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**LOCUS STANDI IN AUSTRALIA – A REVIEW OF THE
PRINCIPAL AUTHORITIES AND WHERE IT IS ALL GOING**

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PART A – INTRODUCTION

We present this paper to participants at the 2010 Conference of the Civil Justice Research Group, Melbourne Law School at the University of Melbourne.

Each of us is an alumnus of this fine university. Each of us is heavily involved in the practice of public interest law. We are acutely aware of the special problems involved in public interest litigation. As all of us in this room know, public interest litigation presents its own obstacles for an applicant and at times the bar can be seemingly unsurmountable, not the least of which for reasons associated with standing.

Our purpose in writing this paper is the formulation of a short excursus into the more important authorities on locus standi. Our paper is not intended to be a textbook nor is it an excursus into *all* authorities in the field. Time does not permit that. As a preliminary remark, it is fair to say that this field of jurisprudence is anything but straightforward. Divining a way through the tangled morass of decisions is truly a challenge. But it all becomes slightly clearer when one recognises that the law of locus standi has its origins in the Courts of Chancery.

That jurisdiction had vast experience in formulating rules aimed at circumventing the misuse of public office as well as the misappropriation of public funds. In the process of formulating those rules, equity was torn by two equally worthy yet opposite interests. On the one hand, equity endeavoured to eradicate the misappropriation of public funds but on the other hand equity recognised that the mere fact that funds were public did not mean that any member of the public could have a say in the fate of those funds. Equity was keen to guard against the inter-meddler. It sought to stamp out busy bodies whose activities intruded into the affairs of those charged with the administration of substantial public funds in large public trusts. The champion of the public interest was the Attorney-General. Unless the Attorney-General brought or was enlisted to bring before the courts litigation concerning abuses in the administration of those public trusts, equity made it well nigh impossible for an ordinary citizen to complain about the

administration of those trusts. That was the position from the late 1800s. It remained the position in Australia until the 1990s.

It cannot be said that the difficulties in demonstrating standing have vanished. What has become known as the "special interest" test remains, to this day, the firewall. Yet steadily and incrementally it is possible to discern a growing flexibility in the application of the standing rules. Nowadays, deserving entities (mainly in the arena of environmental litigation) are being granted injunctions to prevent irremediable damage. The once immutable standing rules prescribed by the High Court of Australia have not changed. The substantive content of the rules is the same. But the *application* of those rules has become more amenable to life in times which recognise interest groups and even their importance in societal affairs.

Our purpose is not to speculate about the reasons why standing rules are more flexible in the new millennium compared with 30 years ago. Our purpose is to give a narration of the more important cases and to attempt to divine the path where the cases are leading us in this field.

But as with anything, we must start at the beginning and the most useful starting point is an understanding of equity's role in the formulation of standing rules.

To this we now turn.

PART B – EQUITY’S IMPORTANCE IN THE ORIGINS OF RULES REGARDING STANDING WHEN INJUNCTIONS AND DECLARATIONS WERE SOUGHT

The rules concerning standing for litigants seeking to enforce public rights have 19th century equitable principles at their core.¹ Those rules arose out of the use and misuse of charitable trusts. The due administration of charitable trusts was seen to be a matter of public concern because those charitable trusts were for public purposes and not for persons with proprietary interests in the funds in the trusts. Special considerations attended the curial enforcement of the due administration of those trusts.² Whenever municipal corporations, acting as administrators of those charitable trusts, misapplied funds the Attorney-General as *parens patriae* moved in Chancery to restrain such misapplication³ by way of injunction. He did so in one of two ways - first, in his own right (*ex officio*) or, alternatively, he did so at the relation of another (*ex relatione*),⁴ upon having first granted his fiat to commence the proceeding.⁵ The relator did not even need a personal interest in the controversy, beyond being a member of the public.⁶ However, it was not competent for a private individual to enforce a public trust by private suit.⁷ By the 1870s, this produced the result that cases were dismissed where a plaintiff was unable to show “an equity”, but despite the dismissal of the suit, the court expressed its regret that it lacked authority to grant a remedy against a defendant which exceeded its statutory powers.⁸ Expressing regret about the want of an equity aside, subsequent English decisions, of which *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Limited*⁹ is an example, pointed out the concern of the

¹ A useful history of equity’s early involvement is given in *Bateman’s Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at [78] (McHugh J).

² *Bateman’s Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 28 (Gaudron, Gummow and Kirby JJ).

³ *Wallis v Solicitor-General for New Zealand* [1903] AC 173, 181 (Lord Macnaghten)

⁴ *Attorney-General (Queensland); ex rel Duncan v Andrews* (1979) 145 CLR 573, 582 (Gibbs J)

⁵ The grant or refusal of the grant of the fiat in connection f a relator action was not reviewable: *Barton v R* (1980) 147 CLR 75, 90

⁶ *Attorney-General v Logan* [1891] 2 QB 100, 103, 106

⁷ *Evan v The Corporation of Avon* (1860) 54 ER 581, 585 (Sir John Romilly MR)

⁸ *Pudsey Coal Gas Company v Corporation of Bradford* (1873) LR 15 EQ 167, 172.

⁹ [1980] 1 QB 407, 423 (Lord Denning MR)

English law to prevent a busy body meddling officiously in the business of others where he or she had no personal grievance. Equity was keen to ensure that only the Attorney-General advanced public interest cases.

The rule which forbade private suits enforcing public rights focussed on the nature of the "public right" in issue.¹⁰ In 1927 Dixon AJ formulated the test in these terms. To enable the Attorney-General to become involved so as to maintain a suit for injunction to restrain the impairment of public rights or interests, the relevant statute must create an interest of the required character and vest its enjoyment in the public. But interests vested in classes of people, however extensive, are private rights and neither require or admit of the intervention of the Attorney-General.

Unsurprisingly, that state of affairs was described as having "little to recommend it".¹¹ In an endeavour to strike a balance between the spectre of the inter-meddler on the one hand and the Attorney-General only having power to bring a proceeding to enforce a public right on the other hand, the English courts developed a concept by which a plaintiff had standing to seek an injunction to enforce a public right if he or she had a "sufficient special interest" in the litigation. That concept was forged in the famous case of *Boyce*.

¹⁰ *Attorney-General (ex rel Lumley) v T S Gill & Son Pty Ltd* [1927] VLR 22 (Dixon AJ).

¹¹ *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247

PART C - THE EVOLVING DOCTRINE AS REVEALED BY THE CASES [IN DETAIL]

THE ENGLISH CASES

***BOYCE v PADDINGTON BOROUGH COUNCIL* - 1903**

The locus classicus is regarded as being attributable to Buckley J where his Lordship said the following-

“A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with a 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.”¹²

Rarely is the first limb of the rule of interest in public interest litigation. Ordinarily courts refer to the second limb of the rule.

***McWHIRTER v INDEPENDENT BROADCASTING AUTHORITY* - 1972**

In that case, Lord Denning MR held that an individual member of the public could apply for a declaration or an injunction “if the Attorney-General refuses leave in a proper case, or improperly or unreasonably delays in giving leave, or his machinery works too slowly”.

***GOURIET v UNION OF POSTAL WORKERS* - 1978**

There, the House of Lords disapproved of Lord Denning's views expressed in *McWhirter* and rejected the notion that the question of standing is one that lies within the discretion of the court. The House of Lords reaffirmed that a private individual has standing to seek a declaration or an injunction to enforce a public right or to prevent a public wrong only in the cases mentioned in *Boyce*.

¹² The emphasis is ours

THE AUSTRALIAN CASES, ESPECIALLY THE CASES IN THE HIGH COURT

ANDERSON V COMMONWEALTH - 1932

There, Mr Anderson (in his capacity as a private individual and not in some representative capacity) sought a declaration that an agreement in writing to which he was not a party made between the Commonwealth and the State of Queensland was invalid for being *ultra vires*. The Commonwealth took out a summons in the High Court challenging Mr Anderson's entitlement to sue.

Held, (Gavan Duffy CJ, Starke and Evatt JJ) that "great evils would arise if every member of the Commonwealth could attack the validity of the acts of the Commonwealth whenever he thought fit. It is clear in law that the right of an individual to bring such an action does not exist unless he establishes that he is "more particularly affected than other people"".¹³ The public is or should not be without remedy, for the Attorney-General of the Commonwealth, or any of the States sufficiently interested, might take proceedings necessary to protect their rights and interests.

The phrase "great evils" may have been overly felicitous but it nevertheless reflected the anxiety the court felt towards unchecked litigation being advanced by individuals who took up some public crusade. The champion of the public interest was the Attorney-General. But where did he leave prospective litigants if he refused to lend a hand?

ROBINSON v WESTERN AUSTRALIAN MUSEUM - 1977

There, under Western Australian legislation all title and property in submerged wrecks vested in a museum board. Robinson, who had worked the seabed off the West Australian coast, found the remains of a Dutch wreck, thought lost in 1656. Robinson claimed those remains. The museum disputed his entitlement to them. Robinson sought a declaration that the legislation

¹³ Our emphasis

purporting to vest property in the museum was invalid. The museum demurred seeking to strike out Robinson's claim.

This was 1977, a time when legal principles of Australian public law were on a very steep climb.

Held, (by Barwick CJ, Jacobs and Murphy JJ in favour of Robinson and by Gibbs, and Mason JJ in favour of the museum, Stephen J expressing no opinion) that Robinson had the necessary locus standi to bring the proceeding. The classic statement from this case came from the judgment of Mason J in the following terms -

"The rule is generally expressed in the proposition that a person not affected in his private rights may not sue for declaratory relief...Sometimes the rule is expressed more liberally, as it was by Gavan Duffy CJ, Starke and Evatt JJ in *Anderson v The Commonwealth* where their Honours said that the right of an individual to bring an actin for an ultra vires declaration does not exist "unless he establishes that he is 'more particularly affected than other people' (see Brice on Ultra Vires 2nd ed p 366)". The rule is said to be directed against multiplicity of actions. In truth it reflects a natural reluctance on the part of the courts to exercise jurisdiction otherwise than at the instance of a person who has an interest in the subject matter of the litigation in conformity with the philosophy that it is for the courts to decide actual controversies between parties, not academic or hypothetical questions.

Reflection on the considerations which underlie the rule do not provide much assistance in defining the nature of the interest which a plaintiff must possess in order to have locus standi. However, it does indicate that the plaintiff must be able to show that he will derive some benefit or advantage over and above that to be derived by the ordinary citizen if the litigation ends in his favour. 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. Here the plaintiff does not seek performance of a public duty; nor does he assert that he will suffer special damage through interference with a public right – cases which are notorious for their difficulties"

Thus, the Boyce criteria remained the starting point, qualified only by whether a plaintiff would obtain some benefit by the litigation over and above that of any other citizen.

THE INVOLVEMENT OF THE AUSTRALIAN LAW REFORM COMMISSION

In February 1977 the then federal Attorney--General, R J Ellicott QC, referred to the Australian Law Reform Commission for review and report the adequacy of Australia's laws on locus standi. The ALRC commenced its task in 1977. Over the ensuing eight years the ALRC investigated all facets of the legal issues associated with locus standi, reporting in 1985 pursuant to Report No 27 entitled "*Standing in Public Interest Litigation*". As our brief survey of that report (below) attests, Report 27 was extremely far reaching, incisive and highly learned. But in the intervening eight year period between 1977 and 1985 and before ALRC Report No 27 was presented to the federal Parliament, a great number of cases were determined by Australian courts on matters of standing.

One of the most significant of those cases was *ACF v Commonwealth*, decided in February 1980. To that we now turn.

AUSTRALIAN CONSERVATION FOUNDATION v COMMONWEALTH - 1980

The then relatively unknown Australian Conservation Foundation was an incorporated body established to involve itself in environmental issues of public concern. The federal Fraser government passed legislation to enable the development of a resort and tourist area in Farnborough Queensland. ACF alleged that the decision to approve the development was made without adequately taking into account the applicable environmental impact statement. ACF issued a proceeding in the High Court seeking declarations and injunctions challenging the approvals given under the legislation. The Commonwealth applied to strike out the proceeding on the basis that ACF had no standing to bring the proceeding. Aickin J granted orders striking out the proceeding. ACF appealed.

Held, (Gibbs, Stephen and Mason JJ dismissing the appeal, Murphy J dissenting) that ACF had no standing. The following observations are the more important ones.

(Gibbs J) ACF seeks to enforce the public law as a matter of principle, as part of an endeavour to achieve its objects and to uphold the values which it was formed to promote. An ordinary member of the public, who has no interest other than that which any member of the public has in upholding the law, has no standing to sue to prevent the violation of a public right or to enforce the performance of a public duty. There is no difference in this respect between the making of a declaration and the grant of an injunction. The assertion of public rights and the prevention of public wrongs by means of those remedies is the responsibility of the Attorney-General, who may proceed either ex officio or on the relation of a private citizen. A private citizen who has no special interest is incapable of bringing proceedings for that purpose, unless, of course, he is permitted by statute to do so.¹⁴

So far as the second limb in *Boyce v Paddington* is concerned the court held that “special damage peculiar to himself” meant “having a special interest in the subject matter of the action”.

A “special interest” (relevantly, in the environment) “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 should be observed or that conduct of a particular kind should be prevented does not suffice to give its possessor locus standi.

(Stephen J) An individual does not suffer damage as gives rise to standing to sue merely because he voices a particular concern and regards the actions of another as injurious to the objects of that concern.

¹⁴ The underlining is ours (where twice appearing in reference to this case)

(Mason J) Depending on the nature of the relief which he seeks, a plaintiff will in general have a locus standi when he can show actual or apprehended injury or damage to his property or proprietary rights or to his business or economic interests (as to which see *New South Wales Fish Authority v Phillips* (1970) 1 NSWLR 725) and perhaps to his social or political interests.

ONUS v ALCOA OF AUSTRALIA LIMITED - 1981

There, Lorraine Onus (a member of the Gourditch-jmara aboriginal people and traditional custodians of the customs of those people) sought injunctions in the Supreme Court of Victoria restraining Alcoa from excavating land in which aboriginal relics were scattered. Alcoa was obliged to construct a smelter at Portland under an agreement with the State of Victoria. In the Supreme Court of Victoria, Brooking J refused the injunction application on the basis that Onus had no standing. Brooking J dismissed the case altogether. Onus appealed. The Full Court refused to upset Brooking J's conclusion. Onus appealed to the High Court.

Mrs Onus's appeal was an outstanding success. Each member of the High Court allowed the appeal and ordered the matter to return to the Supreme Court of the Supreme Court of Victoria for further hearing.

(Gibbs CJ) A special interest is sufficient if it is accompanied by an emotional or intellectual concern. This case is not one in which the plaintiff sues in an attempt to give effect to her beliefs or opinions on a matter which does not affect her personally. The appellants claim not only that these relics have a cultural and spiritual significance but that they are custodians of them according to the laws and customs of their people and that they actually use them.

(Wilson J) The sufficiency of the interest asserted is a question of fact and degree in every case.

(Brennan J) Whether a plaintiff has shown a sufficient interest in a particular case must be a question of degree but not a question of discretion.

AUSTRALIAN LAW REFORM COMMISSION REPORT No 27 (1985)

This report was an enormous contribution to the learning on locus standi. Its text exceeds 250 pages. The following is something of a cherry picking of the more salient provisions of its content.

First, the report described the law of standing as at 1985 as “confused, unclear and restrictive”, “replete with inconsistencies and anomalies”, being “a thing of shreds and patches” and a “bewildering hotchpotch of discrepant rules”.

In the context of public interest litigation, the ALRC report stated that under existing law, when an injunction or a declaration was sought, a person or interest group had to seek the involvement of the Attorney-General, who as *parens patriae* and after the grant of the attorney’s fiat, had standing to bring a relator action seeking injunctions or declarations to enforce “public rights”. But if a person (including a corporation) wanted to enforce a public right without involving the Attorney-General, that person had to show “special damage” or a “special interest” in the litigation. In paraphrasing the meaning of “special interest” the ALRC said –

- The expression did not supply a ready rule of thumb as the test was broad and flexible varying according to the nature of the subject matter and, being a question of fact and degree, no exhaustive list showed what constituted the relevant interest;
- A plaintiff seeking to show a special interest had to prove that it was likely that he or she would gain some advantage in succeeding in the litigation or suffer some disadvantage if the action failed;
- Actual or apprehended injury to proprietary rights, business or economic interests and even social or political interests would be evidence of a “special interest”;
- A plaintiff did not need to show that no-one else possessed the particular interest;

- Mere intellectual or emotional concern was not enough to support standing;
- A company did not acquire standing merely because some of its members possessed standing;
- The relief being sought was relevant to the question whether standing existed.

Of the decided cases up to the date of ALRC Report No 27, the ALRC indicated that standing had been granted in cases involving neighbouring land owners,¹⁵ ratepayers,¹⁶ electors¹⁷ and aboriginal claimants¹⁸ but that it had not been granted in cases involving commercial competitors,¹⁹ taxpayers,²⁰ environmental lobby groups²¹ and challengers to international or commonwealth/state agreements.²²

The ALRC recommended altering the laws relating to standing. It said the laws should be broadened and unified – thereby creating “an open door but with a pest screen”. Meddlesome busy bodies could be kept out yet deserving plaintiffs with genuine interests to advance could be let in. A plaintiff having a personal interest in the litigation was recommended.

RE AUSTRALIAN INSTITUTE OF MARINE AND POWER ENGINEERS v SECRETARY, DEPARTMENT OF TRANSPORT - 1986

In this case, the Institute sought under s 13 of the ADJR Act review of the decision of the respondent refusing to give a tax statement. Gummow J considered whether the Institute was a “person aggrieved” under s 13 of the ADJR and made other observations about standing. His Honour said this –

“The other great field for judicial review of administrative decisions lay in equity, and, in particular, in the remedies of injunction and declaration...In equity

¹⁵ *Day v Pinglen Pty Ltd* (1981) 55 ALJR 416

¹⁶ *Clothier & Simper v Mitcham City Corporation* (1981) 95 LSJS 116

¹⁷ *McDonald v Cain* [1953] VLR 411, 420

¹⁸ *Onus v Alcoa* (op cit)

¹⁹ *Grand Central Car Park Pty Ltd v Tivoli Freeholders Ltd* [1969] VR 62

²⁰ *Logan Downs Pty Ltd v FCT* (1965) 112 CLR 177, 187

²¹ *ACF v Commonwealth* (op cit)

²² *Ingram v Commonwealth* (1980) 54 ALJR 395

attention was in the nineteenth century directed to use of equitable remedies to protect legal and equitable rights in the strict sense and, in particular, to protect such rights as were proprietary in nature. Hence the treatment of equitable remedies in public law, in cases whether the claimant lacked the fiat of the Attorney-General, became enmeshed in the so-called rules in *Boyce's Case* [1903] 1 Ch 109. They had their own complexities which, in Australia, have but recently been diminished by a series of High Court decisions...The result is that standing here does not now require special damage in the traditional sense, and that whilst a mere belief or concern is not sufficient, a "special interest" over and above that enjoyed by the public will suffice."²³

However, in my view (and in the circumstances of the case) there flows from the decision of the Secretary a danger and peril to the interests of the applicant that is clear and imminent rather than remote, indirect or fanciful, and the applicant has an interest in the matter of an intensity and degree well above that of an ordinary member of the public."²⁴

OGLE v STRICKLAND - 1987

Rev Ogle, a priest of the Anglican Church and Father O'Neill, a Roman Catholic priest, claimed that a movie called "Hail Mary" was blasphemous. They challenged the Censorship Board's classification of the movie. The trial judge held that Rev Ogle and Father O'Neill had no standing to bring the proceeding and the case was dismissed. They appealed.

Held, by the Full Court of the Federal Court (Fisher, Lockhart and Wilcox JJ) that the appeal be allowed. The more important matters emanating from the judgment of the Full Court are set out hereunder.

(Lockhart J) Rev Ogle and Father O'Neill were in holy orders in hierarchical Christian churches. As ministers of religion they were in a special position compared with ordinary members of the public as it was their duty and vocation to spread the Gospel, to teach and foster Christian beliefs and to repel or oppose blasphemy.

²³ At [22].

²⁴ At [27]. Emphasis added

(Wilcox J) The liberalisation of standing rules evident in *Onus* is consistent with the attitude expressed in other common law countries, especially in England and Canada.

(Wilcox J) In at least two Australian cases non-financial concern has been recognised as being sufficient to cause a person to be “aggrieved”: *National Trust* [1976] VR 592 and *ACF v EPA* [1983] 1 VR 385.

(Wilcox J) The more substantial worry about a liberalised interpretation of the standing criterion (in s 5 of the ADJR Act) from the policy viewpoint, is whether the abandonment of a requirement that the plaintiff have at risk a legal right or some material interest will lead to an inadequate presentation of the issues to the court. The courts are entitled to insist upon a plaintiff who will adequately represent the case sought to be made, in the public sense.

AUSTRALIAN FOREMEN STEVEDORES ASSOCIATION v CRONE - 1988

The facts of this case are of no special moment. The important issue is that Pincus J held that a sufficient economic effect, caused by the decision attacked, confers standing yet the question is one of degree and it is always necessary to consider whether and if so to what extent an applicant is affected in a practical way by the decision under attack.

AUSTRALIAN CONSERVATION FOUNDATION v MINISTER - 1989

This was another sortie of the ACF into court in respect of environmental issues. It challenged the grant of a licence to export woodchips from State forests. Davies J held that ACF did have standing. His Honour held as follows –

“While ACF does not have standing to challenge any decision which might affect the environment, the evidence establishes that ACF has a special relationship to South East forests and certainly in those areas of the South East forests that are National Estate. The ACF 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 ACF does not have a special interest in the South East forests, there is no reason for its existence.”

YATES SECURITY SERVICES v KEATING - 1990

Curiously, the Full Court's consideration of locus standi for which this case is relevant was jurisprudentially and intellectually inferior to the consideration given to the same point by the trial judge, Wilcox J.²⁵ Applying the ACF template, the Full Court held that Yates had no standing. Lockhart J expressed the test in the following terms and Morling and Pincus JJ agreed. Lockhart J held as follows –

“In my opinion it is now established in Australia that a plaintiff has no standing to bring an action to prevent the violation of a public right if he has no interest in the subject matter beyond that of any other member of the public. If no private right of his is interfered with he has standing to sue only if he has a special interest in the subject matter of the action. The question of what is sufficient interest will vary according to the nature of the subject matter of the litigation. The possession of intellectual or emotional concern about the environment does not confer standing on a person to enforce a public right.”²⁶

Thus, another decision of the Full Court of the Federal Court again restated and slavishly applied the Boyce principle.

ALPHAPHARM PTY LTD v SMITHKLINE BEECHAM (AUSTRALIA) PTY LTD - 1994

On 31 March 1994 the Full Court of the Federal Court handed down judgment in this case. It raised important issues of standing among commercial competitors.

Held, (Davies J) the person whose interests are affected must have an interest other than that which attaches to members of the general public and other than that of a person merely holding a belief that a particular type of conduct should be prevented or a particular law observed. The objectives “real”, “genuine” and “direct” have been used to describe the relationship required. The term “interests are affected” does not make use of an adjective

²⁵ [1990] FCA 432

²⁶ (1990) 25 FCR 1, 9.

but it requires that the applicant demonstrate genuine affection of an interest which attaches to him.²⁷

(Davies J) Proprietary and financial interests have traditionally been considered to be sufficient. Parties are usually discouraged from taking preliminary points in relation to standing. The extent of a person's interest is a relevant factor. Standing is related to procedural fairness – if a person has an interest which ought to be taken into account in the making of a decision then that person should ordinarily be entitled to be heard.

***NORTH COAST ENVIRONMENT COUNCIL INC v MINISTER OF RESOURCES* - 1994**

This was the first standing case on which Justice Sackville stamped his views on administrative law in respect of locus standi. Up to that point in time, a very discernible divide punctuated the opinions of various members of the Federal Court. Staunch adherents to the rigid and uncompromising Boyce-based ACF approach included Justices Lockhart, Fisher,²⁸ Davies,²⁹ Burchett and Gummow. More progressive views were exhibited by Justices Wilcox, Pincus and Sackville each of whom seemed more willing to extend the boundaries of standing and who were not content to refuse an applicant standing uttering the Boyce incantation.

This case concerned a request by North Coast Environmental Council (“NCEC”) for a written statement setting out the findings, evidence and reasons for the decision to grant a licence to a sawmilling entity to export woodchips from south west New South Wales. The minister challenged the request saying NCEC had no standing because NCEC was not a “person aggrieved” under s 13 of the ADJR.

Held, by Sackville J, that NCEC did in fact have standing. Sackville J referred to the observations of Stephen J in *Onus* to the effect that one must assess the nature of the applicant's concern with and relationship to the subject matter. Sackville J pointed out that in *Ogle v Strickland* Wilcox J held that

²⁷ (1994) 49 FCR 250 at 258

²⁸ In fairness to Fisher J, his Honour did find that standing existed in *Ogle v Strickland*

²⁹ Likewise, in fairness to Davies J, his Honour did find that standing existed in *Ogle v Strickland* and in *ACF v Minister*

nothing in the authorities prevented the court from discarding altogether the requirement of special damage or special interest.

Sackville J postulated five concepts which pointed to NCEC having sufficient standing. Those five concepts have been embraced in other cases³⁰ and seem to be regarded as factors pointing almost definitively in favour of the existence of standing. They are –

- NCEC was the peak environmental organisation in the north coast region of New South Wales with 44 environmental groups as members;
- Since 1977 NCEC was recognised by the Commonwealth as a significant and responsible environmental organisation;
- NCEC had been recognised by the NSW state government as a body that should represent environmental concerns on advisory committees;
- NCEC had received significant Commonwealth funding for co-ordinating projects and conferences on environmental matters;
- NCEC had made submissions on forestry management issues and funded a study of old growth forests.

Sackville J held that NCEC demonstrated more than mere “intellectual or emotional concern” and that it had a particular interest in the decision in issue in the case.

TASMANIAN CONSERVATION TRUST v MINISTER - 1995

This was another decision of Sackville J. His Honour applied the same five concepts to determine the existence of standing and found that TCT did in fact have standing.

AUSTRALIAN LAW REFORM COMMISSION REPORT No 78 - 1996

By 1996, eleven years had passed since the ALRC report dated 1985. In May 1995 the federal attorney-general requested ALRC to consider whether

³⁰ See *Tasmanian Conservation Trust v Minister* (1995) 127 ALR 580 and *Environment East Gippsland Inc v VicForests* [2009] VSC 386

changes ought to be made to the recommendations in the 1985 report having regard to subsequent developments in the law. In essence, in Report 78 the ALRC recommended that the “special interest test” be done away with.

Sadly, that recommendation was not picked up by the federal government of the day nor has any subsequent federal government embraced it.

The result has been courts applying their version of the special interest test as ameliorated by such decisions as *North Coast*.

BYRON ENVIRONMENT CENTRE INC v ARAKWAL PEOPLE – 1997

This was a decision of the Full Court of the Federal Court,³¹ on appeal from a determination of the Native Title Tribunal. The case is native-title specific. That said, Merkel J's distillation of concepts of locus standi at a more general level is highly instructive and bears close examination. His Honour's judgment is long and here we have selectively chosen only a snippet of its overall content.

“Decisions as to standing fall broadly into two areas. The first is concerned with standing in a justiciable controversy in which a person is seeking to enforce or protect that person's rights. A broad view has been taken as to what may constitute a sufficient interest for the purpose of determining whether a justiciable controversy has arisen...

In general there is a requirement that the interest of a person seeking to enforce or protect his or her personal or private rights in a proceeding be one which is actual, direct and definite or tangible although it need not necessarily be a commercial, pecuniary or proprietary interest.

The second [lot of decisions relating to standing are] concerned with persons seeking to enforce a public duty or prevent violation of a public right. In this area the High Court in [*ACF*]³² and [*Onus*]³³ has taken an expansive approach to standing. These decisions established that:

³¹ Black CJ, Lockhart and Merkel JJ

³² In the judgment Merkel J set out the full and proper citation

³³ *Ibid*

- A mere intellectual or emotional belief or concern, no matter how genuine or sincerely held, in respect of the subject matter is not a sufficient interest to gain standing to bring a proceeding
- The asserted interest must go beyond that of members of the public in upholding a principle or the law or in righting a wrong
- A “special interest” in the subject matter of a proceeding can be a sufficient interest to gain standing. For example, if the person asserting the interest is “specifically affected” by the decision in question, that is, in comparison with the public at large the person has been affected to a substantially greater degree or in a significantly greater manner, that person has a ‘special interest’³⁴.

EXECUTIVE COUNCIL OF AUSTRALIAN JEWRY v SCULLY – 1998

We have included this case in our survey of the cases on locus standi to point up one important matter, namely, that an unincorporated association, not being a juristic person, cannot be a “person aggrieved” for the purposes of legislation which gives standing to a “person aggrieved”. But a natural person, charged with a special responsibility to safeguard the interests of the group as a whole, can be a “person aggrieved”.

BATEMAN’S BAY LOCAL ABORIGINAL LAND COUNCIL v ABORIGINAL COMMUNITY BENEFIT FUND PTY LTD - 1998

This case illustrates the full reach of the “special interest” test as applied in a context not involving environmental issues. Bateman’s Bay Local Aboriginal Land Council (“BBLALC”) operated a contributory funeral benefit fund business catering for members of the NSW aboriginal community. BBLALC’s activities were financed Under the *Aboriginal Land Rights Act* (NSW). BBLALC proposed to conduct a contributory funeral benefit fund catering for all Aboriginal persons. The respondent commenced a proceeding in the Supreme Court of New South Wales seeking an injunction restraining the respondent from carrying on the business of the fund on the basis that its activities exceeded the power conferred by the legislation. BBLALC contended that the respondent did not have the requisite standing.

³⁴ (1997) 78 FCR 1, 33 at [A – C]

Held, standing existed.

(Gaudron, Gummow and KirbyJJ) –

“But it does not follow that such persons alone have standing. It would be wrong to take this as a starting point. The first question is why equity, even at the instance of the Attorney-General, would intervene. The answer given for a long period had been the public interest in the observance by such statutory authorities, particularly those with recourse to public revenues, of the limitations upon their activities which the legislature has imposed. Where there is a need for urgent interlocutory relief, or where the fiat has been refused, as in this litigation, or its grant is an unlikely prospect, the question then is whether the opportunity for vindication of the public interest in equity is to be denied for want of a competent plaintiff. The answer, required by the persistence in modified form of the Boyce principle, is that the public interest may be vindicated at the suit of a party with a sufficient interest in the subject matter. Reason of history and the exigencies of present times indicate that this criterion is to be construed as an enabling, not a restrictive, procedural stipulation.”³⁵

McHugh J spoke of recent applications of the special interest test in decisions of the High Court and of the Federal Court which have not adopted the narrow formulation applied by Brennan J and instead have adopted a flexible approach.³⁶ Hayne J pointed to the different roles adopted by the attorney-general in England to that in Australia and said that whether those differences warrant a departure from the application of the special interest test is a “difficult question”.³⁷

It was said that the enforcement of the public law of a community is part of the political process and it fell to the executive government not the civil courts acting at the behest of disinterested private individuals to enforce the law.³⁸

³⁵ (1998) 194 CLR 247 at [50]

³⁶ (1998) 194 CLR 247 at [100]

³⁷ (1998) 194 CLR 247 at [107]

³⁸ McHugh J at [83].

Among other reasons for its fame, this case put in lights how the legislature needed to do something about the laws of standing. McHugh J put it thus –

“There can be little doubt that the present law of standing is far from coherent. Even if its current rationale is maintained, it is apparent that it is in need of rationalisation and unification. However, given divergent opinions as to whether the public interest is best served by maintaining the Attorney-General as the primary protector of public rights, it seems prudent for this Court to maintain current doctrine leaving it to the legislature, if it thinks fit, to rationalise, modify or extend that doctrine”.³⁹

The legislature has done nothing to modify the doctrine.

THE PETER ALLAN LITIGATION – 1997 to 1999

Peter Allan lived in West Brunswick, 200 meters from the Tullamarine Freeway. He believed his amenity was likely to be adversely affected by freeway extensions to be carried out as part of the Melbourne City Link Project. He took his complaints to the federal AAT (those arising from a decision made by the federal Development Allowance Authority) and thereafter, on several applications to the Federal Court of Australia.⁴⁰ Ultimately, Merkel J (before whom the case was heard it having been remitted by the Full Court following an appeal from Mansfield J) reviewed the standing rules and held that Mr Allan possessed sufficient standing. Encapsulating the emotion which a litigant in respect of public issues confronts Merkel J said this –

“The present case is an example of the fortitude required by a citizen who wishes to draw upon the administrative law procedures for enforcement of modern public statutory duties against public authorities and large corporations.”

Mr Allan showed he had standing. But he sold his house in West Brunswick by the time the litigation went further and a subsequently constituted five member Full Court pronounced adversely upon his standing.⁴¹

³⁹ At [91].

⁴⁰ [1997] FCA 738 (Mansfield J); [1998] FCA 112 (Wilcox, R D Nicholson and Finn JJ) and [1999] FCA 426 (Merkel J).

⁴¹ [1999] FCA 1723 (Black CJ, Hill, Sundberg, Marshall and Kenny JJ)

TRUTH ABOUT MOTORWAYS LIMITED v MACQUARIE INFRASTRUCTURE INVESTMENT MANAGEMENT LIMITED – 2000

In that case, Truth About Motorways (“TAM”) commenced a case for contravention of the *Trade Practices Act* alleging that a prospectus issued by Macquarie was false in that it failed to accurately state the volume of traffic on the Eastern Distributor freeway. TAM contended that it satisfied the words “any person” in the TPA even though the only interest it had in the case was ensuring that Macquarie complied with the laws of the Commonwealth.

The primary issue for determination was whether, in legislating in respect of corporations under the *Trade Practices Act*, Parliament could provide for the judicial enforcement of the law at the suit of any person. The High Court said it could not.⁴² The majority focussed on the issue of constitutional importance while Kirby J addressed broader issues of standing as well as the types of matters which fall under the rubric of “public law”.

His honour said an array of federal legislation revealed a trend “away from imposing a universal requirement of a special personal interest or individual grievance to authorize the invocation of judicial review.”⁴³ However, his Honour said that the first task is to construe that law and thereafter problems of constitutional validity or standing may not arise.⁴⁴

ALLAN v TRANSURBAN CITY LINK LTD – 2001

Following the decision of the five-member Full Federal Court, Mr Allan pushed on with his attempts to close down the freeway extensions. He contended before the High Court that his claim for relief under the relevant legislation was to be determined by the construction of the legislation itself and not by general principles of locus standi. He said he was a “person who (is) affected by a reviewable decision” for the purposes of the legislation.

Six members of the High court disagreed. And so it was, that after years of expensive and time consuming litigation, his quest was lost.

⁴² Kirby J held that the applicant did have standing

⁴³ (2000) 200 CLR 591, 642 at [135].

⁴⁴ (2000) 200 CLR 591, 642 at [138].

Only Kirby J allowed Mr Allan's appeal. Kirby J adopted an approach to the standing issue which to that point in time was heresy. His Honour said the starting point for the resolution of the matter was not to ask whether the case fell within the observations of Boyce, ACF, Onus or Bateman's Bay - rather the correct approach was a close examination of the legislation itself. After referring to the traditional tendency of showing that the plaintiff has suffered "special damage peculiar to him", Kirby J said this –

"This tendency adds to the need for caution about approaching the issue of "standing" as if it always presents a generic problem. In one sense it does. But the solution to the problem in a particular case must always take as its starting point the language and structure of the legislative prescription in question."

ONESTEEL MANUFACTURING PTY LTD v WHYALLA RED DUST ACTION GROUP INC

– 2006

This was a decision of Debelle J of the Supreme Court of South Australia. We have included the case in this distillation for two reasons. First, some state Supreme Courts persist without waver from the ACF/Onus standing template. Second, despite expressly referring to Kirby J's synthesis of the development of the law of standing as a matter of legislative language and structure Debelle J nevertheless fell back on the well worn, safe ACF/Onus template.

The facts were unremarkable. Whyalla Red Dust Action Group Inc ("WRDAG") was formed by residents who lived near Onesteel's pellet plant operations and who were concerned about local dust, pollution and environmental issues. The South Australian *Environment Protection Act* (in s 104) authorised the Environment Court to make orders to restrain persons from causing environmental harm or damage. WRDAG sought orders restraining Onesteel from discharging dust into the atmosphere from its pellet plant. The Environment Court granted the order. Onesteel appealed to the Supreme Court. Debelle J allowed the appeal. Citing the fact that WRDAG had no more than an intellectual or emotional interest in the litigation, Debelle J said WRDAG had no standing.

In our view, the case is light weight in its analysis of the developments which had by then been made to locus standi, at least since *North Coast*. DeBelle J did not address the five pointed *North Coast* approach beyond saying that it turned on the words “person aggrieved” rather than on the words of the *Environment Protection Act*. DeBelle J cited the High Court’s decision in *Bateman’s Bay* but poured cold water on it in one sentence saying “... that decision does not assist as the respondents in that case had an obvious commercial interest which the applicant in this case does not.”⁴⁵

BLUE WEDGES INC v PORT OF MELBOURNE CORPORATION – 2005

This case highlights how some judges will not even consider issues of standing where a more procedurally pressing obstacle confronts a plaintiff.

In 2005 Port Phillip Bay was the subject of a proposal to carry out shipping channel deepening dredging works. Before works began, a broad consultation process was undertaken culminating in the production of an environmental impact statement. A panel commissioned by the Minister for Planning found that the environmental impact statement revealed many deficiencies and the minister required the Port of Melbourne to produce a supplementary report. Without that report the dredging works could not proceed under the *Environmental Effects Act*. Blue Wedges Inc commenced a proceeding in the Supreme Court of Victoria asserting that the proposed works were unlawful. It sought an interlocutory injunction to restrain the works.

Mandie J refused to order the injunction – not by reason of any issues associated with standing but rather by reason of the fact that Blue Wedges was unable to offer an undertaking as to damages.⁴⁶ Mandie J said that he could conceive that in some circumstances an injunction might be granted without requiring the usual undertaking as to damages if there was a manifest breach of the law threatened. His Honour said it might be in the public interest to grant an injunction without requiring the usual undertaking as to damages or if there was a proven danger of irremediable harm of serious

⁴⁵ (2001) 94 SASR 357, 367 at [28].

⁴⁶ Mandie J cited reference to debate on point in the High Court in *Combet v Commonwealth* [2005] HCA Trans 459. On a careful reading of that transcript, the observations of Heydon J are more general than Mandie J seems to suggest.

damage. But in the circumstances of that case, Mandie J said there was no such evidence and the injunction application was refused.

ENVIRONMENT EAST GIPPSLAND INC v VICFORESTS – 2009

This case is the latest of the Supreme Court of Victoria on locus standi for the purposes of administrative law. There are other cases, some involving standing to challenge wills or standing under the *Corporations Act*, but they are not relevant in the context of this presentation on public law.

There, VicForests proposed to carry out logging activities in two forests on Brown Mountain in East Gippsland. Those forests were the habitat of various protected species of plants and animals. Environment East Gippsland Inc (“EEG”) contended that the logging activities were unlawful because VicForests was required under certain legislation to protect native fauna. EEG commenced a proceeding and sought an injunction

J Forrest J placed heavy reliance on the decision of Sackville J in *North Coast* (particularly on the five points there identified by Sackville J as being important on standing) and ultimately ordered a short interlocutory injunction against VicForests. But unlike the factual situation in *North Coast*, EEG was not the peak body for environmental issues nor did it have a close relationship with government in terms of funding or advice. That did not deter J Forrest J from ordering VicForests to stop the proposed logging activities. EEG’s level of membership, its constant activities on Brown Mountain, its regular communication with government concerning the area and the fact that it was the only body directly interested in the preservation of the area’s natural habitat demonstrated in a practical sense that it had an arguable case to bring the proceeding.

PART D - DRAWING THE THREADS TOGETHER

The survey conducted above shows some markedly different approaches to locus standi by Australian courts over the last 30 years. The High Court decisions in *ACF* and in *Onus* are commonly regarded as the genesis of the modern Australian approach. But in truth the cases began in the 1930s with *Anderson* where the High Court highlighted how an individual wishing to litigate an attack on federal legislation needed to show that he or she was “more particularly affected than other people”. In *ACF*, the High Court forged an indelible imprint on the legal landscape by stating that an ordinary member of the public who has no interest other than that which any member of the public has in upholding the law has no standing to sue to prevent the violation of a public right or to enforce the performance of a public duty. A person possessed of a mere intellectual or emotional concern was definitely without standing. A person needs a “special interest” to be able to commence a proceeding for the enforcement of a public duty or to prevent a public wrong. But according to *Onus v Alcoa*, if a person is already possessed of standing based on other criteria, then the fact that he or she additionally possesses an emotional or intellectual concern is unimportant.

Between the 1980s and the 1990s most cases were decided on the *ACF/Onus* formula, cases such as *Yates*, *Alphapharm*, *OneSteel* and the *Peter Allan* series of cases. Thereafter, especially after *North Coast*, cases were decided according to precepts much more liberally applied, or, to use the words of Gummow J, with greater “flexibility”. We now see the emergence a decision such as *VicForests* where even the more liberal Sackville J five-pointer approach was less rigorously applied.

Perhaps in the new millennium the courts are less concerned about the so-called spectre of the interfering busy body than they were in the 1980s. Maybe the courts are more willing to accept that the public is more informed and are more vocal and participatory than they were in the days when Buckley J famously penned the judgment in *Boyce*. Maybe nowadays the courts are more willing to recognise the legitimate public process by which interest groups, often stocked with highly qualified, publically spirited,

government-interactive individuals (who are not crack pots) wish to make a meaningful contribution to the debate on certain public issues. Of course, the court room is no place for busy bodies to raise academic issues or issues which raise no controversy between parties.

Naturally, there will continue to be serious, if not insuperable obstacles for certain interest groups. Being unable to offer, still less meet, an undertaking as to damages if called upon by the court to do so, is such an insuperable obstacle. That was the fate of *Blue Wedges*, regardless of the validity of the claim it wanted to advance. But not every case demands that an undertaking be given. Cases in the public interest are illustrations.

It may eventuate that the approach favoured by Justice Kirby in *Truth About Motorways* and in the *Peter Allan* litigation will become the benchmark, that is to say, it all boils down to the statute and that the solution to the problem must always take as its starting point the language and structure of the legislative prescription in question.

It seems to us that the tide is turning away from the strict *Boyce* approach. Attorney-General's fiats are rare creatures nowadays and litigants must normally fend for themselves. Court seem more accommodating to that development. In our view it must continue.

September 2010

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