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NINETY-SEVENTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

GENERAL RULE OF STANDING IN ENVIRONMENTAL MATTERS

1987

NINETY-SEVENTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO A GENERAL RULE OF STANDING IN ENVIRONMENTAL MATTERS

TO:

The Honourable C.J. Sumner, M.L.C.,

Attorney-General for South Australia.

Sir,

You have asked us to investigate and recommend a general rule of standing in environmental matters.

Man has from time immemorial been attempting to conquer his environment and to mould and shape it for his own purposes. However, for some time it has been evident that such behaviour could not continue unrestricted without there being unfortunate repercussions on mankind's health and welfare, not to mention irreparable damage to the environment itself.

Bates in his book Environmental Law in Australia describes the growth of environmental law when he says at page 6:-

> "Complaints about pollution were being dealt with by the courts of common law as early as the fourteenth century and anti-pollution legislation was on the statute book in the late thirteenth century.
>
> Initially both judicial activity (which reached a peak in the nineteenth century) and legislative action, reflected more a direct response to particular public health problems than any general concern about environmental quality. As early as 1273, for example, it is said that Edward I prohibited the use of coal because the fumes were considered detrimental to human health. For the same reason, in 1388, a statute prohibited the throwing of dung and other filth into

rivers and ditches close to any towns or villages. Even as late as 1875 water pollution problems in England were still dealt with under the great Public Health Act of that year. Indeed, only the sensitive noses of nineteenth century members of parliament, who could not bear to take tea on the terraces of the Houses of Parliament at Westminster due to the appalling stench coming from the River Thames, finally secured the passing of the Rivers (Prevention of Pollution) Act 1876."

Bates points out that this "piece-meal" approach was reflected in early Australian legislation, with pollution being treated at first as a nuisance incidental to public health and local government functions. But in general, property rights were sacrosanct and an easement could even be obtained to discharge polluting material. For example, in Adelaide an early firm of butchers obtained an easement by prescription to discharge offal and other pollutants into the River Torrens which they successfully vindicated against a motion picture company about to build a picture theatre on servient land in Hindley Street, Adelaide. The high water mark of this point of view is undoubtedly Borough of Bradford v. Pickles (1895) A.C. 587 where the House of Lords upheld the respondent's right to threaten to poison the town water supply of Bradford through water percolating through strata on his land, unless bought out at his price. The law of nuisance is infrequently useful and almost always unpredictable in relation to the suppression of environmental pollution. The plaintiff must put up with pollution if he lives in an industrial neighbourhood: see the judgment of Thesiger L.J. in Sturges v. Bridgman (1879) 11 Ch. D. 852 at 865 and he cannot recover if it is considered by the Court

that an ordinarily robust man would put up with the nuisance. As Dodderidge J. said long ago in Jones v. Powell (1628) Palm. 536 at 538, 81 E.R. 1208 at 1209:- "Si home est cy tendernosed que ne poit indurer sea-cole il doit lesser son mease". When to that is added the many idiosyncrasies of the law of nuisance set out in Fleming: The Law of Tort Sixth Edn. 1983 Chapter 20, it is obvious that the common law of nuisance will only rarely protect against environmental pollution. Only comparatively recently has more comprehensive pollution control legislation been enacted together with other environmental protection and conservation legislation. It has now come to be recognised that undue or unnecessary interference with man's environment should be discouraged not only due to the possible repercussions to health and wellbeing, but in order to protect other species of lifeforms and indeed the earth itself.

In recent years environmental issues have been raised frequently, and it can be assumed that this is not a "fad" which will disappear, but rather will gain momentum as first more environmental crises emerge and secondly as a greater social awareness of the problems develops.

Already, the Government of this State have recognised the serious consequences to the environment which may arise if man is left to carry on certain activities unregulated. Various pieces of legislation have been enacted in recent years which are geared towards preserving our natural resources and environment (see for example Water Resources Act 1976, Waste Management Act, 1979, Clean Air Act

1984 and Environment Protection (Sea Dumping) Act 1984.

Environmental law in recent years has developed greatly. There is now a more widespread awareness in society of the dangers of pollutions and citizens try to do something about environmental problems even though they have not been personally affected. Largely due to the great advances which have been made in the fields of transportation and communications, people are able to see problems either firsthand or by telecommunication that previously they would have been unlikely to see and understand. Thus people have greater awareness of the extent of man's interference with the environment, and appear to have greater motivation to do something about it. Thus in recent years we have seen environmental protests, barricades and green bans used in attempts to protect the environment.

Unfortunately, such practices in many instances appear to do no more than serve to make those wishing to engage in development hostile, and less willing to come to some compromise. It would appear to be far more desirable to have grievances relating to the environment sorted out in a less confrontational and more constructive manner.

It may well be that such methods of getting a point of view across would be used less if the Courts (or some other tribunal) were willing and able to become involved in such disputes. The primary obstacle in the way of Courts being utilised in such a manner would appear to be the present rules of standing, which are generally geared towards

protecting private proprietary rights rather than the interests of society as a whole.

Apart from encouraging certain people to use militant methods to obtain their objectives of conservation and preservation, the standing rules also prevent other people who do not wish to become involved in militant practices from being able to do anything useful about their environmental concerns.

Because our environment is so important to all mankind, it would appear desirable that persons who have a genuine grievance over environmental issues should be enabled to have those grievances adjudicated upon.

As has already been mentioned, the present difficulty with standing arises principally from the fact that most causes of action and the standing rules applying to them reflect the fact that proprietary interests are given great weight while until recently very little thought was given to the interests of the public generally.

Public interests have generally been left to be protected by the Attorney-General either directly or through relator proceedings. The main problem with leaving public interests to be protected in this way arises from the fact that politics may play a role or at least be seen to play a role in the Attorney-General's decision-making process. Thus there appears to be two separate problem areas with respect to public interest suits. First, the present rules of standing are restrictive, and in many instances will not allow concerned members of the public to institute

proceedings as of right. Second, the official protector of the public interest - the Attorney-General may not be able to divorce himself sufficiently from his political objectives when exercising his discretion whether or not to either commence proceedings ex officio, or allow proceedings to be commenced by a private citizen or alternatively may be overruled by Cabinet even though he personally would be willing to authorise action to be taken in the Courts.

One possibility for reform which will be considered later is to vest the Attorney-General's role in a more independent person or body of persons. At this stage however we will examine the present standing requirements, in order to ascertain if there ought to be a greater opportunity for members of the public to bring environmental proceedings as of right.

A member of the public presently has standing to sue with respect to breaches of public as opposed to private rights in certain limited circumstances. For example, a statute may confer a direct right of enforcement by a member of the public, this is at present very rare. Alternatively, a person may have a right to commence proceedings if he has a particular interest in the outcome of the proceedings, for example where some private right of his has been interfered with or he has suffered damage which is different in some way from that suffered by the other members of the public.

Thus in Boyce v. Paddington Borough Council (1903) 1 Ch. 109 Buckley J. said at page 14:-

"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 (e.g., where an obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway); 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."

Due to the fact that the Courts have generally interpreted special damage in a restrictive manner, it will often not be possible for prospective plaintiffs in public interest suits to establish special damage and consequently standing.

An attempt to erode the standing requirements in public interest suits was quite recently made by Lord Denning, M.R. in Attorney-General ex rel McWhirter v. Independent Broadcasting Authority (1973) Q.B. 629. In that case, McWhirter sought an injunction to prevent the televising of a film about Andy Warhol on the ground that the telecast would constitute a breach by the Independent Broadcasting Authority of its statutory duty to satisfy itself that programmes did not offend against good taste or decency or were likely to be offensive to public feeling.

Lord Denning made two significant statements at page 649 regarding the enforcement of a public right or the prevention of a public wrong by a private individual. The first statement was:-

"....I am of the opinion that, in the last resort, 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 itself. He can apply for a declaration and in a proper case, for an injunction, joining the Attorney-General, if need be, as a defendant....I would not restrict the circumstances in which an individual may be held to have a sufficient interest."

The second statement was:-

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

The effect of these statements was to enunciate a new test of locus standi which in effect left the question of standing to the judge's discretion in each individual case. A similar approach was taken in R v. Greater London Council: ex parte Blackburn (1976) 1 W.L.R. 550.

However, the House of Lords in Gouriet v. Union of Post Office Workers (1978) A.C. 435 rejected the notion that the question of standing is one that lies within the discretion of the Court and reaffirmed the test laid down by Buckley J. in Boyce's case. The Lords held that it was a fundamental principle of English law that public rights could only be asserted in a civil action by the Attorney-General as an officer of the Crown representing the public. Except where a statute otherwise provided, a private person could only bring an action to restrain a threatened breach of the law if his claim was based on an allegation that the threatened breach would constitute an infringement of his private rights or would inflict special damage on him.

Soon after Gouriet was decided, an alteration in

the rules governing standing took place, with the coming into effect of Order 53 rule 3(5) of the Supreme Court Rules which provides:-

> "The Court shall not grant leave (to apply for judicial review) unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

(This provision is now found in Order 53 rule 3(7)). Order 53 was introduced in 1977 by the Rules Committee of the Supreme Court to simplify the procedure for judicial review by (inter alia) eliminating technical differences in the standing requirements of the various public law remedies.

The scope of Order 53 rule 3(5) was considered by the House of Lords in I.R.C. v. National Federation of Self-Employed and Small Businesses Ltd. (1982) A.C. 617. In that case, the National Federation of Self-Employed and Small Businesses challenged the validity of an arrangement made between the Inland Revenue Commission and a union of certain casual workers in Fleet Street who had been evading taxes. Pursuant to the arrangement, in return for the adoption by the workers of a system of registration which would ensure that future taxes were paid, the Commission agreed not to carry out investigations into tax evaded prior to 1977. The Federation, which claimed to represent a body of taxpayers who felt aggrieved because the Fleet Street casual workers were allegedly getting preferential treatment, applied for judicial review under Order 53 seeking a declaration that the Commission had acted unlawfully in making the arrangement and

an order of mandamus directing the Commission to assess and collect tax on the newspaper's casual employees as required by law.

The issue before the House of Lords was whether the Court of Appeal was correct in reversing the Divisional Court's finding that the Federation did not have a "sufficient interest in the matter to which the application relates" within the meaning of Order 53 rule 3(5).

The House of Lords decided that, having regard to the duties and powers of the Commission, the arrangement was a proper one and therefore the Federation had shown no sufficient interest in the matter to justify its application for relief. Their Lordships stated that, other than in exceptional cases where the absence of "sufficient interest" is obvious, the question of locus standi should not be treated as an isolated preliminary issue, but should be decided after a consideration of the merits of the application. They said that what constitutes a "sufficient interest" is a mixed question of fact and law, and that regard must be had to the relationship between the applicant and the matter to which the application relates and to all the circumstances of the case. Lord Wilberforce added at page 62 that Order 53 rule 3(5) did not "remove the whole question of locus standi into the realm of pure discretion".

On the other hand, Lord Diplock took the view that rule 3(5) leaves to the Court "an unfettered discretion to decide what in its own good judgment it considers to be a

"sufficient interest"". Lord Diplock cited with approval Lord Denning's statement in R v. Greater London Council, ex parte Blackburn (1976) 3 All E.R. 184 where he said at page 192:-

> "I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then any one of those offended or injured can draw it to the attention of the Courts of law and seek to have the law enforced, and the Courts in their discretion can grant whatever remedy is appropriate."

Thus Lord Diplock appears to hold the view that both pursuant to Order 53 3(5) and at common law the standing requirements have been relaxed, and the Court may in its discretion grant a remedy.

Whether or not this broad direction-based test of standing, which has been advocated by Lord Denning M.R. and Lord Diplock will be generally accepted, is unclear. It would appear that the test may have already been accepted in New Zealand where the New Zealand Court of Appeal has "drawn guidance" from the speech of Lord Diplock. In Environmental Defence Society Inc. v. South Pacific Aluminium Ltd. (No. 3) (1981) 1 N.Z.L.R. 216 the Court of Appeal held that two environment protection societies had standing to bring proceedings alleging that the Governor-General in Council had not properly complied with certain statutory procedures relating to the procurement of consents for the construction of an aluminium smelter. The Court said at page 220:-

> "The proceedings challenge the legality of Government

> action. It is unrealistic to expect the Attorney-General to do this and we see no reason why it must be left to individuals directly affected to undertake the burden. In the exercise of the Court's discretion responsible public interest groups may be accepted as having sufficient standing under the National Development Act."

And in Covent Garden Community Association Ltd. v. Greater London Council (1981) J.P.L. 183 the Court accepted the locus standi of the Association (consisting of most of the residents and formed to safeguard their interests) to maintain a petition for certiorari under Order 53 against a decision of the Council to change the use of the premises it owned in the Covent Garden area to office use. Woolf J. said that it would be quite out of accord with the general approach to questions of locus standi in prerogative proceedings to say that the applicants did not have standing.

The Australian Position with Respect to Standing in Environmental Law

Although the Courts in England and New Zealand appear to be prepared to take a less restrictive approach towards standing, Australian Courts generally have not been quite as flexible. This is despite the fact that in Benjamin v. Downs (1976) 2 N.S.W.L.R. 199 Helsham J. was prepared to apply Lord Denning's observations in McWhirter's case (supra). Helsham J. considered that the plaintiff, who had been refused the fiat of the Attorney-General, had shown a sufficient interest in relation to a matter of great public importance.

On the other hand, there was held to be a lack of standing in the case of Stow v. Mineral Holdings (Aust.) Pty.

Ltd. (1975) Tas. S.R. 25 (1977) 51 A.L.J.R. 672. In that case members of a conservation group objected to the granting of a mining licence for Precipitous Bluff on the south-west coast of Tasmania under a statutory provision that provided:-

> "A person who claims any estate or interest in any land within the area...may...object."

Neasey J. in the Tasmanian Supreme Court stated at page 52:-

> "That which the objectors claimed was no more than a licence to traverse the land, and to enjoy it by camping on it and the like, and a special interest in, in the sense of concern for, the land, by reason of their membership in bodies which were particularly concerned with environmental questions. It will be clear from what has been said earlier....that "estate or interest" are words used in a technical sense, and that a licence to use the land in the ways in which the objectors claimed they are entitled to does not constitute an interest."

Stein in Locus Standi when commenting upon this decision said at pages 11-12:-

> "Although this decision may be confined to the statutory formula in issue, it is illustrative of the fact that environmental or aesthetic rights are not acknowledged as interests in land. This is so for a number of reasons. Firstly, the feudal tenure system did not classify these interests and they do not, as a consequence, have historical recognition. Secondly, the specific values sought to be advanced are not precise and capable of exact delineation. Thirdly, and most importantly, all property interests considered by the judiciary are inevitably ascertained in the light of commercial productivity and thus these values find little recognition when weighed against "legitimate" commercial undertakings."

A similar restrictive approach was taken by the High Court in Stow's case where Aickin J. said at page 679:-

> "The fact that some of them are more disposed to go upon the land than others, derive more benefit therefrom and use the statutory rights more often than others does not elevate that which is a public right enjoyed equally by all members of the public equally into a private right

capable of being described as an estate or interest in land."

The High Court has to a large extent reaffirmed the traditional standing requirements in the recent decision of Australian Conservation Foundation Incorporated v. Commonwealth of Australia (1979) 28 A.L.R. 257 (1980) 54 A.L.J.R. 176, 146 C.L.R. 493.

In that case the appellant Foundation had sought declaratory and injunctive relief against the Commonwealth and other respondents, alleging a failure by the respondents to follow administrative procedures made under the Environmental Protection (Impact of Proposals) Act 1974 (Cth.) in relation to approvals given in respect of the Iwasaki tourist development project at Yeppoon in Queensland.

Aickin J. struck out the appellant's statement of claim and dismissed its action for want of standing. The appellant appealed to the Full Court which upheld the decision of Aickin J.

Gibbs J. said at page 526 of the Commonwealth Law Reports:-

> "For the reasons I have given, the action was not brought by the Foundation to assert a private right. It is brought to prevent what is alleged to be a public wrong. The wrong is not one that causes, or threatens to cause, damage to the Foundation, or that affects, or threatens to affect, the interests of the Foundation in any material way. The Foundation seeks to enforce the public law as a matter of principle, as part of an endeavour to achieve its objects and to uphold the values which it was formed to promote. The question is whether, in these circumstances, it has standing to sue.
>
> It is quite clear that an ordinary member of public, who has no interest other than that which any member of the public has in upholding the law, has no

> standing to sue to prevent the violation of a public right or to enforce the performance of a public duty. There is no difference, in this respect, between the making of a declaration and the grant of an injunction. The assertion of public rights and the prevention of public wrongs by means of those remedies is the responsibility of the Attorney-General, who may proceed either ex officio or on the relation of a private individual. A private citizen who has no special interest is incapable of bringing proceedings for that purpose, unless, of course, he is permitted by statute to do so."

then at 527:-

> "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 matter of the action"."

The problem then became one of determining what would constitute such a "special interest". Despite the fact that the Foundation existed for the purpose of conservation of the Australian environment, the majority of the Court agreed that the Foundation lacked standing.

Gibbs J. said at pages 530-531:-

> "I would not deny that a person might have a special interest in the preservation of a particular environment. However, an interest, for present purposes, does not mean 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, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. 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. If that were not so, the rule requiring special

interest would be meaningless. Any plaintiff who felt strongly enough to bring an action could maintain it.

It is quite clear that when the rule is thus understood, the Foundation has no special interest in the preservation of the environment at Farnborough, and of course none in Iwasaki's exchange control transactions. Counsel for the Foundation sought to show an interest in two alternative ways - first, because of the nature of the Foundation and its objects and, secondly, because of the fact that it had sent written comments when the draft environmental impact statement was made available for public comment. The fact that the Foundation is incorporated with particular objects does not strengthen its claim to standing. A natural person does not acquire standing simply by reason of the fact that he holds certain beliefs and wishes to translate them into action, and a body corporate formed to advance the same beliefs is in no stronger position. If it is the fact that some members of the Foundation have a special interest - and it is most unlikely that any would have a special interest to challenge the exchange control transaction - it would not follow that the Foundation has locus standi, for a corporation does not acquire standing because some of its members possess it."

Murphy J. dissented. He accepted the formulation in Baker v. Carr (1962) 369 U.S. at 204:-

"The gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions."

Murphy J. said at page 557:-

"Even if it is necessary to show that the plaintiff is "more particularly affected than other people" (see Mason J. in Robinson v. Western Australian Museum (1977) 138 C.L.R. 283 at 327), here the plaintiff is more particularly affected as it has gone to the trouble of submitting comments. It is entitled to have these dealt with legally, not passed over or dealt with irregularly."

Unfortunately, the judgments in the Australian Conservation Foundation Case left unresolved a number of questions about the kind of "special interest" which might give standing and how much wider (if at all) this test was

than the one laid down in Boyce's case of "special damage peculiar to himself".

A chance for the Court to answer some of these questions arose quite soon afterwards in Onus and Frankland v. Alcoa of Australia Ltd. (1981) 36 A.L.R. 425.

In that case Onus and Frankland, suing as members of the Gournditch-jmara community in the Portland district, sought to institute proceedings for injunctive and declaratory relief against Alcoa of Australia Ltd. on the ground that the Alcoa project for an aluminium smelter involved a threat to tribal relics. They attempted, quite independently of the ordinary rules of standing, to invoke the Archaeological and Aboriginal Relics Preservation Act 1972 (Vic.). The argument was that since the Act was passed for the benefit of the Aboriginal people as a class, any member of that class could sue to enforce the Act, without any need to show "special damage" or a"special interest". This argument failed. As Gibbs J. put it, the Act was passed:-

> "for the benefit of the public at large, with a view to the conservation of relics....of interest and value not only to Aborigines but also to archaeologists and anthropoligists and....Australians generally. It is quite impossible to hold that the Act confers any private rights onAborigines or any class of them."

The plaintiffs therefore had to fall back on proving a special interest in a threat to tribal relics.

The High Court in that case indicated that sometimes too much is made of the standing of the plaintiff, and that where a case has merit, the Court may decide to hear

the case and determine the question of the plaintiff's right to present it later. For example, Gibbs J. said at page 433:-

> "The question whether a plaintiff has standing to bring an action is one that logically arises before the question whether he is entitled to succeed in the action. However, as I pointed out in Robinson v. Western Australian Museum (1977) 138 C.L.R. 283 at 302, the court has a discretion whether or not it should determine the question whether the plaintiff has a sufficient interest to bring the proceedings before it proceeds to determine the merits of the case."

Murphy J. also said at 438:-

> "In practice, questions of standing are often brushed aside if a court considers that the issue of substance should in the public interest be settled, particularly if it seems clear that the plaintiff will lose on the merits. Often, however, where a plaintiff seeks to have litigated an issue which is awkward because it questions dominant social institutions or relationships, standing looms large."

It is an unfortunate fact that environmentally-based complaints tend to fall into this category mentioned by Murphy J, and as a result standing often "looms large".

In determining whether Onus and Frankland had standing, most of the judges took as their starting point a suggestion by Gibbs J. in the Australian Conservation Foundation Case, which had substituted the traditional requirement of "special damage peculiar to the plaintiff" for the requirement of "special interest in the subject matter of the action".

On the question of whether the appellants had a special interest in the subject matter of the action, Gibbs C.J. Stephen, Mason, Murphy, Wilson and Brennan J.J. held that they did, and that this arose from their position in and

obligations as members of the Gournditch-jmara community in relation to the custody and preservation of ancestral relics, including those at Portland.

The distinction between the position of the Conservation Foundation and that of Onus and Frankland is still unclear. However, Gibbs J. distinguished the two in the following manner at page 432:-

> "The position of a small community of Aboriginal people of a particular group living 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 other Australian."

While Wilson J. said at page 452:-

> "In the present case, the interest of the appellants is necessarily focused on relics in a particular locality. There is nothing abstract about it. There is nothing voluntary about it, as there would be if it were a cause which if not pursued at Portland today may be pursued in the Kimberleys tomorrow. The Gournditch-jmara people, of which the appellants are representative, are involved in these relics, whether they like it or not. It is to their ancestors, their history, that the relics bear silent but meaningful testimony. Furthermore, the corporate nature of the interest, resident as it is collectively in the tribe, also serves to identify an interest which is deeper and more significant than a mere emotional attachment. In my opinion, the interest of the appellants, described as it is as a cultural and historical interest, is more than the kind of emotional or intellectual interest to which Gibbs J. referred in the Conservation Foundation case."

Thus it appears that it was the particular tie of these plaintiffs with that particular land and those particular relics that enabled them to claim standing. Indeed Gibbs J. implied strongly that other persons of Aboriginal descent but not of the Gournditch-jmara people,

would not have been entitled to sue.

Unfortunately, the Alcoa decision has not cast light on the question of the scope and meaning of the term "special interest". It would seem that this is largely as a result of the fact that the special interest formula is merely used as a rationalisation of decisions made on subjective grounds. That this is the case was hinted at by Stephen J. in the Alcoa case where he said at page 436:-

> "The distinction between this case and the ACF 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 in each case 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. The present appellants are members of a small community of Aboriginal people very long associated with the Portland area; the endangered relics are relics of their ancestors' occupation of that area and possess for their community great cultural and spiritual significance. While Europeans may have cultural difficulty in fully comprehending that significance, the importance of the relics to the appellants and their intimate relationship to the relics readily finds curial acceptance. 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. Courts necessarily reflect community values and beliefs, according greater weight to, and perceiving a closer proximity to a plaintiff in the case of, some subject matters than others. The outcome of doing so, however rationalised, will, when no tangible proprietary or possessory rights are in question, tend to be determinative of whether or not such a special interest exists as will found standing to sue."

While flexible definitions do indeed have their advantages in dealing with changes in community values, there is at present too much uncertainty in the requirements of the "special interest test" propounded by the High Court.

Although the Alcoa decision is to some degree encouraging for environmentalists, it is difficult to predict what approach the court will take in subsequent cases where the link between the plaintiffs and the land in question may not be as strong. The court is apparently not prepared to risk the possibility of the "opening of floodgates" as is evidenced by the statement of Gibbs J. in Alcoa at page 431:-

> "If standing is accorded to any citizens to sue the present breaches of the law by another, there exists the possibility not only that the processes of the law will be abused by busybodies and persons activated by malice, but also that persons or groups who feel strongly enough about an issue will be prepared to put some other citizen, with whom they have no relationship, and whose actions have not affected them except by causing them intellectual or emotional concern, to very great cost and inconvenience in defending the legality of his actions."

It does appear however that standing will be found where the plaintiff has a commercial or pecuniary interest in the area concerned. This is evidenced by two recent cases. The first of which being Tasmanian Wilderness Society v. Fraser (1982) 56 A.L.J.R. 763 in which the plaintiff society sought unsuccessfully to have the Commonwealth Environmental Protection (Impact) of Proposals) Act procedures applied to Loan Council decisions on the finding of the Gordon-below-Franklin dam in south west Tasmania. Mason J. who heard the action accepted the submission by the society that it had standing through its commercial or pecuniary interest in the area concerned by virtue of its activities in selling souvenirs and publications etc. relating to the area.

A similar argument was upheld by Connolly J. of the

Queensland Supreme Court in Frazer Island Defenders Organisation Ltd. v. Hervey Bay Town Council (1983) 2 Qld. R. 72. In that case Connolly J. held that although the plaintiff did not have locus standi to claim relief by reason of its aim of preserving the natural resources and environment of Frazer Island, it did have locus standi due to the fact that it apprehended an adverse effect on its business of running tours for profit.

Thus if persons and organisations concerned about the environment can show that they will be adversely affected in a pecuniary way due to an alteration of the environment in their area, they may have sufficient standing.

However, it should be noted that a similar result may have been possible under the original test of "special damage". Indeed it is quite possible that the Alcoa decision would have also been the same under the "special damage test". It is therefore unclear to what extent, if at all, the different wording used in the AFC and Alcoa decisions have broadened the traditional rules of standing.

Despite this uncertainty as to the actual requirements of the present standing test, it is clear that there will be instances where it will prevent genuinely concerned individuals and organisations from bringing environmental proceedings. This is because in many instances all they will be able to show is an intellectual or emotional concern, which was said not to be sufficient in Alcoa.

It is not clear whether or not it would be possible

to succeed by arguing that the area concerned has importance because that is where the individual or members of the organisation spend much of their leisure time. This argument has been successful in the United States. However, courts there have been prepared to take a less restrictive approach towards problems of standing.

United States Position

The American Courts have been willing to take a relatively flexible approach towards standing in environmental law. The view of the American Courts appears to be that since the Congress has intervened to protect environmental values through legislation such as the National Environmental Policy Act (1969) (N.E.P.A.) the courts must adapt their traditional views on standing so as to accommodate injury to environmental interests. Justice Douglas made specific reference to them in Association of Date Processing Service Organisations v. Camp (1970) 397 U.S. 150 when he said at page 154:-

> "The interest....may reflect aesthetic, conservational and recreational as well as economic values....we mention these non-economic values to emphasise that standing may stem from them as well as from economic injury."

The current test for standing before the United States Supreme Court comprises basically two requirements:-

(1) That the interest sought to be protected by the complainant must be within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.

(2) The party asserting standing must show that he has suffered, or will suffer "injury in fact" because of the activities complained of.

The "zone of interest test" postulates that the statute in question must be intended to confer a right of action on a plaintiff (whether he may actually take action depends whether he himself has suffered any injury to those interests i.e. the injury in fact test).

It does not have to be established that the plaintiff's interests are explicitly protected by a relevant statute. Indeed Jacobs in an article in (1972) 41 Cinn. L. Rev. 669 commented at 672:

> "Literally every environmental concern falls within the zone of interests protected by the National Environmental Policy Act, and since all governmental programs must be administered in accord with the Act it is a suit based on the adverse environmental impact of a federal or federally funded program is not seeking to protect a statutorily protected interest."

The "injury in fact test" requires that the plaintiff has suffered, or apprehends that he will suffer, some injury to his private proprietary, economic, environmental or other legitimate interests. Bates in an article entitled Standing in Environmental Litigation (1981) 12 U.Qld. L.J. 18 explains what is meant by this when he says at pages 25-26:

> "We may say "private" environmental interests because it is clear that, even in America, "a party seeking review must allege facts showing that he is himself adversely affected". This preserves the traditional Common Law view that "mere busybodies" should not be allowed access to the courtrooms; for "the courts are not places for those who wish to meddle in things which are no concern of theirs, just for the pleasure of interfering, or of proclaiming abroad some favourite doctrine of theirs, or

indulging in a taste for forensic display. A test which restricts standing to persons or groups who have "such a personal stake in the outcome of the controversy" is intended to preserve "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions". Hence, although recent developments have recognised that injury to environmental interests may found a legitimate basis for standing before the courts, no case has yet decided that the present rules "authorise judicial review at the behest of organisations or individuals who seek to do no more than vindicate their own value preferences through the judicial process". A mere concern about, or interest in, environmental affairs, is not per se enough to establish standing."

A leading case enunciating the United States position relating to standing in environmental law is Sierra Club v. Morton (1972) 405 U.S. 727. In that case, the club, which had maintained an interest in the environment over a long period, sought to review permits granted to a corporation to build a tourist complex in a national park. Although the Court decided 4-3 to refuse the club standing, the principles which were enunciated gave wider opportunities to environmental groups than was hitherto the case.

The Court stated two elements for standing. First, the existence of "damage in fact". It was held that aesthetic damage and damage to the general environment was sufficient.

The second requirement was that the plaintiff allege some damage suffered by himself. It was on this point that the Sierra Club was denied standing; it had failed to allege that its members had suffered damage. The Court said at pages 738-40:-

"The trend of cases arising under the A.P.A. and other statutes authorising judicial review of federal agency

action has been toward recognizing that injuries other than economic harm are sufficient to bring a person within the meaning of the statutory language, and toward 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, 25 L. Ed. 2d at 188, 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.

Some courts have indicated a willingness to take this latter step by conferring standing upon organisations that have demonstrated "an organisational interest in the problem" of environmental or consumer protection. Environmental Defense Fund v. Hardin, 138 U.S. App. D.C. 391, 395, 428 F2d 1093, 1097. It is clear that an organisation whose members are injured may represent those members in a proceeding for judicial review. See, e.g. N.A.A.C.P. v. Button, 371 U.S. 415, 428, 91 Ed. 2d 405, 415, 83 S Ct. 328. But a mere "interest in a problem", no matter how longstanding the interest and no matter how qualified the organisation is in evaluating the problem, is not sufficient by itself to render the organisation "adversely affected" or "aggrieved" within the meaning of the A.P.A. The Sierra Club is a large and long-established organisation, with a historic commitment to the cause of protecting our Nation's national heritage from man's depredations. But if a "special interest" in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide "special interest" organisation, however small or shortlived. And if any group with a bona fide "special interest" could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.

The requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process. It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. The goal would be undermined were we to construe the A.P.A. to authorise judicial review at the behest of organisations or individuals who seek to do no

more than vindicate their own value preferences through the judicial process. The principle that the Sierra Club would have us establish in this case would do just that."

Thus in the Sierra Case the action was dismissed as the club failed to allege that it or its members would be affected in any of their activities or pastimes by the development.

This technical flaw, was however avoided in United States v. Scrap 412 U.S. 669. SCRAP was an unincorporated association formed by five law students for the primary purpose of enhancing the quality of the human environment for its members as well as for all citizens. It challenged the action of the railroads in increasing freight rates by $2^1/_2$% as the rate structure would discourage the use of "recyclable" materials that compete with SCRAP, thereby adversely affecting the environment by encouraging unwarranted mining and other extractive activities. SCRAP specifically alleged harm to its members. The Court granted standing to SCRAP, as the action did harm its members. The Court made it clear that standing is not to be denied simply because many people suffer the same injury. The Court went on to say that to deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread governmental actions could be questioned by nobody, and that this was an unacceptable conclusion.

Thus the United States Courts, while not having gone so far as to extend standing so as to allow people to

"vindicate their own preferences", have been prepared to extend the standing rules in environmental law to a significant extent. The decision in the SCRAP case that special damage was not required, may prove to be of great value to conservationists, especially when coupled with the fact that 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.

A similar extension of the standing rules in Australia would also prove a great boon to environmentalists.

Bates in an article entitled Standing in Environmental Litigation (1981) 12 U.Q.L.J. 18 expresses the view that it is difficult to understand why the "user test" was apparently overlooked in the Australian Conservation Foundation case (supra) but concluded that it may have been because the majority concentrated so much on the principle that a mere concern for the environment was not enough, that they overlooked or did not attach importance to the fact that members of the Conservation Foundation actually used the facilities of the area in question.

Bronstein in an article entitled An American Perspective on Australian Conservation Foundation Inc. v. Commonwealth of Australia 13 F.L.R. 76 also expressed surprise that the Court appeared to ignore the United States "user test". Bronstein commented at page 88:-

> "If I were to act for an environmental group in Australia in the future I would include named individuals as plaintiffs and would make specific allegations showing personal injury, for example: "For the past six years plaintiff X has regularly hunted

at least ten days a year on the subject property; for the past four years plaintiff Y has regularly used part of the subject property at least two days a month for the purpose of recreational birdwatching" etc. It is uncertain whether this would successfully establish standing, but it would certainly force the court to think through the implications of the language in the AFC and Onus cases."

The more relaxed approach to standing taken by the United States Courts appears to be more satisfactory than the approach presently taken by the Australian Courts.

Murphy J. in The Australian Conservation Foundation Case was prepared to follow the path taken by the United States Courts, but the other members of the Court were not then prepared to take any course which was significantly different from the previous Australian position.

Stephen J. said at page 540:-

"If the present state of the law in Australia is to be changed, it is pre-eminently a case for legislation, preceded by careful consideration and report, so that any need for relaxation in the requirements for locus standi may be fully explored and the limits of desirable relaxation precisely defined. Just such an investigation is at present being undertaken by the Australian Law Reform Commission."

Need for Reform

The Courts in some jurisdictions have been willing to alter their approach to standing to suit changes in social values including the growing concern for environmental protection. See for example the cases already discussed of United States v. SCRAP 412 U.S. 669 and Environmental Defence Society Inc. v. South Pacific Aluminium Ltd. (No.3) (1981) 1 N.Z.L.R. 216.

However, the Australian Courts have not been prepared to alter their position to any significant degree.

The present standing requirements in this country will often result in concerned individuals and organisations being unable to utilise remedies to protect the environment. This is because persons wishing to protect the environment are often not complaining about an infringement of a private right or a personal user but rather about the infringement of a right of the public in general to have an environment that is both safe and pleasing to look at. Where, however, it is a "public interest" which is being sought to be protected no ordinary member of the public can at present bring such a suit, unless he has some special interest in the subject matter of the suit, or he has been granted standing to complain by virtue of a statute regulating the activity of which the complaint was made. Without such interest or statutory authority the complainant must ask the Attorney-General, as guardian of the public interest, to either bring proceedings, or to allow the complainant to bring proceedings in his name.

Because the "special interest" test, discussed in the Australian Conservation Foundation case, requires a comparatively close link with the land in question, and environmental statutes at present rarely give a right of action to members of the public, it will in a large proportion of cases not be possible to commence proceedings without the leave of the Attorney-General. This in itself would not necessarily be a bad thing, if it were not for the fact that the Attorney-General is very politically active.

As a result, there may be instances where there is a danger that the Attorney-General's decision whether or not to allow proceedings has been influenced by political objectives. This had led the Australian Law Reform Commission to state in their discussion paper on <u>Standing in Public Interest Suits</u> at pages 13-14:-

> "In an age where many public interest suits are against government the relator procedure increases conflict. It seems better to divorce the Attorney-General completely from the plaintiff's interests and allow him uninhibitedly to advise the government of which he is a member."

This Committee is also of the view that it is undesirable that the Attorney-General should hold responsibility for the "screening" of public interest litigation relating to the environment because it may well place him in an unenviable position of conflict. While this would seem to apply to all public interest litigation we are confining ourselves here to public interest litigation affecting the environment and will on another occasion examine public interest litigation in general.

As the present standing requirements are unsatisfactory, the various alternatives to the present position remain to be considered. For example, is it desirable to throw away all standing requirements, and say that any person can commence environmental proceedings in the public interest? Alternatively, should the Attorney-General be replaced by a non-political official or Board with respect to the screening of potential environmental proceedings? In between these two positions there exists the option of

imposing a somewhat less onerous test of standing, so that there is a greater opportunity for genuinely concerned individuals and organisations to commence proceedings without the need of cooperation from the Attorney-General. While phrases such as "person aggrieved" have been read somewhat restrictively over the last century, it may be possible to use some other phrase which would not require the degree of connection between the subject matter of the proceeding and the plaintiff that the Courts have so far required for this and similar formulae. For example, the Australian Law Reform Commission in their discussion paper entitled Access to the Courts - Standing Public Interest Suits suggest that any person have standing unless he is held to be not a "person concerned", in a non-property sense. In England and New Zealand the test of "sufficient interest" has found favour but this is a test where it is somewhat difficult to predict in advance of litigation whether the Court will at a later date hold the interest propounded to be a "sufficient" one.

Although it is obvious to the Committee that some form of reform is desirable in relation to standing in environmental law, the actual form that that reform should take is unfortunately not equally obvious. Bates in Environmental Law in Australia recognised the difficulty of devising a satisfactory rule with respect to standing when he said at pages 200-201:-

> "The problem here is to adopt some formula which will allow serious, concerned parties with legitimate, non-proprietary interests to protect to come before the courts, while at the same time ensuring that the "courts are not places for those who wish to meddle in things

which are no concern of theirs, just for the pleasure of interfering, or of proclaiming abroad some favourite doctrine of theirs, or of indulging a taste for forensic display" (per Megarry J. in Re Argentum Reductions (U.K.) Ltd. (1975) 1 W.L.R. 186 at 190)."

At this stage we will examine various approaches to reform in environmental law, in order to try and ascertain the one most appropriate for our purposes.

OPTIONS FOR REFORM

Public Trust Doctrine

The American Courts have utilised the Roman and English notions of public rights to develop a doctrine known as the public trust. A number of American states have since passed specific legislation which refers to the public trust and which, as a rule grants citizens access to the courts to enforce it. Several state constitutions also contain certain provisions that either explicitly or implicitly give rise to public trust arguments.

Sax in his publication Defending the Environment: A Strategy of the Citizen Action at page 165 identified three notions that underlie the American public trust law:-

> "First, that certain interests - like the air and the sea - have such importance to the citizenry as a whole that it would be unwise to make them the subject of private ownership. Second, that they partake so much of the bounty of nature, rather than of individual enterprise, that they should be made freely available to the entire citizenry without regard to economic status. And, finally, that it is a principle (sic) purpose of government to promote the interests of the general public rather than to redistribute public goods from broad public uses to restricted private benefit."

Use of the doctrine in the Courts was initially based upon Illinois Central Railway Company v. Illinois 146 U.S. 387. In that case the Illinois legislature had made a

fee simple grant of submerged lands in Lake Michigan to the railway company. These lands comprised virtually the whole commercial waterfront of Chicago. A few years later the legislature repealed the grant and brought an action to have the grant declared invalid. In upholding the State's claim, the Court did not go so far as to prohibit state disposition of public property to individuals. Rather, the land beneath Lake Michigan was viewed differently from other public lands. The Court said at page 490:-

> "It is a title held in trust for the people of the state that they may enjoy navigation of the waters, carrying on commerce over them, and have liberty of fishing therein freed from the obstruction or interferences of private parties."

This principle formed the cornerstone for subsequent litigation, and was restated by Sax (supra) at page 173 as follows:-

> "The courts have operated in public trust cases to provide a counterbalance to market forces. They treat common property resources as an asset belonging equally to each citizen, and they hold that this asset may be impaired only with the court's very reluctant consent and then only when some clear compensatory benefit can be provided for the beneficiaries of the trust."

In recent years a number of American jurisdictions have enacted specific legislation to codify the public trust doctrine or to create a new cause of action for those interested in protecting the public use of certain resources. The Michigan Environmental Protection Act 1970 was drafted by Joseph Sax and is the model for state legislation in California, Connecticut, Florida, Indiana, Massachusetts, Minnesota, Nevada, New Jersey and South Dakota. The Michigan

Act has enlarged the role of the Courts and the public in environmental protection by permitting a plaintiff to sue for a violation of his right to environmental quality, in much the same way as one has always been able to claim that a property or contract has been violated. Section 2 (1) of the Act states:-

> "The Attorney-General, any political subdivision of the State, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organisation or other legal entity may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organisation or other legal equity for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction."

For the full text of the Michigan Environmental Protection Act, see the Appendix.

The nature of the Michigan Environmental Protection Act (MEPA) has been summarised by its author in an article entitled Michigan's Environmental Protection Act of 1970: A Progress Report 70 Mich. L.R. 1003 at 1004-5 as follows:-

> "It authorises any person to bring suit against either a public agency or private entity for declaratory or equitable relief to protect the "air, water and other natural resources and the public trust therein from pollution, impairment or destruction". Once the plaintiff has demonstrated that such harm has occurred or is likely to occur, the defendant may prevail only if he can demonstrate affirmatively that there is "no feasible and prudent alternative to defendant's conduct and that such conduct is consistent with the promotion of the public health, safety and welfare..." If regulatory proceedings are available to pass upon the defendant's conduct, the court is authorised - but not required - to remit the parties to such proceedings, and is, in any event, empowered to grant equitable relief

pending the outcome of such proceedings to protect the rights recognised by the Act."

The legislation is based upon the idea that the public has an interest in the protection of natural resources. However, it goes beyond mere statutory recognition of the public trust by providing specific procedures to be followed in the enforcement of that public trust.

Thus Hunt in Environmental Rights in Canada (edited by Swaigen) explained the effects of the legislation in the following manner at page 159:-

> "The legislation has three broad effects. It gives private citizens the right to initiate or participate in environmental proceedings by specifically recognizing that there is a public trust in the protection of natural resources from pollution, impairment or destruction. It enlarges the role of the courts by permitting plaintiffs to assert environmental damage, through the public trust notion, in the same way that one could traditionally assert violation of a private contract or property right. Third, it reduces the previously unfettered discretion of administrative agencies by subjecting them to judicial review on the basis that their decisions may fail to protect natural resources from pollution, impairment or destruction and thereby may infringe the public trust in such resources."

In addition to the common law and specific statutory foundations of the public trust, state constitutional provisions have provided the basis of public trust lawsuits.

For example, Article 1 section 27 of the Pennsylvania Constitution (enacted in 1971) provides that:-

> "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania's public natural resources are common property of all the people, including generations yet to come. As trustee

of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."

However, lawsuits relating to this provision have raised doubts as to the contribution it is making to environmental protection. For example, in Payne v. Kassab 11 Pa. Commw. 14; 312 A.2d. 86 (1973) a group of private citizens sought to enjoin Pennsylvania from widening portions of two streets. The proposed widening would have destroyed part of an historically valuable area previously dedicated as a public common. The application was dismissed, with the observation that the amendment contemplated controlled development of resources rather than no development. In order to balance environmental and social concerns, the Court put forward a three-fold standard for evaluating future activities in the face of the amendment:-

1. Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?

2. Does the record demonstrate a reasonable effect to reduce the environmental incursion to a minimum?

3. Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

The complainants were likewise unsuccessful in Commonwealth v. National Gettysburg Battlefield Tower Inc. 8 Pa. Commw. 231 302 A. 2d. 886 affirmed 311 A. 2d. 588 and Community College v. Fox 342 A. 2d. 468.

Apparently in the United States the common law and express statutory reforms which lay down procedural

machinery, have been much more fruitful than constitutional reform in the public trust area.

The Committee envisages that if the general approach of the Michigan Environmental Protection Act were to be adopted, then a provision would be enacted which would give any citizen a general right to sue either the relevant government agency or the polluters wherever the environment and natural resources generally are being impaired or adversely affected. So that the defendant would not be affected by crank or blackmail suits it would be necessary we think, if such legislation were enacted, to require a plaintiff to show a prima facie case on the merits and to obtain the leave of the Supreme Court to institute the action.

There are certain threshold obstacles which would have to be swept away. It should not be a defence to any such action that there is a statute or regulation providing for action by a specified agency in certain circumstances. There should not be a defence that the agency concerned has a discretion which either ousts the citizen's right to action or ousts any review by the Courts. There should be no ouster of jurisdiction because the person seeking relief is not one of those explicitly or impliedly within the statute or regulation which governs the administrative action concerned. Further, the plaintiff should be in a position to ask the Court to require an administrator to perform any act or duty which is not discretionary to the administrator.

Legal Rights for Natural Objects

The theory of legal rights for natural objects was propounded in America by Christopher Stone in Should Trees Have Standing? Towards Legal Rights for Natural Objects (1974) asserts that natural, inanimate objects such as streams, forests, sea-shores and wilderness areas should themselves have standing to protect their own interests in the same way that the law at present accords standing to other nominate objects such as corporations and municipalities. Stone argues that at present natural objects do not count in their own right: that, for example, damages awarded as a result of the pollution of a stream are not necessarily applied so as to make the stream "whole" again. Damages and injunctions are not usually awarded for the benefit of the environment itself, and there is nothing stopping for example a riparian owner from "selling out" the stream by agreeing not to enforce his rights in exchange for monetary compensation.

Stone suggests that "when a friend of a natural object perceives it to be endangered", he can apply to a court for the creation of a guardianship. Such "friends" would generally be responsible conservation bodies with a demonstrated competence and concern for the area or objects in question.

While this approach attracted the attention of the minority in Sierra Club v. Morton (1972) 405 U.S. 727 it has not been adopted either judicially or through legislation.

It should be noted that both the public trust

concept and the granting of legal rights to natural objects involve a somewhat different approach to reform than is usually considered. Reform in accordance with either of these approaches would actually create new causes of action, rather than merely broadening the standing requirements with respect to already existing causes of action.

The Attorney-General's role with respect to fiats being taken over by an independant body

Where a plaintiff lacks the necessary standing to sue in his own name, due to the fact that he cannot establish any particular or special damage to himself; then he must either seek permission from the Attorney-General to bring the action, or persuade the Attorney-General himself to sue.

The reasoning behind the requirement of the Attorney-General's permission is to prevent the multiplicity of private suits which might follow some particular public nuisance where no one has suffered any more than anyone else. A major difficulty with the requirement of the Attorney-General's permission is however that there is always the possibility that a conflict between an Attorney-General's political and public obligations could unfairly prejudice possible relators.

The Australian Law Reform Commission's Discussion Paper on Public Interest Suits discussed this problem at pages 8-9:-

> "The office of the Attorney-General has, itself, undergone change with the transfer to Australian conditions. The English Attorney-General and Solicitor-General are normally leading counsel of established 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; departments have their own extensive legal sections. Traditionally, the English attorney is not a member of cabinet; there is a conscious policy of divorcing him from day to day political issues. By contrast all Australian attorneys (federal and state) head considerable departments, administering numerous statutes. The present Commonwealth Attorney-General is responsible for the work of some 2000 officers. His department is the major source of legal advice for other Commonwealth departments and instrumentalities; the very people who may be defendants in a public interest action. Indeed, this occurred in the Black Mountain Tower case; the attorney, with his officers, was considering a fiat application at the same time as other officers in his department were advising the proposed defendant, the Postmaster-General's Department. Finally, Australian attorneys, much more than their English counterparts, are politicians first: they generally sit in Cabinet. Very often they have made their names as politicians rather than lawyers; some state attorneys have not been qualified lawyers."

Despite the possibility of that an Attorney-General may take into account political matters, it appears that if an Attorney-General refuses his fiat, then there is nothing more the plaintiff can do. The English Court of Appeal in Attorney-General Ex rel McWhirter v. Independant Broadcasting Authority (1973) 1 All E.R. 689 thought that "in the last resort" anyone with a "sufficient interest" could be granted relief if the Attorney-General improperly refused his consent to relator proceedings, or refused to give reasons for his refusal, or unreasonably delayed in granting leave. This suggestion was rejected by the House of Lords in Gouriet v. Union of Post Office Workers (1975) A.C. 435 where it was held that public rights are vested in the Crown and enforced by the Attorney-General as an officer of the Crown; his

constitutional position depends on the royal prerogative; and exercises of the royal prerogative are not open to challenge in the Courts.

Thus the present fiat system may be seen in some instances as being unworkable. One method of dealing with this possibility would be to place the role of determining whether or not public interest proceedings in environmental law should be instituted, in the hands of an independent person or body. This was the solution suggested by Mathieson in an article entitled Locus Standi in 1976 N.Z.L.J. 529. Mathieson suggests that a separate office of the Commission for Environment be invested with the power of acting in lieu of the Attorney-General in respect of the complaint.

If the Commission considered that the complaint and supporting material established a prima facie case it would proceed accordingly, conducting the litigation at its own risk as to costs.

If the Commission decided, for whatever reason, not to proceed, it would issue a certificate to that effect stating reasons and the applicant would then be entitled to launch proceedings himself and establish if he could, his standing to sue under the existing law.

The Court would have a discretion as to costs, and in exercising this it would have regard to the reasons stated in the Commission's certificate as well as all other relevant considerations. However, the Court would not be entitled to award costs against the plaintiff if satisfied that the sole ground for refusing any relief was that the

plaintiff lacked standing, and the Court would be entitled to order the Commission to pay the whole or part of the solicitor and client costs of the plaintiff, win or lose, if satisfied that the Commission had unjustifiably refused to take action when requested. A similar view was also expressed by Dr. G.D.S. Taylor in a paper entitled Rights of Standing in Environmental Matters given at a seminar on Environmental Law The Australian Government's Role December 1974. Dr. Taylor stated at page 57 of the seminar papers:-

> "....there must be an official person not associated with the government and independent of private lobbies, whose duty is to ensure that the public interest in the environment is protected at all levels of legal decision making (The Environmental Ombudsman of K.J. Ege, "Enforcing Environmental Policy: The Environmental Ombudsman" 56 Corn. L.R. 847 (1971) is too narrow because it deals only with governmental authorities). Finally that official should have the power, not only to sue as plaintiff or objector, but also to appear as amicus curiae in actions brought by individuals."

Dr. Taylor believed that there was a necessity to have an official environmental watchdog, even though he had already recommended that individual standing be opened widely so as to include all "persons really concerned". This was because individuals approach the public interest from their own private interests, and those prejudicially affected by an activity may not have the money or the intellectual incentive to secure their interests by going to law.

One commentator upon Dr. Taylor's paper, Mr. G. Kelly from the Attorney-General's Department, stated that he could not see how the "official watchdog" would differ substantially from the Attorney-General. He said that he did

not necessarily accept that an official watchdog would be able to fulfil the role more effectively and added that if granting fiats was to be his only function, it was doubtful whether there would be enough work for him to do.

Likewise the Australian Law Reform Commission in its discussion paper relating to public interest suits, while accepting Dr. Taylor's recommendation to open standing so as to include all persons really concerned, was not in favour of creating a public official to replace the Attorneys-General in environmental public interest suits. The Commission said at page 17:-

> "One alternative would be the creation of a public official charged with the task of screening public interest suits and allowing them to proceed. However, no advantage is obtained over the present system unless such an officer is free, and seen to be free, from government control. He would have to be a statutory appointee independent of government, not involved with government administration. Not many fiats are sought of the Commonwealth Attorney-General; applications run at about one per year. Even if applications increase in the belief that suits might be more readily brought against government it is difficult to see sufficient work for such an official. Furthermore, there is a question of principle as to whether a public official, sitting behind closed doors, is the appropriate person to make this type of decision. There would probably be pressure to have a right of appeal from his decision to the Administrative Appeals Tribunal or a court. Once that right is admitted it seems better to go straight to the alternative, screening by a court, rather than incur the expense of a separate public officer."

Application for leave made to court, if the Attorney refuses his fiat

The Law Reform Commission of British Columbia in 1980 reported on Civil Litigation in the Public Interest. The Commission in this report recommended that the Attorney-General still have jurisdiction to bring public interest

suits, but not have exclusive jurisdiction. The Commission said at page 72:-

> "We believe it desirable that the Attorney-General should continue to have an opportunity to participate and exercise some degree of control over public interest suits. He may wish to participate for a number of reasons. For example, he may have doubts as to the competence of the person to conduct the proceeding, or he may think that the case is one which would benefit from having the full resources of his ministry behind it. At the same time he may not wish, for a variety of reasons, to be involved in the proceedings at all."

The solution recommended by the Commission at page 73, was that:-

> "Where a person wishes to maintain an action in respect of an alleged interference with a public right, and such an action is one which at present can only be brought in the name of the Attorney-General, either ex officio or in a relator action, that person should serve an application on the Attorney-General, together with a copy of the proposed originating process. On receipt of this application, the Attorney-General should have the option either to commence and conduct the action himself or consent to the use of his name in a relator action. Thus, up to this stage, we would not be recommending any change to the present practice and procedure.
>
> We take the view, however, that if the Attorney-General should refuse or neglect to take any action within a specified time, the person who served the application upon him should have the right to seek the consent of the court to commence the action in his own name.
>
> We would suggest that to avoid any undue delay, the Attorney-General should be allowed ten days from service to make a decision as to whether or not he wants to be associated with the action. This would, to our mind, give the Attorney-General and his staff adequate time to reach a decision. At present, for example, only six days notice is required to be given to the Attorney-General where the constitutional validity of a statute is going to be argued in a proceeding.
>
> We recommend that if the Attorney-General does not notify the person who applied of his decision within a period of ten days, that person should be permitted, after obtaining the consent of the court, to commence and conduct the proceeding in his own name.

Furthermore, we believe that such consent should be given automatically unless the court considers there is not a justiciable issue to be tried. To us, a requirement that the consent of the court be obtained is desirable for a number of reasons. For example, notice of any application for such leave should be required to be served upon the Attorney-General and the proposed defendant. They would then have an opportunity to speak against the application and to show that there is not a justiciable issue to be tried. While in any action it is always open to a defendant to make such an attack, our recommendation would ensure that this issue was decided before proceedings commenced, saving both time and expense."

The Commission recommended that these reforms be effectuated by the enactment of legislation in the following form:-

"The Law and Equity Act, R.S.B.C. 1979, c. 224, is amended by adding the following sections after section 49:

50. In sections 51, 52 and 53, "public interest proceeding" means a civil proceeding which can by law but for section 51, be brought by the Attorney-General, either on his own initiative or at the request of a relator, in the Supreme Court, in respect of a present or apprehended violation of a public right, including a proceeding:

(a) in respect of a public nuisance, or
(b) to restrain
 (i) a person from violating an enactment, or
 (ii) a public body from exceeding its powers.

51.(1) A person who wants to commence a public interest proceeding shall serve on the Attorney-General:

(a) an application requesting the Attorney-General to commence the proceeding, and
(b) a copy of the proposed originating process.

(2) Upon being served under subsection (1), the Attorney-General may notify the applicant that:

(a) the proceeding will be undertaken by the Attorney-General, or
(b) the applicant may undertake the proceeding in the name of the Attorney-General.

(3) Where an applicant does not receive a notice under subsection (2) within ten days after service under subsection (1), he may apply by petition to the Supreme Court for consent to undertake the proceeding in his own name.

(4) The applicant shall serve the Attorney-General and any proposed defendants or respondents with a copy

of the petition.
(5) The Supreme Court, on conditions it considers appropriate, shall give its consent unless it considers there is not a justiciable issue to be tried.
(6) In a proceeding undertaken with the consent of the Supreme Court under subsection (4), the Attorney-General may intervene or shall on his application be joined as a party of record."

Also of interest are draft provisions dealing with nuisance which provide:

"52.(1) In a public interest proceeding undertaken in respect of a public nuisance, the Supreme Court may in substitution for or in addition to an injunction, award damages payable to the Attorney-General in an amount representing the cost of remedying the effects of the nuisance on the same basis as it would for a private nuisance.
(2) Money received by the Attorney-General under this section shall be spent by the Attorney-General without an appropriation other than this section in whatever manner he considers appropriate to remedy the effect of the nuisance.
53. In a proceeding in respect of a public nuisance, other than a public interest proceeding, the plaintiff is not barred from seeking relief by reason only that damage he has suffered only differs in degree from that suffered by the public at large."

Thus what the British Columbia Commission is recommending, is that in all instances where there is an apprehended or actual violation of a public right, it should not be solely in the hands of the Attorney-General to decide whether public interest proceedings should be instituted. If for any reason the Attorney-General should refuse or neglect to commence proceedings, an individual would still be able to bring proceedings upon obtaining the consent of the Court. The Commission visualised that such consent would be given unless it could be shown that there was not a justiciable issue to be tried.

A somewhat similar approach had already been

recommended by the minority members of the New Zealand Public and Administrative Law Reform Committee in a report published in 1978 entitled Standing in Administrative Law. Two members of the Committee suggested that the Court should be given the power to make a "standing order" which would allow the plaintiff to proceed notwithstanding the Attorney-General's refusal of consent.

It was recommended that the Court should make such an order if it is satisfied that the applicant genuinely represents the public, that the public has a cause of complaint, and that in all the circumstances, having regard to the nature of the statutory power in question and the number of persons affected thereby, it is appropriate that the applicant should be permitted to commence an application for review.

At pages 37-38 of the Report the minority recommendation was summarised in the following manner:-

"(1) An initial application for consent to the Attorney-General in his role as traditional guardian of the public interest, coupled with a recognition that in matters affecting the State itself it is difficult for him always to give the appearance of having acted solely in the public interest and without reference to the possibly conflicting interests of the Government;

(2) the conferment of a new power in the Courts to make what we call "standing orders", notwithstanding that the Attorney-General has declined his consent to an application for review being commenced;

(3) the settlement of standing problems at a preliminary stage, before the expense of preparing for trial is embarked on by a would-be applicant or by respondent(s), thus usefully eliminating arguments over standing from the substantive hearing;

(4) supplementary provisions to avoid multiple applications for review in relation to the exercise of the same "statutory power";

(5) the Court's function, upon application being made to it for a standing order, would be as follows:
"If the Court is satisfied, upon the hearing of an application for a standing order:-
(a) that the person claiming to represent the public interest genuinely represents the interests of the public or a significant section of the public; and
(b) that the public or, as the case may be, that section of the public, has or may reasonably consider that it has, a cause of complaint in relation to the exercise, refusal to exercise, or proposed or purported exercise of the statutory power in question (whether or not relief under this Act is likely to be granted); and
(c) that in all the circumstances, having regard to the nature of the statutory power in question, and the number of persons who are or may be affected thereby, it is appropriate that the person claiming to represent the public interest should be permitted to commence an application for review, -
the Court shall make a standing order."

Preliminary screening by the Court

A further alternative, which was considered and rejected by the Australian Law Reform Commission in their discussion paper on Public Interest Suits was the preliminary screening of public interest suits by the Court.

The Commission suggested that a person lacking standing under present rules could be required to apply to the Court for leave to commence a "public interest" suit. The Commission envisaged that procedures would be devised allowing the Court to direct notice to other interested persons so as to enable them to investigate the proposed plaintiff and his suitability to represent the relevant interest. The procedure would enable the Court to consider

any problem of multiplicity of suits and to refuse leave where the issue had already been determined on its merits in prior proceedings. While conceding that such an approach has the advantage of enabling the Court to deal with standing at an early stage and to dispose promptly of any case brought by a person lacking sufficient interest, the Commission was of the view that this was outweighed by the disadvantages. The disadvantages which the Commission perceived were stated at page 18 as follows:-

> "The first is that the court would be obliged to deal with standing as an issue separate from the substantive merits of the case, probably an undesirable course. Secondly, there will be cases where the plaintiff's standing under present rules is obscure pending investigation of the facts and, possibly, rulings on law. The suggested preliminary procedure necessarily requires the plaintiff to form a judgment as to whether he has standing under the present rules; if he has such standing he brings the action in his own name, if not he seeks leave to bring a public interest suit. The consequences of a mistaken judgment may be serious; requiring the court to dismiss a suit because of the lack of preliminary certification. If the plaintiff takes the cautious view and decides to seek certification he gives away what, in truth, may be a private standing right. Thirdly, public interest actions will often be brought by, or on behalf of, small groups, interested in particular causes, environmental, consumer, racial discrimination and the like. If a court were empowered to grant standing on application it would have to be empowered to impose conditions. Defendants could be expected to seek security for their costs and this would probably defeat such actions at the outset. Few such groups could raise the requisite security. Finally, the procedure represents yet a further step in the litigation, an extra day in court, extra paperwork, and, therefore, extra expense. Litigation is expensive enough; the best way to reduce costs is to reduce work."

It should be noted, that to the extent that these arguments are valid, they may in some respects apply to the previous alternative, of allowing an application to be made

to the Court, where the Attorney-General has refused his fiat.

However, it would appear that the difficulties may not be quite as great as they were thought to be by the Australian Law Reform Commission, and this is especially so if screening by the Court is combined with some of the other alternatives; whether that be by broadening the present standing formulae, or retaining the Attorney-General as the preliminary arbiter as to whether proceedings should be allowed to go forward.

Devising a new formula for determining whether an individual has a sufficient interest in the subject-matter to give him standing

Another possible approach to reform would be to retain requirements of standing for individuals, but to devise a more relaxed formula for determining whether an individual has a sufficient interest in the subject-matter so as to give him standing. That is to say, in place of current standing tests, such as "person aggrieved", or "person who suffers special damage peculiar to himself", there would be a test which more people would be able to satisfy.

In 1976 the English Law Commission published a report entitled *Report on Remedies in Administrative Law*. In that report after recommending a simpler mechanism for the application for judicial review, the Commission also recommended that the standing necessary to make an application for judicial review should be "such interest as the Court considers sufficient in the matter to which the

application relates".

Order 53 of the English Supreme Court Rules, is the result of those recommendations and O.53 r 3(5) (now Order 53 rule 3(7)) provides:-

> "The Court shall not grant leave (to apply for judicial review) unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

To what extent this has broadened the test of locus standi is not entirely clear. The scope of Order 53 rule 3(5) has been considered by the House of Lords in I.R.C. v. National Federation of Self-Employed and Small Businesses Ltd. (1982) A.C. 617. In that case, as we have said previously in this report, the Federation of Self-Employed and Small Businesses challenged the validity of an arrangement made between the Inland Revenue Commission and the union of certain casual workers in Fleet Street who had been evading taxes. Pursuant to the arrangements in return for the adoption by the workers of a system of registration which would ensure that future taxes were paid, the Commission agreed not to carry out investigations into tax evaded prior to 1977. The Federation, which claimed to represent a body of taxpayers who felt aggrieved because the Fleet Street casual workers were allegedly getting preferential treatment, applied for judicial review under RSC Order 53 seeking (a) a declaration that the Commission had acted unlawfully in making the arrangement and (b) an order of mandamus directing the Commission to assess and collect tax on the newspaper's casual employees as required by law.

The issue for the House of Lords was whether the Court of Appeal was correct in reversing the Divisional Court's finding that the Federation did not have a "sufficient interest in the matter to which the application relates" within the meaning of Order 53 rule 3(5).

The House of Lords decided that, having regard to the duties and powers of the Commission, the arrangement was a proper one and therefore the Federation had shown no sufficient interest in the matter to justify its application for relief. This with all respect to their Lordships is a non sequitur. A group may have a sufficient interest in challenging an arrangement which the Court, after enquiry, holds to be a perfectly proper one. Their Lordships stated that, other than in exceptional cases where the absence of "sufficient interest" is obvious, the question of locus standi should not be treated as an isolated preliminary issue, but should be decided after a consideration of the merits of application. Lord Wilberforce said at page 97 that rule 3(5) did not "remove the whole, and vitally important, question of locus standi into the realm of pure discretion".

In contrast Lord Diplock said at page 105 that rule 3(5) leaves to the Court "an unfettered discretion to decide what in its own good judgment it considers to be a "sufficient interest"".

Thus it appears that while the new wording may have enabled the Court to take a broader view of the case rather than stressing too much the threshold question of whether the applicant has locus standi; there still appears to be no

clear test of when a plaintiff will and will not be held to have standing.

A similar approach to the question of standing to seek judicial review of administrative action has also been recommended in New Zealand. The majority of the Public and Administrative Law Reform Committee in a 1978 report entitled Standing in Administrative Law recommended the enactment of a bill which although based upon the English concept is worded differently. The majority members of the Committee stated at pages 29-30 of the Report:-

> "Whereas the English proposal requires that the court "shall not grant relief...unless it considers that the applicant has a sufficient interest", our proposal empowers the court, in exercising its discretion to grant or refuse relief, to refuse it if in the court's opinion he does not have a sufficient interest. The purpose of this approach is to make it clear that in general the question of standing is not one to be dealt with as a purely preliminary matter, but is to be considered along with other issues in the context of the court's general discretion. We have formulated the provision in permissive terms ("may refuse...") and not in the mandatory terms proposed by the Law Commission ("...shall not grant...") because we consider that the liberalising thrust of the proposal might be endangered by a mandatory, negative formula. The formulation emphasises the discretion conferred on the court."

Two members, however, disagreed with this recommendation. They were of the opinion that to allow standing to all people claiming to have a "sufficient interest" would bring about more applications for judicial review merely to secure advantages of delay rather than genuinely to test the legality of a particular decision. The minority members were also of the view that the recommendation of the majority offered no guidelines as to

what interest would be "sufficient" and that the future development of the law of standing would therefore become unpredictable.

The minority suggested that the Attorney-General should still play a role in the screening process, but that if the Attorney-General refuses his consent to the proposed action, the Court should have power to make a "standing order", which would allow the plaintiff to proceed notwithstanding the Attorney-General's refusal of consent. They recommended that the Court should make such an order if it is satisfied that the applicant genuinely represents the public, that the public has a cause of complaint, and that in all the circumstances, having regard to the nature of the statutory power in question and the number of persons affected thereby, it is appropriate that the applicant should be permitted to commence an application for review.

Although neither recommendation appears to have been acted upon, the New Zealand Courts appear to have taken the view that the position with respect to standing is similar to that under Order 53 r.3(5) in England. Sim and Cain on Practice and Procedure (in New Zealand) state at page 56/1:-

> "In England, by O.53 r 3(5) the Court is not to grant leave for judicial review unless it considers the applicant has sufficient interest in the matter; 54(1) of the JAA 1972 above, authorising the Court to grant "any relief that the applicant would be entitled to" if an extraordinary remedy were sought, has substantially the same effect."

In Environmental Defence Society Inc. v. South Pacific Aluminium Ltd. (No.3) 1981 1 N.Z.L.R. 216 the New

Zealand Court of Appeal "drew guidance" from the broad approach to standing taken by Lord Diplock in IRC v. National Federation of Self-Employed and Small Businesses Ltd. (supra) and held that two environment protection societies had standing to bring proceedings alleging that the Governor-General in Council had not properly complied with certain statutory procedures relating to the procurement of consents for the construction of an aluminium smelter. The Court said at page 220:

> "The proceedings challenge the legality of Government action. It is unrealistic to expect the Attorney-General to do this and we see no reason why it must be left to individuals directly affected to undertake the burden. In the exercise of the Court's discretion responsible public interest groups may be accepted as having sufficient standing under the National Development Act."

The Court found authority for this discretion based test of locus standi in the judgment of Lord Diplock in the IRC case (supra) where he expressed the view that apart from Order 53 there was now a discretion-based test at common law; which had come about due to the enormous changes that had taken place since the Second World War in the social structure, the methods of government and the extent to which the activities of private citizens are controlled by governmental authorities.

Formula recommended by the Australian Law Reform Commission that the plaintiff to have standing provided that the matter is one of "real concern to the plaintiff"

The Australian Law Reform Commission in its discussion paper relating to Access to the Courts Standing: Public Interest Suits examined various ways in which standing

requirements might be expressly relaxed in favour of persons who wished to pursue public interest issues.

Three main approaches were examined. The first alternative was an "open door" policy whereby any person could take proceedings to enforce the law. The Commission added that there would need to be some provision allowing a Court to dismiss summarily a suit where it was satisfied that the issues sought to be litigated had already been determined on their merits in an action brought by a plaintiff genuinely concerned to obtain relief. The Commission likewise added that an "open door" policy would not oblige the Court to grant relief; rather it would require that the judicial discretion whether or not to grant relief, be exercised according to the substantial merits of the case, not the interest of the plaintiff.

The second approach, and the one finally recommended by the Commission was that a test propounded by Dr. G.D.S. Taylor be adopted; that a plaintiff be granted standing if the issues he wishes to present are "matters of real concern" to him. The Commission added that the formula may be best expressed negatively so as to limit restrictive interpretation i.e. "relief is not to be denied on standing grounds unless the court is satisfied that the issues sought to be raised are of no real concern to the plaintiff". The Commission added that the legislation should make clear that "concern" is not to be judged by traditional rules and, particularly, that no property interest is necessary.

The third option considered by the Commission was

that there be a preliminary determination of standing, either by an official who would be seen to be more independent of government than the Attorney-General presently is, or by a Court. The Commission was more in favour of court screening than by an independent official. However, it came to the conclusion that the second option of providing a formula of "matter of real concern to him" was to be preferred.

Unfortunately, the Commission have at this stage not issued a final report concerning public interest litigation.

In 1978 an ad hoc Committee made recommendations to the South Australian Attorney-General concerning Access to Courts. The Committee in its report recommended the formulation of Dr. G.D.S. Taylor, which had been recommended by the Australian Law Reform Commission, namely, that the action raises "matters of real concern to the plaintiff". The Committee also agreed with the Commission's proposal, that the test for standing in fact be expressed negatively by the device of empowering a Court to dismiss a public interest civil suit if it is satisfied that the plaintiff had no real concern with the issues.

The Committee also recommended the adoption of the one locus standi rule for injunctions, declarations, prerogative relief, and statutory appeals.

The formula suggested by the Australian Law Reform Commission, has not however, found universal acceptance. Sykes when commenting upon the Australian Law Reform

Commission Proposals in Chapter 7 of Stein's text Locus Standi, was critical of the formula proposed by the Commission. Sykes said at page 237:

> "It is difficult to see how "person concerned" is any whit better than the "person whose interests are affected" of the Administrative Appeals Tribunal Act 1975 (Cth.) or the illfated "person aggrieved."

Sykes was of the view that there should be no standing rules in environmental cases.

Pearson in Locus Standi and Environmental Issues 3 U.N.S.W.L.J. 307, although of the view that the Australian Law Reform Commission's proposal was "eminently sensible", seemed to hold the view that it was possible of restrictive interpretation.

Pearson said at page 319:

> "Having accepted a "real concern" standing test, it would be simpler to go the whole way and allow standing to "any person" along the lines of the Michigan Environmental Protection Act. This would avoid the limitations of past standing formulations."

Bentil in an article entitled General Recourse to the Courts for Environmental Protection Purposes and the Problem of Legal Standing - A Comparative Study and Appraisal 11 Anglo-American Law Review 286 when considering the three approaches examined by the Australian Law Reform Commission said at pages 307-8:

> "Any of these three approaches is capable, in principle, of satisfying the basic objectives of individuals or groups of environmentalists. However, it cannot be overlooked that it is the "open door" mechanism that would be most preferable to pressure groups. Although less enthusiastic about the "open door" policy approach, the Australian Law Reform Commission takes the view that it "would be appropriate if, in all such procedings, public interests were predominant": see n.21 at page 20. Presumably, therefore, the Australian Law Reform

Commission would favour such a system, so far as attempts by environmentalist pressure groups to utilise the judicial process are concerned. It is equally arguable that it would be desirable to combine the "open door" approach and that of the screening of plaintiffs. After all, the two systems cannot be viewed as mutually exclusive."

Combination of Suggested Approaches

After examination of these possible approaches to reform, it has become obvious that some are not mutually exclusive; that is to say, that some could be combined. For example, it would be possible to combine the approach of devising a broader standing formula, and of transferring the Attorney-General's screening function to a person or body with greater independence from the political sphere.

It is envisaged that a formula could be devised setting out when private persons are entitled to commence proceedings as of right. Where the requirements of the formula were not satisfied then it would be possible to apply to some person or Court for leave to proceed in the public interest.

As the screening process would be in the hands of someone with greater political independence than at present, it would not be necessary to attempt to make the standing requirements as broad as may otherwise have been considered desirable. If the public interest in the environment was being adequately protected by an "Environmental Guardian" or similar officer, there would not be the need that there appears to be at present for private persons to ensure that the public interest in the environment is protected.

The Committee envisages that a provision could be

enacted along the following lines:

1. Any person, partnership, corporation, association, organisation or other legal entity shall have standing to commence legal proceedings where an administrative decision, or an action or proposed action of the government or a governmental instrumentality or any person, partnership, corporation, association, organisation or other legal entity has or is likely to affect adversely the environment in such a way as to disadvantage the complainant.
2. Any person, partnership, corporation, association, organisation or other legal entity, being of the belief that an administrative decision, or an action or proposed action of the government or a governmental instrumentality or any person, partnership, corporation, association, organisation or other legal entity has or is likely to affect adversely the environment in such a way as to disadvantage the public may apply to (the Environmental Guardian) for either:
   (a) leave to commence proceedings on behalf of the public interest, or
   (b) proceedings to be commenced by (the Environmental Guardian).
3. For the purposes of sections 1 and 2 "disadvantages" shall include (inter alia) detriment pertaining to interests of a pecuniary, health for recreational nature.

A further alternative is to adopt a new

standing formula together with the approach recommended by the British Columbia Law Reform Commission and the minority members of the New Zealand Public and Administrative Law Reform Committee. Thus after provisions along the lines just suggested (but with Environmental Guardian being replaced by Attorney-General would be added:

4. Where the Attorney-General has either refused the request or neglected to reply to a request made pursuant to section 2 within 14 days (or a reasonable time), then an application may be made to the Court for an order granting standing.

5. Notice of an application made under section 4 must be given to the Attorney-General, who shall have a right to make submissions to the Court with respect to the application.

6. The Court may make an order granting standing, where it is satisfied:

    (a) that the person claiming to represent the public interest in the environment will genuinely and adequately represent that interest;

    (b) that there is a likelihood that the environment has or will be adversely affected, in such a way as to be a detriment to the public, and

    (c) that in all the circumstances it appears appropriate that the applicant should be allowed to commence proceedings to protect the public interest.

Yet a further addition to these provisions may be desirable. Bogart in a note on the British Columbia report found in 59 Can. B.R. 868 was critical of the fact that the report did not address the question of how the public proceedings were to be conducted. As a result Bogart recommended that a provision be added dealing with among other things, intervention by persons who are not parties to the suit. Bogart's draft provision could be modified for our purposes so as to provide:

7. (a) The Court may give its consent on such conditions that it considers appropriate including the following:

   (i) the plaintiff satisfies and continues to satisfy the Court throughout the litigation that he will adequately represent those individuals not before the Court that will be affected by the litigation;

   (ii) that notice be given, by advertisement or otherwise, to those on whose behalf the suit is brought that litigation which affects their interests is proceeding;

   (iii) that the suit not be settled or discontinued without the Court's permission.

   (b) The Court shall allow individuals who are not parties but who will be affected by the suit to intervene in the litigation to make representations

of law or fact or both on any aspect of the litigaton, whether pertaining to liability or remedies, on such terms as it stipulates unless it is satisfied that the reason for which the intervention is sought is being satisfied by one of the original parties to the litigation.

A provision along these lines could be adapted in a number of ways. For example, it may be thought unnecessary to alter the instances in which members of the pubic can bring proceedings as or right, in which case section 1 could be deleted.

Alternatively, a different test from "disadvantaged" may be used. For example, the standing requirements suggested by Smillie in an article entitled Locus Standi the Report of the Public and Administrative Law Reform Committee (1978) 4 Otago L.Rev. 141 could be utilised. Smillie argued at page 161 that rather than the proposal made by the Committee of having a "sufficient interest test", a provision along the following lines could be added to the Judicature Amendment Act 1972:

"Standing to make application for review:

(1) Any person who claims that his interests may be affected by the action to which the application relates shall have standing to make an application for review under Part I of this Act.

(2) In order to establish standing under subsection (1) of this section it shall not be necessary for an applicant for review to show that the nature of the interest which he claims may be affected by the action to which the application relates is distinct from interests shared by the public generally, or that the effect of the action on his interests will be different in kind or degree from the effect of the action on the interests of the public generally.

(3) Any person who has standing under subsection (1) of this section may authorise any other person to make an application for review on his behalf.
(4) Notwithstanding the foregoing provisions of this section, the Court may grant standing to make an application for review under Part I of this Act to any person who, in the opinion of the Court, will genuinely and competently represent an aspect of the public interest relevant to the action to which the application relates."

Thus in place of provision 1 set out above could be inserted a provision based on Smillie's recommendation.

For example:- Any person who claims that his interests may be adversely affected by any action or proposed action relating to the environment shall have standing to commence proceedings notwithstanding that he can not show that the nature of the interest which he claims may be affected by the action or proposed action as distinct from interests shared by the public generally, or that the effect of the action on his interests will be different in kind or degree from the effect of the action on the interests of the public generally.

Granting standing to Environmental Organisations

One member of the Committee has suggested a slightly different method of reform. This is to grant standing to any organisation which has a clear conceptual purpose in its constitution to protect the environment, one example being of course the Australian Conservation Foundation.

The rationale behind this is that it would ensure that people who have the greatest knowledge of and interest in the protection of the environment would be able to present

the Court with the type of material which the Court should have before it in order to determine the rights and wrongs of a particular activity.

This is the approach which has been taken by the Swiss. The relevant law is Bundesgesetz No. 451 of the 1st July 1966, Article 12 which when translated provides:-

> "In relation to matters against the Canton enactments or dispensations or against the enactments of Parliament the objections to the Executive or to the Administrative Court are authorised in the Federal High Court, and the right to object is vested in the municipalities and as well in the Swiss national organisations which are in clear conceptual purpose by their constitution dedicated to the protection of nature and the environment or related matters. The Cantons are also entitled to object against the enactments of Parliament. The organisations in the sense of paragraph 1 are further entitled and given the right to submit any protests and applications (desires) according to article 9, 35 and 55 of the Federal Law of the 20th June 1930 in relation to the disposition."

A variation on this approach would be to grant standing to Councils. Thus section 222(1) of the English Local Government Act 1972 provides:-

> "Power of local authorities to prosecute or defend legal proceedings:
> (1) Where a local authority considers it expedient for promotion or protection of the interests of the inhabitants of their area -
> (a) they may prosecute or defend or appear in any legal proceedings and in the case of civil proceedings, may institute them in their own name, and
> (b) they may, in their own name, make representations in the interests of their inhabitants at any public inquiry held by or on behalf of any Minister or public body under any enactment."

The granting of standing to councils, will not however adequately deal with the problem as it is often the decision or activity of a council itself which is the cause of complaint.