

# Standing?

The first issue is whether <X> can demonstrate they have standing in order to initiate judicial review. The test under s 5 ADJR is whether <X> is a 'person aggrieved' by a decision such that their interests are adversely affected (s 3(4) ADJR). This requirement has been read in light of '*special interest*' test at CL. Therefore, to bring proceedings under either the ADJR or CL, the issue hinges on whether the individual/organisation has some connection or interest in the subject matter of dispute which is over and above a general member of public (*Onus v Alcoa*; *ACF*). <X> will argue that special interest should be construed in a way that is enabling rather than restrictive (*Bateman's Bay*)

- <X> has a *special interest* from the proximity and degree of connection, strength of association and historical significance (*Onus v Alcoa*)
  - o **Cultural and spiritual significance** resulting in close proximity between <X> and subject matter may constitute a special interest (*Onus*)
    - **Contra:** <Y> would argue that <X> is relying on intellectual/emotional concern which is not a special interest (*ACF, Right to Life*)
  - o **Earlier participation in proceedings** – right to participate in formalised procedures and statutory process meant <X> had an interest sufficient to give rise to standing (*US Tobacco*)
  - o **North Coast indicia** (*North Coast*):
    - Relevant factors: (i) Peak <environmental> organisation in region, (ii) received government recognition from different govt levels, (iii) made formal submissions, coordinated projects on <subject matter>.
    - Insufficient factors: (i) Objects of <North Council>, (ii) submitting comments in consultation process, (iii) expressing opposition.
  - o **Relevance of enabling statute:** Divergence in HCA reasoning (*Argos*), but the emergent position is that while relevant consideration may be influential for standing, it is possible to establish standing on the basis of an interest that is not a relevant consideration under statute (per French CJ and Keane J)
    - **Contra:** <Y> could argue that submissions must relate to a relevant consideration of the Act (*Right to Life* – NB FC decision)
  - o **Economic interests:** Sufficient if there is a concern of a significant adverse economic impact (*Argos*)
    - <X> is operating in the same limited market as a statutory body and there is a risk of 'immediate, significant and peculiar' detriment (*Bateman's Bay*)
  - o **Correct use of public funds** – prejudice to material interest in business (*Bateman's Bay*).
- **A-G** has capacity to intervene in the public interest to enforce 'public right', however it is somewhat visionary to rely on A-G's action (*Bateman's Bay*)
- **Statutory reform (Open Standing Clause):** A provision in a statute that forgoes the standing requirement by granting any person the right to review a decision made under the statute (e.g. s 123 EPA)
- **Intervention and friends of Court** (*Roadshow Films*):
  - o **Intervener:** A 3P's participation in proceedings already in progress

- Role/consequence: Able to join; has rights and obligations of a party – eg rights to lead evidence, examine witnesses, appeal; obligation to pay costs
- Test: interests directly affected by outcome and submissions may add to arguments parties will advance.
- **Amicus curiae:** A 3P to proceedings whom a court, at its discretion, allows to participate in proceedings in order to assist the resolution of issues.
  - Role/consequence: only makes submissions on points of law that might be overlooked.
  - Test: permit a party to join if court will be significantly assisted by submissions, and this outweighs the costs and delays incurred from having an additional party.

## Judicial Review of Rule-Making

Prior to grounds of review, <X> might argue that the <subordinate legislation/regulations/Council by-laws> is not authorised by the <Primary Act> and <regulation> is ultra vires to the <Primary Act> making the decision invalid.

- Construing the terms of the <Primary Act>, X can contend that the scope and legal effect of <regulation> falls outside the ambit of power conferred by <Primary Act> (*SA v Tanner*):
  - The <regulation> *does not complement but supplements* the <Act>. Given that the <Act> allows for regulation that '<is necessary or expedient>' to achieve a purpose, the <regulation> extends the scope and operation of the <Act> (*Shanahan v Scott*) making it ultravires.
  - Given the <Act> allows regulation to '*regulate and restrain*', the <regulation> authorises a *total or substantial prohibition* (*Swan Hill v Bradbury*).
    - If prohibited activity subject to obtaining consent, *conditions for obtaining consent must be clearly stipulated* (*Swan Hill v Bradbury*)
    - If unstructured discretion with no qualifications, then decision invalid (*Swan Hill*)
    - **Contra** (*Express Prohibition*): However, Y could argue that <Act> expressly allows for prohibition, giving scope for unstructured discretion (*Foley v Padley*).
      - However X would state that <regulation> purporting to regulate, control or prohibit a <particular activity> is invalid if *decision maker did not form a reasonable opinion* that <activity / distribution religious texts> is likely to fall within type of <conduct / affecting use and enjoyment of land> (per Brennan J (dissent))
  - If <Act> violates *principle of legality* which requires that the <Act's> provisions be construed in light of presumption that the legislature does not intend to infringe on fundamental rights and freedom (*Evans v NSW*)
    - Legislation = regulate anything necessary or convenient regarding public conduct

- Regulation = prevented 'annoyance' and 'inconvenience' → severed annoyance as this was imprecise/had no objective criterion.
- The <Act> only requires regulation to achieve an *end*, but the regulation merely states/rehearses the statutory objectives instead of prescribing, in detail, the manner/means to secured the end (*Utah v Pataky*)
- The <regulation> adopts means that are not authorised means prescribed by the <Act> to achieve a goal (*Paull v Munday*)
- The <regulation> is not reasonably proportionate to the purpose of the <Act>.
  - SA by-laws requiring permission to preach, distribute flyers are valid (reasonably proportionate) means of achieving goal of ensuring the 'convenience, comfort and safety' of the inhabitants – not unduly intrusive or onerous (*AG (SA) v Adelaide*)

#### ADJR? → no

- s 3 requires a decision to be of an administrative character – regulations are legislative in nature and have general application to the public
- Regulations are often enacted by the governor-general and this is excluded s 3(1)(c)