Step two: Standing

Avenues available for challenging the decision to grant or cancel licence

Situation: Does the person have standing for judicial review?

Standing: Common law judicial review

Step one: Aggrieved person's test

Limb one: Is there an interference with a 'private' right?

Private interest: A person will have standing if the interference with a public right also results in an interference with a private right. **– *ACF*.**

- **Requirement:** There must be interference with a private right.

Private right examples:

- **Licence:** An applicant's interest in their application for a licence.

Public right: A public interest effects public interests and the public at large, as opposed to only an individual.

- The impact is shared collectively by the public.

Public interest examples:

- Government development that impacts the environment.
- Infrastructure project causing traffic and noise in the community.
- Government decision impacting health care, housing or services.
- Allocating of funding that causes disadvantage to a group of people.
- Decisions impacting climate change.

No private right: Is there is no interference with a private right, apply try limb two.

Limb two: Is there 'Special interest'?

Special damage test: A person will have standing if the party: **– *ACF*.**

- Suffered 'special damage peculiar to himself'; or
- 'Having a special interest in the subject matter'.
    - **Damage is distinct:** The damage suffered by the party from the Minister's decision must be substantially greater or significantly different to that suffered by any other member of the public. **– *Onus v Alcoa*.**

'Special interest' requirements: A person will have a 'special interest' if: **– *ACF*.**

1. **Gain an advantage:** The person is likely to gain some advantage if the action succeeds (other than satisfaction of righting a wrong, upholding a principle or winning a contest). **– *ACF*.**
2. **Suffer disadvantage:** The person is likely to suffer a disadvantage if the action fails (other than a sense of grievance or a debt for costs). **– *ACF*.**
    - **Actual damage:** The plaintiff must show actual or perceived damage to their property or proprietary rights, business, or economic interests, or social and political interests. **– *ACF*.**
3. **Not intellectual/emotional:** The person has more than a mere intellectual or emotional concern. **– *ACF v Commonwealth*.**

Recognised special interests:

- **Economic damage:** An aggrieved person will include someone whose economic interests are impacted. **– *Argos*.**
- **Damage is distinct:** The damage must be substantially greater or significantly different to that suffered by any other member of the public. **– *Onus v Alcoa*.**
- **Cultural connection:** Cultural and spiritual, and ancestry based connected to the land are sufficient to grant individuals legal stranding in environmental or heritage distributes. **– *Onus v Alcoa*.**
    - **Case facts:** Successful argument of a special interest from two indigenous Australians to prevent construction of a aluminium smelter due to their cultural connection to the land.
- **Government funded/recognised organisation:** A government recognised and funded environmental organisation is distinct from other members of the public. **– *North Coast Environment Council*.**

- **Peak/significant organisation:** An organisation that is a peak organisation or highly significant in the specific area to its cause is considered has a special interest: **– *North Coast Environment Council*.**
    - Conducts or coordinates projects on the topic.
    - Conducts research on the issue.
    - Makes submissions to government on the issue.
    - Recognised body on the matter for addressing concerns on the topic.
- **Trade union:** A trade union has a special interest as a minister's decision will directly impact when union members can work and the conditions of employment. **– *Shop Distributive & Allied Employees Assoc*.**

Step two: Attorney-General's fiat (No private interest)

No private interest: An individual may sue in the Attorney-General's name by obtaining the Attorney-General's fiat if they do not have a private interest to challenge the administrative decision.

- Successfully application for fiat. **– *Re McBain; Ex Parte Australian Catholic Bishops Conference*.**
- **Case facts:** They were not an 'aggrieved person' and lacked 'standing' (no private interest) to challenge the Federal Court's decision directly.

Attorney-General's fiat (ex officio): The Attorney-General's standing to seek an injunction to protect public rights/public interest.

- Fiat = Official authorisation to do something.
- Provides the Governor-General the power to seek judicial review of decisions that affect public rights.
- Permits the person to seek judicial review on the behalf of the Governor-General.

Not granting a fiat: The decision of the Governor-General to grant a fiat is not subject to judicial review. **– *Gouriet*.**

Standing: Statutory judicial review

Step one: Aggrieved person

Aggrieved person: A person who is an aggrieved person can apply to the Federal Court, Federal Circuit and Family Court for an order of review of the decision. **– Section 5(1) *ADJR Act*.**

Aggrieved person: A person will be aggrieved by a decision if: **– Section 3(4) *ADJR Act*.**

- **Decision:** (i) A person's interests are adversely affected by the decision; or
  Decision: (ii) Decision is or is not made in accordance with a report; and
- **Conduct:** A reference to a person aggrieved by conduct has been, is being, or it proposed to be, engaged in for the purpose of making a decision or by a failure to make a decision includes reference to a person whose interests are or would be adversely affected by the conduct or failure.

Step two: Aggrieved person's test

Common law test: The *ADJR Act* test is the same as the common law test. **– *Tooheys*.**

Limb one: Interference with a 'private' right?

Public and private interest: A person will have standing if the interference with a public right also results in an interference with a private right. **– *ACF*.**

Public right

Public right: A public interest effects public interests and the public at large, as opposed to only an individual.

- The impact is shared collectively by the public.

Public right examples:

- Government development that impacts the environment.
- Infrastructure project causing traffic and noise in the community.
- Government decision impacting health care, housing or services.
- Allocating of funding that causes disadvantage to a group of people.
- Decisions impacting climate change.

Private right

- Licence: Applicant's interest in the outcome of their application for a licence (that whose outcome only impacts the individual).

No private right: Is there is no interference with a private right, apply try limb two.

Limb two: Is there 'Special interest'?

Special damage test: A person will have standing if the party: **– *ACF*.**

- Suffered 'special damage peculiar to himself'; or
- 'Having a special interest in the subject matter'.
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    - **Actual damage:** The plaintiff must show actual or perceived damage to their property or proprietary rights, business, or economic interests, or social and political interests. **– *ACF*.**
3. **Not intellectual/emotional:** The person has more than a mere intellectual or emotional concern. **– *ACF v Commonwealth*.**
    - **Freedom of speech:** Right to freedom of speech and to influence public opinion does not translate into a right of standing to pursue proceedings in a court of law. **– *RTL v Secretary, Department of Human Services and Health.***

Recognised special interests:

- **Economic damage:** An aggrieved person will include someone whose economic interests are impacted. **– *Argos v Corbell, Minister for Environment and Sustainable Development*.**
- **Damage is distinct:** The damage must be substantially greater or significantly different to that suffered by any other member of the public. **– *Onus v Alcoa*.**
- **Cultural connection:** Cultural and spiritual, and ancestry based connected to the land are sufficient to grant individuals legal stranding in environmental or heritage distributes. **– *Onus v Alcoa*.**
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