

I. Administrative Decisions (Judicial Review) Act

Standing

“An applicant will have standing if they are aggrieved by the decision where their interests are adversely affected by the decision (ss 3(4) and 5)”

[A]

Private interest model

- “For [A] to have standing, [his/her] concrete interests have to be affected (ACF). [Factual analysis].”
- Applying the **higher** bar:
 - “[A] has a private right to [right] that will be affected because [facts]”
 - Private right = legal right
 - CL right (eg employment or tortious right)
 - Statutory right (eg visa)
- Applying the **lower** bar:
 - “[A] will argue that [he/she] has a special interest in [fact] because their interests are affected in a not insignificant way (Argos). [Factual analysis]”
 - Considerations
 - A “mere intellectual or emotional concern in a matter will be insufficient to give some a special interest in that matter” (Gibbs J in ACF)

Special Interest Established	
Onus <i>Analyse only if the facts are starkly similar</i>	<ul style="list-style-type: none"> • The Archaeological and Aboriginal Relics Preservation Act made it illegal to damage or endanger aboriginal relics • An Aboriginal tribe was concerned that aboriginal relics would be destroyed by Alcoa’s construction of an aluminium smelter <hr/> <ul style="list-style-type: none"> • The tribe had a special interest. The tribe had a special cultural and spiritual interest in the relics. These relics were used to teach their children about the culture of their people. • In order for a potential plaintiff to have a special interest, it is necessary to him to show that in comparison with the public at large he will be affected to a substantially greater degree (Brennan J) • The court will consider the importance of the concern and the closeness of the plaintiff’s relationship to that subject matter (Stephen J)
Argos	<ul style="list-style-type: none"> • The Planning Minister permitted the redevelopment of a shopping centre – Woolworths would be included • 2 IGA operators from nearby suburbs and one of the operator’s landlord challenged this decision <hr/> <ul style="list-style-type: none"> • The IGA operators had standing because their financial interests were likely to be affected in a not insignificant way as a result of the redevelopment (ie decline in profits) • The landlord didn’t have standing because they couldn’t prove that they were likely to financially suffer. This is because it was unlikely that their tenant would become bankrupt, and if they did, the lettable value of the property wouldn’t be reduced because of their bankruptcy.

Private interest model (trade union applicants)

- [1] “Because [A] is a [type of association], the concrete interests of the majority of their members need to be affected by the decision for [A] to have standing (*Shop Distributive*)”
- [2] “[A] represents their members’ interest because [reason]. Thus, they will have standing.”

Shop Distributive	<ul style="list-style-type: none"> • The Minister decided to permit trading on Sundays • The Shop Distributive and Allied Employees Association sought JR
	<ul style="list-style-type: none"> • The Union’s members had a special interest in the decision because they would be required to work on Sunday as a result of the decision (terms and conditions of their employment contract) • The Union had standing because they represented these members’ interests

Public interest model

[1] North Coast and Animals’ Angels

- “To determine whether [A] has standing, the factors from *North Coast* will be applied by the court.
 - Is the applicant a peak body?
 - Are they recognised by Government?
 - Eg do they get funding?
 - Do they conduct projects and conferences on a particular concern which they received funding for?
 - Do they make recommendations and submissions to commissions?
- Conclusion
 - “On balance, my preliminary view is that [A] [does/doesn’t] have standing”

Standing Established	
North Coast	<ul style="list-style-type: none"> • North Coast sought reasons for the Minister’s decision to grant a woodchip export license for woodchips obtained in NSW • NC were the peak organisation for Environmental Protection in the North Coast region of NSW • NC were recognised by the Cth Government as a significant and responsible environmental organisation, as seen from their funding • NC were recognised by the NSW Government as a body that should represent environmental concerns on advisory committees • NC had conducted and coordinated projects and conferences on matters of environmental concern • NC had made submissions on forestry management issues to Resource Assessment Commission
Animals’ Angels	<ul style="list-style-type: none"> • Animals’ Angels were an animal rights group based in Germany • They didn’t have any members in Australia • They sought JR through an Australian representative of various decisions made by the Department of Agriculture with respect to large export voyages • AA’s Australian representative was involved in, and had appeared before, various government committees concerning live animal exports

	<ul style="list-style-type: none"> • Through its Australian representative, EE was engaged in research and lobbying in Australia in regard to live animal exports • AA had spent its own money in this research and lobbying • AA had alerted the Department to many potential breaches of the law concerning live animal exports
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[2] Right to Life

- “However, [A]’s interest has to coincide with the purposes of the Act (*Right to Life*). [Factual analysis].”
- “Thus, my preliminary view is [confirmed/rejected]”
- “*Right to Life* was overruled by *Argos*. Therefore, [A]’s interest doesn’t have to be consistent with the purposes of the Act.”
 - **Note:** the purposes of the legislation can still be a factor that is considered, but it won’t be determinative

Right to Life	<ul style="list-style-type: none"> • Pursuant to the Therapeutic Goods Act, the Secretary gave permission for the testing of a drug (a morning after pill) • S 4 of the Act stated that the purpose was to provide for the establishment and maintenance for national system of controls relating to the quality, safety, efficacy and timely availability of therapeutic goods • RLA was a pro-life organisation that challenged this decision
	<ul style="list-style-type: none"> • RLA wasn’t concerned with the matters listed in s 4, they were morally concerned with the use of the morning after pill • RLA didn’t have standing

[3] Conclusion

- “On balance, [A] [will/won’t] have standing”

[B] Attorney General’s Fiat

- [1] “Because [A] wasn’t able to establish standing, their only recourse would be to seek an Attorney General’s Fiat. The Attorney General has standing to seek judicial review of decisions that affect public rights.”
 - **Note:** ‘public rights’ isn’t defined, but they are different to private rights which are rights arising from decisions affecting them personally
- [2] Methods of review:
 - Seek review on his own motion; or
 - Permit a person (ie applicant) to bring a relator action on his behalf (aka Attorney General’s Fiat)
- [3] “However, it’s rare for the Attorney General to bring such actions because the Attorney General is a member of the executive branch of government. A refusal to grant a fiat also isn’t subject to judicial review (*Gouriet*).”

II. Common Law

Grounds for Judicial Review

“I adopt my analysis above as to the grounds for judicial review. However, in order for judicial review to be made out, they need to be attended by jurisdictional error (ie breach was sufficiently serious) (*Kirk*). [A] can also argue the following grounds have been established at common law.”

- **Note:** if you are asked to only discuss the CL approach, don't cite the provisions from the ADJR Act, but you should still conclude your analysis with the above quote

Jurisdictional fact

[A] “At Common Law, if a jurisdictional fact didn't exist, the decision maker wouldn't be able to exercise the power in question, rendering the decision illegal”

[B]

Objective JF

[1] “The court will consider whether Parliament intended the fact to be a JF. [Factual analysis].”

- Factors to determine whether Parliament intended that the presence or absence of the fact would invalidate the decision (*Timbarra*):
 - How far removed is the factual reference from the decision-making power?
 - If the factual reference is preliminary or ancillary to the decision-making provision, it is more likely that parliament intended the factual reference to be a JF
 - If a factual reference occurs in or near the decision-making provision, it's less likely that parliament intended the factual reference to be a JF
 - The extent to which there may be disagreement about whether the matter is made out
 - If it's contentious as to whether the fact is present, it's less likely that Parliament intended that the fact was a JF

[2] “Because [fact] is a jurisdictional fact, the court will then consider whether the fact did exist. [Factual analysis].”

Timbarra	<ul style="list-style-type: none"> • S 91 of the <i>Environmental Planning and Assessment Act</i> stated that permission had to be obtained from the local council if a mine that already existed was going to be extended or modified • Ross Mining successfully applied to extend its gold mines • Timbarra Protection Coalition challenged this decision on the basis that a JF didn't exist: <ul style="list-style-type: none"> ○ S 77(3)(d): an application to extend a mine “shall... if the application is in respect of development on land that is... likely to significantly affect threatened species... be accompanied by a species impact statement” • RM's application wasn't accompanied by this statement • They argued that if the application was likely to significantly affect threatened species, and the applicant didn't include a statement, their application should be denied
	<ul style="list-style-type: none"> • How far removed was the factual reference from the decision-making power?

	<ul style="list-style-type: none"> ○ The decision-making power was located in s 91 and the factual reference was s 77(3)(d) ○ Because the factual reference is far removed from the decision-making power, the factual reference is more likely a JF ● The extent to which there may be disagreement about whether the matter is made out <ul style="list-style-type: none"> ○ The matter here was whether the development (ie extension of gold mines) was likely to significantly affect a threatened species ○ Because this was a matter in which reasonable minds could disagree, the provision was less likely to be a JF ● The issue of whether a development was likely to significantly affect a threatened species was a JF
<p>Plaintiff M70/2011</p>	<ul style="list-style-type: none"> ● The Australian Government reached an agreement with the Malaysian Government where 800 asylum seekers who had arrived in Australia would be transferred to Malaysia for their refugee protection claims to be assessed ● In August 2011, P arrived on Christmas Island ● Pursuant to s 198A(2) of the <i>Migration Act</i>, P was an ‘offshore entry person’, and could therefore be taken from Australia to a country for which a declaration was in force under s 198A(3) ● P was sent to Malaysia ● Under s 198A(3), the Minister could: <ul style="list-style-type: none"> ○ (a) declare in writing that a specified country: <ul style="list-style-type: none"> ▪ (i) provides access for persons seeking asylum, to effective procedures for assessing their need for protection; and ▪ (ii) provides protection for persons seeking asylum, pending determination of their refugee status; and ▪ (iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and ▪ (iv) meets relevant human rights standards in providing protection. ● P argued that the matters in s 198A(3)(a) were JFs and that the Minister’s declaration to take P to another country only if those facts existed in relation to that country <hr/> <ul style="list-style-type: none"> ● HC majority held that the matters listed under s 198A(3)(a) were JFs <ul style="list-style-type: none"> ○ This was evident from an examination of the text, context and purpose of the legislation ○ Considering the Act as a whole, parliament intended s 198A(3)(a) to facilitate Australia’s compliance with the obligations undertaken in the Convention relating to the status of refugees which Australia was a signatory. Such compliance wouldn’t be facilitated, if the matters in s 198A(3)(a), which mirrored obligations in the Convention, weren’t JFs. ● Did the facts existed in regards to Malaysia? <ul style="list-style-type: none"> ○ The JFs in question won’t exist in regards to a country if neither it’s domestic law or international agreements require it to provide protection of the kind described

	<ul style="list-style-type: none"> ○ Malaysia’s domestic laws didn’t require it to provide such protection, and it wasn’t a party to the 1951 Convention relating to refugees ○ Nor was the agreement between Malaysia and Australia, which was non-binding in any case, require that the relevant protections be provided ● Therefore, effect couldn’t be given to the Malaysia solution
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Subjective JF

[1] “Because [DM] needs to be satisfied of [certain facts] ([provision]), the court will consider whether it’s a subjective JF. [Factual analysis].”

- Factors to determine whether Parliament intended that the presence or absence of the fact would invalidate the decision (*Timbarra*):
 - How far removed is the factual reference from the decision-making power?
 - If the factual reference is preliminary or ancillary to the decision-making provision, it is more likely that parliament intended the factual reference to be a JF
 - If a factual reference occurs in or near the decision-making provision, it’s less likely that parliament intended the factual reference to be a JF
 - The extent to which there may be disagreement about whether the matter is made out
 - If it’s contentious as to whether the fact is present, it’s less likely that Parliament intended that the fact was a JF

[2] “Their decision can only be impugned if their satisfaction has been reached as a result of illogical or irrational reasoning (*SZMDS*). [Factual analysis].”

SZMDS	<ul style="list-style-type: none"> ● The applicant was a Pakistani citizen who arrived in Australia on 3 July 2007 and sought a protection visa ● Pursuant to s 65 of the <i>Migration Act 1958</i> the Minister was required to grant a protection visa to the applicant if the Minister was satisfied that the applicant entertained a well-founded fear that he would be persecuted, on that basis that he was homosexual in the event he was sent back to Pakistan ● The Minister wasn’t satisfied in this respect, denying him a protection visa ● The applicant sought JR on a variety of bases, including the subjective JF, the Minister’s lack of satisfaction that he would be persecuted in Pakistan bc of his homosexuality, was illogical or irrational
	<p>Crennan and Bell JJ</p> <ul style="list-style-type: none"> ● The reasoning process of a Minister could be illogical or irrational where: <ul style="list-style-type: none"> ○ Only one conclusion was open on the evidence and the decision-maker did not come to that conclusion ○ If the decision was “simply not open on the evidence” ○ “If there is no logical connection between the evidence and the inferences and conclusions drawn by the decision-maker” ● However, a decision isn’t illogical if there is room for a logical or rational person to reach the same decision on the material before the DM ● Here, the DM hadn’t been satisfied that the applicant possessed the well-founded fear of persecution on the basis of his sexuality on several bases:

	<ul style="list-style-type: none">○ Well before coming to Australia, he lived for a number of years in the UAE. However, he returned to Pakistan where he lived for a number of years before returning to the UAE and then coming to Australia.○ Just before coming to Australia, he went to England, but didn't seek a protection visa there● The DM's lack of satisfaction could be reached by a logical and rational person with the material before the DM. Accordingly, it couldn't be said that the process he used to reach his decision was illogical or irrational.
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No evidence

“Under the Common Law, the no evidence ground will be made out if [A] the allegation of no evidence relates to a matter upon which the exercise of power depends and [B] there is absolutely no evidence in support of that matter (*Australian Stevedoring*). [Factual analysis].”