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# Faith in the courts: The aggrieved faithful seeking standing in Australia

## **Abstract**

This article examines the history of faith based groups and individuals in Australia who claim to have had their religious or spiritual beliefs aggrieved seeking standing (also known as locus standi) to challenge the decisions of public body authorities through the judicial system. These applicants are described in this article as the 'aggrieved faithful.' The main issues that have given rise to applications for standing by the aggrieved faithful include public decisions pertaining to the areas of abortion, blasphemy and in-vitro fertilisation. These concerns are not unique to Australia, but are also issues that have been raised in Canada and the United Kingdom. This article also briefly considers applications for standing by Indigenous Australians who claim to have had their spiritual beliefs aggrieved. It is argued that the current restrictive test for standing should be liberalised to improve the operation of the rule of law in Australia.

## **Keywords**

administrative law, law and religion, abortion, blasphemy, in-vitro fertilisation

# FAITH IN THE COURTS: THE AGGRIEVED FAITHFUL SEEKING STANDING IN AUSTRALIA

HENRY KHA\*

## ABSTRACT

*This article examines the history of faith based groups and individuals in Australia who claim to have had their religious or spiritual beliefs aggrieved seeking standing (also known as locus standi) to challenge the decisions of public body authorities through the judicial system. These applicants are described in this article as the 'aggrieved faithful.' The main issues that have given rise to applications for standing by the aggrieved faithful include public decisions pertaining to the areas of abortion, blasphemy and in-vitro fertilisation. These concerns are not unique to Australia, but are also issues that have been raised in Canada and the United Kingdom. This article also briefly considers applications for standing by Indigenous Australians who claim to have had their spiritual beliefs aggrieved. It is argued that the current restrictive test for standing should be liberalised to improve the operation of the rule of law in Australia.*

## I INTRODUCTION

The right to commence a legal proceeding is expressed in the administrative law doctrine known as *locus standi* (or standing). Australian societal views and values have changed over the past few decades, especially on censorship and morality, and this has been reflected in changes to the law. Consequently, some of the changes have aggrieved the spiritual or religious beliefs of a significant number of individuals and groups in Australia, particularly church groups. Individuals and groups who claim their spiritual or religious beliefs are aggrieved by acts or omissions of public bodies have sought to have their grievances resolved through the Australian judicial system. I describe these people as the 'aggrieved faithful.' In Australia, the number of aggrieved faithful seeking judicial review remedies has increased over the past few decades. Before judicial review can be sought, the courts have to consider whether an individual or a group passes the test for standing. This article examines the circumstances that have resulted in applicants successfully achieving standing based on their belief that their religious or spiritual beliefs have been aggrieved. Moreover, the effectiveness and success of seeking standing and achieving the remedies in judicial review sought by the aggrieved faithful will be analysed. The article is

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structured as follows: First, the general principles of standing in Australia are examined. This is followed by a comparative analysis of the *locus standi* positions in other common law jurisdictions, namely the United Kingdom and Canada. The next (and most substantial) part of the article focuses on the issues of blasphemy, abortion and IVF for unmarried women – controversial issues that have prompted religious communities in Australia to seek standing in an attempt to redress supposed violations to their faith. Finally, the article considers the experiences of indigenous people who have had their spiritual beliefs aggrieved and considers and compares these experiences with those of non-indigenous aggrieved faithful.

## II PRINCIPLES OF STANDING IN AUSTRALIA

There are two main sources of standing in Australia: constitutional and statutory. Constitutional standing is enshrined in s 75(v) the *Australian Constitution*, which gives the High Court of Australia original jurisdiction to hear matters ‘in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.’ The purpose of s75(v) is to give effect to one aspect of the doctrine of the separation of powers, by enabling the judiciary to police decisions by the executive and by providing citizens with the right to challenge a public decision-maker. The main source of statutory standing in Australia is the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ‘*ADJR Act*’). The standing requirements under the *ADJR Act* are almost the same as the rules governing the application of equitable remedies.<sup>1</sup> Sections 3 and 5 of the *ADJR Act* enable aggrieved persons to seek an order of review for decisions or conduct that has adversely impacted their interests. However, there is some room to give standing more liberally at the discretion of the court. In *Tooheys Ltd v Minister for Business and Consumer Affairs*, Ellicott J stated that ‘the words “a persons aggrieved” should not, in my view, be given a narrow construction. They should not, therefore, be confined to persons who can establish that they have a legal interest at stake in the making of the decision.’<sup>2</sup>

Nonetheless, the standing requirement under the *ADJR Act* is still limited by the statutory limitations and the development of constitutional standing under common law. Despite the existence of the *ADJR Act*, there has so far been no challenge to the distinction between constitutional standing under common law and the language of the *ADJR Act* in regards to standing.<sup>3</sup> Therefore, as a general rule, the term ‘persons

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<sup>1</sup> Roger Douglas, ‘Standing,’ in Matthew Groves and H P Lee, (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 164.

<sup>2</sup> (1981) 36 ALR 64, 79.

<sup>3</sup> Douglas, above n 1, 170.

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aggrieved' defines litigants who at the very least have a special interest that entitles them to be granted standing by the courts.

Australia adopts a narrow test for standing. The leading case is *Australian Conservation Foundation v Commonwealth* ('ACF').<sup>4</sup> This case concerned a public interest environmental group, the Australian Conservation Foundation (the 'ACF'), who challenged the Commonwealth's decision to finance a private tourist resort located in Farnborough, Queensland. Before the Commonwealth could grant foreign exchange approval to the developers to build the resort, it was necessary for the Commonwealth to conduct an environmental impact assessment under the *Environmental Protection (Impact of Proposals) Act 1974* (Cth) (the 'EPIP Act'). The ACF sought a declaration and an injunction under the original jurisdiction of the High Court to declare that the Commonwealth had failed to comply with the *EPIP Act* and to stop the Commonwealth's approval of the foreign exchange respectively. The majority of the High Court ruled that the ACF lacked standing. The Court established the principle that a litigant must have a special interest in the subject matter of the litigation in order to be granted standing, unless the litigant has a right of standing under statute. In the words of Gibbs J:

However, an interest for present purposes does not mean a mere intellectual or emotional concern ... 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*.<sup>5</sup>

The establishment of the special interest test for standing as more than a mere intellectual or emotional concern is an important principle. Under this test, members of the public (or 'concerned citizens') and public interest groups have to establish that they are 'persons aggrieved' who will be directly affected by decisions of public bodies. This principle has played an important role in allowing or rejecting standing in cases involving the aggrieved faithful.

Creyke and McMillan argue that 'the principles enunciated in *ACF* have been consistently applied, even in cases that have seemingly taken a more liberal view of standing.'<sup>6</sup> However, Douglas does not share this view; he argues that subsequent decisions have departed from the *ACF* case.<sup>7</sup> He cites *Bateman's Bay Local Aboriginal*

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<sup>4</sup> (1980) 146 CLR 493.

<sup>5</sup> *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, 530–1.

<sup>6</sup> Robin Creyke and John McMillan, *Control of Government Action* (LexisNexis Butterworths, 2012) 972.

<sup>7</sup> Douglas, above n 1, 162–3.

*Land Council v Aboriginal Community Benefit Fund Pty Ltd ('Bateman's Bay')*<sup>8</sup> as an example of the High Court diverging away from the ACF standing requirement.<sup>9</sup> He notes that the High Court held that potential economic detriment was sufficient for the plaintiff to gain standing without applying the ACF special interest test.<sup>10</sup> Moreover, the joint obiter judgments of Gaudron, Gummow and Kirby JJ seem to suggest that there are no extra standing requirements for those seeking injunctions against people in breach of public duty: 'It will be recalled that, in this Court, there is a body of authority that, even in the absence of a legal interest, "a stranger" to an industrial dispute has standing as a prosecutor to seek prohibition.'<sup>11</sup>

However, this case does not deviate from the special interest test in ACF. Rather, it acknowledges the historical basis upon which equity has intervened to safeguard the public interest. The ACF special interest test is included in the development of standing. Enderbury notes that this 'decision adds new dimensions to considerations of standing, without substantively changing the special interest test.'<sup>12</sup> Furthermore, it should be noted that, in ACF, Aickin J suggested that the courts have defined a 'stranger' as a non-party who has a material interest in the matter of the case, as opposed to 'anyone'.<sup>13</sup> The majority in *Bateman's Bay* were looking at equity beyond ACF with the ACF principles in mind. The court in *Bateman's Bay* considered special interest as the paramount consideration in determining whether to grant standing to the litigant (as established in the precedent of ACF). However, the court also considered issues of equity in conjunction with special interest. The fact that the ACF special interest test continues to be applied in standing cases post-*Bateman's Bay*, most notably in *Re McBain; Ex parte Australian Catholic Bishops Conference*,<sup>14</sup> demonstrates that ACF remains good law.

### III PRINCIPLES OF STANDING IN CANADA AND THE UNITED KINGDOM

It is worth comparing the Australian principles of standing with other common law nations to appreciate the thinking behind the different tests used to grant standing.

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<sup>8</sup> (1998) 194 CLR 247.

<sup>9</sup> Douglas, above n 1, 162–3.

<sup>10</sup> Ibid 163.

<sup>11</sup> *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 263.

<sup>12</sup> James Enderbury, 'Equity and Public Law in the Law of Standing: *Bateman's Bay Local Aboriginal Land Council v the Aboriginal Community Benefit Fund Pty Ltd*' (1999) 21(1) *Sydney Law Review* 129.

<sup>13</sup> *Australian Conservation Foundation v Commonwealth* (1979) 146 CLR 493, 508–9.

<sup>14</sup> (2002) 209 CLR 372.

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Australian standing shares a lot in common with the principles of standing in Canada and the United Kingdom. Therefore, the article will examine these two jurisdictions. American standing, however, is inapplicable for comparison with Australia; Gummow J notes Australian standing extends equitable rights to individuals and groups seeking the right of standing to challenge issues of public concern, particularly in s 75(v) of the Australian Constitution, whereas the American constitution's version of Article III is concerned with the equitable and legal rights of an applicant's private interests.<sup>15</sup>

Canada has established three elements that are necessary to be established in order for a litigant to be granted standing based on the judgment of Le Dain J in the landmark standing case of *Finlay v Canada (Minister of Finance)* ('*Finlay*').<sup>16</sup> The three elements are listed below:

- (1) Whether or not there is a justiciable issue,
- (2) The existence of a legal challenge raised by someone with a genuine interest in a serious issue, and
- (3) The consideration of other reasonable and effective alternatives to bring an issue before a court.<sup>17</sup>

Based on the general principles established by Le Dain J, it appears that the Canadian genuine interest test for standing is broader than the Australian special interest test. Canadian individuals have been successful in seeking standing to challenge decisions involving film censorship<sup>18</sup> and abortion,<sup>19</sup> which otherwise may have been dubious if the matters were heard in Australia. Although Canadian standing has ebbed and flowed, the three elements in *Finlay* still establish the general principles in the operation of standing in Canada. This point is further explored later in this article.

The United Kingdom adopts a middle-ground between Australia and Canada. In *R v Inland Revenue Commissioners; Ex parte National Federation of Self-Employed Ltd*, Lord Denning established that a 'busybody' with no objective cause for grievance should be denied standing, while a person who is 'genuinely concerned' should be heard.<sup>20</sup>

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<sup>15</sup> *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591, 610–2.

<sup>16</sup> [1986] 2 SCR 607.

<sup>17</sup> *Ibid* 631.

<sup>18</sup> *Nova Scotia (Board of Censors) v McNeil* [1976] 2 SCR 265.

<sup>19</sup> *Minister of Justice (Canada) v Borowski* [1981] 2 SCR 575; *Morgentaler v New Brunswick* [2008] NBQB 258.

<sup>20</sup> [1980] QB 407, 422.

On appeal, the House of Lords affirmed the formulation of the ‘genuinely concerned’ test.<sup>21</sup> The question then arises of who would be a ‘genuinely concerned’ person? Wade and Forsyth provide the answer that ‘they are likely to cover any person who has a genuine grievance of whatever kind — and that is tantamount to any person who reasonably wishes to bring proceedings.’<sup>22</sup> Recent leading cases seem to support this argument by allowing standing for issues of sufficient importance, particularly to allow ‘strangers’ to challenge sufficiently serious alleged government acts of illegality. For example, Greenpeace was granted standing by the Queen’s Bench to challenge the Secretary for State and Industry’s decision to construct nuclear power stations in the United Kingdom based on their belief that the consultation process was flawed.<sup>23</sup> However, English standing is not as extensive as standing in Canada. According to Carol Harlow, English courts, unlike Canadian courts, seem to privilege public interest groups over individuals.<sup>24</sup> This is seen in a recent case where the Court flagged that individuals who are accorded standing are placed in an analogous position to lobby groups.<sup>25</sup>

#### IV BLASPHEMY

It is important to briefly explain the historical background of church activism in order to better appreciate standing cases motivated by the aggrieved faithful, especially surrounding the issue of blasphemy. In the 1970s, church leaders in the major Christian denominations were the main advocates against perceived moral depravity in Australian society. This is most evident in the furore that erupted at the Australian release of the *Last Tango in Paris* in 1973 — the most vociferous protest directed at the release of a film in Australian history.<sup>26</sup> The film features graphic sex scenes between a young woman and a significantly older man. The Church of England in Australia and Tasmania, the Roman Catholic Church, the Presbyterian Church of Australia and the Methodist Church of Australasia all condemned the film in the strongest possible terms and called for its ban. However, by the 1990s the

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- <sup>21</sup> *R v Inland Revenue Commissioners; Ex parte National Federation of Self-Employed Ltd* [1981] UKHL 2.
- <sup>22</sup> Sir William Wade and Christopher Forsyth, *Administrative Law* (Oxford University Press, 2004) 739.
- <sup>23</sup> *R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin).
- <sup>24</sup> Carol Harlow, ‘Public Law and Popular Justice’ (2002) 65 *Modern Law Review* 1, 5–6.
- <sup>25</sup> *R (Feakins) v Secretary of State for the Environment, Food and Rural Affairs* [2003] EWCA Civ 1546, 21.
- <sup>26</sup> Peter Johnson, *Cinema of Blasphemy: Film Censorship and the Australian Church* (25 November 2002) Libertus <<http://libertus.net/censor/odocs/pj-cinemaofblasphemy.html>>.



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position of the churches as the leading voice in public controversies had diminished.<sup>27</sup> Coalitions of conservative Roman Catholics (such as the Australian Family Association) and Protestants (such as the Australian Festival of Light and the Australian Christian Lobby) became the leading advocates for moral reform.

### *A Australia: Vocational Interest*

*Ogle v Strickland* ('Ogle') is an Australian standing case that involved two priests, the Reverend Walter Ogle of the Anglican Church and the Reverend John O'Neil of the Roman Catholic Church, seeking judicial review of the Censorship Board's decision to permit the release of the film *Hail Mary* in Australia.<sup>28</sup> They sought judicial review based on the ground that the film was blasphemous. They argued that the film offended the Christian doctrine of the virgin birth in its depiction of a modern-day virgin Swiss girl named Mary falling pregnant in the context of strong coarse language and nudity. They were successful in achieving standing in the Full Court of the Federal Court. The Full Court ruled that since they were ministers of religion, they held a special position and duty compared with ordinary citizens to promote and uphold the tenets of their religious beliefs. This included opposing blasphemy. Lockhart J distinguished *ACF* from *Ogle* by arguing that the priests were not 'busybodies,' but held a special interest as vocational ministers to uphold scripture and speak out against blasphemy.<sup>29</sup> Fisher J relied on *Onus v Alcoa* to justify the Court's position by arguing that a value judgment must be made in determining 'special interest,' and ruled that the priests had a professional calling beyond an emotional or intellectual concern.<sup>30</sup> Wilcox J went further by comparing their actions to the self-sacrifice of a marriage by quoting from the *Book of Common Prayer*: '[it is] not by any to be enterprised, nor taken in hand, inadvisedly, lightly, or wantonly.'<sup>31</sup> The Court in *Ogle* established the notion of a 'vocational interest' by ruling that ministers of religion have the right to seek standing based on having their faith aggrieved 'because to repel blasphemy is a necessary incident of their vocation.'<sup>32</sup>

It is questionable whether *Ogle* was decided correctly based on subsequent cases. In *Cameron v Human Rights and Equal Opportunity Commission*, the Full Court of the Federal Court supported the idea of a 'vocational interest' and affirmed the reasoning

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<sup>27</sup> Ibid.

<sup>28</sup> (1987) 13 FCR 306.

<sup>29</sup> Ibid 318.

<sup>30</sup> Ibid 308.

<sup>31</sup> Ibid 322. The *Book of Common Prayer* passage comes from the first paragraph of the 'Form of Solemnization of Matrimony.'

<sup>32</sup> Ibid 318.

in *Ogle* as a valid precedent.<sup>33</sup> In a later case, however, Sackville J challenged the validity of the *Ogle* judgment, namely the idea of a 'vocational interest'.<sup>34</sup> He questioned the concept of people who have arguably had their spiritual and religious beliefs aggrieved successfully establishing standing based on a peculiar historical notion of blasphemy.<sup>35</sup> Furthermore, he posed the rhetorical question of whether an environmental group would gain standing if they deemed the preservation of the environment to be of a profound cultural or spiritual significance, and whether a 'vocational interest' could extend to deeply held and sound convictions by someone who has a non-vocational interest.<sup>36</sup> Sackville J provided no answers to these questions. It appears that if *ACF* was heard after *Ogle*, *ACF* would likely have passed the test for standing, because the *Ogle* standing test of 'vocational interest' could have extended to the *ACF*'s non-vocational but deeply held cultural values for the environment. In *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal*, the Federal Court affirmed that *Ogle* continues to illustrate the broad notion of a special interest, which is not confined to a legal, proprietary, financial or other tangible interest.<sup>37</sup> It seems that *Ogle* still forms precedent, albeit loosely held. However, the concerns of Sackville J, especially the idea of a 'vocational interest,' seem far from resolved. Perhaps a future case may have to unequivocally determine whether the idea of a 'vocational interest' should continue to exist. The existence of a 'vocational interest' still has merit in allowing people with special skills or positions in society to seek judicial review and ensure administrative justice.

In 1998, Dr George Pell, the Roman Catholic Archbishop of Melbourne, sought an injunction to stop the National Gallery of Victoria from displaying 'Piss Christ,' a photograph of a crucified Christ immersed in the artist's urine.<sup>38</sup> Pell sought an injunction on the ground of blasphemy. The defendant did not challenge Pell's standing. If the defendant had challenged Pell's standing, it may have been questionable if Pell would have received standing based on the views of Sackville J in *North Coast*. Harper J was unable to decisively determine if the exhibition of the photograph was obscene or indecent under s 17(1)(b) of the *Summary Act 1966* (Vic). Thus, Pell failed to get an injunction against the defendant. Likewise in *Ogle*, after *Ogle* and O'Neil received standing, they were unsuccessful in setting aside the Censorship Board's decision to register *Hail Mary* by the Federal Court in 1987. In 1988, they attempted to revive earlier proceedings, but these were discontinued once

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<sup>33</sup> (1993) 46 FCR 509.

<sup>34</sup> *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492, 509.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid* 510.

<sup>37</sup> [2010] FCA 1118, 9.

<sup>38</sup> *Pell v The Council of Trustees of the National Gallery of Victoria* (1998) 2 VR 391.

they were notified that the importer had ordered the destruction of the print of the film. However, the film was never banned.<sup>39</sup> Overall, the aggrieved faithful who have sought judicial remedies on the grounds of blasphemy have been unsuccessful.

### ***B Canada: Opening and Closing the Gate***

In Canada, there was a similar case to *Ogle* concerning film censorship, blasphemy and standing. In *Nova Scotia (Board of Censors) v McNeil* ('*McNeil*'),<sup>40</sup> the Nova Scotia Board of Censors banned *Last Tango in Paris* without giving a reason, though presumably because of the blasphemous and offensive content of the film. Gerard McNeil, a journalist and resident of Nova Scotia, sought to challenge the validity of the *Theatre and Amusement Act*, RSNS 1967, which governed the Nova Scotia Board of Censors. The Supreme Court of Canada granted McNeil standing because a serious constitutional issue was raised, and members of the public were deemed to have a direct interest in what can be publicly exhibited, with no other practical ways to challenge the legislation. This was a more liberal test for standing than *Ogle*, because any Canadian could have had standing to seek judicial review for film censorship. This is in contrast with Australia, where persons with 'special interests' beyond the interests held by ordinary members of the community can gain standing. The Canadian standing test adopted in *McNeil* allows more people who have a serious interest to have their case heard.

However, public interest standing in Canada has ebbed and flowed between broad and narrow positions. The Supreme Court of Canada has restricted public interest standing to persons with special interests that have exhausted other means of judicial review. This principle, known as the Canadian third branch of standing test, stops the so-called 'floodgates' of litigation.<sup>41</sup> For example, in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, a coalition of Christian churches sought standing to challenge amendments to the *Immigration Act*, 1976 C, which limited the determination process of defining a refugee under the UN Convention relating to the Status of Refugees.<sup>42</sup> The coalition argued that this amendment conflicted with the right to life, liberty and security of persons under s 7 of the *Canada Act 1982* (UK), c 11, sch B pt 1 (the '*Canadian Charter of Rights and Freedoms*'). Cory J denied the Council standing as the third branch in the standing test failed. In other

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<sup>39</sup> In fact, Video Excellence released *Hail Mary* on VHS in Australia with the words 'SHOULD THIS FILM BE BANNED? JUDGE FOR YOURSELF!' on the cover.

<sup>40</sup> [1976] 2 SCR 265.

<sup>41</sup> Jane Bailey, 'Reopening Law's Gate: Public Interest Standing and Access to Justice' (2011) 44 *University of British Columbia Law Review* 255, 262–8.

<sup>42</sup> [1992] 1 SCR 236.

words, the Council could have brought the matter to court through other more practical and relevant means, such as being an intervener or *amicus curiae* in pertinent immigration cases already before the court. Jane Bailey has identified *Canadian Council of Churches* as a watershed moment in the history of Canadian standing for 'closing the gate.'<sup>43</sup> However, recent successful Canadian standing cases seem to have reopened the gate of standing by allowing the courts to apply discretion in granting public interest standing to the voices of the disenfranchised.<sup>44</sup> A balance is achieved in the recent Canadian standing cases as the courts acknowledge the importance of access to justice, while at the same time limiting 'busybody' litigation.

## V ABORTION

### A *Australia: 'Aggrieved Persons'*

*Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health ('Right to Life')* is a case concerning a public interest body seeking standing.<sup>45</sup> Right to Life was a pro-life group that sought standing to challenge the failure of the health secretary to stop the clinical trial of an abortion drug mifepristone (also known as RU486) under the Therapeutic Goods Act 1989 (Cth) (the 'TG Act'). The Full Court of the Federal Court ruled that Right to Life did not have standing. Although Right to Life is strictly speaking not a religious body, many of the members hold a pro-life position as a result of their religious beliefs. Public interest bodies such as Right to Life have increasingly played a more active role in voicing the opposition of the aggrieved faithful towards controversial issues in the legal system, largely replacing the traditional role of churches and clergy in representing the aggrieved faithful in legal challenges.

Lockhart J denied standing based on the ground that Right to Life did not pass the test of 'aggrieved persons' under section 3(4) of the ADJR Act, despite Right to Life feeling subjectively aggrieved. In particular, Lockhart J indicated that in order to be

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<sup>43</sup> Jane Bailey, above n 41, 262.

<sup>44</sup> In *Chaoulli v Quebec (Attorney General)* [2005] 1 SCR 791, the Supreme Court of Canada granted standing to a doctor and a patient of the health care system in Quebec to challenge the constitutional validity of statutory prohibitions to contract for private health insurance. In *Morgentaler v New Brunswick* [2008] NBQB 258, the applicant was a doctor and was granted standing by the Queen's Bench of New Brunswick to challenge the restrictions on Medicare funding of abortions. In *Attorney General (Canada) v Downtown Eastside Sex Workers United Against Violence Society* [2012] 2 SCR 524, a group promoting better conditions for female sex workers was granted standing to challenge the prostitution provisions of the *Criminal Code, RSC 1985, c C-46*.

<sup>45</sup> (1995) 56 FCR 50.

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an 'aggrieved person' the plaintiff must demonstrate that they suffer more than other people in the community as a result of the decision.<sup>46</sup> Moreover, he noted that the fact that Right to Life was an incorporated association did not give them greater standing.<sup>47</sup> In regards to the decision in the case, Lockhart J ruled that the TG Act was concerned with the quality of therapeutic goods and not abortion law, with respect to which the appellants harboured a mere emotional interest. He stated that freedom of speech should not transmute into the right of standing, as there already existed a place to express mere emotional grievances in the open system.<sup>48</sup> Beaumont J largely agreed with Lockhart J, but noted interest groups could have a greater interest than an individual if there were vocational and evidentiary interests or government recognition.<sup>49</sup> Unlike Lockhart and Beaumont JJ, Gummow J argued that there was no decision under enactment and thus no need to decide standing.<sup>50</sup> Nonetheless, Gummow J indicated he would have denied standing in this case and in Ogle. In regards to Ogle, Gummow J stated that courts 'do not impute to the legislature an intention to interfere with ... common law rights or freedoms [such as freedom of speech and expression] in the absence of clear language', thus he would have only granted standing to the priests if the statute unequivocally gave the intention to interfere in the common law.<sup>51</sup> It seems unclear based on the differences of opinion between Lockhart and Beaumont JJ whether public interest bodies have more right to standing than individuals. What is clear is that individuals or groups with mere emotional or intellectual concern, even single issue public interest bodies, will not be considered 'persons aggrieved' for standing.

Right to Life followed Alphapharm Pty Limited v Smithkline Beecham (Australia) Pty Limited.<sup>52</sup> This case concerned a pharmaceutical corporation Smithkline seeking a review of the Federal Department of Health's registration of its rival Alphapharm's pharmaceutical product under s 60(2) of the TG Act. This section gives statutory standing to a person whose 'interests are affected' by the relevant decision. The Full Court of the Federal Court ruled that Smithkline lacked standing based on the fact that proprietary interests are insufficient grounds for standing, and only a real, genuine and direct interest would suffice the test for standing.

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<sup>46</sup> Ibid 65.

<sup>47</sup> Ibid 67.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid 81–22.

<sup>50</sup> Ibid 86.

<sup>51</sup> Ibid [parenthesis added].

<sup>52</sup> (1994) 49 FCR 250.

***B Canada: 'Genuine Interest'***

In Canada, the issue of whether to grant standing to a pro-life activist was considered in *Minister of Justice (Canada) v Borowski*.<sup>53</sup> Joseph Borowski challenged the legality of the abortion provisions under s 287 of the *Criminal Code*, RSC 1985, arguing that it was in violation of the right to life under s 7 of the *Canadian Charter of Rights and Freedoms*. The case did not concern Borowski's own life, but the lives of fetuses unrelated to Borowski. On behalf of the majority, Martland J ruled that Borowski had standing based on the Canadian test for standing, namely that the plaintiff has a 'genuine interest' in the validity and that there are no other alternatives to challenge the law. If *Right to Life* was decided in Canada, the applicant would probably have been granted standing based on this test. Blake argues that standing should only be granted to individuals or groups if they are directly confronted with conflicting legislation, as this limitation would stop private citizens abusing the privilege of standing and avoiding government regulation of their activities.<sup>54</sup> This argument is problematic, because standing has a role in protecting civil liberties and keeping governmental and administrative accountability. Without such a privilege, invalid or harmful laws continue to operate as fewer people are able to litigate against injustices. For example, Delwin Vriend was granted standing to successfully challenge the complete omission of protection against discrimination based on sexual orientation under the *Individual Rights Protection Act*, SA 1972.<sup>55</sup> The Court ruled that standing should be allowed as all other alternatives were exhausted and it would be unfair to grant standing only when someone was discriminated against based on his or her sexual orientation. Vriend would fail to achieve standing in Australia, because the Australian courts would consider that he only has a mere emotional and intellectual concern, and has not suffered from direct discrimination in a decision. The merit of the Canadian principles of standing is their willingness to allow issues of potential concern to be heard in court before actual harm has occurred.

***C United Kingdom: 'Genuine Concern'***

The English courts have allowed standing for the review of alleged serious government illegality in public interest litigation. For example, Victoria Gillick was granted standing to challenge the government provision of contraception to girls under the age of sixteen.<sup>56</sup> In another example, Sue Axon, a mother of two daughters,

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<sup>53</sup> (1981) 2 SCR 575.

<sup>54</sup> Sarah Blake, 'Minister for Justice v. Borowski: The Inapplicability of the Standing Rules in Constitutional Litigation' (1982) 28 *McGill Law Journal* 126.

<sup>55</sup> *Vriend v Alberta* [1998] 1 SCR 493.

<sup>56</sup> *Gillick v West Norfolk Area Health Authority* [1986] AC 112.

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received standing to challenge the right of girls under the age of sixteen to procure an abortion without the mother's knowledge and consent.<sup>57</sup> In both cases the applicants were unsuccessful in achieving their outcomes, as the court recognised the rights of 'mature minors' to independently seek medical advice and procedures. It appears that if the continuance of the alleged illegality is potentially harmful and serious or, in other words, raises a 'genuine concern', the English courts will grant standing. This approach has a lot of merit, as granting standing to litigants can either challenge or affirm contentious areas of law that have a serious impact on public interest and welfare. In particular, the courts in *Gillick* and *Axon* considered the legality of serious public health issues in the best interests of the child, which if denied could have had potentially harmful consequences to society. As a consequence of these cases, doctors can perform their medical work on 'mature minors' in their best interest without fear of legal prosecution. As seen in *Right to Life*, these applicants would have had no standing in Australia and would have been simply dismissed. In regards to *Right to Life*, the issue of whether a clinical trial of an abortion drug is legally valid or not is a serious public health issue. This can only be determined by a court under its function to interpret the law and control the executive. The fact that standing was denied demonstrates a deficiency of the judiciary to keep the executive accountable even in relation to issues of potentially serious consequence to Australian public health.

The aggrieved who have sought a judicial remedy based on their ideological position against abortion have been unsuccessful in the courts. Joseph Borowski's case was dismissed by the Supreme Court of Canada for mootness.<sup>58</sup> In the cases of Victoria Gillick and Sue Axon, they essentially 'kicked an own-goal' in their respective legal actions. Both applicants sought to stop minors from accessing contraception and abortion without their parent's permission, but the consequences of their lawsuits led to the establishment of a legal test of competence that provides mature minors with the right to access contraception and abortion without the permission of their parents. This is now commonly known as the test for Gillick competence. In Australia, despite the failure of *Right to Life* to receive standing, RU486 was statutorily banned for nearly a decade. In 1996, the Howard government amended the *TG Act* to introduce special procedures for drugs used in medicating abortion. Under this amendment, the Minister for Health was required to approve the

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<sup>57</sup> *Axon, R (on the application of) v Secretary of State for Health* [2006] EWHC 37 (Admin).

<sup>58</sup> *Borowski v Canada (Attorney General)* [1989] 1 SCR 342. In Canadian law, the doctrine of mootness exists. In this case Sopinka J noted 'The doctrine of mootness is part of a general policy that a court may decline to decide a case which raises merely a hypothetical or abstract question. An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties.'

importation, evaluation, registration and listing for abortifacient drugs. In 2005, this amendment was repealed and RU486 is now legally available. The Australian courts have been increasingly reluctant to grant standing for the aggrieved faithful. This is illustrated in the shifts in thinking between the broad concept of a 'vocational interest' in *Ogle* to the narrow interpretation of 'aggrieved persons' in *Right to Life*. Therefore, the courts increasingly view the aggrieved faithful using litigious tactics as 'busybody' suits. This idea is further explored in the next section.

## VI IN-VITRO FERTILISATION IN AUSTRALIA

The issue of granting IVF treatment for single women has been an issue that has aggrieved the religious beliefs of many Christians. *Re McBain; Ex parte Australian Catholic Bishops Conference* is a case that deals with exactly this issue.<sup>59</sup> This case was unusual in that invoked the original jurisdiction of the High Court under s 76 of the *Constitution*, rather than an appeal from the original decision. Dr John McBain sought to challenge the law and provide IVF treatment to an unmarried woman, Leesa Meldrum, and other unmarried women. In *McBain v State of Victoria*, Sundberg J ruled that s 8 of the *Infertility Treatment Act 1995* (Vic), which barred single women from undergoing reproductive treatment based on their marital status, was invalid as it was inconsistent with the *Sex Discrimination Act 1984* (Cth).<sup>60</sup> The Roman Catholic Bishops and the Australian Episcopal Conference of the Roman Catholic Church sought to quash the decision of Sundberg J by a writ of certiorari. In the initial proceedings, the Bishops were not joint parties with the State of Victoria, but were *amici curiae*. The Commonwealth Attorney-General granted a fiat to the Bishops, which gave rise to a separate application and provided standing.

The High Court considered two issues: First, whether there was a justiciable matter; and secondly, if so, whether the discretionary writ of certiorari should be granted. In a split decision of 4:3, the majority of the High Court ruled that there was no justiciable matter before the Court, thus the writ of certiorari was denied. Hayne J provided a good summary of the majority's position:

The applications will quell no controversy about any immediate right, duty or liability of the applications for reliefs; each application seeks only to enliven the subject-matter of a controversy between others which has already been quelled by the application of judicial power.<sup>61</sup>

The minority — Callinan, Kirby and McHugh JJ — held that there was a justiciable matter, but all agreed that the application for the writ of certiorari should be

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<sup>59</sup> (2002) 209 CLR 372.

<sup>60</sup> (2000) 99 FCR 116.

<sup>61</sup> *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 375, 459.



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dismissed on discretionary grounds. Kirby J noted that the issue of whether there is a justiciable matter can be sidestepped by the Attorney-General's grant of fiat, and that in any case 'this Court should adopt a broad view of what constitutes 'standing', sufficient to secure a decision of a court on a constitutional or other legal point of importance to it.'<sup>62</sup> McHugh J argued that there was a matter of considerable importance in relation to deciding whether or not the order of the Federal Court was an error of law.<sup>63</sup> His judgment is particularly noteworthy for adopting a similar test to the Canadian and English courts on granting standing in matters of importance. The minority's position recognises the duty of courts to interpret and clarify matters of significant importance to the welfare of the public. Since the minority established that there was a justiciable matter, they turned to the next question of whether to grant the writ of certiorari. They all ruled against granting the writ, namely on the grounds that the Bishops were not 'persons aggrieved,' they elected not to seek leave to be joined as a party in the initial proceeding, and the State of Victoria accepted the judgment in the initial proceeding.<sup>64</sup> Even though a 'stranger' can seek a writ of certiorari, the minority ruled that the Bishops had no special interest that directly affected them.<sup>65</sup> McHugh J even questioned whether *Ogle* was decided correctly.<sup>66</sup> Even if it was precedent, McHugh J considered the Bishops to have a far more attenuated relationship between them and the subject matter of the proceedings than the priests in *Ogle*, thus he concluded that *Ogle* did not assist their claim.<sup>67</sup> This can be seen as the High Court clamping down on 'busybody' litigation.

A significant issue raised by the case is the role of the Attorney-General in granting standing by means of fiat. In *Bateman's Bay*, Gleeson CJ indicated that the Attorney-General has a role in determining standing, but the decision 'when and in what circumstances to enforce public law frequently calls for a fine judgment as to what the public interest truly requires.'<sup>68</sup> It seems that the Attorney-General continues to be seen as the guardian of the public interest. In principle, this makes sense in a democratic nation where citizens vote for members of parliament to represent their interest and the public at large. Gaudron, Gummow and Kirby JJ in *Bateman's Bay* seem to be cynical of this notion:

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<sup>62</sup> Ibid 449.

<sup>63</sup> Ibid 424.

<sup>64</sup> Ibid 372–4.

<sup>65</sup> Ibid 423–4.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> (1998) 194 CLR 247, 277 [85], quoted in *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 375, 425–6.

At the present day, it may be 'somewhat visionary' for citizens in this country to suppose that they may rely upon the grant of the Attorney-General's fiat for protection against ultra vires action of statutory bodies for the administration of which a ministerial colleague is responsible.<sup>69</sup>

This expectation for the Attorney-General to grant a fiat is a serious problem for ordinary citizens in their quest to gain standing. In his dissenting judgment in *Combet v Commonwealth*, Kirby J expressed the view that a more liberal test of standing is necessary to uphold the rule of law enshrined in the *Australian Constitution*, and that reliance on the Attorney-General to grant fiats 'takes too traditional and mercantile' a view of the requirements for standing.<sup>70</sup> Kirby J made a strong argument for identifying ways to remedy serious deficiencies in the operation of the rule of law.

## VII INDIGENOUS SPIRITUAL BELIEFS

The main focus of this article has been on aggrieved individuals and groups seeking a judicial remedy based on their Christian beliefs. In this section, the focus shall be on indigenous Australians seeking a remedy for having their spiritual beliefs aggrieved. In *Onus v Alcoa* ('*Onus*'), Sandra Onus and Christina Frankland were members of the Gournditch-jmara Aboriginal people.<sup>71</sup> They sought injunctive relief to protect Aboriginal relics in order to stop the proposed Alcoa construction of an aluminium smelter near Portland, Victoria. They claimed that it was an offence to endanger or damage an Aboriginal relic under the *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic) (the '*Relics Act*'). The High Court ruled that they did not have standing based on the *Relics Act*, because it did not confer rights on Aborigines.<sup>72</sup> However, the Court granted standing to the plaintiffs to enforce the *Relics Act* under the grounds of special interest, namely a cultural and spiritual significance.<sup>73</sup> Gibbs CJ stated that, in his view,

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.<sup>74</sup>

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<sup>69</sup> *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund* (1998) 194 CLR 247, 262-3.

<sup>70</sup> (2005) 224 CLR 494, 619.

<sup>71</sup> (1981) 149 CLR 27.

<sup>72</sup> *Ibid* 32-3.

<sup>73</sup> *Ibid* 36.

<sup>74</sup> *Ibid*.

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It seems unclear why cultural and spiritual interests have standing, but not intellectual and emotional interests. *Onus* appears on one hand to recognise the cultural and spiritual interests of indigenous Australians and on the other hand ignore the cultural and spiritual interests of non-indigenous Australians. It incoherently suggests that the Bishops were denied standing in *McBain* because they were bereft of a culture and spirituality. It appears that indigenous Australians, who have had their cultural and spiritual beliefs aggrieved, have a *sui generis* or special ground for standing. However, there is no evidence to suggest that they will be more successful than non-indigenous Australians in receiving a judicial remedy. The issue in *Onus* of whether the plaintiffs could get an injunction against the defendant eventually did not go to court. After *Onus* was decided, John Cain, the Premier of Victoria, offered the Gourditch-jmara fifty-three hectares of land in exchange for a withdrawal of legal action.<sup>75</sup>

### VIII CONCLUSION

Australia has a more restrictive test for standing compared to other common law jurisdictions, such as Canada and the United Kingdom. The *ACF* principle that only 'persons aggrieved' with a special interest beyond a mere emotional or intellectual concern will be granted standing continues to be the law in Australia. The aggrieved faithful who have sought judicial remedies based on their religious or spiritual beliefs have mostly been unsuccessful in achieving standing. Even when plaintiffs (in Australia, Canada and the UK) have been successful in achieving standing, they have generally been unsuccessful in seeking a judicial remedy. Excluding *Ogle* and *Onus*, the leading Australian cases on the aggrieved faithful seeking standing have been unsuccessful, because the plaintiffs were deemed to only possess a mere emotional or intellectual concern. The issues that failed to warrant standing include abortion and IVF treatment for single women. Such issues are of such great importance to public health and welfare that the plaintiffs in these proceedings would quite possibly have received standing in the Canadian and English courts. However, in Australia, these matters will not even be considered before a court. The aggrieved faithful are generally seen by courts as 'busybodies' attempting to assert their moral and religious beliefs on others by interfering with public body decision-makers and the rights of private individuals. However, standing should be seen as an opportunity to legally consider important public interest decisions, irrespective of an individual's opinion on the issue at hand. Opening standing will help defend the weak and vulnerable in society, challenge the executive's operation of potentially harmful laws,

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<sup>75</sup> The Premier presented this offer to ensure that the Portland aluminium smelter would be built. Alcoa was able to commence building the smelter in 1986.

and uphold the rule of law guaranteed in the Australian Constitution. In this way, we can all have faith in the courts.