CASE NOTES

RECENT DEVELOPMENTS ON LOCUS STANDI: ONUS v. ALCOA OF AUSTRALIA LTD[1]

The Background

The rules governing the locus standi of a party seeking to bring an action for the violation of a public right have, in recent High Court decisions in Australia, undergone some modifications. The modifications relate to situations in which there has been a violation of a public right, and the party who wishes to bring the action has no economic (or proprietary) interest in the subject-matter beyond that of any other member of the public. Under what circumstances can a party bring an action?

The test of standing in this situation in England and Australia had in the past been based on what Buckley J. stated in *Boyce* v. *Paddington Borough Council*[2] wherein he said:

> "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."[3]

Although this test of standing has been affirmed in a long line of cases in both England and Australia there has, in recent High Court decisions, been a modification of the second limb of this test, namely, that the plaintiff must show "special damage". The High Court has replaced the "special damage" test with a "special interest" test. The effect is that a party will only have standing to sue for the violation of a public right if he has a "special interest" in the subject-matter of the action. It is not clear what will come within the confines of "special interest" and the High Court has stated that what is a special interest will vary according to the nature of the subject-matter of the litigation.

The first case where the High Court diverged from the Boyce test was in the *Australian Conservation Foundation (Inc.)* v. *The Commonwealth of Australia*.[4] In this case the Federal Government granted approval to Iwasaki Sangyo Co. (Aust.) Pty Ltd to establish a Japanese tourist resort in Northern Queensland in an area of high conservation significance. The relevant Minister sought an Environmental Impact Statement to be prepared

1 (1981) 55 A.L.J.R. 631.
2 [1903] 1 Ch. 109.
3 Ibid. 114.
4 (1979) 54 A.L.J.R. 176.

pursuant to ss. 5 and 6 of the *Environment Protection (Impact of Proposals) Act* 1974 (Cth.). Iwasaki prepared a draft Environmental Impact Statement. This statement did not comply with the form prescribed in the procedures set out in the Act. Comments were invited by Iwasaki from interested parties and in response the Australian Conservation Foundation (A.C.F.) made detailed criticisms of the form and substance of the statement. No further document and no final Environmental Impact Statement had been prepared when ministerial statements were made indicating that the project had been approved by the Government.

A.C.F. sought injunctions and declarations to compel the Minister to comply with the procedures set out in the Act. On an interlocutory application the Crown sought to have A.C.F.'s statement of claim struck out. Aickin J. at first instance accepted the Crown's argument and his decision was upheld on appeal by the majority of the Full Court of the High Court. Gibbs J. was of the opinion that the special damage test formulated by Buckley J. in *Boyce* v. *Paddington Borough Council* was not altogether satisfactory because:

> "His reference to 'special damage' cannot be limited to actual pecuniary loss, and the words 'peculiar to himself' in my opinion should be regarded as equivalent in meaning to 'having special interest in the subject-matter of the action.' "[5]

Gibbs J. did not go on to apply this variation of Buckley J.'s test as it did not arise in the case before him. However, he referred to Mason J.'s judgment in *Robinson* v. *The Western Australian Museum*[6] where it was indicated that what is a "sufficient interest" will vary according to the nature of the subject-matter of the litigation. The court went on to state that interests that might provide standing in an action were not necessarily confined to economic interests. Gibbs J. stated that one might have sufficient interest in the preservation of a particular environment. Mason J. stated that perhaps social and political interests might suffice. The majority of the court approved Gibbs J.'s test.

The A.C.F. in seeking standing relied on the Victorian decision of the *National Trustees of Australia (Vic.)* v. *Australian Temperance & General Mutual Life Assurance Society Ltd.*[7] In that case the Full Court of the Supreme Court of Victoria held that the National Trust had sufficient interest to appeal to the Victorian Planning Appeals Tribunal. The High Court distinguished this case from the case before it on the basis of a difference between the legislation in question, the *Town and Country Planning Act* 1961 (Vic.), and the *Environment Protection (Impact of Proposals) Act* 1974. The court also stated that unlike the A.C.F. the National Trust in Victoria had been accorded recognition in a variety of statutes, e.g. the *Historic Buildings Act* 1974 (Vic.). The High Court reiterated its view that, where a person or body cannot establish a "special interest" in the

[5] Ibid. 180.
[6] (1977) 138 C.L.R. 283.
[7] [1976] V.R. 592.

action, a private individual must obtain the Attorney-General's fiat when seeking to protect public rights.

On the facts before it the court held that the *Environment Protection (Impact of Proposals) Act* 1974 did not give a person commenting on a draft Environment Impact Statement a right to challenge an administrative action such as the grant of Reserve Bank approval which might be viewed as only indirectly connected with an environmental consideration of the proposed development. The court took the view that the procedures in the Act were not mandatory but merely guidelines which could be followed by the Minister. The case makes it clear that an emotional or intellectual interest in the protection of the environment does not confer a sufficient interest for a person to obtain standing for an injunction to enforce public rights under the *Environment Protection (Impact of Proposals) Act* 1974. This also applied to a person or body who has a statutory right to submit comments on any Environmental Impact Statement.

The case makes it clear that a person or body who has commented on a draft Environmental Impact Statement under the *Environment Protection (Impact of Proposals) Act* will not by that fact alone have "sufficient interest" to challenge a decision in a subsequent action. Where the common law rights of standing are not satisfied the courts will not be prepared to grant standing to parties unless the legislation itself clearly gives parties standing.

The "special interest" test expounded by Gibbs J. (as he then was) has been applied by the High Court in three subsequent decisions. The first was *Ingram* v. *Commonwealth and the Honourable Andrew Peacock*[8] where the plaintiff sought an interim declaration that the Commonwealth and the then Minister for Foreign Affairs, Mr Andrew Peacock, were by their continuing support for the Salt II Treaty between the Soviet Union and the United States acting in breach of the applicable principles of international law. The defendants took out a summons to strike out the plaintiff's statement of claim alleging that the plaintiff lacked standing to bring proceedings.

The court emphasised that the only evidence of the position of the plaintiff was that he was a citizen of the Commonwealth and a resident in Victoria. The plaintiff conceded that no private right of his had been or would be affected. However he submitted that he had a "special interest" because the matter raised questions of great general importance, on the basis that the actions of the defendants were illegal and potentially damaging to the whole of society in that they could enhance the dangers of nuclear war. Gibbs J. did not accept this argument as establishing a "special interest" because:

> "The argument that these matters reveal a special interest in the plaintiff cannot be accepted in the light of the decision in *Australian Conservation Foundation Incorporated* v. *The Commonwealth of Australia*, where it was said . . . that a belief, however strongly felt, that conduct of a particular kind should be prevented, does not suffice to give standing to the possessor of that belief."[9]

[8] (1980) 54 A.L.J.R. 395.
[9] Ibid. 397.

The plaintiff also argued that the fact that other members of society would be equally affected by these dangers would not prevent him having a special interest. Gibbs J. rejected this argument, saying that an interest is not special if it is shared by the public at large. In this regard a special interest would appear to be similar to special damage suffered by a person over and above the public at large.[10] He also stated that there was no difference in relation to the law on standing between the making of a declaration and the granting of an injunction.

The "special interest" test was held by the High Court to have been satisfied in *Day* v. *Pinglen Pty Ltd.*[11] The central question before the court was whether an approval in respect of building work had become void for want of "substantial commencement" within the meaning of s. 315 of the *Local Government Act 1919* (N.S.W.). The respondent company argued that the appellant lacked standing to maintain the proceedings. It was agreed by the parties that there was no interference with a private right and the question was therefore whether the appellant had a special interest in the subject-matter of the action. The High Court held that she had such an interest because:

> "The existence of an impending detriment threatened by an unlawful act is sufficient to confer standing to seek an injunction to restrain that act, without regard to theoretical possibilities in other circumstances. . . ."[12]

The court went on to hold that the fact that the appellant had received notice of the development pursuant to s. 342ZA giving her the right under the Act to object to the granting of permission did not preclude her from seeking relief under the general law for a threatened unlawful act. In fact the section served to establish that she had a special interest in the subject-matter of the action. The court accepted the view expressed by Kearney J. and Samuels J. "that s. 342ZA served a purpose relevant to standing in another way, namely, by identifying the appellant as a member of a category of persons who were, at least potentially, specially affected by the proposed development."[13]

In a different context the "special interest" test was held to have been satisfied not by an individual but by a group of Aborigines. The High Court decided in *Onus* v. *Alcoa of Australia Ltd*[14] that the appellants did have the necessary "special interest" to give them standing to apply for an injunction.

The Facts

The appellants brought proceedings in the Supreme Court of Victoria for the purpose of preventing Alcoa of Australia Ltd from carrying out its works on the construction of a smelter. They were members of the Gournditch-jmara Aboriginal people and were the custodians of the relics of

[10] Ibid.
[11] (1981) 55 A.L.J.R. 416.
[12] Ibid. 420.
[13] Ibid.
[14] (1981) 55 A.L.J.R. 631.

their people according to their laws and customs. It was claimed that the works would interfere with Aboriginal relics on the land and that this amounted to a breach of s. 21 of the *Archaeological and Aboriginal Relics Preservation Act* 1972 (Vic.). The Supreme Court of Victoria denied standing to the appellants because their interest was entirely emotional and intellectual. The court relied upon the statements of the High Court in the *Australian Conservation* case.

On appeal to the High Court the first submission of the appellants was that the *Relics Act* was passed for the benefit or protection of the Aboriginal people as a class, and that any member of the class could sue to enforce the prohibitions contained in the Act, without the necessity of proving special damage or special interest. This argument was rejected by the court. Their second submission was that they had a "special interest" in the subject matter of the action. The majority of the High Court accepted that the appellants should have standing on the basis of this argument.

The Decision

Gibbs C.J. said the principles that applied in this case had been formulated by the court in *Australian Conservation Foundation (Inc.)* v. *Commonwealth of Australia.* Applying these principles to the case before him he stated:

> "It seems to me that the appellants have an interest in the subject matter of the present action which is greater than that of other members of the public and indeed greater than that of other persons of Aboriginal descent who are not members of the Gournditch-jmara people. The appellants, and other members of the Gournditch-jmara people, would be more particularly affected than other members of the Australian community by the destruction of the relics. The appellants claim that, in common with other members of the Gournditch-jmara people, they are custodians of the relics according to the laws and customs of those people. They claim that the relics are of cultural and spiritual importance to them, and that they have used the relics to teach their children the culture of their people."[15]

He continued:

> The appellants claim not only that their relics have a cultural and spiritual significance, but that they are custodians of them according to the laws and customs of their people, and that they actually use them. The position of a small community of Aboriginal people of a particular group living in a particular area which that group has traditionally occupied, and which claims an interest in relics of their ancestors found in that area, is very different indeed from that of a diverse group of white Australians associated by some common opinion on a matter of social policy which might equally concern any other Australian."[16]

Stephen J. agreed with the conclusions reached by the Chief Justice and Wilson J. that the plaintiffs had "sufficient interest to accord them standing to seek relief". He went on to make the following observations:

[15] Ibid. 634.
[16] Ibid. 635.

> "I do not regard the existing state of the law to be that the possession of intellectual or emotional concern is any disqualification from standing to sue. On the contrary, it will be but rarely that a person having a special interest in the subject-matter of the action which he has instituted does not also possess at least a strong intellectual and perhaps also a strong emotional concern with that subject-matter. What is more, the absence of mere material interest in that subject-matter, in the sense of property or possessory rights, will not, as the law now stands, be in itself any bar to standing; this the present case attests."[17]

In distinguishing the A.C.F. Case from the case before him he said:

> "The distinction between this case and the *A.C.F.* case is not to be found in any ready rule of thumb, capable of mechanical application; the criterion of 'special interest' supplies no such rule. As the law now stands it seems rather to involve 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. 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. While Europeans may have cultural difficulty in fully comprehending that significance, the 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. Courts necessarily reflect community values and beliefs, according greater weight to, and perceiving a closer proximity to a plaintiff in the case of, some subject-matter than others. The outcome of doing so, however rationalized, will, when no tangible proprietary or possessory rights are in question, tend to be determinative of whether or not such a special interest exists as will found standing to sue."[18]

The majority of the Court (Aickin J. dissenting) held that the appellants belonged to an identifiable group of people with spiritual and cultural interest sufficient to accord them standing and if the relics were damaged the plaintiffs would suffer.

Although *Onus* v. *Alcoa of Australia Ltd* does not radically alter the rules on standing in Australia there is a clear indication that the High Court will give standing to a group of people who can demonstrate that they have a "special interest" in a matter. It is clear that the "special interest" need not be a property right. Thus although conservationists as a group will not be able to obtain standing as of right they may be able to demonstrate *in a particular case* that they too have a "special interest" in a subject-matter, for example, the use of an area by members of the Conservation Foundation.

The High Court has expanded and applied the common law test of standing as expounded in *Boyce* v. *Paddington Borough Council.* The "special interest test" adopted by the High Court in the *Australian Conser-*

[17] Ibid. 637.
[18] Ibid.

vation Foundation (Inc.) v. *The Commonwealth of Australia* and applied in the three most recent decisions indicates a divergence from the law of standing applied in England where there appears to be an adherence to the test of "particular direct and substantial damage test".[19]

The courts appear to be unwilling to allow any significant expansion of locus standi. Standing in the public law area must still relate to the pre-existing dispute situation. The High Court in Australia in its four recent decisions has given a wider interpretation of the traditional standing test. The move has been away from showing special damage to one of showing a "special interest" in the cause of action. There is still room for the test to be widened even further. Problems have arisen in the past and to a certain extent are still raised under the new test with regard to coming within the technical definition of a legal interest. Difficulties do arise in framing an environmental action within the traditional causes of action. Although the special interest test is wider than the special damage test it is still restrictive. In fact Stephen J. in *Onus* v. *Alcoa of Australia Ltd* questions whether the judiciary is the proper branch to give an expansive view of standing. He made the following comments:

> "Whatever may be thought to be the need for development in this area of the law, the present appeal provides no occasion for it. . . . 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. Any significant changes will necessarily involve the weighing of important considerations of policy; different solutions may be appropriate in different areas of the law or where the remedies sought by the plaintiffs differ; there exists considerable diversity in the recommendations which have emerged to date from agencies in the common law world regarding desirable reforms. All this points towards deliberate legislative action rather than judicial innovation."[20]

The Law Reform Commission of Australia in its *Discussion Paper No. 4: Access to the Courts—1 Standing Public Interest Suits* (1977) advocates sweeping changes to ease the present requirements on locus standi in public litigation. The Commission in its *Tentative Recommendations* concludes that the best solution in this area of the law would be to have

> "a single standing formula empowering the court, in all public interest, matters, to reject action on standing grounds as part of the determination of the suit if satisfied that the plaintiff has no real concern with the issues."[21]

Whether these recommendations will be implemented by the legislature remains to be seen. However, both the High Court in its most recent decision in *Onus* v. *Alcoa of Australia Ltd* and the Law Reform Commission in its discussion paper on standing have given clear indications that not only are

19 See for example *I.R.C.* v. *National Federation of Self-employed and Small Business Ltd* [1981] 2 W.L.R. 722.
20 (1981) 55 A.L.J.R. 631, 637.
21 Law Reform Commission of Australia, *Discussion Paper No. 4 Access to the Courts—1, Standing Public Interest Suits* (1977) 20.

reforms in this area of the law overdue but that the initiative for such changes must come from the legislature.

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DEATH AFTER DIVORCE—UNTYING THE KNOT ONCE TOO OFTEN: EMMETT AND EMMETT

The Problem

The enactment of the *Family Law Act* 1975 (Cth.) has created a new class of disadvantaged litigant—the party whose former spouse dies after they are divorced but before the Family Court[1] has settled the property disputes of the parties. The problem arises because the Act, unlike its predecessor, the *Matrimonial Causes Act* 1959 (Cth.), provides for dissolution proceedings (s. 48) to occur separately from proceedings in relation to the property of the parties (s. 79). Indeed, a property application may now only be made subsequently to filing for principal relief[2] pursuant to the amendments reflecting the constitutional views expressed by the High Court in *Russell* v. *Russell*.[3] The Family Court has found in *Schmidt and Schmidt*[4] and *Sims and Sims*[5] that it has no jurisdiction to hear an action initiated after the death of a spouse under s. 79, or to continue proceedings which are pending at the time of the death even if all that remains is for the court to give its judgment.[6] This creates considerable hardship for the surviving spouse, in view of the now legendary delays in the Family Court's property hearing lists adding "time to die", particularly where the inaccessible estate is a large one and the would-be applicant's means are modest.

However, it is not only the surviving spouse in straightened circumstances who is affected. Any spouse with a credible claim in respect of assets of the other is prejudiced by a death after divorce resulting in loss of rights to a determination of that claim by the Family Court.

Succession rights under state law also fail to supply solutions. The antipathy which culminated in the divorce will almost invariably have motivated the deceased to disinherit the other party. Moreover, family provision legislation (testators' family maintenance) often provides no

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1 Magistrates' Courts also have property jurisdiction under the Act (s. 39(2)) but for the sake of brevity the Family Court will be referred to in this work.

2 S. 4(1)(ca).

3 (1976) 134 C.L.R. 495.

4 (1980) F.L.C. 90-873.

5 (1981) F.L.C. 91-072.

6 *Sims and Sims* is probably needlessly restrictive. While there may be defensible reasons for the Court refusing to continue a hearing after a party has died because of the resultant change in circumstances and in the taking of evidence, the court's own delay in handing down the judgment of the Court should not be visited upon the surviving party.