



Queensland Public Interest Law Clearing House Incorporated

## **STANDING IN PUBLIC INTEREST CASES**

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## 1. INTRODUCTION

The law of standing is the set of rules that determine whether a person who starts legal proceedings is a proper person to do so. While the issue rarely arises in private matters, standing, along with lack of legal resources and the cost of litigation, poses a significant obstacle for litigants in public interest matters.

The following is a brief overview of the law on standing in public interest matters.

## 2. THE ISSUE OF STANDING IN PUBLIC INTEREST MATTERS

Public interest litigation generally involves the enforcement of a “public right”, that is, a right conferred on the public at large, often arising out of legislation requiring public bodies to conduct or administer activities relating to public health, safety or the environment. This is in contrast to a private right, which is a benefit conferred on an individual or group.

The Attorney-General is the proper plaintiff where public rights are affected. The Attorney-General may either commence proceedings on his or her own or grant a fiat to an individual, giving that individual permission to use the Attorney-General’s name and standing to bring a public interest action as a “relator”. However, the Attorney-General is neither bound to commence proceedings nor consent to a relator action, and refusal to grant a fiat is not a justiciable decision: *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 at 527.

Further, the Attorney-General is a minister in charge of a department administering numerous statutes, is likely a member of cabinet and may or may not be legally trained. Accordingly, “it may be ‘somewhat visionary’ for citizens of [Australia] to suppose that they may rely upon the grant of the Attorney General’s fiat for protection against ultra vires action of statutory bodies for the administration of which a ministerial colleague is responsible”.<sup>1</sup>

A body of law, both in common law and in statute, has been developed around exceptions to the rule that private citizens lack standing to protect a public right. It is that body of law which is examined below.

## 3. PROCEDURE FOR DETERMINING STANDING

If the standing of a plaintiff is expressly conceded or is not contested by any other party, the issue need not be judicially determined.<sup>2</sup>

If the issue is raised, the court has a discretion whether to determine standing as a preliminary issue or in conjunction with the merits of the case. Whether the court will determine the matter earlier or later will depend on the circumstances of the case – cost and convenience may favour early determination of the issue.

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<sup>1</sup> *Bateman’s Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Limited* [1998] HCA 49 at [38] per Gaudron, Gummow and Kirby JJ.

<sup>2</sup> *Tasmanian Wilderness Society Inc v Fraser* (1982) 56 AU R 763, 766; *R v Public Vehicles Licensing Appeal Tribunal of Tasmania, ex parte Australian National Airlines Pty Ltd* (1964) 113 CLR 207

## 4. COMMON LAW TESTS FOR STANDING

### 4.1 General Principles

The common law test for standing depends somewhat on the type of relief sought. A remedy or relief is the legal term for the outcome or result a person seeks in commencing court proceedings.

However, as a general rule, the common law standing test in Australia is that the applicant must either have a private right or be able to establish that he or she has a “special interest in the subject matter”.<sup>3</sup> The meaning of “special interest” is discussed in section 4.4 below.

A person may lose standing if circumstances change such that they no longer satisfy the relevant test.<sup>4</sup>

### 4.2 Common Law Remedies

At common law, a public interest litigant may seek relief in the form of a prerogative writ of prohibition, certiorari or mandamus.

#### Prohibition

A writ of prohibition is an order issued by a court to prevent a tribunal or inferior court, which is acting in excess of its jurisdiction or has denied natural justice to a person entitled to it, from proceeding any further.

It is usually sought in respect of proceedings before an inferior court, administrative tribunal, local authority or other public statutory body which has legal authority to determine questions affecting the rights of citizens. The remedy is usually sought before the proceedings are completed.

Traditionally, a person will only have standing to seek prohibition if:

1. he or she is a party to the proceedings in respect of which prohibition is sought; or
2. at the discretion of the court, but generally only if the person is “aggrieved”.

In England, the courts have liberalised the test of standing in relation to writs of prohibition and certiorari - provided the person is not a “mere busybody”, any member of the public whose interests are affected have standing in a case of a flagrant and serious breach of the law by a government authority which is continuing unchecked.<sup>5</sup>

While not following England’s wide approach, Australian courts are now using a “special interest” test to determine standing.<sup>6</sup>

#### Certiorari

A writ of certiorari lies to quash an order or decision already made. It is invoked to redress an error of law appearing on the face of the record.

Like prohibition, in the past, a person had standing to seek certiorari at the discretion of the court, which tended only to be granted in respect of a “person aggrieved”, that is, a

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<sup>3</sup> *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 (Gibbs J)

<sup>4</sup> *Transurban City Link Ltd v Allan* [1999] FCA 1723

<sup>5</sup> Eg. *R v Greater London Council; Ex parte Blackburn* [1976] 3 All ER 184.

<sup>6</sup> *Ex parte Helena Valley/Boya Assn (Inc); State Planning Commission and Beggs* (1989) 2 WAR 422



person who had suffered damage greater than that suffered by ordinary members of the public.<sup>7</sup>

Currently, courts are using a “special interest in the subject matter” test to determine standing for certiorari.<sup>8</sup>

### **Mandamus**

A writ of mandamus is an order from the court which compels the performance of a public duty or the exercise of a discretion according to law by a public official, agency or tribunal. The order cannot direct the manner in which it will be performed. It can only command that the public duty or exercise of discretion be performed according to law.

A person has standing to seek mandamus if:

1. he or she exercises a legal right to participate in the tribunal hearing; or
2. he or she will benefit if the duty is performed or he or she has an “interest” in the duty being performed.<sup>9</sup>

The necessary interest in relation to the latter has been described in a number of ways including “legal specific right”, “sufficient interest” and “special interest”. This appears to be a narrower test than for prohibition or certiorari.

### **Part 5 of the *Judicial Review Act 1991* (Qld)**

The above tests are still important when seeking common law prerogative writs in the High Court, Federal Court<sup>10</sup> and any other jurisdiction where statutory remedies have not been introduced such as New South Wales, South Australia and Western Australia.

In Queensland, the prerogative writs of prohibition, certiorari and mandamus were abolished in 1991.<sup>11</sup> However a grant of similar relief in the form of “prerogative orders” can be made pursuant to an application for review under Part 5 of the *Judicial Review Act 1991* (Qld).

The Act provides the same test for standing for all 3 remedies:

“A person is entitled to make an application for review if the person’s interests are, or would be, adversely affected in or by the matter to which the application relates.” (s 44)

Other remedies under the Act refer to a “person aggrieved” test for standing. Section 7 of the Act provides that a “person aggrieved” includes reference to “a person whose interests are adversely affected by the decision.” At least for the purposes of standing under the *Judicial Review Act*, it appears that “person aggrieved” and a “person whose interests are adversely affected” have a similar, if not the same, meaning.

For discussion on the meaning of “person aggrieved”, see section 5.1.1 below.

## **4.3 Equitable Remedies**

The most frequently used remedies in modern public law are injunctions and declarations. An injunction is a court order requiring a person to do, or refrain from

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<sup>7</sup> *Cheatley v R* (1972) 127 CLR 291

<sup>8</sup> *Cheatley v R* (1972) 127 CLR 291

<sup>9</sup> *R v Arndel; ex parte Freeman* (1906) 3 CLR 557 cf. *R v Metropolitan Police Commissioner; ex parte Blackburn* [1968] 2 QB 118 at 136

<sup>10</sup> Section 10 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) provides that the rights conferred by that Act is in addition to existing common law rights, including review by way of prerogative writ.

<sup>11</sup> *Judicial Review Act 1991* (Qld), s 41(1)



doing, a particular action. A declaration is a formal statement creating or preserving a right.

At common law, apart from the Attorney-General and a person acting under the Attorney General's fiat, the following people have standing to seek a declaration or injunction to enforce a public right:

1. a person whose private right has been interfered with at the same time as the public right: *Boyce v Paddington Borough Council* [1903] 1 Ch 109 at 114; and
2. a person who has a "special interest in the subject matter of the action": *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493<sup>12</sup>

In judicial review matters, the Supreme Court of Queensland has power to order declarations and injunctions under Part 5 of the *Judicial Review Act 1991* (Qld)<sup>13</sup> and the "adversely affected" test under s 44 applies. However, the Court also retains its inherent jurisdiction to order declarations and injunctions. In those cases, the common law test for standing applies.

#### 4.4 Special Interest

The meaning of "special interest" has been long debated in Australia with a trend towards a more liberal approach to finding a person has standing.

##### Rationale

The rationale for the "special interest" test was espoused in *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 by Gibbs CJ (at 35) as follows:

"If an attempt were made to frame an ideal law governing the standing of a private person to sue for such a purpose, it would be necessary to give weight to conflicting considerations. On the one hand it may be thought that in a community which professes to live by the rule of law the courts should be open to anyone who genuinely seeks to prevent the law from being ignored or violated. On the other hand, if standing is accorded to any citizen to sue to prevent breaches of the law by another, there exists the possibility, not only that the processes of the law will be abused by busybodies and cranks and persons actuated by malice, but also that persons or groups who feel strongly enough about an issue will be prepared to put some other citizen, with whom they have had no relationship, and whose actions have not affected them except by causing them intellectual or emotional concern, to very great cost and inconvenience in defending the legality of his actions. Moreover, ideal rules as to standing would not fail to take account of the fact that it is desirable, in an adversary system, that the courts should decide only a real controversy between parties each of whom has a direct stake in the outcome of the proceedings. The principle which has been settled by the courts does attempt a reconciliation between these considerations."

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<sup>12</sup> Originally, the test under 3(iii) had been formulated in *Boyce v Paddington Borough Council* [1903] 1 Ch 109 at 114 as:

"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"

<sup>13</sup> s 47(1) *Judicial Review Act 1991* (Qld)

## Circumstances of the Case

Time and again, the courts have stated that standing depends upon the specific circumstances of the case and that there can be no fixed or exhaustive list of interests which would establish standing.

Some examples:

- The character of the relief which is sought in a particular case is relevant to the question of standing: *Robinson v Western Australia Museum* (1977) 138 CLR 243 at 327
- There is no exhaustive list of interests which may serve to support a claim to standing: *Australia Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 (Mason J at 547).
- "The rule is flexible and the nature and subject matter of the litigation will dictate what amounts to a special interest": *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552.
- "The question of standing to review an administrative decision is to be determined by reference to the interest which the applicant has in the decision which is under review. It is to be determined by reference to the nature and subject matter of the review and the relationship which the applicant individually or a representative body may have to it. An interest in the outcome of the review may give standing. But there will be no standing where the actual outcome of the review will not affect the applicant. There will be a question of degree involved in many cases": *Transurban City Link Ltd v Allan* (1999) 168 ALR 687 at 698, upheld by the High Court in *Allan v Transurban City Link Limited* [2001] HCA 58

## Application of the test – Case studies

Generally speaking, "special interest" requires that the applicant show an interest in the subject matter of the action which is beyond that of any other member of the public. However, at least one decision of the High Court has suggested that the test should be broadened to include any person, unless the right or interest of the plaintiff is insufficient to support a justiciable controversy or is otherwise oppressive, vexatious or an abuse of process.

Another issue is whether the special interest test requires the interest of the applicant to be consistent with the objects, purpose, and policy of the legislation which they are seeking to enforce. There are conflicting views: *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247; *Alphapharm Pty Ltd v SmithKline Beecham (Australia) Pty Ltd* (1994) 49 FCR 250; *Allans v Transurban*.

The following table outlines some key rulings that have been made as to the meaning of the phrase "special interest":

Case	Test	Outcome
<i>Australia Conservation Foundation Inc v Commonwealth</i> (1980) 146 CLR 493 (ACF No. 1)	<ul style="list-style-type: none"> <li>• "... an interest, for present purposes, does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs if his action fails (Mason J at 530)</li> <li>• "a mere believe or concern, however genuine, does not in itself constitute a sufficient locus standi" (Mason J at 548)</li> <li>• However, it does not have to involve a legal or</li> </ul>	A national conservation body did not have standing to challenge the validity of an environmental impact process which would result in the approval of a resort development in Queensland.

## Standing in Public Interest Matters

	<p>pecuniary right (Mason J at 530) or that the plaintiff and no-one else possess the particular interest.</p> <ul style="list-style-type: none"> <li>• A special interest exists where the plaintiff can show actual or apprehended injury or damage to his or her proprietary rights, business or economic interests and perhaps social or political interests. (Mason J at 530)</li> <li>• A special interest in the preservation of a particular environment may also suffice. (Mason J at 530)</li> <li>• A corporation or association does not acquire standing merely because some of its members possess it (Gibbs J at 531)</li> </ul>	
<i>Day v Pinglen</i> (1981) 148 CLR 289	<ul style="list-style-type: none"> <li>• An ultra vires or illegal act adversely affecting a given area is likely to confer a special interest upon those in the area.</li> </ul>	The respondent had standing to seek a declaration and injunction to prevent construction in alleged contravention of the law which would obstruct her view.
<i>Onus v Alcoa Of Australia Ltd</i> (1981) 149 CLR 27	<ul style="list-style-type: none"> <li>• "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" (Gibbs CJ at 36)</li> <li>• "At least the plaintiff must be able to show that success in the action would confer on him - albeit as a member of a class - a benefit or advantage greater than the benefit or advantage thereby conferred upon the ordinary member of the community; or alternatively that success in the action would relieve him of a detriment or disadvantage to which he would otherwise have been subject - albeit as a member of a class - to an extent greater than the ordinary member of the community." (Brennan J at 76)</li> <li>• Cultural, spiritual and historical interests may suffice</li> <li>• The test involves in each case a curial assessment of the importance of the concern which a plaintiff has with the subject matter and of the closeness of the plaintiff's relationship to that subject matter. Community values and beliefs will be relevant in this assessment. (Stephen J at [10])</li> </ul>	The plaintiffs had standing to seek an injunction to restrain the respondents from constructing an aluminium smelter which would interfere with Aboriginal relics on the land, in breach of the <i>Archaeological and Aboriginal Relics Preservation Act 1972</i> (Vic). The plaintiffs were descendents of aboriginal people of that area and custodians of the endangered relics according to their laws and customs.
<i>Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)</i> (1995) 183 CLR 552	<ul style="list-style-type: none"> <li>• A union has the same interest in the subject matter of the dispute as its individual members. In other words a union has standing because of the special interest of its individual members.</li> </ul>	A union had standing to challenge the decision of a Minister to permit Sunday trading by granting an exemption to the regulations to certain shops in the Central Shopping District of Adelaide. The union represented shop assistants employed in the Central Shopping District, who as a class had a special interest in trading hours since alteration would necessarily affect the terms and conditions of employment.
<i>Bateman's Bay Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd</i> (1998) 194 CLR 247 ( <b>Bateman's Bay</b> )	<ul style="list-style-type: none"> <li>• Gaudron, Gummow and Kirby JJ suggested that the test for standing should be liberalised and that the "sufficient material interest" criterion should be construed as "an enabling, not a restrictive, procedural stipulation." (at [50])</li> <li>• "It may well be appropriate to dispose of any question of standing to seek injunctive or other equitable relief by asking whether the proceedings should be dismissed because the right or interest of the plaintiff was insufficient to support a</li> </ul>	The respondents had standing to commence proceedings restraining the appellants from operating a contributory funeral fund business. The respondents stood to suffer financial detriment if the appellants were allowed to conduct their business in contravention of the law, which would operate in the same limited market as the



	<p>justiciable controversy, or should be stayed as otherwise oppressive, vexatious or an abuse of process. The plaintiff would be at peril of an adverse costs order if the action failed." (Gaudron, Gummow and Kirby JJ at [39])</p> <ul style="list-style-type: none"> <li>• However, warns against adopting any precise formula for assessing standing if the consequence was to unduly constrict the availability of equitable remedies for the enforcement of public law (Gaudron, Gummow and Kirby JJ at [46])</li> <li>• "...where breach of a public duty has only an indirect effect on a plaintiff's pecuniary interests the plaintiff has not standing..." (McHugh J at [66])</li> <li>• "...a plaintiff's 'special interest' must as a matter of principle be an interest of the general kind which the relevant public right was intended to safeguard or protect, or, where the 'special interest' consists in a vulnerability to 'special damage', the damage must be 'within the same class of damage as the public suffers as a whole and not just 'any side effect of the infringement of the public right'" (McHugh J at [69] citing McLelland CJ in Eq (1996) 92 LGERA 212 at 219 at first instance with approval)</li> </ul>	<p>respondent's business, and that detriment would be greater than the detriment suffered by other persons as the result of the appellant's activities in breach of the law.</p>
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## 5. STATUTORY TESTS FOR STANDING

In most cases, if a statutory remedy is sought, the statute creating the remedy will specify the class of persons who are entitled to seek the remedy.

The standing provisions of statutes which are commonly raised in public interest litigation are examined below.

### 5.1 Administrative Law

Administrative law is that body of law which enables individuals to challenge the decisions or actions of government.

#### Judicial Review

The function of the court engaged in judicial review is confined to determining whether the public authority (which is part of the executive branch of government) has acted lawfully at the time of its decision, that is, whether it has acted within the powers conferred upon it. Judicial review is brought under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**) for Commonwealth disputes, and under the *Judicial Review Act 1991* (Qld) (**JR Act**) for Queensland disputes.

In judicial review, a court may:

- order the decision be quashed;
- order the decision be referred back to the original decision maker for reconsideration;
- make a declaration;
- order the parties to do, or not to do, specified things.

Under both the ADJR Act and the JR Act, a person has standing to seek judicial review if they are "a person who is aggrieved" by the decision, conduct or failure for which they



seek review.<sup>14</sup> A "person aggrieved" is defined in the legislation to include a person whose interests are adversely affected by the decision, conduct or failure.<sup>15</sup>

When determining whether a person is aggrieved, the courts have referred, at least as a starting point, to the 'special interest' test under the common law.<sup>16</sup> In other words, when applying the Acts, the courts have asked whether the applicant has suffered a grievance as a result of the decision complained of beyond that which he or she would suffer as an ordinary member of the public.<sup>17</sup>

Whether the test for standing in statutory judicial review has been affected by the expanded view expressed in *Bateman's Bay* is debatable. There are cases both for<sup>18</sup> and against<sup>19</sup> allowing liberalisation of the equitable approach to flow across to the statutory test. It would appear, in any case, that the statutory test is being applied more liberally than under the test originally formulated in *ACF No. 1*.

#### *ADJR Act*

In *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492, despite not having as strong a claim to standing as the Australian Conservation Foundation in *ACF No. 1*, the applicant was found to have standing to seek reasons under the *Administrative Decisions (Judicial Review) Act 1977* from the Minister for the decision to grant a licence to a third party to export woodchips.

In relation to liberalisation of the standing test, Sackville J said (at [44]):

"There is much to be said for the view that the focus of attention where decisions of public authorities are challenged or reasons for those decisions are sought should not be any benefit that might accrue to the plaintiff or the applicant. On this view, the focus should be on those "who can represent the public interest (in litigation) most effectively and faithfully" ... Indeed the law, at least for the purposes of the ADJR Act, appears to be in a state of transition, although it is fair to say that there has been a progressive widening of the law of standing and of the concept of "person aggrieved" over the last century. ... The question in this case is, perhaps, how far the latest transitional process has gone."

Sackville J acknowledged that *ACF No. 1* must be understood as a response by the majority of the court to the breadth of the arguments put forward by the appellant in that case although the test put forward in that case was still authoritative (at 492). He then went on to apply the following principles:

- The asserted interest must go beyond that of members of the public in upholding the law and must involve more than genuinely held convictions.
- A person may be able to demonstrate a "special interest" in the preservation of a particular environment. For this purpose, as *Onus v Alcoa* (at 41) allows, an intellectual or emotional concern is no disqualification from standing to sue.

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<sup>14</sup> ADJR Act, ss 5, 6 and 7; JR Act, ss 20, 21 and 22

<sup>15</sup> ADJR Act, s 3(4); JR Act, s 7

<sup>16</sup> *Australian Conservation Foundation v Minister for Resources* (1989) 19 ALD 70; *Re Australia Institute of Marine and Power Engineers* (1986) 18 IR 431 (Galo J); *Friends of Castle Hill Association Inc v Queensland Heritage Council* (1993) 81 LGER 346 (Dowsett J)

<sup>17</sup> *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 36 ALR 64

<sup>18</sup> A 'person aggrieved' is not intended to have a narrow meaning and it at least covers a person with a grievance over and above the public: *Ogle v Strickland* (1987) 13 FCR 306; It is inappropriate to interpret 'person aggrieved' narrowly, *Re United States Tobacco Company* (Unreported G158/1998, 14 July 1998); *Boe v Criminal Commission* (unreported, de Jersey J, SC No. 319 of 1993, 10 June 1993); *Purcell v Venardos* [1996] 1 Qd R 310; It would be strange if being "aggrieved" under the JR Act was narrower than the common law test for standing: *Re Australia Institute of Marine and Power Engineers* (1986) 18 IR 431; The JR Act is a remedial regime to overcome problems of common law: if common law test is liberalised, then so should the statutory test: *Sharples v O'Shea* [1999] QSC 190

<sup>19</sup> Declarations and injunctions are emphasised as equitable in *Bateman's Bay* and to allow liberalisation to flow across would be transferring equitable principles into a clearly non-equitable context: *Transurban City Link Ltd v Allan* [1999] FCA 1723, [40]



- Non-compliance with the *Environmental Protection Act* nor the Administrative Procedures themselves confer any private rights enforceable by individuals.
- The fact that a person makes comments on an Environmental Impact Statement does not of itself confer standing on that person to challenge or complain of a decision resulting from the environmental assessment process.

#### *JR Act*

The trend towards liberalisation is even more advanced in relation to Queensland.

In *North Queensland Conservation Council Inc v Executive Director, Queensland Parks and Wildlife Service* [2000] QSC 172 (the *NQCC Case*), NQCC sought statutory order of review under the *Judicial Review Act 1991* (Qld) of the Minister's decision to issue a permit allowing Queensland to develop a harbour and associated works on Magnetic Island. Chesterman J in the Supreme Court of Queensland held NQCC had standing, but not on the basis of "special interest", although it was noted that NQCC would have the requisite interest if the special interest test were to be applied.

Rather, Chesterman J (at [12]) proposed and applied the following test:

The rationale for limiting standing as explained by Gibbs CJ in *Onus* suggests a solution to the problem. The plaintiff should have standing if it can be seen that his connection with the subject matter of the suit is such that it is not an abuse of process. If the plaintiff is not motivated by malice, is not a busy body or crank and the action will not put another citizen to great cost or inconvenience his standing should be sufficient.

His Honour went on to say that whether this test was helpful or not, it now appeared to be established that courts should not be too strict in their assessment of what constitutes special interest.

Clearly, Chesterman J's "abuse of process" takes a significantly different approach to the traditional test for standing. While it clearly takes on board the first part of Gibbs CJ's rationale in *Onus v Alcoa* for having a "special interest" test, it leaves out his further concern – that is, in an adversary system, it is desirable that the courts only decide a real controversy between parties "each of whom has a direct stake in the outcome of the proceedings".

The *NQCC Case* has been subsequently cited in 3 other cases.

*Save Bell Park Group v Kennedy* [2002] QSC 174 related to the challenge under the *Judicial Review Act 1991* (Qld) of planning decisions by the Minister which would allow development at Bell Park. In a reasonably short discussion on the issue of standing, Dutney J held that the plaintiff did have standing, by finding that it did have a "special interest" in that it was not "merely intellectual or emotion" nor was it an "abuse of process". In doing so, Dutney J effectively used traditional tests as well as applying the test from the *NQCC Case*.

Two years later came *Save the Ridge Inc v Australian Capital Territory* [2004] ACTSC 13 in the Supreme Court of the ACT, where the plaintiff sought to restrain by injunction a potential breach of the *Land (Planning and Environment) Act 1991* (ACT) by the respondent through the carrying out of works at O'Connor Ridge in the Australian Capital Territory, including removal of trees, construction of fences and a site office and relocation of gas and electrical services. While accepting that a more liberal approach had been taken in recent years, Crispin J found that the *NQCC Case* went "far beyond that adopted in any of the earlier authorities". In any case, it was held that the plaintiff had demonstrated a sufficient special interest.

Finally, in *BHP Coal Pty Ltd & Ors v Minister for Natural Resources and Mines & Anor* [2005] QSC 121, the *NQCC Case* was merely cited as one of a number of cases for the

proposition that the term “person who is aggrieved” (the standing test under the *Judicial Review Act 1991* (Qld)) should be given a broad construction.<sup>20</sup>

Chesterman J’s approach is an indication that the law may be moving towards a position where the public interest in ensuring the lawful exercise of executive power is in itself a “special interest” (open standing). It is left to be seen whether subsequent cases in the Court of Appeal and High Court will further develop this position or whether traditional views will prevail.

## Merits Review

Citizens aggrieved by a range of Commonwealth government decisions can seek to have those decisions formally and completely reviewed by a dedicated general review body - the Commonwealth Administrative Appeal Tribunal, pursuant to the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**).<sup>21</sup>

Unlike judicial review, merits review is characterised by the capacity of the reviewing person or body to substitute its decision for that of the original decision maker.

Section 27(1) of the AAT Act provides that an application may be made for review by or on behalf of “any person whose interests are affected by the decision”. Under s 30(1A), any other person whose interests are affected by the decision may apply to be joined as a party. The AAT has a residual discretion as to whether to allow the person to join.<sup>22</sup>

Under s 22(2) and (3), an organisation or association of persons will be taken to have interests that are affected by a decision if the decision relates to a matter included in the objects or purposes of the organisation or association. Much depends on the construction and formulation of the organisation’s objects to see if they are connected specifically enough with the decision under review. The decision must have been made after the organisation was formed and after it adopted the objects or purposes affected by the decision.

Generally, the interest affected need not be a pecuniary interest or a specific legal right, however the interest must be one held other than as a member of the general public and must not be too remote. Further considerations are:

- The test is similar to the common law ‘special interest’ test.
- The AAT Act test for standing appears to be wider than the judicial review test, given that the person’s interest need not be *adversely* affected, merely affected.
- However, the AAT Act test has been phrased in a similar way to the judicial review test: interests which a person has other than a member of the general public and other than a person holding a mere belief that particular conduct should be prevented or a particular law should be observed.<sup>23</sup>
- If review is under a specific scheme established by statute, the interest affected has to be of the type which the relevant statute was directed.<sup>24</sup> That is, in order to determine whether a person’s interest has been affected by a decision, it is necessary to look at the scope, subject matter and purpose of the Act under which the decision was made. Accordingly, satisfaction of the test for standing will depend

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<sup>20</sup> That case considered the interlocutory application to strike out certain paragraphs of the second respondent’s defence. Standing for the principal issue, that is judicial review of the Minister’s decision to extend an Exploration Permit for Coal held by the second respondent, was a relevant although minor issue.

<sup>21</sup> In Queensland, no general merits review body has yet been established and accordingly there has been a continuing ad hoc proliferation of single purpose administrative appeal bodies with varied standing provisions.

<sup>22</sup> *Re City of Doncaster and Templestowe v Minister for Community Services* (1987) V86/577 AAT No. 3226

<sup>23</sup> *Re Control Investments Pty Ltd* (1980) AAT (Davies J, President)

<sup>24</sup> *Allan v Transurban City Link Limited* [2001] HCA 58, [16]; *Alphapharm Pty Ltd v SmithKline Beecham (Australia) Pty Ltd* (1994) 49 FCR 250



to a significant extent upon the subject matter and statutory context of the particular decision in question.<sup>25</sup>

This approach does not affect the question of standing in relation to organisations or associations under s 27(2), as standing can still be established irrespective of statutory context.

## 5.2 Environment and planning law

### Environmental Protection and Biodiversity Conservation Act (Cth)

Under s 475 of this Act, an “interested person” may apply to the Federal Court for an injunction restraining another from committing an offence or otherwise contravening the Act or regulations.

An interested person is defined under the section as:

- For individuals – the individual is an Australian citizen or ordinarily resident in Australia or an external Territory and:
  - the individual’s interests have been, are or would be affected by the conduct or proposed conduct; or
  - the individual engaged in a series of activities for protection or conservation of, or research into, the environment at any time in the two years immediately before the conduct or, in the case of proposed conduct, the making of the application for injunction.
- For organisations – the organisation was incorporated or established in Australia or an external Territory and:
  - the organisation’s interests have been, are or would be affected by the conduct or proposed conduct;
  - at any time during the two years immediately before the conduct or, in the case of proposed conduct, the making of the application for injunction:
    - the organisation’s objects or purposes included the protection or conservation of, or research into, the environment; and
    - the organisation engaged in a series of activities related to the protection or conservation of, or research into, the environment.

### Environment Protection Act 1994 (Qld)

People seeking to remedy or restrain an offence, or anticipated offence, against the EPA may apply for:

- a restraint order under Chapter 10, Part 4 for offences other than development offences; or
- an enforcement order under Chapter 10, Part 5 for development offences.

A development offence is contravention of a development condition of a development approval, whether wilful or not (s 435).

#### *Restraint orders*

Under s 505, a restraint order may be sought by:

- (a) The Minister

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<sup>25</sup> *Allan v Development Allowance Authority* (1998) 152 ALR 439; *Alphapharm Pty Ltd v SmithKline Beecham (Australia) Pty Ltd* (1994) 49 FCR 250

- (b) The administering authority
- (c) someone whose interests are affected by the subject matter of the proceeding; or
- (d) someone else with the leave of the Court (even though the person does not have a proprietary, material, financial or special interest in the subject matter of the proceeding).

In relation to (d), in deciding whether to grant leave, the Court may have regard to any matter the Court considers relevant to the person's standing to bring and maintain the proceeding, but must be satisfied that:

- environmental harm has been or is likely to be caused; and
- the proceeding would not be an abuse of the process of the Court; and
- there is a real or significant likelihood that the requirements for the making of an order under this section would be satisfied; and
- it is in the public interest that the proceeding should be brought; and
- the person has given written notice to the Minister or relevant administering executive requesting that they bring proceedings under the section and the Minister or executive have failed to act within a reasonable time in the circumstances; and
- the person is able to adequately represent the public interest in the conduct of the proceeding.

However, the Act expressly states the Court must not refuse to grant leave merely because the person's interest in the subject matter of the proceeding is no different from someone else's interest in the subject matter (s 505(3)). That is, there is no need to show "special interest".

Leave may be granted subject to conditions, for example, on security for payment of costs or an undertaking about damages (s 505(4)). A further deterrent to commencing an action is that the Court must order a plaintiff to pay costs if the Court is satisfied the proceeding was brought for obstruction or delay (s 505(10)).

#### *Enforcement orders*

Any person may seek an enforcement order under s 507(1). The Act goes on to expressly provide that a person may bring such a proceeding "whether or not any right of the person has been, or may be, infringed by, or because of, the commission of the offence".

### **Integrated Planning Act (Qld)**

The Integrated Planning Act has open standing provisions in that "any person" may bring proceedings in the Planning and Environment Court for a declaration regarding enforcement of the Act.

## **5.3 Consumer Protection**

### **Trade Practices Act 1974 (Cth)**

Any person under the Trade Practices Act may seek an injunction to enforce to enforce its provisions (s 80).

Standing to seek damages is limited to persons who suffer loss or damage (s 82), or in the case of compensation or other remedial orders, to persons who have suffered or are likely to suffer, loss or damage because of the contravention of the Act (s 87).



### **Fair Trading Act 1989 (Qld)**

The same standing provisions as under the Trade Practices Act apply to the Fair Trading Act under the following sections: injunctions (s 98), damages (s99) and compensation and other remedial orders (s 100).

## **5.4 Discrimination Law**

### **Human Rights and Equal Opportunity Commission Act 1986 (Cth)**

The Human Rights and Equal Opportunity Commission is an independent national organisation that investigates and conciliates complaints of discrimination and human rights breaches. It is responsible for administering the *Age Discrimination Act 2004*, *Disability Discrimination Act 1992*, *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984* and the *Human Rights and Equal Opportunity Commission Act 1986*.

Under 46P of the *Human Rights and Equal Opportunity Commission Act*, the following persons may lodge a complaint with the Commission alleging unlawful discrimination:

- a person or persons aggrieved by the alleged unlawful discrimination;
- a person or trade union on behalf of one or more other persons aggrieved by the alleged unlawful discrimination.

If the President of the Commission terminates the complaint, for example, where there is no unlawful discrimination or the complaint is lacking in substance, an affected person in relation to the complaint may take the matter to the Federal Court or Federal Magistrates Court.

### **Anti-Discrimination Act 1991 (Qld)**

Under s 134, the following people may make a complaint to the commissioner about an alleged contravention of the Act:

- a person who was subjected to the alleged contravention; or
- an agent of the person; or
- a person authorised in writing by the commissioner to act on behalf of a person who was subjected to the alleged contravention and who is unable to make or authorise a complaint.

## **6. STANDING OF PUBLIC INTEREST GROUPS**

In public interest litigation, it is more often interest groups which are the applicants. Under the common law, with its focus on private rights, it is difficult for groups to show special damage resulting from an administrative decision. However, under the liberalised approaches, groups have regularly been granted standing.

In assessing standing, the courts have considered a range of relevant factors when determining the status of groups. While there is no separate standing test for public interest groups, the courts tend to take these additional considerations into account and therefore, in practice, treat groups distinctively.

The factors considered by the courts are:

- (a) Representative nature of the group

An important consideration is that the group granted standing is representative of a significant public concern.<sup>26</sup>

(b) Established interest in the area<sup>27</sup>

(c) Relationship with the government<sup>28</sup>

Examples include:

- the group sits on government boards or committees;
- the group has made past submissions to government in related areas;
- the group is recognised by legislation;
- the government has sought advice from the group;
- the group has received funding from the government.

(d) Prior participation in the relevant process

The applicant had some involvement in the relevant process, usually the decision making process itself.<sup>29</sup>

(e) Whether there are other possible applicants.

A number of judges have indicated that the absence of other possible applicants will favour the grant of standing.<sup>30</sup>

(f) Interest of members

In some cases, the interests of individual members have been taken into account to determine the standing of the group.<sup>31</sup>

(g) Importance of issues

The perceived importance of the issues at stake is a consideration sometimes expressly or implicitly relied on in establishing standing.<sup>32</sup>

## 6.1 Case studies

- In *Australian Conservation Foundation and Anor v Minister of Resources and Anor* (1989) 19 ALD 70 (ACF No. 2), it was found that ACF had standing to challenge a ministerial grant of a licence for export of woodchips from State forests. Davies J (at 73) said:

“While ACF does not have standing to challenge any decision which might affect the environment, the evidence establishes that ACF has a special relation to South East forests and certainly in those areas of the South East forests that are the 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 preeminently the body concerned with that issue. If ACF

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<sup>26</sup> *Australian Conservation Foundation v Minister for Resources* (1989) 76 LGRA 200, 205-206; *Right to Life Association v Secretary, Department of Human Services and Health* (1995) 56 FCR 50, 78-80 (Beaumont J)

<sup>27</sup> *Australian Conservation Foundation v Minister for Resources* (1989) 76 LGRA 200, 205; *North Coast Environment Council Inc v Minister for Resources (No. 2)* (1994) 55FCR 492, 512-513; *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 55 FCR 516,552-553

<sup>28</sup> *Right to Life* (1994) 52 FCR 209

<sup>29</sup> *Australian Conservation Foundation v Minister for Resources* (1989) 76 LGRA 200, 205; *North Coast Environment Council inc v Minister for Resources (No. 2)* (1994) 55 FCR 492, 512-513; *Tasmanian Conservation Trust Inc v Minister for Resources (1995)* 55 FCR 516, 552-553

<sup>30</sup> *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27,73; *Ogle v Strickland* (1987) 13 FCR 306, 319-329

<sup>31</sup> *North Coast Environment Council Inc v Minister for Resources (No. 2)* (1994) 55 FCR 492, 512-513; *Ex Parte Helena Valley/Boya Association (inc); State Planning Commission and Beggs* (1989) 2 WAR 422, 437

<sup>32</sup> *Australia Conservation Foundation v Minister for Resources* (1989) 76 LGRA 200, 206; *King Cole Hobart Pty Ltd* (1992) 77 LGRA 92, 100; *Central Queensland Speleological Society Inc* (1989) 2 Qd R 512, 523



does not have a special interest in the South East forests, there is no reason for its existence.”

- In *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492, Sackville J (at [82]), in construing a set of principles from *ACF v Commonwealth* relevant to the present matter, said that an organisation does not demonstrate sufficient special interest in the environment by simply formulating objects that demonstrate an interest in and commitment to the preservation of the physical environment.
- In *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552, a union was held to have standing because of the special interest held by its individual members.
- In *Executive Council of Australian Jewry v Scully* (1998) 51 ALD 108, an unincorporated Jewish association had standing to bring proceedings against a person who had allegedly distributed anti-Semitic literature, under the *Racial Discrimination Act 1975* (Cth) and the *Racial Hatred Act 1995* (Cth), due to the member organisations being “persons aggrieved” by the alleged actions.
- In *North Australian Aboriginal Legal Aid Service Inc v Bradley* [2001] FCA 1728, the Court applied *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552 in finding that the NAALAS had standing to challenge the validity of the appointment of a magistrate of the Northern Territory. It had the same interest in the issue as would any of its clients appearing before the magistrate. This was not to say that all practitioners representing a client before the magistrate would have standing: “Such a practitioner cannot be equated with an incorporated body such as NAALAS, which has particular responsibilities towards Aboriginal persons and the Aboriginal community generally. NAALAS occupies a pivotal role in the administration of criminal justice in the Northern Territory.”

## 7. REFORMING THE LAW OF STANDING

The above shows that both courts and legislation are slowly recognising the need for a broader approach to standing in public interest matters. There have also been several discussion papers and reports recommending reform in the area of the law of standing. These papers favour open standing provisions thereby liberalising the current law and removing a barrier to access to justice.

### 7.1 A Liberal Approach

The traditional approach to standing is to determine whether the complainant has a “special interest” in the subject matter of the dispute. This test has also been used to guide standing tests under various statutes, in particular, standing for judicial review where the person must be a “person aggrieved” or a “person affected” by the decision or action in question.

However, there has been a broadening of the approach the courts take when considering whether a party has standing to enforce a public right. In *Bateman’s Bay*, Gaudron, Gummow and Kirby JJ suggested a test where “the proceedings should be dismissed because the right or interest of the plaintiff was insufficient to support a justiciable controversy, or should be stayed as otherwise oppressive, vexatious or an abuse of process.”

Similarly, Chesterman J in the *NQCC Case* found a person would have standing under the *Judicial Review Act 1991* (Qld) if it could be seen that his or her connection with the subject matter was not an abuse of process and that he or she was not motivated by



malice, was not a busy body or crank and the action would not put another person to great cost or inconvenience.

Consistent with these views, some environment, planning and consumer protection legislation have adopted open standing or near open standing provisions.

However, without formal recognition through statute, it is unlikely that the liberal approach will be applied with any uniformity in the near future.

## 7.2 Australian Law Reform Commission

The Australian Law Reform Commission reviewed the law of standing in 1996<sup>33</sup> and recommended that a broad single test for standing be introduced. The ALRC also recommended that the 'special interest' requirement be removed. It was of the opinion that the test is too narrow, uncertain, complicated, inconsistent and involves making value judgments as to what interests will be recognised.

The ALRC has put forward a new general test for standing allowing any person to commence public law proceedings unless:

- (a) Relevant legislation provided a clear intention to the contrary; or
- (b) It would not be in the public interest to proceed because to do so would unreasonably interfere with the ability of the person having a private interest in the matter to deal with it sufficiently or not at all.

To date no reform has been undertaken.

## 7.3 Environmental Defenders Office (Qld) Inc

Several recommendations have also been made by the EDO regarding the law of standing in environmental matters.<sup>34</sup> These include:

- provisions in statute should make no reference as to who may take action to prosecute criminal offences. This would ensure the retention of the right of private criminal prosecution even though, private criminal prosecution is uncommon;
- open standing provisions should be adopted in relation to civil litigation based on s 123 of the *Environmental Planning and Assessment Act 1979* (NSW)<sup>35</sup>;
- provisions for open rights of appeal should be inserted in legislation regarding administrative appeal.

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<sup>33</sup> 'Beyond the Door Keeper. Standing to Sue for Public Remedies', ALRC Report 78 (1996)

<sup>34</sup> Bragg J, 'Standing and Public Interest Litigation' (undated) EDO Report

<sup>35</sup> ***Restraint etc of breaches of this Act***

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