers ALL the readings, and includes tips, exam prep, exam answers and even some questions that were asked in class that we had to prepare.

The new admin course focuses heavily on essays and administrative law "values" which have been covered in depth in these notes.

Enjoy ☺

[Begin Sample]

LAWS1160 Administrative Law Notes

2B: JUDICIAL REVIEW - STANDING

Cane & McDonald, Principles of Administrative Law, Chapter 6

ACCESS TO JUDICIAL REVIEW

6.1 Two approaches to standing

- Standing = *locus standi*.
- Two ways: interest-based grievance model (interest model)

Interest model	**Enforcement model**
• *Asking whether they personally have a legal right/interest which has been adversely affected by the admin decision.* • *Reflects the view that the primary purpose of JR is protection of individuals against abuse of gov. power.* • *Depends on contextual analysis of facts of each case, large degree od judicial discretion.*	• Asking whether they are an appropriate person to enforce admin law norms. • Court may have regard to their identity and qualifications. • Possible answer: "those whose interests are affected by a decision" • Cannot merely be based on the nature of the applicant's interests in the subject matter of the decision. But occasionally may be sufficient.

Development of judicial review – phases

1. Writs originally developed as a means by which more powerful officials (the Crown) could control inferior bodies by ensuring that they complied with the law. JR conceived of primarily **in terms of enforcement of compliance with the law.**

2. By end of 19th C, prohibition = protective of the rights of the subject (person), rather than as a safeguard of the prerogative (gov. power).
3. Purpose of s 75(v) also includes policing the federal compact and ensuring the courts are able to restrain officers of the Commonwealth from exceeding their jurisdiction = broad ROL purpose explain change from prerogative to 'constitutional' writs.
    a. Requirement of a 'matter' under s 75 does not necessitate adoption of interest-based standing rules or prevent the legislature enacting an open standing regime.

- Traces of both models seen in the rule that the AG may bring proceedings for declarations and injunctions to enforce admin law norms – AG always has standing to enforce public law norms based on identity (rep of gov.) and qualifications (principal law officer of the Crown).
- AG can also give permission (**fiat**) to another person to apply for JR in the AG's name by way of a 'relator action'.
    - An individual who lacks sufficient interest (standing) to apply for JR → AG may authorize in their name.
    - AG unlikely as a minister of the gov. to do so where action would cause the gov. embarrassment.
    - AG decision to grant/withhold permission not reviewable = non-justiciable.
    - **Modern law of standing** → *Australian Conservation Foundation v Commonwealth (ACF).*

6.2 *Australian Conservation Foundation* and the special interest test

- ACF rule: applicant must shoe wither that the decisions interferes with their private law rights (property/contractual) or that they have a 'special interest' in the subject matter of the application.
- HC elaborated on 'special interest' negatively → more than a "mere intellectual or emotional concern", must be seeking more than "the satisfaction of righting a wrong, upholding a principle or winning a contest"
- Interests shared with the public at large insufficient → ACF's commitment to conservation did not give it a special interest in the preservation of the environment. Interest was ideological.
- Case reflects the **interest model** – refusal of standing based on fact applicant was not seeking to remedy a personal grievance. Related to a view that the primary purpose of JR is the **protection of individual interests against gov. abuse**.

11B: OMBUDSMAN

1. Cane & McDonald, Principles of Administrative Law (2nd edition), pp. 132 – 133 (5.2.4) and pp. 245-256[9.3]
2. Article: Creyke, McMillan and Smyth

TEXTBOOK READING

Extending the boundaries of procedural fairness

- PF requires findings of fact be based on 'probative material and logical grounds', rationally or logically supported by the evidence.
- Difficult to see any basis upon which a failure to inquire could constitute a breach of the requirements of PF.
- Failure to make inquiries → consequences for the rationality or reasonableness of the decision.
- *SZIAI* – failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, may amount to a JE.

- CL does not recognise any general duty on admin decision makers to give reasons for their decisions was affirmed in *Osmond*.
- Courts have accepted that implied statutory obligations to give reasons re: statutory powers may arise. Such is more likely to be drawn if there is a right to appeal (which would typically be meaningless without a statement of reasons).
- Australian courts emphasise the existence of the general rule that administrators are not required to give reasons.
- Recognition of a CL obligation to give reasons would raise q's about whether every breach should result in retrospective invalidity of the decisions.

OMBUDSMAN
Introduction

- Office of the Commonwealth Ombudsman (CO) was established by the *Ombudsman Act 1976*.

Constitutional and institutional location

- Kerr Committee recommended creation of General Counsel for Grievances – dealing with legitimate complaints against administration regardless of whether the complaint would fall within the jurisdiction of a court or tribunal. Counsel would be empowered to assist complainants to pursue complaints.
- On advice of Bland Committee, Kerr model rejected in favour of one which the ombudsman would act neutrally between complainant and agency.
- Although ombudsman not required to have legal qualifications, many are lawyers and promoting admin law values (legality, due process) is commonly considered to be an important role.
- Positioned between the executive and legislature.
- Some ombudsman are officers of parliament and their role – parliamentary oversight of the gov.
- Parliament has role of appointment and funding, committee oversees work.
- of ombudsman. It gives ombudsmen a much greater degree of personal control over which cases they deal with than courts and tribunals typically enjoy.

What complaints can ombudsman entertain?

- Public – against gov. agencies, with exceptions.
- Bulk of complaints of CO relate to pensions and social welfare benefits, child support payments, taxation and immigration.
- Jurisdiction – 'action that relates to a matter of administration'
- No power to make determinations of legal rights and obligations.

ARTICLE READING:
Control of Government Action – Creyke, McMillan, Smyth

OBTAINING REASONS FOR GOVERNMENT DECISIONS
Introduction – reasons in Australian Administrative Law

- Kerr Committee – critical people given reasons for decisions.
    - Reality – **s 13 ADJR Act and s 28 AAT Act** = reasons requirement.

- S 28 addition in *Minister for Immigration and Ethnic Affairs v Pochi* (1980) – provides evidence on which findings were based and reasons for the decision.
- Reasons underpins values of transparency and accountability.
- Advantages:
    - Choose whether exercise right to review or appeal based on assessment of critical facts/reasoning.
    - Helps decision makers think more about their task and be more careful in their decision making.
    - Helps agencies identify relevant principles and create standards to guide future decision making.
- *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) – rationale for reasons:
    - Encourage a careful examination of the relevant issues
    - Elimination of extraneous conditions
    - Encourage consistency
    - Facilitate work of the courts in performing their supervisory functions
    - Encourage good administration by ensuring that a decision is properly considered.
    - Increases public confidence in the legitimacy of the administrative process.

<u>Statutory duty to provide reasons for decisions:</u>

- NSW – Uniform Civil Procedure Rules 2005 gives someone seeking JR in admin matters a right to seek a statement of reasons.
    - Statement must: 'set out findings on material questions of fact, and refer to the evidence or other material on which those findings were based, and explain why the decision was made."
- Obligation for reasons in NSW Tribunal – *Civil and Administrative Tribunal Act 2009* s 122.
- Where reasons are not required under the ADJR Act:
    - Decisions not covered by the ADJR Act (eg. not administrative)
    - Reasons have already been given
    - Decision was made under Sch 2 of the Act – defence forces, ASIO, diplomatic/consular issues
- Reasons under s 28 AAT Act;
    - Decisions reviewable under the act
    - Persons with standing to appeal to the AAT.
    - The decision maker need not provide the statement if reasons for the decision have already been given.
- Admin Review Council in report 50 (2012) recommended there should be a sanction for a breach of s 23 where an agency fails to provide a statement of reasons.

<u>Common Law Position</u>

- *Osmond* – HC → no general rule of CL or principle of natural justice that requires admin decision-makers to provide reasons for their decisions, but that such a duty may arise in 'special' or 'exceptional' circumstances.
- Four general arguments in favour of requiring administrators to provide reasons:

- Instrumentalist argument – its thought to encourage better and more rational decision making.
  - Difficult to establish empirically.
- "where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified in terms of rationality and fairness"

Public Service Board of NSW v Osmond (1986)	
Facts	• Osmond – employed under *Public Service Act 1979* (NSW) • applied for promotion but not recommended. • Appealed to Public Service Board of NSW – later advised him orally that his appeal had been dismissed. • Osmond requested reasons for the Board's decision but was refuse. • Not statutory duty on the Board to provide reasons. • Sought declatory and other relief in Supreme Court. • Application refused at first instance but granted by majority on Court of Appeal. • Board appealed to HC which overturned Court of Appeal – held **no general rule of the common law or principle of natural justice which required that reasons for decisions be given.**
Issues	• Statement of reasons – obligation to provide.
Decision	GIBBS CJ: • Recognised exceptions to the obligation to state reasons: • Where it was clear by inference or otherwise to that the reasons would disclose confidential information or invade privacy. Present case did not fall within this rule.

Legal status of a statement of reasons

- Can be used by a court in deciding whether a decision is valid.
- Tribunals, in reviewing the merits of decisions, also refer to the reasons statements.

ESSAY PREPARATION: PRACTICE QUESTIONS AND MOCK ANSWERS

These are not full responses but merely a few sections cut out from the full essay preparation section. These are very similar to what the essays in the final exam will be like, some overlap.

"Public sector **ombudsmen** in Australia are **toothless tigers**." Discuss this statement with reference to matters including: (a) the **powers** of public sector ombudsmen; (b) the **contracting out** of government services; and (c) the role of public sector ombudsmen in the **overall scheme** of administrative law.

Because ombudsman can only make recommendations and have no determinative or coercive powers, there is less need for them to be subject to formal external accountability mechanisms. Investigations not publicly reported, cannot be sued unless they act in bad faith, recommendations are not subject to MR and in some jurisdictions protected from JR.

The discretion not to investigate (further) is one of the most distinctive characteristics of the institution of ombudsman. It gives ombudsmen a much greater degree of personal control over which cases they deal with than courts and tribunals typically enjoy. Significant majority of complaints resolved favourably to the agency → ombudsman has a greater incentive to maintain good relations with agencies than with complainants.

Against Toothless Tiger

- Own motion investigations: initiated by ombudsman actively rather than in reaction to complaints, into matters the relevance of which extends beyond any one individual complaint and which, in that sense, raise 'systemic' issues.
    - Prime medium through which ombudsmen can have a **normative** impact on admin practice.

"Tribunals are vulnerable to criticism from lawyers and administrators alike, although for very different reasons."
Discuss.
Lawyers argue access to tribunals and positive outcomes is overly dependent on strong advocacy. Overly complex of the average person to navigate. Insufficiently independent of the executive. On the other hand administrators argue against broad access which results in numerous cases, potentially costly. Also need to stick to strict procedural requirements

Correctness and preferability

- As opposed to lawfulness but still concerned with it
- Not there but must consider it, not only thing like JR

Lawyers argue access to tribunals and positive outcomes is overly dependent on strong advocacy. Overly complex of the average person to navigate

"The **Wednesbury test** for unreasonableness is **too restrictive** for those seeking **judicial review** of government action. Australian courts should move towards a **less restrictive** test based on the principle of **'proportionality'**." Discuss.

What is Wednesdbury unreasonableness?
Associated Provincial Picture Houses Ltd v Wednesbury Corporation: **administrative determinations could be ultra vires I they were unreasonable in the sense that the decision was 'so unreasonable that no reasonable authority could ever have come to it'**
ADJR Act ss 5(2)(g) and 6(2)(g) test for unreasonableness adopts this same standard: decisions or conduct may be reviewed because 'an exercise of power' was 'so unreasonable that no reasonable person could have so exercised the power'.

Restrictive
Requires the court to make judgments about the substantive correctness or merits of the decision. A determination about what no reasonable authority could do must be based on an assessment of arguments for and against the authority's decision. The test invites judges to measure the reasonableness of decisions against their values.