Taking an "open door" approach with respect to specific causes of action

One approach, which has been suggested by R.J. Fowler in a paper at a workshop on Industry and Environmental Law in Adelaide in May 1984 entitled Environmental Litigation: Standing and the Role of the Courts, is to take an "open door" approach with respect to standing in specific causes of action, which are particularly suited to environmental law. Fowler suggests that any person should be able to enforce obligations imposed by environmental legislation, and that an "open door" approach should also be taken with respect to appeals on the merits against decisions of statutory authorities. At present of course very little opportunity exists for third party participation in the decision making process, either at the outset or at the appeal stage. For example in the field of licensing activities which may be harmful to the environment, it is usually only the applicant who has a right to be heard and a subsequent right of appeal.

Fowler is of the view that a substantial improvement would be made, by merely doing away with standing restrictions with respect to appeals under environmental legislation and proceedings to enforce statutory duties relating to the environment. He said at pages 20-21:-

> "The provision of rights of third party appeal under environmental legislation generally within Australia will do much to accommodate the pressure for greater public involvement in environmental decision-making, whilst also achieving standing reform in a manner which is tailored to the particular style and traditions of environmental management in this country. If coupled with the incorporation of provisions for the enforcement

by any person of the obligations imposed by environmental legislation, significant and adequate reforms with respect to environmental litigation could be achieved without any alteration of the roles performed previously by Australian courts and tribunals.

Such measures would be most unlikely to occasion drastic increases in litigation, or abuse of the process of litigation. However, they would do much to alleviate present frustration within the community concerning the lack of access to decision-makers and the courts with respect to environmental issues. Furthermore, such proposals could be achieved in the immediate future without awaiting the introduction of more general reforms in relation to standing within the legal system. Such reforms are likely to be debated for some considerable time yet. To pursue the development of an effective system of environmental law in this country, it would seem preferable to press for immediate reforms through environmental legislation than to await the uncertain outcome of the more general deliberations which are continuing on the question of standing."

This suggestion presupposes wide and enforceable environmental legislation. If such legislation is restricted in subject matter, coverage, or enforceability, then the "open door" policy, if adopted in relation to standing in environmental matters, would not achieve very much.

Doing away with standing requirements in breach of statutory duty actions

Although a breach of statutory duties may not always affect the public, it would appear that the public does have a special interest in ensuring that any environmental protection measures are obeyed. The maintenance of the environment to a reasonable standard is important for the health and wellbeing of this and future generations.

For this reason it seems undesirable that the standing requirements which are generally applicable in proceedings to enforce statutory duties should apply in the

case of proceedings to enforce statutory obligations relating to the environment.

The present test is of course based upon the dictum of Buckley L.J. in Boyce v. Paddington Borough Council (1903) 7 Ch. page 109 here he said:-

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

Unfortunately very real threats to the environment often do not cause damage which is special to any particular individual. Instead the offending activity is more likely to be merely another one of the many instances where the environment is being slowly destroyed, thereby depriving this and future generations of both its practical and its aesthethic value.

Therefore, on the Boyce test, in many instances no member of the public or of an environmental organisation or the organisation itself will have the standing to bring proceedings to prevent the infringement of statutory provisions designed to protect the environment.

Fowler (supra) expressed the view that this restriction on standing was unsatisfactory and that an "open door" policy should be favoured. He said at page 18:-

> "There is no logic in distinguishing between different classes of plaintiffs in relation to actions for breach of statutory duty, at least in the context of environmental legislation. The general public interest in the maintenance of environmental quality is reflected

in the fundamental policy objectives of environmental legislation and it serves no advantage to invoke technical or subjective curial judgments as to who is entitled to enforce such legislation. The distinctions which are drawn by the courts in such circumstances are arbitrary and subjective. An "open door" policy should be favoured, therefore, so as to enable any person to sue to enforce the obligations imposed by environmental legislation."

Fowler pointed out that there is already an Australian precedent for such an approach in section 123 of the New South Wales Environmental Planning and Assessment Act 1979, which provides:-

"1. Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.
2. Proceedings under this section may be brought by a person on his own behalf or on behalf of himself and on behalf of other persons (with their consent), or a body corporate or unincorporated (with the consent of its committee or other controlling or governing body), having like or common interests in those proceedings.
3. Any person on whose behalf proceedings are brought is entitled to contribute to or provide for the payment of the legal costs and expenses incurred by the person bringing the proceedings."

There is now also some precedent for public enforcement of statutory environmental duties in this State. The Environmental Protection (Sea Dumping) Act 1984 provides in section 28:-

"1. The Supreme Court may -
(a) upon application by the Attorney-General or by an interested person, grant an injunction restraining a person from engaging in conduct that constitutes, or would constitute, an offence under Division I or II of Part II; and
(b) make any order incidental or supplementary to an order made or an application under paragraph (a), including an order as to costs.
2. The reference in subsection 1(a) to an interested person shall be read as including a reference to a person whose use or enjoyment of any part of the

sea, or of the air space above, or of the seabed or subsoil beneath, any part of the sea, is, or is likely to be, adversely affected by the conduct concerned.

3. The reference in subsection 1(a) to engaging in conduct shall be read as including a reference to -
   (a) doing, refusing to do, or refraining from doing, any act or thing; or
   (b) causing or permitting another person to do, refuse to do, or refrain from doing, any act or thing."

Likewise section 14 of the Commonwealth World Heritage Properties Conservation Act 1983 provides:-

"1. The High Court or the Federal Court may, on the application of the Attorney-General or of an interested person, grant an injunction restraining a person from doing an act that is unlawful by virtue of section 9, 10 or 11.

2. Where, pursuant to sub-section 1, an application is made to the High Court or the Federal Court for an injunction restraining a person from doing an act, the High Court or the Federal Court, as the case may be, if in the opinion of the Court it is desirable to do so, before determining the application, grant an interim injunction restraining the person from doing that act pending the determination of the application.

3. The reference in sub-section 1 to an interested person, in relation to an act that is unlawful by virtue of section 9 or 10 in relation to particular property, shall be read as a reference to -
   (a) a person whose use or enjoyment of any part of the property is, or is likely to be, adversely affected by the doing of an act; or
   (b) an organisation or association of persons, whether incorporated or not, the objects or purposes of which include, and activities of which relate to, the protection or conservation of the property or of property of a kind that includes the property.

4. Paragraph 3(b) does not apply in relation to an act done -
   (a) before the organisation or association was formed;
   (b) before the objects or purposes of the organisation included the matter concerned; or
   (c) before the organisation or association engaged in activities related to the matter concerned.

5. The reference in sub-section 1 to an interested person, in relation to an act that is unlawful by virtue of section 11, shall be read as a reference to any member of the Aboriginal race."

It would appear possible to combine this approach with an extension of the standing formula. For example, if it were decided to have a "sufficient interest" or"real concern" test, there could be added:-

> "All members of the public are deemed to have a real concern (or sufficient interest) in the enforcement of statutory provisions designed to protect the environment."

The standing of the public with regard to licences to emit wastes

Presently there is very little opportunity for members of the public to become involved in the process of licensing the emission of wastes and pollutants.

One Act which provides very limited opportunity for public involvement is the South Australian Waste Management Commission Act 1979. This Act provides for the licencing and control of waste depots, collection and transportation of wastes, and the production of waste of certain kinds.

Section 33(2) of that Act provides for public comment with respect to the establishment of waste depots by the Commission.

It reads as follows:-

> "Where the Commission proposes to establish a depot in pursuance of this section, the Commission shall, by notice in the Gazette and in two newspapers circulating generally throughout the State, give notice of the proposal and invite representations from any interested person to be made on or before a date fixed in the notice, being a date not less than one month after the date of the notice."

Section 41(1) of the Act provides:-

> "Any person who is aggrieved by a decision of the Commission may appeal to the Minister against that decision."

At face value this appears to grant to members of the public a right of appeal against the granting of licences. This was held not to be so in the recent case of The Queen v. Ward; exparte Brambles Holdings Limited (Trading as "Cleanaway") (1983) 34 S.A.S.R. 269. The facts in that case were that Re-Use-It Pty. Ltd. applied to the South Australian Waste Management Commission for a licence to operate a waste management depot. Brambles Holdings Ltd. who had a licence to operate a depot nearby sent to the Waste Management Commission a letter of objection to the grant of a licence. The Commission after hearing submissions from Brambles granted the application of Re-Use-It. Brambles, claiming to be a "person aggrieved" by the decision of the Commission, within the meaning of section 41 of the Act, appealed against the decision to grant a licence. The appeal was dismissed as incompetent by Judge Gerald Ward at first instance and on prerogative proceedings in the Supreme Court that Court held by a majority that Brambles was not a "person aggrieved" by the decision and had no right of appeal against the decision. Bollen J. explained why this was so at pages 288-9 where he said:-

> "As I have said there is no provision for third parties to come in and be heard in opposition to an applicant's application. They have no standing to approach the Commission. Here the Commission did, as an act of indulgence, hear Brambles. There is no obligation on the Commission to notify any third party of the existence of an application nor of the time when the Commission will consider it.
>
> Section 41(3) provides that an appeal must be commenced within twenty-eight days of the appellant's receiving notice of the Commission's decision. No

person other than an applicant is entitled to notice.

> I think it implicit in the scheme set up by the Act that an applicant should be notified of the result of his application. There is no provision in the Act for any third party to receive a copy of an applicant's application. How can a person who is not entitled to receive a copy of an application, not entitled to lodge an objection, not entitled to be heard and not entitled to any notice of the time of hearing or the result, launch an appeal? The answer is - he cannot."

Likewise Wells J. said at page 284:-

> "It follows in my opinion that the only persons who may be "aggrieved" within the meaning of the Act are applicants for a licence who have been refused one, or been granted one on conditions which they find acceptable."

Zelling J. on the other hand held that Brambles did have standing. After examining some of the more recent standing cases, His Honour concluded at page 277:-

> "The prosecutor, in my opinion, because of the business which it carries on, has an interest in these proceedings greater than that of an ordinary member of the public, and in my opinion it falls within the words "any person is aggrieved" in s.41(1).
>
> There is an alternative way in which this matter can be approached and that is that the prosecutor for the writ having been heard below, it had a legitimate expectation of being accorded a hearing on appeal under s.41. The appeal process is part of the process of a fair hearing of this matter and it is obvious that a decision has already been made adversely affecting its interests. It therefore has in my opinion a legitimate expectation, because of being heard below, of being entitled to pursue its interests on appeal, notwithstanding that those interests go beyond enforceable legal rights, because in my opinion that expectation does have a reasonable basis, and I refer to the judgement of the Privy Council in Attorney-General of Hong Kong v. Ng Yuen Shiu...."

As a result of this decision it appears that the use of words such as "person aggrieved" will not be helpful to members of the public wishing to appeal against decisions which may adversely affect the environment.

There is however one Act which expressly allows members of the public to appeal. Section 54 of the Planning Act 1981 provides that third parties may make representations to a planning authority, and if having made a representation, are aggrieved by the decision may appeal to the Planning Appeal Tribunal against that decision.

The Planning Act also provides for members of the public to be notified of and be entitled to make submissions with respect to Environmental Impact Statements.

Although the Committee proposes to examine standing in Planning Law at a later stage, it should be noted that already it appears that some of the increased opportunities for public participation placed in the Planning Act 1982 are being discarded.

With the exception of the provisions placed in the 1982 Planning Act, members of the public are given very little opportunity to participate in the licensing of activities which may adversely affect the environment.

In some States, however, there are quite extensive opportunities for public involvement in the licencing process. The Victorian Environment Protection Act of 1970 (as amended) provides for the licensing of waste emissions.

Section 19A(1) and (2) provides that an occupier of a scheduled premises shall not install, construct, alter or modify, apparatus or methods of operation where to do so is likely to cause a discharge or increased discharge of waste, except in accordance with a works approval or licence given by the Authority.

Section 19A(3)(b) provides that the Authority shall upon receiving an application for works approval publish notice in a newspaper circulating generally throughout Victoria of the application and that any person or body interested in the application may within

21 days of the publication of the notice comment in writing on the application.

Section 19A(6) provides that if written comments have been received at the expiration of 21 days from publication the Authority may convene a conference of all the interested parties.

Appeals by third parties are dealt with in section 33B which provides:

> "33B.(1) Where the Authority or a protection agency -
>
> (a) issues a works approval;
> (b) issues a licence where the applicant for the licence has not obtained a works approval as required by this Act;
> (c) amends a licence upon an application to which section 20A(6) applies; or
> (d) removes the suspension of a licence -
>
> any person other than the applicant or licence holder who feels aggrieved by the decision of the Authority or a protection agency may within 21 days of that decision being made appeal against that decision.
>
> (2) For the purposes of an appeal under sub-section (1) the appeal shall be based on either or both of the following grounds:
>
> (a) That the discharge, emission or deposit of waste under the provisions of the works approval or licence will unreasonably and adversely affect the interests, whether wholly or partly of that person;
> (b) That the discharge, emission or deposit of waste under the provisions of the works approval or licence -
> (i) will be inconsistent with State environment protection policy established for the area in which the discharge, emission or deposit will occur; or
> (ii) where there is no State environment protection policy for that area, would cause pollution.

(3) This section does not apply to anything done by the Authority or a protection agency to give effect to a determination of the Planning Appeals Board under section 37.

(4) Where an appeal has been made under this section the matter in respect of which the appeal is made shall be held in abeyance as from the day on which the appeal has been lodged in all respects as if the decision appealed from had not been made."

The Tasmanian Environment Protection Act 1973 also provides for public participation in pollution control. Section 24(2)-(5) of the Act provides:-

"2. The Director, or with the consent of the Director, the person seeking a licence under this Part shall cause a notice containing the prescribed information to be published in 2 consecutive weeks in a newspaper circulating in the locality of the premises in respect of which a licence under this Part is sought.
For the purposes of subsection 2, "prescribed information" means -
(a) a summary of the details contained in the application under subsection 1; and
(b) a statement advising that objections may be lodged with the Director by the date specified in the notice, being a date not earlier than 30 days after the notice is first published in the newspaper.

3. Any person may have the right to inspect the applications made under subsection 1 in the register maintained at the offices of the Director on payment of the prescribed fee.

4. Objections may be lodged with the Director within a period of 30 days of notice on the prescribed form and each objector shall be notified of the decision of the Director and any conditions attached to the licence by the Director pursuant to section 25(2) at the same time as such decision is notified to the applicant.

5. The provisions of subsections 2, 3 and 4 shall apply to the provisions of section 30 (renewals) and section 31 (transfers) as if they had been repeated in those sections."

The Act originally only allowed third parties to inspect applications for licences and object thereto. There was no provision for appeal. In 1977, however, the legislation was widened to allow an objector to an original licence application to appeal against the grant or renewal of

the licence.

With respect to appeals against renewals of licences, however, only persons who reside or carry on business in an area likely to be adversely affected by pollution from the licensed premises are competent to appeal.

The legislation was then further amended in 1978 to allow original objectors to intervene in any appeal lodged by the applicant. The Appeal Board also has a discretion to allow such intervention by persons who could have lodged but did not lodge an objection to the original application.

The relevant provisions of the legislation are to be found in sections 38 to 40. Section 38 (1A) provides:-

> "Where the Director -
> (a) grants a licence; or
> (b) renews a licence and since the date of the grant of the licence or, in the case of a further renewal, the last renewal thereof -
> (i) changes of the nature referred to in section 29 (1) have been made in respect of the premises to which the licence relates; or
> (ii) any terms or conditions of the licence have been varied,
> any person who lodged an objection under section 24 in respect of the application for the grant or renewal of the licence may appeal against the grant or renewal of the licence."

Section 38 goes on to provide:-

> 1B. An appeal may not be made under subsection 1A in respect of the renewal of a licence except on the ground that the appellant resides or carries on business at premises in an area that is or is likely to be adversely affected by pollution or noise arising from the premises to which the licence relates.
> 1C. Where a person who has applied for a licence under this Act appeals against the decision of the Director in regard to his application any person who lodged an objection under section 24 may intervene in the appeal by filing the notice referred to in subsection 1D and shall, upon intervening, be a

party to the appeal.

1D. A person may intervene in an appeal under subsection 1C by filing a notice in the prescribed form with the clerk of the appeal board within the time prescribed for the filing of such notice.

1E. The clerk of the appeal board shall, within the prescribed time, serve the notice referred to in subsection 1D on the Director, the appellant, and all other parties to the appeal, if any.

1F. Where a person who has applied for a licence under this Act appeals against the decision of the Director to the appeal board he shall, within the prescribed time, publish an advertisement containing a copy of the notice of appeal on 2 consecutive weeks in a newspaper circulating in the locality of the premises.

2. An appeal is instituted by giving notice thereof in writing to the clerk of the appeal board.

3. An appeal shall be instituted within 14 days of -
   (a) in the case of an appeal under paragraph (b) of subsection 1, the issue of the licence;
   (b) the appellant being notified under section 24 (4A) of the decision to which the appeal relates; and
   (c) in any other case, the service of the relevant notice,
   or such further time as the Appeal Board may, on an application made before or after the expiration of those 14 days, allow.

4. The Director, or in the case of a notice served by a municipality under section 19 the municipality, is entitled to notice of an appeal under this section from the clerk to the appeal board and to attend the appeal board when it deals with the appeal and then and there to support the action appealed against.

5. Where the Director is served with a notice of appeal under subsection 4, he shall, as soon as practicable, give notice of the appeal to any persons who objected to the application which is the subject of the appeal.

While section 40(7) provides:-

7. Notwithstanding any other provision of this Act, the appeal board may grant leave to any person who was entitled to, but who did not, lodge an application under section 24, to intervene in an appeal.

A somewhat similar approach to the Victorian and Tasmanian Environment Protection Acts is taken in the Commonwealth World Heritage Properties Conservation Act 1983. Section 13 of that Act provides:-

"Consents given pursuant to sections 9, 10 and 11:-

1. In determining whether or not to give a consent pursuant to section 9 in relation to any property to which that section applies, the Minister shall have regard only to the protection, conservation and presentation, within the meaning of the Convention, of the property.
2. A consent given by the Minister pursuant to section 9, 10 or 11 may relate to a particular act or particular acts or a particular class or particular classes of acts.
3. Before giving a consent pursuant to section 9, 10 or 11 in relation to property or a site that is in a State, in the Northern Territory or in Norfolk Island, the Minister shall inform the appropriate Minister of that State or Territory or the Administrator of Norfolk Island, as the case may be, of the proposed giving of the consent and shall give that person a reasonable opportunity to make representations in relation to the proposed giving of the consent.
4. Where the Minister gives or refuses to give a consent pursuant to section 9, 10 or 11, the Minister shall -
   (a) before the expiration of 7 days after the giving of the consent or the refusal to give the consent, cause to be published in the Gazette a notice stating that the consent has or has not been given and setting out particulars of the act or acts to which the consent or the refusal to give the consent relates; and
5. Without limiting any other application of the Administrative Decisions (Judicial Review) Act 1977, for the purposes of the application of that Act in relation to a decision of the Minister to give or refuse to give a consent pursuant to section 9 or 10 in relation to particular property -
   (a) a person whose use or enjoyment of any part of the property is, or is likely to be, adversely affected by the decision shall be taken to be a person aggrieved by the decision; and
   (b) an organisation or association of persons, whether incorporated or not, shall be taken to be a person aggrieved by the decision if the decision relates to a matter which is included in the objects or purposes of the organisation or association and to which activities engaged in by the organisation or association relate.
6. Paragraph 5(b) does not apply in relation to a decision given -
   (a) before the organisation or association was formed;
   (b) before the objects or purposes of the organisation or association included the matter

concerned; or

(c) before the organisation or association engaged in activities related to the matter concerned.

7. Without limiting any other application of the Administrative Decisions (Judicial Review) Act 1977, for the purposes of the application of that Act in relation to a decision of the Minister to give or refuse to give a consent pursuant to section 11, any member of the Aboriginal race shall be taken to be a person aggrieved by the decision.

Although public participation in environmental licensing procedures is now possible in Victoria and Tasmania as a result of their Environment Protection Acts, there is, as we have already indicated, presently very little opportunity for public participation under the various South Australian Acts dealing with the licensing of activities which may detrimentally affect the environment. The relevant Acts at present generally give rights to be heard and to appeal only to the person applying for the license, and no mention is made of third parties who wish to express concern about the possible environmental repercussions. Even where the words "person aggrieved" or "person interested" is used the Court will construe this as meaning the person who has applied for the licence (see The Queen v. Ward: ex parte Brambles Holdings Ltd. (Trading as "Cleanaway" (1983) 34 S.A.S.R. 269).

The present position has recently been criticised by R.J. Fowler (supra) where he said at page 20:-

> "The technicalities of formulae such as "person aggrieved" or "person interested" have been a cause of frustration for all concerned, including the courts. Furthermore, given the growing public interest in environmental quality, it hardly seems appropriate to afford rights of appeal to developers and to exclude them for all other parties. At the very least, as has been recognised in much of our planning legislation,

development proposals may affect most directly those who live or conduct their businesses in a nearby location. They may "affect" in a less direct fashion the public in general, if they result in a serious impact upon the environment.

The desirable approach, therefore, would seem to be to provide for an "open door" standing policy in relation to appeals on the merits, but at the same time to ensure that corresponding constraints exist in the form of provisions relating to costs, vexatious litigation, etc. The procedure of preliminary conferences which is provided for in relation to some statutory appeal processes may be useful in this respect. In South Australia, for example, it is necessary to obtain leave from the Planning Appeals Tribunal to proceed past the preliminary stage with an appeal. Such leave, until most recently, has been granted as a matter of course, but the opportunity is presented for the Tribunal to deal with litigation which appears not to be bona fide in character."

While Fowler appears to imply that it would be sufficient merely to grant open standing in respect to appeals, the Committee is of the view that it would be more desirable to allow members of the public to participate at an earlier stage of the decision making process. This could be accomplished by allowing members of the public to make submissions before a final decision is reached by the decision-maker. Submissions could either be allowed as soon as an application is made, or after the decision. In order that the public be able to utilise the right to participate in the decision making process, it would be necessary for a public notice to be given of the application and of any preliminary decision which may have been made concerning it. This approach, as has been seen, has already been taken in Victoria and Tasmania. However, in those States the process of reform was somewhat simpler than would be the case in this State due to the fact that they have general Environment

Protection Acts which encompass a large percentage of licensing decisions with respect to the environment.

Unfortunately, the licensing of the emission of waste is in this State dealt with in a number of statutes. For example:-

The South Australian Waste Management Commission Act 1979 provides for the licensing and control of waste depots; collection and transportation of wastes and the production of wastes of certain kinds.

The Environment Protection (Sea Dumping) Act 1984 prohibits the dumping of wastes or other matter at sea without a permit.

The Water Resources Act 1976 provides that a person shall not unless authorised under that or another Act, cause, suffer, or permit any waste to come into contact directly or indirectly with waters.

The Clean Air Act 1984 prohibits the carrying on of a prescribed activity without a licence.

Also, it should not be forgotten that it is not only pollution which detrimentally affects the environment. While the Planning Act 1982 does, or at least did, provide some opportunity for public participation, there is also other legislation which provides for the granting of permits and licences with respect to activities which can adversely affect the environment where there are either no, or extremely limited, opportunities for public participation in the decision making process. See for example:-

Fisheries Act 1982

Historic Shipwrecks Act 1981

Aboriginal Heritage Act 1979

National Parks and Wildlife Act 1972

Coast Protection Act 1972

Heritage Act 1978

Soil Conservation Act 1939

Having said this however, it would appear that the need for public participation is the greatest with respect to pollution control measures. This is because pollution is one of the greatest threats to the environment and usually has direct deleterious effects on the health of the population.

The effect of earlier recommendations of this Committee with respect to standing

This Committee has already made recommendations with respect to standing, which, if implemented could possible affect standing with respect to environmental issues.

In our Eighty Second Report dealing with Administrative Appeals, a majority of this Committee expressed the view that any person whose interests are affected by an administrative decision should have standing to appeal. The majority of the Committee were of the view that the proposed Administrative Appeals Tribunal Act could have a standing provision along the lines of section 27 of the Commonwealth Administrative Appeals Tribunal Act 1975 which provides:-

"1. Where this Act or any other enactment provides that an application may be made to the Tribunal for a

review of a decision, the application may be made by or on behalf of any person or persons (including the Commonwealth or an authority of the Commonwealth) whose interests are affected by the decision.

2. An organisation or association of persons, whether incorporated or not, shall be taken to have interests that are affected by a decision if the decision relates to a matter included in the objects or purposes of the organisation or association.

3. Subsection 2 does not apply in relation to a decision given before the organisation or association was formed or before the objects or purposes of the organisation or association included the matter concerned."

It is quite possible that the term "person whose interests are affected by the decision" may be construed narrowly so as to pertain only to such things as property and economic interests. However, section 27(2) would appear to be of some assistance to conservation and environmental organisations such as the Australian Conservation Foundation, in that in certain instances their interests will be deemed to have been affected by virtue of that section, and an appeal will lie.

This Committee also recommended in our Eighty Second Report relating to Administrative Appeals, the adoption of legislation along the lines of the Commonwealth Administrative Decisions (Judicial Review) Act 1977. Standing is dealt with in section 3(4) of that Act, which provides:-

"4. In this Act -
(a) a reference to a person aggrieved by a decision includes a reference -
(i) to a person whose interests are adversely affected by the decision; or
(ii) in the case of a decision by way of the making of a report or recommendation - to a person whose interests would be adversely affected if a decision were, or were not, made in accordance with the report or

recommendation; and

(b) a reference to a person aggrieved by conduct that has been, is being, or is proposed to be, engaged in for the purpose of making a decision or by a failure to make a decision includes a reference to a person whose interests are or would be adversely affected by the conduct or failure."

While a provision along these lines may possibly be of assistance to persons desiring to protect the environment, the present indications are that Australian Courts will continue to interpret formulas such as "person who is aggrieved" in a restrictive manner, and it may well be that the words "person whose interests are adversely affected", will be regarded as not being an extension of any significance.

What would be of assistance to individuals or groups wishing to protect the environment, would be the enactment of a provision along the lines of section 13(5) of the Commonwealth World Heritage Properties Conservation Act 1983 which provides:-

"5. Without limiting any other application of the Administrative Decisions (Judicial Review) Act 1977, for the purposes of the application of that Act in relation to a decision of the Minister to give or refuse to give a consent pursuant to section 9 or 10 in relation to particular property -

(a) a person whose use or enjoyment of any part of the property is, or is likely to be, adversely affected by the decision shall be taken to be a person aggrieved by the decision; and

(b) an organisation or association of persons, whether incorporated or not, shall be taken to be a person aggrieved by the decision if the decision relates to a matter which is included in the objects or purposes of the organisation or association and to which activities engaged in by the organisation or association relate.

This section is qualified to some extent by section

13(6) of that Act which provides:-

"6. Paragraph 5(b) does not apply in relation to a decision given -
(a) before the organisation or association was formed;
(b) before the objects or purposes of the organisation or association included the matter concerned; or
(c) before the organisation or association engaged in activities related to the matter concerned."

CONCLUSION

Man differs from other animals in many respects - one of which is his incredible ability to utilise the resources of the earth. Out of the basic materials found on this planet man has been able to create a degree of "creature comfort" which even two centuries ago would have been undreamed of.

While mankind's achievements are indeed awe inspiring, the unfortunate fact is that the production, use, and ultimate disposal of these "creature comforts" has too often been carried out without sufficient regard being given to the delicacy of the earth's ecosystems.

It is only in recent years that man has realised the very real dangers of the uncontrolled utilisation of the earth's resources. Apart from realising the practical problem that the earth's natural resources are being destroyed without proper opportunity being given for rejuvenation, where that is possible, for the benefit of this and future generations, many people have also come to appreciate (and value) the earth's natural environment with its quiet beauty for its own sake.

It having been recognised, that for various reasons the environment needs some protection from mankind's sometimes over-zealous desire for development, governments have begun to enact legislation designed towards environmental protection. For example, in recent years this State's government has enacted:-

The Water Resources Act 1976

The South Australian Waste Management

Commission Act 1976

The Clean Air Act 1984

The Environment Protection (Sea Dumping) Act 1984

While this is a step in the right direction to ensure adequate environmental protection, it is not enough. This is because not all of man's hazardous activities are regulated, and not all infringements will be noticed and prevented by the relevant regulating agency.

Because our natural environment is valuable in so many different ways to all of us, it would appear that we all have an interest in ensuring that unnecessary destruction of the environment does not occur. However, as the law presently stands, standing requirements will often prevent individuals or organisations being able to seek a legal remedy to prevent such destruction.

Many of the difficulties encountered by a person seeking to protect the environment stem from the fact that the common law has been geared towards the protection of individual interests, and those individual interests restricted in practice to economic interests.

In some instances, individual interests are adversely affected when man begins to alter the environment, for example a farmer spraying weeds and thereby killing his neighbour's stock. In many instances however it will not be the person who has a property interest in the land being affected who will be unhappy about the changes to the environment (indeed the property owner

may be the instigator of the development). In such cases it may well be that nothing can be done about the development unless it is in breach of some statutory duty, which the relevant regulatory authority is willing to enforce.

While it is understandable that because many causes of action are designed to protect personal property rights they are not readily adaptable to the relatively new idea of protecting the environment for the public interest, it seems that some causes of action could be adapted if it was desired to do so.

One cause of action which could be utilised is an action for a breach of a statutory requirement prohibiting noxious damage to the environment. However, even this action has not been readily available to persons and organisations wishing to protect the public interest in the environment. In order to be able to institute proceedings, a member of the public will need to show either that a private right of his has been unlawfully interfered with, or not only that his public right has been interfered with but also that he has suffered special damage different from the damage suffered in common by the rest of the population, or that it was the intention of a statute to give a private plaintiff a cause of action, a question of statutory interpretation on which it is usually difficult to predict the Court's decision.

Unfortunately, these requirements are often difficult to fulfil and it will then be necessary, as in all public interest suits, for the concerned citizen or organisation to ask the Attorney-General either to institute proceedings, or to grant his

fiat to allow the citizen in question to proceed in the name of the Attorney at the relation of the private citizen.

Thus in most causes of action the protection of the environment will normally have to be achieved by a public interest suit rather than a private suit, and unless the law is altered it will be necessary to seek the permission of the Attorney-General, as he is in law regarded as the protector of the public interest.

On the face of it it seems reasonable that one person should protect the public interest. This would undoubtedly prevent a multiplicity of suits and it will also prevent the day to day activities of society grinding to a halt because some "busy body" would like to grandstand his private views of what is in the public interest.

There is, however, one major drawback with the choice of the Attorney-General as the protector of the public interest, and that is that he is, and is seen to be, politically active, and his decisions must be affected by political realities and contingencies.

This situation has come about because Australia has followed the English practice of the Attorney-General as the Crown representative to enforce its property interests and to bring relator suits to protect the public interest as in actions relating to public nuisance, and public rights of way, and more recently in actions to enforce non-proprietary public law. In England however the law officers of the Crown are not, except in a formal sense, part of the political establishment and so their

system works differently in practice.

Thus the Australian Law Reform Commission in a discussion paper entitled Access to the Courts - Standing: Public Interest Suits was critical of the present system and recommended the abolition altogether of the need for the Attorney-General's fiat in public interest suits.

This Committee agrees that the present situation is unsatisfactory. While political considerations may only very rarely prevent public interest suits being brought which ought to be brought, it is important as always that justice not only be done but be manifestly seen to be done.

One method of encouraging environmental protection would be to expand the range of circumstances in which private individuals have a right to commence proceedings relating to the environment.

In recent years the courts have been prepared to accept a greater range of interests as worthy of protection and therefore to "listen to" a wider range of persons by granting them standing. For example in Tasmanian Wilderness Society v. Fraser (1982) 56 A.L.J.R. 763 and Frazer Island Defenders Organisation Ltd. v. Hervey Bay Town Council (1983) 2 Qld.R. 72 the Court was prepared to accept that the plaintiffs had standing due to the fact that they apprehended that their commercial interests would be adversely effected by the proposed developments. In the former case their activities involved selling souvenirs and publications relating to the area and in the latter case their business was that of running tours for profit. In another case, Onus and Frankland v. Alcoa of Australia Ltd. (1981) 36 A.L.R.

425 the High Court held that the plaintiffs had standing arising from their position as members of the Gournditchjmara community in relation to their claims to custody and preservation of ancestral relics in the Portland area.

Despite this apparent relaxation of the standing requirements by Australian Courts it still appears far from clear that our Courts would be prepared to follow the American Courts and allow any person to commence proceedings to protect his recreational interests. By recreational interests is meant activities engaged in, in the area in question, otherwise than for financial gain. For example the applicant may be able to establish that he regularly goes bushwalking or birdwatching or fishing in the area.

The Committee is of the view that the environment would have a better chance of adequate protection if individuals were entitled to seek injunctions and declarations to protect their recreational interests in addition to their economic interests. Since it is unclear that the Australian Courts will feel free to modify the existing standing rules to accomodate recreational interests, we recommend that the law be amended so as to provide that proceedings may be instituted as of right by any person where an activity has affected, or is likely to affect the environment adversely in such a way as to disadvantage the complainant's pecuniary, health or recreational interests.

Such an approach will not, however, in itself be sufficient adequately to protect the environment, because a person whose recreational, pecuniary or health interests have been affected

may not always be motivated to institute proceedings. Indeed there may not be any person affected in these ways. In such case, it will still be entirely in the discretion of the Attorney-General, to decide whether or not public interest proceedings ought to be instituted; and this as we have already stated is not entirely satisfactory.

This then leads us to consideration of the further question - who should have standing to seek remedies from Courts and tribunals for the protection of the public interest?

One option which has been suggested is that the role of the Attorney-General be replaced by an independent commission or other body, or perhaps by a single person, for example an Environmental Guardian. Such person or body would still have the power to bring proceedings ex officio or to allow private citizens to institute proceedings. This would have the advantage of being seen to be independent from any political pressures which may arise.

The Committee is of the opinion that this approach alone would not be sufficient, and if it were to be adopted at all, it would need to be adopted in conjunction with at least some broadening of the instances in which members of the public are entitled to institute proceedings as of right.

A different approach was taken by the British Columbia Law Reform Commission in its report on Civil Litigation in The Public Interest. In that report the Commission recommended that, subject to certain qualifications, any member of the public should have the right to bring proceedings in respect of an

actual or apprehended violation of a public right whether the violation relates to public nuisance, repeated infractions of a statute, or a public body exceeding its powers.

Any individual who wished to bring such proceedings would first request the Attorney-General to take action. If the Attorney-General refused or neglected to take action within a reasonable time, the individual would be permitted to bring the proceedings in his own name on obtaining the consent of the Court. The Commission was of the view that such consent should be given unless it could be shown that there was not a justiciable issue to be tried. The word "justiciable" however is question-begging in this context and a different word such as "genuine" would seem to be more appropriate.

A similar approach was also recommended by the minority members of the New Zealand Public and Administrative Law Reform Committee in their 1978 Report entitled Standing_in_Administrative_Law. Two members of the Committee recommended that if the Attorney-General should refuse his consent to a proposed action, the Court be given the power to make a "standing order" which would allow the plaintiff to proceed notwithstanding the Attorney-General's refusal of his 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.

The Committee is of the view that this approach could if appropriately modified prove a viable solution. It is envisaged that reform could be implemented by a provision along the 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 adversely affect 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 adversely affect the environment in such a way as to disadvantage the public may apply to the Attorney-General for either -

   (a) leave to commence proceedings on behalf of the public interest; or

   (b) proceedings to be commenced by the Attorney-General.

3. For the purposes of sections 1 and 2 "disadvantage" shall include (inter alia) detriment pertaining to interests of a pecuniary, health or recreational nature.

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

5. Notice of an application made under section 4

must be given to the Attorney-General, who shall be entitled to make written or oral submissions to the Court with respect to the application.

6. The Court shall only 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 those interests;

(b) that there is a likelihood that the environment has been or will be adversely affected in such a way as to disadvantage 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.

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

(i) that 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 litigation, 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.

This approach of course differs considerably from the approach taken by the Australian Law Reform Commission and the Law Reform Agencies of England and New Zealand. In the approach set out above the Attorney-General may still become involved in public interest litigation concerning the environment. However, some of the evils perceived in the present system are avoided by extending the circumstances in which members of the public will become entitled to bring proceedings and by allowing the Court, on the Attorney-General deciding not to commence or allow the commencement of public interest proceedings in his name, to permit some qualified person to do so.

After further discussion several members of the Committee have reached the conclusion that the proposed draft ought to go one step further and omit completely the requirement of first making an application to the Attorney-General.

It is thought that the court would be able to act as an adequate "filter", and that to add the requirement of having to apply first to the Attorney-General would cause harmful delays; which usually can be ill-afforded in environment protection cases.

This recommendation would involve the amendment of sections 2-4 of the draft so as to read:-

> 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 adversely to affect the environment in such a way as to disadvantage the public may apply to the Court for an order to grant standing.

3. For the purposes of sections 1 and 2 "disadvantage" shall include (inter alia) detriment pertaining to interests of a pecuniary, health or recreational nature.

(Section 4 deleted)

If neither of these approaches are considered suitable, and you would prefer to follow the recommendations made by the Law Reform Agencies in England and New Zealand, and the draft recommendations of the Australian Law Reform Commission, then in this Committee's view it would be desirable to attempt to make the standing formula somewhat clearer than those proposed by those Agencies.

The wording which was suggested by the English Law Commission for standing for judicial review, and which was subsequently placed in Order 53 rule 3(5) of the English Supreme Court Rules was in the following form:-

> "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."

A majority of the New Zealand Public and Administrative Law Reform Committee advocated a somewhat similar approach, but recommended that the provision be in a permissive rather than mandatory term. The majority members recommended that the provision be in terms such as:-

> "The Court in exercising its discretion to grant or refuse relief, may refuse it if of the opinion that the applicant does not have a sufficient interest."

Different wording again was suggested in a discussion paper f the Australian Law Reform Commission relating to Standing in ublic Interest Suits. The formula put forward by the Commission as "relief is not to be denied on standing grounds unless the court is satisfied that the issues sought to be raised are of no eal concern to the plaintiff." The Commission added that the elevant legislation should make it clear that "concern" is not o be judged by traditional rules and particularly that no roperty interest is necessary.

This Committee is of the view that the principal difficulty ith any of the above formulae is that there is likely to be a considerable amount of uncertainty as to their application. It ay often be difficult to predict whether the plaintiff will be eld to have "a real concern" or "sufficient interest". It should however be added that having a flexible formula does have the advantage of allowing the Courts to interpret it in accordance with the particular circumstances of each case. Courts do not however always take advantage of what may be considered broad and flexible formulae, and in many instances choose to place a narrow interpretation on the meaning of a formula.

Thus the benefit of any proposed formula will depend largely upon how the Courts are prepared to interpret it, and unfortunately it is difficult to forecast with any degree of accuracy whether such formulae will be interpreted in a restrictive manner, or in such a manner as to do no more than

exclude vexatious litigants.

If it is thought desirable that the Courts should take the latter course, it would be wise to make it clearer that that was the intended result. This could be done by providing that anyone could institute proceedings, but that the Court has power to strike them out if it appeared that those proceedings were brought for reasons other than a genuine concern for the environment.

If by "real concern" or "sufficient interest" it is intended that the plaintiff should be affected in some way, but that it does not matter that the rest of the community is similarly affected, that also could be stated with more clarity. For example, the standing requirements proposed by Smillie in Locus Standi - The Report of the Public and Administrative Law Reform Committee (1978) 4 Otago L.R. 141 could be modified so as to read:-

> "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 cannot show that the nature of the interest which he claims may be affected by the action or proposed action 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."

Alternatively, the generality of the term "interest" could be made clear in a similar manner to that proposed earlier under the heading "Combination of Suggested Approaches". Thus the provision could read:-

"(a) Any person shall have standing to

> commence proceedings where an action or proposed action has or is likely to adversely affect the environment in such a way as to disadvantage the complainant.
> (b) For the purposes of this section, disadvantage shall include (inter alia) detriment pertaining to interest of a pecuniary, health or recreational nature."

However, if this, or any other restrictive standing formula were to be adopted, it would still be necessary to have a mechanism whereby the Attorney-General could be approached to commence proceedings on the public's behalf.

If however, it is thought to be desirable that the standing requirements should be fixed somewhere between allowing anyone except vexatious litigants to sue and allowing anyone who is personally affected to sue, then it is difficult to find a formula which is any more precise and certain than those of "real concern" and "sufficient interest". It would however seem desirable to make it clear (if that is what is intended) that the person bringing the proceeding need not necessarily be affected in his person or property by the action or proposed action. This could be accomplished by adding a proviso which stated that a person may have a sufficient interest, or real concern in the subject matter despite the fact that he is not personally disadvantaged by the action or proposed action and wishes to bring proceedings solely to protect the environment, in order to benefit the interest the public in general has in the protection of the environment.

Having reached this stage, the idea of introducing a public trust doctrine appears less radical than it may have otherwise been. Given that almost anyone would be entitled to bring

environmental proceedings for breach of statutory duty or nuisance or any other relevant cause of action, it does not seem such a big jump to say that virtually anyone could commence proceedings for the protection of the air, water and other natural resources, and the public interest therein, from pollution, impairment or destruction.

In cases where the complainant is not in any way directly affected by the action complained about, a percentage of such complainants would be vexatious litigants or "busy bodies". While there will be a very large proportion of genuine complaints brought, it would seem preferable that there be some form of screening mechanism. This screening process would be useful not only to separate out those complainants who are busy bodies wishing to air their views, but would also ensure that it was possible to prevent complainants who were in other ways unsuitable to protect the public interest from being allowed to sue. Accordingly, our proposed formula of a wide grant of standing with a screening test applied by the Courts would ensure that anyone who was in any way really affected by an action would have standing to bring proceedings.

NEW CAUSE OF ACTION

The Committee was asked to devise a single rule of standing for environmental matters. While we have attempted to do this, we must point out that in doing so we have also created a new cause of action.

Rather than merely extending the rules of standing with respect to existing causes of action - for example in respect of

olic nuisance, we have prescribed a new set of facts and rcumstances in which a cause of action will be said to have isen. Under our recommendations a cause of action will arise ere a legal entity has affected or is likely to affect versely the environment in such a way as to disadvantage the cuniary, health or recreational interests of a particular lividual, or of the public in general.

This new cause of action is accompanied by extended rules of anding. Where a person can show that he has been personally sadvantaged by the set of facts that constitute the cause of :ion, then he may institute proceedings as of right. Where the plainant does not allege a personal disadvantage but rather a sadvantage to the public in general then he may institute ceedings with the permission of the Court.

The approach which has been taken is in this regard similar that taken in Section 2(1) of the Michigan Environmental tection Act 1970. That section provides that an action may be ntained for the protection of the air, water and other natural ources and the public trust therein from pollution, impairment destruction. Standing with respect to that cause of action is nted to "The Attorney-General, any political subdivision of state, any instrumentality or agency of the state or of a litical subdivision thereof, any person, partnership, poration, association, organization or other legal entity."

It may be that the fact that a new cause of action is ended ought to be made clearer in the amending legislation n is the case with our proposed draft. This could be done in

a number of ways. One possibility would be to provide at the beginning a general provision along the following lines:-

> "The purpose of this Act is to provide both a new cause of action and an extended rule of standing, so that the environment of this State may be more adequately protected."

Alternatively or in conjunction, it could be provided at the conclusion of section 1:-

> "may commence proceedings to prevent the environment being adversely affected."

Similar words could be added to the end of sections 2(a) and 2(b) of the first alternative draft, and at the conclusion of section 2 of the second alternative draft.

RIGHT OF ATTORNEY-GENERAL TO INSTITUTE PROCEEDINGS

Presently the Attorney-General may institute proceedings to protect the public interest ex officio, or he may authorise proceedings to be brought by another person, as relator using the name of the Attorney-General, to protect the public interest. The main instances in which the Attorney-General becomes involved in public interest suits involving environmental protection are in actions to abate public nuisances, and in proceedings to obtain an injunction restraining a breach of a statutory duty or the commission of a statutory offence.

As the Attorney-General is the protector of the public interest, he should be entitled to institute proceedings relating to the proposed new cause of action. However in order to ensure that this is so, and also as a reminder that in not all instances will private citizens be inclined to institute public interest proceedings, it should be made clear that the Attorney-General

may institute proceedings under the proposed procedures. This could be done by adding a further section after those dealing with standing orders in the following form:-

> "Where the Attorney-General is of the opinion 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 is likely to affect the environment in such a way as to disadvantage the pecuniary, health or recreational interests of the public he may institute proceedings under this Act."

FORM OF REMEDY - INJUNCTION

Having in effect, recommended that a greater number of people in a larger variety of circumstances ought to be able to apply to the court for relief when it appears that the environment is being adversely affected, the next question to be answered is: what form of remedy should be available.

In extending the circumstances in which proceedings may be brought, the primary aim has been to ensure that the environment is adequately protected, as distinct from ensuring that individuals are compensated for their loss. Therefore the most appropriate remedy will normally be an injunction to prevent damage or further damage being done to the environment and to stop action already being taken which has this effect.

One matter which perhaps should be raised at this stage, is that difficulties may be encountered by a person seeking an injunction to prevent alterations to the environment when he merely fears that it will be detrimentally affected and is unable to show that this will be the case.

Bates in Environmental Law in Australia rightly points out that in environmental matters prevention is definitely better than cure, with the result that quia timet injunctions, which issue to remove the threat of harm, are more desirable than an injunction at a later date to stop the continuance of damage when irretrievable harm has already occurred.

The difficulties of this type of injunction result from the requirement that the danger must be imminent, that any damage likely to result be of extreme gravity, and that the damage be capable of present quantification (per Chamberlain J. in Trim v. Corporation of the City of Adelaide - unreported - 1965).

Spry on Equitable Remedies explains the position thus at pages 342-3333:-

> "There have been differing opinions expressed by equity judges as to the degree of probability with which, for these purposes, it must be established that the expected injury in question will take place. It has been said, for example, that "the plaintiff must shew a strong case of probability that the apprehended mischief will, in fact, arise"; and that there must "be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial". Perhaps the most widely accepted statement is that of Cozens-Hardy M.R., who on one occasion said, "The court has to draw an inference from all the circumstances of the case; ex hypothesi you cannot prove actual damage, but the plaintiff takes upon himself the burden of proving that it is reasonably certain that what the defendant is threatening and intending to do will cause imminent and substantial damage to the plaintiff." Whilst it is of course true that a quia timet injunction will not issue unless the plaintiff is able to show that a refusal of relief would involve a substantial hardship to him, in the sense that he must be able to show more than an insignificant or illusory

> risk, a criticism may be made of the various statements which have been set out here in that it is assumed in them that the required degree of probability of proof of an impending injury is fixed, and is independent of the other circumstances of the case. Yet, as has been seen, the degree of probability that the material injury will occur must be weighed together with its gravity and likely consequences, as well as with any other matters which may affect the balance of hardship or inconvenience between the parties.
>
> Therefore the criterion by which the degree of probability of future injury must be established is not fixed or settled, but rather it depends on the various other relevant circumstances of the case. Accordingly the greater the injury or distress which would be caused by the apprehended injury, if it occurred, the more readily will the court intervene despite uncertainties and deficiencies of proof."

This test may well prove to be too restrictive in some nstances of environmental interference. Indeed, often nobody is eally certain as to what the ecological and environmental ffects of any development will be. It is submitted that a erson concerned about the effect on the environment, and ubsequent detrimental effect on himself should not be required o establish the degree of probability of imminent danger that is resently required by law. The Court should have a wider iscretion, which will allow it in appropriate cases to grant an injunction when all that can be pointed to is that there is proper reason for the applicant to fear that the proposed development will adversely affect his interests.

It is envisaged that a provision basically along the following lines could be enacted to deal with the situation:-

> "The Court in its discretion may grant an injunction, if satisfied that the environment is being, or will be, interfered with in a manner which is, or is likely to disadvantage the pecuniary, health or recreational interests of the complainant, or of the public generally."

The present practice with regard to injunctions requires all applicants other than the Crown to give an undertaking as to damages as the price of getting the injunction. This rule would have to be abrogated in the public interest cause of action which we recommend, otherwise there would be few people able to fortify their undertaking if called on so to do.

DECLARATION

Although at first the Committee was disposed to recommend that the remedy available under the proposed provisions be restricted to injunctions, it was soon realised that declarations were a desirable and necessary remedy as well in many cases.

Declarations are often sought when Commonwealth or State governments are in some way involved in the relevant proceedings. For example in Australian Conservation Foundation Inc. v. The Commonwealth (1980) 54 A.L.J.R. 176 the Foundation sought (inter alia) a declaration that a decision approving of the creation of a tourist resort at Farnborough in Queensland and of the exchange control transactions ancillary thereto was void on the ground that there had been a failure to comply with the Environment Protection (Impact of Proposals) Act 1974 (Cwth) and the administrative procedures approved thereunder the Foundation also sought an injunction restraining the defendants from acting upon the decision. These declarations were refused by a majority of

the High Court of Australia for want of standing.

In Ingram v. Commonwealth (1980) 54 A.L.J.R. 395 the plaintiff sought a declaration that the Commonwealth by supporting the S.A.L.T. II Treaty was acting in breach of certain principles of international law. The plaintiff again failed for lack of standing.

In Wacando v. Commonwealth (1982) 56 A.L.J.R. 16 the Full Court held that the plaintiff who was born on Darnley Island and proposed to carry on certain commercial activities on the seabed surrounding the island, had locus standi to claim (inter alia) declarations that Darnley Island did not form part of the State of Queensland and that certain Commonwealth and Queensland fisheries and offshore petroleum legislation, which would impinge on his proposed activities, was either invalid or had no application to that island.

In Onus v. Alcoa of Australia Ltd. (1981) 55 A.L.J.R. 631 two Aborigines sought an injunction restraining Alcoa from carrying out on land in the Portland area of Victoria works which would interfere with Aboriginal relics on that land in contravention of the Archaelogical and Aboriginal Relics Preservation Act 1972. The appellants also sought a declaration that the relics in question were "relics", within the meaning of the Act. They were held to have standing for these purposes.

Recently in Thorne and others v. Doug Wade Consultants Pty. Ltd. and others (1985) V.R. 433 the plaintiffs sought a declaration that a relevant building permit was void, and as

ancillary thereto, a mandatory injunction requiring the defendant to remove at least the second storey of the extension, and damages. The Full Court of Victoria held that the plaintiff lacked standing to pursue any of these claims.

Although the remedy of declaration has no restraining or mandatory effect in itself it is very unlikely to be ignored when ancillary relief can usually be claimed if the declaration does not suffice to determine the rights in issue. Indeed in environmental law cases, declaration and injunction are likely to be the most sought after remedies. As can be seen from the cases cited above a declaration is often sought regarding the validity of a particular administrative decision, while an injunction wil be sought to prevent a person acting upon that decision.

In our view both remedies ought to be available under the new environmental procedures.

DAMAGES - PUBLIC INTEREST PROCEEDINGS

The Committee is of the view that injunctions and declarations ought to be the only remedies available under the proposed environmental proceedings brought in the public interest except where a right to damages presently exists and is capable of being joined with the other claims for relief. There are a number of reasons for this. One is the difficulty of quantifying damages in many such cases. Another is the difficulty of deciding who should have a right to the damages. A further reason is that it could conceivably encourage people who have no real interest in the environment to protect it to bring

proceedings in the sole hope that they will be granted an award of damages. The new procedures are designed for the protection of the environment, not to allow people to sell rights to destroy it.

Indeed the Michigan Environmental Protection Act 1970 upon which our recommendations are partly based only allows actions to be commenced for declatory and equitable relief. Providing in section 2(1):-

> "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, organization 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, organization or other legal entity for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction."

We therefore recommend that where proceedings are brought in the public interest pursuant to section 2 that damages ought not be available except under presently existing causes of action. This ought to be made clear in the legislation.

DAMAGES AWARD TO RELEVANT AUTHORITY IN CASES OF NUISANCE TO BE USED FOR THE PURPOSE OF REMEDYING THE DAMAGE CAUSED

The difficulties of deciding how an award of damages is to be assessed and applied in cases of public nuisance could however

be mitigated if it was decided to adopt the approach recommended by the British Columbia Law Reform Commission in their Report on Civil Litigation in the Public Interest. The Commission said at pages 70-71 of their report:-

> "As a matter of principle, we believe it desirable that in cases of public nuisance, the court should have a discretion to award damages in addition to or in substitution for an injunction. .....
> In cases of private nuisance, various criteria have been laid down by the courts as a guide to awarding damages under the Act. These criteria, however, may not prove too helpful as they are in the main, concerned with the seriousness of the personal loss occasioned by the nuisance. In our suggested restatement of the principle of Lord Cairns' Act, we would therefore give some guidance to the court by limiting the damages that can be awarded in those public nuisance actions maintained as a result of our recommendation to widen standing, to an amount that represents the cost of remedying or repairing the effects of the nuisance. ...
>
> We recommend that the court should have a complete discretion whether or not to make such an award, and if it should decide to make such an award, it should have the power to direct how the award is to be applied and disbursed. Any such award should be payable to the Attorney-General who would then have a duty to spend the amount awarded to remedy the damage caused by the nuisance.
> In exercising its discretion in awarding damages for public nuisance, the court will be guided by equitable considerations. This gives the court a desirable degree of flexibility, and will allow it to take a wide variety of circumstances into account, including the behaviour of the plaintiff and defendant. There is, of course, the unlikely possibility that, as a result of our recommendation to widen standing, a defendant might be faced with a number of actions in respect of the same nuisance, in which a claim for damages is made in addition to or in substitution for an injunction. This possibility is not an overriding concern, however, as we are confident that in most

> cases an application to consolidate the various actions would be successful. Furthermore, if a situation arose where an action for damages was maintained in respect of a public nuisance that had already been the subject of a successful damage claim, the court would doubtless in the exercise of its discretion refuse to make another damage award.
>
> We should like to emphasize that our recommendation in this respect can be treated independently of our principal recommendation to widen standing, and that enactment of our principal recommendation would not of necessity require the enactment of this recommendation relating to damages for public nuisance."

The Commission recommended that a provision in the following terms be enacted:-

> "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 any appropriation other than this section in whatever manner he considers appropriate to remedy the effect of the nuisance."

On the whole we are against such an approach; partly due to difficulties of administration; and partly also because it is conceivable that it is a weapon which could be used unfairly.

Persons wishing to rid society and the environment of a particular developer once and for all, could deliberately refrain from seeking an injunction, until a great deal of work had been done, and it would be extremely expensive to put the environment back into its (near) natural condition.

DAMAGES - PROCEEDINGS BROUGHT AS OF RIGHT, WHEN CLAIMANT CAN SHOW

ACTUAL INJURY TO HIS INTERESTS

The comments which we have made regarding damages only relate to the question whether or not damages ought to be available in public interest proceedings. Different considerations will of course apply when the claimant can show actual injury to his interests and establish a private right of action under the existing law. In such circumstances it is clear that he should and will continue to be entitled to claim and be awarded damages for his loss.

One matter which has been raised, however, is whether the instances in which damages are available at common law should be extended. For example, if the clause of the proposed Bill which allows a person to institute proceedings as of right, covers a greater variety of situations than presently is the case at common law, ought damages be available in those expanded instances? To illustrate this, if a person in future claims that his recreational interests have been adversely affected he will be able to institute proceedings under the proposed section as of right, should he also be able to claim damages? It is by no means clear that a similar right would exist at common law.

The proposed provisions are designed principally to increase the availability of the remedies of injunction and declaration. The incidental question is whether the range of circumstances in which private individuals can claim damages ought also to be expanded. Assuming that instances in which individuals may institute proceedings as of right are to be more extensive under the proposed provisions than at common law, one mthod of

extending the right to claim damages would be to provide that they may be granted whenever it is appropriate to do so in any proceedings instituted pursuant to that provision. On the other hand, if it is thought to be unnecessary or undesirable to increase the situations in which damages are available, it would nonetheless appear to be necessary and desirable to provide that, although injunctions and declarations remain the only remedies available under the new procedures any plaintiffs who have a cause of action for damages at common law may join such common law claim with the proposed applications for injunction and/or declaration.

The latter approach has been taken in Michigan. In Michigan the 1970 Environmental Protection Act recognises the public right to a decent environment as an enforceable legal right. This right is enforceable by private citizens. Under the Act only declaratory and equitable relief are available. However there have been instances involving industrial air pollution in the Detroit metropolitan area in which a claim for equitable relief under the Act have been joined with a claim for damages under the law of nuisance.

Before determining what approach should be taken in this State, it would seem prudent to examine quickly the availability of damages at common law. In instances where damages are claimed for injuries resulting from an interference with the environment, the claim is most frequently brought in nuisance.

A further cause of action available to those injured by pollution or other ecological impairment is an action in

negligence. Plaintiffs may however encounter difficulties in proving any one of more of the requirements, namely a duty, a breach of that duty, material injury and causal connection; especially the first two requirements.

A claim may also in some circumstances be based on Rylands v. Fletcher (1866) L.R. 1 Ex 265. In that case Blackburn J. at pages 279-280 expounded the principle that a "person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is prima facie answerable for all damage which is the natural consequence of its escape." This was affirmed on appeal to the House of Lords see Rylands v. Fletcher (1868) L.R.3 H.L. 330. This principle however can be applied only in "escape" situations, and is of limited use in environmental litigation.

Except in the case of public nuisance it appears that damages are not available to a person who suffers special damage by reason of an infringement of a public right. That this is so appears from the judgment of King J. (as he then was) in Neville Nitschke Caravans Pty. Ltd. v. McEntee and McEntee 15 S.A.S.R. 330, where he said at pages 350-351:-

> "If the respondents have such a right of action, it is for the equitable remedies of declaration and injunction. I am of opinion that the second limb of the Boyce rule does not confer on a person who suffers special damage by reason of an infringement of a public right a right of action to recover that damage. It is true that the rule is derived from the law of public nuisance and that one who suffers particular damage as a consequence of a public nuisance has a right

of action for damages in tort. But the authorities from Boyce onwards make use of the rule in the general area of public law only for the purpose of providing the test for determining the locus standi of individuals to invoke the equitable jurisdiction of the Court, without the intervention of the Attorney-General, to enforce the general law and to protect public rights arising therefrom. In S.A. de Smith's Judicial Review of Administrative Action (3rd ed. (1973) p.402) the learned author comments:

> 'The fact that these rules have been evolved mainly in the context of public nuisance is apt to cause confusion, for one who sustains particular damage attributable to a public nuisance has a private right of action in tort. Yet for the purpose of entitlement to an injunction in public law, it is not always necessary to show that the encroachment on 'public rights' constitutes a public nuisance, or that the plaintiff has suffered wrong remediable by an action for damage. Nevertheless it has been widely assumed that the rules about public nuisance are a guide to locus standi in many other contexts.'

In the only case, of which I am aware, in which a plaintiff sought to found a claim for damages on the second limb of the Boyce rule, namely, Attorney-General v. Birkenhead Borough,(1968) N.Z.L.R. 383 Richmond J. rejected the claim. At p.390 he said: 'The principle in question certainly cannot be taken to be finally established or its limits defined. It means that the equitable remedy of injunction is available at the suit of private individuals in cases where there is no common law action for damages for breach of statutory duty or for the interference with any private right. As I have said, the locus standi of a private individual in such cases appears to be derived by analogy from the law of public nuisance. In case of a public nuisance the common law itself acknowledged a right of action for damages at the suit of a plaintiff who suffered special and substantial damage, but the common law has developed in a restricted way as regards

> acknowledging the existence of any private right of action for breach of statutory duty. In my view the authorities do not justify an extension of the right which exists to recover particular damage sustained as a consequence of public nuisance to particular damage sustained as a consequence of infringements of public rights or of public law generally. To so extend it would, I think, introduce mischievous confusion into the law. It is difficult to see how it could harmonize with the rules as to the circumstances in which a breach of statutory duty gives rise to a claim for damages. I agree too with the decision of Richmond J. in the Birkenhead Borough case that Lord Cairns' Act (the South Australian equivalent is Supreme Court Act, 1935-1975, s.30) does not empower the Court to award damages in lieu of injunction to a plaintiff suing in respect of a breach of a public general duty as distinct from an infringement of a private right. A plaintiff who sues for breach of a public general duty without the intervention of the Attorney-General, relying for locus standi on particular damage suffered in consequence of such breach, is not, in my opinion the 'party injured' by such breach within the meaning of s.30. The duty is owed not to the individual plaintiff but to the public at large and the 'party injured' is the public generally. Such a plaintiff, by reason of the particular damage, has locus standi to sue for an injunction to redress the injury to the public but there is no private injury to himself."

A plaintiff however is more likely to be successful in obtaining damages if he can frame his claim in nuisance. As early as 1611, the Court of King's Bench granted damages to plaintiffs whose air had been infected and corrupted by the odours from the defendant's hog sty (William Aldred's Case (1611) 9 Co.Rep.57b 77 E.R. 816).

Nuisance can be of a private or of a public nature. Private nuisance traditionally was and still is, confined to invasions of the interest in the use and enjoyment of land, although

occasionally an occupier may recover for incidental injury sustained by him by reason of an interest in land, such as for illness caused by noxious gases from an adjoining factory.

A public nuisance, by contrast, confers a cause of action for damages on anyone sustaining personal injury or other loss, although no rights or privileges in land of his have been invaded.

In order to complain of public nuisance, a private claimant must be prepared to show that he incurred some "particular" or "special" loss over and above the ordinary inconvenience or annoyance suffered by the public at large.

According to one view, the plaintiff's injury must have been different not merely in degree, but in kind from that shared by the general public. In its most extreme form, this has defeated the claims of commercial fishermen for loss of their livelihood against polluters of public waters, on the ground that their fishing rights were no different from that of the general public and that their peculiar economic interest did not help. (see Hickey v. Electric Reduction (1970) 21 O.L.R. 3d. 368).

The more liberal approach is to allow recovery so long as the plaintiff's injury was appreciably more substantial, more direct, and more proximate without necessarily differing in its nature. This would include all personal injury and actual pecuniary loss provided it exceeded in degree what was suffered by others.

The gist of private nuisance is an interference with an occupier's interest in the beneficial use of his land.

Interference may consist of physical damage to land, buildings, and chattels thereon or in disturbance of the comfort, health and convenience of the occupant by offensive smell, noise, dust or by reasonable fear of one's safety or health.

However not all amenities commonly associated with beneficial use of land are vindicated by the law of private nuisance. Apparently aesthetic values, like an unobstructed or pleasing view from one's home, and privacy values such as freedom from being spied upon from a vantage point are not protected.

In order to merit legal intervention, the annoyance or discomfort must be substantial and unreasonable. Most cases of nuisance turn upon the gravity of the harm to the complainant. However weight is also given to the purpose or motive of the defendant's activity.

The main reason for allowing damages to be claimed under the new cause of action, would be to extend the instances in which damages were available - if that was considered to be desirable. The question to be answered therefore is whether the instances in which damages are available to private citizens for interference with the environment should be expanded.

The Committee concedes that there may be some instances in which damages are not now available, where perhaps they should be. There is, however a difficulty in extending the instances in which damages are available, and that is to devise a set of principles upon which damages ought to be given.

The Committee tends to the view that at present, at least, it is best to leave the laws regarding damages as they stand. It

should however be made clear that a person seeking an injunction or declaration under the provisions of the Act, may join the application with a common law action for damages.

THIRD PARTY PARTICIPATION IN THE ADMINISTRATION OF ENVIRONMENTAL PROTECTION LEGISLATION

Apart from extending standing rules so as to enable members of the public to institute proceedings for example for an injunction to prevent destruction of the environment to the detriment of the individual or the public at large, it is also believed that members of the public ought to be able to have a greater opportunity to become involved in the administration of Environmental Protection Legislation.

In contrast to the position previously discussed obtaining in Victoria and Tasmania, there is presently very little opportunity in this State for members of the public to become involved in decision-making affecting the environment. Submissions and appeals are usually the right solely of the person proposing the development which is likely to affect the environment. See for example the recent case of The Queen v. Ward: ex parte Brambles Holdings Limited (Trading as "Cleanaway") (1983) 34 S.A.S.R. 269, where a majority of the Full Court held that the only person entitled to appeal was the applicant who had been refused a licence, and the party opponent had no right of appeal.

In fact very few of the many Acts which either directly or

indirectly raise environmental issues allow public participation in the decision making process. It is felt that to some extent at least, this position should be remedied. Dangers are seen however in swinging too far in the opposite direction and thus allowing environmental issues to be raised at any time in the decision making and subsequent appeal process, by any person who for whatever reason feels inclined to do so.

If third party participation procedures are too extensive, it would be more than likely that the system would be abused by individuals and organisations who wish to block any sort of development at any cost. Such people could conceivably cause a great amount of unnecessary delay and expense to both the proponent for development for the licensing or consenting authority, and to the appeal tribunal or court. While arguments of expense and delay should not prevent meritorious claims being heard, they do constitute good reasons for attempting to eliminate vexatious and frivolous claims and claims which are pursued for some irrelevant purpose.

The difficulty is to devise a mechanism which will prevent vexatious claims without stopping meritorious claims. The traditional method adopted for this purpose is to require the person to be "adversely affected" by the activity in question. This test however, as was explained earlier in the report, has been construed rather narrowly so as only to include injury to the person, his property or other economic interests. A man complaining about the destruction of his local environment may be able to point to none of these factors, but may still have a just

cause of complaint that ought to be heard.

For example a person may be very distressed at the thought of a permit being given to emit wastes into a river in which he fishes for trout in his leisure time. He may be concerned that the river will look and smell unpleasant, and perhaps more importantly from his point of view, he may be concerned about the effect it will have on fishing and the health of those who eat fish caught in polluted waters. While none of these factors will affect his economic interests they are likely to affect his recreational interests and his enjoyment of life, and hence deserve to be taken into account when consideration is given to the question of whether or not to permit waste to be disposed of into the river.

Interests other than economic interests have been recognised recently in the Environment Protection (Sea Dumping) Act 1984. That act provides by section 28 that the Supreme Court may upon application by the Attorney-General or by an interested person grant an injunction. "'Interested person' is defined to include a reference to a person whose use or enjoyment of any part of the sea, or of the air space above, or of the seabed or subsoil beneath, any part of the sea, is or is likely to be adversely affected by the conduct concerned".

In the Report it is recommended that the general standing requirements in environmental matters be extended to include recreational interests. Perhaps this could be altered to say "use or enjoyment" as in the Sea Dumping Act. However, whichever expression is used, it is clear that the person concerned must be

adversely affected in some way and that this is not restricted to his economic interests.

It is suggested therefore, that participation in environmental decision making should be restricted to those persons who are likely to be affected in either an economic or a recreational sense, just as it has been recommended that the general standing rules relating to the environment be restricted in this way.

Although such a requirement may still appear rather restrictive, there appears to be no other method of ensuring that the system of public participation is not abused. We gather that difficulties of abuse may have arisen in Victoria, and therefore it would appear prudent to introduce more limited measures than have been introduced there, at this stage at least. It will after all always be possible to extend the third party participation procedures at some further date; but if extensive rights are given now, it will be virtually impossible to take those rights away, even should they prove to result in unreasonable abuse of the rights.

What is envisaged is that "interested persons" as defined, would be entitled to present written submissions to the original decision making authority. Where an appeal was instituted by the proponent against the decision, there would be a similar right to present written submissions to the higher tribunal. It may be that in exceptional circumstances the decision making authority or appellate tribunal would feel the need to call upon that person for further information, in either written or oral form,

but no right to participate actively in proceedings would be created.

The third party likewise would have no right to appeal against the making of a decision. Such an appeal could only be instituted by leave of the tribunal or court.

Thus a provision roughly along the following lines could be enacted along with the provision finally adopted to extend the general standing rule in environmental matters.

THIRD PARTY PARTICIPATION IN ENVIRONMENTAL DECISION MAKING

(1) Any person who believes that a proposed activity is likely to affect the environment adversely in such a way as to disadvantage his pecuniary, health or recreational interests, shall be entitled to submit written submissions to any governmental, statutory, administrative, judicial or similar body which is giving, or is about to give consideration to the question of whether or not to permit such activity.

(2) Where permission to carry on such an activity has been refused, and the proponent appeals against the decision, any person who would be eligible to submit submissions pursuant to section (1), is likewise entitled to submit written submissions to the appellate body.

(3) Where permission to carry on such an activity has been granted, a person who would be eligible to submit submissions pursuant to the previous two sections may only institute an appeal:-

(a) where such a right is expressly given by statute or

(b) the appellate body designated to hear the appeals grants leave to do so.

For practical reasons it would seem preferable to deal with third party rights in one general statute rather than placing provisions in every statute in which environmental issues could conceivably be raised. This is the approach which the Attorney-General has indicated that he wishes should happen.

It is not proposed that notice of the proponent's application be advertised. There are a number of reasons for this. First, advertising is not terribly effective in reaching those persons who are likely to be adversely affected by the decision in question. To make the advertisements more effective would result in a great deal of extra expense without necessarily achieving the objective because few people read the public advertisements. Secondly, those people in a given area who are likely to be affected by the environmental implications of a decision are much more likely to become aware of the situation through the local "grapevine" than by a small notice inserted in the back pages of the "Advertiser".

Thirdly, there would be difficulties due to the general application of the provision, in that notice would need to be given in all instances where decisions possibly had environmental implications and it could result in notice having to be given with respect to extremely trivial decisions.

Possibly the best way to deal with the question of notice, would be to insert into Acts relating to licences affecting the environment, a duty to give notice of applications to carry on

those particular types of activities, in such a manner as to ensure that those persons most likely to be affected were likely to be informed.

RIGHT TO RESTRAIN BREACHES OF ENVIRONMENTAL PROTECTION ACTS

A further method of involving members of the public in environmental protection, would be to allow proceedings to be instituted to restrain breaches of acts designed to protect the environment.

An "open door" policy could be adopted, as in section 123 of the New South Wales Environmental Planning and Assessment Act 1979 which provides:-

> "123.(1) Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.
>
> (2) Proceedings under this section may be brought by a person on his own behalf or on behalf of himself and on behalf of other persons (with their consent), or a body corporate or unincorporated (with the consent of its committee or other controlling or governing body), having like or common interests in those proceedings.
>
> (3) Any person on whose behalf proceedings are brought is entitled to contribute to or provide for the payment of the legal costs and expenses incurred by the person bringing the proceedings."

Alternatively standing rules could be broadened so as to allow persons likely to be affected to bring proceedings. An example of this approach is section 28 of the Environmental Protection (Sea Dumping) Act 1984 which provides:-

"28.(1) The Supreme Court may-

(a) upon application by the Attorney-General or by an interested person, grant an injunction restraining a person from engaging in conduct that constitutes, or would constitute, an offence under Division I or II of Part II;

and

(b) make any order incidental or supplementary to an order made or an application under paragraph (a), including an order as to costs.

(2) The reference in subsection (1)(a) to an interested person shall be read as including a reference to a person whose use or enjoyment of any part of the sea, or of the air space above, or of the seabed or subsoil beneath, any part of the sea, is, or is likely to be, adversely affected by the conduct concerned.

(3) The reference in subsection (1)(a) to engaging in conduct shall be read as including a reference to -

(a) doing, refusing to do, or refraining from doing, any act or thing;

or

(b) causing or permitting another person to do, refuse to do, or refrain from doing, any act or thing."

This approach could be modified so as to correspond with the standing formula recommended in this report. Thus it could be provided:-

"Where an activity is being carried on in contravention of a State Act or regulation, designed to protect the environment then -

(a) the Attorney-General

(b) any person claiming that the activity is likely to affect the environment adversely in such a way as to disadvantage his pecuniary,

health or recreational interests,

and

(c) any person claiming that the activity is likely to affect the environment adversely in such a way as to disadvantage the pecuniary health or recreational interests of the public in general who has applied for and been given a standing order in the manner set out in Part 1 of this Act

may apply to the Court for an injunction restraining such breach."

After consideration of our primary recommendation, we feel that such a provision is probably unnecessary, as activities being carried upon in contravention of statutes designed for the protection of the environment, are likely to be actionable under the provisions of the primary recommendation.

The only reason for having a separate provision would be if it was thought desirable to have an "open door" approach to standing in regard to actions for restraint of breaches of environmental protection Acts. In that case a further provision could be added at the end of the main recommendations.

"The Attorney-General, any person, partnership, corporation, association, organisation, or other legal entity, claiming that an activity is being carried on in contravention of a State Act or regulation, designed to protect the environment, may apply to the Court for an injunction restraining such breach."

While feeling that such a provision has merits, the Committee is of the view that it may ultimately prove unnecessary if the widening of the standing rules in the manner suggested proves adequate to ensure that environmental laws are enforced. We therefore suggest a "wait and see" approach.

ORDER TO RECTIFY ENVIRONMENTAL HAZARDS

One further matter which the Committee has considered, is the possibility of granting to local government bodies a power to order rectification of an environmentally hazardous situation.

It is envisaged that provisions similar to those found in Division III of the *Weeds Act 1956* could be enacted. Thus a council could require an owner or occupier to rectify an environmentally hazardous situation by notice. Where the notice was not complied with, then the council could carry out the necessary work and recover the costs for doing so from the owner or occupier.

This would have the advantage of ensuring that the environment was protected without resort to court proceedings being necessary. This is particularly advantageous when the complainant and the person carrying out the environmentally hazardous activity are neighbours in a small community, where litigation can cause much bitterness for many years. Thus a person who was concerned that his neighbour's activities were environmentally hazardous could merely approach his council, and ask that a notice of abatement and rectification be sent out.

It would be necessary for the legislation which granted such a power to order rectification, to set out clearly what was regarded as an environmentally hazardous situation. An example could be emission of waste contrary to state legislation.

While of the view that allowing councils to order rectification of certain hazardous situations has advantages, we merely bring the possibility to your attention and make no

recommendation.

Relationship with recommendations of 67th Report

The relationship between these recommendations and those previously made in our 67th Report relating to non-party interventions and amicus curiae should be mentioned for the sake of completeness.

In our 67th Report we made recommendations as to the circumstances in which the court ought to allow a person, who was not a party to the proceedings, to make submissions to the court.

A test for non-party intervention was formulated in the following terms:

> "Non-party intervention may be allowed where the intervener can provide arguments or facts which will contribute to the court's reaching an informed decision, and where the significance of these arguments or facts is sufficient to outweigh any expense and/or delay which may be caused to the parties by such intervention."

The recommendations made in the 67th Report are in some respects similar to and run parallel with our recommendations in this report although this report is confined to third party participation in environmental decision making. This report's recommendations are designed to deal specifically with those situations where the licensing of activities affecting the environment is involved and to provide a simple mechanism whereby written submissions can be made by any person claiming that the licensed activity is likely to affect the environment adversely in such a way as to disadvantage his pecuniary health or recreational interests. Such written submissions should be made to the administrative or judicial body charged with the obligation of making the decision.

By way of contrast, the recommendations of the 67th Report deal solely with non-party intervention in proceedings before the Supreme Court. The procedure recommended in the 69th Report is also somewhat more formal. Intending intervenors are required to seek leave to intervene by way of summons. Supported by an affidavit explaining the grounds upon which the intervention is sought. The summons and affidavit have to be served upon the parties to the action who then have a full opportunity to object to such intervention on the hearing of the summons. No such preliminary formalities stand in the way of an intending intervener before an environmental decision-making body.

Although the recommendations with respect to non-party intervention in the 67th Report would, if implemented, in isolated instances assist some persons wishing to intervene in proceedings in order to ensure that the court considered the environmental implications of its decision, the recommendations in this report relating to third party participation in environmental matters are likely to prove significantly more useful in the area of environmental protection.

DISSENTING VIEWPOINT

In conclusion, it needs to be pointed out that the recommendations only express the views of the majority of the members. One member of the Committee, Mr. Morgan, is opposed to the broad approach recommended by the majority of the Committee. He believes that the proposal has the capacity of too wide an application and that it could lead to proceedings being instituted in many unforeseen circumstances. This in turn may

ultimately lead to disruption to day to day activities carried out in this State.

Mr. Morgan feels that the protection of the environment would best be dealt with by a statute by statute approach. Each statute dealing with environmental protection for example, the Clean Air Act 1984, The Waste Management Act 1979, and the Environment Protection (Sea Dumping) Act 1984 would under this approach be individually examined and a decision made as to what rights members of the public should have to be involved in the relevant licensing and enforcement procedures.

SUMMARY OF RECOMMENDATIONS OF THE MAJORITY

This Committee is of the view that if the environment is to be protected adequately, it is necessary to broaden the instances in which members of the public can become involved in environmental protection.

The Committee perceives that there may be dangers in allowing any person whatsoever to institute proceedings with regard to any grievance that he deems involves an environmental issue. As a result we have recommended that proceedings only be allowed to be commenced as of right, where the person claims that the environment has or is likely to be adversely affected in such a way as to detriment that person's pecuniary, health or recreational interests.

Where a person wishes to institute proceedings to protect the public interest in the environment, he must under one recommendation apply to the Attorney-General for approval and failing approval apply to the Court, or under the alternative

proposal apply directly to the Court for an order granting standing.

Thus the first proposal is in the following terms:-

"1.(a) 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 adversely to affect the environment in such a way as to disadvantage the complainant.

(b) Subsection (a) of this section is not intended to limit any right of action available at common law.

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 adversely to affect the environment in such a way as to disadvantage the public may apply to the Attorney-General for either -

(a) leave to commence proceedings on behalf of the public interest; or

(b) proceedings to be commenced by the Attorney-General.

3. For the purposes of sections 1 and 2 "disadvantage" shall include (inter alia) detriment pertaining to interests of a pecuniary, health or recreational nature.

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

5. Notice of an application made under section 4 must be given to the Attorney-General, who shall be entitled to make written or oral submissions to the Court with respect to the application.

6. The Court shall only 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 those interest;

(b) that there is a likelihood that the environment has or will be adversely affected in such a way as to disadvantage 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.

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

(i) that 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 in 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

litigation, 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."

The alternative proposal is in largely similar terms. However the requirement of seeking the Attorney-General's permission to proceed in public interest litigation is deleted. Therefore the alternative proposal provides:-

1. (a) 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 adversely to affect the environment in such a way as to disadvantage the complainant.

   (b) Subsection (a) of this section is not intended to limit any right of action available at common law.

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 adversely to affect the environment in such a way as to disadvantage the public may apply to the Court for an order to grant standing.

3. For the purposes of sections 1 and 2 "disadvantage" shall include (inter alia) detriment pertaining to interests of a pecuniary, health or recreational nature.

4. Notice of an application made under section 4 must be given to the Attorney-

General, who shall be entitled to make written or oral submissions to the Court with respect to the application.

5. The Court shall only 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 those interests;

(b) that there is a likelihood that the environment has or will be adversely affected in such a way as to disadvantage 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.

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

(i) that 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 litigation, 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.

We feel that it should be made clear that the new procedures create a new cause of action, as well as broadening the rules of standing.

It should also be made clear that the Attorney-General can, and in appropriate circumstances should, institute proceedings under the new procedures.

The only remedies available under the cause of action would be declarations and injunctions. However it would be possible to join a common law claims for damages with proceedings instituted pursuant to the new Act.

It should be made clear that in order for an injunction to be granted, it is only necessary to show that disadvantage to pecuniary, health or recreational interests is likely.

We also recommend that members of the public have a more extensive opportunity of becoming involved in environmental decision making than is presently the case. A provision basically along the following lines is suggested:

Third Party Participation in Environmental Decision Making

(1) Any person who believes that a proposed activity is likely to affect the environment adversely in such a way as to disadvantage his pecuniary, health or recreational interests, shall be entitled to submit written submissions to any governmental, statutory, administrative, judicial or

other body which is giving, or is about to give consideration to the question of whether or not to permit such activity.

(2) Where permission to carry on such an activity has been refused, and the applicant appeals against the decision, any person who would be eligible to submit submissions pursuant to section (1), is likewise entitled to submit written submissions to the appellate body.

(3)(a) Where permission to carry on such an activity has been granted, a person who would be eligible to submit submissions pursuant to the previous two sections may only institute an appeal:-

(i) where such a right is expressly given by statute or

(ii) where the person has upon notice to the successful applicant applied to the body designated to hear the appeals of aggrieved applicants for leave to appeal, and leave has been granted.

(b) An appeal instituted pursuant to the subsection (1) will not operate as a stay of the grant of permission unless the third party has, upon notice to the successful applicant, applied to the appellate body for a stay and a stay has been granted.

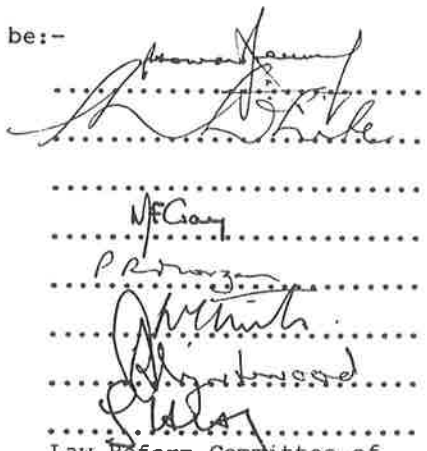
It may be desirable to insert into certain Acts, a duty to give notice of applications to carry on particular activities. The prescribed notice would be such as to ensure that those persons most likely to be affected by the relevant decision were

those most likely to be informed.

In order to clarify our recommendations it was decided to prepare a Draft Bill, which we have done, and you will find annexed to this report. It must be stressed however that it is merely intended to be used as a guide for parliamentary counsel, in drafting the proposed legislation.

The Committee recognise that increasing the opportunities for public participation in environmental matters will at times result in delays in development. We feel however that some degree of delay is an acceptable price to pay to ensure that environmental factors are adequately taken into account. The Committee therefore recommends that legislation along similar lines to our draft provisions be enacted, thereby allowing the public to play a greater role in ensuring that environmental factors are protected.

We have the honour to be:-



Law Reform Committee of
South Australia.

The Honourable Mr. Justice Legoe was in Europe on long service leave when this report was signed.

DRAFT BILL

This Act may be cited as the Environmental Protection (Public Participation) Act 1986.

This Act shall come into operation on a day to be fixed by proclamation.

Part 1: Application for Injunctive or Declaratory Relief to Protect the Environment

(a) 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 adversely to affect the environment in such a way as to disadvantage the complainant, may commence proceedings to prevent the environment being adversely affected.

(b) Sub-section (a) of this section is not intended to limit any right of action available at common law.

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 adversely to affect the environment in such a way as to disadvantage the public may apply to the Court for an order

to grant standing to commence proceedings to prevent the environment being adversely affected.

For the purposes of sections 1 and 2 "disadvantage" shall include (inter alia) detriment pertaining to interests of a pecuniary, health or recreational nature.

Notice of an application made under section 4 must be given to the Attorney-General, who shall be entitled to make written or oral submissions to the Court with respect to the application.

The Court shall only 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 those interests;

(b) that there is a likelihood that the environment has or will be adversely affected in such a way as to disadvantage 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.

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

(i) that 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 in 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 litigation, 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) Where the Attorney-General is 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 is likely to affect the environment in such a way as to disadvantage the pecuniary, health or recreational interests of the public, he may institute proceedings under this Part.

(b) Nothing in this Act affects the right of the Attorney-General to authorise a person to commence or maintain a proceeding as a relator.

Part 2: Remedies

Upon hearing proceedings instituted pursuant to Part 1 of this Act, the court may in its discretion grant declaratory or injunctive relief.

The court in its discretion may grant an injunction if satisfied that the environment is being, or is likely to be, interfered with in a manner which is, or is likely to disadvantage the pecuniary, health or recreational interests of the complainant, or of the public generally.

Where the relevant interference with the environment gives rise to a common law action for damages, an action for damages may be joined with an application for relief under this Act.

Part 3: Third Party Participation in Environmental Decision Making

Any person who believes that a proposed activity is likely to affect the environment adversely in such a way as to disadvantage his pecuniary, health or recreational interests, shall be entitled to submit written submissions to any governmental, statutory, administrative, judicial or similar body which is giving, or is about to give consideration to the question of whether or not to permit such activity.

Where permission to carry on such an activity has been refused, and the proponent appeals against the decision, any person who would be eligible to submit submissions pursuant

to the last preceding Section is likewise entitled to submit written submissions to the appellate body.

(a) Where permission to carry on such an activity has been granted, a person who would be eligible to submit submissions pursuant to the previous two sections may only institute an appeal:-

(i) where such a right is expressly given by statute or

(ii) where the person has upon notice to the successful applicant applied to the body designated to hear the appeals of aggrieved applicants for leave to appeal, and leave has been granted.

(b) An appeal instituted pursuant to the subsection (1) will not operate as a stay of the grant of permission unless the third party has, upon notice to the successful applicant, applied to the appellate body for a stay and a stay has been granted.

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Appendix
Michigan's Environmental Protection Act

THOMAS J. ANDERSON, GORDON ROCKWELL ENVIRONMENTAL PROTECTION ACT OF 1970
Mich. Comp. Laws Ann. 691.1201–.1207 (Supp. 1972).

The People of the State of Michigan enact:

Sec. 1. This act, shall be known and may be cited as the "Thomas J. Anderson, Gordon Rockwell environmental protection act of 1970."

Sec. 2. (1) 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, organization 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, organization or other legal entity for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction.

(2) In granting relief provided by subsection (1) where there is involved a standard for pollution or for an anti-pollution device or procedure, fixed by rule or otherwise, by an instrumentality or agency of the state or a political subdivision thereof, the court may:

(a) Determine the validity, applicability and reasonableness of the standard.

(b) When a court finds a standard to be deficient, direct the adoption of a standard approved and specified by the court.

Sec. 2a. If the court has reasonable ground to doubt the solvency of the plaintiff or the plaintiff's ability to pay any cost or judgment which might be rendered against him in an action brought under this act the court may order the plaintiff to post a surety bond or cash not to exceed $500.00.

Sec. 3. (1) When the plaintiff in the action has made a prima facie showing that the conduct of the defendant has, or is likely to pollute, impair or destroy the air, water or other natural resources or the public trust therein, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show, by way of an affirmative defense, 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 in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction. Except as to the affirmative defense, the principles of burden of proof and weight of the evidence generally applicable in civil actions in the circuit courts shall apply to actions brought under this act.

(2) The court may appoint a master or referee who shall be a disinterested person and technically qualified, to take testimony and make a record and a report of his findings to the court in the action.

(3) Costs may be apportioned to the parties if the interests of justice require.

Sec. 4. (1) The court may grant temporary and permanent equitable relief, or may impose conditions on the defendant that are required to protect the air, water and other natural resources or the public trust therein from pollution, impairment or destruction.

(2) If administrative, licensing or other proceedings are required or available to determine the legality of the defendant's conduct, the court may remit the parties to such proceedings, which proceedings shall be conducted in accordance with and subject to the provisions of Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.313 of the Compiled Laws of 1948. In so remitting the court may grant temporary equitable relief where necessary for the protection of the air, water and other natural resources or the public trust therein from pollution, impairment or destruction. In so remitting the court shall retain jurisdiction of the action pending completion thereof for the purpose of determining whether adequate protection from pollution, impairment or destruction has been afforded.

(3) Upon completion of such proceedings, the court shall adjudicate the impact of the defendant's conduct on the air, water or other natural resources and on the public trust therein in accordance with this act. In such adjudication the court may order that additional evidence be taken to the extent necessary to protect the rights recognized in this act.

(4) Where, as to any administrative, licensing or other proceeding judicial review thereof is available, notwithstanding the provisions to the contrary of Act No. 306 of the Public Acts of 1969, pertaining to judicial review, the court originally taking jurisdiction shall maintain jurisdiction for purposes of judicial review.

Sec. 5. (1) Whenever administrative, licensing or other proceedings and judicial review thereof are available by law, the agency or the court may permit 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, organization or other legal entity to intervene as a party on the filing of a pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is likely to have, the effect of polluting, impairing or destroying the air, water or other natural resources or the public trust therein.

(2) In any such administrative, licensing or other proceedings, and in any judicial review thereof, any alleged pollution, impairment or destruction of the air, water or other natural resources or the public trust therein, shall be determined, and no conduct shall be authorized or approved which does, or is likely to have such effect so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare.

(3) The doctrines of collateral estoppel and res judicata may be applied by the court to prevent multiplicity of suits.

Sec. 6. This act shall be supplementary to existing administrative and regulatory procedures provided by law.

Sec. 7. This act shall take effect October 1, 1970.

This act is ordered to take immediate effect.

D. J. Woolman, Director and Government Printer, South Australia