

## TOPIC 9: ACCESS TO JUDICIAL REVIEW- STANDING

- Merits and judicial review not commenced 'on own motion' but rather initiated by individuals – 'standing' refers to an individual's right to be heard i.e. bring an action for review.

### A. Special Cases:

- Attorneys-General have standing to commence judicial review proceedings.
- In some limited cases, statutes provide for open standing.

### B. Otherwise:

- Various tests for standing in review on common law remedial model (mandamus, prohibition, certiorari, injunction and declaration) and under *ADJR Act 1977 (Cth)* are converging on 'person aggrieved' and 'special interest' tests.

### C. Interveners and Amicus Curiae.

## A. SPECIAL CASES

### Attorneys-General

#### *Bateman's Bay Local Aboriginal Land Council* at [33]-[38].

- A-G represents the public interest and has standing to enforce 'public rights' in the A-G's own name.
- Realtor proceedings:
  - A-G can give fiat, allowing action to be brought 'on the relation of' an individual.
  - A-G controls proceedings but does not conduct them
- Observation at [38], it is 'somewhat visionary' to suppose that citizens can rely on A-G for protection against ultra vires actions.

### Open Standing

#### Examples noted:

- *Environmental Planning and Assessment Act 1979* (NSW), s 123: 'Any person may bring proceedings to remedy or restrain a breach of this Act whether or not any right of that person has been infringed.'
- *Truth About Motorways Pty Ltd v Macquarie* (2000) 200 CLR 591 – HCA upholds statutory provision giving open standing to seek injunction to restrain contraventions of trade practices legislation.

## OVERVIEW

### STANDING TEST

- 'A private citizen who has no special interest is incapable of bringing proceedings [to assert public rights or prevent public wrongs], unless... permitted by statute do so': *ACF* at 526 (Gibbs J).
- A person has a special interest if the action adversely affects 'some private right' or the person has 'a special interest in the subject-matter of the action': *ACF* at 527 (Gibbs J).

#### A. The interest:

- not limited to rights; the interest may be non-material: *Onus v Alcoa*.
- 'mere intellectual or emotional concern' is not an 'interest': *ACF*; *Right to Life*.

#### B. The interest in the action/the effect on the interest:

- the person must be 'specially affected': *Onus v Alcoa* at 74 (Brennan J).
- 'zone of interests' of the enabling legislation may be a relevant consideration: *Argos*
- The standing test should be construed as "an enabling, not a restrictive, procedural stipulation": *Bateman's Bay*

<b>THE NATURE OF THE INTEREST</b>	
<ul style="list-style-type: none"> <li>– Non-material interests, ie, cultural, spiritual and historical interests may suffice: <b>Onus v Alcoa</b></li> <li>– Prejudice to material interest (in business) recognized: <b>Bateman’s Bay</b></li> <li>– Proximity is a relevant factor: <b>Onus v Alcoa</b></li> <li>– Other factors may distinguish the concerns from mere ‘intellectual and emotional’: <b>North Coast Environment Council Inc v Minister for Resources</b></li> <li>– Exercise of participation rights in the administrative proceeding may establish special interest in review of the proceeding: <b>United States Tobacco Co Ltd v Minister for Consumer Affairs (1988)</b></li> <li>– “mere intellectual or emotional concern’ is not an ‘interest’: <b>ACF; Right to Life.</b></li> </ul>	
<ul style="list-style-type: none"> <li>– <b>Issue:</b> whether the special interest test requires the interest of the applicant to be consistent with the objects, purpose, and policy of the legislation which they are seeking to enforce- <i>conflicting views</i>: <b>Right to Life; Argos</b></li> <li>– <b>Emergent position-</b> cannot negatively use relevant considerations, statutory scope and purpose to prevent an interest giving rise to standing; but might be able to positively use those considerations in support of an argument for standing: <b>Argos</b></li> </ul>	

## **B. TEST FOR STANDING**

### **CONVERGENCE OF TESTS FOR STANDING**

#### ***Australian Institute of Marine and Power Engineers:***

- Historically each remedy had its own standing rules.
- Consensus that tests for standing have converged or are converging: a person has standing if they are ‘aggrieved’ or have a ‘special interest’.

<b>Declaration and injunction</b>	‘special interest in the subject matter’ ( <b>ACF</b> ); ‘sufficient material interest in the subject matter’ ( <b>Bateman’s Bay</b> ).
<b>ADJR Act 1977 (Cth)</b>	‘Person aggrieved’ (s 5,6,7,13, inclusive definition at s 3) construed to be as wide as standing for injunction and declaration.
<b>Certiorari and prohibition</b>	‘Strangers’ may apply even though they lack ‘a relevant legal interest’ <i>but</i> courts may refuse standing as matter of discretion if applicant does not have a special interest.
<b>Mandamus</b>	Person must have ‘special interest’ in compelling performance of the public duty.

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| <ol style="list-style-type: none"> <li>1. Are the applicant’s private law rights affected by the decision (such as property or contractual rights)?</li> <li>2. If no rights are affected, does the applicant have a ‘special interest’ in the subject matter of the action? <b>ACF v Cth (1980); Onus v Alcoa (1981)</b></li> </ol> |
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### **THE SPECIAL INTEREST TEST**

#### ***Australian Conservation Foundation Inc v Commonwealth (1980)***

##### **Facts:**

- Project to develop a tourist resort in Queensland
- Finance approval of Reserve Bank was required
- Environment Minister determined that an environmental impact statement (EIS) was required
- Finance approval was granted before the EIS was completed

- ACF seeking to argue that:
  - Approval process was legally flawed
  - It was denied the opportunity to make proper submissions
- No private law right of the ACF was affected by the decision; and so it needed to establish that it had a special interest in the subject matter of the decision

**Held:** ACF did not have standing

- ACF's clear commitment to conservation did not give it a special interest in the preservation of the environment at the particular site slated for development. Its interest was essentially ideological
- A special interest is ***more than a 'mere intellectual or emotional concern'***, no matter how intense or strong that concern may be
- The applicant ***must be seeking more than 'the satisfaction of a wrong, upholding a principle or winning a contest'***
- Although a special interest ***need not be unique to the applicants, interests shared with the public at large (or perhaps a significant section of it) are insufficient to establish standing***
- It does ***not have to involve a legal or pecuniary right*** (Mason J at 530) or that the plaintiff and no-one else possess the particular interest
- A corporation or association does not acquire standing merely because some of its members possess it: Gibbs J at 531

### ***Onus v Alcoa of Australia Ltd (1981)***

**Facts:**

- Alcoa sought to construct an aluminium smelter
- Applicants were local Gournditch-jmara people, claim based on their custodianship of relics on Alcoa's land
- Applicants claimed that aluminium smelter would interfere with Aboriginal relics, constituting an offence under s 21 of the *Archaeological and Aboriginal Relics Preservation Act* (Vic); heritage legislation.

**Held:**

- Applicants had standing to seek an injunction
- Confirms **non-material interests recognised**
- Significance of case - refinement of special interest test to include notions of proximity as a factor.
- "A plaintiff has no standing to bring an action to prevent the violation of a public right if he has no interest in the subject matter beyond that of any other member of the public" (Gibbs CJ at 36)
- "At least the plaintiff must be able to show that success in the action would confer on him - albeit as a member of a class - a benefit or advantage greater than the benefit or advantage thereby conferred upon the ordinary member of the community; or alternatively that success in the action would relieve him of a detriment or disadvantage to which he would otherwise have been subject - albeit as a member of a class - to an extent greater than the ordinary member of the community." (Brennan J at 76)
- ***Cultural, spiritual and historical interests may suffice*** (ie non-material interests)
- The test involves in each case a ***curial assessment of the importance of the concern which a plaintiff has with the subject matter and of the closeness of the plaintiff's relationship to that subject matter***. Community values and beliefs will be relevant in this assessment. (Stephen J at [10])