

Standing to Sue at Common Law in Australia

by
The Honourable Justice Brian J Preston
Chief Judge, Land and Environment Court of New South Wales
Australia

A paper presented to
The Joint Seminar on Legality of Administrative
Behaviours and Types of Adjudication

Organised by the National Judges College
and the
Administrative Trial Division of the Supreme People's Court
at
Xian, People's Republic of China, 11-13 April 2006

NATURE OF STANDING

Before a person can commence legal proceedings, it is necessary that that person have standing to sue. This simply means that the person must be considered by the courts to be an appropriate party to instigate the particular proceedings in question. The issue of standing is really only of concern in the realm of public law.¹ The important point to note about standing is that it depends on the identity of the person and the nature of the proceedings. If standing is denied to a particular plaintiff, it does not follow that no other person exists who has standing to commence proceedings or that the plaintiff necessarily lacks standing to commence other proceedings.

This interrelationship between the identity of the plaintiff, the nature of the proceedings and the issue of standing means that the choice of remedy may be of the utmost importance. An ideological environmentalist may not have standing at common law to restrain breaches of a statute such as the *Forestry Act* 1916 (NSW) but the desired result may be able to be achieved by bringing different proceedings under some other statute such as the *Environmental Planning and Assessment Act* 1979 (NSW) which grants “any person” standing to sue.

This paper considers the standing rules for proceedings in which the plaintiff seeks one of the prerogative writs such as prohibition, certiorari or mandamus or seeks the equitable remedies of the declaration or injunction.

STANDING FOR PREROGATIVE WRITS

The three prerogative writs which might be of use in environmental cases are prohibition, certiorari and mandamus.

Prohibition

Although any person (even “a stranger”) may apply for a writ of prohibition², the likelihood of the court awarding it depends on, first, whether the defect of jurisdiction is patent or latent and, secondly, whether the person is a person aggrieved or not. If the defect of jurisdiction is patent on the face of the proceedings, an application for prohibition may be brought by any person, whether aggrieved or not,³ and the court is obliged to allow the application.⁴ However, if the defect of jurisdiction is not

¹ See Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27 (AGPS, Canberra, 1985), pp 17-18.

² *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 263; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 599-600, 611, 627-628, 652-653 and 670; and *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 413.

³ *De Haber v Queen of Portugal* (1851) 17 QB 171 at 214; *R. v Graziers' Association (NSW); Ex parte Australian Workers' Union* (1956) 96 CLR 317 at 327; SA de Smith, *Judicial Review of Administrative Action* (4th ed, Sweet & Maxwell, London, 1980), p 416.

⁴ *Buggin v Bennet* (1767) 4 Burr 2037; 98 ER 60; *Farquarson v Morgan* [1894] 1 QB 552; *R. v Comptroller-General of Patents and Designs; Ex parte Parke, Davis & Co* [1953] 2 WLR 760 at 764.

patent, the court has a discretion to refuse to award prohibition to an applicant. Generally, it will exercise its discretion to grant prohibition if the person is aggrieved⁵ but will tend to refuse prohibition where the person does not fall within that category unless the case is a strong one and the issues important.⁶

Certiorari

There have been two views as to the criterion for standing for certiorari. The first has been that certiorari may only be sought by a person aggrieved.⁷ The second and more recently accepted view in the High Court of Australia is that an application for certiorari may be made by any person, whether aggrieved or not.⁸ However, the interest of the applicant—the degree of grievance—is a relevant factor in the exercise of the court’s discretion to grant relief. Hence, where the person is aggrieved, he or she may be awarded certiorari as of right if he or she can establish any of the recognised grounds for quashing,⁹ although the court would seem to retain a discretion to refuse the application if the person’s conduct has been such as to disentitle them to relief.¹⁰ In respect of the latter point, it should be noted that there has been some divergence of judicial opinion as to whether a court has a discretion to refuse certiorari where the defect is manifest and the person seeking the remedy is directly aggrieved.¹¹ There is little doubt, however, that where the error is latent or the person seeking certiorari is not aggrieved, the court has a discretion to refuse the remedy.¹²

Mandamus

Mandamus is an order of the court requiring a public official, agency or tribunal to perform its public duty or exercise a discretion according to law. To determine who has standing to seek an order of mandamus in any particular case, it is important to examine the nature of the duty in question and the persons to whom it is owed. It may be that such an examination will reveal that the applicant for mandamus falls

⁵ *Foster v Foster and Berridge* (1863) 32 L.J.Q.B. 312 at 314.

⁶ *Bateman’s Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 263; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 627, 652-653; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 415-417, 422, 426 and see Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27 (AGPS, Canberra 1985), p 49.

⁷ *R. v Nicholson* [1899] 2 QB 455 at 468, 471; *Ex parte Stott* [1916] 1 KB 7 at 9; *R. v Manchester Legal Aid Committee, Ex parte RA Brand & Co Ltd* [1952] 2 QB 413 at 431-432; *Durayappab v Fernando* [1967] 2 AC 337.

⁸ *Truth about Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 653 and 670; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 413-414, 464-465; *R v Surrey Justices* (1870) LR 5 QB 466; *R v Stafford Justices; Ex parte Stafford Corp* [1940] 2 KB 33 at 43, 44; *R v Glenelg Town Corp.; Ex parte Pier House Pty Ltd* [1968] SASR 246; *Brack v Wills* [1977] 1 NSWLR 456 at 466 and see Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27, (AGPS, Canberra, 1985), p 50.

⁹ *R v Thames Magistrates’ Courts; Ex parte Greenbaum* (1957) 55 LGR 129 at 132, SA de Smith, *Judicial Review of Administrative Action* (4th ed, Sweet & Maxwell, London, 1980), p 418.

¹⁰ *R v Stafford Justices; Ex parte Stafford Corp* [1940] 2 KB 33 at 43-44 per Sir Wilfred Greene MR and *Re McBain; Ex parte Catholic Bishops Conference* (2002) 209 CLR 372 at 415-417, 422, 426.

¹¹ See M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd ed, Law Book Co, Sydney, 2004), pp 714-715

¹² See SA de Smith, *Judicial Review of Administrative Action* (4th ed, Sweet & Maxwell, London, 1980), p 419.

within the class of persons to whom the duty is owed in which event standing is easily obtained.

Where, however, the person falls outside the class, he or she may have standing if they have the requisite interest in the performance of the duty. The degree of interest required is difficult to define¹³. In Australia, the courts have required applicants to have a “legal specific right”,¹⁴ “real interest”,¹⁵ “sufficient interest”,¹⁶ “legal, pecuniary or special interest”,¹⁷ “specific personal interest of a sufficiently substantial nature”¹⁸ and “special interest”.¹⁹ However, these tests may have been superseded by the criterion for statutory mandamus that the person merely be “personally interested”: see below.

Where the duty imposed on the public official or body is for the general public good, the test would seem to be that the applicant should establish that he or she has an interest in the matter beyond that of an ordinary member of the public.²⁰ There is a tendency to interpret this test liberally. In *R v Commissioner of Police of the Metropolis; Ex parte Blackburn (No. 1)*,²¹ a London resident was said to have standing as a concerned member of the public to seek mandamus compelling the Metropolitan Police Commissioner to withdraw a directive instructing non-enforcement of gaming laws. In *Sinclair v Mining Warden at Maryborough*,²² the High Court of Australia held that the applicant, a well-known conservationist, had standing to claim mandamus because he had lodged an objection to sand mining operations on Fraser Island in the Mining Warden’s Court and was a party to the proceedings in that court. In respect of this latter case, it is interesting to contrast the High Court’s acceptance that the lodging of an objection was sufficient to ground standing with the court’s subsequent contrary decision, although in respect of proceedings for declaratory and injunctive relief, in *ACF v Commonwealth*.²³

Statutory Mandamus

Statutory mandamus is established by the various Supreme Court Rules and is available to anyone who is “personally interested”.²⁴ It has been held in New South Wales that the older, common law standing requirements such as that the applicant for mandamus should have a “legal specific right” have been superseded, not only

¹³ See M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd ed, Law Book Co, Sydney, 2004) pp 677-679.

¹⁴ *R. v Whiteway; Ex parte Stephenson* [1961] VR 168 at 172.

¹⁵ *R. v Licensing Commission; Ex parte McAnalley* [1972] Qd R 522 at 531.

¹⁶ *Ex parte New South Wales Rutile Mining Co Pty Ltd; Re Burns* (1967) 85 WN (Pt 1) (NSW) 494 at 501.

¹⁷ *Ex parte Mullen; Re Wigley* (1970) 91 WN (NSW) 497.

¹⁸ *R. v Havlock; Ex parte Standford and Atkinson Pty Ltd* [1974] WAR 101 at 106.

¹⁹ *R. v West Torrens Corp.; Ex parte Kentucky Fried Chicken Pty Ltd* [1969] SASR 545 at 562.

²⁰ See *R. v Manchester Corp* [1911] 1 KB 560; *R. v Customs and Excise Commissioners; Ex parte Cook* [1970] 1 WLR 450.

²¹ [1968] 2 QB 118.

²² (1975) 132 CLR 473.

²³ (1980) 146 CLR 493. See GM Bates, *Environmental Law in Australia* (2nd ed., Butterworths, Sydney, 1987), p 278.

²⁴ See New South Wales, *Supreme Court Act 1970*, s 65(1) and M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd ed, Law Book Co, Sydney, 2004), pp 687, 745-751.

in statutory mandamus but also the prerogative writ of mandamus, by the statutory criterion of being “personally interested”.²⁵

STANDING FOR EQUITABLE REMEDIES

The two equitable remedies most likely to be sought are the declaration and the injunction. In many cases they will both be sought and since the standing test has now been held to be the same for both,²⁶ they are dealt with together in the following discussion.

The Two Limb Boyce Test

Any discussion on standing in Australia usually starts with a reference to *Boyce v Paddington Borough Council*²⁷ where Buckley J stated the principles which apply when a private person seeks a declaration or an injunction in respect of public rights. These are:²⁸

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

The case was in fact a planning case involving overshadowing of an adjacent residence. Boyce owned a block of flats which had windows overlooking the adjacent churchyard. The council resolved to erect a screen or hoarding in the churchyard which would have prevented the flats having access to light. Boyce sought an injunction to restrain the council from erecting the hoarding on the grounds that the council was required under the *Open Spaces Act 1877* (UK) to keep the churchyard as open space. He submitted, firstly, that the Act conferred on him a private right such as to entitle him to standing under the first limb and, secondly, that he had suffered special damage in that the screen affected his building in a manner different from that in which other people were affected. Buckley J rejected Boyce’s argument on the first limb but upheld his standing under the second limb. However, the Court of Appeal reversed the latter decision leaving Boyce without standing at all.²⁹

The two limb test in *Boyce* was applied in *Gouriet v Union of Post Office Workers*³⁰ where the House of Lords held that the plaintiff, a private citizen, had no standing to

²⁵ See *Dickinson v. Perrignon* [1973] 1 N.S.W.L.R. 72 at 79-80; *Bilbao v Farquhar* [1974] 1 NSWLR 377 at 380; *Moroney v Ombudsman* [1982] 2 N.S.W.L.R. 591 at 605; *Maksimovic v. Walsh* [1983] 2 NSWLR 656 at 659; *Osmond v Public Service Board* [1984] 3 NSWLR 447 at 466; and *Mirror Newspapers Ltd v Waller* (1985) 1 NSWLR 1 at 8.

²⁶ See *Gouriet v Union of Post Office Workers* [1978] AC 435; *ACF v Commonwealth* (1980) 146 CLR 493.

²⁷ [1903] 1 Ch 109.

²⁸ [1903] 1 Ch 109 at 114.

²⁹ [1903] 2 Ch. 556 at 563.

³⁰ [1978] AC 435.

seek a declaration and injunction relating to a temporary union ban on postal communications to and from South Africa, which ban would have been a statutory criminal offence. The House of Lords held that declaratory and injunctive relief share the same standing rules and they are those enunciated in *Boyce v Paddington Borough Council*. Standing was denied to the plaintiff because no infringement of a private right had been shown nor had the plaintiff proved that the postal ban would inflict special damage on him over and above that suffered by the public at large.³¹

The two limb *Boyce* approach remains in force although it has been modified in both England and Australia. The modifications relate to the second limb, which requires a plaintiff to establish “special damage”. Before turning to these modifications, I should say something more about the first limb.

First Limb

The requirement that the plaintiff have some interference with a private right of his or her own is not so much an entitlement to seek relief in respect of public rights but rather an affirmation of the principle that an individual who possesses private rights can enforce those rights regardless of whether or not in so doing he or she simultaneously enforces public rights. The private right can be legal or equitable or can be conferred by statute either expressly or impliedly. The plaintiff need not be the sole possessor of those rights but can be part of a class of persons who possess the private rights.³² Ascertaining whether a statute impliedly creates a private right is difficult. The implication will not be made unless the statute was passed for the benefit of an ascertainable class of persons. However, identification of an ascertainable class does not necessarily result in the existence of a statutory private right.³³

A central problem with the first limb, however, is that it is rarely of assistance in environmental and planning cases. The courts have consistently declined to find that the statutes which give rise to the proceedings confer on the plaintiff a private right. Hence, in *Boyce v Paddington Borough Council*³⁴ and *Thorne v Doug Wade Consultants Pty Ltd*,³⁵ a neighbour was held not to have any private rights affected by a decision of the relevant consent authority to allow development on the adjoining property. In *ACF v Commonwealth*,³⁶ a conservation group which had, pursuant to an environmental statute, made a submission objecting to a development was held nevertheless not to have any private rights in enforcing compliance with the statute. In *Onus v Alcoa (Aust) Ltd*,³⁷ the submission of the Aboriginal plaintiffs that a statute which makes it a criminal offence to interfere with

³¹ [1978] AC 435 at 483, 495, 500, 516, 523.

³² See *ACF v Commonwealth* (1980) 146 CLR 493 at 537-538 and *Onus v Alcoa (Aust) Ltd* (1981) 149 CLR 27 at 66-67 and *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672 at 681. See also Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No. 27 (A.G.P.S., Canberra, 1985), pp 62-63.

³³ See M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd ed, Law Book Co, Sydney, 2004), pp 814-815.

³⁴ [1903] 1 Ch 109.

³⁵ [1985] VR 433 at 485 ff.

³⁶ (1980) 146 CLR 493.

³⁷ (1981) 149 CLR 27.

Aboriginal relics thereby confers private rights on all Aborigines was rejected on the basis that all Australians and not just Aborigines stood to benefit from the statute. Finally, in *King v Gousssetis*³⁸ it was held that a statutory provision requiring owners of buildings to comply with fire safety requirements and notices did not confer private rights on the tenants of the building in question.

Hence, whilst it is true that the courts have recognised that there could potentially be a very large class of persons possessing private rights, based on past experience, the likelihood of this occurring in any particular case seems remote. Inevitably, plaintiffs with standing problems will need to satisfy the court that they fall within the second limb.

Second Limb As Modified

The requirement of the second limb that there be “special damage” has proved difficult and unduly restrictive. As a result, courts in both England and Australia have watered down this requirement.

England

In England, the requirement of special damage has been replaced legislatively by a requirement that the applicant for judicial review have a “sufficient interest” in the matter to which the application for judicial review relates.³⁹

In *R v Inland Revenue Commissioners; Ex parte National Federation of Self-Employed and Small Businesses Ltd (Fleet Street Casuals Case)*⁴⁰ the applicant company which was formed to promote the interests of small business, was held by a bare majority (3:2) of the House of Lords not to have standing since it could point to no injury or interest beyond the sense of grievance in seeing union members allegedly receive preferential treatment in breach of the law. Three of the Law Lords, Lords Wilberforce, Fraser and Roskill, held that the standing requirement should be retained and that this should be that the plaintiff has a “sufficient interest” in the matter to which the application relates.⁴¹ This one test was applied even though the plaintiff sought both a declaration and an order for mandamus. This evidences a trend to employ a common standing formula regardless of the remedy sought, although the court’s application of the formula may differ depending on the different character of the relief sought.⁴²

The minority, however, considered that the amendment to the rules was such as to abolish the standing requirement, as it has been traditionally known, and leave the grant of judicial review in the discretion of the court. In Lord Diplock’s opinion, O 53

³⁸ (1986) 60 LGRA 116 at 120 per McHugh J.A.

³⁹ see s 31(3) of the *Supreme Court Act* 1981(UK) and former Order 53 rule 3(7) of the *Rules of the Supreme Court* and now Part 54.4 of the *Civil Procedure Rules*.

⁴⁰ [1982] AC 617.

⁴¹ This was necessitated by the amendment in 1977 to the *Rules of the Supreme Court*, O 53 r 3(7) which provides: “The court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.”

⁴² See [1982] AC 613 at 631 per Lord Wilberforce; at 645-646, Lord Fraser and at 658-659 per Lord Roskill.

swept away differences as to locus standi between the various forms of relief and substituted a threshold requirement that the court form a prima facie view whether the applicant has a sufficient interest in the matter to which the application relates. This is not so much a new standing test as a means by which the court, in its discretion, can filter out hopeless cases.⁴³ This was made clear by Lord Scarman when he said:⁴⁴

“The one legal principle, which is implicit in the case law and accurately reflected in the rule of court [O 53 r 3(5)], is that in determining the sufficiency of an applicant’s interest it is necessary to consider the matter to which the application relates. It is wrong in law...for the court to attempt an assessment of the sufficiency of an applicant’s interest without regard to the matter of his complaint. If he fails to show, when he applies for leave, a prima facie case, on reasonable grounds for believing that there has been a failure of public duty, the court would be in error if it granted leave. The curb represented by the need for an applicant to show, when he seeks leave to apply, that he has such a case is an essential protection against abuse of legal process. It enables the court to prevent abuse by busybodies, cranks and other mischief-makers. I do not see any further purpose served by the requirement for leave.”

Although the *Fleet Street Casuals Case* strictly only applies to cases where the applicant proceeds under the Rules for permission to seek judicial review, the thinking which gave rise to the judgments of both the majority and minority would seem to be resulting in a more liberal approach to standing. The test for actions for declaratory and injunctive relief may still be the same, namely “special damage”, but the courts would seem to be more willing to find such special damage where not so long ago they might have been unwilling to do so.⁴⁵

The English cases have employed a two stage approach. At the first stage, which is on the application for leave to bring the claim for judicial review, the court uses the test for standing to filter out those persons who have no interest whatsoever and are in truth no more than meddling busybodies. At the second stage, which is at the time of determining the relief that ought in the court’s discretion be granted if the claim has been made out, the court re-applies the test of interest or standing by assessing the strength of the applicant’s interest and weighing the strength of the interest as one of the factors in the exercise of discretion to grant relief.⁴⁶ At the first stage, the threshold of sufficient interest is fairly low.⁴⁷

⁴³ [1982] AC 613 at 637, 638, 641, 642, 643-644.

⁴⁴ [1982] AC 613 at 653.

⁴⁵ See *R v HM Treasury; Ex parte Smedley* [1985] 1 All ER 589; *R v Secretary of State for Social Services; Ex parte Greater London Council*, *The Times*, 16 August 1984 per Woolf J and see discussion in M Aronson and N Franklin, *Judicial Review of Administrative Action* (Law Book Co, Sydney, 1987), particularly at pp 422-429 and cases there cited subsequent to the decision in the *Fleet Street Casuals Case*. See also *Prasad v Republic of Fiji* [2001] 1 LRC 665 and cases cited in M Aronson, B Dwyer and M Groves, *Judicial Review of Administrative Action*, 3rd ed, Law Book Co, Sydney, 2004), p 669.

⁴⁶ *R v Monopolies and Mergers Commission; ex parte Argyll Group plc* [1986] 2 All ER 257 at 265; [1986] 1 WLR 763 at 744. *R v Pollution Inspectorate; ex parte Greenpeace (No. 2)* [1994] 4 All ER 329 at 349; *R v Oxby* [1997] EWCA Civ 2960 (11 December 1997) p 7.

⁴⁷ See cases cited in M Aronson, B Dyer and M Groves, *Judicial Review of Administration Action*, Lawbook Co, 2004, p 669.

In *R v Pollution Inspectorate; ex parte Greenpeace (No. 2)*,⁴⁸ Otton J held that in deciding whether an applicant for judicial review had a sufficient interest in the matter to which the application related the court should take into account the nature of the applicant, the extent of its interest in the issues raised, the remedy the applicant seeks to achieve and the nature of the relief sought. The applicant in that case, Greenpeace, was an environmental protection organisation with an international standing. Greenpeace was concerned about the high levels of radioactive discharge from a site at which spent nuclear fuel was reprocessed. Greenpeace applied for judicial review by way of an order for certiorari to quash the relevant government agency's decision to vary the existing authorisations to the company which reprocessed spent nuclear fuel and an injunction to stay the implementation of the varied authorisations. The effect of granting such relief would be to halt the proposed testing of a new plant pending a decision on the company's main application for a new plant.

Otton J held that Greenpeace had a sufficient interest to be granted locus standi. Greenpeace was an entirely responsible and respected body with a genuine interest in the issues raised. It had 2,500 supporters in the area where the plant was situated. These persons might not otherwise have an effective means of bringing their concerns before the court if Greenpeace were denied locus standi. The primary relief Greenpeace sought was an order of certiorari and not mandamus, which, even if granted, would still leave the question of an injunction to stop the testing process pending determination of the main issues in the discretion of the court. Greenpeace had been actively involved in the consultation process relating to the company's application to operate the new plant.⁴⁹

Australia

In Australia, the second limb of the *Boyce* test was reformulated so as to substitute the criterion of "special interest" for "special damage". This occurred in *ACF v Commonwealth*.⁵⁰ In that case, the ACF sought to challenge the validity of decisions approving both a proposal to establish a resort and tourist area at Yeppoon, near Rockhampton in Queensland, and certain exchange control transactions connected with the proposal. The proposed development had been advertised under the *Environment Protection (Impact of Proposals) Act 1974* (Cth) and the ACF had lodged an objection to the development in accordance with the prescribed procedures. Nevertheless, the approvals were granted and the ACF sought declarations that there had been a failure to comply with the procedures required under the Act and consequential injunctions.

The High Court (Murphy J dissenting) held that the ACF did not have standing under either the first or second limbs of *Boyce*. The ACF had sought to establish standing under the second limb on two grounds. First, it claimed standing on the ground that it had a well-known concern for the Australian environment, as evidenced by its past activities and its objects, and for what it regarded as the particular threat to the environment if the proposed development were to proceed.

⁴⁸ [1994] 4 All ER 329 at 349.

⁴⁹ [1994] 4 All ER 329 at 349, 350, 351.

⁵⁰ (1980) 146 CLR 493.

Secondly, the ACF claimed standing on the ground that it had lodged an objection to the proposed development. Each of these grounds was rejected by the majority as being insufficient.

Gibbs J first set about substituting “special interest” for “special damage”, a step which the High Court had done previously in *Anderson v Commonwealth*⁵¹ as did Aickin J in his decision at first instance.⁵² Gibbs J stated:⁵³

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

Gibbs J declined to elaborate on the circumstances in which standing would be established applying the special interest test. However, he did hold that a special interest need not be pecuniary but it must be more than intellectual or emotional.⁵⁴

“I would not deny that a person might have a special interest in the preservation of a particular environment. However, an interest, for present purposes, does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi. If that were not so, the rule requiring special interest would be meaningless. Any plaintiff who felt strongly enough to bring an action could maintain it.”

In a similar vein, Stephen J said:⁵⁵

“Let it be assumed that the damage need be no more than apprehended, that it need not be damage to a property right recognised by the law and that it need not be so peculiar to the would-be plaintiff that no one else suffers it. Even so, the appellant clearly enough fails to establish standing to sue on the basis of damage suffered by itself. For it to succeed upon this particular ground the law must be that any person with genuinely held convictions upon a topic of public concern thereby acquires standing to enforce a public right the breach of which it takes exception. That is not the current state of the

⁵¹ (1932) 47 CLR 50 at 51-52.

⁵² (1980) 146 CLR 493 at 504,509,511. See also *Robinson v Western Australian Museum* (1977) 138 CLR 283 at 292-293, 301-303, 327-328.

⁵³ (1980) 146 CLR 493 at 527.

⁵⁴ (1980) 146 CLR 493 at 530-531. See also Gibbs J.'s subsequent decision in *Everyone v. Tasmania* (1983) 49 ALR 381.

⁵⁵ (1980) 146 CLR 493 at 539.

law. To hold otherwise would be radically to alter the existing law as it now stands.”

Mason J expressly agreed with Gibbs J and held: “a mere belief or concern, however genuine, does not in itself constitute a sufficient locus standi in a case of the kind now under consideration.”⁵⁶

Murphy J dissented and would have granted the ACF standing.⁵⁷

Establishing Special Interest

Under the current position in Australia, it is clear that would-be plaintiffs must set about differentiating themselves from the rest of the public. The cases reveal a number of different ways this can be done.

Active Use of the Subject Land

In a situation such as was considered in *ACF v Commonwealth*, “special interest” could be established by the plaintiff showing that it has a practice of organising tours or bushwalks in the area such as the plaintiff did in *Fraser Island Defenders Organization Ltd v Hervey Bay Town Council*.⁵⁸ Alternatively, where the plaintiff is a natural person, it may be sufficient if he or she regularly and particularly uses the area in question for bushwalking, canoeing or camping, and hence uses the area and would stand to lose to a greater extent than the ordinary members of the public. This was the situation in *Onus v Alcoa (Aust) Ltd*,⁵⁹ although there was in that case a further factor in that the plaintiffs were members of an Aboriginal tribe which claimed cultural and spiritual attachment to the land.

However, these grounds for standing will not be made out if the evidence reveals a tenuous basis. In *Australian Conservation Foundation Inc v Conservation Council of South Australia Inc*,⁶⁰ one of the judges of the Full Court of the Supreme Court of South Australia, King CJ, held that the Australian Conservation Foundation, a non-profit making incorporated association, could not found standing on a diminution of use and enjoyment of the national park proposed to be developed or interference with the commercial interests of the association.

As to the first, King CJ held that any diminution of use and enjoyment of the park affects individual members of the association, not the body corporate itself. Corporations do not use or enjoy recreational facilities.⁶¹

As to the second, the association alleged it sold publications, posters and various other goods in order to support its conservation activities and it thereby had a commercial interest in the area threatened by the proposed development. The

⁵⁶ (1980) 146 CLR 493 at 547-548.

⁵⁷ (1980) 146 CLR 493 at 555-558.

⁵⁸ [1983] 2 Qd R 72; 51 LGRA 94.

⁵⁹ (1981) 149 CLR 27.

⁶⁰ (1990) 53 SASR 349; 69 LGRA 443

⁶¹ (1990) 69 LGRA 443 at 446-447.

association also alleged it conducted bushwalking tours that would be less appealing to members. King CJ held that these allegations “are on the face of them merely colourable attempts to assert a non-existent commercial interest. Whether the proposed development will diminish, rather than enhance, interest in the area is purely speculative and the suggestion that sales of publications will diminish in consequence is fanciful. Moreover the notion of commercial detriment is incompatible with the allegation...that the second plaintiff is a non-profit making association. The allegation of threat to a commercial interest of the second plaintiff is plainly unsustainable and is unworthy of serious consideration”.⁶²

However, King CJ did find that the association had standing on another ground, namely that the decision challenged had failed to follow the statutory procedures as a consequence of which the association was deprived of its statutory rights to object to and appeal against the decision to approve the development. The deprivation of such statutory rights amounted to a special interest sufficient to found standing.⁶³

The other two judges of the full Court, Cox J and Duggan J, agreed with King CJ that the association had standing on this ground. However, they did not expressly agree with King CJ’s conclusion that the association did not have standing on the other grounds rejected by King CJ.⁶⁴

Similarly in *Central Queensland Speleological Society Inc v Central Queensland Cement Pty Ltd [No. 1]*,⁶⁵ a majority of the Full Court of the Supreme Court of Queensland held, on an appeal against the refusal of an interlocutory injunction, that the Speleological Association did not have a sufficient pecuniary interest to found standing. There was evidence of sales of T-shirts, books and stickers, although the amount of funds generated was small. Derrington J held that “a party cannot create his own standing simply by spending money in support of the cause being or intended to be promoted by the litigation, whether it be by printing slogans on T-shirts or by any other such means.”⁶⁶ de Jersey J agreed.⁶⁷ Thomas J, however, found that the association had established a serious question to be tried that the association had standing.⁶⁸

Spiritual or Cultural Relationship to Subject Land

Onus v Alcoa (Aust) Ltd is an interesting case. Although it does not alter the law as expounded in *ACF v Commonwealth*⁶⁹, it does clarify the statement in *ACF v Commonwealth* that a mere intellectual or emotional concern is insufficient to ground standing. The High Court explained that provided there is a special interest then the existence of an intellectual or emotional interest as well is no bar to standing. The problem of lack of standing only arises when the plaintiff’s sole interest is an intellectual or emotional one.⁷⁰

⁶² (1990) 69 LGRA 443 at 447

⁶³ (1990) 69 LGRA 443 at 447-448.

⁶⁴ (1990) LGRA 443 at 453.

⁶⁵ [1989] 2 Qd R 512; (1989) 73 LGRA 218.

⁶⁶ (1989) 73 LGRA 218 at 236.

⁶⁷ (1989) 73 LGRA 218 at 239-240.

⁶⁸ (1989) 73 LGRA 218 at 230.

⁶⁹ See (1981) 149 CLR 27 at 41 where Stephen J expressly said that there was no call for reconsideration of the present law.

⁷⁰ (1981) 149 CLR 27 at 37 per Gibbs C.J. and at 41-42 per Stephen J.

Applying the test in *ACF v Commonwealth*, the High Court held that the fact that the plaintiffs had a special attachment or relationship to the land in question, by reason of their being the descendants of the tribe associated with that land and the custodians of the relics of that tribe according to their laws and customs, was sufficient to give them the requisite special interest.

Interestingly, prior to the High Court giving judgment, the decision of the House of Lords in the *Fleet Street Casuals Case*⁷¹ was delivered. Unfortunately, Brennan J was the only member of the court to refer to the House of Lords decision. He adopted the dicta of Lord Wilberforce that it is “vitally important” that the question of locus standi not be removed into the realm of pure discretion.⁷² It is unknown whether the other members of the High Court similarly would reject the discretionary approach advocated by Lords Diplock and Lord Scarman in the *Fleet Street Casuals Case*, although by their continued employment of the *ACF* test, this would seem likely.

Consistent with *Onus v Alcoa (Aust) Ltd*, the Supreme Court of New South Wales held in *Coe v Cordon*⁷³ that the broad Aboriginal interest in the assertion of Aboriginal land rights claims is an insufficient basis for an individual Aboriginal citizen, not connected with the particular tribe or land involved, to seek a declaration that certain Aboriginal reserves were illegally revoked.⁷⁴

In *Yourgarla v Western Australia*,⁷⁵ the Aboriginal plaintiffs sought declarations that certain 19th century legislation appropriating an annual sum to the old Aborigines Protection Board had never been validly repealed and replaced. The plaintiffs did not make any money claim. They hoped, however, that the declarations would place the government under moral pressure to make financial reparation to Aborigines. The Supreme Court of Western Australia held such a hope was not justifiable. Expenditure under the old scheme was discretionary. There was no evidence that expenditure under the new scheme had been less than that under the old scheme. Hence, the plaintiffs could have “no justifiable expectation or apprehension of financial or other material benefit accruing from the grant of the declaration they seek”.⁷⁶

In these circumstances, the plaintiffs could not demonstrate that they had any interest in the subject matter of the litigation “other than the concern that every right-thinking citizen might have about an alleged episode of unconstitutional conduct on the part of government that has passed into history. No doubt, the concern of the appellants is more strongly felt because they are Aborigines. In my opinion, however, it is clear in point of law that that is insufficient to give them standing to bring this action”.⁷⁷

⁷¹ [1982] AC 617.

⁷² (1981) 149 CLR 27 at 75.

⁷³ [1983] 1 NSWLR 419.

⁷⁴ See also *Davis v Commonwealth* (1986) 68 ALR 18 at 23-24 per Gibbs CJ.

⁷⁵ (1999) 21 WAR 488. Standing was not an issue in the appeal to the High Court: (2001) 207 CLR 344 at 370.

⁷⁶ (1999) 21 WAR 488 at 510 [80] per Anderson J. See also at 497 [14] per Ipp J and 529 [164] per White J.

⁷⁷ (1999) 21 WAR 488 at 510 [81] per Anderson J. See also at per Ipp J at 497 [9], 498 [15] and at 529 [164] per White J.

Adverse impact on religious or spiritual beliefs

There are cases concerned with the statutory standing test of “person aggrieved” under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) that provide some insight into the common law’s test of “sufficient interest”, where the plaintiffs claim an adverse impact on their religious or spiritual beliefs.

In *Ogle v Strickland*,⁷⁸ standing was granted to an Anglican and a Roman Catholic priest to challenge a movie “Hail Mary”, they thought should never have passed customs and censorship barriers against blasphemy. Fisher J and Lockhart J held that the priests’ role as religious leaders with preaching and teaching duties made their concern more than that of the average Christian, whose concern was simply intellectual or emotional.⁷⁹ Wilcox J agreed but went further and found the priests to have standing merely because the priests were concerned Christians with a deep spiritual interest in the matter.⁸⁰

In *Cameron v Human Rights and Equal Opportunity Commission*,⁸¹ the direct professional and vocational interests of the priests in *Ogle v Strickland* was held to be significant in explaining the decision to uphold standing in that case.

However, in *North Coast Environment Council Inc v Minister for Resources*,⁸² Sackville J considered that the applicants’ vocation as priests in that case did not provide an entirely satisfactory basis for according standing to them to challenge a decision offensive to their religious or spiritual values. First, some Christian religions and many non-Christian religions have no hierarchical structure. If *Ogle v Strickland* is to be explained on the basis only of the priests’ vocation in a hierarchical structure, the consequence would be to deny to adherents of non-hierarchical religions or of religions with no vocational structure, standing to complain of decisions they find deeply offensive to their spiritual or religious values.⁸³

Secondly, Sackville J noted that “One basis for confining the decision is that it rests on the special position of blasphemy at common law and therefore the special position, for the purposes of standing, of those who have a vocational interest in repelling blasphemy. Yet it is difficult to accept, in the last years of the twentieth century, that standing to complain of decisions that are offensive to spiritual or religious values should depend upon the peculiar historical position of blasphemy”. Sackville J continued:

“If *Ogle v Strickland* is not to be confined to cases of blasphemy, it seems to me that the decision has implications going beyond the field of religious beliefs. In *Church of the New Faith*, Mason ACJ and Brennan J said (at 132) that the protection of the law “is accorded to preserve the dignity and freedom of each man so that he may adhere to any religion of his choosing or to none”. This suggests, not only that the law not distinguish between different religions, but that cultural and spiritual beliefs, of the kind that may

⁷⁸ (1987) 13 FCR 306; 71 ALR 41

⁷⁹ (1987) 13 FCR 306; 71 ALR 41 at 43 and 52-53, 55.

⁸⁰ (1987) 13 FCR 306; 71 ALR 41 at 59.

⁸¹ (1993) 46 FCR 509 at 518-519.

⁸² (1994) 85 FCR 492; 127 ALR 373; 85 LGERA 296.

⁸³ (1994) 55 FCR 492 at 509.

confer standing to challenge decisions offending those beliefs, can be non-religious in character. If an organised group regards the preservation of the environment in general, or of an area in particular, to be of profound cultural and spiritual significance, how does their standing to challenge decisions threatening the values to which they adhere, differ from the position of the applicants in *Ogle v Strickland*? And if the distinction between a vocational interest in a set of values and an interest based on a deeply held but non-vocational commitment to those same values is unsound, why should organisations genuinely committed to the preservation of the environment be denied standing to complain of (or to claim reasons for) decisions that offend their values? In the end, I do not think it necessary to answer these questions in this case, but in my opinion *Ogle v Strickland* poses them”.⁸⁴

In *Right to Life Association (NSW) Inc v Secretary of Department of Human Services and Health*,⁸⁵ the applicant was an incorporated association which sought to review a decision of the Secretary of the relevant government department not to stop clinical trials in Australia for a drug that purported to produce abortion. The objects of the association included defending the right to life against abortion and promoting community awareness in relation thereto and to influence law makers to defend the right to life.

At first instance, Lindgren J held that the association was not a person aggrieved with standing to challenge the decision of the Secretary for a number of reasons. Of relevance to the issue of adverse impacts on beliefs, the association had argued that its objects of association directly related to the subject matter of the decision sought to be challenged. Lindgren J rejected the argument:

“The applicant submitted that what distinguished it from ordinary members of the public was that it was organised, and since 1984 incorporated, with objects directly related to the subject matter of the decision sought to be challenged. But to accord the status of a “person aggrieved” for no more reason than this would be to elevate form above substance. It would allow individuals who were opposed to a decision, albeit sincerely and for unselfish motives, to acquire standing to challenge it by the procedure of devising an appropriate form of constitution, and if necessary procuring corporate form.

It would, for example, distinguish between the unsuccessful Mr Cameron in *Cameron v Human Rights and Equal Opportunity Commission* noted above and an incorporated association of individuals organised under a constitution with objects of seeking a more equitable allocation of scholarships to Fijians. In my opinion, the issue of standing is not to be foreclosed by such a formal distinction.”⁸⁶

The association also sought to substantiate its standing by arguing that individual members of the association had a special interest in the subject matter of the

⁸⁴ (1994) 55 FCR 492 at 510.

⁸⁵ (1994) 52 FCR 209 (Lindgren J) upheld on appeal (1995) 126 ALR 238 (Lockhart and Beaumont JJ, Gummow J not deciding)

⁸⁶ (1994) 52 FCR 209 at 225.

decision, which interest could be attributed to the association.⁸⁷ Lindgren J also held that:

- (a) the association did not have some connection with or involvement in a process antecedent to the making of the decision;⁸⁸
- (b) there was not present either the factor of funding or other recognition by government of the applicant as the representative of a particular public interest involved in the particular issue to which the challenged decision related, or public acceptance of the particular interest as one calling for protection and representation;⁸⁹ and
- (c) there was no coincidence between the applicant's interests and the objects of the statute under which the challenged decision was made; the moral and ethical concern of the association was not a public interest with which the statute evinced concern.⁹⁰

On appeal, Lindgren J's decision was upheld. In relation to the association's argument that it was incorporated with objects of relevance to the decision challenged, Lockhart J held:

"The fact that the appellant is an incorporated association, has been incorporated since 1984, and is a successor to an earlier body does not by itself confer the status upon it of a person aggrieved. If an individual sought to acquire standing by virtue of its strong feelings and emotional concern with the decision made and had no other connection with the subject matter of the decision, that individual has no standing. A corporation cannot be placed in any better position than the individual and this applies even in the case where the corporation has included in its members those who would themselves have an interest in the subject matter of the litigation: *Victorian Chamber of Manufacturers v Commonwealth* (1943) 67 CLR 335, 347 and 413. As Lindgren J pointed out, correctly in my view:

"It would allow individuals who were opposed to a decision, albeit sincerely and for unselfish motives, to acquire standing to challenge it by the procedure of devising an appropriate form of constitution, and if necessary procuring corporate form."⁹¹

Lockhart J concluded:

"In my opinion the appellant has no greater interest in the subject matter of the Secretary's decision which is impugned in this case than any concerned person might have. If the appellant's argument is correct, anyone having such concern would have standing. The grievance of the appellant does not travel beyond that which any person has an ordinary member of the public. Here there is only an intellectual, philosophical and emotional concern. The

⁸⁷ (1994) 52 FCR 209 at 227.

⁸⁸ (1994) 52 FCR 209 at 225.

⁸⁹ (1994) 52 FCR 209 at 225.

⁹⁰ (1994) 52 FCR 209 at 225.

⁹¹ *Right to Life Association (NSW) Inc v Secretary of Department of Human Services and Health* (1995) 128 ALR 238 at 253.

appellant is not affected in any way to an extent greater than the public generally. There is no advantage likely to be gained by the appellant if successful in the proceeding nor disadvantage likely to be suffered if it fails. The most that it can achieve is the satisfaction of correcting a wrong decision if it should succeed and winning a contest which may improve its position in persuading the public and politicians of the correctness of its cause".⁹²

Beaumont J held that the association, while it may have believed subjectively it was aggrieved by the Secretary's decision, was not on the evidence before the Court objectively and actually aggrieved. Apart from its constitution, there was no evidence of the nature or scale of the activities of the association or its membership.⁹³ Beaumont J stated:

"Although Right to Life, in its stated objects, has asserted an interest in opposing abortion, there was no evidence adduced of activities of the scale or significance of the kind led in evidence by the ACF before Davies J; nor of material of the type relied on by Sackville J in *North Coast Environment Council Inc v Minister for Resources* (1994) 127 ALR 617, in which the present case was distinguished (at 639). Nor was there any evidence of a vocational or professional interest of the kind relied on to justify standing in *Ogle v Strickland* (1987) 71 ALR 41. There was no material before the court here, for instance, to indicate that Right to Life had undertaken any particular research or study, or any other activity, in this area (cf *Central Queensland Speleological Society Inc v Central Queensland Cement Pty Ltd (No. 1)* [1989] 2 Qd R 512)".⁹⁴

Gummow J did not need to decide this question of standing.⁹⁵ However, the indication was that Gummow J was of the opinion that standing should not have been granted to the association in that case, nor indeed, should standing have been granted to the priests in *Ogle v Strickland*.⁹⁶

In *Re McBain; Ex parte Australian Catholic Bishops Conference*,⁹⁷ the Conference of Catholic Bishops and its corporate trustee the Episcopal Conference applied to be joined as a respondent to proceedings brought by a doctor challenging the lawfulness of a Victorian statute which made the provision to a woman of certain artificial insemination and fertilisation procedures available only if the woman was married and living with her husband or living with a man in a de facto relationship. The doctor wished to provide treatment procedures covered by the Victorian statute to a single woman.

McHugh J held:

"The interest of the Conference lies in its opposition to the effect of the order of Sundberg J, an effect that is contrary to the religious beliefs and teachings of the members of the Conference. According to the submissions of the Episcopal Conference, the order made by Sundberg J permits services to be

⁹² (1995) 128 ALR 238 at 255.

⁹³ (1995) 128 ALR 238 at 265, 266.

⁹⁴ (1995) 128 ALR 238 at 267.

⁹⁵ (1995) 128 ALR 238 at 275-276.

⁹⁶ (1995) 128 ALR 238 at 271.

⁹⁷ (2002) 209 CLR 372

provided to unmarried women that violate the most basic beliefs of Catholics about the dignity of marriage and family, and the rights of children. But these beliefs and the effect of the order on these beliefs do not give the Conference a special interest in the outcome of proceedings. A person does not have a 'special interest' 'unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance'. The relationship of the Conference to the order made in this case is far more attenuated than the relationship that existed between the ministers of religion and the subject matter of the proceedings in *Ogle v Strickland* where the ministers were held to be 'persons aggrieved'. Whether that case was rightly decided is debatable. But right or wrong, it does not support the claim of the Conference for standing in this case".⁹⁸

Adverse Impact on Amenity of Plaintiff's Land

The affirmation that "special interest" can be something other than pecuniary loss has meant that neighbours who will suffer loss of views and amenity by a proposed development have been given standing by Australian courts thereby highlighting the difference between the "special interest" test and the "special damage" test used in *Boyce*.⁹⁹ It will be recalled that in *Boyce* the fact that the neighbouring owner of a block of flats would have his access to light significantly reduced was held to be insufficient and fall short of what is required to constitute special damage. *Gregory v Camden London Borough Council*¹⁰⁰ is to the like effect.

In contrast, in *Lord v Hiscock*,¹⁰¹ the Supreme Court of New South Wales, applying the *ACF* test of special interest, held that a neighbour who would be adversely affected by a proposed extension to an adjoining house had standing. The court found that the plaintiff's house would be overshadowed, particularly in winter, and that this effect coupled with the proximity, height and bulk of the proposed extensions would reduce the amenity and enjoyable use of the plaintiff's property. There was also evidence that these adverse effects would substantially reduce the value of the plaintiff's property.¹⁰² Similarly, in *Day v Pinglen Pty Ltd*,¹⁰³ the High Court of Australia held that the plaintiff had standing by reason of the fact that the proposed development on an adjoining property would interfere significantly with the plaintiff's existing panoramic view of Sydney Harbour. This would also reflect on the value of the plaintiff's property.¹⁰⁴

In *Ex parte Helena Valley/Boya Association Inc; Re State Planning Commission*,¹⁰⁵ the applicants included natural persons who owned land abutting or adjacent to land that was the subject of a proposed rezoning from Rural to Urban. The proposed

⁹⁸ (2002) 209 CLR 372 at 423-424.

⁹⁹ [1903] 1 Ch. 109.

¹⁰⁰ [1966] 1 WLR 899.

¹⁰¹ (1980) 47 LGRA 168.

¹⁰² (1980) 47 LGRA 168 at 172-173.

¹⁰³ (1981) 148 C.L.R. 289.

¹⁰⁴ *Id.* at 299-300. See also: *Dajon Investments Pty Ltd v. Talbot* (1969) 21 LGRA 228; *Howes v Victorian Railways Commissioners* (1970) 23 LGRA 227 at 248-249; *Vanderwolf v Warringah Shire Council* [1975] 2 NSWLR 272 at 275; *Wentworth v. Woollahra Municipal Council* (1982) 149 CLR 672.

¹⁰⁵ (1989) 2 WAR 422.

rezoning would allow a closely settled urban development which would significantly interfere with the enjoyment of their lands. The landholders had an interest in protecting the enjoyment of their land by attempting to prevent a change in the zoning of the adjoining land. This interest was sufficient for the Full Court of the Supreme Court of Western Australia to grant standing to the landholders to challenge the legality of the decision to rezone the land.¹⁰⁶

Similarly, in *Sims v Planning Appeal Tribunal*,¹⁰⁷ a landowner was held to have standing as a person who would be affected by a proposed development on adjoining land.

It is clear, however, that the mere fact that a would-be plaintiff is a close neighbour of a developer is not sufficient in itself. There must be, in addition, a likelihood of some perceptible adverse impact on the plaintiff if the development is to proceed. This was shown in *Thorne v D Wade Consultants Pty Ltd (No.2)*.¹⁰⁸ At the trial, the judge at first instance found, as a question of fact, that the three plaintiffs did not suffer such detriment as could afford them standing under the ACF “special interest” test. In forming this conclusion, the trial judge had the benefit of a view of the subject site. On appeal to a Full Court of the Supreme Court of Victoria, the plaintiffs did not seek to disturb the trial judge’s conclusions of fact. However, they submitted that they had a special interest by reason of the fact that they were close neighbours of the defendant. The Full Court rejected this submission: “mere proof that they were ‘close neighbour’ being insufficient alone to establish it”.¹⁰⁹

This was also the problem in *Australian Conservation Foundation v Minister for Resources*.¹¹⁰ The second applicant, Mr Harewood, was a natural person who owned a property near to a State Forest that was proposed to be logged. Mr Harewood objected to the logging and the effects it would have on him. Davies J summarised Mr Harewood’s concerns as follows:

“Harewood has a property outside the Coolangubra State Forest on the Towamba River. Access is via the road which leads to the Harris-Daishowa’s woodchip mill. Harewood’s standing was put on the basis that he was a local property holder. In affidavits, Harewood said that he feared that intensive logging for woodchips in the Towamba Valley and surrounding forest areas would jeopardise his future livelihood, safety and enjoyment of life, that roading and logging in the Towamba Catchment would increase the frequency of damaging floods, that logging would increase the risk of uncontrollable fires, that logging would lead to silting up of the river, to flooding and to damage to his property. Mr Harewood deposed that timber trucks travelling along the mill road have caused damage to the windscreens of his motor vehicles, that the noise of the chip boats loading at night is disturbing and that, when he visits the logged areas, he is upset by the loss

¹⁰⁶ (1989) 2 WAR 422 at 431 per Rowland J, 435, 436 per Ipp J with whom Pidgeon J agreed at 425.

¹⁰⁷ (1992) 57 SASR 325 at 341; 75 LGRA 233 at 249.

¹⁰⁸ (1985) 57 LGRA 90.

¹⁰⁹ (1985) 57 LGRA 90 at 102-103.

¹¹⁰ (1989) 76 LGRA 200.

of trees which are obviously several hundred years old and by the insensitive destruction of plants and animal habitat".¹¹¹

Davies J held that these matters were insufficient:

"These facts do not show that Harewood has a special interest in the issue which is raised in the present proceedings, namely whether the action taken by the Minister has adversely affected the National Estate. Harewood's interest in the National Estate is little more than that of an ordinary member of the community. Harewood has an objection to logging and its aftermath. But these proceedings are not concerned with the effect of logging inside the National Estate on property outside the National Estate. As to the effect of logging on the National Estate, Harewood's interest is not a special interest but is that of an ordinary member of the community.

I therefore hold that Harewood has no standing to bring the present application and that his application must be dismissed".¹¹²

Residents/Ratepayers

As the degree of impact on the plaintiff becomes more remote, so does the likelihood of the plaintiff establishing the necessary "special interest" for standing purposes. As a general rule, a resident would not have standing to challenge a council's decision where the only basis for standing is that he or she is a ratepayer of the shire and is affected no more or no less than other residents.¹¹³ Where, however, the residents live in an area where they would, as ratepayers, be likely to suffer the most if a separate rate were to be declared, they may have standing. Such a situation arose in *Clothier and Simper v City of Mitcham*.¹¹⁴

Participation Rights

Statutes often provide for participation by persons in the administrative decision-making process. The type of right to participate varies, but may include a right to receive notice, such as notice of the receipt of an application for a permission, a right to lodge a submission objecting to the application, a right to appeal by way of merits review a decision, such as to grant permission to the application, or a right to appear in proceedings. The standing of a person to challenge an administrative decision or conduct will depend on the correlation between that decision or conduct and the type of right the person enjoys.

A right of a person or organisation to make submissions to a governmental decision-maker will give standing to sue to protect that right, but it is insufficient to confer standing to challenge the planning decision itself. To have standing to

¹¹¹ (1989) 76 LGRA 200 at 207.

¹¹² (1989) 76 LGRA 200 at 207.

¹¹³ See *Qurban v Attorney-General and Town of Brighton* [1928] SASR 457; *Lopez v Brighton* [1982] VR 369; *Sutton v Warringah Shire Council* (1985) 4 NSWLR 124.

¹¹⁴ (1981) 45 LGRA 179 at 188 per White J. See also *Arsenal Football Club Ltd. v Ende* [1977] AC 1.

challenge the decision itself, the person or organisation needs a right of further participation in the planning or decision-making process. This might include full appearance rights in any planning hearings.

The need for there to be a correlation between the decision or conduct the subject of the challenge and a right to participate in relation to that decision or conduct provides an explanation for the different decisions in relation to standing. It explains the difference between cases such as *Sinclair v Maryborough Mining Warden*¹¹⁵ and *ACF v Commonwealth*.¹¹⁶

In the former case, Sinclair lodged an objection to applications by a mining company for mining leases over some 1,100 acres on Fraser Island, off the coast of Queensland. At the hearing of the applications, Sinclair was entitled to and did present extensive expert evidence in support of his objection. At the conclusion of the hearing, the mining warden determined to grant the mining leases. Sinclair applied to the Supreme Court of Queensland for a writ of mandamus directed to the warden requiring him to hear the applications and objections according to law. The Supreme Court refused the writ and Sinclair appealed to the High Court of Australia. Barwick CJ noted that Sinclair was a proper party (and hence had standing) to seek a mandamus.¹¹⁷

“The appellant, having been an objector before the warden, had a right to have the hearing of the application conducted, and the warden consider the application and objections and make his recommendation, according to law. If the application has not been so heard and determined, he is a proper party to seek a mandamus to compel the hearing to be had according to law: *Reg v Bowman*¹¹⁸ and *Reg v Cotham*.”¹¹⁹

Similarly, in *R v Liquor Commission (NT); Ex parte Pitjantjatjara Council Inc*¹²⁰ the prosecutor’s statutory right to be heard as an objector before the Liquor Commission was held to be sufficient to give it standing for a writ of certiorari to call up and quash a determination of the Commission on the basis that the decision displayed an error of law on the face of the record.

In *United States Tobacco Co v Minister for Consumer Affairs*¹²¹ a Full Court of the Federal Court of Australia held that the Australian Federation of Consumer Organisations was entitled to be joined as a party to proceedings on the basis that they had applied for and had been permitted to make submissions at a conference called under s 65J of the *Trade Practices Act* (Cth). The United States Tobacco Co. had commenced proceedings challenging the validity of the conference and the minister’s decision under s 65J(1). The court (Davies, Wilcox and Gummow JJ.) held: “the Australian Federation of Consumer Organisations has an interest in that decision as well as in the conference itself. That interest is different in kind from the

¹¹⁵ (1975) 132 CLR 473.

¹¹⁶ (1980) 146 CLR 493.

¹¹⁷ (1975) 132 CLR 473 at 478.

¹¹⁸ [1898] 1 QB 663 at 666.

¹¹⁹ [1898] 1 QB 802.

¹²⁰ (1984) 31 NTR 13 per Muirhead J.

¹²¹ *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520; 83 ALR 79.

interest of members of the public. Moreover, relief is sought against the conference itself.”¹²²

In *Australian Conservation Foundation v Forestry Commission of Tasmania*,¹²³ a conservation association, ACF, and two other unincorporated bodies with similar objectives challenged by judicial review the decisions of a Commission of Inquiry contained in an interim report. The Commission was appointed under the *Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987 (Cth)* to inquire into and report on a number of matters relating to world heritage and areas in Tasmania. The Commission made an interim report specifying areas which in its opinion were definitely not qualifying areas.

The ACF and other bodies contended that the Commission, in making its decisions, had failed to take account of relevant issues and had taken into account irrelevant issues. The applicants had been given leave to appear by the Commission and had participated in its hearings.

Burchett J held that the applicants were persons who were aggrieved by the decisions contained in the interim report and had standing to bring proceedings to judicially review those decisions. Burchett J applied *Sinclair v Maryborough Mining Warden*¹²⁴ and held that: “The applicants, who were given leave to appear by the Commission and did participate in its hearings, had a right to have their submissions considered according to law.”¹²⁵

In *Sims v Planning Appeal Tribunal*,¹²⁶ the plaintiff was held to have standing to seek an order quashing the decision of a Planning Appeal Tribunal and council at first instance on grounds that included that, in certain events, the plaintiff would be able to object to the development proposal and, if the Council granted planning consent, the plaintiff would be able to appeal from that decision to the Planning Appeal Tribunal.¹²⁷

In *Tasmanian Conservation Trust Inc v Planning Appeal Board*,¹²⁸ a developer brought proceedings seeking a declaration that a planning appeal lodged by it against a determination of a council granting consent but on conditions considered unsatisfactory was deemed to be determined in favour of the developer, by reason of the developer and the council having reached agreement at a compulsory conference held before the Planning Appeal Board. The Planning Appeal Board had exercised a discretion that it had under the relevant statute not to proceed with the conference for the purpose of resolving the matters in dispute, notwithstanding the agreement of the developer and the council, but instead the Board concluded the matter must go for a hearing on the merits by the Board on a future occasion. The Board gave notice to the Tasmanian Conservation Trust, being a person who had objected to the development application, inviting it to attend and be heard on the appeal. The developer’s action sought to prevent such appeal being heard.

¹²² (1988) 20 FCR 520 at 530; 83 ALR 79 at 89.

¹²³ (1988) 19 FCR 127; 79 ALR 685; 76 LGRA 369.

¹²⁴ (1970) 132 CLR 473 at 478.

¹²⁵ (1988) 19 FCR 127 at 131; 76 LGRA 369 at 373. In a later case, Burchett J contrasted that situation with the situation where the applicant had no right under the statute to be heard on the original consideration of the matter: see *Alphapharm Pty Ltd v Smith Kline Beecham (Australia) Pty Ltd* (1994) 49 FCR 250 at 266.

¹²⁶ (1992) 57 SASR 325.

¹²⁷ (1992) 57 SASR 325 at 341.

¹²⁸ Reported sub nom. *King Cole Hobart Properties Pty Ltd v Planning Appeal Board* (1992) 77 LGRA 92.

The Trust responded by bringing its own proceedings challenging the outcome of the compulsory conference, in particular that there was no determination of the planning appeal by way of compulsory conference. The Trust argued that it had been deprived of putting submissions and calling evidence in open session before the Board by reason of a collusive arrangement between the developer and the Council in respect of which the Trust was given the opportunity to be heard.

Wright J held that the Trust had standing to bring the proceedings. The Trust had made written representations, as it was entitled to do under the relevant statute, objecting to the application for planning permission. The Council took these representations into account in reaching a decision to grant approval, but subject to conditions. Bearing in mind the nature and extent of these conditions and its agreement with these conditions, the Trust decided to appeal against the council's approval. Had the Trust been dissatisfied with the Council's decision, the Trust was entitled under the relevant statute to appeal against the decision to the Planning Appeal Board.¹²⁹ On the appeal by the developer, the Board had power under the relevant statute to allow the Trust to be heard on the appeal.

The Board had exercised that power after the conference had not proceeded. Wright J held that notwithstanding that the Trust had not been a party to the appeal at the time of the conference, it should have standing to challenge the outcome of the conference:

“Whether or not the trust can be regarded as a party to the appellate process, it seems to me that the essential factor to be borne in mind is, that the trust, having made submissions to the council before the council reached its decision on the matter, had a vested right to appeal against the council's determination pursuant to the provisions of the *Local Government Act 1962*, s 733c(2), if the corporation's determination of the matter did not meet with the trust's approval. It would be an extraordinary situation if persons with a right of representation to the council, having seen those representations acknowledged and taken into account by the council and reflected in its determination, could be deprived of an entitlement to make further submissions to the Appeal Board once its jurisdiction had been invoked by a disgruntled developer, simply by the developer and the council reaching agreement to their mutual satisfaction on the matters in issue. I cannot think that the position of a bona fide objector in this situation was ever really contemplated by those responsible for the 1985 amendments to the *Local Government Act 1962*.

Mr Kable argues that the factual framework within which the present problem must be considered is indistinguishable from that which confronted the High Court in *Australian Conservation Foundation Inc v The Commonwealth*, but I cannot agree with this submission. The passages already quoted from the judgment of Gibbs J indicate that once the Foundation had made written representations to Iwasaki, there was no further right or expectation on the part of the Foundation that it could participate in any of the available review processes thereafter. Such is not the case here. The lodgement of a notice of appeal by the Tasmanian Conservation Trust Incorporated would undoubtedly have given it the status of a party for all relevant purposes. As

¹²⁹ (1992) 77 LGRA 92 at 93.

such, it would have had an entitlement to be involved in the compulsory conference processes provided for in the *Local Government Act* 1962, s 733D. In any event, in so far as those processes failed to bring about a complete resolution of the appeal, the trust had a legitimate expectation that it would be permitted to appear before the Appeal Board pursuant to the provisions of s 733D(4). The letter by the clerk of the Appeal Board to the trust is a fairly clear indication that the practice of the Appeal Board is to allow a body such as the trust to be heard at the appeal.”¹³⁰

By way of contrast, the plaintiff conservation group in *ACF v Commonwealth*¹³¹ only had a right, as did every other member of the public, to make a submission objecting to the development proposed in the environmental impact statement on public exhibition. But once it had made such a submission, the ACF had no further rights such as did the plaintiffs in the cases referred to above to appear at a hearing or otherwise. Gibbs J said in *ACF v Commonwealth*:¹³²

“The fact that the Foundation sent the written comments, as permitted by the administrative procedures, is logically irrelevant to the question whether it has a special interest giving it standing. That fact would only have some significance in relation to this question if the administrative procedures revealed an intention that a person who sent written comments thereby acquired further rights. As I have endeavoured to show, that is not the case...[After referring to the dicta of Barwick CJ in *Sinclair v Maryborough Mining Warden*, his Honour continued.] That passage clearly brings out the point of distinction between that case and the present—there the objector had a right which he was entitled to enforce; here, the person submitting the written comments had no further right.”

In *Friends of Castle Hill Association Inc v Queensland Heritage Council*,¹³³ the incorporated association challenged by judicial review two decisions of the Queensland Heritage Council. The first decision was to exclude certain land from a place, Castle Hill, to be entered on the Heritage Register. The second decision was to grant development approval to a rezoning of the land and its use as a tourist resort. The objects of the association included the safeguarding of the natural environment of Castle Hill. The association wished for the land excluded from the Castle Hill entry in the Heritage Register to be included and for the rezoning and development of the land not to occur.

The *Queensland Heritage Act* 1992 provided for public participation in two relevant respects. First, s 26 provided that where the Heritage Council proposes to enter a place in the Register or remove it from the Register, the owner of the place or any other person may object to the proposal. Second, s 34 provided that applications for approval of proposed developments of properties in the Register are to be subject to public notice and comment requirements. However, the Act did not grant any further right to persons who objected under either provision to appeal or challenge a decision of the Heritage Council.

¹³⁰ (1992) 77 LGRA 92 at 97-98.

¹³¹ (1980) 146 CLR 493.

¹³² (1980) 146 CLR 493 at 531-532.

¹³³ (1993) 81 LGERA 346

Pursuant to these statutory provisions for participation, the association lodged objections to the first decision to exclude the land from the entry in the Heritage Register and representations in respect of the second decision. Subsequently, the association challenged both decisions, but not on grounds relating to any failure in the process to invite or consider objections or representations. Dowsett J held that the association lacked standing – the mere making of an objection or representation did not give any further entitlement in relation to the subsequent decision:

“[In relation to the first decision]...there is nothing in s 26 of the *Queensland Heritage Act* relating to objections which would suggest that there are any continuing rights vested in the applicant as an objector. There is a right to object, and no doubt it should be inferred that there is an obligation to consider such an objection. However there is nothing in the Act to suggest that it was contemplated that an objector would have any further entitlement to participate in the decision-making process.

With respect to the first decision then, I am of the view that the applicant lacks standing.

Turning to the second decision, the same problem appears to arise. Members of the public are given the right to make representations and there is an express obligation to consider those representations. There is no suggestion that that was not done in the present case. There is nothing in the Act to suggest an intention that a person making representations thereafter has any right to participate in the outcome of proceedings”.¹³⁴

Two other cases are sometimes cited in support of the proposition that the lodging of a written submission or objection to an application for development is sufficient to ground standing to review the decision to grant approval to the application. These are the Victorian cases of *National Trust of Australia (Vic) v Australian Temperance and General Mutual Life Society Ltd*¹³⁵ and *ACF v Environment Protection Appeal Board*.¹³⁶ However, a proper examination of these decisions shows that they turn on the particular words used in the statute in question in each case and are not authorities for the broader proposition. In both of these cases, the relevant statute provided first, for members of the public to make written objections to proposed developments and, secondly, for persons who feel aggrieved to appeal to the relevant planning tribunal.¹³⁷ The question in each case was whether the plaintiffs were persons who felt aggrieved such that they had a right of appeal. In the *National Trust* case, a Full Court of the Supreme Court of Victoria considered that the status of the National Trust was such that it was “a person who being an objector feels aggrieved”. In *ACF v Environment Protection Appeal Board*, a different Full Court of the Supreme Court of Victoria also held that ACF had standing but on the broader basis that any person who lodges a written objection and who feels aggrieved at the decision (in the sense that he is dissatisfied with its objections not having been met) may appeal.

¹³⁴ (1993) 81 LGERA 346 at 353-354.

¹³⁵ (1976) 37 LGRA 172.

¹³⁶ (1982) 49 LGRA 326.

¹³⁷ See, in the *National Trust* case, the *Town and Country Planning Act* 1961, ss 18B, 19(1)(d) and, in the *ACF* case, the *Environment Protection Act* 1970, ss 20A (1)(c), 32(5).

Objects and Activities of Plaintiff Association

An association may have standing to challenge a decision that relates particularly to the objects and activities of the association.

In *Australian Conservation Foundation v Minister for Resources*,¹³⁸ Davies J held that the ACF had standing to challenge a decision to grant licences for the export of woodchips derived from logging certain forests in south eastern NSW. In doing so, Davies J had regard to the following matters:

- (a) the nature of the controversy underlying the dispute in the proceedings, namely that logging, including for export of woodchips, in the forests of south east Australia, was one of the major environmental issues of the time;¹³⁹
- (b) the environment concerned, namely the forests, were listed on the National Estate Register maintained under the *Australian Heritage Commission Act* and therefore involved an issue of national and not local significance;¹⁴⁰
- (c) the increased public perception of the need for the protection and conservation of the natural environment and for the need of bodies such as the ACF to act in the public interest;¹⁴¹
- (d) the ACF is the major national conservation organisation in Australia and established with a view, inter alia, to reconciling the use and exploitation of resources with the conservation of the natural environment;¹⁴²
- (e) the substantial annual funding received by the ACF from both Commonwealth and State governments;¹⁴³ and
- (f) the leading role played by the ACF in the protection of the National Estate and in raising the debate on sustainable forestry in Australia, and in the south east forests in particular.¹⁴⁴

Davies J concluded:

“While the Australian Conservation Foundation does not have standing to challenge any decision which might affect the environment, the evidence thus establishes that the Australian Conservation Foundation has a special interest in relation to the South East Forests and certainly in those areas of the South East Forests that are National Estate. The Australian Conservation Foundation is not just a busybody in this area. It was established and functions with governmental financial support to concern itself with such an issue. It is pre-eminently the body concerned with that issue. If the Australian Conservation Foundation does not have a special interest in the South East Forests, there is no reason for its existence.

¹³⁸ (1989) 76 LGRA 200.

¹³⁹ (1989) 76 LGRA 200 at 205.

¹⁴⁰ (1989) 76 LGRA 200 at 205.

¹⁴¹ (1989) 76 LGRA 200 at 205.

¹⁴² (1989) 76 LGRA 200 at 205.

¹⁴³ (1989) 76 LGRA 200 at 205-206.

¹⁴⁴ (1989) 76 LGRA 200 at 206.

In determining standing, it is necessary to take account of current community perceptions and values. As Stephen J said in the *Onus* case (at 42):

“Courts necessarily reflect community values and beliefs, according greater weight to, and perceiving a closer proximity to a plaintiff in the case of, some subject matters than others. The outcome of doing so, however rationalised, will, when no tangible proprietary or possessory rights are in question, tend to be determinative of whether or not such a special interest exists as will be found standing to sue”.

In my opinion, the community at the present time expect that there will be a body such as the Australian Conservation Foundation to concern itself with this particular issue and expects the Australian Conservation Foundation to act in the public interest to put forward a conservation viewpoint as a counter to the viewpoint of economic exploitation”.¹⁴⁵

In *North Coast Environment Council Inc v Minister for Resources*,¹⁴⁶ Sackville J held that the North Coast Environment Council Inc (“North Coast”) had standing to bring proceedings seeking a declaration that the Federal Minister for Resources was obliged to furnish a statement in writing setting out the findings, evidence and reasons for the decision to grant a licence to export woodchips from an area on the north coast of NSW.

North Coast was a non-profit conservation body with the prime aim and object of promoting the cause of conservation in the north coast region of NSW. North Coast had made submissions on the exhibited environmental impact statement for the forestry and woodchipping activity prior to the decision being made. Sackville J held that these matters themselves were insufficient to show a special interest in the subject of the litigation.¹⁴⁷

However, Sackville J held there were other factors demonstrating the importance of the applicant’s concern with the subject matter of the decision and the closeness of its relationship with that subject matter:

“In my opinion, the most significant of these facts are the following:

- First, North Coast is the peak environmental organisation in the north coast region of New South Wales, having 44 environmental groups as members. Its activities relate to the areas affected by the operations generating the woodchips that are the subject of the export licence granted to Sawmillers.
- Secondly, North Coast has been recognised by the Commonwealth since 1977 as a significant and responsible environmental organisation. This recognition has taken the form of regular financial grants for the general purposes of the organisation. While the grants have been modest, they have been recurrent and reflect acceptance by the Commonwealth of the significance of the role played by North Coast in advocating environmental values.

¹⁴⁵ (1989) 76 LGRA 200 at 206.

¹⁴⁶ (1994) 55 FCR 492; 127 ALR 373; 85 LGRA 270.

¹⁴⁷ (1994) 55 FCR 492 at 512; 85 LGRA 270 at 292.

- Thirdly, North Coast has been recognised by the Government of New South Wales as a body that should represent environmental concerns on advisory committees. The most important form of recognition for present purposes has been membership of North Coast's nominees on the Forestry Policy Advisory Committee, the role of which is to advise the State Minister on forestry matters, including the management of State forests. This and other forms of participation in official decision-making processes show that the State government has accepted North Coast as a representative of environmental interests.
- Fourthly, North Coast has conducted or co-ordinated projects and conferences on matters of environmental concern for which it has received significant Commonwealth funding. While these have not specifically concerned forest management or woodchipping, they reflect North Coast's standing as a respected and responsible environmental body.
- Fifthly, independently of North Coast's long involvement with successive licences granted to Sawmillers, it has made submissions on forestry management issues to the Resource Assessment Commission and has funded a study on old growth forests, focusing upon the Wild Cattle Creek State Forest".¹⁴⁸

Sackville J noted that North Coast received considerably less funding and earned less income than the ACF did in *ACF v Minister for Resources*. Yet that merely meant that North Coast was "closer to the line where a special interest in the subject matter of the action ends". Yet, having regard to the earlier factors found, Sackville J held "North Coast has shown enough to demonstrate that it is a person aggrieved in relation to its claim to reasons for the decision to grant Sawmillers an export licence".¹⁴⁹

In *Tasmanian Conservation Trust Inc v Minister for Resources*,¹⁵⁰ Sackville J found the Tasmanian Conservation Trust had standing to challenge the decisions of the Federal Minister for Resources to grant a licence and an in-principle approval to export woodchips derived from logging forests in Tasmania. Sackville J's reasons were similar to those he gave in *North Coast Environment Council Inc v Minister for Resources*.¹⁵¹

"As in *North Coast*, I think that there are a number of factors in the present case that justify the conclusion that the Trust is a person aggrieved for the purpose of challenging the Minister's decisions to grant an export licence to Gunns and to grant an in-principle approval to Gunns to export woodchips over a five-year period. These factors, to use the language of Stephen J in *Onus v Alcoa* (at 42), show the importance of the Trust's concern with the subject matter of these decisions and the closeness of its relationship to that subject matter.

¹⁴⁸ (1994) 55 FCR 492 at 512-513; 85 LGERA 270 at 292-293.

¹⁴⁹ (1994) 55 FCR 492 at 513; 85 LGERA 270 at 293.

¹⁵⁰ (1995) 55 FCR 516; 127 ACR 580; 85 LGERA 296.

¹⁵¹ (1994) 55 FCR 492; 85 LGERA 270.

- First, the Trust is the peak environmental organisation for Tasmania, recognised as such by the State and Commonwealth governments. Its activities include research, advice, lobbying and consultations in relation to Tasmanian forests and to woodchipping in Tasmania. Its areas of concern include the forests the subject of its licence and the in-principle approval.
- Secondly, the Trust has been recognised by the Commonwealth as a significant and responsible environmental organisation. This is reflected in the Trust's membership of the Peak Conservation Organisation since 1983 and in the annual administration grants provided by the Commonwealth to the Trust. Recognition of the importance of the Trust's role is also shown by the extensive support given by Commonwealth agencies to projects undertaken by the Trust or in which it has participated.
- Thirdly, the Trust is recognised by the Tasmanian Government as a body that should represent environmental interests on advisory or consultative bodies. Its annual reports show that it is represented on a large number of committees and advisory bodies, covering a wide range of topics, including forestry issues.
- Fourthly, the research and advisory activities of the Trust, although extensive, have involved detailed considerations of woodchipping and the preservation of Tasmanian forests, the very subject-matter of the present litigation. It is of particular significance that the Trust, either alone or in combination with other conservation organisations, has received Commonwealth funding to undertake projects designed to identify forests of high conservation value and to consider their relationship with proposed woodchipping activities.
- Fifthly, the Trust has made submissions and engaged in other activities (such as supporting areas for inclusion in the World Heritage) that demonstrate its commitment to conservation values. These activities go well beyond submissions made in relation to the 1985 EIS that has been referred to earlier.
- Sixthly, while, as appears from *North Coast*, I do not regard the size of an organisation or its resources as a critical factor, the Trust is a substantial body in terms of membership, income and range of activities.

In *North Coast* I noted that there were differences between the position of the North Coast Environment Council and that of the Australian Conservation Foundation, an organisation considered by Davies J in *Australian Conservation Foundation v Minister for Resources*. There are also some differences between the position of the Trust in the present case and that of the Australian Conservation Foundation, although the Trust is closer to the Australian Conservation Foundation's position than was the North Coast Environment Council. The Trust, for example, is the peak environmental organisation within Tasmania and has paid staff and a substantial budget.

To the extent that there are differences between the position of the Trust and the Australian Conservation Foundation, for reasons given in *North Coast*, I do not think they disqualify the Trust from being a ‘person aggrieved’ for the purposes of the present proceedings”.¹⁵²

In *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director of the Department of Conservation and Land Management*,¹⁵³ a number of incorporated associations, whose members were concerned to preserve the natural forests of the south west of Western Australia, brought proceedings claiming that the respondents would be in breach of the *Conservation and Management Act 1984* (WA) in conducting logging operations in certain forests. The respondents applied to strike out the statement of claim on the ground that the plaintiff association lacked standing.

A Full Court of the Supreme Court of Western Australia held that it was arguable that certain of the plaintiff associations had standing to maintain the proceedings, but not others. The reasoning differed between judges.

Murray J expressed reservations concerning any test for standing which relies upon government funding or recognition of a body to confer standing upon it.¹⁵⁴ Where the defendant is the government, that would be to deliver to interests represented by the defendant the resolution of the question of the plaintiff’s standing. However, it still would be relevant to see whether a plaintiff finances its activities by public funding raised in one way or another.¹⁵⁵ Otherwise, Murray J referred to the reasons of Templeman J to determine the tests for standing.¹⁵⁶

Scott J also agreed with Templeman J¹⁵⁷ but added some comments. Scott J recognised that a non material interest in the preservation of land can suffice to establish a special interest in the subject matter of the action. However, to determine whether a particular non material interest will suffice in the circumstances, the trial judge must analyse “the importance of the applicant’s concern with the subject matter together with an analysis of the applicant’s relationship to that subject matter in pursuing the interests or concern”.¹⁵⁸ In the circumstances of the case at hand, Scott J was unable to conclude that some of the plaintiff associations would not be able to establish by evidence a special interest in the subject matter such as to justify the grant of standing.¹⁵⁹

Templeman J dealt more particularly with each association. The pleadings in respect of each association revealed differences in size, recognition, activities, funding and involvement. These differences were important in the different conclusions reached as to the standing of the associations. It is instructive to compare the findings in relation to each association. For example, the *Bridgetown/Greenbushes Friends of the Forest Inc* was held arguably to have

¹⁵² (1995) 55 FCR 516 at 552-553; 85 LGERA 270 at 292-293.

¹⁵³ (1997) 18 WAR 126; 94 LGERA 380.

¹⁵⁴ Murray J. shared the reservations to that effect of Wheeler J in an earlier case, *Bridgetown/Green bushes Friends of the Forest v Department of Conservation and Land Management* (1997) 93 LGERA 436 at 446.

¹⁵⁵ (1997) 94 LGERA 380 at 385.

¹⁵⁶ (1997) 94 LGERA 380 at 385.

¹⁵⁷ (1997) 94 LGERA 380 at 401-402.

¹⁵⁸ (1997) 94 LGERA 380 at 403.

¹⁵⁹ (1997) 94 LGERA 380 at 404.

standing. Templeman J stated the matters which supported that conclusion as follows:

“The statement of claim pleads the following matters in relation to the Bridgetown/Greenbushes Friends:

1. The association was formed in 1987 in response to the defendants’ invitation to the public to participate in, and with the purpose of participating in, the public consultation procedures on the management of State forests. The invitation is said to be contained in the *Central Forest Region, Regional Management Plan 1987*, (which was before the Court as an agreed document). At p 46 of that Plan reference is made to ss 14 and 57-59 of the *Conservation and Land Management Act*, where provision is made for public participation in the preparation of management plans.
2. The association is a responsible and representative body having a membership of 98 persons, the majority of whom are ratepayers and residents of the Bridgetown/Greenbushes Shire.
3. The Association has a special interest in the conservation and proper management of the relevant forests by virtue of:
 - (1) the interests of its members;
 - (2) its involvement in public participation conducted by the defendants and by the Environmental Protection Authority;
 - (3) its publication of booklets and leaflets concerning forest management, including publications undertaken with funding provided by grants from Government and “a public organisation”;
 - (4) the recognition which the defendants have accorded to it “at all material times” as a responsible and representative body concerned with the conservation and proper management of State and other forests within and near the Bridgetown/Greenbushes Shire.

It is to be noted from the above summary that the Bridgetown/Greenbushes Friends is a relatively small organisation: and nothing is said about its financial resources. However, as Sackville J observed in the *North Coast* case at 514; 294, although a large income and a paid staff may be strong indicators of a responsible body, they are not the only indicators:

“[to] hold otherwise would place an unjustified premium on attracting financial support, as opposed to other forms of commitment to environmental issues, including part-time organisational activities, research and consultation.”

In my judgment, the matters relied on in the statement of claim, if established at trial, could demonstrate that the Bridgetown/Greenbushes Friends is no

‘mere busybody’. Further, the fact that it has been provided with Government funds and accorded recognition suggests that the association may well be said to have a special interest, beyond a mere emotional or intellectual concern for the proper management of the State forests.

I do not think it possible to state the position any more definitely than that. The extent of the funding and the facts relied on as being ‘recognition’ will need to be established. As Sackville J observed in the *North Coast* case (at 513; 293), there is a line where a special interest in the subject matter of an action ends. However, I do not think it would be right to say, as a matter of law, on the present pleadings, that the Bridgetown/Greenbushes Friends is beyond that line”.¹⁶⁰

In *North Queensland Conservation Council Inc v Executive Director, Queensland Parks and Wildlife Service*,¹⁶¹ Chesterman J held¹⁶² that the North Queensland Conservation Council (NQCC) had standing, for reasons similar to those given by Davies J in *Australian Conservation Foundation v Minister for Resources*.¹⁶³ However, Chesterman J preferred to approach the question of standing in a more liberal manner:

“The plaintiff should have standing if it can be seen that his connection with the subject matter of the suit is such that it is not an abuse of process. If the plaintiff is not motivated by malice, is not a busybody or crank and the action will not put another citizen to great cost or inconvenience his standing should be sufficient. The difference in approach is that the former looks to the plaintiff’s interest in bringing the suit. The latter looks to the effect of the proceedings on the defendant. One is, in a sense, the obverse of the other. If a plaintiff’s interest is insufficient the proceedings will be abusive. It is, however, probably easier to identify a proceeding which is an abuse of process than to recognise a ‘special interest’. The distinction which must be drawn is between those who seek to prevent an abuse of process and those who seek to abuse the process itself”.¹⁶⁴

Applying that approach, Chesterman J asked:

“Whether NQCC’s concern with the litigation is such that its application is not an abuse of process. This in turn involves an enquiry into the nature of the legal proceedings, the nature and extent of NQCC’s interest in those proceedings and their outcome, and whether any person will be put to expense or inconvenience as a result of the proceedings”.¹⁶⁵

In answer, Chesterman J held NQCC had standing.¹⁶⁶

In *Save Bell Park Group v Kennedy*,¹⁶⁷ Dutney J referred to with approval the approach of Chesterman J in *North Queensland Conservation Inc v Executive*

¹⁶⁰ (1997) 94 LGERA 380 at 414-415.

¹⁶¹ [2000] QSC 172 (14 June 2000).

¹⁶² At [33].

¹⁶³ (1989) 76 LGRA 200.

¹⁶⁴ [2000] QSC 172 (14 June 2000), [12].

¹⁶⁵ [2000] QSC 172 (14 June 2000), [34].

¹⁶⁶ [2000] QSC 172 (14 June 2000), [35] – [38].

¹⁶⁷ [2002] QSC 174 (29 May 2002)

Director, Queensland Parks and Wildlife Service.¹⁶⁸ The applicant, an unincorporated association called Save Bell Park Group, was formed about a year before the proceedings were commenced in response to an application to approve the allocation of part of Bell Park, in the town of Emu Park, for a proposed development. The association had a membership of 41 residents of a town population of 2,253. The association was actively involved in organising public opposition to the proposal and public meetings, and participating on the local council's steering committee for the Open Space and Recreation Plan.¹⁶⁹

Dutney J held:

“The applicant, despite its short existence, appears on the evidence to be the recognised body in the Emu Park community involved in the preservation and protection of Bell Park and its surroundings. It is difficult to imagine any other group or individual having standing if the applicant is denied the right to pursue this matter. The applicant has, in my view, a genuine desire to test the validity of decisions affecting its area of specific community activity. It thus cannot in my view be said to have an interest which is merely intellectual or emotional as such interests are now understood nor is the proceeding an abuse of process. I therefore regard the applicant as possessing sufficient standing to bring these proceedings”.¹⁷⁰

In *Save the Ridge Inc v Australian Capital Territory*,¹⁷¹ Crispin J declined to follow the approach of Chesterman J in *North Queensland Conservation Council Inc v Executive Director, Queensland Parks and Wildlife Service*¹⁷² but accepted that in recent years a more liberal approach has been taken to standing.¹⁷³

Crispin J upheld the standing of the plaintiff which was an unincorporated association concerned with the conservation of the natural environment of the O'Connor Ridge Nature Reserve, to apply for an injunction to restrain a threatened breach of the *Land (Planning and Environment) Act 1991* by certain work on O'Connor Ridge.

Crispin J held:

“In the present case the evidence establishes that the plaintiff association was incorporated on 28 October 1999 and has since engaged in a series of activities directed toward ensuring the protection of the environment in the vicinity of O'Connor Ridge. It has several hundred financial members and a much larger number of supporters from across Canberra, including people from the suburbs adjacent to or near the proposed works. The plaintiff is a member organisation of the Conservation Council of Canberra and the South East Region, which has been described as the umbrella body of conservation organisations in the ACT. There is unchallenged evidence to the effect that it has been one of the main bodies concerned with the conservation of the natural environment of both the O'Connor and Bruce Ridge nature reserves

¹⁶⁸ [2000] QSC 172 (14 June 2000).

¹⁶⁹ [2002] QSC 174 (29 May 2002), [2], [3], [4], [12].

¹⁷⁰ [2002] QSC 174 (29 May 2002), [14].

¹⁷¹ (2004) 133 LGERA 188.

¹⁷² [2000] QSC 172 (14 June 2000).

¹⁷³ (2004) 133 LGERA 188 at 195 [18], [19].

within the Territory, as component parts of the larger Canberra Nature Park. It has participated in a large number of community consultation committees and community consultation exercises conducted by government agencies. There is evidence that it has appeared before various forums and enquiries concerned with planning and development in particular areas of the Australian Capital Territory with which it is concerned. Its views have been sought by agencies of the ACT Government and on occasions by Ministers and other members of the Assembly. Indeed, there is evidence that some years ago its Chairperson was contacted by the then Chief Minister who sought the opinion of the plaintiff in relation to the proposed Gungahlin Drive extension".¹⁷⁴

Pecuniary Loss

Clearly, pecuniary loss will be sufficient to ground standing. It does not matter that the loss will occur indirectly rather than directly or that it is minor provided it is measurable. An illustration is to be found in *Murrangong Nominees Pty Ltd v Melbourne and Metropolitan Board of Works*¹⁷⁵ where the Supreme Court of Victoria held that the plaintiff Murrangong had standing under the second limb of the *Boyce* test. The plaintiff owned a shopping centre within the area covered by a prescribed scheme and objected to a proposed re-zoning of other land in that area so as to permit another major shopping centre. The plaintiff alleged that if the re-zoning were to be permitted it would suffer economic loss. Nathan J. said:¹⁷⁶

"It [Murrangong] asserts a public right and has a special interest in enforcing that right which is greater than that of the general public. The public right is to ensure that the integrity of the planning process relating to amendments to schemes which affect land use zones in which it has a significant financial investment, be maintained. It has much more than the emotional or intellectual interest referred to in the *ACF* case. Persons whose use of their own land is constrained by a particular zoning requirement of the Melbourne Metropolitan Planning Scheme have a public right in maintaining the integrity of those zones if it is proposed to alter them. All landowners within the Melbourne Metropolitan Planning Scheme have a right to ensure that any changes to the scheme are introduced in accordance with the Act. But a special interest is required to give standing. In this case, Murrangong's use of 'restricted business' land is impinged upon by the proposed enlargement of similarly zoned land. All the land is within the same municipality. Its commercial interests are likely to be touched to a minor, but not immeasurable, degree. As businesses are unlikely to claim an interest on other than commercial grounds, this factor alone may give them the special interest required. Therefore, this interest is significant in proposals to change zonings or to introduce a new scheme, whereas it may not be so with permit applications: compare, the *Kentucky Fried Chicken* case."¹⁷⁷

¹⁷⁴ (2004) 133 LGERA 188 at 196 [20].

¹⁷⁵ (1985) 60 LGRA 210.

¹⁷⁶ (1985) 60 LGRA 210 at 227 per Nathan J.

¹⁷⁷ *Kentucky Fried Chicken Pty Ltd v Gantidis* (1978) 140 CLR 675; 40 LGRA 132.

The decision of a Full Court of the Supreme Court of South Australia in *Happy Valley Shopping Centre Pty Ltd v Meadows District Council*¹⁷⁸ is to like effect.

In *R v City of Marion; Ex parte Independent Grocers Co-operative Ltd* [No. 2],¹⁷⁹ the applicants owned or operated retail premises abutting the land proposed to be developed as a retail centre. The proposed development necessitated the closure of an existing road and the opening of an alternative road. The proposed new road was on land owned by the council. The council required a payment from the developer for that land. The council and developer also entered an agreement with the developer as to the closure of the existing road. The applicants challenged the council's conduct on grounds of bias and denial of natural justice. A Full Court of the Supreme Court of South Australia held that the applicants had standing, having a special interest by virtue of owning or operating retail premises on adjoining land and their business being likely to be affected adversely by the competition of those businesses which would be established if the new retail and commercial development were to take place.¹⁸⁰

Other Circumstances

The above circumstances are merely illustrations of situations where the courts have found the plaintiff to have a special interest in the subject matter of the proceedings. There are, of course, many other circumstances which will, in appropriate cases, ground standing. As Mason J said in *Robinson v Western Australian Museum*¹⁸¹ the "cases are infinitely various and so much depends in a given case on the nature of the relief which is sought, for what is a sufficient interest in one case may be less than sufficient in another". Some other examples are to be found in the Australian Law Reform Commission's Report on *Standing in Public Interest Litigation*.¹⁸²

¹⁷⁸ (1981) 27 SASR 117 at 126; 59 LGRA 194 at 205-206. See also *Ansett Transport Industries (Operations) Pty Ltd v Air Express Ltd* (1979) 25 ALR 639; *Fraser Island Defenders Organisation Ltd v Hervey Bay Town Council* [1983] 2 Qd R. 72 for two other examples of cases where commercial interests have been held to constitute a "special interest" in the subject matter of the proceedings.

¹⁷⁹ (1984) 59 LGRA 244.

¹⁸⁰ (1984) 59 LGRA 244 at 247 per Zelling J with whose reasons Jacobs J agreed at 254 and at 255 per Millhouse J.

¹⁸¹ (1977) 138 CLR 283 at 327-328.

¹⁸² Report No 27, (AGPS, Canberra, 1985), pp 67-69. See also L Pearson, "Standing: Recent Developments and Future Possibilities", *Impact*, September 1988, p 1 and M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action*, (3rd ed, Law Book Co, Sydney, 2004), Ch 11, pp 653-674.