STANDING on Castle Hill

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Should the right to public access be written into environmental protection laws?

All members of the public hold a legitimate interest in the quality of the environment, and expect to be able to participate in the administrative processes which control pollution. The public also expects government to enact, observe and enforce adequate laws to protect the environment. The public should also be kept fully informed on the state of the environment. When government fails to observe environmental laws, or to enforce those laws against others, a member or members of the public should be able to use the judicial system to hold the government or individuals accountable. To do so, they must be able to show that they have legal 'standing'. The issue of 'standing' is whether or not the courts will recognise a person as an appropriate party to bring a court action. The common law on standing in civil cases, which is discussed below, is quite restrictive.

It is not enough to rely on the government to stop illegal damage to the environment. Because public rights are at stake, members of the public should be able to:

- commence civil action against illegal polluters;
- obtain judicial review of decisions made by government officers under statutes dealing with the environment; and
- bring private criminal prosecutions for breach of environmental statutes.

The principles relating to standing for civil actions should be the same as those for criminal prosecutions. Lord Diplock once described the right of private prosecutions as a 'safeguard against capricious, corrupt and biased refusal of those authorities to prosecute offenders against the criminal law' (*Gouriet v Union of Post Office Workers* (1977) 2 WLR 300 at 329). If a breach of an environmental or planning law has been alleged, the crucial issue should be whether a breach of the law has occurred and not whether the person making the allegation has the legal right to do so, or whether the alleged breach is criminal or civil.

It has been suggested that open standing provisions are unnecessary as an individual can seek the consent or 'fiat' of the Attorney-General to an action and so overcome the standing issue. This argument naively ignores the political pressures which may be brought to bear on the Attorney-General. For example in 1973 when a State government instrumentality proposed to construct a dam and flood Lake Pedder in Tasmania, conservationists sought the Tasmanian Attorney-General's fiat to bring proceedings to restrain construction of the dam. The Attorney-General decided to grant his fiat, but Cabinet intervened and instructed him not to do so. The Attorney-General resigned, making it clear that he treated the intervention of Cabinet as improper political interference in the administration of justice. He was replaced as Attorney-General by the Premier, who withdrew the fiat. The courts were thus given no opportunity to rule on the legality of the dam.[1]

It has also been suggested that open standing provisions are dangerous as they will lead to a flood of vexatious litigation. A vexatious litigant is a person who frequently institutes legal proceedings which, on the face, are clearly without reasonable grounds, and which no reasonable person could

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treat as *bona fide* or genuine. However, the flood of vexatious litigation is not supported by evidence of operation of 'open standing' provisions in New South Wales. Section 123 of the *Environmental Planing and Assessment Act 1979* (NSW) permits any person to take proceedings in the New South Wales Land and Environment Court to remedy or restrain a breach of the Act. In 1990 the Chief Judge of that court, the Honourable Mr Justice Cripps said:

> It was said when the legislation was passed in 1980 that the presence of s.123 would lead to a rash of harassing and vexatious litigation. That has not happened and, with the greatest of respect to people who think otherwise, I think that that argument has been wholly discredited.[2]

In Queensland, recent events have raised questions about the extent to which existing pollution laws are being enforced by government. There are specific provisions in existing and proposed legislation which impact on citizens' access to its regulatory and enforcement provisions. The common law also impacts on citizens' access to regulation and enforcement, and difficulties in this area were highlighted by a decision under the *Judicial Review Act 1991* (Qld).

Are Queensland's environmental laws being enforced?

In late 1993 three issues raised concerns about the Queensland Government's enforcement of pollution laws: the operation of two waste incinerators on Brisbane's southside; a Criminal Justice Commission inquiry into liquid waste disposal; and a Queensland Government report into the Department of Environment and Heritage's licensing operations.

The two waste incinerators at Willawong gained press coverage in mid-November, when members of the Doolandella and Pallara District Residents Association obtained and publicised documents about their operation. An environmental officer in the Department of Environment and Heritage stated in an internal memorandum that 'neither the company, the residents, nor we have a clear knowledge of the character or fate of the chemicals being produced by the operation', described the Company's record in operating the facility as 'abysmal', and stated that it was clear that the units were being 'grossly overloaded'. Other documents obtained by the residents deal with apparent illegal dumping of partly burned materials by the incinerators' operators and the suggestion that fumes at nearby schools emanated from the incinerators. Members of the residents' association had expressed concerns about the incinerators for several years. Using the internal documents, they gained front page publicity. The Minister for Environment and Heritage responded by announcing that the two older incinerators would be shut following the installation of a state of the art incinerator. However, the Minister argued that shutting the incinerators down earlier 'would not have solved the problem of disposing of south-east Queensland's hospital waste because there was no acceptable alternative to incineration'. While the problem incinerators are to be closed, the public can reasonably be concerned that the incinerators were not previously safely operated.

At the same time that Willawong was in the news, the Criminal Justice Commission began investigating allegations that a business systematically disposed of liquid wastes in the Brisbane and Logan areas improperly, that employees were forced to participate in the scheme, and that public officers passed information to the business to assist it in avoiding detection. The CJC interviewed over 180 people associated with the waste disposal industry. One driver gave evidence that drivers were told they would be sacked if they refused to dump illegally. Other drivers gave evidence that when they were given too much to collect on a grease trap run, the load was dumped, usually into the sewer. While other people giving evidence have denied the allegations, the evidence so far can only add to the community's concern that pollution laws are not being adequately enforced.

The third cause for concern was the release on 22 October 1993 of a State Government report highly critical of the Department of Environment and Heritage's pollution monitoring system. It says that between 1989 and 1992 monitoring of premises discharging effluent into waterways and sewerage outlets in south east Queensland was 'almost non-existent', and describes the monitoring system as 'falling apart at the seams'. The Minister for Environment and Heritage responded that the claim that the monitoring system was falling apart at the seams was not widely supported within the Department, and that recent changes in the Department had addressed many of the concerns raised.[3]

Taken together, the three incidents are more than enough reason for the public to feel uneasy about leaving the enforcement of laws designed to protect the environment entirely to the Government.

Public enforcement rights in current environmental legislation

The *Clean Air Act 1963* (Qld) requires certain premises to be licensed. There is no opportunity for members of the public to make submissions on the issue of a licence, or to seek a merit appeal in relation to the grant of a licence. It does not provide for state of the environment reporting, nor for a publicly accessible register of licences to be kept, although the public could utilise the *Freedom of Information Act 1992* (Qld) to obtain information about licence holders and discharges into the atmosphere. It is silent concerning civil proceedings, so the question whether a community group or individual had standing to bring proceedings to enforce the Act would be determined at common law. While the Minister may authorise any person to prosecute an offence against the Act's penal provisions (s.46(2)) political considerations may influence whether or not this will be given.

Similarly restrictive provisions limiting criminal prosecution are found in the *Clean Waters Act 1971* (Qld) (s.47), with the same political considerations potentially intruding. Section 34 of the *Clean Waters Act* authorises the Minister to seek a Supreme Court injunction restraining occupiers of premises from carrying out certain specified actions which are creating or are likely to create water pollution. The Act is otherwise silent about civil action to enforce it. A member of the public wishing to take action to prevent a breach of the Act would need to establish common law standing.

Enforcement rights in the draft Environmental Protection Bill

The Queensland Department of Environment and Heritage released a draft *Environmental Protection Bill* for public consultation in November 1993. If enacted, the Bill would replace the *Clean Waters Act*, the *Clean Air Act* and certain other environmental legislation such as the *Noise Abatement Act 1978* (Qld).

The draft Bill does not provide for mandatory state of the environment reporting. However, its provisions promise a more open authorisation process, at least with regard to activities categorised as carrying a serious risk of environmental harm (level 1 activities). Such activities would have to be licensed. An

application for a licence would have to be advertised and the advertisement would have to invite submissions, including from members of the public. A person who made a submission would become an 'interested party'. The authority administering the Act would have to take public submissions into account when deciding the application, and give written notice of the decision to all interested parties. Interested parties, as well as the applicant for the licence, would be entitled to reasons for the decision to grant or refuse a licence, and to apply for internal review of the decision, or appeal it to the Planning and Environment Court. The appeal would be on the merits, by way of re-hearing. However, the draft Bill does not include provision for an interested party to respond to an applicant's appeal against a refusal to grant a licence. This seems to be an oversight. The open nature of the process is reinforced by provision for a Register of Licences which is open to the public for inspection and copying.

Activities which are likely to have consequences for the environment but which do not constitute Level 1 activities are regulated by the issue of 'approvals'. However, the approval process does not have the same public participation provisions as the licensing process. It would be based on another form of regulation, Environmental Management Program (EMP), which is intended to be significantly self-regulatory. EMPs would be prepared by the applicant and approved by the administering agency. It is intended that EMPs would contain a number of performance criteria, including a time-table for improving environmental performance. It appears from the draft Bill that even Level 1 activities could be regulated by an EMP instead of a licence. The EMP process also lacks the same amount of public participation as is provided for in the licensing process. At least for Level 1 activities, it should be the same. However, the transparency of the draft Bill's administrative processes is assisted through the proposed inclusion of both approvals and EMPs in the public Register.

The draft Bill would also go some way to increasing the accountability of government officers exercising powers under the Act. For example, when deciding whether or not to approve a draft EMP, the administering agency would have to consider eight specified matters including relevant environmental protection policies, the principles of ecologically sustainable development, and best environmental management practices. A decision approving an EMP which ignored one or more of these considerations would be invalid. However, as discussed later, the ability of an environmental group or a member of the public to test the validity of such a decision is limited.

Clauses 142 and 143 of the draft Bill provide for civil enforcement of its provisions. The Supreme Court would have a broad jurisdiction to restrain activity which constitutes an actual, threatened or anticipated offence against the Act, including by interlocutory order. However, only the chief executive of the Department administering the Bill or, if devolution of powers has occurred to a local authority, the local authority, would be able to apply for a restraining order. Ordinary citizens are left out in the cold when it comes to civil enforcement.

As the draft Bill makes no express provision about who may commence criminal prosecutions, it would seem that any member of the public may do so (s.42 *Acts Interpretation Act 1954* (Qld)). This would be an improvement over the *Clean Waters Act* and *Clean Air Act.* However, criminal prosecutions are often regarded as the least useful means of enforcement available to community groups and private individuals concerned with the enforcement of environmental statutes, because of the practical disadvantage of having to satisfy the higher criminal onus of proof, and the undesirability of pursuing criminal sanctions for past activity when the real objective is to prevent future polluting activities. The situation is further complicated by the fact that the draft Bill makes offences for which the maximum penalty of imprisonment is two years or more indictable offences. Sections 102A to 102G of the *Justices Act 1886* (Qld) make special provisions for private complaints charging a person with an indictable offence other than those relating to injury to the complainant's person or property. At least 14 days notice must be given to the defendant before any appearance in court, and the defendant may apply to have the matter struck out as an abuse of process or being frivolous or vexatious. On application by the defendant, the complainant may be ordered to give security for costs and the complaint is liable to be struck out if it is not given. If a complaint is struck out, no further proceedings may be taken by way of private complaint charging the same offence by the same defendant. A decision dismissing or refusing to dismiss the complaint may be appealed to the Supreme Court. A person who decided to bring a private complaint of an indictable offence under the proposed Bill would therefore have to be prepared at a very early stage to resist an application to dismiss. This will require a high degree of organisation.

Standing and judicial review

The common law placed severe limitations on the right of a person to challenge the validity of a government official's actions. It was said in 1903 in *Boyce v Paddington Borough Council* [1903] 1 Ch. 109 that:

> 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 a special damage peculiar to himself from the interference with the public right. [at 114]

In 1980, the Australian Conservation Foundation (ACF) sought to call Federal Ministers to account for ignoring the provisions of the *Environment Protection (Impact of Proposals) Act 1975* (Cth) when approving the Iwasaki Resort on the Rockhampton Coast. The High Court resisted the opportunity to get rid of the old standing rules but re-stated the Boyce test in a slightly more liberal manner. Mr Justice Gibbs in *ACF v the Commonwealth* (1980) 146 CLR 493 at 527, said:

> Although the general rule is clear, the formulation of the exceptions to it which Buckley J laid in *Boyce v Paddington Borough Council* is not altogether satisfactory. Indeed the words which are 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'.

Despite the slight liberalisation, it is difficult for public interest and community groups to satisfy the test, because of Gibbs J's following observations:

> I would not deny that a person might have a special interest in the preservation of a particular environment. However, an interest, for present purposes, does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer no disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor *locus standi*. If that were not so, the rule requiring special interest would be meaningless. Any plaintiff who felt strongly enough to bring an action could maintain it. [at 530-1]

The Commonwealth's *Administrative Decisions (Judicial Review) Act*, enacted in 1977, provided a much more convenient and accessible procedure for challenging Commonwealth administrative decisions. It provides that 'a person who is aggrieved by a decision', including a person whose interests are adversely affected by it, has standing to make an application

under it. The Federal Court has repeatedly stated that these provisions should not receive a narrow meaning.[4] Public interest groups, particularly the ACF and the Australian Federation of Consumer Organisations have been accorded standing in a number of cases brought under the Act (*ACF v Minister for Resources* (1990) 19 ALD 70; *US Tobacco v Minister for Consumer Affairs* (1988) 83 ALR 7).

In Queensland, the Electoral and Administrative Review Commission (EARC) was established as part of the Fitzgerald Inquiry reforms. One of its tasks was to develop legislation streamlining and simplifying Queensland's judicial review procedures. The best approach to standing was one important policy matter which it had to address as part of this. A number of submissions urged EARC to develop a more open formula than that used in the Commonwealth *Administrative Decisions Judicial Review Act,* for instance, by allowing any person to use the new *Judicial Review Act* procedures, subject to the court having a reserve power to strike out obviously frivolous applications. EARC, sufficiently afraid of a flood of mythical busybodies and sufficiently encouraged by the Federal Court's generous approach, resisted any temptation to adopt a more liberal approach to standing. It said:

> ... The judicial interpretation of the standing requirement in the *ADJR Act* ... removes most of the major concerns relating to the technical restrictions on standing at common law, while still retaining legitimate limiting function for a test of standing.[5]

Thus the *Judicial Review Act 1991* (Qld) has standing provisions identical to those in the *ADJR Act.*

The early experience in Queensland has not been as encouraging as the EARC report anticipated. This is particularly evident in Dowsett J's decision in *Friends of Castle Hill Association Inc. v The Queensland Heritage Council and Ors* (unreported, Supreme Court of Queensland, 15 September 1993).

Friends of Castle Hill is an organisation formed to safeguard Castle Hill against inappropriate development. Castle Hill, a very large rock outcrop in the middle of the otherwise flat city of Townsville, is a major landmark which the Queensland Heritage Council had listed in the Heritage Register maintained under the *Heritage Act 1992* (Qld). Heritage listing means that the Heritage Council must approve any development of the listed place. A company, AIS Pty Ltd, received approval for a development including a restaurant and luxury accommodation near Castle Hill's summit, to be serviced by a cable car network running up its side.

Friends of Castle Hill sought judicial review of the decision on a number of grounds. The company and the Townsville City Council sought to have the application for judicial review summarily dismissed on the basis that the association did not have standing under the *Judicial Review Act.* The association's claim to standing was essentially based on the earlier participation in the statutory process. It had taken the opportunity provided by the *Heritage Act* to make representations in respect of the application for approval. Under the Act the Heritage Council was bound to consider these representations. Friends of Castle Hill argued that the *Judicial Review Act's* standing test was wider than the common law test spelt out in *ACF v The Commonwealth.* In a case which pre-dated *ACF v The Commonwealth,* the High Court had held that an objector to a decision made under the *Mining Act 1968* (Qld) had standing to seek judicial review of the decision (*Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473). Friends of Castle Hill argued that it was in an analogous position.

Dowsett J nonetheless derived a great deal of assistance from *ACF v The Commonwealth* and *Onus v Alcoa of Australia Limited* (1982) 149 CLR 27, another common law decision decided shortly after *ACF v The Commonwealth,* quoting heavily from both cases. While he briefly referred to three cases decided under the Commonwealth and Queensland legislation, he gave little or no weight to the Federal Court principle that the statutory test should not be construed narrowly. In particular he dismissed the decision in *United States Tobacco Company v Minister for Consumer Affairs* (1988) 83 ALR 7 as '[going] little further than that in *Sinclair'* (at 12). The claim to standing based on participation in the statutory process was dismissed with the following words:

> Members of the public are given the right to make representations and there is an express obligation to consider those representations. There is no suggestion that that was not done in the present case. There is nothing in the Act to suggest an intention that a person making representations thereafter has any right to participate in the outcome of proceedings. [at 14]

The *Friends of Castle Hill Case* gives no ground for optimism that the *Judicial Review Act's* standing test will be generously interpreted. The exercise of the numerous statutory discretions contained in legislation such as the *Clean Waters Act* and the proposed *Environmental Protection Bill,* may adversely affect the environment, if they are not exercised according to law. The ability to use the judicial process to hold decision makers accountable provides a considerable degree of protection for the environment. Current indications are that the *Judicial Review Act* will not provide that protection.

Queensland conservation groups asked the Attorney-General to amend the *Judicial Review Act* to provide a more liberal test of standing. He indicated a disinclination to do so but has invited potential applicants to seek his fiat. Even if relator actions with the Attorney-General's fiat are in fact available under the *Judicial Review Act* procedures, there are the difficulties associated with relator actions discussed earlier.

Conclusion

It is clear that citizens need to be vigilant about the performance of bureaucratic enforcement structures in environment protection. Arguments in favour of generous citizen access to the courts to enforce environmental legislation do not depend on individual incidents giving rise to concern but constitute part of an overall set of values by which equality before the law may be realised. The restrictive view taken in *Friends of Castle Hill,* a case concerning the traditionally more liberal area of statutory judicial review, is likely to be reflected in civil enforcement actions – actions brought to restrain continuing breaches of pollution laws. Expectations of judicial liberalisation of standing requirements since 1980 seem to have been dashed. It is up to governments to write access into the environmental protection laws. It is up to the environmentalists to help convince government that this is a good idea. Both governments and environmentalists but, more particularly the community, will benefit.

References

1. Australian Law Reform Commission, Report No. 27, 1985, p.xix.
2. From 'People v The Offenders', a paper given by His Honour at a Dispute Resolution Seminar held at the Hilton Hotel, Brisbane, on 6 July 1990.
3. Franklin, M., 'Waste Claim Wrong', *Courier-Mail,* 25.10.93.
4. See *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 36 ALR 64; *Ogle v Strickland* (1987) 13 FCR 306; *Australian Institute of Marine and Power Engineers v Secretary Department of Transport* (1986) 13 FCR 124 and *Broadbridge v Stammers* (1987) 16 FCR 296.
5. EARC, Report on Judicial Review of Administrative Decisions and Actions, Serial No. 90/R5, para. 8.26 on p.77.