Administrative Law Notes

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Arguments for and Against Standing

Legislation

ADJR Act ss 3, 5 – A person must be aggrieved to the extent that their interests are adversely affected by the decision or the conduct being challenged

AAT Act s 27(1)(1): A person whose interests are affected by the decision. Note that this includes community groups (s 27(1)(2)). AAT has slightly broader approach to standing.

Arguments for open standing – locus standi

There should be a presumption of open standing to challenge executive decisions.

There has been an increasing liberalisation of public law standing in the last 40 years.

ACF v Cth – test for common law standing. Per Gibbs J: applicant must have either a private right or a ‘special interest’ in the subject matter. Public interest standing to be granted must be ‘more than a mere intellectual or emotional concern’.

ACF v Cth - “It is for the Parliament, whose members are the elected representatives of the people, to change an established rule if they consider it to be undesirable, and not for judges, unelected and unrepresentative, to determine not what is, but what ought to be, the law.” (Gibbs J)

Should be able to challenge ‘public wrongs’ – ACF

Bateman’s Bay Local Aboriginal Land Council v Aboriginal Community Benefit: per GAUDRON, GUMMOW AND KIRBY JJ “...the basic purpose of the civil courts is to protect individual rights, that it is not part of their function to enforce the public law of the community or to oversee the enforcement of the civil or criminal law, except as an incident in the course of protecting the rights of individuals...”... McHugh J: An ordinary member of the public generally has no standing in the civil courts = unless there is interference or threatened interference with a private legal right.

Onus v Alcoa – Stephen J - required plaintiff to establish some interference with some private right or suffer some ‘special damage peculiar to himself’. Stephen J states ‘deliberative legislative action rather than judicial innovation’ would be desirable to reform the law of standing. Also in Onus, Stephen J stated the AFC test supplies no ‘rule of capable mechanical application’.

Onus v Alcoa – Per Brennan J ‘ “To deny standing would be to deny an important category of modern public statutory duties an effective procedure for curial enforcement’
Other arguments for open standing

Expanding roles of govt, improve government accountability and citizen participation.

Broad social regulation = broad standing

Facilitate maintenance of the decision-makers and the rule of law (ensure decision makers act lawfully)

Some people directly affected by the decision may not be in position to challenge its legality. I.e. Not sufficient resources, time or expertise. Open standing means others can challenge decisions for them/join as groups even. Groups could protect rights of individuals.

Knowledge that any decision may be challenged may improve the standard of administrative decision making. Being held to account for one’s decisions.

Overriding fundamental common law right to have access to courts

Ability to challenge government decisions in the public interest

Liberal approach to standing
Freedom of Information

Freedom of Information Act 1982 (Cth)

Key Sections

3 Objects—general

(1) The objects of this Act are to give the Australian community access to information held by the Government of the Commonwealth, by:
   (a) requiring agencies to publish the information; and
   (b) providing for a right of access to documents.

(2) The Parliament intends, by these objects, to promote Australia’s representative democracy by contributing towards the following:
   (a) increasing public participation in Government processes, with a view to promoting better-informed decision-making;
   (b) increasing scrutiny, discussion, comment and review of the Government’s activities.

(3) The Parliament also intends, by these objects, to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource.

(4) The Parliament also intends that functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

11 Right of access

(1) Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to:
   (a) a document of an agency, other than an exempt document; or
   (b) an official document of a Minister, other than an exempt document.

(2) Subject to this Act, a person’s right of access is not affected by:
   (a) any reasons the person gives for seeking access; or
   (b) the agency’s or Minister’s belief as to what are his or her reasons for seeking access

11A Access to documents on request

Scope

(1) This section applies if:
   (a) a request is made by a person, in accordance with subsection 15(2), to an agency or Minister for access to:
      (i) a document of the agency; or
      (ii) an official document of the Minister; and
   (b) any charge that, under the regulations, is required to be paid before access is given has been paid.

(2) This section applies subject to this Act.

Note: Other provisions of this Act are relevant to decisions about access to documents, for example the following:
   (a) section 12 (documents otherwise available);
   (b) section 13 (documents in national institutions);
   (c) section 15A (personnel records);
   (d) section 22 (access to edited copies with exempt or irrelevant matter deleted).

Mandatory access—general rule

(3) The agency or Minister must give the person access to the document in accordance with this Act, subject to this section.
Delegated Legislation

**NSW v Cth (Workchoices Case)** – Regulations can specify ‘prohibited content’. Very little limit of extensive use of delegated legislation. Delegated power is broad.

**LA Act 2003** – requires 1. Public consultation in making delegated legislation. 2. Registration in the fed. Register of legislation. 3. Tabling in parliament within 6 days and 4. A 10-year sunset clause. **BUT** – Check the parent Act

S4 LA Act: (4) An instrument is a *legislative instrument* if:

(a) the instrument is made under a power delegated by the Parliament; and
(b) any provision of the instrument:

(i) determines the law or alters the content of the law, rather than determining particular cases or particular circumstances in which the law, as set out in an Act or another legislative instrument or provision, is to apply, or is not to apply; and

(ii) has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

If not registered – becomes inoperative, not invalid – *Golden- Browne*

**Austral Fisheries** – Courts can strike down regulations

**Paul v Munday** – Where a Parent Act specifies the means to be adopted, the use of a different means to achieve the same result is NOT permissible.


**Extended Ultra Vires**

**Unreasonableness**

*Eshetu:* To be unreasonable, the decision or regulation must be irrational/of no logical basis.

*Associated Provincial Picture House Ltd v Wednesbury Corporation* - To prove unreasonableness would require something overwhelming and has to be something so illogical. This is a strict test. This must be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Only applies to an exercise of discretion.

*Parramatta v Pestell* – discriminating decisions. Assume parliament doesn’t intend Act to discriminate by decision maker.

*Minister for Immigration v SZDMS at [122]* – Involves an element of arbitrariness, capricious or injustice. Failure to give genuine, proper and realistic consideration to a matter including making adequate inquiry as to facts, according to Wilcox J in *Prasad v Minister for Immigration and Ethnic Affairs at [33]* (1985) 159 CLR 550, 570, ‘[t]he circumstances in which a decision will be invalid for failure to inquire are…strictly limited’ – failure to make reasonable enquiries could be held to be unreasonable.

*South Australia v Tanner* – disproportionality – whether power used for a purpose or in a way to what is in the Act

*SZFDE v MIC* – fraud by decision maker could be held unreasonable. Hard to prove.

*Minister for Immigration and Citizenship v Li* – Refusal to adjourn a hearing was ‘unreasonable’ – less restrictive approach here.

**Exam answer model**

*Is the decision by the Minister invalid because of unreasonableness?*

In order to establish Wednesbury unreasonableness it is necessary to show that the ‘decision made was a decision so unreasonable that no reasonable decision maker acting according to the law would have made it’ (*Associated Provincial Picture House Ltd v Wednesbury Corporation*; Head p188). This is a strict test. Based on the facts, it does not appear the decision made by the Minister would be found to be unreasonable as it would require a decision which is so illogical and would need to be something so overwhelming.

However, a more recent and less restrictive approach must be argued which can be seen in the case of *Minister for Immigration v Li* 2013 – where it was held that the decision was found to be unreasonable and given the view of *per French CJ at [28]* ‘it cannot be allow for decisions to be arbitrary or capricious otherwise equivalent to unreasonable beyond the wednesbury test’ (Head pgs190-191). In support of this is the same view in *Minister for Immigration v SZDMS at [122]*.

Arbitrary = unrestrained, anti democratic, not based on a specific reason or a rule= based on a personal whim.

Capricious = erratic/impulsive/unpredictable.

*And: political discriminating decisions in exam: Parramatta v Pestell* –. Assume parliament doesn’t intend Act to discriminate by decision maker