TABLE OF CONTENTS

1B: THE BIG PICTURE – ADMINISTRATIVE LAW IN IT'S BROADER CONTEXT

READINGS

Cane & McDonald, Principles of Administrative Law (2nd edition), Chapter 2

- Concerns historical context and development of admin law, particularly the prerogative writs.

Cane & McDonald, Principles of Administrative Law Casebook: pp. 12 – 21

R V PANEL ON TAKEOVERS AND MERGERS; EX PARTE DATAFIN PLC [1987] QB 815

R v Panel on Takeovers and Mergers; ex parte Datafin PLC	
Facts	• The Panel on Takeovers and Mergers had code of conduct for takeovers of public companies on the stock exchange. • The panel is a self regulating body without a legally enforceable base. • If the panel found a breach, they could prevent a trader for listing stocks, give various sanctions and refer to the **Department of Trade and Industry**. • Panel investigated and rejected a complaint from Datafin about two companies that breached the code (Norton Opax and Kuwait Investment Office) • Datafin applied for judicial review of the decision.
Issues	1. Jurisdictional: are the decisions of the panel susceptible to judicial review? 2. Practical: if so, how is the jurisdiction to be exercised? 3. If jurisdictional issue answered positively, if relief is to be granted, what form? ***What is the appropriate reach of administrative law?*** -Blurring of the private and public (admin/governmental) spheres.
Decision	Court potentially had jurisdiction to undertake judicial review, however, not in this case as the Panel had not made a legal error. Court could only consider the illegality where "the panel's decision is so outrageous and its defiance of logic or of accepted moral standards". • Jurisdictional: listing of shares is a statutory function performed by the Stock Exchange in pursuance of the Stock Exchange (Listing) Regulations 1984 – legal sanction? Its lack of a direct statutory base is an anomaly. Private tribunals have always been outside the scope of certiorari since their authority is derived from contract (agreement between parties involved) • Practical: decisions of the panel remain fully effective unless and until they are set aside by a court of competent jurisdiction. Where there is a breach, internal right of appeal must first be exercised. • An application for judicial review is not an appeal – the panel and not the court is the body charged with the duty evaluating the evidence and finding the facts.
Key Quotes	• *Czarnikow v Roth, Schmidt & Co* [1922]: no individual or association is outside the law except a trade union. • "use of the remedies of certiorari and mandamus would be in the event…of the panel acting in breach of the rules of natural justice…unfairly"

ARTICLE: PERRY – THE ADMINISTRATIVE REVIEW COUNCIL REPORT ON JR: RENAISSANCE OF THE ADJR ACT?

Melissa Perry, 2013

- The ARC keeps the system under review.
- Errors as the centre-piece of s 75(v) → minimum standard of JR.
- There is increasing divergence between the 2 avenues of JR available in the Federal Court – s 39B and the ADJR.
- The ADJR Act was intended to overcome many of the technical issues associated with obtaining what we now describe to be constitutional writs under s 75(v).

- **Strengths of the ADJR Act:**
    - Clear procedure for initiating JR
    - Set standing criteria
    - Range of decisions to which scheme applies
    - Legal requirements for a lawful decision
    - Made available flexible remedies
    - S 13 – right to obtain written reasons for a decision.
    - Procedural benefits – enhance the availability and accessibility federal JR.

> *"…the ADJR Act has played a central role in improving the quality of Australian Government decision making since 1980 and elevating respect for the rule of law in government. An important body of jurisprudence that lies at the core of Australian administrative law and that is generally understood within government has been developed under the ADJR Act. The relative ease with which proceedings can be commenced under the Act means also that judicial review is more accessible to the Australian community and that proceedings can be commenced without professional legal assistance."*

LECTURE

Assignment

- person implicated by a decision of a government department
- Recognise it is an admin law issue
- Governmental discretion eg under immigration law on an individual law and they are using admin law mechanisms to challenge it.
- Identify and summarise admin issue that is capable of challenge
- Need to use an admin/accountability mechanism

Core concepts:

- The rule of law
    - Curbing arbitrary use of power
    - Integrity of the law → writs
- Parliamentary supremacy
    - Discussion exercise:
        - Dicey
        - Legislative power
        - Statute v common law
        - Re admin: HR
        - Weakness?
        - Courts reluctant to rule on policy
        - Relationship IMR
        - Australian history of political accountability
        - Supreme re: law but also in holding the executive to account.
        - Courts ensure parliament acts within the powers that they have been given – connects to the rule of law.
        - ROL in tension with parliamentary supremacy through common law – there has been a breach of due process/procedural fairness (ruling).
- The separation of powers

Kerr report:

- What was it?
    - Report evaluating the ADJR

    - Recommended the establishment of a tribunal, with jurisdiction covering government activities to review decisions of administrative officials and admin tribunals.
        - Reason: currently inadequate provision made for citizens to challenge administrative decisions **on their merits** because it was the view that most admin decisions raise non-justiciable issues and that reviewing merits (not legality) of such decisions is **not a judicial function** so could not be undertaken by the chapter 3 courts. SO → tribunal was established as a body exercising power under Chapter 2.
        - Administrative Appeals Tribunal established by the *Administrative Appeals Tribunal Act 1975* (Cth) which has the power of **merits review.**
- What did it change?
    - Created the Admin Review Tribunal
    - Merit-actions (can re make decision), judicial – the way it was enacted or passed, supervisory (look from above at way it was made – was it within their power?)
- Why did the administrative justice system need to change?
    - Scale of decision making was huge and problem of access to justice.
    - Bringing administrative justice closer to the person affected by the decision.

<u>Problem:</u>

- Ombudsman looks at maladministration, can only recommend change to decision (cannot remake decision) = weak avenue.

<u>The reach of administrative law</u>

- Greater privatization of state activities
- *Datafin* – issue of privatisation

2A: JUDICIAL REVIEW – SCOPE

READINGS

Textbook: Chapter 3

THE SCOPE OF JUDICIAL REVIEW

3.1 - General introduction to judicial review

- Federal level – HC original judicial review jurisdiction derives from the Constitution.
- Statute – Federal Court shares constitutional jurisdiction AND *Administrative Decisions (Judicial Review) Act 1977* (Cth) AND *Judiciary Act 1903* (Cth).
- State courts – 'inherent' or 'supervisory' judicial review jurisdiction. Legal source originally thought to come from common law.
    - HC held in *Kirk* – aspects of this jurisdiction protected by the federal Constitution.
- *ADJR* – confers judicial review jurisdiction + contains rules about the scope and grounds of, and access to, judicial review, and about remedies.
- *Kirk* effect – bring into alignment the law associated with the supervisory jurisdiction of state courts on these matters with the law applicable in the constitutional judicial review jurisdiction of the HC.
- HC – appellate jurisdiction re: JR jurisdiction of other federal courts.
- Succeed JR application requires:
    - Court must have jurisdiction + accept it is a justiciable issue
    - Applicant = appropriate person (standing)
    - Breach of administrative law norm (ground of review)
    - Court power to grant remedy.

3.2- The nature of the courts' review jurisdiction

- JR originally a product of the common law
    - Courts' power (jurisdiction) = inherent.
- Courts consistently denied that the purpose of review is to usurp powers given by statute or common law to government administrators.
- Purpose of review is to supervise.

3.2.1- The appeal/review distinction

- Distinction focuses on idea that although appeal courts can substitute their own decision for that of the original decision maker, a review court **cannot**.
- If only one legally available outcome → remit decision to original decision maker to be made in accordance with the law. CONTRAST → JR from common law, appeals from **statute**.
    - Appeals = greater power, can consider law, fact and policy → **power to substitute a decision**.
    - CONTRAST → JR has standard remedies connect with conclusions about legality (validity), **not** the correctness of the decision.
        - Court's limited remedial powers in JR reflect supervisory rational for JR where role of courts (ROL) is to ensure those exercising powers conferred by parliament are kept within the limits of the jurisdiction (ultra vires). JR not intended to take power from government.
        - Courts can supervise the boundaries an administrator's legal powers, but should not exercise those powers.

3.2.2 Judicial review, merits review and the separation of powers

- JR – a review of the manner in which the decision was made (procedure) Vs merits (substance).

- Wednesbury unreasonableness – a decision may be held illegal where it is so unreasonable that no reasonable decision maker could have so decided.
- Legality/merits divide reflect concern that JR should not in name of ROL enable judges to colonise public admin by reference to their own perceptions of what good admin requires.
- Brennan J – courts not equipped to make decisions which require many interests to be balanced.
- HC held Ch 3 Constitution subjects federal executive power to the power of the law → judicature = safeguard on powers of admin decision makers.

3.3 The shifting and complex boundaries of judicial review

- Historical institutional approach of JR → certain decision makers (GG) and categories of power (prerogatives).
- Q: extent to which some private decision makers should be subject to JR when undertaking governmental/public functions.
- Some states = statutory regimes + supervisory common law jurisdiction.
- Federal level – multiple statutory sources of jurisdiction + HC constitutionally entrenched JR jurisdiction.
- *Kirk* – aspects of state Supreme Courts' supervisory jurisdiction cannot be removed by legislation.
- Core part of state jurisdiction derived from constitution → integrated judicature.
- Emergence of 3 bases for JR: constitutional review (s 75(v)/ s 39B(1)), statutory review + common law (supervisory jurisdiction).

3.4 Constitutional sources of judicial review jurisdiction

3.4.1. Section 75(V) of the Constitution and s 39B of the *Judiciary Act*

- HC original JR jurisdiction through availability of named remedies: mandamus, prohibition and injunction **against an officer of the commonwealth**.
    - Purpose: ensure the HC has jurisdiction to determine the legality of Commonwealth government decisions. Maintenance ROL.
- Importance of s 75 reasserted due to way in which federal statutory regime attempted to reorient the law of JR away from the prerogative writs to a focus on the ground on which decisions could be reviewed.
- ADJR intended to simplify the law by sweeping away technicalities associated with JR remedies but this has been frustrated by narrow interpretations of the Act's jurisdictional requirements.
- Following commencement of ADJR Act, realised some decisions could not be reviewed under the Act and so were left to the ambit of s 75(v)
- 1983 s 39b(1) inserted into the *Judiciary Act* to confer identical jurisdiction on the Federal Court to avoid overburdening the HC with trials. Meant original jurisdiction HC cases could be remitted to the Federal Court.

3.4.1.1 The emergence of the constitutional remedies

- constitutional foundation of JR under s 75 (and 39b) = prominence by product of the legislature's successive attempts to curb Federal Court's powers to review **migration decisions** (policy driven).
- Federal court jurisdiction (ADJR + Judiciary Act)
- Federal court review jurisdiction originally limited to migration matters = narrow.
- HC rebadged s 75(v) remedies by replacing the language of prerogative writs with that of the constitutional writs and the constitutional injunction.
- Grounds of JR under s 75 linked to remedies.
    - Jurisdictional error → JR under s 75 and s 39 as constitutional writs are **only** available for excess or denial or jurisdiction.
    - At common law, certiorari available for both jurisdictional and non jurisdictional errors of law.
    - Certiorari (not named in s 75) is available as an **ancillary remedy** – where necessary for the effective exercise of the remedies named is s 75. However, if errors complained of are **within jurisdiction** there is no remedy under s 75 to which certiorari might be appended.

3.4.1.2 'Officer of the Commonwealth' → **limitation of constitutional judicial review**

- Applications for constitutional remedies under s 75 are limited to claims where relief is sought against an officer of the commonwealth → HC jurisdiction depends upon some sort of institutional **nexus being established between the decision maker and the government.**
- Government can engage private bodies → discretion re: nature and closeness of the required connection.
- Government can evade judicial scrutiny under s 75 (and 39) by the adoption of a corporate form.
- Orthodox definition → "a person appointed by the commonwealth to an identifiable office who is paid by the Commonwealth for the performance of their functions under the office and who is responsible to and removable by the commonwealth concerning the office.
- Formal appointment to an office is required? HC yet to rule.
- Some cases justify the exclusion of corporate bodies on the basis of their independence from government.
    - *Plaintiff M61.*
- Question of whether judicial review remedies may be granted against non-gov bodies.
    - *NEAT* case: whether a private corporation given a role in a scheme of public regulation, whereby it could protect its own statutory monopoly to export wheat by vetoing an application made to the government regulator to allow its competitors to export wheat, was able to be reviewed under the ADJR Act.
- S 75's ROL purpose justifies a flexible and expansive approach to the meaning of office of the commonwealth.
- The constitutional text is likely to make it difficult for the HC to fully adopt the English public function test.

3.4.1.3 The 'matter' concept

- Constitution confers jurisdiction, and allows for the parliament to make laws conferring jurisdiction **only in relation to specified matters.**
- Particular focus of non-justicability in the s 75(v) jurisdiction has been the exclusion of abstract or hypothetical questions from the 'matter' concept → jurisdiction to issue advisory opinions cannot be conferred on the HC.
- Requirement for a justiciable matter intersects with the question of whether and applicant has sufficient interest (standing) to bring the action.

3.5 STATUTORY SOURCES OF JUDICIAL REVIEW JURISDICTION

3.5.1 *Administrative Decisions (Judicial Review) Act 1977* (Cth)

- Hope was that it would become the main vehicle for JR of decisions of the Commonwealth government.
- Included modifications to the common law → substantially declatory of the common law.
- CL broadened → changed the traditional approach to determining the availability of review.
- Act shifted attention away from the availability of particular remedies and towards whether or not a ground of review could be established (where legal error can be shown).
- Applications under the act must:
    - 1. A decision to which this act applies s 5
    - 2. Proposed and actual conduct engaged in for the purpose of making a decision to which this act applies s 6
    - 3. A failure to make a decision to which this Act applies s 7.
        - "decision to which this act applies requires:
            - 1. A decision
            - 2. Of an administrative character
            - 3. Made under an enactment.
                - Each element has been treated discretely, resulting in considerable litigation which has not generated an integrated set of principles.
- 2 decisions exempted from the Act: those made by the GG and those listed in Schedule 1 of the Act such as tax assessments, criminal proceedings, migration, security and defence.

3.5.2 Jurisdiction under the *Judiciary Act*

- In 1997, s 39B(1A)(c) inserted to create a further source of federal judicial review jurisdiction, extended to include all matters arising under any laws made by the parliament.

- Consequence of amendment: Federal Court can review the legality of subordinate leglisation (not reviewable under ADJR as it is not of an administrative character).
- Suggested that s 39B(1A© was intended to provide ample scope for judicial review jurisdiction.

3.5.3 Statutory sources of judicial review jurisdiction the state courts

- Alongside supervisory/common law jurisdiction → ACT, Qld and Tas, modelled on ADJR Act.
    - In Qld- also includes administrative decisions made by public officers or employess under a non statutory scheme.
    - Though commonwealth parliament can invest state courts with federal jurisdiction, there is little scope for state courts to exercise federal JR jurisdiction.

3.6 THE SUPERVISORY JURISDICTION OF STATE SUPREME COURTS

- All state supreme courts have CL/supervisory JR jurisdiction.
- *Kirk* – aspects of state JR jurisdiction have constitutional significance. Held: defining characteristic of a state Supreme Court is the power to review decisions made by state decision makers on the basis of jurisdictional error. Some aspects of relief which may be granted in exercise of this jurisdiction are not entrenched in the Constiution. **The line between when relief is entrenched by the Constitution and when it is not is maked out by the key distinction between non jurisdictional and jurisdictional errors.**
- Ultimate source of power in Constitution.
- Courts use 'non justiciability' to limit reach of review – even where decision is 'public', jurisdiction to review that decision may be declined it is concluded that the decision is not apt for review by judges and courts.

3.6.1 Review of 'public' decisions

- *Datafin* – decisions which are made in the exercise of a 'public function' are subject to JR.
- Private functions or powers are not judicially reviewable even if exercised by a government body.
    - Contractual powers are generally a private dunction – legal source of a body's power can indicate the nature of the functions performed and thus be relevant to its amenability to review.
- *Datafin* – relevance of the identity and characteristics of the decision maker, sensitivity to context.
- JR jurisdiction of HC only for jurisdiction error → **when a decision maker acts outside the limits of their authority** (ultra vires).
- Although prerogative writs aren't against private clubs, declarations and injunctions are available in relation to decisions of such bodies affected by errors which would constitute a ground of judicial review **if the decision had been made by a government defendant.**

3.6.2 The meaning of 'non-justiciability'

- Justiciability: the aptness of a question for judicial solution.
- Non-justiciable – court will decline to exercise its jurisdiction to review it, involvement is not appropriate or proper.

3.6.2.1 Separation of powers and institutional choice

- Separation of power justified by the importance of matching particular tasks (functions) to institutions (forms).
- Distinction between the legality of a decision and its merits is not merely reflective of the importance of a strictly separated judicial branch to disperse power and to provide a ROL check on the executive branch. Also ensures that courts do not meddle in matters ill-suited to resolve, such as high level policy → also reflected in notion of **non-justiciability**.

3.6.2.2 Review of prerogative powers

- Two basic schools of thought about the nature of the prerogative powers:
    - Broad – prerogative powers encompass all non-statutory powers of the executive arm (these can't be reviewed then) such as power to enter into contracts

    - Narrow – prerogative powers are those non-statutory powers of the executive arm which are specific/unique to it. Eg. powers to declare war, enter treaties, diplomacy etc.
- Suggestions that the executive power of the Commonwealth (s 61 constitution) extends beyond the categories of prerogative powers recognised at common law and the express constitutional powers to execute and maintain the constitution. Such suggestion assumes that any powers which are 'essential' to the existence of a sovereign nation must repose in the national *executive*.
- Law regarding non-statutory executive power complicated by *William v Commonwealth* (chaplaincy services in schools by Commonwealth, operated by Qld State Gov, exceeded executive power under s 61 Constitution)
- *Williams:*
    - S 61 does not confer the same powers on Commonwealth executive as those conferred by the common law.
    - The scope of the executive power in s 61 is not defined by ss 51, 52 and 122.
    - Considerations of the federal distribution of powers and responsible government limit the scope of Commonwealth executive power.

<u>Non-justiciability and the rule of law</u>

- Idea that some exercises of executive power raise non justiciable question arguably limits the reach of the ROL (enforced by the courts).
- Courts tend to justify conclusions of non-justiciability by reference to 2 themes:
    - Expertise and institutional capacities of courts
        - Courts can't handle polycentric problems – disputes characterised by numerous, complex, interrelated issues which affect a large number of interest. Court's adjudicative methodology cannot respond to ALL interests.
    - Courts relative political responsibility
- *Poko-Wallsend:*
    - Commonwealth nominated Kakadu to be World Heritage Listed
    - Decision was non justiciable – Bowen Cj: "the whole subject matter of the decision involved complex policy questions relating to the environment, the rights of Aboriginals, mining" etc, need be resolved in the political arena.
- Difficulties with polycentricity as a reason: it's a matter of degree and assumes a static model of adjudication (procedures of courts can be changed to reflect the nature of the tasks they are set). Fails to appreciate the limited nature of JR – review is never directed at the *merits* of a decision.
- Surprising if mere connection of a decision with politically sensitive subject matters was a sufficient reasn to render it non-justiciable.
- In some instances, certain grounds of judicial review would be sensibly applied to actions or decisions made in the conduct of international relations (traditionally off limits to judges).
- Argument that the final say should be left with more politically responsible actors → Judges are not required to judge the substance of these questions but only the legalities.
- Classifying a decision as non-justiciable will come at a cost to the ROL.

NEAT DOMESTIC TRADING PTY LTD V AWB (2003)

NEAT Domestic Trading Pty Ltd v AWB (2003)	
Facts	• s 57 *Wheat Marketing Act* (Cth) provided that was an offence to export wheat without written consent from Wheat Marketing Authority. • Act stated that the Authority was NOT to grant consent UNLESS AWBI had given its prior written consent to export. • AWBI was a wholly owned subsidiary of AWB - both were companies owned by wheat growers & incorporated under the Corporations Law (why the case is against AWB • NEAT was refused export approval. • At trial, Federal Court dismissed the action. • HCA- majority dismissed the appeal from the Federal Court Tribunal → NEAT lost.
Issues	• AWBI had a right to export wheat under the Act; therefore it could maintain a monopoly by vetoing the export of wheat by a competitor. • NEAT challenged refused export approval under the ADJR submitting that AWBI had applied the policy inflexible without regard to the merits of the case. • **Issue:** whether a decision by a private company that had statutory effect was a decision that was reviewable under the ADJR Act? • Rule: decision made by a private company, which has a statutory effect, is not considered a reviewable decision under the ADJR Act.
Decision	• Public law remedies are not available against private companies. • AWBI's existence is not drawn from the Act, but it is a company limited by share incorporated under Corporation law. • If a company is under the *Corporations Act*, one would expect the company would behave like a private company. • The aim of a private company such as AWBI is to maximize profits, a private objective. Subsequently, AWBI is under no duty to consider *public* considerations when deciding whether to grant approval. • Cannot impose public law obligations on AWBI while accommodating their private interests.
Kirby dissent	• AWBI's refusal to grant consent was a decision of administrative character because it was made pursuant to governmental or statutory authority which enabled AWBI to pursue interests much wider than the private interest of an ordinary corporation → AWBI was a private corporation BUT was a *repository of public power*. • AWBI was acting as a quasi-regulator of the industry/competitors = should be subject to accountability measures.

AYE V MINISTER FOR IMMIGRATION AND CITIZENSHIP (2010)

Aye v Minister for Immigration and Citizenship (2010) (casebook 62-67)	
Facts	•
Issues	
Decision	She wanted to challenge that policy decision but the court would not allow it as the correctness or otherwise of the policy is not justiciable. If the applicant's claims had related to whether she fell within the terms of the policy; the application of the policy rather than its content; those claims would have been justiciable regardless of the foreign affairs context of the decision. • •

LECTURE

Goals:

- Big picture
- Limitations
- Difference between legality and merits
- Notion of jurisdiction – procedural rules of the court to exercise JR jurisdiction
- Public and private justiciability

Scenario: merits or legality?

- Coal mine expansion:
  - Merits
  - Legality/JR → look at statute behind the approval, are frogs protected (failed consideration → statement of reasons for decision)?
- Deportation:
  - Case by case
  - Background
  - Were all factors considered? What factors needed to be considered? How were they considered? (family, employment)
  - Due process?
  - If merits review failed → judicial review:
  - JR remedy → apply for an injunction
  - Statute = option to re make decision (effectively an appeal)
- JR v statutory right to appeal.

JR and sources of jurisdiction

COURT	SOURCE OF JR JURISDICTION?	LIMITATIONS
HIGH COURT	• Constitution s 75(v)	• "officer of the commonwealth" • specified matter
FEDERAL COURT	• Constitution s 75(v) • ADJR • Judiciary Act	• "officer of the commonwealth" • narrow interpretation of ADJR. • Judiciary act – relate to matter and OotC • Exceptions under Sch 1 ADJR Act- decisions by GG
STATE SUPREME COURTS	• inherent/supervisory – common law • *Kirk* – from federal Constitution • Some states – statutory regimes	• Minimal scope for state courts to exercise federal JR jurisdiction • Non justicability – to limit the reach of review

- Struggle between courts and executive as to who has the final say
- Policy → migration

2B: JUDICIAL REVIEW - STANDING

READINGS

Cane & McDonald, Principles of Administrative Law, Chapter 6

ACCESS TO JUDICIAL REVIEW

6.1 Two approaches to standing

- Standing = *locus standi*.
- Two ways: interest-based grievance model (interest model)

Interest model	Enforcement model
• Asking whether they personally have a legal right/interest which has been adversely affected by the admin decision. • Reflects the view that the primary purpose of JR is protection of individuals against abuse of gov. power. • Depends on contextual analysis of facts of each case, large degree od judicial discretion.	• Asking whether they are an appropriate person to enforce admin law norms. • Court may have regard to their identity and qualifications. • Possible answer: "those whose interests are affected by a decision" • Cannot merely be based on the nature of the applicant's interests in the subject matter of the decision. But occasionally may be sufficient.

Development of judicial review – phases

1. Writs originally developed as a means by which more powerful officials (the Crown) could control inferior bodies by ensuring that they complied with the law. JR conceived of primarily **in terms of enforcement of compliance with the law.**
2. By end of 19th C, prohibition = protective of the rights of the subject (person), rather than as a safeguard of the prerogative (gov. power).
3. Purpose of s 75(v) also includes policing the federal compact and ensuring the courts are able to restrain officers of the Commonwealth from exceeding their jurisdiction = broad ROL purpose explain change from prerogative to 'constitutional' writs.
    a. Requirement of a 'matter' under s 75 does not necessitate adoption of interest-based standing rules or prevent the legislature enacting an open standing regime.

- Traces of both models seen in the rule that the AG may bring proceedings for declarations and injunctions to enforce admin law norms – AG always has standing to enforce public law norms based on identity (rep of gov.) and qualifications (principal law officer of the Crown).
- AG can also give permission (**fiat**) to another person to apply for JR in the AG's name by way of a 'relator action'.
    - An individual who lacks sufficient interest (standing) to apply for JR → AG may authorize in their name.
    - AG unlikely as a minister of the gov. to do so where action would cause the gov. embarrassment.
    - AG decision to grant/withhold permission not reviewable = non-justiciable.
    - **Modern law of standing** → *Australian Conservation Foundation v Commonwealth (ACF).*

6.2 *Australian Conservation Foundation* and the special interest test

- ACF rule: applicant must shoe wither that the decisions interferes with their private law rights (property/contractual) or that they have a 'special interest' in the subject matter of the application.
- HC elaborated on 'special interest' negatively → more than a "mere intellectual or emotional concern", must be seeking more than "the satisfaction of righting a wrong, upholding a principle or winning a contest"
- Interests shared with the public at large insufficient → ACF's commitment to conservation did not give it a special interest in the preservation of the environment. Interest was ideological.
- Case reflects the **interest model** – refusal of standing based on fact applicant was not seeking to remedy a personal grievance. Related to a view that the primary purpose of JR is the **protection of individual interests against gov. abuse**.

- Implication of ACF – ideological, intellectual and emotional interests and concerns should be vindicated through political, not legal mechanisms of accountability.
- Courts shifted from thinking about standing in terms of protecting rights and interests to understanding it as defining who may enforce admin law norms.
- Record of involvement in matter/acknowledged as expert body/recognised by gov. (funding) tends to **entrench the status quo** by privileging well-established groups who are already part of the relevant decision making loop (policy network).
- Once interest model replaced by enforcement, may be difficult to resist calls for a regime of open standing.
- *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd:* special interest test, despite it's flexibility, results in an 'unsatisfactory weighting of the scales in favour of defendant public bodies' by requiring plaintiff to d more than show 'the abuse or threatened abuse of public admin.
    - HC accepted that a business competitor could seek review of a decision favorable to a rival operating in the 'same limited market'.
- Enforcing ROL under **open standing**:
    - Courts would have available the ordinary means to prevent abuse of court processes and
    - Could rely on the principles of non-justicability to avoid being drawn into disputes over political issues.

<u>6.3 Standing and specific remedies</u>

- *Bateman's Bay*: special interest in ACF was in context of applications for injunctions and declarations, distinct from standing requirements in application for prerogative writs.
- ADJR's – "only persons aggrieved" can bring applications = consistent with the 'special interest' test.

<u>6.4 Towards open standing?</u>

- Courts remain bound by the special interest test
    - In some cases the test has been extended to the point of virtual abandonment
    - There is a significant level of judicial support in the HC for replacing the test with a regime of open standing.
    - Support for open standing in HC reflective of s 75(v) purpose – to ensure that constitutional, statutory and common law limits on admin powers are not exceeded.
- Support from ALRC (1996):
    - Any person should be able to commence proceedings unless:
        - The relevant legislation indicated an intention that the decision or conduct sought to be litigated should not be the subject of challenge.
        - It would not be in the public interest to proceed/interfere with a private interest.
            - This would result in an instruction to the courts to make discretionary judgments about the circumstances in which individuals personally affected by a decision should be allowed to decide how to challenge decisions.
- Reasons for support:
    - Recognise the failure of the courts to produce a coherent jurisprudence fleshing out the special interest test
    - Allow increased citizen and group participation consistently with theories of democracy
    - Not preclude the use of alternative mechanisms designed to protect the courts from inappropriate applications for review.
    - Marks a decisive move from the traditional interest model to the enforcement model of standing.
    - Greater role for the courts.
- Open standing gives effect to the ROL – requires that the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercised them only in accordance with the laws which govern their exercise – *Corporation of the City of Enfield v Development Assessment Commission* (2000).
- Reflects a preference for legal accountability over political modes of holding government decision makers to account for their decisions.
- Question that open standing raises: 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.

- Would require the courts to clarify the principles of non-justicability.
- May encourage interest groups to use applications for judicial review as political tactic.
- Puts the idea of the courts as impartial arbiters under strain.
- Some judges have commented that the issue of standing is subsumed within the constitutional requirement of matter – a matter may exist even though a case is brought by a person who is not connected in any special way to the challenged decision.
- Two ways in which third parties may participate in litigation commenced by others: as interveners and as *amici curiae* ('friends of the court') – join as a party to the proceedings.
- Australian courts have adopted a restrictive approach to allowing third parties to intervene.

Cane & McDonald, Principles of Administrative Law Casebook, pp. 326-338

BATEMAN'S BAY LOCAL ABORIGINAL LAND COUNCIL V ABORIGINAL COMMUNITY BENEFIT FUND PTY LTD [1998]

Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd [1998] (casebook 238)	
Facts	• Bateman's Bay Local Aboriginal Land Council ("BBLALC") operated a contributory funeral benefit fund business catering for members of the NSW aboriginal community. BBLALC's activities were financed Under the *Aboriginal Land Rights Act* (NSW). BBLALC proposed to conduct a contributory funeral benefit fund catering for all Aboriginal persons. The respondent commenced a proceeding in the Supreme Court of New South Wales seeking an injunction restraining the respondent from carrying on the business of the fund on the basis that its activities exceeded the power conferred by the legislation
Issues	• BBLALC contended that the respondent did not have the requisite standing. • Respondents claimed that the business was ultra vires the powers of the appellants and the subject of an invalid exemption under the *Funeral Funds Act 1979* (NSW).
Decision	• The test of whether a party has "sufficient material interest in the subject matter" of the action "is to be construed as an enabling, not a restrictive, procedural stipulation." • Standing was solely on basis of economic interest. • Parties would be operating the same limited market, allowing would cause detriment to the business of the respondents = sufficient interest for standing. • Appeal dismissed with costs.
Key Quotes	• "where a public authority clothed with statutory powers exceeds them by some act which tends to interfere with public rights and so to injure the public, the AG may move to protect the public interest" •

- if the AG declines to exercise their prerogative to commence proceedings 'to prevent the violation of a public right or to enforce the performance of a public duty', a private individual is unable to challenge the AG's decision.

Tests of standing re: public rights where declaratory or injunctive relief is sought

- what constitutes standing in an application for a prerogative writ may be insufficient for equitable relief.
- The exclusive right of the AG to represent the public interest is constitutional.
- *ACF:* a person is not 'interested' within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong.