COMMENT

LOCUS STANDI OF PRIVATE INDIVIDUALS SEEKING DECLARATION OR INJUNCTION AT COMMON LAW

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I. INTRODUCTION

The test traditionally applied by the courts in determining the *locus standi* of a private individual seeking relief by way of declaration or injunction[1] in administrative law actions is encapsulated in the following statement of Buckley J. in *Boyce v. Paddington Borough Council*:[2]

> 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.

Until *McWhirter's Case*[3] in 1973, the adequacy and suitability of the *Boyce* test had not been impugned.[4] In *McWhirter*, Lord Denning M.R., burdened with the thought that '[w]e live in an age when Parliament has placed statutory duties on government departments and public authorities — for the benefit of the public — but has provided no remedy for the breach of them',[5] adopted a wide discretion-based approach to *locus standi*. Although the House of Lords in *Gouriet v. Union of Post Office Workers*[6] disapproved of Lord Denning's approach, there are indications in the subsequent decision of *I.R.C. v. National Federation of Self Employed and Small Businesses Ltd*[7] that at least some of their Lordships have had a change of heart regarding the role of judicial discretion on the question of

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1 The standing requirements for injunction and declaration are for present purposes identical and therefore will be discussed together. See *Australian Conservation Foundation Inc. v. Commonwealth* (1980) 54 A.L.J.R. 176, 180.

2 [1903] 1 Ch. 109, 114.

3 *Attorney-General ex rel. McWhirter v. Independent Broadcasting Authority* [1973] Q.B. 629, 646-9.

4 Buckley J.'s statement has been approved by: the House of Lords in *London Passenger Transport Board v. Moscrop* [1942] A.C. 332, 344-5; the High Court of Australia (by implication) in *Thompson v. The Council of the Municipality of Randwick* (1953) 90 C.L.R. 449, 456; and the Supreme Court of New Zealand in *Collins v. Lower Hutt City Corporation* [1961] N.Z.L.R. 250, 254.

5 [1973] Q.B. 629, 646.

6 [1978] A.C. 435.

7 [1981] 2 All E.R. 93.

locus standi. The High Court of Australia has also reappraised the rules governing *locus standi.* In *Australian Conservation Foundation Inc. v. Commonwealth*,[8] *Day v. Pinglen Pty Ltd*[9] and *Onus v. Alcoa of Australia Ltd*,[10] the High Court, and Gibbs C.J. in particular, reformulated the second limb of the *Boyce* test by substituting the criterion of 'special interest' for the traditional one of 'special damage'.

These recent developments in the law dealing with the nature of an interest sufficient to support proceedings which are directed to the enforcement not of private rights but of public rights by persons other than the Attorney-General or those to whom he has granted his fiat, will be examined in turn. It will become evident that over the last two years there has emerged a divergence in the law of England and the law of Australia with respect to *locus standi.* The approach of both the English and Australian courts will be analysed and compared and with regard to the new criterion of 'special interest' which is currently applicable in Australia, it will be suggested that the difference between this criterion and that of 'special damage' is purely semantic.

II. THE ENGLISH POSITION: THE CRITERION OF 'SUFFICIENT INTEREST'

The judgment of Lord Denning M.R. in *McWhirter* represents the first serious judicial attempt to erode the rigour of the traditional test of *locus standi.*[11] In that case, McWhirter sought an injunction to prevent the televising of a certain film on the ground that the telecast would constitute a breach by the Independent Broadcasting Authority of its statutory duty to satisfy itself that programmes did not offend against good taste or decency or were likely to be offensive to public feeling. Lord Denning made two significant statements regarding the enforcement of a public right or the prevention of a public wrong by a private individual. The first statement was:

> . . . I am of opinion that, in the last resort, if the Attorney-General refuses leave in a proper case, or improperly or unreasonably delays in giving leave, or his machinery works too slowly, then a member of the public *who has a sufficient interest* can himself apply to the court itself. He can apply for a declaration and, in a proper case, for an injunction, joining the Attorney-General, if need be, as defendant . . . I would not restrict the circumstances in which an individual may be held to have a sufficient interest.[12]

[8] (1980) 54 A.L.J.R. 176.
[9] (1981) 55 A.L.J.R. 416, 420.
[10] (1981) 55 A.L.J.R. 631.
[11] See also *Thorson v. Attorney-General of Canada (No. 2)* (1974) 43 D.L.R. (3d) 1, 18 (where a more flexible test of *locus standi* in relation to constitutional cases was accepted by Laskin J.), and *Baker v. Carr* (1962) 369 U.S. 186, 204 (where the criterion controlling standing was expressed to be a requirement that the plaintiff have a certain 'personal stake in the outcome of the controversy').
[12] [1973] Q.B. 629, 649 (emphasis added). Lawton L.J. agreed with this statement (see at 657) whereas Cairns L.J. left open the question of what remedies a private citizen had when the Attorney-General refused to grant his fiat: see at 654.

The second statement was:

> . . . I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then in the last resort any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced.[13]

Strictly speaking both statements were *obiter dicta* because at the commencement of the full hearing before the Court of Appeal the Attorney-General had granted his consent to relator proceedings and the hearing proceeded on that basis. Nevertheless, the effect of these statements was to enunciate a new test of *locus standi* which in effect left the question to the judge's discretion in each individual case — a development which Lord Denning more explicitly encouraged in relation to the prerogative writs: see *R. v. Greater London Council; ex parte Blackburn.*[14]

In *Gouriet v. Union of Post Office Workers*,[15] a case concerning an application by a private citizen for an injunction to prevent a threatened union boycott of all mail and telecommunications to South Africa, the House of Lords strongly disapproved of Lord Denning's *dicta.* Their Lordships, after a full consideration of the authorities, rejected the notion that the question of standing is one that lies within the discretion of the court and reaffirmed the *Boyce* test. Lord Edmund-Davies said:

> Whenever public rights are in issue, the general rule is that [declaratory or injunctive] relief may be sought only by, and granted solely at the request of, the Attorney-General. There are certain [statutory] exceptions to the general rule. . . . And there are the familiar common law exceptions to the general rule, dealt with by Buckley J. in *Boyce v. Paddington Borough Council* [1903] 1 Ch. 109, 114, where a private right has also been invaded or special damage suffered.[16]

However, six months after *Gouriet* was decided, a significant alteration in the rules governing *locus standi* took place in England, with the coming into effect of R.S.C. Order 53, rule 3(5). This provides: 'The Court shall not grant leave [to an applicant seeking judicial review by way of declaration or injunction as an alternative or in addition to any of the prerogative orders] unless it considers that the applicant has a sufficient interest in the matter to which the application relates.' Order 53 was introduced in 1977 by the Rule Committee of the Supreme Court in order to simplify the procedure for judicial review, by *inter alia* eliminating technical differences in the standing requirements of the various public law remedies.

The scope of Order 53 rule 3(5) was considered by the House of Lords in *I.R.C. v. National Federation of Self-Employed and Small Businesses Ltd*[17] (the *I.R.C. Case*). In this case the National Federation of Self

[13] *Ibid.* 649.
[14] [1976] 1 W.L.R. 550, 558-9.
[15] [1978] A.C. 435. *Cf. Bradley v. Commonwealth* (1973) 128 C.L.R. 557.
[16] [1978] A.C. 435, 513. See also 483-4 *per* Lord Wilberforce, 494-5 *per* Viscount Dilhorne, 501-2 *per* Lord Diplock, 509, 511 *per* Lord Edmund-Davies and 518, 521-2 *per* Lord Fraser of Tullybelton.
[17] [1981] 2 All E.R. 93.

Employed and Small Businesses Ltd (the Federation) challenged the validity of an arrangement made between the Inland Revenue Commission and the union of certain casual workers in Fleet Street who had been evading taxes. Pursuant to the arrangement, in return for the adoption by the workers of a system of registration which would ensure that future taxes were paid, the Commission agreed not to carry out investigations into tax evaded prior to 1977. The Federation, which claimed to represent a body of taxpayers who felt aggrieved because the Fleet Street casual workers were allegedly getting preferential treatment, applied for judicial review under R.S.C. Order 53 seeking (a) a declaration that the Commission had acted unlawfully in making the arrangement and (b) an order of mandamus directing the Commission to assess and collect tax on the newspapers' casual employees as required by law. The issue for the House of Lords was whether the Court of Appeal was correct in reversing the Divisional Court's finding that the Federation did not have a 'sufficient interest in the matter to which the application relates' within the meaning of Order 53 rule 3(5).

The House of Lords decided that, having regard to the duties and powers of the Commission, the arrangement was a proper one and therefore the Federation had shown no sufficient interest in the matter to justify its application for relief. Their Lordships stated that, other than in exceptional cases where the absence of 'sufficient interest' is obvious, the question of *locus standi* should not be treated as an isolated preliminary issue, but should be decided after a consideration of the merits of the application.[18] In relation to Order 53 rule 3(5) their Lordships held that it was a procedural reform and did not alter the substantive law.[19] They said that what constitutes a 'sufficient interest' is a mixed question of fact and law; a question of fact and degree having regard to the relationship between the applicant and the matter to which the application relates and to all the circumstances of the case.[20] Lord Wilberforce added that rule 3(5) did not 'remove the whole, and vitally important, question of *locus standi* into the realm of pure discretion'.[21]

In contrast, Lord Diplock took a robust approach to the question of *locus standi*. He said that rule 3(5) leaves to the court 'an unfettered discretion to decide what in its own good judgment it considers to be a

[18] *Ibid.* 96 *per* Lord Wilberforce, 101 *per* Lord Diplock, 107 *per* Lord Fraser of Tullybelton, 110, 113 *per* Lord Scarman, 115 *per* Lord Roskill.

[19] *Ibid.* 97, 102, 108, 109.

[20] *Ibid.* 97, 113, 117. Lord Fraser (at 108) said: there is general agreement that (a) a direct financial or legal interest is not required, and (b) a mere busybody does not have a sufficient interest; the difficulty is, in between those extremes, to distinguish between the desire of the busybody to interfere in other people's affairs and the interest of the person affected by or having a reasonable concern with the matter to which the application relates. In the Court of Appeal, Lord Denning stated the Federation and its members were not 'mere busybodies' but were reasonably asserting a 'genuine grievance': [1980] 2 All E.R. 378, 392. See also 399 *per* Ackner L.J.

[21] [1981] 2 All E.R. 93, 97. See also 108 *per* Lord Fraser.

"sufficient interest" '.[22] Furthermore his Lordship approved of the second of Lord Denning's statements in *McWhirter* (see above) as modified by the Master of the Rolls in *ex parte Blackburn*.[23] Lord Diplock acknowledged that the Attorney-General could not be relied on to institute proceedings to prevent breaches of the public law, especially where government departments are involved, and he concluded by saying 'it would, in my view, be a grave lacuna in our system of public law if a pressure group, like the [F]ederation, or even a single public spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped'.[24]

It appears that Lord Diplock in the *I.R.C. Case* has used the first occasion upon which the scope of Order 53 rule 3(5) has required determination by the House of Lords as an opportunity to boldly reconsider the whole question of *locus standi* in public law. His Lordship has deliberately associated himself with the earlier attempts of Lord Denning to revolutionize this area of the law, and with both these influential judges championing its cause, it may not be long before a broad discretion-based test of *locus standi* prevails in England and other common law jurisdictions. There are indications that this has already occurred in New Zealand. In *Environmental Defence Society Inc. v. South Pacific Aluminium Ltd (No. 3)*[25] the New Zealand Court of Appeal 'drew guidance' from the speech of Lord Diplock and held that two environment protection societies[26] had standing to bring proceedings alleging that the Governor-General in Council had not properly complied with certain statutory procedures relating to the procurement of consents for the construction of an aluminium smelter. The Court said '[T]he proceedings challenge the legality of Government action. It is unrealistic to expect the Attorney-General to do this and we see no reason why it must be left to individuals directly affected to undertake the burden. In the exercise of the Court's discretion responsible public interest groups may be accepted as having sufficient standing under the National Development Act.'[27] However Australian courts, as will appear from part three of this Comment, have not as yet taken up Lord Diplock's initiative in

[22] *Ibid.* 105.

[23] [1976] 1 W.L.R. 550, 559. See [1981] 2 All E.R. 93, 104. Lord Scarman also appears to be sympathetic to Lord Denning's statement: see at 113. *Cf.* 118-9 *per* Lord Roskill.

[24] [1981] 2 All E.R. 93, 107. *Cf.* Lord Wilberforce (at 99), Lord Fraser (at 108) and Lord Roskill (at 120) who considered that, in general, one taxpayer (or groups of taxpayers) has (have) no sufficient interest in asking the court to investigate the tax affairs of another taxpayer or to complain that the latter has been underassessed or overassessed.

[25] [1981] 1 N.Z.L.R. 216.

[26] The Environmental Defence Society Inc. and the Royal Forest and Bird Protection Society of New Zealand Inc.

[27] [1981] 1 N.Z.L.R. 216, 220.

liberalizing he rules of *locus standi* which apply to proceedings for injunctive or declaratory relief.

Like Lord Denning in *McWhirter*, Lord Diplock in the *I.R.C. Case* based his preference for a discretion-based test of *locus standi* on the enormous changes that have taken place since the Second World War in the social structure, the methods of government and the extent to which the activities of private citizens are controlled by governmental authorities.[28] Under the *Boyce v. Paddington Borough Council*[29] test of *locus standi* a private citizen is left remediless in relation to breaches of the public law if the special damage or private right criteria are not satisfied and the Attorney-General refuses to give his consent to relator proceedings. A discretion-based test overcomes this problem and makes the remedies of declaration and injunction more accessible. However such a test, due to its very nature, has the obvious shortcoming of providing little, if any, guidance to a prospective applicant for injunction or declaration as to whether or not the court will hold that he has the necessary *locus standi* to seek such relief. The test may also be objectionable on the ground that it assumes that judges acting at the instigation of private individuals are better equipped than the executive government represented by the Attorney-General to decide when to intervene to prevent breaches of statutory or public duties. Lord Wilberforce and Lord Fraser persuasively challenged the correctness of this assumption in their respective speeches in *Gouriet*.[30]

In the *I.R.C. Case* Lord Diplock distinguished *Gouriet* on the ground that the test therein considered is relevant only to civil actions under private law whereby a private citizen seeks either an injunction to restrain another private citizen from committing a public wrong or a declaration that the latter's conduct is unlawful.[31] He intimated that it is his new discretion-based test, and not *Gouriet*, which is applicable where proceedings are taken against public bodies exercising governmental powers.

In relation to the *Boyce* test, Lord Diplock made some curious observations in the subsequent case of *Lonrho Ltd v. Shell Petroleum Co. Ltd (No. 2)*.[32] His Lordship said:

> The first [limb of the *Boyce* test] would not appear to depend upon the existence of a public right in addition to the private one; while to come within the second [limb] at all it has first to be shown that the statute [which has been breached], having regard to its scope and language, does fall within that class of statutes which creates a legal right to be enjoyed by all of Her Majesty's subjects who wish to avail themselves of it. A mere prohibition upon members of the public generally from doing what it would otherwise be lawful for them to do, is not enough.[33]

[28] [1981] 2 All E.R. 93, 103.
[29] [1903] 1 Ch. 109, 114.
[30] [1978] A.C. 435, 482, 523.
[31] [1981] 2 All E.R. 93, 102-3. See also 110 *per* Lord Scarman, 116 *per* Lord Roskill.
[32] [1981] 3 W.L.R. 33. This case concerned the question of whether breaches of the Southern Rhodesia (Petroleum Order) 1965 (U.K.) by the respondents gave the appellants a cause of action in tort.
[33] *Ibid.* 39.

His Lordship also said that *locus standi* may be made out where a statute creates a public right and a particular member of the public suffers 'particular, direct and substantial damage other and different from that which was common to all the rest of the public'.[34]

III. THE AUSTRALIAN POSITION: THE CRITERION OF 'SPECIAL INTEREST'

At one time it was arguable that the views of Lord Denning in *McWhirter* supplied the operative test of *locus standi* in Australia with regard to declaratory or injunctive relief. This arose from the fact that Helsham J. (as he then was) in *Benjamin v. Downs*[35] applied Lord Denning's observations and found that the plaintiff in the case before him (who sought a declaration and injunction in relation to the saying of prayers at his children's public school in contravention of the Public Instruction Act 1880 (N.S.W.)) had sufficient standing to bring the proceedings — at least so far as declaratory relief was concerned. However such an argument is no longer open as a result of *Australian Conservation Foundation Inc. v. Commonwealth*[36] (the *A.C.F. Case*) in which the High Court[37] approved the *Gouriet* decision and refused to accept the invitation of counsel for the Australian Conservation Foundation to 'disregard the existing authorities and devise a new rule . . . allowing standing to any private citizen to enforce public duties, unless the court in its discretion considered it inadvisable that the action should be allowed to proceed'.[38]

In the *A.C.F. Case* the High Court dealt fully with the question of *locus standi*. The case concerned an action by the Australian Conservation Foundation Inc. (the Foundation) against the Commonwealth, three Commonwealth Ministers and the Reserve Bank of Australia (the defendants) in which the Foundation challenged the validity of a decision made by some of the defendants to approve of a proposal by Iwasaki Sangyo Company (Australia) Pty Ltd to establish and operate a resort and tourist area at Fairnborough in central Queensland, or alternatively, to approve exchange control transactions in relation to that proposal. The Foundation sought, *inter alia*, a declaration that the decision approving of the exchange control transactions was void on the ground that there had been a failure to comply with the Environment Protection (Impact of Proposals) Act 1974 (Cth) as amended (the Act) and the administrative procedures approved thereunder (the administrative procedures). The Foundation also sought an injunction restraining the defendants from acting upon the decision. On the

[34] *Ibid.* His Lordship relied on what Brett J. said in *Benjamin v. Storr* (1874) L.R. 9 C.P. 400, 407.
[35] [1976] 2 N.S.W.L.R. 199, 210-1.
[36] (1980) 54 A.L.J.R. 176.
[37] Gibbs, Stephen, Mason and Murphy JJ.
[38] (1980) 54 A.L.J.R. 176, 180.

matter coming before Aickin J., the defendants by way of preliminary objection, asked that the action be dismissed on the ground that the Foundation had no *locus standi*. Aickin J., applying the *Boyce* test, held, by way of determination of a preliminary issue, that the Foundation had no *locus standi*. He therefore dismissed the action. On appeal to the Full Court of the High Court the issue was whether Aickin J.'s decision was correct.

A majority of the Court (Gibbs, Stephen and Mason JJ., Murphy J. dissenting) dismissed the appeal, holding that the Foundation lacked the standing to seek declaratory or injunctive relief. The first limb of the *Boyce* test was approved and applied by the Court. The majority Justices carefully examined the Act and the administrative procedures but could not be satisfied that they created private rights enforceable by private individuals.[39] Since also it was common ground on the appeal that the general law recognised no private right of the Foundation that had been interfered with,[40] it was the second, and not the first, limb of the *Boyce* test upon which the Foundation principally had to rely on to demonstrate it had sufficient standing.

It is with the High Court's treatment of the second limb of the *Boyce* test that this part of the Comment is primarily concerned. Gibbs J. (as the Chief Justice then was) said:

> [T]he formulation of . . . Buckley J. . . . in *Boyce v. Paddington Borough Council* is not altogether satisfactory. Indeed the words which he used are apt to be misleading. His reference to 'special damage' cannot be limited to actual pecuniary loss, and the words 'peculiar to himself' do not mean that the plaintiff, and no one else, must have suffered damage. However, the expression 'special damage peculiar to himself' in my opinion should be regarded as equivalent in meaning to 'having a special interest in the subject matter of the action'. . . . Although, in some cases . . . the formula of *Boyce v. Paddington Borough Council* is, naturally enough, repeated, the broad test of special interest is, in my opinion, the proper one to apply.[41]

Later in his reasons his Honour elaborated his understanding of 'special interest':

> [A]n interest, for present purposes, does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi.[42]

Mason J. agreed with these observations[43] and concurred in Gibbs J.'s conclusion that the Foundation did not have a 'special interest' in the

[39] Gibbs J. at 179 summarised the position thus: 'the Act does not expressly create any rights, and the duty which it casts upon each Minister of State is one which is to be performed by him in the course of administering the affairs of his department. That is a public duty, and it is not owed to any particular person or persons'.

[40] *Ibid.* 184.

[41] *Ibid.* 180.

[42] *Ibid.* 181.

[43] *Ibid.* 188.

preservation of the environment at Fairnborough nor in Iwasaki's exchange control transactions. In their Honours' view, even though the Foundation's main object was promotion of the conservation of the environment, its concern in bringing the action was merely emotional or intellectual and therefore it lacked *locus standi*.[44] Stephen J. agreed that mere intellectual concern does not confer standing to sue[45] but he contented himself with restating the 'special damage peculiar to himself' criterion of the second limb of the *Boyce* test, and applying it to the facts of the case before him. His conclusion was that the Foundation did not satisfy the test.[46] Murphy J. dissented on the ground that the Act disclosed a legislative intent to give standing to persons and groups interested in the environment who allege that factors affecting it are not being properly considered by those with authority to make decisions affecting the environment.[47]

It is interesting to note that the Foundation submitted that Aickin J. should not have dealt with the question of standing as a preliminary issue, but should have decided it after an examination of the merits. The Full Court held that the court has a discretion whether to determine the question of standing immediately or to proceed to deal with the merits without first resolving the question of standing; in this case it was more convenient to deal with the question of standing, as Aickin J. did, before proceeding to consider the merits.[48] In this respect the Court followed the earlier High Court decision of *Robinson v. Western Australian Museum*.[49] Both the *A.C.F. Case* and *Robinson* were decided before the *I.R.C. Case*, but even after that decision, the High Court has not altered its views on this matter.[50]

In holding that the Foundation in the *A.C.F. Case* lacked standing, the majority distinguished the following cases: *S.S. Constructions Pty Ltd v.*

[44] See Gibbs J. at 179: 'The [alleged public] wrong is not one that causes, or threatens to cause, damage to the Foundation or that affects, or threatens to affect, the interests of the Foundation in any material way. The Foundation seeks to enforce the public law as a matter of principle, as part of an endeavour to achieve its objects and to uphold the values which it was formed to promote.' *Cf. Environmental Defence Society Inc. v. South Pacific Aluminium Ltd (No. 3)* [1981] 1 N.Z.L.R. 216, 220. On the standing of environmental groups in the United States see *Sierra Club v. Morton* (1972) 405 U.S. 727.

[45] *Ibid.* 184-5.

[46] *Ibid.* 185, 187.

[47] *Ibid.* 191. Murphy J. expressly disagreed with the majority view that the fact that the Foundation had sent written comments, which pursuant to the administrative procedures Iwasaki was required to take into account in revising its draft environmental impact statement, did not give the Foundation standing to bring the action. Murphy J. said (at 192): 'It is not sensible to deny standing to members of the public to enforce rules under the Act by which Parliament has provided they shall be consulted.' However the majority were of the view that a 'commentator's role is fulfilled once the comments are received by the proponent and by the Department': at 186 *per* Stephen J. See also 179 and 181-2 *per* Gibbs J., 188 *per* Mason J.

[48] *Ibid.* 182, 187, 190.

[49] (1977) 51 A.L.J.R. 806, 814.

[50] In *Onus v. Alcoa of Australia Ltd* (1981) 55 A.L.J.R. 631, 635, Gibbs C.J. reaffirmed *Robinson* on this point but he did say that in the circumstances of the *Onus* litigation it was 'unfortunate that the question of . . . standing was determined as a preliminary issue . . . particularly on such scanty material'. *Cf.* 650 *per* Brennan J.

Ventura Motors Pty Ltd,[51] *Dajon Investments Pty Ltd v. Talbot,*[52] *Vanderwolf v. Warringah Shire Council,*[53] *Sinclair v. Mining Warden at Maryborough,*[54] *National Trust v. Australian Temperance and General Mutual Life Assurance Society Ltd.*[55] The grounds upon which they did so are stated briefly and are not very convincing.[56]

The *A.C.F. Case* has been consistently followed by the High Court. In *Ingram v. Commonwealth,*[57] Gibbs A.C.J. held that the plaintiff, who sought a declaration that the Commonwealth by supporting the SALT II Treaty was acting in breach of certain principles of international law, did not have a special interest in the subject matter of the action. In *Day v. Pinglen Pty Ltd*[58] the Full Court,[59] in a joint judgment, held that the plaintiff, whose view of Sydney Harbour would be adversely affected by the building activities of the defendants on land adjoining her own, had a special interest in the subject matter of her action in which she sought (a) a declaration that the original approval of the development was void, and (b) an injunction restraining the defendants from proceeding with the construction of the proposed building without a valid consent. The Court said 'The existence of an impending detriment threatened by an unlawful act is sufficient to confer standing to seek an injunction to restrain that act . . .'[60] More recently in *Wacando v. Commonwealth*[61] the Full Court held that the plaintiff, who was born on Darnley Island and proposed to carry on certain commercial activities on the seabed surrounding the island, had *locus standi* to claim, *inter alia*, declarations that Darnley Island did not form part of the State of Queensland and that certain Commonwealth and Queensland fisheries and offshore petroleum legislation, which would impinge on his proposed activities, was either invalid or had no application to that island.

Undoubtedly the most significant of the recent High Court decisions which have applied the 'special interest' test is *Onus v. Alcoa of Australia Ltd.*[62] In this case two Aborigines (the appellants), members of the Gournditch-jmara people that had occupied the Portland area in Victoria since prehistoric times, sought an injunction restraining Alcoa from carrying out on certain land in the Portland area works which would interfere with the Aboriginal relics on the land (of which the appellants claimed to be

[51] [1964] V.R. 229.
[52] [1969] V.R. 603.
[53] [1975] 2 N.S.W.L.R. 272.
[54] (1975) 132 C.L.R. 473.
[55] [1976] V.R. 592.
[56] See (1980) 54 A.L.J.R. 176, 182, 186. *Cf.* Murphy J.'s reliance on the above cases: at 191.
[57] (1980) 54 A.L.J.R. 395.
[58] (1981) 55 A.L.J.R. 416.
[59] Mason, Murphy, Aickin, Wilson and Brennan JJ.
[60] (1981) 55 A.L.J.R. 416, 420.
[61] (1982) 56 A.L.J.R. 16, 18, 26 (Gibbs C.J., Mason, Murphy, Aickin, Wilson and Brennan JJ.).
[62] (1981) 55 A.L.J.R. 631 (Gibbs C.J., Stephen, Mason, Murphy, Aickin, Wilson and Brennan JJ.).

custodians according to the law and customs of their people) in contravention of the Archaelogical and Aboriginal Relics Preservation Act 1972 (Vic.) (the Act). The appellants also sought a declaration that the relics in question were 'relics' within the meaning of the Act. The case came before the High Court by way of special leave to appeal from the decision of the Full Court of the Victorian Supreme Court, which upheld the order of Brooking J. dismissing the appellants' action on the ground of absence of *locus standi.*

Six Justices (Gibbs C.J., Stephen, Mason, Murphy, Wilson and Brennan JJ.; Aickin J. approaching the matter differently) in the *Onus Case* expressly applied the 'special interest' criterion propounded by Gibbs J. in the *A.C.F. Case.* It is now beyond doubt that this criterion supplies the operative test of *locus standi* in Australia. Furthermore, because the criterion of 'special interest' purports to supersede the second limb of the *Boyce* test, it can be said that what the High Court has done is to promulgate a new test of *locus standi* for Australia. Gibbs C.J. summarised the new test as follows:

> A plaintiff has no standing to bring an action to prevent the violation of a public right if he has no interest in the subject matter beyond that of any other member of the public; if no private right of his is interfered with he has standing to sue only if he has a special interest in the subject matter of the action. . . . The rule is . . . a flexible one since . . . the question what is a sufficient interest will vary according to the nature of the subject matter of the litigation[63]

Stephen J. interpreted the 'special interest' test as involving in each case 'a curial assessment of the importance of the concern which a plaintiff has with particular subject matter and of the closeness of that plaintiff's relationship to that subject matter'.[64]

Applying these principles the High Court concluded: Firstly, the appellants did not have *locus standi* on the basis that a private right belonging to them had been interfered with; the provisions of the Act as a whole showed that it was passed to preserve relics for the benefit of the public at large and not only Aborigines as a class, so that it was impossible to hold the Act conferred any private right on Aborigines or any class of them.[65] Secondly, the appellants had established *locus standi* on the ground that they had a special interest in the subject matter of the action which interest was greater than that of other members of the public. The *A.C.F. Case* was distinguished:

> The present appellants are members of a small community of Aboriginal people very long associated with the Portland area; the endangered relics are relics of their ancestors' occupation of that area and possess for their community great cultural and spiritual significance. . . . [T]he importance of the relics to the appellants and their intimate relationship to the relics readily finds curial acceptance. It is to be distinguished, I think, and will be perceived by courts as different in degree, both in terms of weight and, in particular, in terms of proximity from that concern which a body of conservationists, however sincere, feels for the environment and its protection.[66]

[63] *Ibid.* 634.
[64] *Ibid.* 637.
[65] *Ibid.* 634 *per* Gibbs C.J., 636 *per* Stephen J., 644 *per* Wilson J., 647 *per* Brennan J.
[66] *Ibid.* 637 *per* Stephen J. See also 634-5 *per* Gibbs C.J., 637 *per* Mason J., 645

Even though *Onus* was decided after both the *I.R.C.* and *Lonrho* decisions of the House of Lords, only Stephen, Aickin and Brennan JJ. briefly discussed *Lonrho* and, with respect, their Honours appeared to have had difficulty in coming to terms with Lord Diplock's observations in that case.[67] Brennan J. was the sole member of the Court to refer to the *I.R.C. Case*. Brennan J. agreed with Lord Diplock's comment in the *I.R.C. Case* that there are significant differences between proceedings against a public official to enforce performance of a public duty and proceedings against a private defendant — but his Honour added that the question whether the private plaintiff has or has not legal or equitable rights to enforce does not furnish an exhaustive test for distinguishing between the two classes.[68] Brennan J. did not refer to Lord Diplock's adoption of a discretion-based test of *locus standi* but instead his Honour endorsed the more conservative statement of Lord Wilberforce in the *I.R.C. Case* (at page 97 of the report), *viz.* '[Order 53 rule 3(5)] does not remove the . . . question of locus standi into the realm of pure discretion. The matter is one for decision, a mixed decision of fact and law, which the court must decide on legal principles'. His Honour said standing is 'a question of degree, but not a question of discretion'.[69]

It is clear that, at least for the foreseeable future, Lord Diplock's approach to *locus standi* in the *I.R.C. Case* will have no application in Australia. This is evident from the fact that in *Onus* the Court was pre-occupied with discussing the *Boyce* test and the 'improvements' to it effected by the *A.C.F. Case*. For example, Brennan J. stated '[T]he . . . second limb of *Boyce* [1903] 1 Ch. 109, was reformulated by Gibbs J., the better to express the principle which now governs the standing of a private plaintiff to sue to enforce performance of a public duty'.[70] Clearly his Honour thought that the 'special interest' test is more liberal and therefore superior to the *Boyce* test. His Honour's views however differed from those of Aickin J. who challenged[71] the statement of Gibbs J. in the *A.C.F. Case* that support for his proposition that 'special damage peculiar to himself' should be regarded as equivalent in meaning to 'having a special interest in the subject matter of the action' can be found in *London Passenger Transport Board v. Moscrop*,[72] *Gouriet*,[73] *Anderson v. Commonwealth*[74] and *Robinson v.*

per Wilson J., 651 *per* Brennan J. It is interesting to note that the High Court did not seem to think that the fact that s. 21 of the Act made it an offence to damage relics precluded the appellants from seeking injunctive relief. This differs from the attitude of the House of Lords in *Gouriet*: see at 481. *Cf. Onus* at 645.

[67] (1981) 55 A.L.J.R. 631, 637, 643, 649.
[68] *Ibid.* 649.
[69] *Ibid.* 650.
[70] *Ibid.* 647.
[71] *Ibid.* 640-2.
[72] [1942] A.C. 332, 345.
[73] *Supra.* See especially at 482 *per* Lord Wilberforce and 514 *per* Lord Edmund-Davies.
[74] (1932) 47 C.L.R. 50, 51-2.

Western Australian Museum.[75] It is respectfully submitted that Aickin J. successfully demonstrated that there is some doubt whether Gibbs J.'s proposition is in substance supported by the authorities he cited. His Honour went on to apply the 'classic formulation' of *Boyce* — as he did also in the later case of *Wacando*[76] — and from this fact the inference arises that his Honour prefers this formulation to that of the *A.C.F. Case*.

It is the writer's view that, despite the claims of the High Court that the new test of *locus standi* liberalizes this area of the law, the 'special interest' test in essence differs from the *Boyce* test in terminology only. The *A.C.F. Case* and *Onus* are important not because they have broadened the rules governing *locus standi* but because they have clarified in certain respects those traditional rules, *albeit* using different nomenclature. The proposition that there has not been a broadening of the traditional rules is supported by the fact that even before the *A.C.F. Case* it could be said of the words 'special damage' that 'the damage need be no more than apprehended, that it need not be damage to a property right recognised by the law and that it need not be so peculiar to the would-be plaintiff that no one else suffers it'.[77] Additionally, the 'special damage' test was potentially just as flexible as the 'special interest' test — as recent 'planning cases' such as *Howes v. Victorian Railways Commissioners*[78] and *Neville Nitschke Caravans (Main North Road) Pty Ltd v. McEntee*[79] (applying the *Boyce* test) and *Day v. Pinglen Pty Ltd* (applying the *A.C.F.* test) illustrate. The notion of 'special damage' simply required that the plaintiff suffered a loss that was greater than that of other members of the public generally, *e.g.*, loss that was distinct in character or significantly different in degree.[80] Therefore to say, as Wilson J. did in *Onus* at 645, that what constitutes special interest is 'a question of fact and degree in every case' does not involve anything new and does not provide a valid ground for preferring that criterion to the one of 'special damage'.[81]

[75] (1977) 51 A.L.J.R. 806, 810-1, 814, 824-5.

[76] (1982) 56 A.L.J.R. 16, 26. This contrasts with the fact that he was one of the Justices who applied the *A.C.F.* test in *Day v. Pinglen Pty Ltd* (1981) 55 A.L.J.R. 416, 420.

[77] *A.C.F. Case, supra* 184-5 *per* Stephen J. See also *Onus* 640, 642 *per* Aickin J.; Whitmore H and Aronson W., *Review of Administrative Action* (1978) 330; de Smith *Judicial Review of Administrative Action* (4th ed. 1980) 451.

[78] [1972] V.R. 103 (McInerney J.).

[79] (1976) 15 S.A.S.R. 330. See also Sykes E. I., Lanham D. J. and Tracey R. R. S., *General Principles of Administrative Law* (1979) 180-1. It should be noted that *Boyce* itself was a 'planning case'. The Court of Appeal found that the plaintiff did not suffer special damage: [1903] 2 Ch. 556, 563. The fact that in similar circumstances in *Howes* and *Neville Nitschke* the court was prepared to find that the special damage test was satisfied exemplifies the fact that this test had developed in scope since 1903.

[80] See de Smith, *supra* 451.

[81] See also *Robinson, supra* 824 where Mason J. said (at a time when *Boyce* was generally accepted by the High Court as correctly stating the rules relating to *locus standi*): 'The cases are infinitely various and so much depends in a given case on the nature of the relief which is sought, for what is a sufficient interest in one case may be less than sufficient in another.' *Cf.* his comment in the *A.C.F. Case* at 188. '[A] plaintiff will in general have a *locus standi* when he can show actual or apprehended

In substituting the test of 'special interest' for 'special damage', the High Court may be accused of engaging in semantics because on closer examination the difference between the two concepts appears to be illusionary. A mere change in terminology, in the absence of a reappraisal of the validity of the premises underlying the present rules of *locus standi*, resolves nothing and may indeed serve only to mislead and confuse. Both the 'special interest' and 'special damage' tests contain the same basic requirements which seek to restrict the availability of public law remedies in respect of infringements of public as opposed to private rights. Since the avowed intention of the High Court was to apply the existing law rather than to abrogate it,[82] it would have been simpler for the Court to clarify and apply the *Boyce* test rather than superseding it. The Court could easily have applied the 'special damage' test in the *A.C.F. Case*, as Stephen J. did, to find that the Foundation lacked standing because it had not suffered special damage, and subsequently in *Onus*, as Aickin J. attempted to do, to find that the appellants in that case had standing because they would suffer special damage if the relief sought was not granted. Of course ultimately it is not the wording of the test that matters but the method and result of its application; the point is, however, that so far there is no evidence that the result of any of the Australian cases discussed above would have differed depending on the test being applied.

IV. CONCLUSION

Over the last decade or so increasing attention has been focused on the rules governing the standing of a private individual to institute proceedings in respect of breaches of the public law. On February 1 1977 the Commonwealth Attorney-General referred the question of standing to the Law Reform Commission for inquiry and report. The subsequent discussion paper[83] published by the Commission commenced with the following quotation:

> Restrictive rules about standing are in general inimical to a healthy system of administrative law. If a plaintiff with a good case is turned away merely because he is not sufficiently affected personally, that means that some government agency is left free to violate the law, and that is contrary to the public interest. Litigants are unlikely to expend their time and money unless they have some real interest at

injury or damage to his property or proprietary rights, to his business or economic interests . . . and perhaps to his social or political interests. Beyond making this general observation, I consider that there is nothing to be gained from discussing in the abstract the broad range of interests which may serve to support a *locus standi*. . . .' Of course after *Onus* cultural and spiritual interests can qualify to confer standing.

[82] *A.C.F. Case, supra* 181 *per* Gibbs J.

[83] The Law Reform Commission of Australia, *Discussion Paper No. 4 Access to the Courts — I Standing: Public Interests Suits* (1978). See also the Commission's *Working Paper No. 7 Access to Courts — I Standing: Public Interest Suits* (1977).

stake. In the rare cases where they wish to sue merely out of public spirit, why should they be discouraged?[84]

In England some relaxation of the strict and technical rules of standing has been effected by a change to the Rules of the Supreme Court. In Australia, the Commonwealth Parliament in its recent intrusions into administrative law has made some progress in liberalizing standing requirements.[85] In both countries, increasing pressure has been placed on the courts to provide public law remedies where none would exist if the traditional rules of *locus standi* were to be applied strictly. The approach of Lord Denning in *McWhirter* and Lord Diplock in the *I.R.C. Case* represents an alternative to the traditional rules of *locus standi*, and its implication should be seriously considered.

Where the public wrong is a failure to comply with a statute, the question of *locus standi* is increasingly being determined by the application of those rules of statutory interpretation that are pertinent to the tort of breach of statutory duty. *A.C.F.* and *Onus* illustrate that this approach has not thus far had any beneficial effect on the rules of *locus standi*. In general it can be said that the courts are still slow to respond to the need for greater accessibility of the remedies of injunction and declaration in relation to breaches of the public law. The High Court in both the *A.C.F.* and *Onus* cases believed that it was liberalizing the law regarding *locus standi*. However judging from the actual results of these cases the writer is of the view that the new test of 'special interest in the subject matter of the action' is unlikely to have this effect. Whilst the result in *Onus* is most welcome, and the claim that there was a difference in degree between the interest of the Foundation in the one case and that of the two Aborigines in the other is plausible, it is submitted that the High Court's view that the Foundation's interest in the land in question was not sufficient to confer *locus standi* is not beyond question. After all, the Foundation was not a 'mere busybody';[86] its objects of promotion of the conservation of the environment were directly affected by the actions of the defendants in that case and furthermore, the Foundation had gone to the trouble of submitting comments in relation to the Iwasaki proposal. For these reasons the Foundation could legitimately be said to have had a more proximate interest than the public generally in ensuring that the Act and the administrative procedures in question were duly complied with. In this respect, the approach of the New Zealand Court of Appeal in the *Environmental Defence Society Case*[87] is more enlightened.

[84] Quoted from Schwartz B and Wade H. W. R. *Legal Control of Government* (1972) 291. For a statement of the conflicting considerations involved in framing an ideal law governing *locus standi*, see *Onus* 634 *per* Gibbs C.J. See also at 638 *per* Murphy J.

[85] See e.g. Administrative Appeals Tribunal Act 1975 (Cth) as amended, s. 27; *Re McHattan v. Collector of Customs (N.S.W.)* 1977 1 A.L.D. 67; *Re Control Investment (No. 1)* (1980) 3 A.L.D. 74. Compare Trade Practices Act 1974 (Cth) as amended, s. 80, *Phelps v. Western Mining Corporation Ltd* (1978) 33 F.L.R. 327.

[86] See *supra* n. 20.

[87] [1981] 1 N.Z.L.R. 216, 220.

Perhaps the best way to gauge the implications of the new 'special interest' test is to look at what the members of the High Court who adopted it themselves think of it. The following statement of Stephen J. sufficiently represents their views:

> [W]hatever may be thought to be the need for development in this area of the law, the present appeal provides no occasion for it. In this case the contentions of the parties call for no reconsideration of the present law: the appellants need invoke no new principle in order to establish their right to sue; the respondent urges no new principle but instead contends that the application of existing law supports its denial of the appellants' standing to sue. Moreover it may be that any general development of the law relating to standing to sue should be left to legislative action, prompted by law reform agencies . . . rather than [to] judicial innovation.[88]

In light of this statement, anyone who expects radical changes in the law relating to *locus standi* to flow from the adoption of the 'special interest' test by the High Court, is likely to be disappointed.

[88] *Onus, supra* 636.