# ENVIRONMENTAL DEFENDERS' CONFERENCE

# LAW, STANDING AND THE ENVIRONMENT

## ADDRESS BY THE HONOURABLE JUSTICE P W SLICER

## THE OLD WOOLSTORE, HOBART

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## ADDRESS GIVEN TO THE ENVIRONMENTAL DEFENDERS' CONFERENCE BY THE HONOURABLE JUSTICE P W SLICER _ UNLOCKING THE GATES OR FLOODGATES FRIDAY 23 AUGUST 2002, THE OLD WOOLSTORE, HOBART

This paper attempts to identify, analyse and bring together, a number of themes and their effects on the right of a citizen to challenge government, claim or defend interests, or seek redress for harm caused in areas of environmental law. The themes impact on all areas of governance and society and all too often we lose sight of the parameters of the legal and political process when engaged in a specific cause or campaign.

Themes:

(1) Changes in social and political process.

(2) Tensions between the Executive and Judicial institutions.

(3) Legal remedies and materialism.

(4) Law as a vehicle for social change.

These themes impact on the central questions of standing, namely who may engage in proceedings, and the degree to which judicial institutions can grant remedy without usurping the rightful interests of the Executive and Parliament in determining policy, the allocation of resources and the responsibility of accepting the political and economic consequences of decision making.

### Changes in the Social and Political Process

Australian political economy, that is, the social, political and economic institutions and forces can best be described as an amalgam of post-war European social engineering and the American model of declared rights determined by institutions. We have yet to determine the desired model, or at least its mix. We are moving from a process of regarding rights as being gained by political struggle, involving the ebb and flow of party ideology, the interplay of capital and labour, the effectiveness or otherwise of social movements to the American model of stating rights and using the courts as vehicles to interpret and enforce those rights. Traditionally, in the historic model, Australian courts played but a minor role in the processes of social debates concerning environmental issues. Whereas, in the United States, they were central to those processes. In Australia, that shift of focus has and will continue to move to a lobby/court based methodology. More and more statutes are enacted to provide for, defence, or restrict, forms of conduct.

Societies have always borrowed from the future: growth; loans, deficits, spending, bonds, expectations of future bounty and the like, always formed the economic paradigm. The economic problem is that the traditional approach of borrowing from the future has only looked at the cost of production and distribution without affording consideration to the cost of depletion of resources, health of citizens and the price of remedying environmental degradation. Our generation has less of the future from which to borrow, whilst, at the same time, it realises that it is responsible for paying for the debts of the past.

Those two developments have met. As citizens perceive the existence of rights enforceable in courts, and governments choose or feel obliged to appoint more and more statutory or judicial bodies to define and enforce rights and standards, the values inherent to those questions, especially those economic consequences both of the past and for the future, are central to the factors which must be considered by judicial tribunal. These developments are not confined to issues affecting the environment. In many respects, *Mabo v Queensland [No 2*][1] represents an acknowledgement that Australia cannot go forward until it has accepted and understood its past. *Mabo,* and, to a far lesser degree *Wik*[2], represent an acceptance of responsibility for the reality of the past as necessary to define who we are as a society. Questions posed by environmental issues, whilst more pragmatic involving as they do values of long-term self-interest, nevertheless require analysis of past debts and future payments.

Laws concerned with the environment date back to the formative years of the Common Law.[3] Initially such laws were usually directed at "localised problems of health and welfare and the rectification of immediate problems of pollution and degradation of economically important resources." Essentially, the law has approached environmental questions insofar as they impact on residence and amenity with the emphasis centred on its impact on human beings. It was affected by John Locke's theory of property characterised that part of the environment which had not been the subject of private economic development as 'waste'.[4]

Today, environmental law exists as a distinct branch of the law, transgressing traditional legal areas such as tort, constitutional and property law, as well as more recent functional developments in international law, town and country planning, administration law, and mining and energy law.[5]

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1 (1992) 175 CLR 1

2 *Wik Peoples v State of Queensland* (1996) 141 ALR 129

3 Fisher, D E, *An Overview of Environmental Law in Australia,* (1977) 3 Earth L J, at 47. See also G M Bates, *Environmental Law in Australia* (2nd ed) Sydney Butterworths (1989) at 213.

4 Locke, J, *Second Treaties*, Chapter V in P Laslett (ed) Two Treaties on Government, Cambridge University Press 1964.

5 Grinlinton, D *The Environmental Era and the Emergence of Environmental Law in Australia* - A Survey of Environmental Legislation and Litigation 1967 - 198 7 *Environmental and Planning Law Journal* (1990) Vol 70 No 2, 74 at 76.

Environmental Law, as an entity, however, eludes precise definition, largely because it is difficult to arrive at a satisfactory definition that narrows the field to a discrete subject area given that social surroundings are so integral to the physical and biological aspects of living, and that social considerations, so far as they effect the biosphere, must be imported, be they political, economic, ideological, aesthetic, or cultural. The law does not view the health of the environment separate from human factors. Matters affecting environmental law are:

1 Statute whereby the State responds to demands or seeks to implement a course of social engineering.

2 Allocation or abrogation of responsibility to the courts in order to avoid political pressures and/or damage.

3 The consequence that, absent political decision making processes, the referral of decision making to tribunals departs from our traditional political processes and forces.

The challenge then for courts when "judging environmental health" has been to consider what is essentially a scientific concept in the light of the general health and well-being of each community, and yet, not be unduly influenced by factors which draw attention from those scientific principles. But in doing so, they are expected to pay regard to the perceived values of the society affected by any decision. The courts are, if not immune, at least cushioned by the interplay of social forces which ordinarily impact on political decision making processes.

**Tensions Between the Executive and Judicial Institutions**

Recent political attacks, especially on the Federal and High Courts, show the depth of this tension. The competing views are strongly held by both parties, but it is not, as some political observers claim, that of the Courts are seeking to be either adventurist or social engineers. The Courts are defending two fundamental principles, access to judicial institutions and procedural fairness which form part of the vague concept of natural justice. In the case of refugees, the Executive and Parliament are attempting to restrict access, believing the Court process to be expensive and slow. Hence, the Pacific solution and the attempt by regulation to exclude islands from the migration zone. The United States removes suspected terrorists to Guantanamo Bay, the military base not being part of the territory of the United States, for the same reason. France being more pragmatic, built their holding station near the Channel Tunnel, hoping, no doubt, that detainees would escape to perfidious Albion. The Courts in preserving access and procedural fairness are giving effect to general statements of Parliament and international law, but are seen to be interfering in policy. Migration is not the only battleground.

Judges have no charter to retreat from the settled principles of common law and to substitute them with others intended to achieve specific environmental goals, "... Judges reject the notion that they are at liberty to give effect to personal preferences or to predetermined ideologies in deciding cases."[6]

In the words of Sir Daryl Dawson:

> *"The question is not whether judges act as legislator, for they do not, or at least if they do, they are not proper judges ... A judge can not lay down a rule in order to implement some premeditated policy when ever he or she wishes to do so as a legislature does. The question for a judge's determination must arise in litigation brought about before the court by the parties to that litigation. And even then the judge's pronouncements upon the law do not operate only in the future, as does most legislation, but establish the law in the present and past as well. However, it is the manner in which judges make law which most clearly distinguishes their law from legislation. A judge makes law too much if he or she uses a legislative rather than a judicial method.*"[7]

Judges are required to operate within the framework of the law, and whilst this entails some measure of constraint, it does not render the process entirely uncreative. According to Professor Dworkin, integrity requires judges "... to treat our present system of public standards as expressing and respecting a coherent set of principles, and, to that end, to interpret these standards to find implicit standards between and beneath the explicit ones".[8]

Three factors exacerbate the tension. The change of self-perception from subject to citizen and the claim of rights means that people expect redress through the Courts when the Executive or other interest groups fail to accommodate their expectations. Parliaments tend to enact laws in general terms often including safe and warm concepts which meet with political approval. In some areas a difficult or controversial issue will be assigned to the Courts to avoid the political or electoral repercussions of a decision. Much modern environment related enactments employ such terminology. An example of such legislation is provided by the *State Policies and Project Act* 1993, which defines the goal of sustainable development as:

> "the means managing the use, development and protection of natural resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural well-being and for their health and safety while -

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6 Mason, The Honourable Sir Anthony. Law and Economics, Monash Law School Foundation Lecture *25* March 1992, Monash University Law Review Vol 17 No 2 1991, 167 at 179.

7 Dawson, The Honourable Sir Daryl AC KBE DB "*Do Judges Make Law? Too Much*?" The Judicial Review, Selected Papers, Journal of The Judicial Commission of New South Wales, Vol 3, September 1996 No 1, 1 at 1.

8 Dworkin, R, *Law's Empire* (1986), Fontana, London.

(a) sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations; and

(b) safeguarding the life-supporting capacity of air, water, soil and ecosystems; and

(c) avoiding, remedying or mitigating any adverse effects of activities on the environment."

If the Courts give effect in terms to those statements, they can be accused of causing change of policy or undesirable consequences.

The third factor is that ordinarily Courts are precluded from considering the economic consequences of their decisions. It is one thing to require a high standard of care in medicine, another if a consequence is that, as in the United States, many areas are left without the services of obstetricians. Experience in Canada and the United States in areas such as abortion and prisons illustrate the problems of Courts entering into social debate or of economic consequence of principled decisions.

A further tension exists between law and science in the area of environment law.

Whilst science and law have some methodologies in common, they remain different disciplines. Science is inquisitorial and subject to scrutiny after observation; whilst law is adversarial, concerned with the immediate resolution of competing or conflicting interests of those parties who have brought their disputation before the court. Tension is inherent between the two disciplines of science, as:

> "A branch of study in which facts are observed and clarified and, quantitative laws are formulated and verified; it involves the application of mathematical reasoning and data analysis to natural phenomena".

And the legal system, as:

> "A body of principles or set of rules recognised and applied by the state in the administration of justice."

Those tensions impact on lawyers who must prepare opposing scientific and technical evidence, the witnesses who give differing opinions or conclusions and judicial officers who are required to weigh the competing cases and arrive at a determination of fact. The needs and expectations of the community, also relevant to the decision making process, are not necessarily determined by the above paradigms. They are involved by perceptions of 'what is and what ought to be'. The problems which face us contain not only observable and empirically testable facts, but also value laden questions such as, what constitutes 'quality of life'? That is to say, the issues raised through scientific data analysis, mathematical reasoning, quantitative laws and 'hard' objective fact, must be tempered with 'softer' subjective opinion of community, political, humanist values and interests. In the balance is scientific knowledge in the pursuit of 'truth', and society values constructed around the intangible pursuit of 'justice' and a fair outcome.

The combination of bringing the scientist into the court room makes for an uneasy alliance. In law, the civil onus or degree of probability required to discharge a burden of proof is characterised as being 'on the balance of probability'. The scientific community, on the other hand, is in general agreement that confidence levels for the acceptance of theory or explanation require a higher standard. This natural tension is often exploited in a court process.

The law, on the other hand, cannot deal in absolutes for its processes must account for policy and social factors. In contrast, science must, where possible, arrive at findings devoid of bias or preference which can be said to positively prove a given hypothesis. Scientists seek to know the secrets of the universe, while courts seek a basis for action. A synthesis of the two disciplines necessitates the canvassing of a broad range of criteria to reach "environmentally acceptable" as opposed to "best possible" solutions. The resulting compromise of the "unbridgeable gulf", a less than perfect means of addressing pressing environmental health concerns.

Scientists challenge the concept that humans are central to the universe. Conservatives resist change or seek a return to the past, whilst environmentalists either advocate change to the existing patterns of industrial development, or have a mystical yearning for Elysium fields. When the law enters the debate of the determination of environmental objectives, it commences from an acceptance of a number of value judgments; the law must accept that humans are not the most significant factor in the universe, the law must accept that existing social change ought to be resisted; the law must accept that continued patterns of resource management are not sustainable, whilst acknowledging that the problems sought to be resolved involve immediate human and society interests. Yet courts can only deal with the evidence placed before them. To do otherwise would be to act inconsistent with their mandate. To do otherwise would be to promote a particular recipe for social action and take a fixed position in an area of social concern that is characterised by a rich store of challenging and diverse intellectual exchanges. To this must be added the reality that the law is often a generation behind current social trends, that is, it must be able to perceive core social values as distinct from transient values until they have become settled. It must avoid the so-called "tram catching syndrome". In such complexity, Cotgrove in referring to the diversity of conviction that characterises the environmental debates observes: ".... consensus evaporates into a bewildering disagreement over what are the most pressing environmental dangers, what are their causes, and how they can best be tackled", and goes on to point out that the "wide diversity of ideologies and utopias which can be detected beneath the surface range from recipes for anarcho-socialist communes, proto-feudal communities to technocratic
solutions for world government."

Thus the citizen or institution seeking to advance or defence claimed rights seeks redress, not through the traditional forms of political processes, but before tribunals, specialist bodies and litigation.

Laws concerned with the environment date back to the formative years of the Common Law.[9] In their inception such laws were usually directed at "localised problems of health and welfare and the rectification of immediate problems of pollution and degradation of economically important resources." Essentially the law has had an anthropocentric viewpoint that has valued the environment, only in so far as it has a capacity to serve human living. It was a long time ago that John Locke's theory of property characterised that part of the environment which had not been the subject of private economic development as "waste".[10]

Today environmental law stands as a distinct branch of the law, transversing traditional legal areas such as tort, constitutional, and property law, as well as more recent functional developments in international law, town and country planning, administration law, and mining and energy law.[11]

Environmental Law, as an entity, however, eludes precise definition. This is largely because it is difficult to arrive at a satisfactory definition that narrows the field to a discrete subject area given that social surroundings are so integrated with the physical and biological aspects of living that social considerations, so far as they effect the biosphere, must be imported, be they political, economic, ideological, aesthetic, or cultural . That is to say we can not view the health of our environment in isolation from human living.

The challenge then for courts when 'judging environmental health' has been to consider what is essentially a scientific concept in the light of the general health and well being of each community, and yet not be unduly influenced by factors which draw attention from the central legal principles at issue.

## Materialism and Remedy

Capital is victorious. Whether that be inevitable or desirable, is not the point. Social constructs based on religion or secular ideologies have little application, at least in the developed world, in the 21st Century. A consequence is that political systems based on concepts of community or collective responsibility have but little impact on the way we govern ourselves. Western societies, at least, are dependent upon values and attitudes derived from secular humanism and the philosophies of rationalism developed in the 18th Century. Whilst some might claim that the modern liberal state is the end point of history[12], the problem of non-dialectic materialism remains. Capital is a methodology, not an ideology. It is based on economic means and outcomes and has

9 Fisher, D E, *An Overview of Environmental Law in Australia*, (1977) 3 Earth L J, p47. See also G M Bates *Environmental Law in Australia* (2nd ed) Sydney Butterworths (1989) p213.

10 Locke J, *Second Treaties*, Chapter V in P Laslett (ed) *Two Treaties on Government*, Cambridge University Press 1964.

11 Grinlinton, D, *The Environmental Era and the Emergence of Environmental Law in Australia* - A survey of Environmental Legislation and Litigation 1967 - 1987 *Environmental and Planning Law Journal* (1990) Vol 70 No 2, p74 at 76.

12 *The End of History and the Last Man*, Fukuyama, Hamish Hamilton, London

never professed responsibility for social or value constructs other than those which enhance or facilitate its own desired outcomes. We see remedy in terms of money. We seek redress in economic sanction. A society which claims the supremacy of individual rights has an expectation of monetary compensation for any perceived harm or interference with those rights. The consequence of the conjunction of those two processes has led to increased recourse to litigation and the Courts. Every claimant has an expectation for compensation, even if only principle is at issue. Property values, compensation for required changes in land use, loss of profits for resumed mineral rights and harm caused by pollution or defective or harmful products are assessed in monetary terms.

The complexity of modern politics has created tribal, rather than class, or ideologically based identification. Disparate identification creates varying agendas and coalitions. The politically correct can become allied to the fundamentalist right. Current claims for damages against religious institutions for past acts of sexual predation might extinguish some church communities. The claimants might have legitimate grievance, their supporters might have a different agenda, namely hostility to organised religion. The same processes have occurred in attempts to confiscate the property of political organisations[13] and trade unions. The agendas and legal methodology remain consistent.

## Law as a Vehicle for Social Change

Tom Wolfe described a Bronx jury as "the American way for the redistribution of wealth". It is true that in many areas decisions of the Courts have brought about fundamental change in areas of economic[14], social[15], indigenous[16] and environmental[17] concern. The consequences of the decision of the High Court in *Deitrich*[18] have yet to be worked out within our society[19]. The Courts continue to expand the categories of relationship giving rise to duty[20] and the obligations of public authorities.[21] It may be that the high point of that expansion has been reached and there will be

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13 *Australian Communist Party v The Commonwealth* (1950-1951) 83 CLR 1.

14 *Donoghue v Stevenson* [1932] AC 562

15 *R v Bourne* [1939] 1 KB 687; *R v Davidson* [1969] VR 667; *Roc v Wade* US

16 *Mabo* (supra)

17 *The Commonwealth v Tasmania* (1983) 158 CLR 1

18 (1992) 109 ALR 385

19 Solomon, D *The High Court, Government Politics, Power and Policy in Australia,* Longman Cheshire 1994, Boas G, Dietrich *The High Court and Unfair Trials Legislation; a Constitutional Guarantee?,* Monash University Law Review, Vol 19, No 2, 1993, 256

20 *Jaensch v Coffee* (1984) 155 CLR 578; *Allcock v Chief Constable of South Yorkshire* [1991] 3 WLR 1057.

21 *Council of the Shire of Sutherland v Heyman & Ann* (1985) 157 CLR 242, Monash University Law Review, Vol 17 (1991) Hogg, 285.

some retreat from the high standards of care required.[22] The current political debate on medical negligence will impact on this area of the law. Yet courts remain precluded from paying regard to economic consequences.[23] The law of torts has developed largely unaffected by economics. As the academic, Englard, pointed out:[24]

> "Among the presumably thousands of tort cases published during the nearly three decades ..., only a small fraction made explicit use of the economic approach. Moreover even in those opinions where Calabresi's or Prosner's writings are mentioned, the reference is often made perfunctorily without real significance in terms of judicial process"

although he concedes:

> "There can be no doubt that the modern economic approach to the law has left its mark on judicial reasoning in a considerable number of tort opinions. However, the reformatory effect of 'explicit' economic analysis has been limited, if not completely absent."

In a recent lecture, Sir Anthony Mason, the former Chief Justice of the High Court, observed:[25]

> *"The court has no charter to articulate legal principles in order to serve particular economic goals. Nor are curial procedures adapted to achieving those goals. .... The dilemma we face is this; if we seek to make judges more aware of the implications of economic analysis and of the potential use of economic information, how can they conceive of it in any but an instrumental or normative way? If counsel present an argument based on economic analysis which suggests that judgment for the defendant would lead to wealth maximisation for society, how does a court take account of this if previous authorities or considerations* of *justice or morality point in the other direction? As I have said, there is a possibility that courts would set at risk their own standing were they to decide such cases on the basis of an economic approach. That said, what benefit is to be derived from the presentation of the economic arguments if the court decided in the contrary manner. I must confess to serious misgivings about the prospect of courts proceeding to make or adopt economic analyses, including cost /benefit analyses, for the purpose of determining whether it is proper to impose liability on a defendant, that is, hinging the decision on a judgment that the community or a section of the*

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22 *Negligence: The Last Outpost of the Welfare State*, Judicial Conference of Australia, Spigelman CJ, Sixth Colloquium, Launceston 26 - 28 April 2002.

23 *Effect of Legal Liability on Physicians' Services* (1991) 41 University of Toronto Law Journal 168; *Professional Negligence in America*; Partlett Essays on Tort, Sydney Law Book Company (1998) at 998; Richardson, S. "*Why Law and Economics in the Courts*", Speech to Law and Economics Association of New Zealand, Wellington, 30 May 1994.

24 Englard, I, "*Law and Economics in American Tort Cases, A Critical Assessment of the Theory's Impact on Courts*", (1991) 41 University of Toronto Law Journal, 359 at 369.

25 Mason, The Honourable Sir Anthony. *Law and Economics*, Monash Law School Foundation Lecture 25 March *1992.*, Monash University Lain Review Vol 17 No 2 1991, 167 at 179.

*community can or cannot afford that liability. In essence the problem is one of reconciling two contradictory approaches. The first approach is that in some cases, few though they may be, the court should receive material which enables the to assess the economic implications of alternative decisions. The second approach is that judges are not at liberty to decide cases on the basis of the predetermined ideologies, but must decide according to law and justice ... Economic analysis is another voice questioning tentative conclusions and suggesting possible alternatives. But that is all. Beyond that, the issues presented by economic analysis are essentially issues that have been resolved, according to our tradition, by the political process. The fact that the issues have been left unresolved, even neglected, by the political process does not seem to be a particularly persuasive reason for expecting the courts to undertake the role of government and legislature. Primarily, it is for the political process to decide whether the community is unable to afford the dictates* of *justice as enunciated by the courts. "*

The balancing of the probability and the magnitude of injury against the cost of guarding against it" was recognised by the High Court in 1980[26] but, by necessity, the balancing is confined to the particular circumstances of a claim and does not extend to the wider consequences.

The second area of difficulty is that the legal system, as a whole, has been ambivalent as to whether the law of tort, ie, the awarding of damages resulting from a "civil wrong" is compensatory or punitive in nature.[27] This ambiguity has significance in the area of environmental law. In the United States, civil actions are often used as a method of punishing corporations for damage caused to the environment (Exon Valdez, tobacco cases, Corning litigation Bohpal, General Motors, are but examples) and the risk of an award of billions of dollars is a significant factor in shaping corporate policy. Tort as a punishment is used as a vehicle for social change. Australia has not developed the sophistication of the United States, although the OK Tedi case is an example of this form of the use of courts.

The two most significant developments for individuals and public interest groups have been the allowance of contingency fees[28] and class actions. As government retreats from the exercise of regulatory power and transnational corporations are more able to avoid governance by the nation state, the use of class actions will become more and more a vehicle used by society to change policy and the misuse of corporate power. The capacity for many people to share the costs of complex litigation, the shared resources and large financial return for lawyers, will further permit proper preparation of cases against wealthy institutions. It will be not the courts which act as the vehicle of social change, but the economic consequences of their decisions which produce an outcome and act as a form of social and economic engineering.

## Congurance of Themes

The emergence of a society based on the existence of rights, extension of the terms of a relationship giving rise to a duty of care, increased standards of that care, economic consequence when coupled with greater opportunity to litigate, have created an expanding mix. To that complexity must be added the legitimate right of a citizen to challenge or review administrative action.

Courts are also responsible for social control through the criminal justice system. Like the Bolsheviks in 1917, they sit in constant session. They are incapable of accommodating all of the expectations placed upon them. The Executive, for reasons both good and those of self-interest, attempts to restrict access or power to make decisions which defeat policy or cause adverse economic consequence.

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26 *Wyong Shire Council v Shirt* (1979 - 1980) 146 CLR 40.

27 *Perre v Apard* (1999) HCA 36; *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241.

*28* *Contingency Fees, Principles, Practical Problems and Proposals*, Dr Peter Cashman, Paper presented to National Conference Labour Lawyers, 1989.

The topic which the organisers of this conference have asked me to address, namely, standing in areas of environmental law, can now be seen to be central to current and future legal procedure. The question of access or standing ceases to be a peripheral issue confined to academia, but an immediate and vibrant component.

A person without valid interest ought not be permitted to wander through the Courts causing mayhem, nor should a citizen be denied resolution of a legitimate grievance.

## Planning and review

Greater expectations, public amenity, competing interest in natural resources and the need to remedy past or historic harm, have led to the establishment of specialist tribunals or legal commissions of inquiry. General statements of public utility by parliamentary enactment or executive regulation, have required such tribunals to make value judgments on a case by case basis.

## Standing

Standing is ordinarily defined by statute which varies between States and the nature of the matters provided for by the particular legislation. The *Administrative Appeals Tribunal Act* 1975 (Cth), provides a good general example, and states:

> "(1) Where this Act or any other enactment (other than the *Australian Security Intelligence Organisation Act 1979*) provides that an application may be made to the Tribunal for a review of a decision, the application may be made by or on behalf of any person or persons (including the Commonwealth or an authority of the Commonwealth) whose interests are affected by the decision.
>
> (2) An organisation or association of persons, whether incorporated or not, shall 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.
>
> (3) Subsection (2) does not apply in relation to a decision given before the organisation or association was formed or before the objects or purposes of the organisation or association included the matter concerned."

The need to identify a special interest is both one of principle and pragmatism. There must be a limit to both the issues which are brought before the courts and the people who can advance them. Outrage and principled or emotional commitment are not sufficient.[29] The recent intervention by the Catholic Bishops in a case [30] involving in vitro fertilisation, might lead to a more liberal approach.

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

*30* *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16.

In many cases of environmental health, safety and impact, superior (an hierarchical rather than an elitist term) courts do not deal with the merits of administrative decisions. Legislation provides for tribunals empowered to determine questions on merit, but often restrict appellate jurisdictions to questions of form and procedure.

Historically, only proprietary or economic interests were the basis of a "special interest" sufficient to warrant standing, perhaps best outlined in the often quoted extract from the decision of Buckley J in *Boyce v Paddington Borough Council*[31] who stated that (at 114):

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

Persons then with no private grievance are often left without remedy, for the law largely protects private interests. This has had particular ramifications for Aboriginal plaintiffs. In the case of *Onus & Anor v Alcoa of Australia Ltd*,[32] per Gibbs CJ, the Federal Court rejected the contention that the *Archaeological and Aboriginal Relics Preservation Act* 1972 conferred a private right of action on Aboriginal peoples. In fact, it was determined that:

> "The provisions of the Act as a whole show that the Act was passed for the benefit of the public at large, with a view to the conservation of relics which are regarded as being of interest and value not only to Aborigines, but also to archaeologists and anthropologists and indeed to Australians generally. It is quite impossible to hold that the Act confers any private rights on Aborigines or any class of them."[33]

The general proposition has been that a complainant has standing to pursue an environmental complaint only where he or she has a right conferred by statute, or a special interest in the subject matter that is equivalent, in nature, to a private, proprietary or economic interest.

This proposition has, however, been tempered over time as courts have broadened the 'special interest' test to include "social and political"[34], cultural[35], as well as religious or vocational

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31 [1903] 1 Ch 109

32 (1981) 36 ALR 425

33 Ibid at 430; see also *Coe v Gordon* [1983] 1 NSWLR 419 where a general interest in an Aboriginal land claim was insufficient to establish standing in the individual.

*34* *Australian Conservation Foundation Inc v Commonwealth* (1980) 28 ALR 257 at 268 per Mason J.

*35* *Onus & Anor v Alcoa of Australia* (1981) 36 ALR 425 (appellant given standing to sue).

interests.[36] Now, two decades on from *Onus v Alcoa,* the Federal Court has demonstrated a willingness to award standing to a major national conservation organisation such as the Australian Conservation Foundation whose special interest was held to comprise its commitment to ecologically sustainable planning and development·[37] Given that this same organisation ( the ACF) was denied standing some years previous[38], this shift was qualified with the observation that "public perception of the need for the protection and conservation of the natural environment and for the need of bodies such as the ACF to act in the public interest has noticeably increased."[39]

This shift is however illustrative of a legal process that is slow to react and which follows the lead of community values cautiously and reservedly. "Reform therefore seems more likely to arise from statutory intervention than through deliberate and considered judicial activity·[40]

However the following statement made by Gibbs J in *Australian Conservation Foundation v The Commonwealth:*[41]

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*36* *Ogle v Strickland* (1987) 71 ALR 41.

37 *Australian Conservation Foundation v Minister for Resources* unreported Federal Court of Australia NoG326, 1989

*38* *Australian Conservation Foundation Inc v Commonwealth* (1980) 28 ALR 257.

*39* *Australian Conservation Foundation v Minister for Resources* Unreported Federal Court of Australia NoG236 per Davis J at p8

40 Bates, G, *Environmental Law in Australia*, 366.

41 (1980) 146 CLR 493

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

remains restrictive. The approach is consistent with that taken in the United States.[42] A desire by an aboriginal group to have the historical record set right (and possibly enhance a moral right to have government make financial reparation) has been held to provide no basis for standing.[43] Reputation of a deceased person has been held to permit standing in a coronial inquiry.[44]

Rights of standing are normally afforded to persons dealing with commercial interests generally[45] but with some limitation[46], trade unions[47] and include owners horses who come third,[48] representational groups[49] and the media.[50]

## Standing in Environmental Cases

Environmentalists can sometimes establish a threat to commercial interests such as tourism, selling postcards, etc, sufficient to give them standing[51] although it is a risky strategy.[52] However a right to participate in the planning process, even if not exercised, gives an environmental interest group,

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*42* *Steel Co v Citizens for a Betta Environment* 118 S Ct (1998) 1003

*43* *Yongarla v Western Australia* [1999] WASSCA 248.

*44* *Annets v McCann* (1990) 170 CLR 596.

*45* *Boral Resources (Qld) Pty Ltd v Johnston Shire Council* [1990] 2 Qd R 18.

*46* *Alphapharum Pty Ltd v Smith Kline Beecham (Aus) Pty Ltd* (1994) 121 ALR 373.

*47* *Shop Distributors Employees Association v Minister for Industrial Affairs* (1995) 183 CLR 552; cf *Australian Foremen Stevedores Association v Crone* (19989) 98 ALR 276.

*48* *LA Ward Racing Syndicate v Trotting Appeal Committee* (1987) 46 SASR 467

*49* *Executive Council of Australian Jewry v Scully* (1998) 79 FCR 537.

*50* *John Fairfax Group Pty Ltd v Local Court* (1991) 26 NSWLR 131.

*51* *Fraser Island Defenders Organisation Ltd v Harvey Bay town Council* [1983] 2 Qd R 72.

*52* *Australian Conservation Foundation* (1989) 53 SASR 349; *Central Queensland Speliological Society Inc* 349.

standing in a subsequent challenge top the findings of the original tribunal.[53] Residents and land owners nearby to land threatened with environmental harm usually get standing.[54]

There are subtle differences between the assessment of an incorporated group in its own right as distinct from the interests of its members.[55] Status, local involvement and respectability are significant factors in obtaining standing[56] and State courts give a broad interpretation to the test.[57] It is doubtful if a member of parliament, claiming breach of statutory has standing.[58] A new test of proximity akin to that developed in tort law has been proposed[59] which might attract itself to the High Court·[60]

The current discourse within the High Court concerning the existence of implied rights in the Constitution, such as political free speech (commencing with Lange will also impact on the question of standing).[61]

Two pieces of advice are offered. The first is the risk of costs orders on applications for security for costs.[62] The second concerns the debacle caused by the Hindmarsh Island campaign.[63] Many themes arise in environmental cases ranging from property values to endangered species. Lawyers are trained to use any available and attractive issue in support of the cause. In Hindmarsh, the issue of aboriginal rights was used in support of an original environmental cause. The addition of "secret business" prevented judicial examination. The issue was transformed into a political and judicial impossibility. All were consumed by an opportunistic tactical decision.

Activists who get arrested rarely face the problem of standing.

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53 *King Cole Hobart Property Pty Ltd v Planning Appeal Board* (1992) 77 LGRA 92; *King Cole Hobart Property Pty Ltd v Planning Appeal Board (No 2)* (1992) 78 LGRA 289.

54 *Spitzer v Nicholls Properties Ltd & Ors* B60/1990, Zeeman J;

55 *Australian Conservation Foundation Inc v The Commonwealth* (1980) 146 CLR 493.

56 *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 127 ALR 580

57 *National Trust of Australia (NT) v Minister for Lands* (1997) NTLR 20.

58 *Bates v Attorney-General (Tas)* (1995) 87 LGRA 106.

59 *Bridgetown/Green Bushes Friends of the Forest Inc v Department of Conservation and Land Management* (1997) 18 WAR 126

60 *South-West Forest Defence Foundation Inc v Department of Conservation and Land Management* (1998) 72 ALJR 837.

61 *Limbo v The Commonwealth (No 2)* (1996) 136 ALR 251

62 *Barrett-Peacock v State of Tasmania* A90/1995, Slicer J.

63 *Chapman v Tickner* (1995) 55 FCR 316; *Chapman v Allan & Draper* [1998] SADC 3915 (16/11/98); *Kartinyeri v The Commonwealth of Australia* [1998] HCA 22.

## Conclusion

The current political debate about judicial independence is no mere rhetoric. It touches upon public confidence, decentralisation of power and a redefinition of the role of courts. The emerging concept has been summarised by the present Chief Justice of South Australia, who, in discussing claims of activism by the High Court, suggested that:

> "... the court legitimately is creative (by implication or by interpretation) in shaping the constitution to the interests and needs of the Australian people; in doing so the Court will rely on current community values which it will identify; the Court will identify the purpose of constitutional provisions (by reference to history and also its own views) and will mould these provisions (within limits) to enable them to achieve their purpose; the Court will be less deferential to Parliament in its scrutiny of laws to determine if they are within their power, and will be more willing to invalidate laws because of the means chosen to effect the end; the court will actively promote and protect individual rights and protect people against the state unless Parliament (validly) clearly undertakes to override those rights, and the court will by implication create constitutional and fundamental rights when such implication can fairly be drawn."[64]

If that analysis be correct and the courts are becoming increasingly focused on reflecting community needs and protecting the individual from arbitrary exercise of power by the State, then they ought create rights to serve that end and preserve procedural rights such as access. Though courts ought not write the law, they can imply democratic and due process rights.[65] However the Australian judicial system is not a panacea for social change, policy machine or the progressive force which characterises their American counterparts. Instead, Australian courts will retain the unenviable task of reconciling scientific, political, economic and ideological considerations as they impact on legal principles to arrive at first outcomes. They will do so, not as part of an agenda, activist or otherwise, but on the issues brought before them by members of our society. But the constraints remain. Whilst courts will play an increasingly significant role in the determination of particular environmental questions, responsibility for the identification of issues, the development of the appropriate policies, the allocation of resources and decisions affecting the price to be paid by those using environmental-based resources must remain with the community through public discourse and the democratic institutions of elected representatives. The problems associated with self-interest, constraints of elections and the like, are far less than those associated with a decision-making process by a scientific elite or a judicial system constrained by its own discipline and obligations.

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64 Doyle J, *At the eye of the Storm*, paper presented to Conference on The High Court (1993).

65 Solomon D, *The High Court*, chapter 6 in A Parkin et al, *Government, Politics, Power and Policy in Australia*, 5th ed Melbourne, Longman Cheshire, 1994. at 116.

The second issue concerns the requirement that society recognise the economics of the environmental issue and accepts the need to use current resources to pay for past debts without borrowing too much from the future. Society has yet to develop a strategy, political, economic or institutional, to adequately deal with that imperative.

The courts ought not seek to fulfil that role. But they ought defend the right of citizens to have access to a forum separate from the Executive or Parliament and unpersuaded by power or wealth.