COMMENT

LOCUS STANDI AND ENVIRONMENTAL ISSUES

BY LINDA PEARSON*

The author examines the functions of standing rules applying to individuals or groups seeking the assistance of the courts to challenge public or private action affecting the environment. Possible reform of standing requirements to facilitate such challenges is assessed. Particular attention is focused upon the Environmental Planning and Assessment Act 1979 (N.S.W.).

Locus standi, or standing to sue, is the "right of an individual or a group . . . to have a court enter upon an adjudication of the issue brought before that court".[1] "Environmental issues" in the context of this comment cover the entire spectrum of concern for the environment; from preservation of wilderness areas and national parks to enhancing the quality of the air and water in our cities.

The more "traditional" areas of concern for the environment such as air and water pollution are the subject of regulatory legislation in New South Wales which depends on government agencies for enforcement.[2] The common law has provided some remedies for individuals seeking to protect the environment. However, these remedies have been restricted to those who can establish that they have been (or will be) affected by the actions of the defendant in a manner over and above society in general. The severe limitation of the rights of individuals at common law is illustrated by the field of tort liability known as nuisance.

Private nuisance is essentially concerned with protection of the property rights of the individual: "he alone has a lawful claim who has suffered an invasion of some proprietary or other interest in land".[3] The interference with those rights is judged according to "whether the act complained of is an inconvenience materially interfering with the ordinary comfort of human existence".[4] Public nuisance, conduct which "materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects who come within the sphere or neighbourhood of its operation",[5] can be restrained by an action of the Attorney-General, or of an individual who has suffered "greater damage or inconvenience . . . than the generality of the public".[6] The damage

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1 L. Stein (ed.) *Locus Standi* (1979) 3.

2 For instance the Clean Air Act 1961 (N.S.W.), Clean Waters Act 1970 (N.S.W.) and the Waste Disposal Act 1970 (N.S.W.).

3 *Read* v. *J. Lyons & Co. Ltd* [1947] A.C. 156, 183 *per* Lord Simonds.

4 *Halsey* v. *Esso Petroleum Co. Ltd* [1961] 2 All E.R. 145, 151 *per* Veale J. See also *Vanderpant* v. *Mayfair Hotel Co. Ltd* [1930] 1 Ch. 138, 165.

5 L. Bowden, "Evolution of Involvement of Lawyers in Environmental Problems" (1975) 49 *A.L.J.* 399, 401.

6 *Southport Corporation* v. *Esso Petroleum Co. Ltd* [1954] 2 All E.R. 561, 571 *per* Denning L.J.

suffered by the plaintiff may consist of general damage "provided that it is substantial, that it is direct and not consequential, and that it is appreciably greater in degree than any suffered by the general public".[7] The damage is not limited to actual pecuniary loss to the plaintiff. However, in order to obtain an injunction to restrain the nuisance the plaintiff must establish his right to damages resulting from the nuisance.[8] The difficulty with an action for public nuisance is that in many cases, such as those involving air pollution, there will not be a plaintiff who has suffered any greater damage than members of the public generally.

Challenges to the actions of administrative agencies, local government or judicial bodies are sometimes complicated by the historical development of public law remedies. For instance, the interest required to give an applicant standing to seek mandamus (compelling the performance of a public duty owed by the respondent) depends on whether the application is for the prerogative order of mandamus, or statutory mandamus pursuant to section 65 of the Supreme Court Act 1970 (N.S.W.). For the prerogative order, the applicant must show that he has a legal specific right to the performance of the duty. The courts have under this formulation accorded standing to "public interest" applicants,[9] most notably in this context to an objector challenging a mining warden's decision to recommend the grant of a mining lease for Fraser Island.[10] In an application for statutory mandamus pursuant to Section 65 the applicant need only show that he is personally interested in the performance of the duty. A familial interest will suffice.[11]

Applications for the prerogative remedies of prohibition and certiorari cause greater difficulty. An applicant for certiorari (an order quashing the decision of an administrator, inferior court or tribunal) or prohibition (an order prohibiting an inferior court, tribunal or administrator from continuing or commencing activities beyond their powers) must show that he is a person aggrieved by the decision.[12] "Person aggrieved" has received a liberal interpretation and would seem to include "any person who has a genuine grievance because something has been done or may be done which affects him . . ."[13] while excluding a person with no interest at all in the matter.

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[7] *Walsh* v. *Ervin* [1952] V.L.R. 361, 371 *per* Sholl J.

[8] H. Whitmore and M. Aronson, *Review of Administrative Action* (1978) 326-327.

[9] *Id.*, 482-483; E. Sykes, D. Lanham and R. Tracey, *General Principles of Administrative Law* (1979) 168-169.

[10] *Sinclair* v. *Mining Warden at Maryborough* (1975) 132 C.L.R. 473.

[11] *Bilbao* v. *Farquhar* (1974) 1 N.S.W.L.R. 377.

[12] H. Whitmore and M. Aronson, note 8 *supra*, 475-477; E. Sykes, D. Lanham and R. Tracey, note 9 *supra*, 161-163.

[13] *R.* v. *Liverpool Corporation; ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299, 309 *per* Lord Denning M.R.

Since damage to the environment cannot be adequately measured in monetary terms, and organisations which seek to protect the environment are in general seeking to prevent harm rather than obtain compensation for the damage done, the most useful remedies are the declaration and the injunction. In an application for a declaration the plaintiff needs to show that the dispute arises in some legal context but "so far from a legal right having to precede a declaration, the declaratory procedure can actually generate rights".[14] Instead of having to show that a legal right has been infringed, the plaintiff need only establish that he has a "real interest" in the issue.[15]

Applications for injunctions present even greater difficulty. An individual plaintiff may obtain an injunction where the harm done falls within the bounds of private nuisance, or public nuisance with particular damage to the plaintiff. The individual plaintiff also has standing to claim an injunction to restrain actions in breach of public statutory rights where some private right is interfered with at the same time, or where the plaintiff has suffered special damage from the interference with the public right.[16] The Attorney-General always has standing to sue to restrain illegal actions, and to grant his fiat to allow actions by private individuals unable to show special damage.[17] Recent cases have questioned the value of the relator action, for instance, where the Attorney-General refuses his fiat—a decision which is unreviewable.[18] Attempts by the English Court of Appeal in *Attorney-General (ex rel. McWhirter)* v. *Independent Broadcasting Authority*[19] and *Gouriet* v. *Union of Post Office Workers*[20] to give a private individual with "sufficient interest" standing "if the Attorney-General refuses leave in a proper case, or improperly or unreasonably delays in giving leave"[21] were overruled by the House of Lords.[22] Their Lordships felt that it was "the exclusive right of the Attorney-General to represent the public interest—even where individuals might be interested in a larger view of the matter".[23]

Helsham J. in *Benjamin* v. *Downs*[24] considered that the plaintiff, who had been refused the fiat of the Attorney-General, had "shown a sufficient interest in relation to a matter of great public importance . . .

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[14] *Johnco Nominees Pty Ltd v. Albury-Wodonga (N.S.W.) Corporation* [1977] 1 N.S.W.L.R. 43, 66 *per* Hutley J.A.

[15] *Forster* v. *Jododex Australia Pty Ltd* (1972) 127 C.L.R. 421, 438 *per* Gibbs J. (McTiernan, Stephen and Mason JJ. agreeing).

[16] *Boyce* v. *Paddington Borough Council* [1903] 1 Ch. 109.

[17] H. Whitmore and M. Aronson, note 8 *supra*, 337-338.

[18] *Id.*, 333.

[19] [1973] 1 Q.B. 629.

[20] [1977] 2 W.L.R. 310; [1977] 1 All E.R. 696.

[21] Note 19 *supra*, 649 *per* Lord Denning M.R.

[22] *Gouriet* v. *Union of Post Office Workers* [1978] A.C. 435.

[23] *Id.*, 481.

[24] [1976] 2 N.S.W.L.R. 199.

[t]he fact that he has not shown any illegality does not affect his right to have his complaint brought before the courts".[25] The decision of Helsham J. to accord the plaintiff standing (while refusing relief on the merits) was based on the decision in *McWhirter* and hence its correctness is doubtful since the House of Lords decision in *Gouriet*. Helsham J. did not consider the possibilities arising out of section 66(1) of the Supreme Court Act 1970 (N.S.W.) which arguably gives the Supreme Court as much scope to grant injunctions as it has under section 75 of the same Act to grant declarations; possibly the injunction can now be used in New South Wales to protect rights and interests beyond purely legal or equitable rights.[26]

The decision of the House of Lords in *Gouriet* reinforces the unwillingness of the courts to make decisions about the public interest preferring to leave such decisions to the Attorney-General. The difficulty with this division of responsibility is that it increases the potential for a conflict of interests in complex political and social situations. The decision of the Tasmanian Cabinet to refuse a fiat to a group seeking to challenge the flooding of Lake Pedder by the Tasmanian Hydro-Electric Commission in 1972[27] illustrates the way political considerations can prevent review of possibly illegal action. The *Black Mountain Tower* case[28] has been regarded as an exception to the usual difficulty of obtaining a fiat to challenge legislation or administrative actions of the government of which the Attorney-General is a member.[29] In fact, the case highlights the real deficiencies in a requirement that an individual obtain the fiat of the Attorney-General to challenge where no private right is affected. After granting his fiat (two days before the case opened in the Supreme Court of the Australian Capital Territory)[30] the Attorney-General removed his name from the proceedings as soon as they commenced. Fortunately for the plaintiffs Fox J. treated the withdrawal as incidental and proceeded to consider the interlocutory application.[31] The case highlighted the absurdity of requiring the approval of the Attorney-General to initiate the proceedings while the Department of the Attorney-General was, at the same time, providing legal advice to the defendant government department as well as

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[25] *Id.*, 211.

[26] H. Whitmore and M. Aronson, note 8 *supra*, 319.

[27] Australian Law Reform Commission Discussion Paper No. 4, *Access to the Courts—I: Standing: Public Interest Suits* (1978) 10.

[28] *Kent* v. *Johnson* (1973) 21 F.L.R. 177; on appeal to the High Court, *Johnson* v. *Kent* (1975) 132 C.L.R. 164.

[29] G. Taylor, "Standing to Challenge the Constitutionality of Legislation" in L. Stein (ed.), note 1 *supra*, 143; L. Stein, "The Theoretical Bases of Locus Standi", *id.*, 12.

[30] W. Hancock, *The Battle of Black Mountain* (1974) 24.

[31] *Id.*, 12.

objecting to the tendering of evidence on the ground of public interest.[32] This basic conflict of interests could be resolved, on at least a superficial level, by allowing the defendant government department to obtain advice elsewhere,[33] or by divorcing the Attorney-General from the interests of the plaintiff.[34] The latter would be preferable.

The right of individuals who have become involved in the planning process through participation in inquiries and lodging objections to appeal against or seek review of subsequent planning decisions is limited in Australia. The Environmental Planning and Assessment Act 1979 (N.S.W.) passed in November 1979 after a period of public discussion and submissions,[35] gives individuals the right to participate in public inquiries and the right to appeal against unfavourable decisions. The Act provides for three levels of environmental planning instruments: state environmental planning policies, regional and local environmental plans. Before regional and local plans are prepared, public notice must be given of intention to prepare the plans: sections 42 and 58.

Submissions on the aims, objectives, policies and strategies which should be adopted can be made: sections 42 and 58. Once a draft regional or local plan is prepared, public exhibition (sections 47 and 66) and opportunity for submissions (sections 48 and 67) must follow. State environmental planning policies will be made by the Governor on recommendation of the Minister: section 39(4). Before making the recommendation the Minister is required to take such steps as he considers necessary to publicise a draft state policy and seek submissions from the public: section 39(2). In the original form of the Bill, the decision to publicise the draft plan and invite submissions from the public was entirely at the discretion of the Minister. The discretion of the Minister now relates to the form of publicity.

In applications for approval of "designated developments" section 87 gives *any* person the right to object and any objector must be notified of the result of the application: section 95. If the application is rejected the applicant has twelve months in which to appeal: section 97(1). The objector must be notified of the appeal and has the right to be heard at the appeal: section 97(2). If the application is approved, the objector has the right to appeal within 28 days: section 98(1).

The courts have previously been reluctant to imply a right of third party appeal in the absence of clear legislative intention. Sugerman J.,

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[32] *Id.*, 30.

[33] *Id.*, 19.

[34] Australian Law Reform Commission, note 27 *supra*, 13-14.

[35] The other parts of the legislative package aimed at instituting a new system of planning and assessment are the Land and Environment Court Act 1979 (N.S.W.), Miscellaneous Acts (Planning) Repeal and Amendment Act 1979 (N.S.W.), Heritage (Amendment) Act 1979 (N.S.W.) and Height of Buildings (Amendment) Act 1979 (N.S.W.).

in *Greenberg* v. *Sydney City Council*[36] interpreted the phrase "any person who is dissatisfied with the decision of the council . . . may appeal to the Land and Valuation Court" in section 342N(2) of the Local Government Act 1919 (N.S.W.) as being restricted to the class of persons who could apply for development consent. There is some support for the view that an objector taking part in an initial inquiry has the right to challenge the validity of the decision arrived at as a result of the inquiry.[37] A major unresolved question in the provision for third party appeals in the Act is their scope. The rights of objectors relate only to "designated developments". In the original form of the Bill, clause 4 defined designated development as any class or description of development designated as development that if carried out would be likely to have a significant impact on the amenity of the locality. The Act no longer contains the "significant impact" test. Section 4 defines designated development as any class or description of development that is declared under section 29 (in an environmental planning instrument) or section 158 (in the regulations) to be a designated development for the purposes of the Act. Designation of only a few classes of development would greatly restrict public participation in the planning process.

With regard to public participation in planning, section 123 of the Act is extremely significant. It provides that any person may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of the Act, whether or not any right of that person has been infringed as a consequence of that breach. A breach of the Act as defined in section 122 includes a breach of an environmental planning instrument, a consent granted under the Act or a condition subject to which a consent is granted. Section 123(2) allows proceedings by individuals or groups whether incorporated or not. Further, section 123(3) effectively removes the threat of prosecution for maintenance of actions financed by several people.[38]

Concern for the environment is to a large extent a relatively recent phenomenon. Past obsessions with expansion of population and industry are reflected in the legal system: "[t]here is as yet little legal or governmental machinery which can be used by citizens to challenge governmental or private actions which are felt to be against the interest of the public".[39] Arguably the courts, given time, will adjust to new concerns and provide

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[36] (1958) 3 L.G.R.A. 223, 225.

[37] *Turner* v. *Secretary of State for the Environment* (1974) 28 P. & C.R. 123; *Sinclair* v. *Mining Warden at Maryborough*, note 10 *supra*, 478 *per* Barwick C.J. (Murphy J. agreeing).

[38] Although a financial contribution to an action to restrain a breach of the Act might be classed as "prompted by a desire to advance the cause of justice" and thus be a situation in which interference would be justified: J. Fleming, *Law of Torts* (5th ed. 1977) 615.

[39] *Report of the Committee of Inquiry into the National Estate* (1974) para. 1.50.

machinery as they did in *Donoghue* v. *Stevenson*[40] to cope with mass production of consumer goods and in *Hedley Byrne & Co. Ltd* v. *Heller & Partners Ltd*[41] to cover increased commercial sophistication.[42] There is little evidence of such an adjustment so far in Australia. For instance, *Stow* v. *Mineral Holdings (Aust.) Pty Ltd*[43] turned on the interpretation of "estate or interest" in section 15C of the Mining Act 1929 (Tas.). The Supreme Court of Tasmania and the High Court confined "interest" to its traditional proprietary context. The argument that the appellant objectors had an interest in land (managed by the National Parks and Wildlife Service) which they used as members of the public[44] was rejected:

> The fact that some of them are more disposed to go upon the land than others, derive more benefit therefrom and use the statutory rights more often than others does not elevate that which is a public right enjoyed by all members of the public equally into a private right capable of being described as an estate or interest in the land.[45]

A similar argument in *Kent* v. *Johnson*[46] that a public trust arose out of the declaration of Black Mountain as a public park such as to require maintenance of the environmental quality of the mountain was dismissed.[47] The further argument that disfigurement of the skyline constituted a public nuisance was also dismissed.[48]

The issue of standing is crucial to any development of a responsive legal system. Environmental quality and the responsibility for its maintenance should be a concern of the individual citizen and cannot safely be left to government or industry.[49] However, the difficulty is that "by its very nature the public interest in conservation . . . is far more difficult to quantify in economic terms than is the private interest in industrial, commercial or other projects which can result in loss or destruction of this public interest".[50] Courts feel most comfortable balancing competing private interests, particularly pecuniary interests. The very strict interpretation of standing requirements is one of the ways in which courts opt out of difficult issues. Other ways of opting out are classification of the issue as hypothetical, political, or non-

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[40] [1932] A.C. 562.

[41] [1964] A.C. 465.

[42] L. Bowden, note 5 *supra*, 399.

[43] [1975] Tas. S.R. 25; (1977) 51 A.L.J.R. 672 (High Court).

[44] *Id.*, 56. The appellant objectors were members of the Launceston Walking Club, the Tasmanian Conservation Trust and the South-West Committee.

[45] Note 43 *supra*, 679 *per* Aickin J.

[46] Note 28 *supra*.

[47] *Id.*, 221.

[48] *Id.*, 212.

[49] C. Loorham, "The Impact of Environmental Legislation in the Seventies" (1975) 49 *A.L.J.* 407.

[50] *Committee of Inquiry*, note 39 *supra*, para. 1.5.

justiciable.[51] One reason for insisting that the plaintiff have a personal stake in the outcome of the case before a court is to "assure that concrete adverseness which sharpens the presentation of issues on which the court so largely depends for illumination of difficult [legal or] constitutional questions".[52] This factor has not been articulated by Australian courts.[53] The fear that the plaintiff will not produce a thorough and complete argument unless affected by the decision of the court is unfounded:

> [T]he very fact of investing money in a lawsuit from which one is to acquire no further monetary profit [suggests] . . . a quite exceptional interest, and one peculiarly indicative of a desire to say all that can be said in the support of one's contention.[54]

Denying the "non-Hohfeldian" or "ideological" plaintiff standing on the effectiveness of his advocacy alone is not the issue. Another possible foundation for strict standing requirements is an unwillingness to overburden the resources of the courts. The fear that once review is widely available, the courts would be inundated with delaying and frivolous actions seems unrealistic: "when the 'floodgates' of litigation are opened to some new class of controversy by a decision, it is notable how rarely one can discern the flood that the dissenters feared".[55]

The floodgates argument ignores the effect of well chosen test cases, and the limiting effect which litigation costs have on the number and types of actions brought. Only important cases will be litigated, particularly when the defendant is a government agency with much greater financial resources than an individual or group of plaintiffs.[56] As the *Black Mountain Tower* case shows:

> The argument of statutory powers still remained open to us . . . we did not then propose to emphasise that argument because it would almost certainly consume a great deal of time. Time meant money, and we were short of money. Whereas our opponents were spending taxpayers' money on the legal battle, we were spending money freely donated by public-spirited citizens.[57]

The experience of Michigan illustrates the fallacy of the floodgates argument. The Michigan Environmental Protection Act[58] allows "any

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[51] L. Stein, note 1 *supra*, 5.

[52] *Baker* v. *Carr* 369 U.S. 186, 204 (1962).

[53] With the exception of Murphy J. in *Attorney-General (Cth) ex rel. McKinlay* v. *Commonwealth* (1975) 135 C.L.R. 1, 76.

[54] L. Jaffe, "The Citizen as a Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff" (1968) 116 *U. Pa Law Rev.* 1033, 1038.

[55] K. Scott, "Standing in the Supreme Court—A Functional Analysis" (1972) 86 *Harv. Law Rev.* 645, 673.

[56] *Ibid.*

[57] W. Hancock, note 30 *supra*, 26.

[58] Mich. Comp. Laws Ann. §§691.1201-1207 (Supp. 1973), Mich. Stat. Ann. §§14.528 (201)-(207) (Supp. 1973).

person . . . association, organisation . . . [to] maintain an action . . . for protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction". In the first three years after its enactment only 74 cases were initiated.[59] The overwhelming majority of cases were the subject of only one proceeding —hardly a flood.[60]

Perhaps what really lies behind the "allocation of judicial resources" argument is an unwillingness of courts to get involved in an area in which most lawyers have no special competence. However, it is the function of courts to resolve conflicts of interest; there are many areas of specialist knowledge that lawyers have mastered and arguably they should become more informed about environmental issues.[61] Inadequacy of judicial remedies leaves concerned individuals with two choices: resort to extra-legal means such as Green Bans,[62] or no remedy at all.[63]

The approach of the United States Supreme Court illustrates the possibilities given a court prepared to give standing in genuine public interest actions. Despite some doubts as to the appropriateness of judicial involvement in complex social problems, its "intervention has undoubtedly stimulated action where stagnation was the rule".[64] Working from the federal legislative formulation of the interest required (in terms similar to some Australian legislation[65]) "person aggrieved",[66] the Supreme Court has been

> recognising that injuries other than economic harm are sufficient to bring a person within the meaning of the statutory language, and toward discarding the notion that an injury that is widely shared is *ipso facto* not an injury sufficient to provide the basis for judicial review.[67]

The starting point for widening standing beyond protection of legal interests was *Association of Data Processing Service Organisations* v. *Camp*.[68] It was there held that persons had standing to challenge federal

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[59] J. Sax and D. Mento, "Environmental Citizen Suits: Three Years' Experience under the Michigan Environmental Protection Act" (1974) 4 *Ecology L.Q.* 1,7.

[60] *Id.*, 37.

[61] C. Loorham, note 49 *supra*, 409.

[62] *Id.*, 408.

[63] *McKinlay's* case, note 53 *supra*, 71 *per* Murphy J.: "If the legislature fails to ensure fairness, and there is no constitutional right enforceable in the courts, where is the remedy?"

[64] W. Ruckelshaus, "Environmental Protection in the United States—The State of the Art" in *Seminar on Environmental Law: The Australian Government's Role* (1975) 5, 9.

[65] Both the Environment Protection Act 1970 (Vic.) s. 32(5) and the Environmental Protection Act 1971 (W.A.) s. 43(2) allow "aggrieved persons" to appeal to administrative bodies: P. Opas, "The Place of the Lawyer in the Administration of Environmental Legislation" (1975) 49 *A.L.J.* 411, 413.

[66] Administrative Procedure Act 5 U.S.C. 702 §10(a).

[67] *Sierra Club* v. *Morton* 405 U.S. 727, 738 (1972) *per* Stewart J.

[68] 397 U.S. 150 (1970).

agency actions when the action caused "injury in fact"[69] and where the alleged injury was to an interest arguably within the zone of interests protected by the statutes allegedly violated. *Data Processing* involved economic damage. In *Sierra Club* v. *Morton*[70] the Supreme Court had to consider *non-economic* injury to interests shared by a number of people. The majority considered the threat to the aesthetics and ecology of the Mineral King Valley by a proposed $35 million resort development could amount to an "injury in fact" sufficient to lay the basis for standing under section 10 of the Administrative Procedure Act.[71] However, the Sierra Club was denied standing since it had not shown that any of its members would be directly affected in their use of Mineral King.[72] Had the Club been accorded standing, the Court would have considered the general public interest in support of their claim but the public interest argument was not enough by itself to give standing.[73] In *U.S.* v. *Students Challenging Regulatory Agency Procedures*[74] the respondents alleged in their pleadings that each of its members "suffered economic, recreational and aesthetic harm directly as a result of the adverse environmental impact of the railroad freight structure".[75] The respondents were held to have sufficient standing but lost on the merits.

The dissenting judgments of Douglas and Blackmun JJ. in *Sierra Club* v. *Morton* illustrate alternative approaches to what the majority characterised as an attempt "to do no more than vindicate [the Club's] own value preferences through the judicial process".[76] Douglas J. felt that

> the critical question of "standing" would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled . . . and where injury is the subject of public outrage.[77]

Blackmun J., as an alternative to allowing the Sierra Club to amend its complaint to meet requirements of the Court for standing, suggested that the Court should

> permit an imaginative expansion of our traditional concepts of standing in order to enable an organisation such as the Sierra Club, possessed, as it is, of pertinent, bona fide, and well-recognized attributes and purposes in the area of environment, to litigate

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[69] *Id.*, 152.
[70] Note 67 *supra.*
[71] Note 66 *supra.*
[72] Note 67 *supra*, 735.
[73] *Id.*, 737.
[74] 412 U.S. 669 (1973).
[75] *Id.*, 678.
[76] Note 67 *supra*, 740.
[77] *Id.*, 741.

> environmental issues. It is no more progressive than was the decision in *Data Processing* itself.[78]

The proposal of Douglas J. has little chance of receiving approval: "acceptance of legal personality by the courts for previously 'rightless' bodies or things is an infrequent occurrence".[79] The proposal of Blackmun J. may have some chance of acceptance in the United States Supreme Court. However, it would require a revolution in judicial thinking for it to be accepted in Australia.

The High Court reaffirmed its unwillingness to extend standing in public interest litigation in *Australian Conservation Foundation Inc.* v. *Commonwealth of Australia.*[80] The Foundation challenged the Federal Government approval of the Iwasaki-Sangyo Corporation's development at Yeppoon in Queensland. The Foundation based its standing on the nature of the Foundation and its objects and the fact that it had sent written comments when the draft environmental impact statement was made available. The majority, Gibbs, Stephen and Mason JJ., refused to allow the Foundation standing on the ground that "[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".[81] This was despite the fact that the Australian Conservation Foundation was an organisation with 6500 members, funded in part by the Federal Government, pursuing its objectives by participating in consideration of the impact of the proposed development on the environment by written submissions. With one reservation as to the constitutionality of legislation extending standing[82] the High Court clearly felt that any change would need to be by way of legislation.

Given the reluctance of Australian courts to extend standing in public interest litigation, the decisions in *Stow* and *Australian Conservation Foundation* being prime examples, it would seem that any change must come from legislation: "[t]he present results of judicial decision over a wide spectrum are not re-assuring and . . . the courts are likely to be trammelled by the particular considerations developed in relation to each remedy".[83] There are several possible forms such legislation could take. Dr Taylor argues that individual standing should be widened to include persons "really concerned",[84] but that this would not by itself

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[78] *Id.*, 757.

[79] L. Stein, note 1 *supra*, 7.

[80] (1980) 54 A.L.J.R. 176.

[81] *Id.*, 182 *per* Gibbs J.

[82] *Id.*, 189 *per* Mason J.

[83] E. Sykes, "Suggested Reform: A General Rule" in L. Stein (ed.), note 1 *supra*, 233-234.

[84] G. Taylor, "Rights of Standing in Environmental Matters" in *Seminar on Environmental Law: The Australian Government's Role* (1975) 46, 61.

ensure the proper guarding of the public interest. He proposes the creation of an environmental ombudsman, independent of government and private lobbies, with power to sue as plaintiff or objector, and able to appear as *amicus curiae* in actions brought by individuals.[85] If such a watchdog would merely replace the current screening function of the Attorney-General, his existence would be of questionable value.[86] There is also a psychological barrier that the existence of the ombudsman would imply. In an area of importance to the public, concerned individuals should be able to take direct action to enforce their rights without having to approach yet another administrative agency.[87]

Professor Sykes has proposed guidelines of the interest required of an applicant seeking review of an administrative decision or alleging invalidity of legislative or administrative action:

> [I]t should be enough that the applicant is affected, will be affected or is reasonably likely to be affected by the action or inaction in relation to (a) his business or trade interests, (b) his enjoyment of material amenities, (c) his enjoyment of personal liberty or (d) his enjoyment of relationships with the close members of his family.[88]

This general formulation would still exclude the applicant claiming standing because of a purely ideological commitment such as concern for the environment. Professor Sykes argues that environmental issues should constitute an exception and that there should be no standing rules in such cases.[89] Such legislation would require "a consummate exercise of the draftsman's art"[90] in defining the extent of the exception. Arguably there are other "ideological" commitments such as challenges to the constitutional validity of legislation which should also be part of this exception.

The Australian Law Reform Commission has proposed[91] a standing formula based on the "real concern" of the plaintiff. The Commission made it clear that "concern" is not to be judged on traditional rules.[92] The plaintiff would still need to show that the issue was justiciable. The "open door" policy would still leave the courts with the discretion to grant or refuse relief. However, the discretion would be exercised on the merits of the case, not on the characterisation by the court of the interest of the plaintiff.[93] This proposal would appear to be eminently sensible. In cases where the plaintiff has what the courts would consider to be an individual interest meriting protection, such as legal or statutory

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[85] *Id.*, 57.
[86] Australian Law Reform Commission, note 27 *supra*, 20.
[87] J. Sax, *Defending the Environment* (1971) 58.
[88] L. Stein, note 1 *supra*, 233.
[89] *Id.*, 234.
[90] *Ibid.*
[91] Australian Law Reform Commission, note 27 *supra*, 20.
[92] *Id.*, 17.
[93] *Id.*, 16.

rights, the court would find it difficult to deny that the plaintiff had a "real concern". Standing in such cases would effectively be automatic, while the width of the formulation would allow plaintiffs who previously have been denied standing to argue their case. Reliance upon a sensible exercise of discretion by the courts would lead to no more uncertainty than exists at the moment. In some instances the courts have ignored the lack of standing of the plaintiff and considered the merits of the argument. In *Prescott* v. *Birmingham Corporation*[94] the plaintiff in an action as a ratepayer without the fiat of the Attorney-General obtained a declaration that free transport for the elderly was illegal. In *Environmental Defence Society Inc.* v. *Agricultural Chemicals Board*[95] Haslam J. held that the Society, whose " 'special interest' was no more than the personal concern that might be felt by any responsible private citizen with strong views upon the dangers of chemical contamination"[96] had no standing without the fiat of the Attorney-General. However, the judge then proceeded to consider and dismiss the application by the Society for mandamus on the merits.[97]

Having accepted a "real concern" standing test, it would seem simpler to go the whole way and allow standing to "any person" along the lines of the Michigan Environmental Protection Act. This would avoid the limitations of past standing formulations. Section 80(1)(c) of the Trade Practices Act 1974 (Cth) allowing any person, as well as the Minister and the Trade Practices Commission, to take proceedings to restrain a breach of the Act does not appear to have caused much difficulty. To borrow an expression of Lord Edmund-Davies in *Gouriet*, "the heavens have not fallen and the stars stay in their courses".[98] In *World Series Cricket Pty Ltd* v. *Parish*[99] it was "common ground that no question arose as to the right of the respondent to commence the proceedings".[100] In *Phelps* v. *Western Mining Corporation Ltd*[101] the standing of the plaintiff "derived from the fact that the essential nature of his suit is one for the protection of the public interest . . . it is irrelevant whether an interest of his own is affected or not".[102]

Section 123 of the Environmental Planning and Assessment Act 1979 (N.S.W.) is a significant step in this direction, allowing any person to bring proceedings to remedy or restrain a breach of the Act. This would include a breach (or apprehended breach) of an environmental planning instrument, a consent granted under the Act, or a condition attached to

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[94] [1955] 1 Ch. 210.
[95] [1973] 2 N.Z.L.R. 758.
[96] *Id.*, 762.
[97] *Id.*, 767.
[98] [1978] A.C. 435, 507.
[99] (1977) 16 A.L.R. 181.
[100] *Id.*, 193 *per* Franki J. See generally *R.* v. *Judges of the Federal Court of Australia; ex parte Pilkington A.C.I. (Operations) Pty Ltd* (1978) 23 A.L.R. 69.
[101] (1978) 20 A.L.R. 183.
[102] *Id.*, 187 *per* Bowen C.J.

the granting of a consent under the Act. The Land and Environment Court will have power to make any order it thinks fit to remedy or restrain a breach of the Act where it is satisfied that a breach has occurred, or will occur unless restrained: section 124(1). Presumably the Court would normally grant an injunction to restrain the breach: section 124(2)(a). However, the orders can include orders to demolish or remove buildings or works erected in breach of the Act, or require the reinstatement so far as practicable of buildings, works or land to the condition they were in before the breach was committed: section 124(2)(b) and (c).