COMMENTS

AN AMERICAN PERSPECTIVE ON *AUSTRALIAN CONSERVATION FOUNDATION INCORPORATED* v *COMMONWEALTH OF AUSTRALIA*[1] AND THE STATUS OF ENVIRONMENTAL LAW IN AUSTRALIA

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1 INTRODUCTION

There is, on the surface, a fair degree of similarity between the Environment Protection (Impact of Proposals) Act 1974 (Cth) and the United States National Environmental Policy Act ("NEPA"). Both statutes explicitly state that matters of environmental concern are to be expressly considered before actions which will affect the environment are undertaken by government (chiefly executive and administrative) agencies.[2] This facial similarity is accepted by non-Australians as evidence that Australia is, indeed, a country in which thoughtful consideration of environmental consequences is required before possibly damaging activity proceeds.[3]

Most foreign commentators do not know, as this author did not know until he spent a three month sabbatical in Australia in 1981, that the Environment Protection (Impact of Proposals) Act is possibly unenforceable in the courts. This is, of course, a major difference from NEPA; keeping track of the case law under NEPA provides full-time employment for many practising attorneys and law professors in the United States.[4]

It would be most presumptuous of the author as an outsider to discuss the correctness of the High Court's decision in *Australian Conservation Foundation* v *Commonwealth of Australia* ("the *ACF* case") as a matter of Australian law. The author's knowledge of Australian or English law in the area of *locus standi* is quite limited and his knowledge of Canadian law in this area, although better, is still not exhaustive. However all four of the judges explicitly discuss a series of United States decisions on standing[5] and it is the author's contention that most of this discussion is a misapplication of the United States law in this area. The first section of this comment then will attempt to show that, to the extent that the majority in the *ACF* case relied on United States precedents, it did so incorrectly. This will be followed by a very brief and generalised discussion of the development of the case

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1 (1979) 54 ALJR 176. See case note (1980) 11 FL Rev 431.

2 Environment Protection (Impact of Proposals) Act 1974 (Cth) s 5; National Environmental Policy Act 42 USC s 4332.

3 *Eg* Organization for Economic Cooperation and Development, *Technology on Trial* (Paris, 1979) Ch III.

4 *Eg* F R Anderson, *NEPA in the Courts* (Baltimore, 1973); D A Bronstein, "Recent Environmental Decisions—A War Correspondent's Report" (1977) 12 Forum 876; W H Rodgers, *Environmental Law* (Minneapolis, 1977) 697-809; American Bar Association, Natural Resources Section, Environmental Quality Committee, *Annual Report* (1977) 10 Nat Res Lawyer 55, 57-60; *ibid* (1979) 12 Nat Res Lawyer 51, 51-81; *ibid* (1980) 13 Nat Res Lawyer 49, 49-97.

5 (1979) 54 ALJR 176, 181 *per* Gibbs J; 185 *per* Stephen J; 188-189 *per* Mason J; 191 *per* Murphy J.

law under NEPA showing that there were strategic considerations in the selection of issues and cases by environmental groups that appear to be missing in Australia. Finally, the recent attempt of one Australian environmental group to use the United States courts to halt an action in Australia will be examined.

2 THE LAW OF STANDING IN THE UNITED STATES

As a preliminary matter it must be realised that the terms "standing" as used in the United States and "*locus standi*" as used in most other common law countries are not directly interchangeable, although they come from the same roots. The law of standing in the United States has two distinct parts, generally called "constitutional" and "prudential". The first is closely related to the concepts of "jurisdiction" and "justiciability"; the second is much closer to the issues of *locus standi.*

Under the United States Constitution the judicial power has been held to be limited to "cases and controversies".[6] This is a question of jurisdiction; if there is no live case or controversy the judicial power cannot decide the issue. Justiciability is a court-fashioned rule theoretically based on the "separation of powers" doctrines underlying the United States constitutional structure; it prohibits the courts from intruding into "political questions" which are outside the traditional range of legal issues.[7] Both jurisdiction and justiciability are concerned with the subject matter at issue; who is entitled to raise an issue is a question of standing.

Although over ten years have passed since the Supreme Court stated that "generalizations about standing to sue are largely worthless . . .",[8] and many new decisions in the area have been handed down, it is, in the opinion of many, still true.[9] Moreover, seeing the differences between some of the decisions requires eyesight at least as good as Alice's.[10] Nevertheless,

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[6] United States Constitution, Art III s 2:
> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

For a review of the early cases in this area, see G L Haskins and H A Johnson, "Foundations of Power: John Marshall 1801-15" in *History of the Supreme Court of the United States* (New York, 1981) Vol II Part II Ch 8. For a good discussion of the recent cases, to which I am indebted, see F K Benfield and R J Lazarus, "Standing to Sue the Federal Government: Current Law and Congressional Power" (1981) 18 US Dept of Justice Land and Natural Resources Division Journal No 3, 2.

[7] For a lively discussion of these highly theoretical issues, see A M Bickel, *The Least Dangerous Branch: the Supreme Court at the Bar of Politics* (Indianapolis, 1962) Ch 4.

[8] *Association of Data Processing Service Organizations* v *Camp* 397 US 150, 151 (1970).

[9] *Eg* F K Benfield and R J Lazarus, *op cit* n 6; K C Davis, *Supplement to Administrative Law Treatise* (1980) 164.

[10] " 'I see nobody on the road,' said Alice. 'I wish *I* had such eyes,' the King remarked in a fretful tone! To be able to see Nobody! And at that distance too!' " Lewis Carroll, *Through The Looking Glass* (New York, 1960) 279.

the author shall attempt a limited exploration of the concepts of standing in the United States.

A *Standing as a Constitutional Rule*

As part of the interpretation of the constitutional requirement of an actual "case or controversy" the Supreme Court has fashioned limitations on parties who can raise issues. In other words, it has imposed standing restrictions. The purpose of these restrictions is to guarantee that the party raising the issue has a sufficient "personal stake in the outcome of the controversy"[11] to ensure that the best arguments will be presented. This requirement has been traced back to two "trumped up" cases before the Supreme Court in which both sides were in agreement on the outcome and had not necessarily presented the best arguments in support of their nominal postions.[12] While not directly criticizing earlier courts for hearing such cases, the Supreme Court began incorporating aspects of standing into the constitutional requirement of "case and controversy" in the 1930's.[13]

What, then, constitutes a sufficient "personal stake in the outcome"? In a long line of cases since 1968[14] the Supreme Court has been wrestling with this issue and the most recent review concludes that it has finally adopted the view, strongly advocated since 1970 by Professor Davis,[15] that the constitutional test of standing is "injury in fact".[16]

The injury need not be economic or monetary—it "may reflect 'aesthetic, conservational, and recreational' as well as economic values".[17] Neither need the injury be great, as the Supreme Court has "allowed important interests to be vindicated by plaintiffs with no more at stake . . . than a fraction of a vote, . . . a five-dollar fine . . . and a $1.50 poll tax".[18] An organisation has standing if any of its members would have standing on

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[11] *Baker* v *Carr* 369 US 186, 204 (1962).

[12] *Scott* v *Sandford* 19 How 393 (1856) (The "*Dred Scott* case", once attributed a direct link in the causal chain leading to the Civil War) and *Pollock* v *Farmers' Loan & Trust Co* 158 US 601 (1895), which declared the income tax legislation passed over thirty years before to be unconstitutional.

[13] The history of this can be found in R Berger, "Standing to Sue in Public Actions: Is it a Constitutional Requirement?" (1969) 78 Yale LJ 816; L L Jaffe, "The Citizen as a Litigant in Public Actions: the Non-Hohfeldian or Ideological Plaintiff" (1968) 116 U Pa L Rev 1033; A M Bickel, *op cit* n 7.

[14] *Hardin* v *Kentucky Utilities Co* 390 US 1 (1968); *Flast* v *Cohen* 392 US 83 (1968); *Association of Data Processing Service Organizations* v *Camp* 397 US 150 (1970); *Barlowe* v *Collins* 397 US 159 (1970); *Sierra Club* v *Morton* 405 US 727 (1972); *US* v *Students Challenging Regulatory Agency Procedures* 412 US 669 (1973); *Schlesinger* v *Reservists Committee to Stop the War* 418 US 208 (1974); *Warth* v *Seldin* 422 US 490 (1975); *Franks* v *Bowman Transportation Co Inc* 424 US 747 (1976); *Simon* v *Eastern Kentucky Welfare Rights Organization* 426 US 26 (1976); *Arlington Heights* v *Metropolitan Housing Development Corporation* 429 US 252 (1977); *Duke Power Co* v *Carolina Environmental Study Group Inc* 438 US 59 (1978); *Gladstone, Realtors* v *Village of Bellwood* 441 US 91 (1979); *Davis* v *Passman* 442 US 228 (1979).

[15] K C Davis, "The Liberalized Law of Standing" (1970) 37 U Chicago L Rev 450.

[16] F K Benfield and R J Lazarus, *op cit* n 6, 2.

[17] *Association of Data Processing Service Organizations* v *Camp* 397 US 150, 154 (1970) cited with approval in *Sierra Club* v *Morton* 405 US 727, 738 (1972).

[18] *US* v *Students Challenging Regulatory Agency Procedures* 412 US 669, 689 n 14 (1973). In the same note the Court cites Professor Davis to the effect that "an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation".

their own behalf,[19] and the mere fact of widespread injury is not enough to deny standing.[20]

B *Standing as a Prudential Rule*

With the expansive constitutional definition of standing, the Court seems to have found it necessary to fashion some rules of "self restraint" so as to "avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim".[21] These too it has called rules of standing.

The first of these rules is the "zone of interests" test. It grants standing only if "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee".[22] At the time it was first enunciated it was thought to be a constitutional test both by the dissenting justices[23] and by commentators.[24] It is now clear, however, that this is merely a prudential rule[25] and, in fact, it has not been applied by the Court since 1970.[26]

A second such rule is the rule prohibiting a plaintiff from asserting *only* the rights of third parties. This may be referred to as a "best plaintiff rule", and it is alleged to have four (or five) exceptions. It will not be discussed here as it has virtually dropped from sight in the Supreme Court since it was enunciated in 1975.[27] The same can be said of the so called "generalised grievance" rule.[28]

The last of these rules, the causation/redressability test, was explicitly stated by the Court to be constitutional, not prudential, when first enunciated. Despite this clear statement by the Court, it has been included here in the category of prudential rules because that is the only way I believe it can be applied at all. Since the rule has never been concisely formulated by the Court, I shall adopt the words of Benfield and Lazurus: "There must be a

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[19] "An organization whose members are injured may represent those members." *Sierra Club* v *Morton* 405 US 727, 739 (1972).

[20] ". . . standing is not to be denied simply because many people suffer the same injury." *US* v *Students Challenging Regulatory Agency Procedures* 412 US 669, 687 (1973).

[21] *Gladstone, Realtors* v *Village of Bellwood* 441 US 91, 99-100 (1979).

[22] *Association of Data Processing Service Organizations* v *Camp* 397 US 150, 153 (1970).

[23] Brennan and White JJ.

[24] Professor Davis devotes most of his article (above n 15) to attacking this test.

[25] "The Data Processing decision established a second, *non constitutional* standing requirement that the interest of the plaintiff . . . at least be 'arguably within the zone of interests to be protected or regulated'. . . ." *Simon* v *Eastern Kentucky Welfare Rights Organization* 426 US 26, 39 (1976) (italics added).

[26] F K Benfield and R J Lazarus, *op cit* n 6, 13.

[27] *Warth* v *Seldin* 422 US 490, 499 (1975). For a discussion see F K Benfield and R J Lazarus, *op cit* n 6, 15-19.

[28] ". . . when the asserted harm is a "generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant the exercise of jurisdiction." *Warth* v *Seldin* 422 US 490, 499 (1975) discussed in F K Benfield and R J Lazarus, *op cit* n 6, 19-20. Compare the above statement with the following from *US* v *Students Challenging Regulatory Agency Procedures* 412 US 669, 688 (1973): "To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion."

'fairly traceable' causal connection between the defendant's alleged illegal conduct and the plaintiff's injury, such that the relief sought will redress the injury".[29]

The problems with calling this a rule of standing should be obvious from its mere statement—it is concerned not with the parties but with the subject matter of the suit. It might well be an aspect of the "case and controversy" requirement, but by way of jurisdiction, not standing. As stated by the dissenting justices when the majority adopted this rule,

> the Court's reasoning . . . is unjustifiable under any proper theory of standing and clearly contrary to the relevant precedents . . . [this] further obfuscation of the law of standing is particularly unnecessary when there are obvious and reasonable alternative grounds on which to decide this litigation.[30]

The decisions of the Court are simply not susceptible to analysis based on the causation/redressability test as a constitutional requirement.[31] If it is assumed, however, that the causation/redressability test is really prudential there is no difficulty—the cases in which the test was applied were simply ones that the Court did not wish to decide on the merits. This would accord with Professor Davis's view that "principle and logic do not control the law of standing, when the Court has substantive motivation to decide the standing question either way".[32]

If Australian readers feel somewhat confused at this point concerning the law of standing in the United States, they should not be too disheartened; there is a general belief in the United States, which I share, that the Supreme Court does not really understand the concept either.[33]

C *The Effect of s 10 of the Administrative Procedure Act (US)*[34]

The Administrative Procedure Act in the United States has no direct counterpart in Australia. It is a general statute which sets forth the way in which government agencies shall conduct their business, unless the particular statute under which they are acting either specifies other procedures or exempts these actions from the provisions of the Act. Section 10 of the Act states: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof".

In the light of the preceding discussion it should be clear that this statute in no way changes the principles of standing. Any person "suffering legal wrong", or "adversely affected or aggrieved" has met the constitutional test of "injury in fact". The various prudential tests can be and are applied to cases brought under s 10; both the "zone of interests" and "causation/

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[29] F K Benfield and R J Lazarus, *op cit* n 6, 9.

[30] *Simon* v *Eastern Kentucky Welfare Rights Organization* 426 US 26, 46 (1976) *per* Brennan and Marshall JJ.

[31] "Much could be written in an attempt to rationalize these decisions, but their inconsistencies are too obvious to ignore." F K Benfield and R J Lazarus, *op cit* n 6, 11.

[32] K C Davis, *Supplement to Administrative Law Treatise* (1980) 173.

[33] *Eg* F K Benfield and R J Lazarus, *op cit* n 6, 20: "The Court's confusion of its own rulings amply illustrates the difficulties inherent in discerning standing principles."

[34] 5 USC s 702.

redressability" tests were first enunciated in cases that arose under s 10.[35] The Act does not grant standing.

What s 10 of the Act does grant is a cause (or right) of action. The Supreme Court, in one important clarifying footnote, has distinguished the many concepts discussed in this comment as follows:

> *jurisdiction* is a question of whether a federal court has the power . . . to hear a case . . .; *standing* is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art III case or controversy, or . . . to overcome prudential limitations on federal-court jurisdiction . . .; *cause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may . . . appropriately invoke the power of the court; and *relief* is a question of the various remedies a federal court may make available.[36]

The Court goes on to say that

> whether petitioner has asserted a cause of action depends not on the quality or extent of her injuiry [a standing question], but on whether the class of litigants of which petitioner is a member may use the courts to enforce the right at issue.[37]

The legislature can restrict or broaden causes of action virtually without limit. In many United States statutes very limited causes of action have been granted. Under many environmental statutes, for example, a potential plaintiff must give advance written notice of intent to file a suit and then must wait a specified time for the agency to take action on its own; failure to comply with this requirement will result in dismissal of the suit.[38]

D *Application to the* Australian Conservation Foundation *case*

In the *ACF* case the Government, according to the report, did indeed fail to comply with the procedures it had adopted for implementing the Environment Protection (Impact of Proposals) Act.[39] The Foundation, alleging its interest in the general subject of the environment and that "some members of the Foundation, have access and rights of access and use which would be detrimentally affected"[40] filed a suit which was struck out on the grounds of lack of *locus standi*. This ruling was affirmed by the High Court by a majority of three to one. I shall first examine each judge's discussion of the United States precedents and then determine what the decision in this case would have been had it arisen in the United States.

Gibbs J discussed the United States decisions in one brief paragraph quoting a statement from *Warth* v *Seldin*[41] and simply stating that it accords with his view.[42] Since the statement quoted is the very general statement that one must have " 'alleged such a personal stake in the outcome of the

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[35] *Association of Data Processing Service Organizations* v *Camp* 397 US 150 (1970), and *Simon* v *Eastern Kentucky Welfare Rights Organization* 426 US 26 (1976), respectively.
[36] *Davis* v *Passman* 442 US 228, 239 n 18 (1979).
[37] *Ibid.*
[38] Discussed in F K Benfield and R J Lazarus, *op cit* n 6, 24-48.
[39] (1979) 54 ALJR 176, 177-179 *per* Gibbs J.
[40] *Ibid* 177.
[41] 422 US 490 (1975).
[42] (1979) 54 ALJR 176, 181.

controversy' as to warrant *his* invocation" of jurisdiction, its use by Gibbs J is accurate, if neither analytic nor perceptive of the actual decisions.

It is the author's opinion that Stephen J made a cardinal error at the beginning of his discussion of the United States precedents by stating that "Congress has expressly conferred standing . . . [by the] Administrative Procedure Act".[43] As has already been pointed out, this is wrong. After a brief discussion of *Sierra Club* v *Morton*[44] and *United States* v *Students Challenging Regulatory Agency Procedures*[45] ("SCRAP"), Stephen J concludes by saying:

> as I understand the relevant United States decisions, they would not go so far as to entitle the appellant to standing where the basis for standing *is confined* to a concern regarding threatened detriment to the environment.[46]

This is an accurate statement of the United States precedents, but is not applicable to the fact situation facing the High Court. It is precisely because the plaintiff in *Sierra Club* v *Morton* failed to allege injury to itself or its members that it was denied standing; in *United States* v *SCRAP*, on the other hand, where personal (but very remote) injury to the members was alleged, standing was granted. As we shall see, under the facts in the *ACF* case the United States courts would find standing.

Mason J discusses briefly and quotes extensively from the *Sierra Club* case and *Simon* v *Eastern Kentucky Welfare Rights Organization*.[47] There can be no dispute that His Honour's restatement of the United States law is accurate, but he appears to ignore the most important point, although he quotes it (from *Simon's* case):

> Since they allege no injury to themselves as organizations . . . they can establish standing only as representatives of those of their members who have been injured in fact, and thus could have brought suit in their own right.[48]

Considering that the other judges approved the language in the United States decisions, the principal legal issue in the *ACF* case would appear to be that addressed by Murphy J, that is, whether an Australian group or corporation can sue on behalf of some of its members. This is explicitly the law in the United States[49] and Murphy J, after a brief discussion of some Australian cases, concludes that "corporations can represent interests of members"[50] in Australia. Since none of the other judges address this question, and since I am unable to research the issue due to the paucity of Australian materials in the United States, I shall assume, *arguendo*, that Murphy J is correct.

Based on this assumption it can be concluded that the results in Australia and the United States should be congruent, and there is no doubt that in

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[43] *Ibid* 185.
[44] 405 US 727 (1972).
[45] 412 US 669 (1973).
[46] (1979) 54 ALJR 176, 185 (italics added).
[47] 426 US 26, 40 (1976).
[48] (1979) 54 ALJR 176, 189.
[49] Above n 19.
[50] (1979) 54 ALJR 176, 191.

the United States the Australian Conservation Foundation would have been granted standing. The key words in the pleadings that lead to this result are the allegations of particular injury to some of the members—that they "have access and rights of access and use which would be detrimentally affected".[51] These allegations of injury and the right of an organisation to sue on behalf of its members would be sufficient to grant the Foundation standing in the United States. Compare the allegations which were held sufficient to grant standing to SCRAP:

> It claimed that each of its members 'suffered economic recreational and aesthetic harm directly as a result of the adverse environmental impact of the railroad freight structure, as modified by the Commission's actions to date. . . .' Specifically, SCRAP alleged that each of its members was caused to pay more for finished products, that each of it members 'uses the forests, rivers, streams, mountains, and other natural resources surrounding the Washington Metropolitan area and at his legal residence, for camping, hiking, fishing, sightseeing, and other recreational [and] aesthetic purposes', and that these uses have been adversely affected by the increased freight rates, that each of its members breathes the air within the Washington metropolitan area and the area of his legal residence and that this air has suffered increased pollution caused by the modified rate structure, and that each member has been forced to pay increased taxes because of the sums which must be expended to dispose of otherwise reusable waste materials.[52]

Although more prolix than the allegations by the Australian Conservation Foundation, SCRAP certainly alleged less direct injury than did the Foundation whose members' rights to occupy and use real property were affected. Clearly, in the United States, the Foundation would have been granted standing.

3 SOME HISTORICAL ASPECTS OF THE DEVELOPMENT OF THE LAW UNDER NEPA

A review of the substantive law of NEPA would be much too long to fit into this comment and, besides, is readily available elsewhere.[53] In this section I merely wish to show that most of it has developed in the normal common law tradition by the gradual accumulation of precedent.

Immediately before the implementation of NEPA almost all of the cases and precedents in environmental matters involved relatively minor factual situations. The most common were problems of highway location and construction. Typical examples involved nine miles of rural expressway,[54] two-thirds of a mile of rural road[55] and, in the leading case, one and a half miles of urban expressway.[56] So obvious was this concentration on small-

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[51] *Ibid* 177 *per* Gibbs J.

[52] *US* v *Students Challenging Regulatory Agency Procedures* 412 US 669, 678 (1973).

[53] See the works cited above n 4.

[54] *Citizens Committee for Hudson Valley* v *Volpe* 302 F Supp 1083 (SDNY, 1969); affirmed 425 F 2d 97 (2nd Cir, 1970); certiorari denied 400 US 949 (1970).

[55] *Pennsylvania Environmental Council Inc* v *Bartlett* 315 F Supp 238 (MD Pa, 1970).

[56] *Citizens to Preserve Overton Park Inc* v *Volpe* 401 US 402 (1971).

scale highway projects that many environmental law casebooks for law students devoted significant space to such issues.[57]

In *Citizens to Preserve Overton Park* v *Volpe*,[58] the Supreme Court set forth the following standard for determining whether the decision would be sustained:

> [T]he court must consider whether the decision was based on a consideration of the relevant facts and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.[59]

For many years this ability to conduct a "searching and careful" inquiry has enabled courts willing to do so to delve into the merits of agency action, although not all courts have done this.[60] Although the Supreme Court has recently stated that:

> once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences,[61]

the general consensus among practising attorneys is that courts are still willing to immerse themselves in the details of the agency decision and possibly reverse it.[62]

While there can be some dispute about the willingness of judges to decide the merits of such issues, there can be no dispute about Professor Rodgers' statement that "the procedural provisions of Section 102 of NEPA are enforced with a vengeance".[63] Any government agency in the United States which failed to comply with the exact letter of the regulations in the way the Commonwealth failed in the *ACF* case would be enjoined before the ink on the order dried.

This willingness of courts to intrude into executive action is, I believe, based on the long history of such action under NEPA and, before that Act, in highway cases. The issues in most of these cases were of strictly local importance and the merits were neither excessively complicated nor particularly arcane. No great issues and no great sums of money were involved. Thus judges did not feel as though they were intruding into areas outside their knowledge. It is, after all, one thing to order a road rerouted by a thousand feet or a mile, and quite another to decide what might constitute a reasonably safe level of airborne lead.[64] Thus by the traditional common law process of the accretion of precedents a large body of law relating to the enforcement of NEPA has accumulated in the lower courts.

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[57] *Eg* F P Grand, *Environmental Law: Sources and Problems* (1971) Ch 9; O S Gray, *Cases and Materials on Environmental Law* (2nd ed 1973) Ch 4C.

[58] *Citizens to Preserve Overton Park Inc* v *Volpe* 401 US 402 (1971).

[59] *Ibid* 416.

[60] W H Rodgers, *Environmental Law* (1977) 738-750.

[61] *Strycker's Bay Neighbourhood Council, Inc* v *Karlen* 444 US 223, 227 (1980).

[62] This consensus emerged at a panel discussion on the subject at the Midyear Meeting of the Environmental Committees of the Section of Natural Resources, American Bar Association, at Keystone, Colorado, on 27 February 1981.

[63] W H Rodgers, *op cit* 717.

[64] Compare *eg Scottsdale Mall* v *Indiana* 549 F 2d 484 (7th Cir, 1977) with *Ethyl Corporation* v *EPA* 541 F 2d 1 (DC Cir, 1976).

These precedents have then been available when issues such as the construction of a liquid metal fast breeder reactor[65] or the $2,000,000,000 Tennessee-Tombigbee Waterway[66] arise, and the courts have been willing to stop such projects.

In my outsider's view, it has been the lack of such lower court precedents that has led to the problems that citizens' environmental groups are facing in Australia. Now that the High Court has decided the *ACF* case it is probably too late to back-up and start again, but I believe that it is much better to start developing precedents on small-scale local projects before asking the courts to intervene in major projects of national importance.

4 CAN AUSTRALIANS RESORT TO THE US COURTS?

Australian environmental groups and lawyers look at the United States cases with some degree of envy because of the lack of similar decisions in their home territory.[67] One Australian group, the Conservation Council of Western Australia even went so far as to file a suit in the United States in an attempt to prevent the development of bauxite mining and subsequent aluminium refining and smelting in the Darling Range outside Perth. A brief discussion of the decision in this case[68] should indicate how difficult it can be to do this.

The relief sought by the Conservation Council was an injunction prohibiting the defendants from developing the bauxite ore in the Darling Range until the defendants demonstrated that no harm would result from these activities. As one might imagine, however, the Court never reached the issue of relief, or even the merits, as it found it lacked jurisdiction.[69]

The defendants, ALCOA and Reynolds Metal, are both United States corporations, so it was not unreasonable to sue them in the United States. The problem was, however, how to secure jurisdiction over the subject matter, the *res* of which was clearly in Australia. In an ingenious (or ingenuous) attempt to circumvent jurisdictional problems the Conservation Council alleged that the actions of ALCOA and Reynolds Metals violated the anti-trust laws, which are among the few United States statutes regularly interpreted as having extraterritorial effect.[70] The Conservation Council also alleged what is called "general federal question" jurisdiction.[71]

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[65] *Scientists' Institute for Public Information, Inc* v *Atomic Energy Commission* 481 F 2d 1079 (DC Cir, 1973).

[66] *Environmental Defense Fund* v *Marsh* 651 F 2d 983 (5th Cir, 1981).

[67] Personal conversations of the author with L Stein and P Johnston, Perth, WA, on 5 August 1981, and with G Gajewicz, Melbourne, Victoria, on 10 August 1981.

[68] *The Conservation Council of Western Australia, Inc* v *Aluminium Corporation of America (ALCOA)* 518 F Supp 270 (WD Pa, 1981).

[69] It is the author's opinion that, even had the Court found itself to have jurisdiction, no relief would have been granted. Even under the most liberal US statute, the so-called Sax Act in Michigan, which provides that "any person . . . may maintain an action . . . for declaratory and equitable relief against . . . any person . . . for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction", The Michigan Environmental Protection Act 1970, MCLA s 691.1202, "the principles of burden of proof . . . generally applicable in civil actions . . . shall apply . . .". MCLA s 691.1203(1).

[70] W Fugate, *Foreign Commerce and the Antitrust Laws* (2nd ed 1973); *In re Uranium Antitrust Litigation* 617 F 2d 1248 (7th Cir, 1980).

[71] "The district courts shall have original jurisdiction of [sic] all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest

The defendants filed a motion to dismiss under the Federal Rules of Civil Procedure for lack of jurisdiction,[72] "failure to state a claim upon which relief can be granted",[73] and other somewhat more esoteric grounds.[74] Strangely enough, the issue of standing under the causation/redressability test[75] was not raised. The Court made quick work of the motions, granting those under rules 12(b)(1) and 12(b)(6), since the

> Plaintiff's complaint fails to allege *any* effects on United States commerce. The only effects alleged are effects on the regional resources and environmental systems of Western Australia. . . . These allegations regarding the defendant's activities are not sufficient to confer jurisdiction on this court. . . .
>
> The Complaint in this case does not explain what the supposed 'federal question' is. No federal statute is alleged, no federal common law right is pleaded, and the complaint is totally devoid of any allegations of fact tending to show the existence of a federal question.[76]

Without passing judgment on the allegedly harmful results of the defendants' activities to the Darling Range/Perth environment,[77] I believe that this case shows the deficiencies of the Australian system for dealing with such problems. The mining activities were specifically authorised by State statutes[78] but, based on the Fraser Island example,[79] I suspect there was some Commonwealth involvement too. Nevertheless, and despite the Environment Protection (Impact of Proposals) Act, there appears to have been little consideration of public input. In the United States the matter would have gone to court, State statute or no State statute, if the federal government were also involved. Even the fact of explicit legislative approval does not prohibit court review under NEPA,[80] whereas under the Environment Protection (Impact of Proposals) Act the availability of judicial review is certainly clouded by the question of standing.[81]

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and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in an official capacity. . . ." 28 USC s 1331(a).

[72] "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter. . . ." Federal Rules of Civil Procedure 28 USC Rule 12(b).

[73] Federal Rules of Civil Procedure 12(b)(6). (This is the equivalent of a general demurrer.)

[74] Failure to join indispensable parties (Federal Rules of Civil Procedure 28 USC Rule 12(b)(7)); and the "Act of State doctrine": *eg Banco Nacional de Cuba* v *Sabbatino* 376 US 398 (1964).

[75] Above p 79.

[76] *Conservation Council of Western Australia* v *ALCOA* 518 F Supp 270, 276 (WD Pa, 1981). NEPA of course applies only to federal government, not private, actions.

[77] One of these is the poisoning of the water supply through runoff from the mined areas: Johnston interview n 67 above.

[78] Alumina Refinery (Wagerup) Agreement and Acts Amendment Act 1978 (WA); Alumina Refinery (Worsley) Agreement Act 1973 (WA); Alumina Refinery (Worsley) Agreement Act Amendment Act 1978 (WA).

[79] *Murphyores Inc Pty Ltd* v *Commonwealth* (1976) 9 ALR 199.

[80] *Eg Environmental Defense Fund* v *Marsh* 651 F 2d 983 (5th Cir, 1981).

[81] See Postscript below.

5 CONCLUSION

It is my opinion that the *ACF* case, whatever its merits as a piece of Australian jurisprudence, used an incorrect analysis of the United States cases to help support its conclusion. Furthermore, I believe the decision is bad from a public policy viewpoint. In order to maintain public confidence in government it is vital that the government be open to citizen input.[82] Although not enamoured of commissions, royal or other, since they remind me very much of conferences,[83] I do believe that the Environment Protection (Impact of Proposals) Act has worked well in the Fraser Island and Ranger Mining cases.[84]

Since the process *can* work well it is my belief that the courts should be able to force it to work well. In the *ACF* case the Commonwealth had already decided to have an inquiry; it simply violated its own regulations regarding how the inquiry was to be conducted. In such a case I believe it both proper and useful for the courts to step in and force the government to follow its own regulations.

It should be noted that the author is not advocating that Australia opt for the same sort of judicial review of environmental matters practised in the United States. It is quite possible that the United States has gone too far; but the fact that a line can and must be drawn does not mean that it is drawn correctly in the *ACF* case.

There are at least two simple positions intermediate to the *ACF* result of denying all judicial review and the United States result of reviewing everything. One would be to have judicial review of the procedures followed once the government has decided to hold an inquiry (the result sought by the plaintiffs in the *ACF* case). The second would be to permit judicial review of the decision to hold (or not hold) an inquiry. Courts which believe strongly in the virtues of judicial self-restraint should have little difficulty dealing with the first of these as the standards would be those created by the government itself and there would be no impingement on parliamentary supremacy. If the judiciary felt a little more assertive it could attempt the second type of review also, although there the standard would be less precise and it would, in effect, be "creating law". Both of these positions, however, clearly stop far short of reviewing the merits of the decision made pursuant to the inquiry.

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[82] See M R Cutler and D A Bronstein, "Public Involvement in Government Decisions" (1974) 4 Alternatives 11-13; R D Vlasin and D A Bronstein, "Institutional Mechanisms for Land Use Planning and Controls" in Beatty, Swindale and Peterson (eds), *Planning the Use and Management of Land* (Madison, 1979) 981-1011; H Saddler, "Public Participation in Technology Assessment with Particular Reference to Public Inquiries" (1978) Centre for Resource and Environmental Studies (Canberra) General Paper.

[83] "A conference is a gathering of important people who singly can do nothing but together can decide that nothing can be done." F Allen in McCarthy (ed), *Fred Allen's Letters* (New York, 1966) 22.

[84] The author acknowledges that he has not made major studies of these inquiries, but has read the following reports: Fraser Island Environmental Inquiry, *Interim Report* (1976); *Final Report* (1976); Ranger Uranium Environmental Inquiry, *First Report* (1976); *Second Report* (1977); Supervising Scientist for the Alligator Rivers Region, *First Annual Report 1978-79* (1979); S Harris (ed), *Social and Environmental Choice: the Impact of Uranium Mining in the Northern Territory* (1980); H Saddler *op cit*; A Gilpin, *The Australian Environment* (1980) Chs 5 and 6.

At a time when government, by the dynamics of our shared "Western" culture,[85] is forced to make decisions that can affect the fate of a country and, perhaps, the entire planet, for hundreds or thousands of years[86] it is irresponsible for the judiciary to shirk its duty and hide behind old legal doctrines. At the very least the judiciary should force the other branches of government to live up to *their* obligations and make these decisions as the result of an orderly process of reasoned judgment.

POSTSCRIPT

Since this comment was originally written the author has received notice of the High Court's decision in *Onus* v *ALCOA of Australia Ltd.*[87] On the issue of standing, and in particular for its discussion of the *ACF* case, the decision merits attention here.

An action was brought by some members of the Gournditch-jmara Aboriginal people, who alleged that they were "custodians of relics . . . according to their laws and customs",[88] and, in effect, asked the courts to resolve an apparent conflict between the Alcoa (Portland Aluminium Smelter) Act 1980 (Vic) and the Archaeological and Aboriginal Relics Preservation Act 1972 (Vic). The Victorian courts dismissed the action for lack of standing, but the High Court reversed this finding in a unanimous decision.

The High Court distinguished the *ACF* case on its facts, not on any legal principles. Stephen J stated:

> It is to be distinguished . . . as different in degree, both in terms of weight and, in particular, in terms of proximity, from that concern which a body of conservationists, however sincere, feels for the environment and its protection.[89]

As discussed above, such a statement appears to ignore the allegations of interference with rights to the use of real property made in the *ACF* case.

Perhaps the difference really concerns the issue of group versus individual action. If I were to act for an environmental group in Australia in the future I would include named individuals as plaintiffs and would make specific allegations showing personal injury, for example: "For the past six years plaintiff X has regularly hunted at least ten days a year on the subject property; for the past four years plaintiff Y has regularly used part of the subject property at least two days a month for the purpose of recreational birdwatching", etc. It is uncertain whether this would successfully establish standing, but it would certainly force the court to think through the implications of the language in the *ACF* and *Onus* cases.

One last thought about the latter case. Wilson J, in the course of his opinion says, "the character of the relief which is sought in a particular case

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[85] A phrase which unfortunately and inaccurately omits the Chinese and Japanese.
[86] *Eg* OECD, *Technology on Trial* (1979) Paris.
[87] (1981) 36 ALR 425. A useful discussion of the case is to be found in A R Blackshield, "The Alcoa Decision on Standing: How Liberal?" (1981) 6 Legal Service Bulletin 274.
[88] (1981) 36 ALR 425, 427.
[89] *Ibid* 436.

is relevant to the question of standing".[90] For the sake of all Australian lawyers I hope this concept will die an early death. As discussed above, the introduction of similar language has thoroughly confused the law of standing in the United States; I certainly hope that Australia will learn from our unhappy experience.

[90] *Ibid* 452.