STANDING TO SUE FOR PUBLIC LAW REMEDIES

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I speak with you this evening about standing to sue for public remedies, the subject of the Australian Law Reform Commission Report No 78 entitled *Beyond the door-keeper - standing to sue for public remedies.*

Background

This work on standing was part of the Australian Law Reform Commission's on-going concern with reform of the federal judicial dispute system. Recently we reported on the costs shifting rules (ALRC Report No 75) and earlier on Evidence (ALRC Report No 26 and ALRC Report No 38). We are presently working on a major reference on the adversarial litigation system.

The ALRC was asked on 17 May 1995 to re-open its standing reference (ALRC Report No 27, 1985) by the former Attorney-General, Mr Michael Lavarch. (A copy of the Terms of Reference relating to the Attorney-General's request appears at Appendix A). Essentially, the former Attorney-General and the Australian Government were interested in knowing whether the ALRC would confirm its 1985 recommendation for an 'open standing' test in public interest litigation. All of this reconsideration was set in the context of the Government's desire to achieve fair, efficient, effective and accessible justice (see the Prime Minister's Justice Statement of 18 May 1995)

In the decade since our initial "open standing" recommendation was made there have been changes in the law relating to standing both as a result of judicial decisions and through legislation in specific areas. These changes are discussed in Chapter 3 of ALRC Report No 78 and in summary amount to a continuation of a general trend of broadening the base of capacity to sue in public interest matters. In its report, the Access to Justice Advisory Committee recommended that the 'open standing proposal' of ALRC Report No 27 should be considered for implementation by the Commonwealth, and the States and Territories should be encouraged to introduce similar reforms in their jurisdictions. Furthermore, the ALRC itself in its Report No 69 (*Equality before the law: Women's equality*) had reiterated that the proposals with respect to interveners and friends of the court in ALRC Report No 27 should be implemented.

In addition, during the decade 1985-1995, a number of judicial decisions, including decisions of the High Court, stimulated a renewed debate on who should be able to file material or otherwise intervene in public interest matters.

The legal and constitutional foundations of Australia's system of representative democracy was also the subject of heightened judicial consideration and

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professional debate during this period, most recently in *McGinty v Western Australia*[1] with respect to the freedom of political speech.

ALRC Report No 78

Against this background and after targeted consultation on Discussion Paper 61, the Commission endorsed its earlier belief that legislation enshrining an "open standing" approach should be enacted at the federal level.

In essence, we recommended that any person should have standing to commence proceedings that have a *public element* subject to only two limitations:

- the provisions of any relevant legislation which provides otherwise; and
- where such litigation would unreasonably interfere with the ability of a person having a private interest in the matter to deal with it as he or she wishes, this broad standing should be restricted.

Appendix B provides a detailed list of all the recommendations made in ALRC Report No 78.

In general terms, under the current law, people must possess a private right or have a special interest in a matter which is more than a mere intellectual or emotional concern before they can claim to have standing to sue for a public remedy. Apart from this standing test, there are a multitude of particular standing requirements contained in particular legislation, such as the Administrative Decisions (Judicial Review) Act 1977 (person aggrieved), and others in environmental legislation.

The essential reason that the Commission on two separate occasions has recommended the replacement of the current requirements for standing is that they do not, in practice, act as a filter against vexatious, frivolous or meddlesome claims, but simply add to costs and delays. They are an unpredictable and technical hurdle.

The Commission was further strengthened in its resolve to recommend a single simple test because:

- most inquiries in comparable overseas jurisdictions have supported such a test for standing;
- since 1985, the desirability of such a test has been implicitly recognised by the Courts;
- the overwhelming majority of submissions lodged in response to our Discussion Paper 61 supported the introduction of a single open test for standing;
- where there is legitimate reason for restricting standing in particular circumstances, Parliament can enact appropriate legislation; and
- the Commission on the material available to it and from looking at the experience of the Land & Environment Court in NSW and proceedings under federal legislation such as the Trade Practices Act 1974 (Cth) was unable to find any support for one of the principal justifications for special interest tests, ie, that it kept the "floodgates" closed.

The Commission's recommendation with respect to open standing applies only to proceedings that have a public element. The Commission specifically considered that it was appropriate to define civil proceedings having a public element in terms of the recognised public law remedies. This approach provides a simple and relatively certain mechanism for identifying proceedings in which standing may be an issue. In broad terms this approach covers all judicial review proceedings and almost all proceedings

for an injunction or declaration based on a statutory cause of action or that could be brought by the Attorney-General in his or her own name to enforce public rights. It does not cover damages claims or actions involving purely private rights.

The Commission also found that the wide range of statutory remedies and statutory standing criteria meant that no single criterion would be sufficient to indicate precisely which statutory remedies should be subject to the new open standing test. Our view was therefore that in determining whether a remedy was one where the reformed test of standing would be applicable was a matter of judgment having regard to:

- the extent to which the remedy resembles in form any one or more of the general law remedies in the 'public law' area;
- the extent to which it supersedes such remedies;
- whether the persons entitled to invoke the remedy are expressly identified;
- if so, whether they are entitled to invoke the remedy by virtue of being individuals, or members of a class, who are alone entitled to enforce the rights to which the remedy relates;
- alternatively, whether the basis on which they are entitled to invoke the remedy is that they fall within a description similar to that found in general law rules of standing (for example, "persons interested" or "persons aggrieved");
- whether the remedy is in substance an appeal which can only be brought by a party to the earlier proceedings from which the appeal stems;
- the nature and extent of any "public element" in proceedings where the remedy is sought: for example:
  - that the conduct of a public official is being reviewed; or
  - that the remedy acts in aid of the criminal law; or
  - that the remedy exists as a means of enforcing a statute enacted for the benefit and protection of the public; or
  - that the constitutional validity of a law is at issue.

This was the same approach as adopted in Schedule 1 of the draft Bill at Appendix A of ALRC Report No 27. An updated sample of the application of the standing test to the statutory remedies is set out in Appendix C to ALRC Report No 78.

In considering whether or not to recommend the open standing test, the Commission considered whether there was any constitutional requirement for a plaintiff to have a personal stake in the litigation. Under Chapter III of the Constitution, a court cannot exercise federal jurisdiction unless it has a "matter" to consider. There is an argument that there might not be a matter sufficient to guarantee the constitutionality of the proceeding if a person were allowed to start proceedings where he or she does not posses a right or special interest. The Commission rejected this argument of unconstitutionality in ALRC Report No 27 on the basis that such a plaintiff would still be contending that the defendant had broken or was threatening to break some law or omitting to carry out some duty, if the defendant exceeded or misconceived some jurisdiction or was likely to do so. In other words, there was a genuine rather than hypothetical disagreement, and hence, there would be a "matter" at issue. The Commission believes that the open standing test it has recommended would meet the tests of constitutionality laid down by the High Court in *South Australia v Victoria*[2] and *Re Judiciary and Navigation Acts*.[3] The analysis of

Gummow J in *ICI v the TPC*[4] in dealing with the "any person test" in the Trade Practices Act 1974 (Cth) provides, the Commission believes, further support for its views of the constitutionality of open standing and also illustrates the likely approach that would be taken by the High Court to the notion of open standing should it be challenged.

The Commission similarly considered arguments put to it that an open standing test may result in some courts declining to hear a particular case on the basis that it was not justiciable.

In ALRC Report No 27, the Commission noted that although the test for justiciability is a very general one, the underlying principle is that matters are not properly for decision by a court if there are no available legal standards or if they are matters of a political nature which should be resolved by the executive or the legislature rather than the courts. The Commission believes that justiciability is a different issue from standing although in some cases the two may be intertwined. It is possible for an issue to be justiciable but the plaintiff may not have standing and *vice versa*. The requirement for justiciability remains irrespective of any changes to the law of standing.

The Commission recommended (ALRC Report No 78, Appendix C) that its new test for open standing should also apply to an application for reasons for a decision made pursuant to s 13 of the Administrative Decisions (Judicial Review) Act 1977 (Cth). The Administrative Law Committee of the General Practice Section of the Law Council of Australia has pointed out that officials may have difficulty in applying the second proposed limitation on the open standing test, ie, that contemplated (public element) litigation would unreasonably interfere with a private litigant's interest in having a matter dealt with as he or she would wish given that there is no requirement for litigation to be actually in contemplation at the time reasons are sought. It does seem that this is an issue that will need additional work at the time of settling the drafting of the proposed new Standing Act. The Commission concludes, however, that the same test of standing should apply to both ADJR review and requests for reasons. The outcome with respect to reasons, we believe, would be that unless an applicant for reasons indicated some desire to litigate, the second restriction on the proposed test of standing would, in the majority of cases, not be effectively applicable to any request on which an official was called upon to make a decision. The Commission of course has no desire to reduce the current ability of an individual to obtain a statement of reasons and particularly in circumstances where that individual had no present intention to litigate but simply wished to fully understand the decision which had been made by the official. In many of these circumstances at present the giving of reasons in fact forestalls any possibility of litigation and the Commission would want to see this potential maintained.

Intervention and *friends of the court*

The Commission confirmed its conclusions in ALRC Report No 27 that, in general terms, in a representative democracy in which the Constitution is founded on the sovereignty of the people, participation in proceedings with a public element by persons other than the original parties should be encouraged. Harnessing private support for compliance with public duties is consistent with modern public policy developments. But the Commission now considers that having separate categories of interveners and friends of the court (*amicus curiae*) is not the most effective way to promote participation by private parties. Such a dichotomy limits the court's ability to accommodate the range of levels of participation that is useful.

Therefore, in ALRC Report No 78, the Commission recommended that these two categories should be replaced by a statutory framework giving courts a general power to allow intervention of an infinitely variable kind on specific terms and conditions in individual cases.

The features of the statutory framework the Commission recommended to complement existing statutory provisions are:

- at any stage of public law proceedings a court may, on its own motion or on the application of a person (an intervener), give leave to the intervener to participate in the proceedings subject to such terms and conditions and with such rights, privileges and liabilities (including liability for costs), as the court determines;

- when deciding whether to grant leave the court should have regard to whether the intervener's contribution will be useful and different from those of the parties to the proceedings and whether the intervention will unreasonably interfere with the abilities of the parties having a private interest in the matter to deal with it differently;

- leave should not be refused solely because the applicant does not have a personal or "special" interest in the litigation. However, the existence of such an interest may be relevant to the level and nature of participation. For example, a person with a personal interest is more likely to be given the same rights, duties and obligations as a party than a person with no such personal interest;

- when granting leave, the court should specify the role and manner of participation of the intervener, including the matters he or she may raise; whether his or her submissions are to be oral, written or both; the length of the submissions and the evidence (if any) he or she may adduce;

- unless the court orders otherwise, the role of a person who intervenes with the leave of the court will be confined to assisting the court in its task of resolving the issues raised by the parties and will not include filing pleadings, leading evidence or examining witnesses. In these circumstances, an intervener will not be liable for costs;

- the court must give reasons for its decision to grant or refuse a person's application to intervene. This will assist in developing judicial guidelines as to how the discretion should be exercised;

- neither the parties nor a person seeking to intervene should have a right of appeal against an order granting or refusing the intervention or setting the terms and conditions it will be subject to. It would be counterproductive if intervention was allowed to become a substantive issue in dispute, adding to the complexity and total costs of the litigation rather than assisting in its resolution. An appeal against intervention orders may, however, be made with the leave of the appellate court. Leave to appeal should only be given if it can be shown that the discretion as to intervention miscarried at first instance either by reason of some manifest error or by consideration of irrelevant matters; and

- the court should have the power to direct that notice of public law proceedings be given to third parties (including the Attorney-General) whom it specifies.

Implementation

In conclusion, the Commission in ALRC Report No 78 addressed itself to how its recommendations should be implemented while noting the draft Bill attached to

ALRC Report No 27 recommended a more pragmatic approach to settling the terms of the proposed new federal Standing Act. In addition, ALRC Report No 78 recommended that the federal government should, through the Standing Committee of Attorneys-General, encourage the uniform adoption of the open standing rule and new framework for intervention in public interest litigation in all Australian jurisdictions.

The ALRC's recommendations give rise to a number of practical issues that need to be considered before implementing legislation is drafted. The Commission has recommended that the federal Attorney-General should arrange for members of the judiciary, lawyers and other interested individuals to examine how the new rules for standing will work in practice. The Attorney-General should also ask the Australian Institute of Judicial Administration to coordinate this examination and, in light of the outcome, coordinate the development of rules, guidelines and practice notes for the better implementation of the new Standing Act.

The objective of this examination and the statute by statute review of special standing requirements referred in Appendix C of ALRC Report No 78 is to provide an opportunity for a full review area by area of whether or not the present limitations, in the way of full participation by personal litigants to the enforcement of public duties, should be removed.

Endnotes

1 (1995-96) 134 ALR 289.
2 (1911) 12 CLR 667.
3 (1921) 29 CLR 257.
4 (1992) 110 ALR 47, 65.

APPENDIX A

TERMS OF REFERENCE

STANDING

I, MICHAEL LAVARCH, Attorney-General of Australia, HAVING REGARD TO:

- the need for a fair, efficient and effective legal system;
- the Law Reform Commission's Report No. 27 *Standing in Public Interest Litigation*;
- changes in the law relating to standing since 1985 both as a result of judicial decisions and legislation in specific areas;
- Action 2.7 in the Report of the Access to Justice Advisory Committee; and
- Recommendations 7.1 and 7.2 in the Laws Reform Commission's Report No 69 Part 2 *Equality before the law: women's equality.*

REFER to the Australian Law Reform Commission for inquiry and report under the *Law Reform Commission Act 1973*, the following matters:

(a) what changes, if any, should be made to the recommendations and draft legislation contained in the ALRC 1985 Report on *Standing in Public Interest Litigation* in the light of subsequent developments in law and practice and recent and proposed reforms to court and tribunal rules and procedures;
(b) whether, in the light of developments since 1985, any further general changes are now required to present law and practice in relation to the capacity and right of persons to be heard in courts and tribunals exercising federal jurisdiction; and
(c) any related matters.

The Commission shall consider, among other matters:

(i) the need to avoid Australia becoming an unduly litigious society by giving consideration to other methods available outside the litigation process to achieve resolution of disputes;
(ii) participation in proceedings by intervention or as an *amicus curiae* or expert adviser or by any other method;
(iii) the relationship between standing rules and other relevant aspects of litigation including the volume and cost of litigation; and
(iv) developments in public interest litigation in Australia and the impact of present and proposed standing rules on public interest litigation.

IN PERFORMING its functions in relation to this reference the Commission shall

(i) conduct such consultations as are necessary among the Australian community and with relevant bodies;
(ii) in recognition of work already undertaken, have regard to relevant reports, and any steps taken by governments to implement their recommendations, including:
  - the Report of the Access to Justice Advisory Committee, and
  - relevant reports of the Law Reform Commission; and
(iii) consider and report, as appropriate, on relevant developments in standing rules in other countries.

IN MAKING ITS REPORT the Commission will also have regard to its function in accordance with s6(1)(d) of the Law Reform Commission Act to consider the present proposals for uniformity between the laws of the Territories and laws of the States.

THE COMMISSION IS REQUIRED to make a final report not later than 29 February 1996.

Dated 17th May 1995 Michael Lavarch
Attorney-General

APPENDIX B

LIST OF RECOMMENDATIONS

Recommendation 1 - standing reforms to apply to public law proceedings

Reforms to the law of standing should apply to

- proceedings to obtain a remedy under the *Administrative Decisions (Judicial Review) Act 1977* (Cth)
- proceedings for an injunction or declaration where
  - the Attorney-General could have commenced the proceedings in his or her own name or
  - rights, duties or powers created by or under an enactment are in dispute
- proceedings for prerogative relief (such as certiorari, prohibition, mandamus, habeas corpus or quo warranto)
- proceedings to obtain a statutory remedy which is similar in function to any of the foregoing remedies

where the proceedings relate to a matter arising under the Constitution (or involving its interpretation) or federal legislation or are against the Commonwealth or a person acting on its behalf.

Recommendation 2 - any person should be able to commence public law proceedings

Any person should be able to commence and maintain public law proceedings unless

- the relevant legislation clearly indicates an intention that the decision or conduct sought to be litigated should not be the subject of challenge by a person such as the applicant; or
- in all the circumstances it would not be in the public interest to proceed because to do so would unreasonably interfere with the ability of a person having a private interest in the matter to deal with it differently or not at all.

Recommendation 3 - standing to be determined as a preliminary issue

As a general rule, any issue as to standing should be resolved as a preliminary or interlocutory matter.

6 Intervention in public law proceedings

Recommendation 4 - intervention at the court's discretion

A court may, at any stage of proceedings, on its own motion or upon the application of a person, give leave to that person to participate in public law proceedings subject to such terms and conditions, and with such rights, privileges and liabilities (including liability for costs), as the court determines.

When deciding whether to grant leave the court should have regard to whether the intervenor's contribution will be useful and different from those of the parties to the proceedings and whether the intervention will unreasonably interfere with the abilities of the parties having a private interest in the matter to deal with it differently.

Recommendation 5 - special interest not needed for intervention

Leave to intervene should not be refused solely because the applicant does not have a personal or 'special' interest in the litigation.

Recommendation 6 - court must give reasons

The court must give reasons for its decision to grant or refuse a person's application to intervene.

Recommendation 7 - appeals against an intervention order

A party to proceedings or a person seeking to intervene in those proceedings may, with the leave of the appellate court, appeal against an order granting or refusing the intervention or an order setting the terms and conditions for the intervention. Leave to appeal should be given only if it can be shown that the court's discretion to allow intervention miscarried at first instance either by reason of some manifest error or by consideration of irrelevant matters.

Recommendation 8 - court may give notice of proceedings

The court should have the power to direct that notice of public law proceedings be given to third parties (including the Attorney-General) whom it specifies.

Recommendation 9 - discretionary intervenor may seek leave to appeal

A person who intervenes in public law proceedings pursuant to the statutory framework may appeal against the judgment of the court with the leave of the appellate court.

When considering whether or not to grant leave to appeal the appellate court should take into account the basis on which leave to intervene was granted.

Recommendation 10 - intervention by the Attorney-General

Legislation should confer on the Attorney-General an unfettered right of intervention in public law proceedings in order to protect Crown prerogatives or to argue issues of public importance as a party to the proceedings.

Recommendation 11 - statutory intervenor to be a party

Where the Attorney-General, a Minister, a government body or a private person intervenes in public law proceedings pursuant to a specific statute, he or she shall do so as a party to the proceedings unless the statute provides otherwise.

Recommendation 12 - costs and statutory intervenors

The Attorney-General and any person who intervenes in public law proceedings pursuant to a specific statute may seek or be subject to orders for costs unless the statute specifies otherwise.

Recommendation 13 - costs and discretionary intervenors

A person who intervenes with the leave of the court should not recover or be liable for costs other than pursuant to a disciplinary or case management costs order unless the court, when setting the terms and conditions of the intervention, orders otherwise.

Where a court allows an intervenor to play a greater part in the proceedings than was originally specified the court should also address at that time the question of whether and to what extent the intervenor should pay any costs incurred by the parties as a result of the intervenor's greater involvement.

7 Implementation

Recommendation 14 - a Commonwealth standing statute

The rules for standing and intervention in federal public law proceedings recommenced by the Commission in this report should be implemented by the enactment of a Commonwealth standing statute.

Recommendation 15 - uniform standing rules

The rules for standing and intervention in federal public law proceedings recommended by the Commission should proceed irrespective of whether the State and Territory governments take steps to implement the recommendations.

Recommendation 16 - Standing Committee of Attorneys-General

The federal Government should, through the Standing Committee of Attorneys-General, encourage the uniform adoption of reforms to the rules for standing and intervention in public law proceedings in all Australian jurisdictions.

Recommendation 17 - assessing the impact of new rules for standing and intervention prior to implementation

Before the standing rules recommended by the Commission are implemented, the federal Attorney-General should arrange for members of the judiciary, lawyers and other interested individuals and organisations to examine the way in which the rules will probably work in practice. The Attorney-General should ask the Australian Institute of Judicial Administration to coordinate the development of rules, guidelines and practice notes for implementation of the new rules.

Recommendation 18 - reforms to the litigation process and the rules for standing and intervention

The rules for standing and intervention recommended by the Commission should be adopted as part of a package of reforms that will

make the litigation process cheaper and more effective.

Recommendation 19 - review of the operation of the new rules

The federal Attorney-General should arrange for the operation of the rules for standing and intervention in public law proceedings to be monitored and assessed by a body such as the Australian Institute of Judicial Administration to ensure that they are achieving the desired outcomes without unnecessary expense to the court, tribunal, parties or community.