357

ENVIRONMENTAL LAW ASSOCIATION OF N.S.W.
ENVIRONMENTAL LAW SECTION - LAW INSTITUTE OF VICTORIA

FIRST ENVIRONMENTAL LAW SYMPOSIUM

SYDNEY 23 OCTOBER 1982

STANDING: AN AUSTRALIAN OVERVIEW

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

ENVIRONMENTAL LAW ASSOCIATION OF N.S.W.
ENVIRONMENTAL LAW SECTION - LAW INSTITUTE OF VICTORIA

FIRST ENVIRONMENTAL LAW SYMPOSIUM

SYDNEY 23 OCTOBER 1982

STANDING: AN AUSTRALIAN OVERVIEW

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

LAW REFORM AND NAPOLEON

Incipient Bonapartism should not be attributed to the Australian Law Reform Commission simply because I begin this talk with a reference to Napoleon. He was, of course, a considerable law reformer. Codification of French law - the basis of the legal systems not only of Europe but of most of Latin America and even the private law of China and Japan - can be attributed directly to Napoleon's initiatives. I do not wish to talk of these today, though I am sure we could learn from examination of the development of the 'interet collectif' in French administrative law.[1] It is rather Napoleon's view about delay that I wish to address at the outset of my remarks. You will recall that the Emperor adhered throughout his life to the opinion that no correspondence should ever be answered for a period of six months at least. If the issue was then still important enough, he would deign to answer it.

Can this principle be applied to the law and law reform? In 1977 the Commonwealth Attorney-General assigned to the Australian Law Reform Commission an enquiry into the law governing standing to sue in Federal and other courts whilst exercising Federal jurisdiction.[2] The related issue of class actions was also referred. Under the leadership of Mr. Murray Wilcox, Q.C., then a full-time Commissioner, a discussion paper on standing was issued late in 1977. Subsequently public hearings were held. In the intervening years, a number of decisions and legislative and other initiatives have occurred which have been considered in some places to represent significant steps forward in the provision of access to the courts in Australia. Two leading decisions have been delivered by the High Court of Australia, namely, the Australian Conservation Foundation case[3] and the Onus case.[4] In the first, the Court ventured a test for standing, apparently wider than that offered in earlier English decisions. In the latter, it reversed decisions in the Supreme Court of Victoria, holding that Aboriginal appellants

were not shown to lack standing as custodians of relics on land to be developed for industrial use. Applying Napoleon's thesis, is there still a need for law reform? I shall answer this question in the affirmative by reference to Australian developments. I shall then review the options before the Law Reform Commission before offering a few general conclusions. I fully realise that the novel and innovative reforms of environment law in New South Wales have swept aside in that field much of the law of standing - so far with no untoward effects. However to understand why that law of standing persists elsewhere - and what its present state is - we must look to the rationale of standing law and the current formulations of it in the general law of Australia. Only if this is done will it be possible to ask the question - whether the New South Wales experience in environment law can be exported and extended.

THE SOCIOLOGY OF STANDING

It is usual to start with definitions. Locus standi or standing to sue I take to be the 'right of an individual or group...to have a court enter upon an adjudication of the issue brought before that court'.[5] The orthodox test applied by Australian courts for many years in determining, in public law cases, whether the plaintiff could bring an action before the court, was Mr. Justice Buckley's formulation in Boyce v. Paddington Borough Council[6]:

> 'A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such that some private right of his is at the same time interferred 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'.

Australian courts and legislatures were until quite recently content with the legal and political theory behind the English rules as to 'standing'. This theory asserted that it was not for a private individual to enforce laws operating generally for the benefit of the community, unless he had some particular stake in the issue which took his interest beyond that of an ordinary taxpayer, citizen or member of the public. If his interest was simply in this last category, he required (certain specific statutory exceptions apart) the approval or fiat of the Attorney-General, who could be taken to represent the general public interest, before being heard by the court. Strong feelings and even gross illegalitiy or unlawfulness were not enough. The Attorney-General's fiat was necessary to assure that it was appropriate in a wider community interest to entertain the plaintiff's challenge.

Mr. Justice Murphy has recently declared that this rule of standing was a mere 'judicial invention'.[7] If so, the 'invention' developed over many years. And it has lasted many years. Though few judges paused to identify the policy reasons behind the requirements of 'standing', it should not be thought that the rule - whether in environmental or other litigation - was simply developed by cantankerous conservatives, described by one judge recently as 'bewigged relics of a bygone era'.[8] If they had stopped to identify the reasons for the standing requirement they might have offered some at least of the following:

* Adversary system: The trial system we have inherited from England depends largely for its success upon well-matched adversaries, with a motivation sufficient to ensure that the issues will be refined and presented with vigour to the court and an interest such that the issue will be clearly defined. The requirement of a personal interest or specific stake in the outcome of the litigation could be seen as the best guarantee of this.

* Floodgates: Fear is always expressed about a flood of litigants troubling busy judges and inconveniencing distracted fellow citizens, with expensive litigation on issues in they have no material claim but simply an ideological, intellectual or political concern.

* Political: Such general political, philosophical or ideological questions, it is argued, should be handled through more representative organs of government than the unrepresentative and unresponsive judiciary. In inter-partes litigation, the courts can come to grips with narrow issues, susceptible of curial resolution. Questions of a broader character - such as are often involved in environmental cases - should, according to this view, be dealt with elsewhere: in less expensive, less time-consuming, less frightening and more flexible procedures of decision-making, more responsive to the public interest.[9] Moreover, in environmental cases especially complex questions not appropriate for the courts may be raised. These include decisions on scientific and technical controversies, risks, multiple parties' disputes, multiple choice decisions, distributions of gains and losses and so on.

* Reserve: There was probably a further semi-political factor. We all know of the English characteristic of 'reserve'. It is not only a personal and national characteristic. It tends to affect institutions. It is relevant to our liberties. The English concept of keeping the State out of the life of ordinary citizens is very much reflected in our accusatorial criminal justice system. It influenced, I believe, the notion that litigation was a bad and undesirable thing and should not be encouraged. It affected the judicial attitude that judges should not make orders, fussing about to

ensure that the law was always enforced, unless there was a good reason for them to do so in the instant case. The impediment of 'standing' was merely one incident of this attitude.

* Economics: A further consideration was the cost of litigation, both direct and indirect for the parties involved and for the whole community. Standing rules were seen as a guarantee that the cost rules would be observed by a viable party. Opponents should not be dragged into court without a fair measure of assurance that they would get most of their costs from an interested party if they succeeded. Hypothetical and community litigants might not be as safe for costs as litigants with a personal stake in the case.

* Judicial psychology: Then there is the issue of the psychology of the Bench. Judges, it is said, are a generally conservative breed who, at least in the Anglo-Australian tradition, dislike broad policy questions such as are more overtly raised if the preconditions of standing are relaxed.[10] In these circumstances, the standing requirement represents a handy means of postponing a difficult policy question to another place (the Legislature or the Executive) or to another time (some other judge who has no excuse but to deal with the substantive issue). This tendency to resort to the law of standing as an escape hatch or to overlook it where a case can be dismissed on the merits was referred to by Mr. Justice Murphy in the Onus case. According to him:

'Often...where a plaintiff seeks to have litigated an issue which is awkward because it questions dominant social institutions or relationships, standing looms large'.[11]

* Alternatives: Quite apart from urging political, administrative and other non-judicial alternatives to wider standing, many lawyers and even more judges might consider that the present law is adequate or could be appropriately developed with a little imagination. Test cases, the development of amicus curiae proceedings or the expansion of advisory opinions might be seen as a preferable way ahead, rather than expanding the rights of private litigants.

* Constitutional: A constitutional impediment to reform, at least in Federal courts, has been hinted at and reserved by at least Mr. Justice Mason in the High Court. By inference, this must raise the issue of whether Parliament can intrude into the judicial realm and tell the court who will be heard in litigation. The constitutional requirement that courts adjudicate on a 'matter' may imply some limitations. This issue has also been debated in the United States.

* Institutional law reform: Another reason offered by some Justices for leaving the general law of standing as it is has been the action of the Executive Government in referring reform to the Law Reform Commission, in a process of consultation and public debate which is said to be more appropriate than curial inventiveness. Critics, however, have pointed to the uncertainty, and certainly the slow pace, of much institutional law reform.

What I am suggesting is that various factors, some only of which I have mentioned, have contributed to the development or lack of development of Australia's law on standing. But a number of considerations have lately contributed to calls for change.

* Historical: The first is a growing realisation that the individualistic philosophy of rights of the 19th Century must now give way to legal reforms to permit representation for more 'diffuse' interests, particularly in areas of consumer or environmental protection.[12] The law, reflecting, as it tends to do, earlier times, continues to reflect the society in which economic interests predominate. Only recently have changed values begun to develop. Now the moves are afoot to reflect changing social values in the law. Mr. Justice Stewart in the United States Supreme Court put this thought well:

'Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process'.[13]

* Political: Murray Wilcox has pointed to the political movement that is leading to greater public participation in government generally and in administrative decision making in particular.[14] Even the recent debate about a special Australian doctrine of responsibility of Ministers is relevant here. Ministers are no longer responsible to the Parliament and thence to the electorate for the mistakes and misconduct of individual government officials. Everyone agrees that it is necessary to build new checks and balances to ensure that the law of the land is observed and that administrators who fail to do so are made accountable somewhere. This is essentially the philosophy behind the new Federal administrative law.[15] It is the principle that is leading to demands that environmental and like decisions should not be made by bureaucracies behind closed doors but should be publicly accountable - including by scrutiny against laws passed for the protection of the general public.[16] To those who say that the general public can look to the Attorney-General and the issue of a fiat in appropriate cases and who suggest that

the Attorney-General has a separate non-political function in our democracy to uphold the law, one need only refer to the numerous cases mentioned in the Law Reform Commission's discussion paper where fiats have been refused for reasons never publicly stated, where Attorneys inclined to give the fiat have been forced to resign or where claimants have been long delayed.[17] Anyone with lingering doubts should read the pamphlet 'Erosion of the Judicial Process' by M.J. Ely reflecting on the efforts to get a fiat to test government aid to church schools in Australia against Section 116 of the Australian Constitution.[18] Whatever one's philosophy about State aid, the tale of prevarication, buck-passing, and political expediency told in that story reflects little credit upon our constitutional government, the rule of law and the administration of justice in this country. The effort to get a fiat began in 1957 and only succeeded through chance factors in Victoria in 1973. Only one fiat has ever been granted by the Commonwealth Attorney-General to permit scrutiny of the legality of Commonwealth action. This history prompted even the normally circumspect Mr. Justice Gibbs to comment:

'I would...think it somewhat visionary to think that the citizens of a State could confidently rely upon the Commonwealth to protect them against unconstitutional action for which the Commonwealth itself was responsible.'[19]

* Floodgates: So far as the 'idle and whimsical plaintiff' who 'litigates for a lark'[20] is concerned, it is now generally conceded that the costs, delays and other impediments to litigation are, in terms of social policy (individual cases apart) sufficient protection against foolish, nuisance litigation. Other protections exist, including the court's power to strike out frivolous and vexatious litigation, orders for costs and the general judicial control of proceedings, to say nothing of the tremendous advantage in litigation of those public and private litigants flush with funds, when compared to publicly spirited groups and individuals.

* Alternatives: So far as development of alternatives to enhanced standing is concerned, present procedures limit intervention and amicus curiae litigants and in any case restrict them to reacting not initiating proceedings. Constitutional limitations have been interpreted to restrict the availability of advisory opinions - a matter shortly to be considered by the Constitutional Convention. Test cases depend too much upon the availability of particular litigants and their willingness to press through with what is often, for them, a harrowing ordeal. Furthermore, in much environmental litigation no test litigant with a special interest can be found.

And the laws of champerty and maintenance may still present an impediment to organising lawfully an appropriate test case.

THE AUSTRALIAN CASES

It is against a background of the understanding of the issues that are involved in reform of the law of standing, that I turn to the recent Australian decisions and ask whether, like Napoleon, the Law Reform Commission can now put the standing reference to one side.

Obviously, the starting point is the Australian Conservation Foundation case.[21] The Foundation brought proceedings against the Commonwealth and others challenging the validity of decisions to approve a proposal by a Japanese company to establish a tourist resort in Central Queensland or to approve exchange control transactions connected with the proposal. Declarations were sought that there had been a failure to comply with the Environment Protection (Impact of Proposals) Act 1974 and an injunction was sought. On preliminary objection, Mr. Justice Aickin found that the Foundation had no standing. On appeal the full High Court by a majority (Mr. Justice Murphy dissenting) affirmed this view. The first principle in the Boyce test was applied by the Court, the majority being able to find no suggestion that the legislation relied upon created private rights enforceable by private individuals without a fiat of the Attorney-General.

Turning to the second limb of the Boyce test, Mr. Justice Gibbs proposed a reformulation. As this reformulation was accepted by the majority and has been reaffirmed in the later Onus case, it is important to state it. It was seen by some early commentators as a liberalisation of the Boyce requirement:

> '[T]he formulation in...Boyce is not altogether satisfactory. Indeed the words...used are apt to be misleading. [R]eference 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"....[T]he broad test of special interest is, in my opinion, the proper one to apply.'[22]

Later in his reasons, Mr. Justice Gibbs elaborated this notion of 'special interest':

'[A]n 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'.[23]

It is notable, and in accordance with our judicial tradition, that in approaching the issue of formulation of the law of standing in the High Court of Australia, our Federal supreme court, no effort was made to address overtly the policy considerations which I have briefly sketched. Instead, the decision of an English judge sitting at first instance in 1903 is taken, because frequently applied, as the starting point for the issue. His formulae are analysed as if having the authority of legislation. A variation in the language is proposed, in much the same way as an amendment would be offered to a Bill passing through Parliament, and the debate is confined within the legal framework with which lawyers, trained in our tradition, are familiar and comfortable. Invitation by counsel for the Foundation to utilise the opportunity for a completely fresh reformulation of the standing test was declined.

The Australian Conservation Foundation decision was followed by the High Court in a number of cases. In Ingram v. The Commonwealth[24] Mr. Justice Gibbs held that the plaintiff, who sought a declaration that the Commonwealth by supporting the SALT II treaty was acting in breach of certain principles of international law, did not have any special interest in the subject matter of the action. In Day v. Pinglen Pty. Ltd.[25] the full High Court in a joint judgment held that the plaintiff, whose view of Sydney Harbour would be adversely affected by building activities on adjacent land, did have a special interest because of 'the existence of an impending detriment threatened by an unlawful act'.[26]

In Wacando v. The Commonwealth[27] the full High Court held that the plaintiff who was born on Darnley Island and proposed to carry out certain commercial activities on the seabed surrounding the island, had standing to claim a declaration that it did not form part of the State of Queensland. Most recently, in a decision the report of which I have not seen, Mr. Justice Mason dismissed, for want of standing, a claim against the Prime Minister and others by the Tasmanian Wilderness Society seeking to restrain Loan Council activity relevant to the proposed dams in Tasmania. The news reports at least suggested that the test had been applied as formulated in the Australian Conservation Foundation case.

But the most significant recent High Court decision is Onus v. Alcoa of Australia Limited.[28] This was the case in which two Aborigines, whose people had occupied the Portland area since prehistoric timed, sought an injunction to restrain Alcoa from carrying out works on land at Portland which would interfere with Aboriginal relics. They claimed to be custodians of the relics according to the laws and customs of their people and alleged a contravention of the Victorian Archeological and Aboriginal Preservation Act 1972. The full High Court unanimously reversed decisions dismissing the action on the ground of absence of standing. The Court concluded that the appellants did not have standing on the basis of interference with a private right. But a majority held that they had established standing, on the ground they had established a special interest in the subject matter of the action greater than that of other mere members of the public. How could this case be distinguished from the Australian Conservation Foundation case? Mr. Justice Stephen offered this explanation:

> 'The present appellants are members of a small community of Aboriginal people very long associated with the Portland area; the endangered relics are relics of their ancestors' occupation of that area and possess for their community great cultural and spiritual significance...[T]he importance of the relics to the appellants and their ultimate relationship to the relics readily finds curial acceptance. It is to be distinguished, I think, and will be perceived by courts as different in degree, both in terms of weight, and, in particular, in terms of proximity from that concern which a body of conservationists, however sincere, feels for the environment and its protection'.[29]

After the first flush of pleasure expressed in some quarters concerning the result of the Onus case and the direction it seemed to point had worn off, scholars began the painful task of actually analysing the reasons offered by the High Court Justices to see whether there was any important shift in articulated legal policy. Generally speaking, conclusions to date appear to be negative or at least pessimistic. Professor Blackshield has suggested:

> 'Any favourable prospect for...wider claims [for public interest litigation] must be found (paradoxically enough) in the highly unsatisfactory nature of the Court's distinction between the claims of a localised Aboriginal group and of the Conservation Foundation. Clearly, the Court has given new impact to its earlier statement that the test is "broad" and "flexible" and the cases "infinitely various"...The Court's responsiveness to community concern for legitimate Aboriginal claims is thus central to the Alcoa decision. But that means only that in

this case (in the words of Stephen J.) "the importance of the relics to the appellants and their intimate relationship to the relics readily finds curial acceptance'".

Is it nothing more than this? A reflection on the earlier policy considerations might suggest that it is not. Yet Mr. Justice Brennan was at pains in his decision in Onus to deny that it was simply a matter of judicial discretion - a judicial juggling of the social considerations involved, the aptness of the litigants and the timeliness of the case. Difficult questions of 'degree' may arise. But in Mr. Justice Brennan's judgment these questions must still be controlled by resort to 'legal principles'. In the present case, the 1972 Act. This assertion does not appear to square up readily with the candid and 'strikingly perceptive'[30] observation of Mr. Justice Stephen to the effect that there is:

'No ready rule of thumb capable of mechanical application; the criterion of "special interest" supplies no such rule'.

According to Mr. Justice Stephen's view, there must in each case be a curial assessment of the importance of the plaintiff's concern and his closeness to the subject matter. What for Mr. Justice Brennan was a question of no more than 'legal principle' was for Mr. Justice Stephen an indeterminate question of weight. As Professor Blackshield points out, this latter approach represents the vehicle for the extension of legal rights whenever courts think this is appropriate and a brake when courts, for policy reasons, decide not to expand legally enforceable rights.

Similar critical observations have been offered by Peter Cashman in his review of the subject in the context of the creation in New South Wales of the Public Interest Advocacy Centre. Obviously, the impediment of standing may be an important obstacle to the success of that Centre operating in fields far beyond environment protection. So Mr. Cashman's concentration of the language on the High Court Justices is appropriate. He points out that even Mr. Justice Murphy, who persisted with the liberal view he had expressed in the Australian Conservation Foundation case, 'felt unable, or disinclined, to shed the shackles of precedent' [to the extent of still requiring, as all the Justices did in Onus, that a party must have a special interest exceeding that of members of the public generally in preventing breach of a public right or in securing performance of a public duty].[31]

In a useful review of recent cases in the Melbourne University Law Review, Emilios Kyrou has also concluded that though the High Court in both the Conservation Foundation and Onus cases believed that it was liberalising the law of standing:

'...Judging from the actual results of these cases, the writer is of the view that the new test of 'special interest in the subject matter of the action' is unlikely to have this effect...After all, the Foundation was not a "mere busybody". Its objects of promotion of the conservation of the environment were directly affected by the actions of the defendants in that case and furthermore, the Foundation had gone to the trouble of submitting comments in relation to the...proposal. For these reasons, the Foundation could legitimately be said to have had a more proximate interest than the public generally in ensuring that the Act and the administrative procedures in question were duly complied with'.[32]

According to this author, anyone who expects radical changes in the general common law relating to locus standi to flow from the adoption of the 'special interest' test by the High Court is 'likely to be disappointed'.[33]

Whilst one author has suggested that the failure to persuade the High Court of Australia to push the law of standing significantly forward was based upon the failure to get the Court to tackle and concentrate upon the 'user test' introduced in the United States by the Sierra Club decision[34] it seems more likely to me that Professor Blackshield has got it right. With unarticulated policy concerns of the kind I have listed in this paper, the Court was not prepared to push the law of standing forward, save for a few semantic changes which signal the general appropriateness of standing reform - but not yet, and not by the High Court.

THE WAY AHEAD?

What then is the way ahead, especially for the Law Reform Commission which has its reference on this topic?

Various suggestions have been made both for a broad front reform and for special reform action in the environmental area. The passage of Section 123 of the N.S.W. Environmental Planning and Assessment Act 1979 indicates that legislative reform, at least in particular areas, can be secured. Environmental lawyers - operating in an often sensitive and contentious area - can teach other lawyers that reform of the law of standing can be accomplished without the dire predictions of the legal pessimists.

So far as reform on a broad front is concerned, a number of proposals have been offered:

* Specified interest: Professor Sykes has proposed that legislation should define a number of particular interests which should suffice to establish standing on a challenge by an individual to a public law. The interests he proposes are the effect or possible effect on (a) business or trade interests, (b) enjoyment of material

amenities, (c) enjoyment of personal liberty or (d) enjoyment of relationships with close family members.[35] But the difficulty of any formula of such specificity is that it will be criticised as unconceptual and will give rise to disputes about the categories chosen. Of specific relevance to the environment is that Professor Sykes' categories fail to give protection to this growing community concern. Professor Sykes despaired of a draughtsman able to define precisely enough an adequate standing rule for the environment.[36]

* Real concern: A second approach is to adopt a new formula of 'real concern' as proposed by Dr. G. Taylor.[36] His aim was to get away from the formulae of 'interests' used to date. The Law Reform Commission in its discussion paper elaborated this proposal by suggesting its formulation in a negative sense (viz that any person should have standing unless the issue was not a 'real concern'to him. Secondly, the Commission proposed that it should be made plain that 'concern' is not to be judged on traditional [property and economics] rules.[38] Although this approach has been praised by some commentators[39] and although it might help to overcome the 'wilderness of cases' which are 'riddled with technicalities'[40] it offers nothing more than another category of indeterminate reference which would invite unarticulated policy decisions of the kind identified by Professor Blackshield in the recent Onus decision.

* Procedural checks: A third general proposal is that offered recently by the Law Reform Commission of British Columbia. This would allow any member of the public to have a right to bring proceedings in respect of public law, subject to procedural qualifications. The first was that the plaintiff should first have approached the Attorney-General for a fiat. And the second was that consent of the court would be sought. But the court would be required to give its leave to proceed, unless it could be shown that there was no justiciable issue.[41]

* Open door: The last proposal is, so far as compatible with the Australian Constitution in Federal Courts, to abolish the standing impediment by statute and to permit 'any person' to bring a justiciable issue without legal procedural impediments. Supporters of this approach are strong in the academic community. They point to the absence of the feared floods both under the New South Wales environmental legislation and under consumer protection provisions in the Federal Trade Practices Act.[42] Mr. Peter Cashman, speaking from the viewpoint of the Public Interest Advocacy Centre, urged a total rejection of the Law Reform Commission's earlier approach in favour of the 'open door' policy:

'To do otherwise would (a) perpetuate undesirable barriers to the courts; (b) ensure that in many instances the courts would continue to be preoccupied with the identity of the prospective litigant rather than the merits of the case; and (c) give rise to never-ending litigation about the meaning and ambit of the standing formula. Other remedies and safeguards are more than adequate to guard against frivolous, vexatious, hypothetical or non-justiciable issues'.[43]

Outside New South Wales where s.123 of the Act has, in a bold stroke, achieved reform in the special area of environmental litigation a number of suggestions for reform have lately been made. These, no doubt, reflect awareness of the delays inherent in waiting for reform on a broad front:

* Guardians: The first, is the suggestion that an environmental defender or some kind of environmental ombudsman should be appointed who, by statute, is given enhanced rights of standing and representing the public interest before the courts and tribunals.[44] This proposal is frequently coupled with suggestions for an Environmental Bill of Rights[45] that could be enforced in the public's name by such a guardian. The suggestion is not without its critics. If such a watchdog would merely replace the screening function of the Attorney-General in the environmental area, his existence would be, according to one commentator, 'of questionable value'.[46] Furthermore, it is pointed out that in matters of importance to the public, concerned individuals are more likely actively to combat public oppression than a public official who may be dependent upon the Executive Government for resources, reappointment, honours and other blandishments.

* Inanimate standing: The second possibility is suggested by some judicial and academic writing in the United States. This would offer legal standing to inanimate as well as animate things, permitting proceedings to be brought in court on behalf of trees, forests, rivers and so on, the standing attaching not to the particular natural person but to the inanimate objects. Mr. Justice Douglas in Sierra put it thus:

'The critical question of "standing" would be simplified and also neatly put 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'.[47]

This theory was first asserted by Christopher Stone in his well-known piece 'Should Trees have Standing?'.[48] This approach seems unlikely to attract curial supporters in Australia in view of the conservative approach to reform offered by the High Court.

* Bona fide bodies: A more feasible line of territory for judicial reform and expansion of the law of standing, not so far very successful in Australia, is that which would recognise the standing of bona fide representative bodies with objects relevant to the issue concerned in the litigation. This approach was embraced by Lord Diplock in IRC v. National Federation of Self-Employed and Small Businesses Limited[49] when he observed:

> 'It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the Federation, or even a single public spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and to get the unlawful conduct stopped'.[50]

Lord Diplock's approach has now been followed by the Court of Appeal of New Zealand in Environmental Defence Society Inc. v. South Pacific Aluminium Limited (No. 3).[51] The Court held that two environmental protection societies had standing to begin proceedings alleging that the Executive Government had not properly complied with certain statutory procedures relating to the procurement of consent for the construction of an aluminium smelter:

> '[T]he proceedings challenge the legality of Government action. It is unrealistic to expect the Attorney-General to do this and we see no reason why it should be left to individuals directly affected to undertake the burden. In the exercise of the court's discretion, responsible public interest groups may be accepted as having sufficient standing under the National Development Act.'[52]

There have been a few hints that Australian courts would follow a similar line. In Victoria, the Supreme Court recognised the status of the National Trust to appeal against the grant of a building demolition permit.[53] The Trust had objected to the application but it was granted by the responsible authority. The Victorian Town Planning Appeals Tribunal dismissed the appeal on the ground that the Trust was not within the statutory category of 'a person who, being an objector, feels aggrieved'. The Full Court of the Supreme Court of Victoria took into account the objects of the Trusts and its statutory recognition under both Victorian and Commonwealth legislation in holding that, in furthering its objects, the Trust constituted a 'person who felt aggrieved'. This decision, however, is to be contrasted with a decision of the Victorian Environmental Protection Appeals Board in the Corio Bay case now reversed on appeal by the Victorian Full Supreme Court.[54] Nevertheless, by inference from the decision of the High Court in the Australian Conservation Foundation case, the objects of the Foundation and the fact that it represented thousands of Australians concerned with the environment,

was insufficient in the general law to activate a discretion to afford standing to it. Nonetheless, the developing authority in the highest courts of England and New Zealand must give encouragement to the persistent, including those who appear for responsible, widely representative environmental bodies with objects that are relevant to the litigation.

CONCLUSION

In this paper, I have sought to identify some of the policy considerations which have stood in the way of judicial expansion of the law of standing. I have also sought to identify factors which are continuing to apply reform pressure. Recent decisions of the High Court of Australia, whilst superficially suggesting liberalisation of the standing rules, do not, on close inspection, give much cause for optimism that access to the courts in Australia will be greatly expanded by judicial reform. Nor do they suggest that the 'technical legal barrier of standing' will be removed by the courts themselves. The law of 'standing' remains as a barrier at the gate to the courts. It is not a particularly pernicious law. But it developed in earlier times to meet earlier problems - whether real or perceived. Times are changing. Most people would now believe that it is better that justiciable legal questions should be capable of being resolved in courts, rather than on the streets or by other non-peaceful means. The way ahead, both for enhanced standing in environmental cases and generally, would seem to suggest a liberalisation of present Australian standing rules. The precise direction to be taken is a matter for controversy. Reforms of environmental law in New South Wales point the way. The Law Reform Commission will endeavour to offer its solution to the controversy when it delivers its report early in 1983. The report will have relevance for environmental protection. More fundamentally, it will have relevance to the role of the courts, of judges and of lawyers in 21st Century Australia.

FOOTNOTES

1. C.S.P. Harding, 'Locus Standi in French Administrative law', [1978] Public Law.
2. Terms of reference are set out in the Law Reform Commission, Annual Report 1981 (ALRC 19), 62.
3. Australian Conservation Foundation Inc. v. The Commonwealth of Australia (1980) 54 ALJR 1976 (1980) 28 ALR 257.
4. Onus v. Alcoa Australia Limited (1981) 55 ALJR 631, (1981) 36 ALR 425.
5. L. Stein (ed.) Locus Standi, 1979, 3.
6. [1903] 1 Ch. 109, 114, [1900-3] All E.R. Rep. 1240, 1243.

7. Murphy J. (1981) 55 ALJR 637.
8. Mr. Justice Fitzgerald, Federal Court of Australia, see [1982] Reform 122.
9. These considerations are reflected in the majority judgment in the Australian Conservation Foundation case above, in n 3.
10. Cf A.R. Lucas, 'Legal Foundations for Public Participation in Environmental Decision-making' (1976) 16 National Resources J. 73, 102.
11. Murphy J. in Onus, no. 4 above, 438.
12. M. Cappelletti, Rabels Z., 1976, 699, 672. This view is cited in the Law Reform Commission, Access to the Courts - I. Standing: Public Interest Suits (ALRC DP 4) 1977.
13. Sierra Club v. Morton 405 US 727 (1972).
14. M.R. Wilcox, 'Working together to protect our environment' (1981) 6 Legal Service Bulletin 13.
15. G.D.S. Taylor, 'The new administrative law' (1977) 51 ALJ 804.
16. Wilcox, 13.
17. The cases are set out in ALRC DP 4, 10.
18. M.J. Ely, 'Erosion of the Judicial Process: The struggle of citizens to be heard in the Australian Full High Court on the State aid issue', 1981.
19. Victoria v. The Commonwealth (1975) 134 CLR 338, 383.
20. K.E. Scott 'Standing in the Supreme Court: A functional analysis' 86 Harv L Rev, 645, 674 (1973).
21. Australian Conservation Foundation case n.3 above.
22. Gibbs J., ibid, 180.
23. id, 188.
24. (1980) 54 ALJR 395. This discussion draws on E. Kyrou, 'Locus Standi of Private Individuals Seeking a Declaration of Injunction at Common Law' (1982) 13 Melb Uni L Rev 453, 462.
25. (1981) 55 ALJR 416.
26. ibid, 420.
27. (1982) 56 ALJR 16, 18, 26.
28. (1981) 55 ALJR 631.
29. ibid, 637 (Stephen J.) see also Gibbs C.J. (634-5); Mason J. (645); Wilson J. (651).
30. A. R. Blackshield, 'Alcoa Decision on Standing. How Liberal' (1981) 6 Legal Service Bulletin 274, 276.
31. P. Cashman, 'Public Interest Law: Recent Developments and some Strategies for surmounting the stranglehold of Superior Court stricture on Standing', mimeo, unpublished paper for the 4th National Conference of Labor Lawyers, Canberra, July 1982, 25. He conceded that Murphy J. 'was not disinclined to offer some rather hard-hitting comments about the judicial method generally and about the particular decision in the Victorian Supreme Court which had precipitated the appeal'.
32. Kyrou, 467.
33. ibid, 468.

34. G. Bates, 'Standing in Environmental Litigation' (1981) 12 Uni Qld LJ 18, 31.
35. E. Sykes in L. Stein, n. 5 above, 233.
36. Discussed in L. Pearson, 'Locus Standi and Environmental Issues' (1980) 3 UNSWLJ 307, 318.
37. G. D. S. Taylor, 'Rights of Standing in Environmental Matters' in Seminar on Environmental Law: Australian Government's Role, 1975, 46, 51.
38. ALRC DP 4, 20.
39. eg Pearson, 319.
40. Robertshaw cited by Cashman, 24. Note however that Middleton cited loc cit suggested that 'the ACF case is not an instance of unwarranted conservatism by the High Court but an instance of proper restraint'. The same view has been offered by Professor P. Lane (1981) 55 ALJ 737.
41. Law Reform Commission of British Columbia, Report on Civil Litigation in the Public Interest, 1980. Note that this report must be read against the background of Canadian developments on the law of standing. See ALRC DP 4, 7.
42. Trade Practices Act 1974 (Cwlth), s.80.
43. Cashman, 30.
44. M.R. Wilcox in Environmental Law Newsletter, 1981, No. 4, 7, Cashman, 11.
45. Environmental Law Newsletter, ibid, 6.
46. Pearson, 318.
47. Douglas J. in Sierra Club v. Morton 405 US 727, 737 (1972).
48. 45 S.Cal L Rev 450 (1972).
49. [1981] 2 All ER 93.
50. id, 107.
51. [1981] 1 NZLR 216.
52. id, 220.
53. [1976] VR 592.
54. Australian Conservation Foundation v. Shell Refining (Aust.) Pty. Ltd. See Wilcox, 16, reversed on appeal.