ADMINISTRATIVE LAW – JUDICIAL REVIEW

STANDING

- There are different tests for standing at both common law and under the ADJR, although there is little practical difference today (*Right to Life*)

ADJR

- Under section 5(1) of the ADJR, a "person who is aggrieved" will have standing to seek judicial review of a decision to which the ADJR applies
    - Per s 3(4), 'persons aggrieved' includes persons whose interests are adversely affected by the decision

COMMON LAW

- In order to have standing at common law, the party must have a "special interest in the subject matter of the action" (*ACF v Cth*)
    - "Special interests" include private or financial interests, but must be more than a mere intellectual or emotional concern (*ACF v Cth; Right to Life*)
- **Public interest groups**
    - Despite the outcome of *ACF v Cth*, public interest groups may have a special interest if they've had a prior involvement in the particular matter, the group is recognised or funded by the government, the group represents a significant strand of public opinion, or has a particular expertise in the subject matter (*Northcoast*)
        - **Prior involvement**: have they been protesting the matter? Have they written research papers on the topic?
        - **Recognised or funded by government**: does the government recognise that it reflects a special interest?
        - **Represents a significant strand of public**: is there a large number of people in the group?
        - **Expertise:** is the group led by doctors/psychologists? Or is it merely backed by housewives/uni students with no expertise?
            - I.e. the above four factors = should this group be representative/have the ability to challenge the government?
- **Examples of special interests**
    - Union's interest in decision to permit Sunday trading (*Shop Distributive*)
        - They were deemed to have a special interest because the union's membership was comprised of retail workers and those workers had a private and financial interest in getting Sunday hours → unions have a special interest
    - Members of indigenous group in preventing construction on land containing relics of which group was custodian (*Onus v Alcoa*)

TAKING INTO ACCOUNT IRRELEVANT CONSIDERATIONS (JE)

- Facts may also trigger improper purpose ground

- Judicial review may be sought on the ground that the making of the decision was an improper exercise of power as the decision-maker has taken into account an irrelevant consideration in the exercise of their power (ADJR ss 5(1)(e), (2)(a))

- Taking into account irrelevant considerations will likely be considered a jurisdictional error (*Craig v SA*)

- This ground requires that: (1) the decision-maker took account of a consideration, (2) that consideration was a matter that the decision-maker was prohibited from considering under the Act, and (3) that consideration materially affected the decision (*Peko-Wallsend*)

1. CONSIDERED THE MATTER

- A decision-maker may look at a matter without considering it (*Australian Conservation Foundation v Forestry Commission*)
    - I.e. just because a DM glances at some irrelevant material does not invalidate the decision
- The mere omission of a particular matter from the reasons for decision does not necessarily mean that matter was not considered (*Minister for Immigration v Yusuf*)

2. PROHIBITED FROM CONSIDERING UNDER THE ACT

- Where the empowering statute does not expressly exclude certain matters, it is necessary to determine which matters are irrelevant by reference to the 'subject-matter, scope and purpose' of the legislation (*Peko-Wallsend*)
- Where a decision-maker has a broad discretionary power, a wide range of matters might be relevant to the exercise of this power (*Murphyores v Cth*) (e.g. broad power to approve exportation of minerals allows for consideration of environmental impact)
- Decision-makers are typically prohibited from considering personal or whimsical matters (*Murphyores v Cth*)

3. MATERIALLY AFFECTED THE DECISION

- The test of whether such a consideration will justify the court setting aside the decision is one of significance: is the matter so insignificant that its consideration would not materially affect the decision, or is it something that stands to severely affect the parties interest? (*Peko-Wallsend*)
- The consideration of such irrelevant considerations must 'deprive the applicant of the possibility of a successful outcome by the decision-maker's failure to observe the requirements of the statute' (*Lu v Minister for Immigration*)

Should we retain closed standing or move towards open standing?

Introduction

The courts have traditionally taken a restrictive approach to standing. However, particularly following the High Court's decision in *ACF v Cth*, there has been ongoing debate surrounding whether administrative law should retain closed standing, in which persons seeking to commence or be joined to legal proceedings must first prove that they have a sufficient "special interest" in the matter (*ACF v Cth*), or move towards open standing, whereby every person would be able to access the court if a public servant has acted unlawfully. This paper briefly weighs the arguments for and against open standing before finding that a middle ground between open and closed standing is required for the efficient running of government.

Arguments in favour of open standing

Arguments for open standing can be made on the basis that the boundaries of public power should be properly monitored at all times and that any individual should be able to draw the court's attention to errors, regardless of whether they're personally effected. Accountability is a core public law value. As such, there is a collective interest in ensuring that the rule of law is upheld and that the exercise of public power is confined to its proper boundaries.

If an applicant must establish that he or she has a particular connection with a matter, that leaves the possibility that some matters in which a reviewable error of law could be established will not proceed for want of an applicant with standing. In this way, as argued by Mary Anne Noone in the Monash University Law Review, the current position of standing hampers the role that public interest litigation can play in enforcing legal compliance and government accountability.

Arguments against open standing

Contrarily, there are a number of arguments against the adoption of open standing. The leading argument against such standing is that it would greatly cripple the proper functioning of government. As discussed by Andrew Edgar, allowing any person to dispute a government decision would ultimately open the metaphorical 'floodgates' of litigation. While it may sound ideal in principal, it is evidently not realistic that every government decision should be at risk of being set aside at the suit of a person who has no personal stake in the decision.

Further, as court decisions create binding precedent, it is important that plaintiffs who seek to represent the public interest have a sufficient level of motivation and interest in the outcome as, without such a motivation, the public interest will suffer (ALRC report no 27 (1985))

Recommended position

As demonstrated in the case of *ACF v Cth*, the courts are undoubtedly moving towards a more open standing, with standing being construed as an enabling rather than a restrictive requirement. Balancing the above arguments for and against open standing, the author opines that a balance must be struck between government accountability and functionality. As such, the author believes that a modified doctrine of open standing be adopted, in line with the ALRC's report, that allows for open standing except for in circumstances where the court assesses that it would be against the public interest.