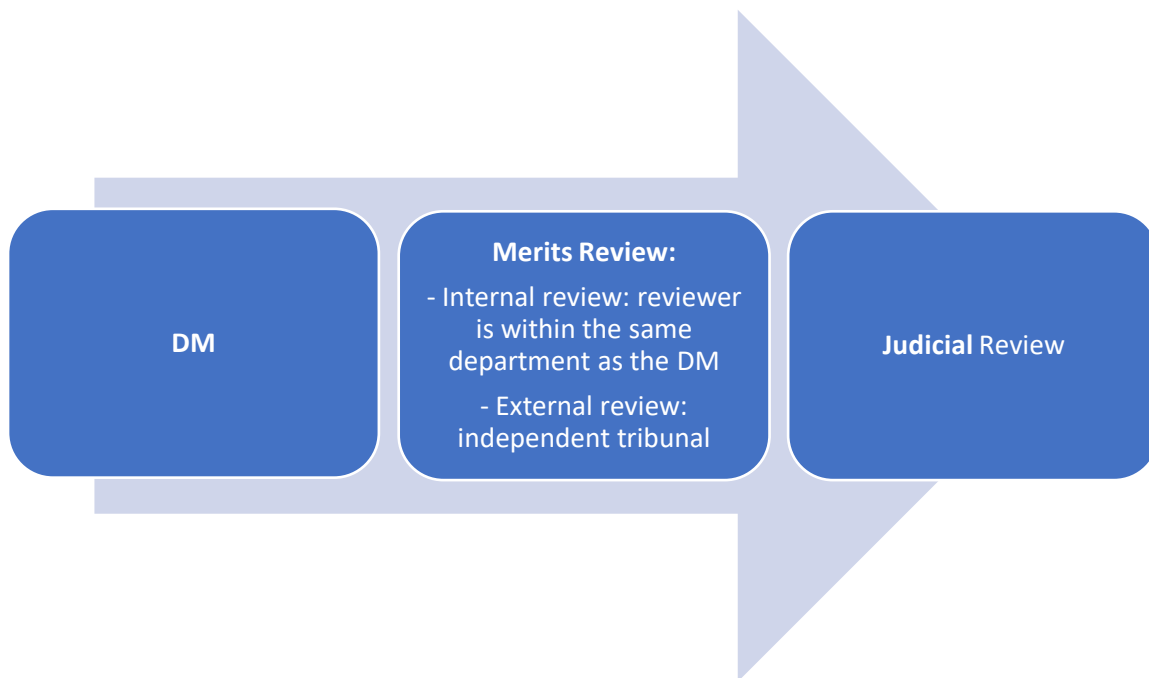


ADMIN LAW THEMES/KEY IDEAS



1. JUDICIAL REVIEW AND JUDICIAL RESTRAINT:

Towards Open Standing?

- Support for open standing has come from the ALRC, which in 1996 recommended legislative reform of the law
 - Any person should be able to commence and maintain public law proceedings unless,
 - The relevant legislation clearly indicates an intention that the decision or conduct sought to be litigated should not be the subject of challenge by a person such as the applicant; or
 - In the circumstances it would not be in the public interest to proceed because to do so would unreasonably interfere with the ability of a person having a private interest in the matter to deal with it differently or not at all.

Towards Open Standing	Against Open Standing
Judicial system becomes more accessible to people – less money, quicker	Floodgates argument- don't want to overburden the court
No consistency in the law regarding standing- recognises the failure of the courts to produce a coherent jurisprudence fleshing out the special interest test	Supremacy of parliament- leave it up to parliament to decide what things can be challenged.- reflects a preference for legal accountability over political modes of holding government decision-makers to account for their decisions
Rule of law- everybody has a right to bring an action- allows increased citizen and group participation consistently with some theories of democracy	There are other ways of creating change- political means- if people care enough about it

Not many people would meet the special interests test proposed in Bateman's Bay/ACF- stringent test	Other forms of avenues such as private or civil suits
Standing is only one criteria of application – court will consider other factors before making a decision	'lawfare' argument: prevent people from seeking revenge through courts- vexatious
The court has the power to strike down vexatious proceedings	Broad standing gives discretion
Broader notion of standing is starting to be recognised by courts- ACF	People bringing the action forward might not have the best interests of the other party in mind
Environmental matters- we need an expansion of standing rights to hold environmental law accountable-	Parliaments were elected in on a majority- don't want to effect this
	Although open standing may facilitate review of applications other factors may work to restrict its effectiveness
	Although the any person rule would continue to allow people with personal grievances to challenge decisions which interfered with their private rights or personal interests, it would also allow others to challenge such decisions- question of whether there are any circumstances in which those with a personal interest in a decision should have priority in determining whether or not the decision should be challenged by way of judicial review proceedings
	<p>May affect the development of other administrative law principles</p> <ul style="list-style-type: none"> • Relationship between standing and the doctrine of non-justiciability • Broad standing rules may encourage interest groups to use applications for judicial review as a political tactic. • Connection between standing rules and the 'matter' requirement is not quite clear • Moves away from the interest model of standing raise the question of whether developments in the law of standing may outstrip the development of the grounds of review <ul style="list-style-type: none"> ▪ If an applicant's complaint is that they were not consulted, broad standing rules may not assist them unless the rules of procedural fairness are further developed to impose a general duty to consult ▪ It may be argued that the proper place for the expression of their points of view is in administrative and political processes, not in the courts
	<p>Broad participation rules might increase the cost, in time and resources of litigation</p> <ul style="list-style-type: none"> - Might also change the nature of the judicial process that courts would begin to look more like executive decision-makers - If a rule of open standing were adopted, more attention would need to be paid to the development of clearer principles regulating other modes of involvement in litigation.

Environment Protection and Biodiversity Conservation Act 1999-Sect 487- extended standing for judicial review

- “(2): *An individual is taken to be a person aggrieved by the decision, failure or conduct if*
 - *The individual is an Australian citizen or ordinarily resident in Australia or an external Territory; and*
 - *At any time in the 2 years immediately before the decision, failure or conduct, the individual has engaged in a series of activities in Australia or an external Territory for protection or conservation of, research into, the environment”*
- In 2015, an attempt was made to repeal this section to restrict green groups from challenging major developments under federal law
- This was in response from the appeal against the approval of the controversial Carmichael coal mine, being developed by the Adani Group, on environmental grounds- initiated by the Mackay Conservation Group- the idea was that this stopped economic growth, jobs etc.
 - Claimed that this decision could have a negative impact on current free trade agreement negotiations with India

Non-Justiciable: Should all decisions be reviewable?

KEY IDEAS:

- Polycentricity- idea that courts are not equipped to deal with issues such as foreign policy
- Undermines the rule of law but can be said to strength the separation of powers- by acknowledging that some executive decisions should not be reviewable
- Imposes a limit on judicial review

The meaning of 'non-justiciability':

- If a court concludes that a decision is non-justiciable, it will decline to exercise its jurisdiction to review it on the basis that judicial involvement is not 'appropriate' or 'proper'

Separation of powers and institutional choice:

- Protection of liberty main goal of SOP
- But the commitment to separating power often justified by the importance of matching particular tasks (functions) to institutions (forms).
 - **Barber:** 'the separation of powers is a vigorous contemporary doctrine that recognises the central importance of institutional choice' in constitutional analysis and design

Review of prerogative powers:

- Two ways of thinking about these powers
 - Broad- prerogative powers encompass all non-statutory powers of the executive arm of government, including 'common law' powers held in common with other legal persons

