

STANDING IN ENVIRONMENTAL INTEREST SUITS

by
Timothy Longwill*

INTRODUCTION

This paper seeks to examine an individual's right to standing on issues involving public interest. The paper concentrates particularly on environmental interest suits and the law in Queensland. The examination has regard to various avenues available to establish standing. These are:

- (1) Suit by way of the Attorney-General;
- (2) Individual standing under the general law;
- (3) Standing and prerogative writs;
- (4) Class actions; and
- (5) Standing provided for by statute.

From a consideration of these areas, the general inadequacy of the law to provide a comprehensive and predictable system of *locus standi* on public interest issues is emphasized, particularly in comparison with the recently reformed English system. Finally, a suggestion is made as to a possible avenue which both the courts and the legislature may take up, to overcome the inadequacies under existing rules in Australia.

Since environmental interest suits fall within the wider category of 'public interest', an initial question arises as to the definition of 'public interest'. Generally, the phrase applies to a right or interest applicable to the public at large with or without any immediate traditional right vesting in a particular individual. Difficulties can arise in two ways:- (a) Where the public interest is affected and according to the traditional rules of *locus standi* an individual has the right of standing to bring an action but does not desire to; or (b) Where according to the traditional rules of *locus standi* no right vests in any person but the public interest is affected.

To define the term 'public interest' at law involves essentially an examination of the host of specific phrases used in specific, predominantly legislative areas of law, all of which are included under the general heading 'public interest'. Phrases such as 'public detriment' or 'public damage' import a damage element but necessarily 'public interest' cannot be limited to issues arising from such criteria. 'Public duty' or 'public right' are also indicative of specialist statutory issues and again, while perhaps included in the broader concept of 'interest', provide too limiting a perspective on 'public interest', concentrating on definable criteria in a statutory context. 'Public interest' is simply an interest of legal concern to the public, although not essentially of concern to any particular individual. Therefore knowledge of the interest by the public is not necessary at the time, as recognition may be accorded by the courts subsequently. The protection of the environment whilst capable of being actionable on the basis of the traditional rules of *locus standi* more often than not falls outside those criteria and remains traditionally non-actionable.

1. The Role of The Attorney-General

The Attorney-General as first law officer of the Crown is the guardian of the 'public interest'. An individual may sue, together with the Attorney-General, firstly, by the grant of his *fiat* or, secondly, by convincing the Attorney-General himself to sue. The former involves joining the individual as a relator to secure costs. Obviously the Attorney-General is bound by limits on his own standing and cannot provide standing through the issue of a *fiat* unless the action falls within the limits of a matter involving the public interest which the Attorney has standing to protect. Fundamentally, as Lord Wilberforce stated in *Gouriet v. Union of Post Office Workers*

... private rights can be asserted by individuals but ... public rights can only be asserted by the Attorney-General as representing the public. In terms of constitutional law, the rights of the public are vested in the crown and the Attorney-General enforces them as an officer of the crown. And just as the Attorney-General has in general no power to interfere with the assertion of private rights so in general no private person has the right of representing the public in the assertion of public rights.¹

The grant of a *fiat* in a matter involving issues of a public interest nature is strictly within the discretion of the Attorney-General, without any course for review. An earlier view in *Attorney-General (ex rel. Lumley and Lumley) v. T.S. Gill & Son Pty Ltd*² required that the discretion be exercised only where the suit involved a proprietary right. However, Menzies J. in *Cooney v. Ku-ring-gai Corporation* stated, in disapproving of *Gill*, that:

... Whatever was the position in 1927, it is now apparent from a line of cases in New South Wales and in England that courts have granted injunctions or mandatory orders to protect benefits or advantages of the kind considered in *Gill's* case and even any benefits or advantages that could not be regarded as having any resemblance at all to proprietary rights.³

The reason behind requiring consent by the Attorney-General for public interest suits is principally the 'floodgates argument'. Lord Cairns in *Attorney-General Ex rel. McWhirter v. Independent Broadcasting Authority* commented that the judicial device was '... a useful safeguard against merely cranky proceedings and against a multiplicity of proceedings ...'⁴ In that case the Court recognised the possible harm that might result from endorsing the Attorney's unreviewable discretion but on balance '... the risk of damage to the public interest by allowing a right to apply for relief to such a person without such consent is greater than the risk of damage to the public in withholding it.'⁵

The major defect in the theory vesting a monopoly in the Attorney-General is the discretion-based criteria used by the Attorney in granting consent, given the political aspects of the office of Attorney-General. Cairns stated:

... in Australia, the Attorney-General is a political officer of the government of the day, [and] the decision whether or not to sue may well be motivated by purely political considerations.⁶

Cairns recognised such a statement to be '... speculative, because the reasons for granting or denying fiats are not made known.'⁷

Public interest suits such as those involving environmental litigation may fall foul of the public and partisan interest dichotomy involved in the office of the Attorney-General. Whilst empowered exclusively to allow a public interest suit to be brought by him or in his name, he is responsible also for legal advice and legal protection of his Government's political policy. Recognition that in certain cases a conflict may and has arisen is to be found in the Australian Law Reform Commission statement:

1. [1978] A.C. 435 at 477-8.

2. [1927] V.L.R. 22.

3. (1963) 114 C.L.R. 582 at 592.

4. [1973] Q.B. 629 at 640.

5. *Ibid.* at 641.

6. B.C. Cairns, *Australian Civil Procedure*, (1981) at 277.

7. *Ibid.* It is to be noted that in the second edition (1985) at 294, the scrutiny is less critical: 'In some cases this procedure has operated well enough, but it depends on whether the Attorney-General will consent to the institution of proceedings [sic] ... In making his decision he is not responsible to the court, or to the government of which he, in Australia, is a member. This is the situation in law, in fact what motivates an Attorney-General to grant or refuse a fiat is unknown.'

His department is the major source of legal advice for other Commonwealth departments and instrumentalities; the very people who may be the defendants in a public interest action.⁸

The political aspect of the role of the Attorney-General was recognized also in England by Viscount Dilhorne in *Gouriet*:

In the discharge of any of the duties to which I have referred, it is, of course, always possible that an Attorney-General may act for reasons of this kind and may abuse his powers . . .⁹

Viscount Dilhorne made the comment in relation to a statement by Sir Hartley Shawcross, the British Attorney-General in 1951, that

. . . there is only one consideration which is altogether excluded, and that is the repercussion of a given decision upon my personal or my party's or the Government's political fortunes.¹⁰

The Australian Law Reform Commission has noted that conflict has occurred in Australia, exemplified by *Kent v. Johnson*.¹¹ In that case, the Attorney-General's department, whilst considering a *fiat* application, was also advising the proposed defendant, the Postmaster-General's Department. A more recent and perhaps more sinister example of the conflict of interest was the dealing with an application made to the Tasmanian Attorney-General to grant a *fiat* challenging the flooding of Lake Pedder. After a public announcement that the *fiat* would be given, Cabinet instructed to the contrary and the Attorney-General resigned. The then Premier personally replaced the Attorney-General and refused the grant of the *fiat*.

Despite the fact that the office of the Australian Attorney-General has its legal origin in English law, an interesting anomaly between the offices was expressed in the Australian Law Reform Commission's paper which stated:

The English Attorney-General and Solicitor General are normally leading counsel of established and curial reputation. They sit in the House of Commons but they have no administrative responsibilities. Aided by a small professional staff currently consisting of nine persons they consider top level domestic and international legal issues. They do not advise government departments . . . Traditionally the English Attorney is not a member of cabinet; there is a conscious policy of divorcing him from day to day political issues.^{11a}

As stated above, there is no judicial review of decisions of the Attorney-General to grant or refuse the grant of a *fiat*. In the decision in *McWhirter's Case* the established attitude was criticized by Denning M.R. who stated:

Suppose the Attorney-General refuses to give leave for no good reason or on entirely wrong grounds, mistaking, maybe, the interpretation of a statute. Would a private individual be entitled to come to the court¹²

Denning M.R. in his judgement proposed that

. . . if the Attorney-General refuses leave in a proper case, or improperly or unreasonably delays in giving leave, or his machinery works too slowly, then a member of the public who has a sufficient interest can himself apply to the court

8. Law Reform Commission Discussion Paper No. 4, 1977, 'Access to the Courts I: Standing in Public Interest Suits'.

9. *Supra* n.1 at 489.

10. *Ibid.* Viscount Dilhorne is quoting from Edwards, *The Law Officers of the Crown*, pp 222-223.

11. (1973) 21 F.L.R. 177.

11a. *Supra* n.8 at 8-9.

12. *Supra* n.4 at 648 and see Zamir, *The Declaratory Judgment*, (1962) at 275, and *Dyson v. A-G* [1911] K.B. 410 for an example of a mistake by the Attorney-General.

itself . . . I would not restrict the circumstances in which an individual may be held to have a sufficient interest.¹³

Lawton L.J. agreed with Denning M.R. that ' . . . if at any time in the future there was reason to think that an Attorney-General was refusing improperly to exercise his powers, the courts might have to intervene to ensure that the law was obeyed.'¹⁴ Denning M.R. reiterated his view in *Commissioner of Police of the Metropolis, ex parte Blackburn*¹⁵ but was specifically overruled in *Gouriet v. Union of Post Office Workers*¹⁶ by the House of Lords. Lord Wilberforce L.J. stated that 'There is no authority for this proposition and in my opinion it is contrary to principle.'¹⁷

Lord Edmund-Davies stated in confirmation of the rule:

. . . the general rule is that relief may be sought only by, and granted solely at the request of the Attorney-General. There are certain exceptions to the general rule, but none of them applies here. For example the statutory exceptions . . . And there are the familiar common law exceptions to the general rule dealt with by Buckley J in *Boyce v. Paddington Borough Council* [1903] 1 Ch 109 at 114 . . .¹⁸

The principle that an exercise of discretion by the Attorney-General is not reviewable by the court was clearly confirmed. Given the role of the Attorney-General as created by Royal Prerogative and therefore not subject to review and that such role has been recognised strictly by Australian courts, the apparent political element in the office in Australia, though to a lesser extent in England, renders the grant of *fiat* of dubious and unpredictable value.

There appears, it is suggested, no reason why a decision by the Attorney-General should not be reviewable for the reasons outlined by Denning M.R. above. It does seem a little incongruous that the Attorney-General, whilst basically a politician, enjoys the freedom of non-reviewability by way of administrative action over his right to grant a *fiat* or represent the public interest, while his or her cabinet colleagues are rightfully under such scrutiny.

2. Individual Standing at Law – The Equitable Remedies

(a) Historical Development

The standing of an individual, including a body corporate, to bring an action with respect to a public interest issue, and, more particularly for the equitable remedies of declaration or injunction, has developed from the confusion exemplified in the differing opinions of Baldwin C.J. and Fitzherbert J. in *Williams case*¹⁹ in 1592, to what Stein describes as rules which are ' . . . amorphous intellectually inconsistent and unnecessarily complex.'²⁰ The modern rules of *locus standi* of an individual have until very recently²¹ been a threshold issue decided apart from and before the factual or legal merits of the case. The limitation so imposed is purely a creature of the judiciary and has basically developed from three sources. Stein states that the modern rules have stemmed from bases ' . . . such as notions of

13. *Ibid.* at 649.

14. *Ibid.* at 657.

15. [1968] Q.B. 118; see also *Benjamin v. Downs* [1976] 2 N.S.W.L.R. 199 at 210-11.

16. *Supra* n.1 at 505-506.

17. *Ibid.* at 483 and see also Diplock L.J. at 502; Edmund-Davies L.J. at 505-6; and Fraser L.J. at 501-2.

18. *Ibid.* at 505.

19. (1592) 5 Co. Rep. 73a.

20. L.A. Stein, 'The Theoretical Basis of Locus Standi' in L.A. Stein (ed.) *Locus Standi* (1979).

21. See Lord Wilberforce in *I.R.C. v. National Federation of Self-Employed and Small Business Ltd (The 'Mickey Mouse' Case)* [1982] A.C. 617 at 630-632.

legal personality, property rights, the functions of courts, the historical growth of remedies and the scope and development of judicial review of administrative action.²²

Historically, an individual's right to sue on public interest issues has seen development particularly in litigation involving highway nuisance. Fitzherbert J. in *Williams* outlined the initial view of a 'special interest' requirement of an individual considering suit on a public interest matter. He stated:

... that a nuisance in the King's way was punishable in the leet unless a man had greater hurt or inconvenience than everyman had but that in such a case he who had more inconvenience or hurt could have an action to recover the damages which he had by reason of that especial hurt.²³

The requirement of 'especial hurt' met almost immediately with difficulty. Problems arose on the highway in cases where no private qualification was impeached, unlike the *Williams* case where the especial hurt was apparent by the blocking of an individual's land as well as the highway.

Sholl J. in *Walsh v. Ervin*²⁴ examined the case of *Paine v. Partriche*,²⁵ where being late for an 'important affair' was not sufficient 'hurt'. Other cases such as *Hart v. Bassett*²⁶ indicated that where a pecuniary loss 'could be at least inferred', the individual requirement would be met. Mere redirection, it was held, was not enough to infer pecuniary loss²⁷ whereas the loss of tenants in *Baker v. Moore*²⁸ and interference with business as in *Iveson v. Moore*²⁹ could allow such an inference.

(b) Floodgates

The primary rationale behind the limitation by courts of standing to sue on public interest issues, to individuals with the personal qualification of 'special interest', is once again a variation of the 'floodgates argument'. Fitzherbert J. stated in *Williams*:

... for the same reason that one person might have an action for it, by the same every one might have an action and then he [the defendant] would be punished 100 times for one and the same cause.³⁰

Absence of limits on standing requirements for public interest issues, so that each member of the public could sue if a public right or duty had been breached, has been regarded as undesirable for policy reasons. In *Anderson v. The Commonwealth*,³¹ in examining the analogous situation of enabling any person to question the correctness of Commonwealth statutes, it was thought 'Geat evils would arise'.³² Professor K.E. Scott has said in criticizing this view that

... the idle and whimsical plaintiff, a dilettante who litigates for a lark is a specter which haunts the legal literature not the courtroom.³³

The Australian Law Reform Commission in its discussion paper *Access to the Courts I: Standing In Public Interest Suits*,³⁴ has commented on actions under the Michigan

22. *Supra* n.20 at 7.

23. *Supra* n.19.

24. [1952] V.L.R. 361 at 367.

25. (1691) Carth 191 at 194.

26. (1681) T. Jones 156.

27. *Ibid.* at 157.

28. Cited in (1696) 1 Ld Raym 491.

29. (1699) 1 Ld Raym 486.

30. *Supra* n.19.

31. (1932) 47 C.L.R. 50.

32. *Ibid.* per Gavan Duffy C.J.; see also Starke and Evatt JJ. at 51-2.

33. K.E. Scott, 'Standing in the Supreme Court: A Functional Analysis' (1973) 86 *Harv. L.R.* 645 at 674. See also Murphy J. in *Australian Conservation Foundation Ltd v. Commonwealth* (1980) 146 C.L.R. 493 at 557-8.

34. *Supra* n.8 at 6-7.

Environmental Protection Act. The Act enabled any person whatever 'to take legal proceedings against any other person whatever for the protection of the air, water and natural resources and the public trust therein from pollution impairment and destruction.' In the first year of operation out of a population of 9 million only 74 plaintiffs approached the Court, two thirds of whom obtained substantial relief. Notable were the findings of Sax and Di Mento, that all of the litigation involved '... raised serious socially useful issues'.³⁵

In Australia, Dwyer notes that despite the wide ambit given for standing under s.80(1)(c) of the Trade Practices Act, 1974 (C'th), which '... entitles anybody to apply to the Federal Court for an injunction to restrain certain types of conduct in breach of the Act, there has not been a flood of litigation'.³⁶

Set against this, however, must be the observations made by Battle:

It is quite unlikely that many of the initial proponents of NEPA [National Environmental Policy Act 1969] anticipated the staggering amount of litigation which it has produced ... By the end of 1984 nearly 2000 law suits [were brought and a total of \$US 18,000,000,000 was spent] challenging federal action for non-compliance with NEPA ...³⁷

It would seem that much depends on the type of statute and its potential applicability and upon the extent of the limits imposed by the statute upon the class recognised as having rights of challenge. It seems impossible to deny that the theory does have some merit on examination of the experience in other jurisdictions and therefore it is suggested that abandoning all requirements of standing in such public interest suits would in a practical sense be counter-productive. Any change to the law of standing with respect to public interest suits whether under the general law or by statute must be done in such a way as to avoid frivolous or vexatious suits but allow those suits of consequence.

(c) Modern Developments

An individual's right to initiate action before the courts in a matter of public interest for the remedy of injunction or declaration without the Attorney-General's *fiat* or consent for use of his name, is traditionally limited to the circumstances enunciated in Buckley J.'s statement in *Boyce v. Paddington Borough Council*:

A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with ...; and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.³⁸

Boyce concerned an action to restrain the defendants from erecting a large hoarding on a disused burial ground in front of the windows of the plaintiff's flats. The object of the hoarding was to ensure a right of access to light was not obtained. Buckley J. in the passage quoted above dismissed the defendants' contention that the concurrence or *fiat* of the Attorney-General was required as the action involved strictly a public interest issue.

Until recently (for example, see *Attorney-General ex rel. McWhirter v. Independent Broadcasting Authority*) the operation of the principle enunciated in *Boyce* was not

35. J.L. Sax & J.F. Di Mento, 'Environmental Citizen Suits: Three Years Experience Under the Michigan Environmental Projects Act' (1974) 4 *Ecol LQ* 1 at 17.

36. J. Dwyer, 'Public Interest Litigation: Who can start proceedings?' 6 *Legal Service Bulletin* (Oct 1981) 220 at 222.

37. J. Battle, 'Environmental Law and Co-operative Federalism in the United States' (1985) 2 *Environmental & Planning Law Journal* 302.

38. [1903] 1 Ch. 109 at 114.

questioned (see e.g. *London Passenger Transport Board v. Moscrop*³⁹). Australian decisions of the time such as *Thompson v. The Council of Municipality of Randwick*⁴⁰ reflected this English approach.

McWhirter was the first case to question the '... adequacy and suitability' of the *Boyce* test.⁴¹ The case involved an injunction sought to prevent telecasting a film on the ground that it was likely to be offensive and as such was a breach by the defendant of the statutory duty under s.3(1)(a) of the Television Act 1964.

This attempted extension of the principle was the result primarily of the Master of the Rolls' dissatisfaction with the traditional test limiting the individual's 'special damage' requirement to the traditional proprietary or pecuniary interests. Denning M.R. attempted to extend the *Boyce* principle even further when he stated:

I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government department ... is transgressing the law or about to transgress it in a way which offends or injures thousands of Her Majesty's subjects, then in the last resort any one of those offended or injured can draw it to the attention of law and seek to have the law enforced.⁴²

If the term 'offends or injures' can, as it is suggested, simply be substituted for 'affects issues of a public interest', this extended test would have placed the question of standing purely in the discretion of the court. Denning M.R.'s attempted extension of the *Boyce* principle was however specifically overruled in *Gouriet*, Lord Edmund-Davies limiting the exceptions to standing without the Attorney-General '... to the general rule dealt with by Buckley J. in *Boyce v. Paddington Borough Council* [1903] 1 Ch. 109 at 114 ...'⁴³

Gouriet involved an individual's application for an injunction restraining an impending boycott by the Union of Post Office Workers of all mail and telecommunications to South Africa. It was alleged this was in breach of s.58(1) of the Post Office Act, 1953, and s.45 of the Telegraph Act, 1863. At common law, *Gouriet* entrenched the principle enunciated in *Boyce*, outlining the only non-statutory exceptions to public interest suits by individuals without the Attorney-General.

(d) Standing At Law of the Individual in Australia

Australian developments on the issue of *locus standi* in public interest suits have undergone a slower, and recently, different evolution. The principle enunciated in *Boyce* was followed strictly by the High Court⁴⁴ until the recent change espoused by Gibbs J. in *Australian Conservation Foundation v. The Commonwealth*.⁴⁵ Only Helsham J. in *Benjamin v. Downes*⁴⁶ applied Denning M.R.'s discretion-based *McWhirter* test (but such is of doubtful value as it was decided before *Gouriet*).

The *Australian Conservation Foundation* case involved an application by the Foundation for a declaration as to the validity of approval given to the Iwosaki Sangyo Company (Aust) Ltd. to develop a tourist facility at Fairborough near Yeppoon in Central Queensland. The challenge alleged a non-compliance with the Environmental Protection (Impact of Proposals) Act, 1974, regarding examination of an Environmental Impact Study on the area done by the A.C.F. on invitation by the company. The A.C.F. sought also

39. [1942] A.C. 333 at 344-5.

40. (1953) 90 C.L.R. 449 at 456.

41. See E. Kyrou, 'Locus Standi of Private Individuals Seeking Declaration or Injunction at Common Law', (1982) 13 *M.U.L.R.* 453 at 453.

42. *Supra* n.4 at 649.

43. *Supra* n.1 at 513.

44. For example *Thompson v. The Council of the Municipality of Randwick*, *supra* n.40.

45. (1980) 146 C.L.R. 493.

46. [1976] 2 N.S.W.L.R. 199 at 200-1.

an injunction to restrain any action upon any approval given. At first instance, Aickin J., on a strict application of the second limb of the *Boyce* test, dismissed the application by way of preliminary objection on the ground that the A.C.F. did not have standing.

The Full Court affirmed Aickin J.'s decision by applying both limbs of *Boyce*: the first, by stating that no individual was granted a right under the Act,⁴⁷ the second, that the individual qualification of special damage did not exist. In examining this second limb, Gibbs J., (as he then was) in an apparent attempt to widen the scope of *locus standi*, stated:

Although the general rule is clear, the formulation of the exceptions to it which Buckley J. made in *Boyce v. Paddington Borough Council* is not altogether satisfactory. Indeed the words which he used are apt to be misleading. His reference to "special damage" cannot be limited to actual pecuniary loss, and the words "peculiar to himself" do not mean that the plaintiff and no one else must have suffered damage. However the expression "special damage peculiar to himself" in my opinion should be regarded as equivalent in meaning to having a *special interest* in the subject the matter of the action".⁴⁸ (emphasis added)

As an example of the application of this principle, Gibbs J. cited *Anderson v. The Commonwealth*⁴⁹ as a case where *locus standi* was denied. The case involved a challenge to an agreement between the Commonwealth and a State with respect to the importation of sugar. The plaintiff's interest was simply that of a member of the public and as a consumer. Kyrou suggests that the change to 'special interest' is merely semantic, citing *Howes v. Victorian Railways Commissioners*⁵⁰ and *Neville Nitschke Caravans v. McEntee*⁵¹ in support of the contention that the *Boyce* principle is just as flexible as the apparently broadened concept.⁵²

To explain what does appear to be a widened criterion, Gibbs J. acknowledged Mason J.'s recognition in *Robinson v. Western Australian Museum* that the

... cases are infinitely various and so much depends in a given case on the nature of the relief which is sought, for what is a sufficient interest in one case may be less sufficient in another.⁵³

Gibbs J. then outlined the base threshold for 'special interest' as not meaning ... a mere intellectual or emotional concern. 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 ... A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor *locus standi*.⁵⁴

Whilst this statement is explicit and *prima facie* discouraging to public interest groups whose sole interest might arguably fall under the category of 'emotional' or 'intellectual' or both, it is not, it is suggested, the imposition of a strict criterion. Gibbs J.'s acknowledgement of the *Robinson* decision, it is suggested, is akin to the view of Lord Wilberforce recently expressed in the *Mickey Mouse case*⁵⁵ discussed later, that standing must not be looked at as an isolated issue, but determined in context with legal and factual

47. *Supra* n.45 at 557 per Murphy J; cf Gibbs J. at 524.

48. *Ibid.* at 527.

49. *Supra* n.31.

50. [1972] V.R. 103.

51. (1976) 15 S.A.S.R. 330.

52. *Supra* n.41.

53. (1977) 138 C.L.R. 283 at 327-8.

54. *Supra* n.45 at 530.

55. *Supra* n.21.

issues. Mason J. also expressed an affinity with this view, as well as widening the special interest requirement from the traditional tests. He stated:

Depending on the nature of the relief which he seeks a plaintiff will in general have a locus standi when he can show actual or apprehended injury or damage to his property or proprietary rights to his business or economic interests . . . and perhaps to his social or political interests.⁵⁶

Mason J. did not expand on the latter part of this statement, relying on the above quoted statement in *Robinson v. West Australian Museum*.⁵⁷

In Queensland, the 1983 decision in *Fraser Island Defence Organization Limited v. Hervey Bay Town Council*,⁵⁸ whilst following the traditional approach as outlined in the A.C.F. case, is important for two reasons, although its authority is limited in that the decision is of a single judge only. The case concerned an application by F.I.D.O. Ltd for an injunction restraining Island Air, the second defendant, from subdividing an area of land zoned Rural 'A' into blocks smaller than that allowed by the Local Government Act 1936-1980. Apart from the factual issue involving the timing of the application for subdivision, the first defendant also brought in to issue the question of whether the plaintiff organization had standing to apply for the injunction.

Mr Justice Connolly dismissed the contention that simply because a right to object to the subdivision was granted to 'any person' under section 33(18) of the Local Government legislation, a right to initiate proceedings was also given to the same class. Turning to the right to initiate proceedings, he stated:

I do not think that . . . preserving the natural resources and environment in themselves can amount to the necessary special interest and I say this on the authority of the *Australian Conservation Foundation's* case . . .⁵⁹

However, Connolly J did find *locus standi* in the organisation on traditional grounds stating:

However the business in which it [F.I.D.O. Ltd] is engaged is another matter altogether. The evidence is not contraverted that it is engaged in the business which it shortly describes and it is I think important that the character of the area as an unspoiled wilderness is an essential feature of the business in question. The evidence is meagre but it is uncontradicted . . . The plaintiff's case is that it apprehends an adverse effect on its business of running tours for profit. I can see no reason in principle why this does not give it a special interest in the subject matter of the action.⁶⁰

Although Connolly J.'s decision is by no means judicially revolutionary, it does, it is suggested, show a tendency by the court to have regard to the gravity of the major issue and the consequence if the unlawful act remains non-suitable.

The High Court in subsequent cases has adopted Gibbs J.'s widened criterion of 'special interest'.⁶¹ The most important of these is the decision in *Onus v. Alcoa*.⁶² In that case two members of the Gournditchimara people (a tribe of aborigines occupying an area near Portland in Victoria), sought an injunction against Alcoa to restrain works which would

56. *Supra* n.45 at 527.

57. *Supra* n.53.

58. [1983] 2 Qd.R. 72.

59. *Ibid.* at 79.

60. *Ibid.*

61. See for example, *Ingram v. Commonwealth* (1980) 54 A.L.J.R. 395, *Day v. Pinglen* (1981) 148 C.L.R. 289, and *Wacando v. Commonwealth* (1981) 148 C.L.R. 26.

62. (1981) 149 C.L.R. 27.

interfere with their sacred relics on the land. Gibbs C.J. in what, it is submitted, is further confirmation of the emancipation arising from his 'special interest' test, stated:

A plaintiff has no standing to bring an action to prevent the violation of a public right if he has no interest in the subject matter beyond that of any member of the public; if no private right of his is interfered with he has standing to sue if he has a special interest in the subject matter of the action. The rule is obviously a flexible one since as was pointed out . . . the question of what is a sufficient interest will vary according to the nature of the subject matter of the litigation.⁶³

The special interest possessed by the applicants, although described as sparsely evidenced,⁶⁴ was described as the intimate relationship of the plaintiffs to the endangered relics which were of great cultural and spiritual significance.⁶⁵ How the Court assessed the 'special interest' criterion in favour of the tribe in comparison with that in the A.C.F. case was outlined by Stephen J.:

. . . the distinction between this case and the *A.C.F. Case* is not to be found in any ready rule of thumb, capable of mechanical application: the criterion of "special interest" supplies no such rule. As the law now stands it seems rather to involve a curial assessment of the importance of the concern which a plaintiff has with particular subject matter and of the closeness of that plaintiff's relationship to that subject matter . . . It is to be distinguished, I think, and will be perceived by courts as different in degree, both in terms of weight, and in particular, in terms of proximity, from that concern which a body of conservationists, however sincere, feels for the environment and its protection.⁶⁶

A conservation group is not excluded by the fact that its interest is emotional or intellectual,⁶⁷ but its interest must fall within the sub-criteria of 'special interest' outlined above, including weight and proximity of relationship to the subject matter.

3. Standing and The Prerogative Writs

The most common remedies under the general law available to public interest groups in seeking the review of questionable decisions concerning public interest others were the prerogative writs. Despite the now more frequent usage of the injunction and declaration,⁶⁸ the writs are still of importance given the specificity of the breaches they cover.

There are three commonly used writs, being certiorari, prohibition, and mandamus. An immediate difficulty arises with respect to analysing the standing for such writs in that the standing requirements differ from each other and from that required for the equitable remedies as outlined above.

(a) Mandamus

The writ of mandamus involves an order to perform a public duty imposed at common law or by statute. To fall within the purview of the writ, the performance of a 'duty' and not merely the exercise of a power is required. The most common, although not conclusive indication is the difference in wording of the duty or power.⁶⁹ If a mandatory 'will' is used, as opposed to a discretionary 'may', then it is more likely that a duty has been created.

Mandamus may only be invoked upon the non-performance of a public duty. In the

63. *Ibid.* at 35.

64. *Ibid.* at 41 per Stephen J.; see also Gibbs C.J. at 38.

65. *Ibid.* at 42.

66. *Ibid.*

67. *Ibid.* at 44.

68. *Supra* n.4 at 637; n.8 at 8.

69. See *Julius v. Bishop of Oxford* (1880) 5 App. Cas. 214 at 222-3, per Lord Cairns.

environmental context, mandamus could, (assuming standing) have been used by the A.C.F. in that case to require the consideration of their Environmental Impact Study. In this area the writ could be a useful tool. What is required of the applicant is a clear demand to perform the duty before the commencement of proceedings.⁷⁰

A refusal either in specific terms or so couched in conditions as to be in effect a refusal, is also required.⁷¹ Again, in the context of environmental impact studies required under legislation, a refusal may be constituted by the reliance on an inadequate study, as alleged by the A.C.F. in that case.

Apart from the requirements of a public duty, a demand for performance and a refusal, mandamus as against the Crown is limited in the Commonwealth sphere only to the circumstances outlined in s.75(v) of the Constitution which states that the writ is to be sought only against 'Officers of the Commonwealth'. There would seem little argument that such a requirement is wide enough to cover effectively most relevant personnel. At a state level however, the position is less clear, as historically without the constitutional expression of susceptibility, the Crown in right of the State is not liable to review by the writ. In the recent decisions of *R v. Toohey; Ex parte Northern Land Council*⁷² and *F.A.I. Insurances Ltd v. Winneke*⁷³ applicants successfully issued non-Commonwealth Crown officers with the writ, reinforcing the comment by Whitmore and Aronson that with respect to non-issue on officers of the State:

... the rule is generally ignored, misstated or disingenuously distinguished. This means that discussion of the rule must be divided into two parts – theory and practice.⁷⁴

While therefore the writ is potentially useful in an environmental sphere its general unpredictability as to whether issue would be successful erodes its overall value.

The *locus standi* required for issue of the writ has varied from 'a specific legal right' in *R v. Lewisham Union Guardians*⁷⁵ and a 'special interest' in *R v. Manchester Corporation*,⁷⁶ to the wider requirements of 'sufficient interest' or 'general concern' most recently expressed as the test in England in the *Mickey Mouse case*.⁷⁷ (Note that this latter case arose under the recent amendments to the Rules of the High Court of Justice.)⁷⁸

In Australia, even apart from the alleged widening of the scope of 'special interest' in *ACF v. Commonwealth* under the general law, Hotop has commented that the requirement for mandamus is in any event wider:

... locus standi may be accorded to an applicant who has a 'genuine grievance' or 'genuine concern' ... a court may, in its discretion, accord locus standi to an ordinary member of the public, no more affected by the non-performance of the duty than anyone else, where it considers it is in the public interest to do so.⁷⁹

(b) Certiorari and Prohibition

Of more limited use are the writs of certiorari and prohibition. These are generally used

70. *R v. Brecknock & Abergavenny Canal Navigation Co.* (1835) 3 Ad. & E.217 at 334 per Coleridge J.

71. See *R v. City of Preston; ex parte Sandringham Drive-in Theatre Pty Ltd* [1965] V.R. 10.

72. (1981) 151 C.L.R. 170.

73. (1982) 151 C.L.R. 342.

74. H. Whitmore and M. Aronson, *Review of Administrative Action*, (1978) at 362.

75. [1897] 1 Q.B. 498.

76. [1911] 1 K.B. 560 at 564.

77. [1980] Q.B. 407 at 422-3.

78. O.52 r.3(7).

79. S. Hotop, *Principles of Australian Administrative Law*, (1985) at 237 citing *R v. Greater London Council* [1978] 1 W.L.R. 550 at 559 and note also the broad approach taken in Australia in *Sinclair v. Mining Warden at Maryborough* (1975) 132 C.L.R. 473.

to police the decisions made by inferior tribunals. The former removes from the record a decision made by the tribunal or quashes a bad decision, while the latter imposes a restraint upon the carrying out of such a decision. Any application for the issue of such writs must be made on the grounds of jurisdiction or error of law.⁸⁰

The tribunals in respect of which the writs may be issued must be bodies with more than a legislative role. They must have the capacity to effect decisions concerning '... the rights of subjects' and '... have the duty to act judicially'.⁸¹ These requirements therefore limit the bodies to a select group created by statute or under the common law.

In the environmental context, local government tribunals and other semi-government bodies, provided they have the functions outlined above, would be susceptible to the writs.

The standing requirement for either of the writs is that of an 'aggrieved person' which, according to the Queensland decision of *R v. Knyvett; ex parte Weber*,⁸² could be as wide as 'any person' following the tradition that unlawful dealings of tribunals under the cloak of the law should be allowed to be challenged by any subject. The history of this relatively loose requirement for standing culminated in the decision in *Attorney-General of Gambia v. N'Jie*,⁸³ where the interpretation of the term 'person aggrieved' was effectively 'any person'.

Whilst the standing requirements for all three of the writs are lower than those required for the remedies of injunction and declaration, the usefulness of the remedies is limited in the manner outlined. Notwithstanding those limits, it would seem that the writs are effective within those limits and possibly underutilised in the Australian context.

(c) Statutory Standing: Recent Developments in England

The most significant recent development in England has been the standardization of the standing rules.⁸⁴ The change to the general law principle occurred as a result of High Court Rules amendments in 1978 and 1980 with respect to applications for judicial review. Order 53 r.3(7) states that: 'The court shall not grant leave unless it considers that the applicant has a *sufficient interest* in the matters to which the application relates (emphasis added). The House of Lords in the *Mickey Mouse case* examined the rules application. The case involved a challenge to a misnamed 'amnesty' arrangement between the Internal Revenue Commissioners and 'Mickey Mouse and Co.'⁸⁵ – Fleet Street workers. The IRC would, under the 'amnesty', ignore previous tax evasion if the workers registered correctly and agreed to pay future tax levied. The National Federation of Self-Employed & Small Business Ltd represented a group who felt that the arrangement was preferential and unlawful. All applications for judicial review, whether by the prerogative writs or for the remedies of injunction or declaration, as in this case, would need to be by way of 0.53 otherwise, according to the decision of House of Lords in the subsequent case of *O'Reilly v. Mackman*,⁸⁶ an abuse of process would occur.

Denning M.R. in the Court of Appeal in the *Mickey Mouse case* attempted to revive the test he outlined in *McWhirter* (later overruled in *Gouriet*) by stating that the House of Lords' rejection of his test applied 'only with relator actions – Lord Wilberforce pointed

80. *R v. Northumberland Compensation Appeals Tribunal; Ex Parte Shaw* [1952] 1 K.B. 338.

81. Per Atkin J in *R v. Electricity Commissioners; Ex Parte London Electricity Joint Committee Co.* [1924] 1 K.B. 171.

82. [1929] St.R.Qd. 16; and see *De Haber v. Queen of Portugal* [1851] 17 Q.B. 171.

83. [1961] A.C. 617.

84. *Supra* n.21 at 631.

85. See Lord Denning, *The Closing Chapter*, (1983) at 214.

86. [1983] 2 A.C. 237 at 267.

out that it did not apply to the prerogative orders such as mandamus or certiorari.⁸⁷

Denning M.R. was again overruled by the House of Lords on appeal.⁸⁸ Lord Wilberforce held that what is now O.53 r.3(7) was merely procedural and did not alter the substantive law and consequently did not import Denning M.R.'s view in *McWhirter* removing '... the whole – and vitally important – question of locus standi into the realm of pure discretion'.⁸⁹ Lord Diplock adopted Denning M.R.'s *McWhirter* test as reiterated in *R v. Greater London Council, ex parte Blackburn*⁹⁰ stating that it would

... be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.⁹¹

Denning M.R. again used the *McWhirter* rule in *R v. Horsham, ex parte Farquharson*,⁹² where he adopted the dicta of Lord Diplock from the *Mickey Mouse Case*.

Finally, in *O'Reilly v. Mackman*,⁹³ Denning M.R. accepted the decision of the House of Lords in the *Mickey Mouse Case*, that the effect of O.53 r.3(7) was merely a procedural change, but held that the later effect of s.31 of the Supreme Court Act, 1985, was to change the substantive law. He stated 'Rules of Court can only affect procedure: whereas an Act of Parliament comes in like a lion. It can affect both procedure and substance alike.'⁹⁴

S.31 in effect codified O.53 with respect to judicial review. A recent example of the operation of O.53 r.3(7) is *Reg v. HM Treasury, Ex parte Smedley*.⁹⁵ In that case the applicant, being a British taxpayer and elector, applied for judicial review seeking a declaration that an undertaking made to the European Community by representatives of several of its members to finance a supplementary and amending Budget was not a treaty ancillary to any of the treaties outlined in s.1(2) of the European Communities Act, 1972. Despite failure on the substantive issue, there was no question that the applicant did not have sufficient interest. Slade L.J. stated:

The speeches of their Lordships in *R v. IRC, Ex parte National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617 well illustrate that there has been what Lord Roskill described (p.656) as a 'change in legal policy' which has in recent years greatly relaxed the rules as to locus standi. Lord Diplock at p.640 referred to a 'virtual abandonment' of the former restrictive rules as to locus standi of persons seeking prerogative orders against authorities exercising governmental powers. If the court had taken the view that Mr Smedley's application was of a frivolous nature, the wide discretion given it by RSC, Order 53 would have enabled it to dispose of it appropriately ... The making of any such order ... (by Her Majesty in Council) ... would be likely to be followed automatically by the expenditure by the government of substantial sums from the Consolidated Fund ... I do not feel much doubt that Mr Smedley, if only in his capacity as a taxpayer, has sufficient locus

87. *R v. Inland Revenue Commissioners; Ex parte National Federation of Self-Employed and Small Business Ltd* [1980] 1 Q.B. 407 at 420.

88. *Supra* n.21.

89. *Ibid.* at 631.

90. [1976] 1 W.L.R. 550 at 558-9.

91. *Supra* n.21 at 644.

92. [1982] Q.B. 762 at 787.

93. *Supra* n.86.

94. *Ibid.* at 255.

95. [1985] 1 Q.B. 657.

standi to raise this question . . . I cannot think that any such right of challenge belongs to the Attorney-General alone.⁹⁶

Whether this purely discretion-based test will be of assistance to public interest groups with non-pecuniary interests, such as environmental groups, is yet to be seen in England. However, there is little doubt that the new test is substantially wider than that enunciated in *Boyce* and is potentially of enormous usefulness.

(d) Locus as a Threshold Issue in England

A further issue examined by the English courts, especially in the light of the R.S.C. amendment, is the issue whether *locus standi* must be established before substantive issues can be examined. Given the 0.53 amendment, the House of Lords decided, in a divided decision, that *locus standi* was to be dealt with in context with factual issues rather than as an isolated and threshold issue. Lord Wilberforce in the *Mickey Mouse case* acknowledged that there would be simple cases: ' . . . in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all or no sufficient interest to support the application.'⁹⁷

In those cases the court can refuse leave for the application. However, Lord Wilberforce noted where an application is not easily dismissed that

. . . it will be necessary to consider the powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and to the breach . . . In other words, the question of sufficient interest cannot, in such cases, be considered in abstract, or as an isolated point: it must be taken together with the legal and factual context.⁹⁸

As stated above, reference to *Robinson* in the *A.C.F.* case does seem to suggest that the requirement of sufficiency of *locus standi* in Australia may be examined together with the substantive issues and not as an isolated and threshold issue.

4. Class Actions

Given the limited scope, even of the expanded 'special interest' requirement, effectively denying standing to environmental or other public interest groups to sue of their own accord if the group's only 'special interest' is intellectual or emotional, a less direct method through so-called 'class actions' has found favour in other jurisdictions. An action by a group of people who individually either do not have sufficient 'special interest' or the means to support an action, may be brought in Queensland in one of two ways. Firstly, a class or representative action and, secondly, an arrangement of maintenance of a person with 'special interest', provided it falls short of any enduring tortious prohibition against maintenance. In both cases, the 'special interest' requirement must still be satisfied. The actions do not themselves satisfy the interest qualification.

(a) Representative Actions and Class Actions

The representative action as provided for, for example under 0.3 r.10 of the Supreme Court Rules (Qld), involves specifically three requirements:

- (i) a common interest by a class of persons in the subject matter;
- (ii) a common grievance;
- (iii) relief which by nature is beneficial to all of the class.

Each of the members of the class must possess the 'special interest' requirement such that

96. *Ibid.* at 669-70; see also Donaldson M.R. at 667.

97. *Supra* n.22 at 630.

98. *Loc. cit.*

each member could sustain an action individually. The representative action merely avoids a multiplicity of actions and the subsequent extra cost.⁹⁹

Fitting an environmental group within this type of action would involve a lowering of the 'special interest' requirement to include emotional or intellectual concerns as the sole basis.

The so-called 'class action', as distinct from representative action, was described by the Australian Law Reform Commission as:

... a legal procedure which enables the claims of a number of persons against the same defendants to be determined in the one action. In a class action one or more persons (the plaintiff) may sue on his own behalf and on behalf of a large number of other persons ("the class") who have the same interest in the subject matter of the action" as the plaintiff.¹⁰⁰

A short-lived 'revolution' in the United States occurred in relation to the 'class action', directed to permitting a class of persons who did not individually qualify under traditional rules of standing, to bring suit on the grounds that the group had a legitimate interest in the issue. This was brought to an end in *Sierra Club v. Morton*¹⁰¹ where the court held that a mere interest in a problem, no matter how long-standing the interest and no matter how qualified the organization, was not sufficient:

The trend of cases arising under the APA and other statutes authorizing judicial review . . . has been towards recognizing that injuries other than economic harm are sufficient to bring a person within the meaning of the statutory language and towards discarding the notion that an injury that is widely shared is, ipso facto, not an injury sufficient to provide the basis for judicial review. We noted this development with approval in *Data Processing* 397 U.S. at 154 in saying that the interest alleged to have been injured "may reflect aesthetic, conservational and recreational as well as economic values". But broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.¹⁰²

A public interest group in the U.S. may, however, maintain a person who has the required 'special interest'.¹⁰³

The pre-*Sierra Club* class action was merely a representative action with a lowered 'special interest' requirement if the group members demonstrated a genuine concern. This incongruity with the rest of the law associated with *locus standi*, which required the 'special interest' element, was recognised in the *Sierra Club* case.

This type of action has no place in Australian litigation. Firstly, if the 'special interest' requirement was lowered to cover the interests of an environmental or public interest group, the group could sue in its own right (assuming legal personality) and, secondly, as the law stands, the group will still require a 'special interest' to sue, which in effect is merely a representative action as described above.

Finally and incidently, the *Sierra Club* case did establish the requirement in the United States for 'special interest' as a 'user test'. Bates summarises it as follows:

A plaintiff will have standing if he can allege that as a user of the recreational or aesthetic facilities of an area his interests will be adversely affected. And an

99. See B.C. Cairns *Australian Civil Procedure*, (1985) at 282.

100. Australian Law Reform Commission, Working Paper No. 7 at 1.

101. 405 U.S. 727 (1972).

102. *Ibid.* at 745-746.

103. *Environmental Defence Fund v. Hardin* 138 U.S. App. D.C. 391.

organization may gain standing through its members' use and enjoyment of an area.¹⁰⁴

This 'user test' was relied upon by the A.C.F. in the Australian case in an attempt to gain standing. The High Court impliedly rejected the test more by ignoring the submission than by analysing and rejecting it.

(b) Maintenance

The second type of action available to a class of 'interested' persons is by way of maintenance, by an organization or group, of a person who has the required 'special interest' to bring suit. The suit as maintained by the organization, does not require the interest qualification necessary if the action were brought by the organization itself.

To maintain a party legitimately, that is, to fall short of the vestigial remnants of the tort of maintenance, the group must have a relevant interest in the matter for litigation. Such is described by Fleming as '... a legitimate and genuine business interest which would justify him in giving financial support to an action brought ...'¹⁰⁵

Danckwerts J. in *Martell & Ors v. Consett Iron Ltd* states:

... it would be disingenuous to disregard difficulties which the man of small financial resources faces in present day conditions of defending such rights as he may have against infringement by powerful commercial corporation ... If such a man may not avail himself of sympathisers his condition is serious indeed.¹⁰⁶

This rationale expresses not only the basis of thought on the maintenance issue but also that the criteria of relevant interest can be as low as 'sympathisers' and therefore much below the threshold of 'special interest' as required of the person actually bringing the action. The requirement as a basis for the formal action again is an individual with the requisite 'special interest'.

Despite attempts in the United States to establish an action maintainable by a group of persons, none of whom have the traditional requisite *locus standi*, but who together show a genuine concern, class actions in Australia seem only advantageous in enabling prospective applicants to come to court through another who has sufficient interest.

(c) Group Legal Personality and The Common Law

A public interest group such as an environmental group could sue in its own right if it possessed the 'special interest' requirement through its own legal personality. Lack of legal personality will be a conclusive bar to standing of the group, and an unincorporated association without the requisite *persona juridica* cannot have any sort of interest as at law it does not exist except through its individual membership.

In *Willis v. Association of Universities of the British Commonwealth*, Lord Denning concluded that he could find no reason why an unincorporated company could not be said to have legal personality, quoting a view expressed by Dicey:

When a body of twenty or two thousand or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body which by no fiction of law, but by the very nature of things differs from the individuals of whom it is constituted.¹⁰⁷

According to the more orthodox approach expressed in *Bristol & Others v. Water Conservation and Irrigation Commission*,¹⁰⁸ this view has found no favour in Australia. There is, however, no bar on such an association maintaining an individual having the

104. G.M. Bates, *Environmental Law in Australia*, (1983) at 209.

105. J.G. Fleming, *The Law of Torts*, (1983) at 189.

106. [1955] 1 Ch. 303 at 371.

107. [1965] 1 Q.B. 140.

108. [1975] 2 N.S.W.L.R. 643.

requisite interest, provoking the relevant Attorney-General to grant his *fiat* or taking part in a representative action. Standing of the group of its own accord will be denied unless incorporated.

5. Statutory Standing

As well as a statute providing, for example, a duty enforceable by writ of mandamus, it may provide an explicit statutory standing provision. Acts which grant standing are of two basic categories.

The first, 'administrative review' acts, provide general avenues of appeal from administrative decisions and provide an outline as to the class of persons able to seek a review. The second is a class of individual acts covering particular areas of public interest and providing individually for the class of persons granted standing. With respect to environmental issues, the individual acts which were examined (Table I shows a list forming the basis of environmental legislation in Queensland), apart from the Local Government Acts which in themselves provide a specific structure for third-party appeals, demonstrate no avenue for third-party appeals.

Table 1

Summary of Queensland Legislation Involving Environmental Issues Where Third Party Appeals are not Recognised

- *Aboriginal Relics Preservation Act* 1967-1976
- *Agricultural Chemicals Distribution Control Act* 1966-1983
- *Beach Protection Act* 1968-1986
- *Clean Air Act* 1963-1984
- *Clean Waters Act* 1971-1982
- *Fauna Conservation Act* 1974-1985
- *Fisheries Act* 1976-1984
- *Forestry Act* 1959-1984
- *Harbours Act* 1955-1982
- *Litter Act* 1971-1978
- *Marine Parks Act* 1982
- *Mining Act* 1968-1986
- *National Parks and Wildlife Act* 1975-1984
- *National Trust of Queensland Act* 1963-1981
- *Native Plants Protection Act* 1930
- *Queensland Museum Act* 1970-1985
- *Radioactive Substances Act* 1958-1978
- *River Improvement Trust Act* 1940-1985
- *Sewerage and Water Supply Act* 1949-1985
- *Water Act* 1976-1986
- *Water Resources Administration Act* 1978-1984

LL.B. (Q.I.T.) The paper was prepared whilst the author was a 4th Year LL.B. Student, Queensland Institute of Technology.

The 'administrative review' acts therefore lie as the only apparent opening in Queensland for environmental groups seeking legislative standing. In this category three Acts are potentially important, only one is a Queensland act and therefore the other two are applicable only to decisions made under Commonwealth Legislation.

(a) The Administrative Decisions (Judicial Review) Act 1977 (Commonwealth)

The requirement for standing under this Act is a 'person aggrieved'. The most important section in this Act for present purposes is s.5(1) which states:

A person who is aggrieved by a decision to which this Act applies . . . may apply to the Court for an order of review in respect of the decision.

The Act then lists a series of grounds for review. A 'person aggrieved' is defined in s.3(4) as including a reference

- (i) to a person whose interests are adversely affected by the decision; or
- (ii) in the case of a decision by way of the making of a report or recommendation – to a person whose interests would be adversely affected if a decision were, or were not, made in accordance with the report or recommendation; and a reference to a person aggrieved by conduct that has been is being or is proposed to be engaged in for the purpose of making a decision or by a failure to make a decision includes a reference to a person whose interests are or would be adversely affected by the conduct or failure.

S.7 also allows a person aggrieved to apply for an order of review when a person who has a duty to make a decision fails to do so. While the avenue is available, the question then arises as to the 'class' of persons contemplated as having standing. Despite its being dangerous to generalize as to meanings of specific phrases in specific acts – their meaning depending heavily on their context – the phrase 'person aggrieved' has received much judicial comment and attempts at a standard definition are fruitful for two reasons: firstly, they may aid the standing 'interest' requirement for the AD(JR) Act and, secondly, they display a trend in legislative interpretation reflected in the development of standing at common law.

English decisions on the expression have their first real authority in *Ex parte Sidebotham*, where James L.J. stated:

A "person aggrieved" must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something.¹⁰⁹

In the same year that Salmon J. in *Buxton v. Minister for Housing and Local Government*¹¹⁰ confirmed the views of James L.J., Denning M.R. attempted to widen its ambit stating in *A-G Gambia v. N'Jie*:

The words "person aggrieved" are of wide import and should not be subjected to a restrictive interpretation. They do not include of course a mere busybody who is interfering in things which do not concern him but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests . . .¹¹¹

The wider view of the Master of the Rolls was adopted in 1964 in *Maurice v. London County Council*¹¹² to cover a right to air and light. Ackner J. in *Turner v. Secretary of State for Environment*¹¹³ also adopted Denning M.R.'s approach. Bayne has commented that:

Ackner J. appears to consider that they [the objectors] did have an interest apart from the mere fact that they had appeared at the enquiry. Their interest was solely as representatives of the Preservation Society and, if that is sufficient, the implications of the decision are very far reaching.¹¹⁴

It does seem however that Ackner J.'s judgment in this respect is neither authoritative nor definitive of the clear statement Bayne imports. Its implications are however far

109. (1880) 14 Ch.D. 458 at 465-6. The quotation, whilst applying to parties who are directly affected by the decisions under an act, that is parties against whom the act applies, can, it is submitted, also apply to third parties wishing to enforce the public interest.

110. [1961] 1 Q.B. 278 at 286.

111. *Supra* n.83 at 638.

112. [1964] 2 Q.B. 362.

113. (1974) 28 Property and Compensation Reports 123 at 139.

114. P. Bayne, 'Statutory Review' in *Locus Standi supra* n.20 at page 107.

reaching in that they inject into the term 'person aggrieved' a threshold for standing far below the expression as examined in either *Sidebotham*, or for that matter, *N'Jie*. While the approach of the Master of the Rolls does widen the threshold for standing by requiring less than the traditional proprietary or pecuniary interest, it does not define the lowered limit nor, it is suggested, is such feasible. What can be gained from this statement is that the standing requirement will not be so restricted and it is on that basis that Acts must be interpreted.

While these phrases are to be determined with respect to the context of each act, they universally import the criterion of objectivity. The most blatant example is the interpretation of 'Person who feels aggrieved' in *Maurice v. London City Council* where Lord Denning M.R. stated that this requirement must be determined objectively and that the phrase meant the same as 'person aggrieved'.¹¹⁵

In other contexts, the phrase 'a person dissatisfied' has been used. While *prima facie* these words appear wider than 'aggrieved',¹¹⁶ they were interpreted with respect to the *Sidebotham* test in *Bryson Industries Ltd v. Sydney City Council*.¹¹⁷ The use of the test has been criticized as having 'little justification'¹¹⁸ but again indicates an attitude of adoption of the traditional rationale.

The phrase 'substantial detriment' on the other hand seems to narrow the ambit for suit, but as Gillard J. stated in *SS Constructions Pty Ltd v. Ventura Motors Pty Ltd* the phrase:

does not mean some blot on or defect of title. . .it connotes persons other than, as well as those who have, some proprietary interest in the land.¹¹⁹

A 'person affected' as interpreted by recent decisions also has received or been accorded wide meaning, as Brennan J. stated:

The relevant interests do not have to be pecuniary interests or even specific legal rights . . . Restrictions of that kind are incompatible with the variety of decisions which are subject to review . . .¹²⁰

The scope of decisions subject to review under the AD(JR) Act, whilst limited to Commonwealth jurisdiction under s.3(1), is comprehensive as regards the decisions under that jurisdiction which the Act does cover. Section 3(2) outlines a very wide ambit of decisions reviewable including both 'doing or refusing to do any other act or thing. . .' and a failure to make a decision. A 'decision' is defined in 3(1) as basically a decision of an administrative character made under an enactment excluding those made by the Governor-General and as outlined in the Second Schedule to the Act.

(b) The Administrative Appeals Act 1975

The standing requirement of this Act is that of a 'person affected'. An environmental group will be 'a person affected' given that under s.27(2) 'an organization or association of persons whether incorporated or not shall be taken to have interests that are affected by a decision if the decision relates to a matter included in the objects or purposes of the organisation or association'. The Act however is again limited initially to matters involving Commonwealth jurisdiction and, secondly, only to acts which provide review by the Tribunal. Bates states that with respect to environmental groups this limitation is unfortunate since 'Decisions taken under Commonwealth legislation rarely are included within the Jurisdiction of the tribunal.'¹²¹

115. *Supra* n.112 at 373.

116. *Ex parte Fitzpatrick* (1916) S.R. (N.S.W.) 541 at 548.

117. (1963) 8 L.G.R.A. 395.

118. *Supra* n.114 at 128.

119. [1964] V.R. 229 at 236-7.

120. *In Re McHattan* (1977) 18 A.L.R. 154 at 157.

(c) *Ombudsman*

A third Act which can be regarded as administrative and providing a potential avenue for enforcing examination of public interest issues is the Ombudsman Act 1976 (Commonwealth) and its counterpart in Queensland, the Parliamentary Commissioner Act 1974-1976. Complaints concerning administrative decisions may be investigated by these bodies at Commonwealth or State levels respectively. The complainant must, under s.6(1)(b)(iii) of the Commonwealth Act, and s.17(1)(c) of the State Act, have '... sufficient interest in the subject matter of the complaint' upon which the decision is made.

The lack of use of this avenue leads to questions of the effectiveness of any application made to either of the authorities.¹²²

Conclusion

An environmental or public interest group wishing to sue on a public interest issue has four general avenues open to establish the requisite standing. These, as examined above, are:

- (1) Suit through the Attorney-General;
- (2) A 'special interest' under the general law;
- (3) Use of the prerogative writs;
- (4) A statutory right.

Consideration of each of the avenues reveals a general inadequacy in the provision of a comprehensive and predictable system of standing rules for public interest issues. Suit by way of the Attorney-General's *fiat* remains completely discretionary and as such is not a reliable tool for litigation. The fact that any decision made in refusing to grant the *fiat* is beyond review adds to the unpredictable nature of the avenue especially given the Attorney-General's other and perhaps predominant role as a politician under the Australian system.

To date, individual statutory provisions have generally failed to provide for third party appeals. Further, general administrative review acts are so limited as to be generally unavailable.

The prerogative writs seem generally under-utilized considering that they may provide an effective and, given the lower requirements for standing, more readily available tool. The use of the prerogative writ of mandamus may be hampered because of current unpredictable availability as against the Crown in right of a State.

The final area of standing under the general law has seen a constant if slow evolution to the expanded 'special interest' requirement recently examined in *Onus v. Alcoa*. The transfusion in *Australian Conservation Foundation v. Commonwealth* of the 'special damage' criterion to 'special interest' made by Gibbs J.¹²³ begs explanation by identification of sub-criteria. The only hint given by the court came in *Onus v. Alcoa* where Stephen J. cited a curial assessment involving the proximity of the applicant to the subject matter as an element of 'special interest'.¹²⁴ Stephen J. did not go on to explain any sub-criteria to examine proximity but merely distinguished the relationship between the aboriginal tribe and its spiritual relics on the one hand, and the Australian Conservation Foundation and an area of Central Queensland on the other.

Gibbs C. J. however did expand this criterion by explaining the proximity test as including physical proximity. He stated:

The position of a small community of Aboriginal people of a particular group living

121. *Supra* n.104 at 193.

122. *Ibid.*

123. *Supra* n.45 at 527.

124. *Supra* n.62 at 42.

in a particular area which that group has traditionally occupied and which claims an interest in relics of their ancestors found in that area is very different indeed from that of a diverse group of white Australians associated by some common opinion on a matter of social policy which might equally concern any Australian.¹²⁵

A second factor relevant to the proximity test is that described by Gibbs C.J. as the 'custodial role' played by the tribe over relics of a 'cultural and spiritual significance'.¹²⁶ This test would depend very much on the relationship which exists between the individual and the subject matter of the action. This relationship need not be exclusive to the individual but according to Murphy J:

It is sufficient for standing that a plaintiff have an interest exceeding that of the public generally in preventing breach of a public right or securing the performance of a public duty.¹²⁷

To examine the proximity of an individual or group to the subject matter necessarily involves an examination of the factual context of the case. An individual's circumstantial or physical proximity can be determined only in relation to the surrounding circumstances, for as Mason J. stated in *Robinson v. Western Australian Museum*, the

... cases are infinitely various and so much depends in a given case on the nature of relief which is sought, *for what is sufficient interest in one case may be less than sufficient in another.*¹²⁸ (emphasis added.)

If the sole individual interest is an intellectual or emotional concern, it cannot give rise to standing – see Gibbs J. in *Australian Conservation Foundation v. Commonwealth*.¹²⁹ If the proximity test cannot accommodate this insufficient interest, the individual cannot sue. This presents the crux of the inadequacy of the law of standing in public interest suits. While a public breach, whether statutory or under the common law, may have been committed, there may be cases where there is no individual with sufficient special interest to sue or who wishes to sue. The act breaching the public duty can thereby continue unchallenged and it is regrettable that the suggestion made by the Australian Law Reform Commission, that anyone be accorded standing provided such person is concerned in the issue, has not been pursued.

It is suggested that there is a need for a second context rule: an examination of standing in its legal context as proposed by Lord Wilberforce in the *Mickey Mouse* case. The result of examination in this context would be that if the result without the legal context test was that no sufficient interest was found in one individual, what must be looked to are the substantive issues. If the action is of a frivolous or vexatious nature, the standing requirement will loom large to defeat the applicant's claim. If, however, there are substantive issues of particular public importance raised, standing assumes a secondary if not non-existent role, allowing an examination of such issues. This would overcome the floodgates argument by avoiding non-substantive suits.

The problem is that in determining what is or is not a substantive suit raises the issue of public policy. This, whilst being impossible to define and controversial in application, is a role not unknown to the courts. To overcome problems in this area may require legislative reform. The Administrative Appeals Tribunal is at present of little value given its limited ambit of jurisdiction over State decision making authorities. However a tribunal on a State level given a more liberal standing requirement is another area for possible reform.

125. *Ibid.* at 37.

126. *Ibid.* at 36.

127. *Ibid.* at 44.

128. *Supra* n.53 at 327-8.

129. *Supra* n.45 at 530.