literally, yet he reached the same decision as Barwick C.J. who did interpret the Act literally. This result exposes a problem that the High Court will have to resolve if it changes its approach to interpretation. The question is not whether Parliament's intention should be considered. Both Mason and Wilson JJ. considered it. They disagreed, however, on the more fundamental question of *what* is Parliament's intention.[52]

CHRISTOPHER ERSKINE*

AUSTRALIAN CONSERVATION FOUNDATION INCORPORATED v. COMMONWEALTH OF AUSTRALIA AND OTHERS[1]

Administrative law — Environmental law — Standing to sue — Corporation — Environmental Protection (Impact of Proposals Act) 1974 (Cth) — Violation of public right — Boyce v. Paddington Borough Council

> But this is not ordinary, run-of-the-mill litigation. The case poses —if only we choose to acknowledge and reach them—significant aspects of a wide, growing, and disturbing problem, that is, the Nation's and the world's deteriorating environment with its resulting ecological disturbances. Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?[2]

The Australian Conservation Foundation, an association incorporated in the A.C.T. with a membership throughout Australia of 6,500, brought an action before Aickin J. in the original jurisdiction of the High Court seeking declaratory and injunctive relief against the Commonwealth, three Ministers of State of the Commonwealth and the Reserve Bank of Australia, alleging a failure by the respondents to follow administrative procedures made under the Environmental Protection (Impact of Proposals) Act 1974 (Cth) in relation to approvals given in respect of the Iwasaki tourist development project at Yeppoon in Queensland. Aickin J. struck out the appellant's statement of claim and dismissed its action for want of *locus standi*. The appellant appealed to the Full Court which upheld the decision of Aickin J. and dismissed the appeal (Gibbs, Stephen, and Mason JJ., Murphy J. dissenting).

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[52] The possibility of referring to Hansard to discover Parliament's intention was rejected by the House of Lords in *Black-Clawson International Ltd* v. *Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591. However, it is still open to the High Court to take a different view.

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[1] (1980) 28 A.L.R. 257; (1980) 54 A.L.J.R. 176. High Court of Australia; Gibbs, Stephen, Mason and Murphy JJ.

[2] *Sierra Club* v. *Morton* (1972) 405 U.S. 727, 755-756 *per* Blackmun J. (dissenting).

The administrative procedures the subject of dispute were made under section 6 of the Act, which makes provision for the approval by the Governor-General of such procedures as are necessary for the purpose of achieving the object of the Act, which is to ensure, to the greatest extent that is practicable, that matters affecting the environment to a significant extent are fully examined and taken into account in and in relation to "a list of activities" (section 5), which covers virtually the whole range of activities carried out by the Commonwealth Government or Commonwealth authorities.

The administrative procedures approved by the Governor-General provide that any person wishing any action within the terms of section 5 to be taken by the Commonwealth must supply information to the relevant Minister in order to ascertain whether an Environmental Impact Statement (EIS) is required. If an EIS is necessary, a draft EIS is to be made available by the proponent for public comment, and provision is made for the submission to the Minister of written comments by interested members of the public. The draft EIS must be revised by the proponent to take such comments into account (paragraph 8.1). Thereupon the final EIS is submitted to the Minister.

The Minister concerned is enjoined by section 8 of the Act to "give all such directions and do all such things" possible to ensure that the administrative procedures are followed in connection with matters dealt with by his Department and to ensure that any final EIS, suggestions, or recommendations made under the administrative procedures are taken into account in making any decision.

The appellants alleged a failure by the respondents to follow the administrative procedures in relation to the approval by the respondents of the Iwasaki proposal. Such a scheme required the approval of the Commonwealth and exchange control approval from the Reserve Bank. Iwasaki prepared a draft EIS and the appellant submitted comments. Before any final EIS was made available to the Minister, the Minister announced that the project would go ahead.

The Foundation thereupon sought various declarations and an injunction restraining the respondents from acting upon the decision and orders that each of the respondents should carry out their respective duties under the Act.

As the question of standing was heard by Aickin J. as a preliminary issue, this was the only part of the case with which the Full Court dealt; there was no consideration of the substantive issue.

The majority held that the Foundation had no standing. In so doing, the Court stringently adhered to a restrictive view of standing and firmly refused to allow any widening of narrowly defined prerequisites for a public interest action to be brought before the courts.

The Court saw two cases in which a private individual could bring an action to restrain the breach of a public duty:

(a) where it can be deduced that the intention of a statute was to give a private plaintiff a cause of action;

(b) where the interference with a public right is such that some private right of the plaintiff is simultaneously affected, or, although no private right has been infringed, the plaintiff has suffered special damage peculiar to himself from interference with the public right.

In all other cases only the Attorney-General, either *ex officio* or *ex relatione*, may sue.[3]

In so holding the Court reaffirmed the line of authority originating from the well-known judgment of Buckley J. in *Boyce* v. *Paddington Borough Council*.[4] The Court considered that in a case such as the present the rules relating to standing for both declaration and injunction were the same.[5]

The majority was unanimous in deciding that neither the Act nor the administrative procedures made under the Act conferred any private right on the appellant, with the exception of the right conferred by section 10 to be informed by the Minister concerned of any action to be taken. It was not decided whether such procedures could in fact be the source of private rights for a person, although Stephen J. tended to the view that they could,[6] while Gibbs J. was of the view that they could not.[7]

While it was conceded that the appellant had a statutory right to submit comments,[8] Gibbs J. stated that "the person submitting the written comments had no further rights"[9] and distinguished the position of the Foundation from that of the objector in *Sinclair* v. *Mining Warden at Maryborough*.[10] In that case an objector had submitted written comments concerning a proposed development on Fraser Island, but the Mining Warden refused to take these into account in deciding whether the development would be in the public interest, being of the view that the opinions of only a very small section of the public were represented. The High Court directed the Mining Warden to take into account the objector's views. In this respect, it appears that the view of Gibbs J. is incorrect, as Stephen J. appears to recognise:[11] while the appellant had a right to have its comments considered, it had no right to participate further in the preparation of the final EIS. If, however, the appellant had been able to show that its comments had not been taken into consideration, the Foundation could have sought and obtained mandamus to compel consideration of its comments.

The fact that the appellant was a corporation which had as its stated objects the preservation and enhancement of the environment distin-

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[3] (1980) 28 A.L.R. 257, 267 *per* Gibbs J.; 276 *per* Stephen J.; 284 *per* Mason J.

[4] [1903] 1 Ch. 109, 114. The most notable reaffirmation of the *Boyce* view has been that of the House of Lords in *Gouriet* v. *Union of Post Office Workers* [1978] A.C. 735.

[5] (1980) 28 A.L.R. 257, 267 *per* Gibbs J. This was also the view endorsed by the House of Lords in *Gouriet*.

[6] *Id.* 283.

[7] *Id.* 266.

[8] *Id.* 271 *per* Gibbs J.; 279 *per* Stephen J.

[9] *Id.* 271 *per* Gibbs J.

[10] (1975) 132 C.L.R. 473.

[11] (1980) 28 A.L.R. 257, 281.

guished it in no way from a natural person with regard to the rules of standing.[12]

The Court held that the holding of a genuine concern for the protection or preservation of that public right which is violated is not sufficient to give a person *locus standi*.[13] The familiar terminology of suffering "special damage peculiar to himself" was considered to express the requirement for granting standing where no private right is affected, though this phrase is not to be construed as restrictively as might first appear:

> [The] 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 . . . [T]he expression "special damage to himself" . . . should be regarded as equivalent in meaning to "having a special interest in the subject matter of the action".[14]

The majority of the Court confirmed its view by reference to Canadian, United States and New Zealand cases, which all propounded a similar view of standing requirements (with an exception in Canada where a constitutional case is concerned).[15]

The words of Gibbs J. perhaps best sum up the view of the Court:

> 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 some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor *locus standi*. 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.[16]

It would appear that the sort of interest contemplated by the Court which might be sufficient to grant an organisation standing in a case such as the present would have been the use of the area in question by the Foundation or by some of its members. The case of *Sierra Club* v. *Morton*[17] was cited with approval, a case analogous to the present, in which the U.S. Supreme Court was of the view that had the members of the Sierra Club been users of the park threatened by a tourist development, they would have had standing to sue; the fact that their concern was intellectual, not practical, disbarred them from challenging the proposed development.[18]

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[12] *Id.* 270-271 *per* Gibbs J.; 277 *per* Stephen J.; 284 *per* Mason J.
[13] *Id.* 270 *per* Gibbs J.; 277 *per* Stephen J.; 284 *per* Mason J.
[14] *Id.* 268 *per* Gibbs J.
[15] *Id.* 269-270 *per* Gibbs J.; 277-278 *per* Stephen J.; 285-287 *per* Mason J.
[16] *Id.* 270.
[17] (1972) 405 U.S. 727.
[18] *Id.* 735.

The Court's decision is, in essence, the automatic and unimaginative application of a rule that has apparently hardened into an established rule of procedure. The harshest criticism which could be levelled at the majority is that it applied a rule automatically "because it was there" with little or no consideration of the appropriateness of that rule to modern conditions, with an almost total disregard of political realities, and a disappointingly predictable approach to judicial innovation and the role of the courts in society.

The *Boyce* rules of standing derive their theoretical justification from the assumption that the Attorney-General, as *parens patriae*, is the guardian of the public interest and, unless a person has a personal stake in the outcome of an action, the Attorney-General should be the person to institute proceedings *ex officio* or *ex relatione.*

This rule, however, developed in the United Kingdom, where the position and role of the Attorney-General are different from that of the various Australian Attorneys-General.[19] In Australia the Commonwealth and State Attorneys are very much caught up in political life, being normally politicians themselves. Thus the view that Attorneys are non-partisan when evaluating the necessity for an action in the public interest hardly accords with the reality. As Gibbs J. commented in *Victoria* v. *Commonwealth*:

> I would . . . think it somewhat visionary to suppose that the citizens of a State could confidently rely upon the Commonwealth to protect them against unconstitutional action for which the Commonwealth itself was responsible.[20]

When the State(s) and Commonwealth are acting in concert, the same comment is appropriate.

One result of an allegedly unlawful action being too sensitive for challenge in the courts by an Attorney-General may be the exclusion from the courts of issues of substantial importance to the community. A particularly compelling example is the recent challenge to state aid to private schools on the ground that it contravened section 116 of the Commonwealth Constitution. This was clearly an issue which had enormous social, political, and constitutional implications, yet it took the Organisation for the Defence of Government Schools (D.O.G.S.) ten years to obtain the fiat of the Victorian Attorney-General, and Attorney after Attorney refused his fiat as the case was potentially a political liability.[21] To maintain that the theoretical role of the Attorney-General corresponds to the reality is to close one's eyes to the obvious. Yet Gibbs J. confidently asserted:

> It is by no means obvious that a rule which leaves it to the Crown (through its representative the Attorney-General) to enforce public duties, and denies standing to a citizen who has no special interest, is a bad one—something can be said on both sides of the question.[22]

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[19] Australia Law Reform Commission, *Access to the Courts—I; Standing: Public Interest Suits* (1978) Discussion Paper No. 4, 9.

[20] (1975) 134 C.L.R. 338, 383.

[21] Ely, "The State Aid Case", unpublished paper (1980) ch. 2.

[22] (1980) 28 A.L.R. 257, 269. *Cf.* Stewart J. (for the majority) in *Sierra Club* v. *Morton* (1972) 405 U.S. 727, 740.

"Bad" it may not be in some cases; in many it is at the very least seriously defective.

Justification is occasionally attempted of the fairly overt political role that an Attorney-General may play in deciding to withhold his fiat, although in the legal context such political justification may appear to be wanting.[23] To assert that "if the Attorney-General is to be called to account, then that is the function of Parliament"[24] is to admit that if the Attorney-General, following the policy of his Government, allows an unconstitutional or unlawful act to pass by unchecked, a potentially justiciable issue will not be resolved, no matter how great its importance to the public as a whole. The D.O.G.S. case is a clear example of this.

It has further been argued that, in circumstances where political expediency overrides purely legal considerations, the appropriate place to register disapproval is the ballot-box.[25] This is clearly a fairly unsatisfactory way to raise an issue which may be relatively minor in the context of the multitude of issues which are often the subject of debate at election time. It further assumes that those concerned have the financial or other resources necessary to bring the issue before the public eye. It also assumes that, if effected, a change of political master will necessarily bring with it observance of the particular law being flouted.

Perhaps most importantly, the "ballot-box" justification ignores the situation of minorities who are in a vulnerable position. For example, in *Warth* v. *Seldin*[26] the U.S. Supreme Court held that members of minority racial or ethnic groups did not have standing to challenge exclusionary zoning codes which prohibited low-income housing which would have been within the means of members of those groups. The result was that the merits of the dispute went unheard and "minority members were effectively confined to the cores of cities, and ghettos perpetuated".[27]

The High Court further expressed the view that it was not for it, but for the legislature, to change the law[28] and indeed the decision could be viewed as a holding manoeuvre pending the legislative results of the Law Reform Commission's present investigation into reforms of the law of standing, a fact which may partly account for the hesitancy of the majority to introduce innovations into the law of standing.[29]

However, the apparent refusal to accept the role of the courts in the ongoing development of the law is unsatisfactory, particularly when it results in the application of a common law rule which was formulated

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[23] "I can conceive of many political reasons why the Attorney-General decided not to intervene, but political reasons are not necessarily good legal reasons": *Gouriet* v. *Union of Postal Workers* [1977] Q.B. 729, 739 *per* Lawton L.J. (Court of Appeal).

[24] This was the argument of the U.K. Attorney-General before the House of Lords in *Gouriet* v. *Union of Postal Workers* [1978] A.C. 435, 442.

[25] *E.g., United States* v. *Richardson* (1974) 418 U.S. 166, 179 *per* Burger C.J.

[26] (1975) 422 U.S. 490.

[27] Morris, "Citizen Access to the Federal Courts" in Keller (ed.), *In Honor of Justice Douglas: A Symposium on Individual Freedom and Government* (1979) 90, 100.

[28] (1980) 28 A.L.R. 257, 269 *per* Gibbs J.; 278 *per* Stephen J.; 287 *per* Mason J.

[29] *Id.* 278 *per* Stephen J.; 287 *per* Mason J.

in a time when conditions and expectations of the role of the law were quite different from what they are today. That the High Court is unwilling to modify a rule of ancient origin totally inappropriate to modern conditions was amply demonstrated by the decision in *Trigwell's* case.[30] In that case stubborn adherence to an archaic rule goaded reform by legislation though there would appear to be no reason why the Court could not itself have changed the case law. As a general means of developing the law such an approach is less than satisfactory. In the area of concern for the environment, one can only conclude that the law is falling a long way behind community awareness and expectations.

The above comments raise the more fundamental issue of the role of the courts and the function of the standing rules in attempts by courts to expand or limit that role. The High Court in the present case propounded the conservative judicial view that the Court is fitted to solve disputes between parties by applying settled law to the facts, but it is not in a position to "carry out investigations or inquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent".[31] The Court in the present case thus saw its role as not extending to a dispute which, while involving clear legal issues, had significant political overtones. It accordingly used the restrictive rules of standing to deny access to the legal process. It is submitted that such an approach is unfortunate, particularly in the sphere of environmental protection, an area of particular concern to the whole of society today. Despoliation of the environment as a whole can easily take place as the result of a proliferation of smaller developments, none of which can be challenged by concerned citizens whose sole interest is a genuine concern for the environment. Yet that is what the High Court appears willing to countenance. On the other hand, one can understand the desire to prevent the judicial process from becoming "no more than a vehicle for the vindication of the value interests of concerned bystanders".[32]

Lurking behind the continued support for *Boyce* rules appears to be the demon of the "floodgates". That such a fear is unfounded has been demonstrated by analyses of widened standing rules under various U.S. statutes, cited by Murphy J. in his dissenting judgment. To continue to fear a flood of litigants from widened standing rules is to fly in the face of reality—the costs of litigation, if nothing else, would act as a powerful deterrent.[33]

While the spirit of the dissenting judgment of Murphy J. may be applauded his analysis is not altogether convincing. His Honour considered

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[30] *State Government Insurance Commission* v. *Trigwell* (1979) 26 A.L.R. 67.

[31] *Id.* 78 *per* Mason J. *Cf. White* v. *Barron* (1980) 54 A.L.J.R. 333, 336 *per* Stephen J.

[32] *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)* (1973) 412 U.S. 669, 687.

[33] Scott, "Standing in the Supreme Court: a functional analysis" (1973) 86 Harvard Law Review 645, 673; *Sierra Club* v. *Morton* (1972) 405 U.S. 727, 757-758 *per* Blackmun J. The D.O.G.S. case involved costs of around $750,000.00, a substantial portion of which is to be borne by the plaintiffs.

that the Act discloses a legislative intent to confer standing on persons such as the appellant. It is difficult to extract this intention from section 5(1), which his Honour viewed as the particular expression of such intention.

His Honour further considered that the appellant's right to submit written comments entitles it to insist on the whole procedure being carried out according to law. To justify this point his Honour relied on cases distinguished by members of the majority and on *Sinclair* v. *Mining Warden at Maryborough*,[34] a case which establishes no more than that the appellant could compel consideration of its comments by the Minister. To assert that the appellant is "more particularly affected than other people" because it went to the trouble of submitting written comments[35] is to adopt an untenable interpretation of the traditional standing requirements, one which would deprive them of any meaning whatsoever.

The decision in the present case is hardly satisfactory. The automatic application of the *Boyce* rules nipped the substantive issues of this, and many another, case in the bud; the appropriateness of these rules to modern conditions can be questioned, particularly in the area of environmental law. Clearly the rules of standing are unsatisfactory, above all in the constitutional and environmental areas, but it is clear that it is to the legislature that we must look for reform. One can merely speculate as to the possible effects of the suggestion by the Australian Law Reform Commission that courts carry out a preliminary screening to determine whether an applicant should be given standing.[36]

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[34] (1975) 132 C.L.R. 473.
[35] (1980) 28 A.L.R. 257, 291-292.
[36] Australia Law Reform Commission, *op. cit.* 17-18.
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