

## Access to Justice in Environmental Law - An Australian Perspective

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ACCESS TO JUSTICE IN ENVIRONMENTAL LAW  
AN AUSTRALIAN PERSPECTIVE

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*"If liberty and equality, as it is thought by some, are chiefly to be found in democracy, they will be best attained when all persons alike share in the government to the utmost" (Aristotle) [1].*

*"In practice, questions of standing are often brushed aside if a court considers that the issue of substance should in the public interest be settled, particularly if it seems clear that the plaintiff will lose on the merits. Often, however, where a plaintiff seeks to have litigated an issue which is awkward because it questions dominant social institutions or relationships, standing looms large" (Murphy J) [2].*

Although democracy has an ancient tradition it is only in recent generations that western societies have allowed most of their citizens to participate in the processes of the State. It is salutary to remember that for many years women were not to be trusted with the vote and in some countries property or wealth were an essential qualification to be able to participate in an election. Although laws are made for the welfare and protection of all of the citizens of the State, special rules have been constructed by the courts which exclude most people from bringing proceedings to enforce them. Various justifications have been offered. The fear of the intermeddler opening the "floodgates" and clogging the business of the courts and frustrating the ambitions of the executive government has meant that a member of the public could not, without the Attorney-General's fiat, bring proceedings to restrain a breach of a public law. This paper considers the manner in which the ability of a citizen to bring proceedings to enforce a public law in Australia has been confined by the courts and, in New South Wales, at least in relation to environmental laws, expanded by the legislature.

### **The origins of environmental law in New South Wales**

At the end of the 19th century the industrial and agricultural development of modern Australia was just beginning. Our wealth was still derived from the land. The common law was the guiding force for the rule of law. However, change was coming. At the same time as Federation (1901) there was a concerted effort to provide legislation to control many aspects of our lives. In the abridged edition of Manning Clark's History of Australia the period 1851 to 1888 was given the title "The Earth Abideth Forever". 1888 - 1915 is entitled "The People Make Laws". At the time of Federation, New South Wales had no environmental law. Problems with polluters or others who sought to damage the environment were resolved between individuals by the application of the common law doctrines of nuisance.

In 1906, as part of the burgeoning volume of legislation in the State of New South Wales the Parliament passed the first *Local Government Act* which, in a limited form, provided controls over some aspects of the environment. In the main those controls were confined to the obligations of landowners who sought to subdivide land and open roads and imposed requirements with respect to the health and safety of individual buildings. The Act could only be enforced by the Attorney-General with some limited rights in the local council [3].

The New South Wales *Local Government Act* was significantly recast in 1919 and by 1947 included a regime for the planning and development of most of the State. This was the first attempt at comprehensive environmental law in New South Wales. However, it was not until 1979 that the Parliament made provision for the control of development proposed by government agencies as well as by individuals and corporations. Government projects had not previously been subject to any statutory environmental control. This was provided in the *Environmental Planning and Assessment Act* of that year. At the same time the Parliament passed the *Land and Environment Court Act* which created the Land and Environment Court. Section 123 of the *Environmental Planning and Assessment Act* provided "open standing" to enforce a breach of its provisions in the Land and Environment Court, although criminal prosecutions remained controlled by the executive. "Open standing" is also provided by a number of other statutes which control various aspects of the environment. They are listed in Appendix 1.

### Standing at common law

Before the creation of the Court a breach of a provision of the *Local Government Act*, or any other law designed to protect the environment, could be restrained or remedied by proceedings in the Equity Division of the Supreme Court of New South Wales [4]. The statute provided that a council could bring proceedings [5] but otherwise locus standi was for many years defined by the well-known decision in *Boyce v Paddington Borough Council* [6]. The effect was that there were few, if any, proceedings initiated by individuals or corporations without the Attorney-General's fiat (a list of some proceedings initiated with the Attorney's fiat is included in Appendix 2). It will be remembered that in *Boyce* the plaintiff was troubled by the erection of a hoarding which would obstruct the access of light to the plaintiff's windows and brought proceedings to restrain the Council from proceeding with the project. Buckley J held that as the plaintiff was suing, either in respect of an alleged private right to the access of light, or in respect of an alleged interference with a public right, from which he personally sustained special damage, he could sue without joining the Attorney General as a plaintiff. In words which for many years defined a plaintiff's right to obtain relief Buckley J said:

*"A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with (eg, where an obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway); and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right"* [7].

His Honour did not stop to provide us with any philosophical explanation for confining the right of access to the courts in this manner, although, presumably it was out of a concern to discourage the intermeddler and upon the assumption that the State was best placed to enforce its laws. As the subsequent cases reveal the courts have been nervous about providing liberal access to ordinary citizens to enforce breaches of the public law [8].

The *Boyce* test contained two limbs. The first limb recognised the right in an individual to enforce his or her private rights even if in the process a public right is vindicated. The second limb - the requirement for "special damage" - ultimately proved troublesome and, both in England and Australia, has undergone significant modification.

The law in Australia has been effectively defined by the reasons of the High Court in *Australian Conservation Foundation Incorporated v The Commonwealth of Australia* [9]; *Onus & Anor v Alcoa of Australia Limited* [10] and *Batemans Bay Local Aboriginal Land Council & Anor v The Aboriginal Community Benefit Fund Pty Ltd & Anor* [11].

In *Australian Conservation Foundation* the second limb in *Boyce* was reformulated and the concept of "special interest" was substituted for "special damage". The case concerned a challenge by the Australian Conservation Foundation, a body with the fundamental objective of protecting the environment, to the validity of decisions by the Minister to establish a resort and tourist area at Yeppoon near Rockhampton in Queensland. The proposed development had been advertised under the *Environment Protection (Impact of Proposals) Act 1974* (Cth) and the Foundation had lodged an objection in accordance with the prescribed procedures. The Australian Conservation Foundation sought declarations that there had been a failure to comply with the requirements of the Act.

It was held by the majority (Murphy J dissented) that the Australian Conservation Foundation did not have standing. The Australian Conservation Foundation argued, inter alia, that it had standing under the second limb of *Boyce* because it had a well-known concern for the Australian environment evidenced in its previous activities.

The intellectual problem which the case presented is apparent in the judgments. The combination of a development likely to have a significant impact on the natural environment, a statutory regime for its assessment and an informed and environmentally aware organisation, concerned that the statute had been breached, presented the Court with difficulties. The majority were troubled by how far the standing rules should be relaxed in the interests of ensuring that the executive government honoured the obligations imposed by the statute. The case was argued at a time when social and environmental issues in Australian society were increasingly being pursued by groups or organisations formed for the advancement of an individual cause or a group of related causes. The traditional expression of concerns through the major political parties was diminishing - a phenomenon which has accelerated in recent years.

Although the *Australian Conservation Foundation* failed, Gibbs J found the *Boyce* formulation of "special damage" inappropriate for contemporary problems. His Honour said:

*"Although the general rule is clear, the formulation of the exceptions to it which Buckley J made in Boyce v Paddington Borough Council is not altogether satisfactory. Indeed the words which he 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' [12].*

Gibbs J indicated that before there could be the relevant interest it must be more than intellectual or emotional, but, need not be pecuniary. His Honour said:

*"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" [13].*

In *Onus* two plaintiffs, Lorraine Sandra Onus and Christina Isabel Frankland, who claimed to be the descendants of the Gournditch-jmara aboriginal people, sought relief to restrain Alcoa from undertaking a mining project which it was said would be likely to damage aboriginal relics on their people's traditional lands.

The High Court distinguished *Australian Conservation Foundation* and, because of the cultural and spiritual significance of the relics for the Gournditch-jmara community, held that the plaintiffs had the relevant special interest to entitle them to sue.

In the course of his reasons Stephen J said:

*"... the distinction between this case and the ACF case is not to be found in any ready rule of thumb, capable of mechanical application; the criterion of 'special interest' supplies no such rule. As the law now stands it seems rather to involve in each case a curial assessment of the importance of the concern which a plaintiff has with particular subject matter and of the closeness of that plaintiff's relationship to that subject matter ... Courts necessarily reflect community values and beliefs, according greater weight to, and perceiving closer proximity to a plaintiff in the case of, some subject matters than others. The outcome of doing so, however rationalised, will, when no tangible proprietary or possessory rights are in question, tend to be determinative of whether or not such a special interest exists as will be found standing to sue" (sic) [14].*

Brennan J, who joined in finding that the plaintiffs had standing, recognised and addressed the fundamental policy question which the issue raises. His Honour said:

*"A special interest in the subject matter of an action being neither a legal or equitable right, nor a proprietary or pecuniary interest, will ordinarily be found to arise from modern legislation enacted to protect or enhance non-material interests - interests in the environment, in historical heritage, in culture. Where such a statute imposes a public duty to protect or enhance a non-material interest a breach of the duty is apt to affect a non-material interest, and it would be vain to search for proprietary or pecuniary damage suffered by a plaintiff. A plaintiff in such a case, though he may be able to show a special interest in what the statute seeks to protect or enhance, would be unable to show a private right or to prove that he has suffered private or pecuniary damage. To deny standing would deny to an important category of modern public statutory duties an effective procedure for curial enforcement" [15].*

Notwithstanding Brennan J's concern to ensure that legislation designed to protect the community assets provided by the existing environment and cultural heritage was able to be enforced, he nevertheless joined in confirming the approach in *Australian Conservation Foundation* that, however defined, a plaintiff must show that he, or she, has been "specially affected", meaning that "in comparison with the public at large [the plaintiff] has been affected to a substantially greater degree or in a significantly different manner" [16].

In *Bateman's Bay Local Aboriginal Land Council*, the New South Wales Supreme Court held that the plaintiffs did not have standing to sue to control the way in which the Land Council, a body created by statute to assist aboriginal people, proposed to conduct a funeral benefit fund. It was not a case concerned with the environment. The question raised for consideration by the High Court was the criterion for standing in a case where a plaintiff seeks an injunction to prevent possible economic loss as a consequence of ultra vires activities by a statutory body using or enjoying recourse to public monies. In the joint judgment of Gaudron, Gummow and Kirby JJ the evolution of the standing rules in the absence of the Attorney-General was considered. The early view had its clearest statement in *Evan v Avon Corporation* [17] where Sir John Romilly said that:

*"there is a public trust for the town and inhabitants, and a suit to enforce such a trust ought to be by information by the Attorney-General, and not by a private individual" [18].*

More than a century later this statement was strongly condemned by the joint judgment. Their Honours said of it:

"Such a state of affairs can have little to recommend it. While equitable remedies are generally described as discretionary in nature, standing to institute a suit for such relief turns upon whether particular criteria are met in the case in question. Yet the effect of decisions such as *Evan* is that in many instances it is the Attorney-General who determines whether there is to be curial enforcement of the requirement that statutory bodies observe the law. This, it has been said, 'is a matter which should be determined by known rules of law, and not by the undisclosed practice of a minister of the Crown' (see *Wade and Forsyth, Administrative Law, 7th ed (1994), p 607*).

*The evolution of the Boyce doctrine of 'sufficient special interest' represents an attempt to alleviate that state of affairs whilst keeping at bay 'the phantom busy body or ghostly intermeddler' (Craig, Administrative Law, 3rd ed (1994), p 484). The result is an unsatisfactory weighting of the scales in favour of defendant public bodies. Not only must the plaintiff show the abuse or threatened abuse of public administration which attracts equitable intervention, but the plaintiff must also show some special interest in the subject matter of the action in which it is sought to restrain that abuse" [19].*

Their Honours repeated the warning of Brennan J in *Onus* that to deny standing may be to "deny an important category of modern public statutory duties an effective procedure for curial enforcement" [20].

The joint judgment also considered the position of commercial competitors who complain about the activities of a rival which they contend to be in breach of a regulatory regime provided for the benefit of the whole community. In this respect they said that:

*"... the circumstance that the plaintiff conducts commercial activities in competition with those which it seeks to restrain is not necessarily insufficient to provide it with a sufficient interest in the subject matter of the action (see *Hawker Pacific Pty Ltd v Freeland (1983) 52 ALR 185 at 189-190*)" [21].*

Their Honours went on to suggest that a sufficient material interest may be constituted by an impact upon the practice of a profession or occupation.

Although McHugh J joined in the unanimous decision of the court, he was careful to mark out the limits on the capacity of a citizen to seek relief to enforce a public law. Identifying that the basic purpose of the civil courts is "to protect individual rights" his Honour said that it was "not part of their function to enforce the public law of the community or to oversee the enforcement of the civil or criminal law, except as an incident in the course of protecting the rights of individuals whose rights have been, are being, or may be interfered with by reason of a breach of law" [22].

His Honour confirmed the conventional philosophical basis for confining standing seemingly putting himself at odds with Brennan, Gaudron and Gummow JJ. McHugh J said:

*"The enforcement of the public law of a community is part of the political process; it is one of the chief responsibilities of the executive government. In most cases, it is for the executive government and not for the civil courts acting at the behest of disinterested private individuals to enforce the law. There are sometimes very good reasons why the public interest of a society is best served by not attempting to enforce a particular law. To enforce a law at a particular time or in particular circumstances may result in the undermining of the authority of the executive government or the courts of justice. In extreme cases, to enforce it may lead to civil unrest and blood shed" [23].*

There may be good reasons why any person in a community should not have a right to bring a criminal prosecution, or, at least, the state should have the right to terminate such a prosecution. However, with respect, it is difficult to understand how it can be legitimately argued that any citizen should not have the right to bring proceedings to enforce a public law. If, as Justice McHugh argues, the particular law is no longer relevant or appropriate, having regard to contemporary problems, the legislature may repeal it, or, a court in the exercise of its discretion, may decline to enforce it. To adopt the position that a citizen cannot approach a court to ask that a member of the executive or a government agency should obey the law, which the Parliament has provided in the interests of the general community may itself carry significant dangers for the stability of the community. Some of those dangers have been apparent in environmental disputes in New South Wales [24]. Given that the court has a discretion as to whether or not to make orders these dangers are likely to far outweigh any risks from the bringing of proceedings.

#### **Some lower court decisions**

Notwithstanding the conservative approach of some members of the High Court, a number of Australian trial judges have adopted a relatively liberal application of the principles. In *Ogle & Anor v Strickland & Ors* [25] the

Full Federal Court granted standing to an Anglican priest and a Roman Catholic priest to challenge the decision of the Censorship Board relating to the importation of a film claimed to be blasphemous. The Court applied the "special interest" test outlined by Stephen J in *Onus* to determine whether a Christian minister of religion was a "person who is aggrieved" under s 5(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). It was held that the priests qualified as "persons aggrieved" because repelling blasphemy was a "necessary incidence of their vocation" [26] and as such "their interest ... extends beyond that of other members of the Christian community whose limited concern could be fairly described as only 'intellectual or emotional'" [27].

In *Australian Conservation Foundation & Anor v Minister for Resources & Anor* [28] the Australian Conservation Foundation and a landowner, whose property adjoined the area proposed for logging, sought judicial review of the Minister's decision, made under s 30 of the *Australian Heritage Commission Act 1975*, to grant a licence for the export of woodchips from forests in south-east Tasmania. Davies J held that the Australian Conservation Foundation satisfied the special interest test. His Honour determined that the case could be distinguished from *Australian Conservation Foundation v The Commonwealth* because the issue was not "a local issue" logging being "one of the major environmental issues of the present time" [29]. His Honour found that there had been an increase in the "public perception of the need for the protection and conservation of the natural environment and for the need of a body such as the Australian Conservation Foundation to act in the public interest". Finding that the Australian Conservation Foundation was not just a busy-body but was established with functions and government financial support to concern itself with environmental issues, his Honour held that, if the Foundation "does not have a special interest in the South East Forests, there is no reason for its existence" [30].

Davies J found that the Foundation had the relevant special interest but he also held that the landowner did not. Although the landowner feared that logging might affect his quality of life, by increasing the likelihood of floods, fire and siltation of the waterways, Davies J held that his "interest in the National Estate is little more than that of any ordinary member of the community" [31].

In *North Coast Environment Council Inc v Minister for Resources & Anor* [32] the Environment Council sought an order under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) that the Minister supply reasons for the grant of a licence to export woodchips from forests in eastern New South Wales. Sackville J found that the Environment Council had standing as a "person aggrieved" because it was the "peak environmental organisation" in the area and had been recognised by both the Commonwealth and State governments as a significant and responsible environmental organisation. Its history of coordinating projects and conferences in the area and the making of submissions to the government concerning environmental management gave it the relevant "special interest".

In *Tasmanian Conservation Trust Inc v Minister for Resources* [33] Sackville J applied similar reasoning, finding that the Conservation Trust, being the peak environmental group for Tasmania, had performed research and advisory work and made representations to government with respect to the environment of Tasmania. Sackville J again emphasised the importance of a body being recognised by Commonwealth and State governments in determining whether it should be given standing to enforce laws protective of the environment.

These decisions can be contrasted with the approach of Lockhart and Gummow JJ in the Full Federal Court in *Right to Life Association (NSW) Inc v Secretary of the Department of Human Services & Health & Anor* [34], where the Right to Life Association was denied standing to review a decision made by the department to allow medical research institutions to continue conducting clinical trials of Mifepristone, a pregnancy termination drug. Lockhart J accepted the principles which had been developed but found that the Association's concern "with making the community aware as best it can of the importance and sanctity of human life; and of the need to defend life against abortion based upon the concept that life begins at conception or when the embryo commences to be formed" was not more than "a mere emotional attachment or intellectual pursuit or satisfaction" [35]. Although the concern carried with it "the right to speak and to influence the opinions of the public and of politicians" [36], it did not satisfy the test for standing. Lockhart J's decision appears to have been influenced by a recognition that the relevant legislation was not concerned with the resolution of the abortion debate but rather with the safety and quality of pharmaceutical products.

In coming to the same conclusion, Gummow J said that before a person could have standing more was needed than "identification of a person who is an effective and faithful representative of the public interest in due administration of the law concerned" [37].

In *Botany Bay City Council & Ors v Minister for State Transport and Regional Development & Ors* [38] the Botany Bay City Council brought proceedings challenging the legality of a decision made by the Minister to exempt the management of the runways and flight paths of aircraft at Sydney Airport from the requirements of the procedures established under the *Environment Protection (Impact of Proposals) Act 1974* (Cth). Although Lehane J rejected the application he found that the councils had standing. Being "responsible for areas whose environment may well suffer, at least as an indirect consequence of the decision", the council satisfied the "special interest" test. [39]. His Honour held that each council's interest was greater than that of an ordinary member of the public.

The applicant was denied standing in *Defence Coalition Against RCD Inc v Minister for Primary Industry and Energy* [40]. It is of interest to contrast this decision with *Rundle v Tweed Shire Council* [41], which was determined under the open standing provisions of the *Environmental Planning and Assessment Act*, which I consider later. In *Defence Coalition* the plaintiff sought an order setting aside a declaration, made by the Biological Control Authority under the *Biological Control Act 1984* (Cth), that rabbit calicivirus disease organisms be defined as "agent organisms" for the purposes of that Act. The applicant was incorporated for the specific purpose of campaigning against the official use of rabbit calicivirus. Nicholson J held that although the applicant had a concern about the potential danger from the virus it was unable to show that it had a "special interest" above that of an ordinary member of the public. His Honour held that "the basis of the applicant's concern being any alleged shared common danger which humanity faces from RCD, it is unable to show its interest in that danger rises above that of others" [42]. His Honour held that incorporation of the applicant did not assist it and pointed to the fact that there was no "evidence of funding or other government recognition" of the organisation, which "would give rise to the requisite special interest" [43]. As the applicant was merely an association of individuals having like views, the true position was that "the decision does not effect the members of the applicant differently from ordinary members of the public except in relation to their emotional and intellectual interest in the subject matter of the decision." [44].

In *Allen v Development Allowance Authority* [45] the applicant was the owner of premises located 200 metres from a major freeway which was proposed to be constructed under complex financial arrangements. A decision had been made by the Development Allowance Authority which had the effect of transferring the tax benefits of borrowings in a way which benefited the project. The applicant sought a review of that decision. However, the Full Federal Court determined that he did not have standing because the financial arrangements for the project were of no concern to him. The court found that the applicant's purpose was to bring an end to the City Link project, but, held that the interest which he claimed was too remote.

Shortly before the New South Wales *Environmental Planning and Assessment Act 1979* came into law, a planning case was brought in the New South Wales Supreme Court in which the plaintiff relied upon common law standing [46]. A major retailer, Grace Bros Pty Limited, was concerned about the impact of a shopping centre development proposed by its commercial rival, David Jones Limited. Grace Bros sued the council which had granted consent for David Jones development, joining David Jones in the action.

The trial judge, Wootten J, found that Grace Bros had the relevant "special interest" and commented that "it may seem strange, in light of the facts I have set out, that Grace Bros standing to bring the action should be questioned. Yet until recently the authorities might well have constrained a single judge of this Court to deny the plaintiff's standing. In *Helicopter Utilities Pty Ltd v Australian National Airlines Commissioner* [47] Jacobs J held that a commercial competitor, deprived of business as a result of its being undertaken in breach of statute by a statutory rival, had no standing to complain of the breach" [48].

Wootten J determined that having regard to the approach taken by the High Court in the *Australian Conservation Foundation* case, a broad test should be utilised. Applying what his Honour considered to be the appropriate test the plaintiff had a special interest in the subject matter of the action "that is in seeing that the provisions of the relevant legislation are observed in authorizing the development which will so considerably affect its interests" [49].

Although the matter was reconsidered by the Court of Appeal the question of locus standi was not put in issue. However, reflecting apparent concern about a liberalisation of the relevant test Hutley JA observed:

*"A question as to whether a development authorized contravenes the zoning of a particular block of land to the detriment of another person may give the latter a sufficient interest, but I doubt whether this principle should be extended to allowing every slip in the processing of applications to be taken up as an objection by a third party. The counsel for the respondents expressly refused to take up the question as to whether the locus standi of the appellant extended to this issue. If rights to rely upon procedural slips leading to the ultimate result, when the ultimate result standing alone is otherwise impeccable are extended to third parties, the perils of planning, already excessive will be multiplied. I do not wish to be taken as accepting that a private litigant in a case where public not private rights are in issue can raise every issue connected with the case. The courts in accepting a private litigant's capacity to enforce what are public rights, should be in a position to limit the issues which can be litigated"* [50].

### **The position of the Australian Law Reform Commission**

In a report published in 1996 the Australian Law Reform Commission reviewed the question of standing in relation to proceedings to enforce a public law. Its recommendation was that the complex restrictions which existed to deny standing should be removed in favour of open standing. It further recommended that any person should be able to commence proceedings having a public element subject to only two matters. The first, and obvious matter, was if the relevant legislation provides otherwise. The second consideration was that the litigation would unreasonably interfere with the ability of a person having a private interest in the issue to deal with it as he or she wishes. In support of its recommendation the Law Reform Commission said in its overview:

*"The public has an interest in ensuring that government decision makers are accountable and that their decisions are made in accordance with the law. The public also has an interest in ensuring compliance with legislation that creates public rights and duties. These are interests which must be capable of protection when necessary, through litigation" [51].*

The recommendation of the Law Reform Commission has not been adopted by the Australian Government.

The review and recommendations of the Law Reform Commission were made after the New South Wales Parliament had legislated to provide open standing to enforce environmental law within that State. Although the Commonwealth Government has responsibility for some areas of environmental law the control upon the use of land in both the urban and rural environment rests with State Governments. Accordingly, by providing open standing, the New South Wales Parliament provided a mechanism which facilitated proceedings by any person, including the misguided intermeddler and the major commercial competitor.

### **The legislative framework in NSW**

The New South Wales *Environmental Planning and Assessment Act* provides the legislative structure for the control of planning and development in New South Wales. Other legislation provides particular control of air quality, water quality, native vegetation and many other environmental issues. A list of these statutes is contained in Appendix 3. The *Environmental Planning and Assessment Act* provides for the Minister to make planning instruments containing provisions for the control of particular land uses in various zones [52]. The statutory obligations for environmental assessment of government projects are also incorporated [53]. The Act binds the Crown [54].

Proceedings to enforce the Act and the provisions of any planning instrument are litigated exclusively in the Land and Environment Court [55]. Standing is provided to any person by s 123 of the *Environmental Planning & Assessment Act* which is in the following terms:

*"(1) Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.*

*(2) Proceedings under this section may be brought by a person on his or her own behalf or on behalf of himself or herself and on behalf of other persons (with their consent), or a body corporate or unincorporated (with the consent of its committee or other controlling or governing body), having like or common interests in those proceedings.*

*(3) Any person on whose behalf proceedings are brought is entitled to contribute to or provide for the payment of the legal costs and expenses incurred by the person bringing the proceedings."*

When the *Environmental Planning & Assessment Act* was introduced into the Parliament the Minister said of the legislation that it would provide greater opportunities for public participation. The opposition spokesman commented that "there is no question that (s 123) is likely to be a controversial section of the legislation" [56]. Described as a provision enabling class actions the member expressed a fear that it would be inevitable that open standing would delay the processing of development applications.

Other members of the Parliament were troubled by s 123 expressing concern about the possibility of the delay of development and mischievous proceedings. The Local Government Association and The Shires Association, representing the councils with primary responsibility for development control, were opposed to open standing.

In other places the provision was described as "opening the flood gates", the constant theme being that open standing would be exploited by the mischievous individual or a commercial competitor, to delay and frustrate legitimate and lawful development.

Section 123 is complemented by s 124 of the Act. That section is in the following terms:

*"(1) Where the Court is satisfied that a breach of this Act has been committed or that a breach of this Act will, unless restrained by order of the Court, be committed, it may make such order as it thinks fit to remedy or restrain the breach.*

*(2) Without limiting the powers of the Court under subsection (1), an order made under that subsection may:*

*(a) where the breach of this Act comprises a use of any building, work or land - restrain that use,*

(b) where the breach of this Act comprises the erection of a building or the carrying out of a work - require the demolition or removal of that building or work, or

(c) where the breach of this Act has the effect of altering the condition or state of any building, work or land - require the reinstatement, so far as is practicable, of that building, work or land to the condition or state the building, work or land was in immediately before the breach was committed.

(3) Where a breach of this Act would not have been committed but for the failure to obtain a consent under Part 4, the Court, upon application being made by the defendant, may:

(a) adjourn the proceedings to enable a development application to be made under Part 4 to obtain that consent, and

(b) in its discretion, by interlocutory order, restrain the continuance of the commission of the breach while the proceedings are adjourned.

(4) The functions of the Court under this Division are in addition to and not in derogation from any other functions of the Court.

(5) Nothing in this section affects the provisions of Division 3 of Part 3 of the Land and Environment Court Act 1979."

It is apparent that the section was deliberately framed so that if a breach of the Act was demonstrated the court could fashion orders to deal with the public law problems and, also, appropriately protect the interests of the individual parties. The effective width of the available discretion was considered by Street CJ in *F Hannan Pty Ltd v Electricity Commission of New South Wales*, [55] where the plaintiff brought proceedings to restrain the Electricity Commission from constructing a major transmission line across his property. Although the plaintiff clearly had common law standing, the plaintiff's land was directly affected by the proposed transmission line, the New South Wales Court of Appeal took the opportunity to provide guidance as to the application of the legislative provisions, Street CJ said:

"Section 123 grants virtually unlimited status to any person to bring proceedings in the court for an order to restrain or remedy a breach of the Act. It is of major importance in identifying the true role of the court" [58].

Later in his reasons, the Chief Justice said:

"This provision read in the context of the objects of the Act as set down in s 5 makes it apparent that the task of the Court is to administer social justice in the enforcement of the legislative scheme of the Act. It is a task that travels far beyond administering justice inter partes. Section 123 totally removes the conventional requirement that relief is normally only granted at the wish of a person having a sufficient interest in the matters sought to be litigated. It is open to any person to bring proceedings to remedy or restrain a breach of the Act. There could hardly be a clearer indication of the width of the adjudicative responsibilities of the Court. The precise manner in which the Court will frame its orders in the context of particular disputes is ultimately the discretionary province of the Court to determine in the light of all of the factors falling within the purview of the dispute" [59].

This statement was generally accepted as the appropriate approach to the exercise of the Court's discretion and was not questioned until in *Oshlack v Richmond River Council* [60] Gaudron and Gummow JJ expressed some doubts. However, although criticising the Chief Justice's statement, their Honours did not attempt to redefine the task of the Land and Environment Court when fashioning orders to resolve a dispute when a breach of a public law had been shown. Because s 123 expressly contemplates that proceedings may be brought by a person who may not be impacted by the breach of the law in any way and who may not suffer an impact on any relevant right, it is respectfully suggested that the approach adopted by the Chief Justice must be generally correct. Whether or not it should be described as dispensing "social justice" when fashioning its orders, the court must look beyond adjusting rights between the plaintiff and the defendant. For open standing to be of any value any order which the court makes must respond to the interests of the general community.

### Some statistics

Proceedings to declare and enforce environmental law are described in the legislation as class 4 proceedings [61]. In the four months of 1980 after the court commenced operation 50 proceedings in class 4 were filed. Of those proceedings 41 were commenced by a state instrumentality or a local council. Accordingly, at the most 18% of the proceedings were dependant upon s 123 for standing. However, an unknown proportion (I suspect the majority) of the 9 (18%) would have been proceedings which could have been brought by the plaintiff relying upon common law standing.

Table 1 provides a statistical summation of all of the class 4 proceedings which have been brought in the

court until the end of May 2005. As can be seen the maximum proportion of class 4 proceedings in any one year, which were not initiated by government agencies, was 46% in the year 2002.

**TABLE 1**

<b>CLASS 4 APPLICATIONS - 1980 to 2005</b>			
<b>Year</b>	<b>Total Class 4 Registrations</b>	<b>Applications not commenced by a government agency</b>	<b>% of Total Class 4 registrations not commenced by a government agency</b>
1980	50	9	
1981	191	39	
1982	200	45	
1983	212	59	
1984	210	64	
1985	227	52	
1986	272	64	
1987	275	92	
1988	302	88	
1989	320	84	
1990	316	86	
1991	294	77	
1992	235	65	
1993	211	59	
1994	241	64	
1995	256	76	
1996	309	99	
1997	331	107	
1998	260	73	
1999	224	78	
2000	211	72	
2001	243	86	
2002	239	109	
2003	251	86	
2004	196	87	
2005 (to March)	41	29	

Table 2 provides a graphical representation of the trends in relation to the total class 4 registrations compared with those that were not commenced by government agencies. Table 3 provides the trend of the proportion which were possibly s 123 matters between the years 1980 and 2004.

**TABLE 2**

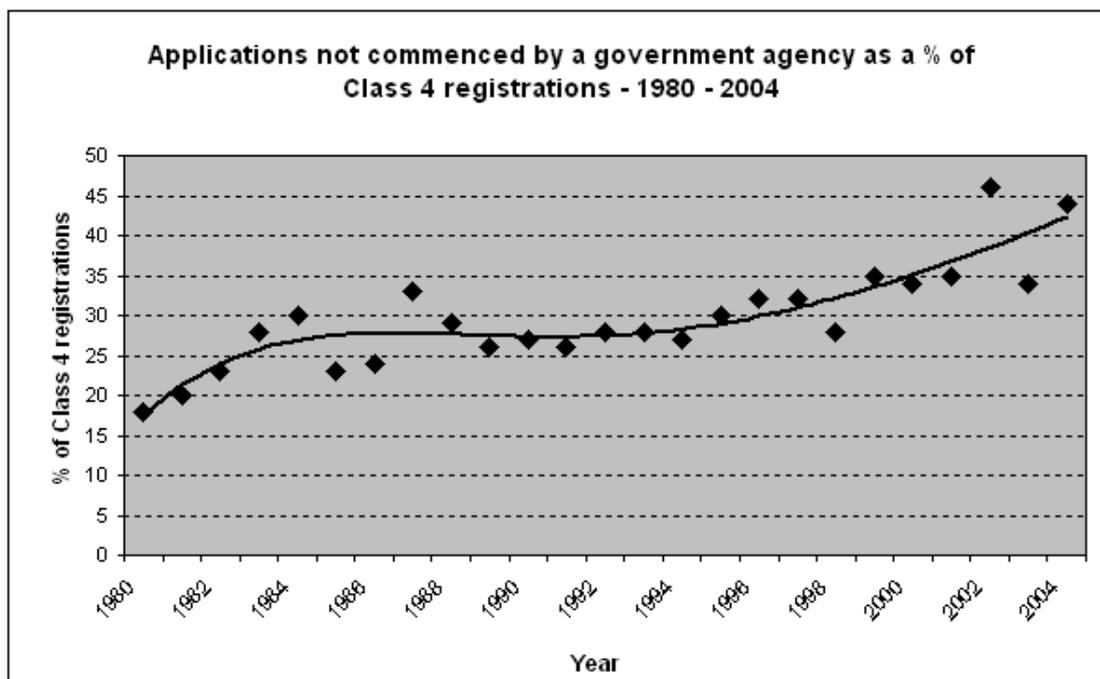
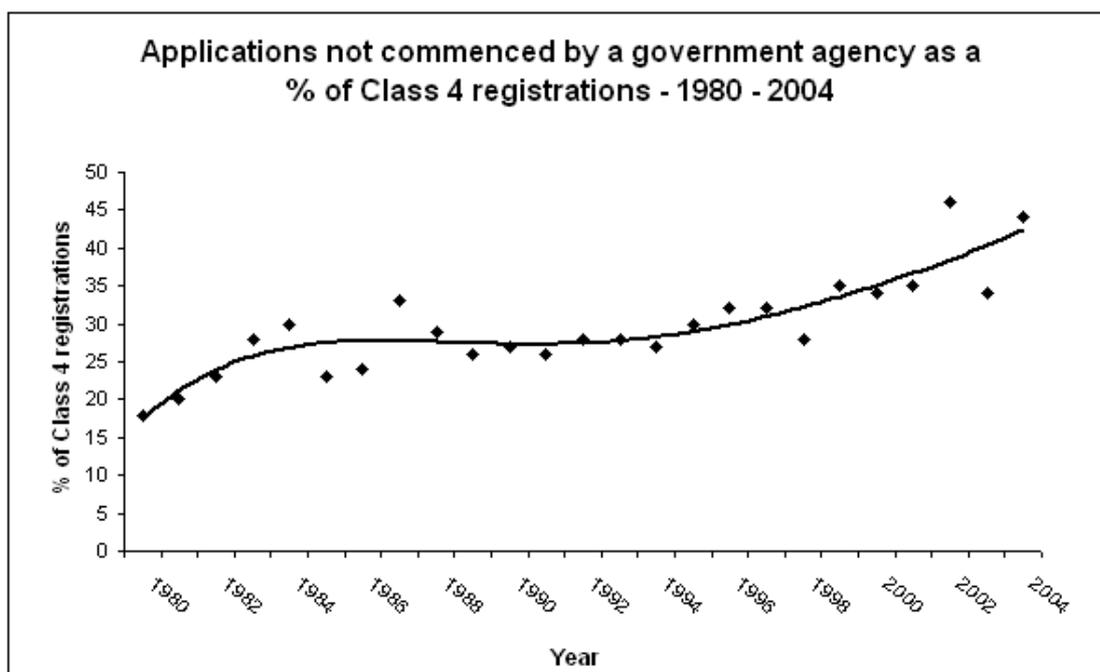


TABLE 3



It is of interest that, during the operation of the court, the number of proceedings commenced by private individuals or corporations, as a proportion of the whole of the proceedings in class 4, has been increasing, with an acceleration of that rate of increase occurring in recent years. At the same time the total number of class 4 proceedings has not grown and has, in fact, been decreasing since about 1990. The reasons for these trends are unknown.

Because s 123 provides standing for any person, making evidence of their "interest" irrelevant, it is not possible, in many cases, to determine from an examination of the court file whether the plaintiff would have been able to commence the proceedings relying on common law standing or, whether s 123 was essential. The evidence is simply not available.

In his article in the Environmental Planning & Law Journal: The Role of the New South Wales Land and Environment Court in the Emergence of Public Interest and Environmental Law, Stein J, a former judge of the Court, analysed third party applications in class 4 of the Court's jurisdiction in the years 1989 to 1995. Observing that there had not been any obvious growth in the use of "open standing" provisions over the

seven years his Honour concluded that s 123 had not caused the "floodgates" to open. He also noted that any analysis of the relevant filings would include unknown applicants who would have had common law standing in any event.

My expectation is that in many cases, and probably a large proportion, the plaintiff would not have been dependent on s 123 to bring the proceedings. This can be illustrated by an examination of some of the more significant cases and identification of some of the common issues which have arisen. However, before I undertake that task it is instructive to examine judicial reaction to the open standing provided by s 123.

### Initial reactions to s 123

The cautious approach to open standing to enforce a public law, reflected in the judgment of Hutley JA in *Grace Bros*, was evident in some initial reactions to s 123 of the *Environmental Planning and Assessment Act*. As Brian Preston SC points out in his book *Environmental Litigation* "the section was such a departure from traditional standing rules that it did not take long before defendants were attempting to have the court read down the sections so as to confine it to persons who fell within the second limb of the *Boyce* test" [62]. In *Rowley v New South Wales Leather and Trading Co Pty Ltd and Woollahra Municipal Council* [63] a neighbour brought proceedings seeking an order to restrain the construction of extensions to an existing building in circumstances where it was alleged the necessary statutory consent had not been obtained. Cripps CJ of L&E held that the plaintiff would have had standing under the second limb of the *Boyce* test but nevertheless said of s 123:

*"... I think, that Parliament intended that many of the hitherto established limitations on the rights of citizens to take proceedings in a court to enforce a public right have been removed in so far as the proceedings relate to breaches of the Environmental Planning & Assessment Act"* [64].

Significantly, having regard to the later discussion in *Hannan and Oshlack*, his Honour went on to briefly discuss the discretion available to the court when relief is sought, observing that the width of the provision in relation to standing "results in the court having a proportionately wider discretion as to whether a remedy ought to be granted assuming a breach is established".

In *Building Owners & Management Association (Aust) (Ltd) v Sydney City Council* [65] the plaintiff was a company whose objects included the promotion of commerce and industry by representing owners and managers of buildings and proposed buildings. Its membership included major institutional property owning companies and managers of property.

The Council had adopted a plan to provide low cost housing which was to be funded by contributions which were to be extracted from developers in return for the grant of development rights.

The owners and managers of individual buildings were concerned that if they commenced proceedings in their own name they may be disadvantaged in their further dealings with the Council. Accordingly, it was decided that Building Owners & Management Association, relying on s 123, would bring the necessary proceedings. Cripps CJ in L&E held that the plaintiff had standing, a decision which was confirmed by the Court of Appeal. Mahoney JA held that the words "whether or not any right of that person has been or may be infringed by or as a consequence of that breach" are sufficient to remove any restriction arising from the second limb of the *Boyce* test.

Both Hope JA and Priestley JA agreed with the reasons of Mahoney JA. Priestley JA added some additional comments of particular relevance to standing in cases where plaintiffs seek to enforce environmental laws. He said:

*"About the only thing that can be said with complete assurance about these 'rules' is that they are moving towards greater readiness to recognise plaintiffs as having locus standi no matter what it is that moves a plaintiff to have the court decide a question of law. Granted the reality of the convention I mentioned at the outset this movement is a comprehensible one, because it seems to me to follow from that convention that when A raises a question whether B is in breach of a law, it is more rational for a court to ask whether it is true that B is in breach of that law than to ask why A should be allowed to ask the court to answer the question.*

*Although this seems to me to follow as a matter of generality, it also seems to me there must be limits to it as a universal proposition; clearly for one example, there will be cases where the alleged breach is of such a kind that its investigation would be of insufficient significance to justify the various costs. But the proposition to my mind is at least valid to the extent that when A seeks to have B's alleged breach investigated in court and B claims A has no locus standi, B should have to show why the question should not be answered, rather than that A should be required to justify his presence in court.*

*The few cases I have mentioned are some of the many which show that the accepted approach has tended to be the opposite and that it is only recently, that in the absence of statutory direction, the pendulum has begun to swing.*

*The liberalising tendency shown in cases such as Onus is perhaps partly linked with the trend in some modern statutes to try and get rid of the older attitude. A well-know example is the Trade Practices Act 1974 (Cth), s 80(1)(c) which permitted 'any other person' to apply to the court for an injunction restraining conduct contravening Pts IV or V of the Act. These apparently plain words of s 80 were unsuccessfully sought to be read down; the reasons advanced were typical of the rationale for the older approach: Phelps v Western Mining Corp Ltd (1978) 33 FLR 327. Deane J disposed of these in a very convincing way (at 333-334).*

*The argument that to give the words which the parliament has used their ordinary meaning would, to use a popular phrase, 'open the floodgates of litigation' strikes me as irrelevant and somewhat unreal. Irrelevant, in that I can see neither warrant for concluding that the Parliament did not intend that floodgates be opened on practices which contravene the provisions of the Act nor reason for viewing that prospect, if it were a realistic one, with other than equanimity. Unreal, in that the argument not only assumes the existence of a shoal of officious busybodies agitatedly waiting, behind the 'floodgates', for the opportunity to institute costly litigation in which they have no legitimate interest but treats as novel and revolutionary an approach to the enforcement of laws which has long been established in the ordinary administration of the criminal law: see W S Holdsworth, A History of English Law; (7th ed., Sweet and Maxwell, 1956), Vol II, p 453, vol IX, pp 236-240. Prynne's case (1794) 5 Mod 459; 87 ER 764; Berchet's case (1794) 1 Show KB 106, 89 ER 480; Crimes Act 1914 (Cth), s 13; Brebner v Bruce (1950) 82 CLR 161 and note, apropos proceedings under the Trade Practices Act, Norris' case (1825) 2 Keny 300, 96 ER 1189 where Lord Mansfield CJ speaking on behalf of the Court of King's Bench, declared: 'that if any agreement was made to fix the price of salt, or any other necessity of life (which salt emphatically was), by people dealing in that commodity, the court would be glad to lay hold of an opportunity, from what quarter soever the complaint came, to shew their sense of the crime'. To confer, as the Crimes Act 1914 does, authority upon 'any person' to institute criminal proceedings in respect of an alleged contravention of a law is, to my mind, no less likely to 'open the floodgates of litigation' than to confer authority to institute proceedings for an injunction to restrain repetition of the contravention. In the context of Brebner's case (1950) 82 CLR 161, one may be permitted the comment that the broken public telephones around the cities of Australia perhaps provide mute testimony of how dry the ground beneath the floodgates has remained" [66].*

#### **Proceedings in the Land and Environment Court - the commercial competitor**

There have been a number of proceedings in which a commercial competitor has sued seeking to set aside a zoning of land requested by a rival trader, or to have a development consent granted by a council declared void. There have also been a number of attempts by major shopping centre proprietors to restrain alleged illegal methods of trading by competitors. Although the motivation of the applicant is presumably to bring a halt to the activities of the rival, delaying the opponent will often bring a significant commercial advantage. A list of typical cases is provided in Appendix 4.

It is probable that the applicants, who in most of these cases would have a concern that their revenue may be affected by the alleged illegal proposal, would have had standing, at least if the approach by Gaudron, Gummow and Kirby JJ in *Batemans Bay* and the Court of Appeal in *Grace Bros* prevailed. It would seem that commercial competitors would, relying upon no more than a financial impact upon their enterprise, have standing to bring proceedings to restrain the allegedly illegal activities of their rivals without the assistance of the statute.

In *Gwynville Southpoint Pty Ltd & Ors v the Council of the Municipality of Botany Bay Council & Ors*, proceedings were commenced by a number of major retailers seeking to stop Westfield Limited, a major shopping centre proprietor, from developing a new shopping centre. The Minister had made a planning instrument under the *Environmental Planning & Assessment Act* which purported to authorise the development. The proceedings were never heard as the government of the day brought legislation into the Parliament which both terminated the litigation and authorised the new development [67].

A troublesome problem in New South Wales has been the attempts by traders to conduct retail businesses, particularly the sale of household goods, from land zoned for industrial purposes. They are often referred to as "bulky goods retailers". The cost of acquiring suitable land in an industrial zone is significantly less than if the land is zoned for retail purposes. By trading from industrial land a retailer can undercut the competition and significantly impact upon the business of conventional retailers operating within identifiable commercial centres. A number of proceedings in Appendix 4 are of this type. The success rate for applicants is high, although some have only succeeded in the appeal court [68].

*Woolworths Ltd v Pallas Newco Pty Ltd* [69] were proceedings brought by Woolworths, a major retailer, seeking to restrain activities proposed by Coles, its major commercial rival, in a proposed retail liquor outlet. The matter was finally resolved in the Court of Appeal. The decision has far-reaching significance as it defines the extent to which the court can intervene in the development consent process. The Court found that the classification of a proposed development was a "jurisdictional fact" which the court could examine for itself, the primary decision maker's conclusion being of no significance. The challenge to the council's decision to approve the application was not confined to conventional administrative law principles [70].

In *Guthega Development Pt Ltd v Minister Administering the National Parks & Wildlife Act 1974 (NSW) & Ors* [71] the owner of a ski resort in the Snowy Mountains area in southern NSW brought proceedings to restrain

the construction of a project which was intended to provide a major transport facility which would enable the expansion of a rival ski resort. The project would have had no direct impact on the applicant. The only interest peculiar to it was its commercial interest in minimising competition but, because of s 123, questions of standing were not debated.

#### **Proceedings in the Land and Environment Court - the affected neighbour**

Many of the cases which have not been commenced by a government agency or local government are matters where an individual has taken proceedings to restrain a proposed domestic or commercial development which will impact directly on their own property. In an urban environment it is likely that the plaintiffs would have had standing without the benefit of s 123 of the *Environmental Planning & Assessment Act*. I have not attempted to analyse the character of the plaintiff in all of the proceedings which have been commenced - an almost impossible task. However, my best estimate is that in at least 70% of the matters commenced by private individuals or corporations common law standing would have been available. It is probably greater.

#### **Proceedings in the Land and Environment Court - by an association or a concerned person from an association**

Although not the most numerous of the various classes of proceedings, those which have been brought by an association or an individual on behalf of a group are probably the most significant. This is both because of the issues raised and the impact of the decisions on the proper administration of environmental law. Many plaintiffs would have been denied standing under the *Australian Conservation Foundation* principles, although the later development of those principles would have been likely to have allowed more plaintiffs to bring proceedings. Many of these cases were commenced in the earlier years of the Court's operation, which is explained by the fact that many government departments and others responsible for administering the legislation initially experienced difficulty in understanding and meeting their obligations under the *Environmental Planning and Assessment Act*. The decisions have proved of fundamental importance in construing the legislation and defining the obligations of both the public and private sector under it. Without these proceedings it is almost certain that the quality of environmental assessment of major development projects, particularly those undertaken by government, would not have met the expectations of the legislature when the Act was passed. A list of some of the important decisions in this category are contained in Appendix 5.

Many of these cases have been brought by individuals without formal acknowledgement that they were acting on behalf of an organisation. Mr Prineas, the plaintiff in *Prineas v Forestry Commission of New South Wales* [72], was the Executive Officer of the National Parks and Wildlife Association, a voluntary body, concerned with the provision and management of national parks within New South Wales. It would be likely, under the approach taken by Davies J and Sackville J, that the Association would have had standing without s 123.

Dianne Kivi, the plaintiff in *Kivi v Forestry Commission of New South Wales* [73], was a member of an association referred to as Nightcap Action Group, which was formed because of a concern about logging operations which had commenced in the Nightcap National Park. The organisation had no government funding, nor recognition, and it may have been difficult for it to have established standing.

Mr Corkill, the plaintiff in two proceedings *Corkill v Forestry Commission of New South Wales* [74] was the spokesman for the North East Forest Alliance, a network of individual and community forest protection groups working to protect old growth forests in north-east New South Wales. As the Alliance was formed out of a concern for the future management of large areas of forest and had participated in the environmental assessment of some proposals, it may have had standing without s 123.

The plaintiff in *Jarasius v Forestry Commission of New South Wales* [75] was a resident of a town near to the forest which was proposed for logging and was a member of the unincorporated association known as the Towamba Valley Protection Association. The Association consisted mainly of residents whose properties adjoined one of the two areas in question. Whether the Association had an interest beyond any other member of the general public would have been a live issue if the plaintiff had been required to rely upon common law standing.

*Save the Showground for Sydney Incorporated v Minister for Urban Affairs and Planning* [76] were proceedings brought by a group formed to oppose the relocation of the showground facility, which had been traditionally provided in Paddington, to a site at Homebush Bay, near to the 2000 Olympic facilities. The Save the Showground group was incorporated and had as its members a number of persons who had been involved in the statutory process whereby the future planning for the existing showground was being considered. It was the abandonment of that process which both triggered and became the issue in the proceedings. It is likely, having regard to the fact that these persons had been involved in the planning process, that a court would have found the relevant "special interest" without the benefit of s 123.

The applicant in *Coalcliff Community Association Inc v Minister for Urban Affairs and Planning* [77] was an association formed for the purpose of opposing the development of a coal waste dump on a site to the south

of Sydney. The organisation had no government funding or recognition and was formed for the purpose of opposing the project. It may not have had standing, but for s 123.

*Tinda Creek Spiritual & Environment Centre v Baulkham Hills Shire Council* [78] were proceedings brought by a group incorporated for the purpose of providing and maintaining an "environmental centre for spiritualism". It became concerned about sandmining operations which had been occurring in the general area including on a property nearby to the premises occupied by the centre. It was apparent that the centre was little other than a corporate shell, with no assets, and had not received recognition by any government agency and had no record of contribution to the welfare of the community. But for s 123 the centre may have had difficulty in bringing the proceedings.

The proceedings in *Over Our Dead Body Society Incorporated v Byron Bay Community Association Inc* [79] were concerned with the proposed demolition of the Byron Bay Community Centre. Although the Society had concerns about the consequences if the centre was demolished, it is probable that it could not have demonstrated a concern beyond that of any other person in the community if it had been required to assert standing at common law.

*Blue Mountains Conservation Society Inc v Director-General of National Parks and Wildlife & Ors* [80] were proceedings in which the Society succeeded in restraining a proposal to allow filming within a wilderness area of the Blue Mountains National Park. It is possible that the Society, having been formed out of a concern in relation to the quality of development in the Blue Mountains, including the conservation of flora and fauna in a number of national parks and the maintenance of wilderness areas within them, and because of its history of involvement in conservation issues may have been able to demonstrate standing at common law.

### **Proceedings in the Land and Environment Court - concerned individuals**

There have been a number of proceedings brought by individuals, sometimes as the representative of others, but, also, on their own behalf. Some of these matters are included in Appendix 6.

In *Hale v Parramatta City Council* [81], Mr Hale, a suburban optometrist with no direct interest which would have entitled him to common law standing, brought proceedings to restrain the construction of a sporting stadium which was proposed for an area of historic parkland within the city of Parramatta, part of greater metropolitan Sydney. Although a group was formed to oppose the development, calling itself "Friends of Parramatta Park", it is questionable whether it would have had standing to bring the proceedings. The group was apparently formed for the purpose of opposing the development and could not demonstrate a general concern in relation to environmental issues or any recognition by government. To many people, particularly those who supported the local Parramatta rugby league football team, Mr Hale was the classic intermeddler, if not a nuisance. He succeeded at trial, a decision which was confirmed in the Court of Appeal [82]. The proponent of the stadium - the Parramatta Leagues Club - was prepared to seek leave to appeal to the Privy Council but this was made unnecessary when the State Government again passed special legislation authorising the construction of the stadium.

*Rundle v Tweed Shire Council* [83] were proceedings brought by an individual with the apparent support of some other, but undisclosed, local residents living on a property comprising a housing community of 14 families. The local council had a management regime to eradicate noxious weed from nearby land by spraying with the herbicide 2,4-D. Ms Rundle, concerned about the possible environmental consequences of using the herbicide, brought proceedings alleging that the management program was being carried out in breach of the *Environmental Planning and Assessment Act*. Ms Rundle was able to prove that she had been personally affected by the use of herbicides by farmers in the area and would, no doubt, have argued that for this reason she had the relevant "special interest" in the program of spraying proposed by the Council. She may have been able to demonstrate a particular sensitivity. However, whether this would have been sufficient to give rise to a "special interest" did not have to be considered having regard to the provisions of s 123.

Rosemount Estate Pty Ltd, the plaintiff in *Rosemount Estates Pty Ltd v Cleland* [84], was a private company and large producer of Australian wine. The owner of the company, Mr Oatley, was the lessee of a rural holding in the Hunter Valley in NSW on which he maintained a modest vineyard. His company also had a vineyard on nearby land known as Roxburgh Vineyard, from which a premium quality chardonnay was harvested. Mr Oatley became concerned that a proposal to develop a major coal mine, some few kilometres from his property, could affect the image of the valley in which the wine was created and also impact upon the amenity of his dwelling. Accordingly, it would seem likely that Rosemount would have had common law standing. The plaintiff succeeded at trial, although special legislation was passed which approved the project before the Court of Appeal handed down a decision in the coalminer's favour. The legislation took away any opportunity for an appeal to the High Court where, if leave had been granted, the issue of proportionality would have been at the centre of the debate.

In the proceedings involving Mr Nettheim, *Nettheim v Minister for Planning and Local Government and Bevelon Investments Pty Limited* [85] Actors' Equity of Australia, an organisation representing actors, was concerned about a proposal to demolish the Regent Theatre, an old live theatre venue within the City of Sydney. The Minister had decided to revoke a permanent conservation order, the first step to approving its demolition. Although no doubt the actors claimed to have an interest in the maintenance of theatres capable

of being used for live productions, it is conceivable that a court would have held that interest did not extend beyond the interest of any member of the general public.

### Considerations relevant to interlocutory relief when "open standing" is available

Many development proposals which cause controversy are large and involve significant capital investment. Delay can cause an escalation in that cost and it can also result in significant loss of prospective revenue from the completed undertaking. For a plaintiff seeking interlocutory relief to restrain the implementation of such a project, an undertaking for damages, the usual requirement before relief can be obtained, may prove a daunting, if not impossible, obligation. Open standing provisions may bring little practical benefit if an undertaking is required.

The problem was addressed by the Land and Environment Court in *Ross v The State Rail Authority of NSW & Anor* [86]. As it happens the applicant would have had standing at common law to bring the proceedings but the principles articulated in the decision have been applied in many cases where s 123 has been relied upon.

The applicant was the owner of land in a rural area. The State Rail Authority sought to construct a railway line in the vicinity which would be controlled by a series of microwave towers, one of which was proposed to be located on a property adjoining Mrs Ross. The Authority proposed to gain access for the construction and maintenance of a tower across her property but had not sought, nor obtained, development consent and had not otherwise complied with the provisions of the *Environmental Planning and Assessment Act* when considering whether or not to carry out the proposal.

Cripps CJ of L&E considered the authorities in relation to a grant of interlocutory relief and the role of an undertaking as to damages by the applicant before an injunction would be granted. His Honour noted that Young J in *Southern Tableland Insurance Brokers Pty Ltd (in Liq) v Schomberg* [87] had accepted that in exceptional circumstances an undertaking as to damages may not be required, although Young J was not able to identify occasions where those circumstances had arisen. Cripps CJ of L&E proceeded to consider Mrs Ross's circumstances in light of the provisions of s 123 and s 124 of the Act and observed that:

*"... it is not apt to describe a litigant seeking to remedy breaches of the Environmental Planning and Assessment Act as an 'officious, though well-meaning, bystander who is not content merely to stand by'. In Phelps v Western Mining Corporation Ltd (1978) 33 FLR 327 at 334; 20 ALR 183 at 190, Deane J, after referring to s 80 of the Trade Practices Act 1974 (Cth) (which enables 'any person' to bring proceedings), said:*

*'It is patently desirable that the legislature does not assume that traditional rules of the common law relating to locus to institute civil proceedings are universally appropriate to circumstances where laws are increasingly concerned with the attainment and maintenance of what are seen as desirable, national, economic and commercial objectives and standards and with the protection not only of the life and liberty of the citizen but of the environment in which he lives and the quality of the life which he may lead. There is little merit in approaching the construction of a statute on the basis that it is to be presumed that the Parliament has in fact ill-advisedly made such an assumption. There is no merit in the erection of a curial ambush of shibboleths in which even a legislative intent if evinced by words as clear as those used in s 80(1)(c) would lie entrapped' [88].*

His Honour referred to the remarks of Street CJ in *Hannan* and noted that in *Commercial Bank of Australia Ltd v Insurance Brokers Association of Australia* [89], Bowen CJ found that when proceedings were brought by a private litigant under the *Trade Practice Act* 1974, which provided for "open standing", the offer of an undertaking as to damages was one matter to be taken into account on the balance of convenience in the exercise of the court's discretion. His Honour then said:

*"Section 123 and s 124 in the Environmental Planning and Assessment Act demonstrated that the Parliament of New South Wales has decided that civil law enforcement of environmental laws are no longer to be restricted to the Crown, regulatory authorities or to people having what was traditionally referred to as an 'interest in the proceedings'. It would seem to me, therefore, that where a strong prima facie case has been made out that a significant breach of an environmental law has occurred, the circumstances that an applicant is not prepared to give the usual undertaking as to damages is but a factor to be taken into account when considering the balance of convenience. In this regard, I respectfully adopt the observations of Bowen CJ in Commercial Bank. The court ought inquire from an applicant whether he or she is willing to give an undertaking as to damages. The court should then take into account, on the balance of convenience, the presence or absence of such an undertaking as one of the factors to be considered in the exercise of its discretion: see Flynn v Director of National Parks and Wildlife Service (17 July 1987, unreported); Hornsby v Municipal Council v Ettra (6 October 1987, unreported) and Warringah Shire Council v Seaside Gardens Pty Ltd (23 March 1987, unreported)" [90].*

Noting that there will be cases where a failure to offer an undertaking as to damages would lead to the court declining to grant interlocutory relief on the balance of convenience, notwithstanding that a strong arguable case has been made out, his Honour granted Mrs Ross an interlocutory injunction.

This decision has been followed in a number of unreported cases.

### **The problem of costs**

Although open standing provisions allow plaintiffs an opportunity to approach the court for relief they will be of little consequence if the plaintiff cannot afford to fund the proceedings, and, as may very often be the case, will be bankrupted if the proceedings fail.

In an address to a conference of the National Environmental Law Association in 1989 Toohey J - formerly a member of the High Court - said:

*"Relaxing the traditional requirements for standing may be of little significance unless other procedural reforms are made. Particularly is this so in the area of funding of environmental litigation and the awarding of costs. There is little point in opening the doors to the courts if litigants cannot afford to come in. The general rule in litigation that 'costs follow the event' is in point. The fear, if unsuccessful, of having to pay the costs of the other side (often a government instrumentality or wealthy private corporation), with devastating consequences to the individual or environmental group bringing the action, must inhibit the taking of cases to court. In any event, it will be a factor that looms large in any consideration to initiate litigation."*

In New South Wales there have been occasions when Legal Aid monies provided through the Legal Aid Commission, a statutory body, have been available to finance a plaintiff. However, the grants have been modest and private litigants, as opposed to corporations, have generally been dependant upon the generosity of solicitors, counsel and experts to bring cases to court. The community in New South Wales is also served by a private body, which receives some public monies, the Environmental Defenders Office, to advise and manage environmental litigation. Sometimes it has received a grant of legal aid to pursue proceedings. One advantage of a grant of legal aid is that s 47 of the *Legal Aid Commission Act 1979* provides that a plaintiff will be immune from a substantial proportion, or in some cases all, of the defendant's costs if the proceedings fail.

In class 4 proceedings the Court has in most cases applied the conventional rule - costs follow the event. However, in the important decision in *Oshlack v Richmond River Shire Council & Anor* [91], Stein J departed from the usual rule. The trial judge's decision was overturned by the Court of Appeal [92] but was restored by the High Court [93], in a majority decision.

The argument turned upon the proper application of s 69(2) of the *Land and Environment Court Act 1979* (NSW) and its application in the context of s 123 of the *Environmental Planning & Assessment Act*. Section 69 (2) provides as follows:

*69(2) Subject to the rules and subject to any other Act:*

*(a) costs are in the discretion of the Court,*

*(b) the Court may determine by whom and to what extent costs are to be paid, and*

*(c) the Court may order costs to be assessed on the basis set out in Division 6 of Part 11 of the Legal Profession Act or on an indemnity basis"*

The trial judge held that the relevant principles in exercising the discretion conferred by s 69(2) included the following:

*"(i) The "traditional rule" that, despite the general discretion as to costs being "absolute and unfettered", costs should follow the event of the litigation "grew up in an era of private litigation". There is a need to distinguish applications to enforce "public law obligations" which arise under environmental laws lest the relaxation of standing by s 123 have little significance.*

*(ii) The characterisation of proceedings as "public interest litigation" with the "prime motivation" being the upholding of "the public interest and the rule of law" may be a factor which contributes to a finding of "special circumstances" but is not, of itself, enough to constitute special circumstances warranting departure from the "usual rule"; something more is required.*

*(iii) The appellant's pursuit of the litigation was motivated by his desire to ensure*

*obedience to environmental law and to preserve the habitat of the endangered koala on and around the site; he had nothing to gain from the litigation "other than the worthy motive of seeking to uphold environmental law and the preservation of endangered fauna".*

*(iv) In the present case, "a significant number of members of the public" shared the stance of the appellant as to the development to take place on the site, the preservation of the natural features and flora of the site, and the impact on endangered fauna, especially the koala. In that sense there was a "public interest" in the outcome of the litigation.*

*(v) The basis of the challenge was arguable and had raised and resolved "significant issues" as to the interpretation and future administration of statutory provisions relating to the protection of endangered fauna and relating to the ambit and future administration of the subject development consent; these issues had "implications" for the Council, the developer and the public.*

*(vi) It followed that there were "sufficient special circumstances to justify a departure from the ordinary rule as to costs".*

The High Court divided on the issue with Gaudron, Gummow and Kirby JJ in the majority. Although critical of Street CJ's remarks in *Hannan*, Gaudron and Gummow JJ said of s 123 that "of present significance is that s 123 relieved a person in the position of the appellant from any requirement to obtain the Attorney-General's fiat" or otherwise satisfy the common law requirements for standing [94].

Turning to the requirements of s 69(2) the joint judgment said:

*"The provisions of s 69 of the Court Act which confer upon the Court the discretion exercised by the primary judge attract the application of the general proposition that it is inappropriate to read a provision conferring jurisdiction or granting powers to a court by making conditions or imposing limitations which are not found in the words used Hyman v Rose [1912] AC 623 at 631; FAI General Insurance Co Ltd v Southern Cross Exploration NL (1988) 165 CLR 268 at 283-284; Owners of 'Shin Kobe Maru' v Empire Shipping Co Inc (1994) 181 CLR 404 at 421; PMT Partners Pty Ltd (In Liq) v Australian National Parks and Wildlife Service (1995) 184 CLR 301 at 313; Emanuele v Australian Securities Commission (1997) 188 CLR 114 at 136-137. The necessity for the exercise of the jurisdiction or power by a court favours a liberal construction. Considerations which might limit the construction of such a grant to some different body to not apply Knight v F P Special Assets Ltd (1992) 174 CLR 178 at 205.*

*The terms of s 69(2) contain no positive indication of the considerations upon which the Court is to determine by whom and to what extent costs are to be paid. The power conferred by the section is to be exercised judicially, that is to say not arbitrarily, capriciously or so as to frustrate the legislative intent. However, subject to such considerations, the discretion conferred is, to adapt the words of Dixon J, unconfined except in so far as 'the subject matter and the scope and purpose' of the legislation may enable an appellate court to pronounce the reasons given by the primary judge to be 'definitely extraneous to any objects the legislature could have had in view' Water Conservation and Irrigation Commission (NSW) v Browning (1974) 74 CLR 492 at 505" [95].*

Gaudron and Gummow JJ held that his Honour had not erred in defining the relevant principles and accordingly found that it was within a proper exercise of the judge's discretion to decline to order Mr Oshlack to pay costs.

The third member of the Court in the majority, Kirby J, also looked at s 123. His Honour found that it was unlikely that Mr Oshlack would have had the standing required by law to bring his claim but this was provided by s 123. His Honour said that this section and like provisions in other legislation in NSW (See for example *Heritage Act 1977* (NSW), s 153(1); *National Parks and Wildlife Act 1974* (NSW), s 176A(1); *Wilderness Act 1987* (NSW), s 27(1); *Uranium Mining and Nuclear Facilities (Prohibitions) Act 1986* (NSW), s 10(1); *Environmentally Hazardous Chemicals Act 1985* (NSW), s 57(1) *Local Government Act 1993*; (NSW), s 674):

*"portray an apparently consistent view that the legal barriers which formally prevented environmental activists from engaging the jurisdiction of the courts should, in the specified cases and in the Land and Environment Court, be lifted.*

*Inherent in the foregoing legislative innovation is a parliamentary conclusion that it is in the public interest that such individuals and groups should be able to engage the jurisdiction of the Land and Environment Court, although they have no personal, financial or like interest to do so. It can be assumed that Parliament would know that sometimes, such applications would*

*succeed and, sometimes they would fail. The removal of the barrier to standing might amount to an empty gesture if the public character of an applicant's proceedings could in no circumstances be taken into account in disposing of the costs of such proceedings, either where they succeeded or (as here) where they failed" [96].*

The approach adopted by the majority in *Oshlack* has been followed in some cases in the Land and Environment Court and considered in others [97].

### **Conclusion**

It is apparent that the open standing provided by s 123 modifies the common law to provide that any person can bring proceedings to enforce the *Environmental Planning & Assessment Act*, whether or not they have any particular interest in the activities which are allegedly being carried out contrary to its provisions. Although the common law in Australia, with significant cautionary words from some members of the High Court, has been moving towards a liberalisation of standing to enforce public laws, the New South Wales Parliament has removed any impediment in relation to many environmental laws [98].

So far as it is possible, the analysis undertaken of various cases over the 25 years since the Act commenced operation does not suggest that a "flood of cases" has come to the court which could not have been brought but for the provisions of s 123. There are some cases where standing may have been an arguable issue and some where it may have been denied, but many cases and probably most cases would fall within the common law principles defined by the Australian High Court as they have more recently been applied.

In some cases where proceedings have been brought and the government was persuaded that the project should not be delayed or altered by court proceedings, special legislation has been passed, terminating the litigation and authorising the project. These cases are few and in most cases where a plaintiff has succeeded, a real problem in the assessment of the project or some other breach of the planning law has been identified.

It is apparent from the many cases in relation to the exploitation of natural resources, particularly forestry, that the opportunity for a plaintiff to bring proceedings without having to establish standing has meant that it has been possible to use the plaintiff's, sometimes limited, resources to debate matters relating to the operation of the relevant planning laws rather than debating issues of standing. Many of these cases have significantly enhanced the quality of environmental decision-making within New South Wales. A comprehensive set of principles in relation to the preparation of environmental impact statements and the correct approach to evaluating the possible impacts of a project have been defined by the court [99].

Any fears that open standing will encourage proceedings which have the potential to destabilise orderly government have been unfounded. Although the government has felt it necessary to legislate in a very few cases, there has been no suggestion that the open standing provisions have led to litigation which adversely impacts upon the well-being of the whole community. The contrary is undoubtedly true. In relation to some of the projects about which there has been litigation, in particular the forestry matters, members of the public have gathered and, at times, engaged in civil disobedience, including the physical obstruction of bulldozers and other heavy equipment. On a number of occasions persons lives have been at risk. Because it has been possible to access the court and litigate the lawfulness of these projects the possibility of injury to members of the public, or damage to plant and equipment has been alleviated and in almost every case avoided. Far from damaging the "body politic" open standing, to the extent that it has facilitated proceedings to enforce environmental laws, has proved beneficial.

There is no doubt that proponents of individual projects which have been challenged in the court feel a sense of frustration. Very often the challenge has been to the actions of the government authority obliged to consider the environmental merit of the project and where the proponent has little or no control over the quality of the authority's actions. If the assessment of the project is found to be legally wanting, significant issues with respect to the exercise of the court's discretion arise. On one occasion the plaintiff succeeded in proving that a major sewerage project was being undertaken without the necessary environmental assessment. Having regard to the advanced stage of the project when proceedings were commenced and the community benefit from a coordinated sewerage scheme the court declined to intervene [100]. A similar outcome occurred in *Liverpool City Council v Roads and Traffic & Anor* where the council proved that a proposed major roadway had not been assessed as required by the Act but the Court declined to grant relief [101].

The impact of open standing can also be found in the approach which the courts have taken to the conditions for the grant of interlocutory relief and in the principles which have been applied to the exercise of the court's discretion and the making of orders for costs in the event that a "public interest" plaintiff fails to obtain relief. Although, as will be apparent from the comments of some judges of the High Court in *Oshlack*, the principles are not entirely settled, the impacts of the legislative provisions are apparent.

### **Appendix 1 - Open standing legislation:**

*Contaminated Land Management Act 1997, s96*

*Environmental Planning and Assessment Act 1979*, s123  
*Environmentally Hazardous Chemicals Act 1985*, s57  
*Fisheries Management Act 1994*, s282  
*Heritage Act 1977*, s153  
*Local Government Act 1993*, s674  
*National Parks and Wildlife Act 1974*, s176A  
*Native Vegetation Act 2003*, s41  
*Native Vegetation Conservation Act 1997*, s63  
*Protection of the Environment Operations Act 1997*, s252  
*Rural Fires Act 1997*, s110H  
*Sydney Water Act 1994*, s102  
*Threatened Species Conservation Act 1995*, s147  
*Uranium Mining and Nuclear Facilities (Prohibitions) Act 1986*, s10  
*Water Management Act 2000*, 336  
*Wilderness Act 1987*, s27

## **Appendix 2 - cases with Attorney-General's fiat**

Attorney-General; Ex rel Anka (Contractors) Pty Ltd v Legg (1979) 39 LGRA 399  
Attorney-General; Ex rel Hornsby Shire Council v Farley v Lewers Ltd (1962) 8 LGRA 186  
Attorney-General; Ex rel Rosman v Municipal Council of Mosman (1910) 11 SR (NSW) 133  
Attorney-General; Ex rel Wentworth v Woollahra Municipal Council (1980) 41 LGRA 376  
Attorney-General (NSW); Ex rel De Lorenzo v Lane Cove Municipal Council [1976] 1 NSWLR 557  
Attorney-General (NSW); Ex rel Franklins Stores Pty Ltd v Lizelle Pty Ltd [1977] 2 NSWLR 955  
Attorney-General (NSW); Ex rel Stone v Warringah Shire Council [1972] 1 NSWLR 526  
Permewan Wright Consolidated Pty Ltd v Attorney-General (NSW), In re; Ex rel Franklins Stores Pty Ltd (1977) 17 ALR 63

## **Appendix 3 - Environmental Legislation in NSW**

*Aboriginal Land Rights Act 1983*  
*Agricultural and Veterinary Chemicals (New South Wales) Act 1994*  
*Biological Control Act 1985*  
*Catchment Management Authorities Act 2003*  
*Coastal Protection Act 1979*  
*Community Land Development Act 1989*  
*Contaminated Land Management Act 1997*  
*Environmentally Hazardous Chemicals Act 1985*  
*Environmental Trust Act 1998*  
*Fertilisers Act 1985*  
*Fisheries Act 1935*  
*Fisheries Management Act 1994*  
*Forestry Act 1916*  
*Forestry and National Park Estate Act 1998*  
*Heritage Act 1977*  
*Hunter Water Act 1991*  
*Local Government Act 1993*  
*Marine Parks Act 1997*  
*Marine Pollution Act 1987*  
*Mining Act 1992*  
*Murray–Darling Basin Act 1992*  
*National Environment Protection Council (New South Wales) Act 1995*  
*National Parks and Wildlife Act 1974*  
*Native Vegetation Act 2003*  
*Native Vegetation Conservation Act 1997*  
*Nature Conservation Trust Act 2001*  
*Non-Indigenous Animals Act 1987*  
*Noxious Weeds Act 1993*  
*Ozone Protection Act 1989*  
*Pesticides Act 1999*  
*Petroleum (Onshore) Act 1991*

*Plantations and Reafforestation Act 1999*  
*Protection of the Environment Administration Act 1991*  
*Protection of the Environment Operations Act 1997*  
*Radiation Control Act 1990*  
*Rivers and Foreshores Improvement Act 1948*  
*Rural Fires Act 1997*  
*Rural Lands Protection Act 1998*  
*Soil Conservation Act 1938*  
*Sydney Harbour Foreshore Authority Act 1998*  
*Sydney Water Catchment Management Act 1998*  
*Threatened Species Conservation Act 1995*  
*Uranium Mining and Nuclear Facilities (Prohibitions) Act 1986*  
*Waste Avoidance and Resource Recovery Act 2001*  
*Waste Recycling and Processing Corporation Act 2001*  
*Water Act 1912*  
*Water Management Act 2000*  
*Wilderness Act 1987*

#### **Appendix 4 – The commercial competitor**

Botteros v Pittwater Council and Butcher (1995) 89 LGERA 334

Centro Properties Ltd v Hurstville City Council & Anor (2004) 135 LGERA 257

Cook v Grafton City Council & Anor (1994) 85 LGERA 1

Danis Hotels Pty Ltd v Dubbo City Council & Anor (1991) 72 LGRA 35

Darling Casino Ltd v Minister for Planning & Sydney Harbour Casino Pty Ltd (1995) 86 LGERA 186

Franklins Ltd v Penrith City Council and Campbells Cash & Carry Pty Ltd [1999] NSWCA 134

Grace Bros P/L v Minister for Planning & Anor (1981) 44 LGRA 422

Guthega Development Pty Ltd v Minister Administering the National Parks & Wildlife Act 1974 (NSW) & Ors (1986) 7 NSWLR 353

Harris Farm Markets Pty Ltd v Ashfield Fresh Pty Ltd & Anor (2002) 121 LGERA 176

Lakeside Plaza Pty Ltd v Legal & General Properties No2 Ltd and Wyong Shire Council (1992) 76 LGRA 60

Marjen Pty Ltd v Coles Supermarkets Australia Pty Ltd & K-Mart Australia Ltd (1996) 90 LGERA 363

McConaghy Developments Pty Ltd v Tamworth City Council & Anor (1996) 89 LGERA 415

Melville v Craig Nowlan & Associates & Anor [2001] NSWLEC 109

Scott & Ors v Wollongong City Council & Anor (1992) 75 LGRA 112

Westfield Management Pty Limited & Anor v Gazcorp Pty Limited & (2) Ors [2004] NSWLEC 7

Woolworths Ltd & Kenlida Pty Ltd v Bathurst City Council and Austcorp No 71 Pty Ltd (1987) 63 LGRA 55

Woolworths Ltd v Campbells Cash & Carry Pty Ltd (1996) 92 LGERA 244

Woolworths Ltd v Pallas Newco Pty Ltd (2004) 136 LGERA 288

Woolworths Ltd v Warehouse Group (Australia) Pty Ltd (2002) 123 LGERA 341

#### **Appendix 5 – proceedings by an association or a concerned person from an association**

Bailey v Forestry Commission of New South Wales (1989) 67 LGRA 200

Blue Mountains Conservation Society Inc v Director-General of National Parks and Wildlife & (2) Ors [2004] NSWLEC 196

Breitkopf v Wyong Council (1996) 90 LGERA 269

Building Owners & Managers Assoc of Australia P/L v Sydney CC (1984) 53 LGRA 54

Byron Shire Businesses for the Future Inc v Byron Shire Council & Holiday Villages (Byron Bay) Pty Ltd (1994) 84 LGERA 434

Campbell on behalf of Lord Howe Island Preservation Movement v Minister for Environment and Planning (Unreported, No 40061 LEC, 24 June 1988)

Canterbury District Residents & Ratepayers Association v Canterbury Municipal Council (1991) 73 LGRA 317

Citizens Airport Environment Association v Maritime Services Board of New South Wales (1992) 78 LGERA 57

Coalcliff Community Association Inc v Minister for Urban Affairs and Planning (1999) 106 LGERA 243

Coffs Harbour Environment Centre Inc v Minister for Planning & Coffs Harbour City Council (1993) 80 LGERA 342

Corkill v Forestry Commission of NSW (1990) 71 LGRA 116

Engadine Area Traffic Action Group Inc v Sutherland Shire Council & Anor [2004] NSWLEC 264

Friends of Hay Street Inc v Hastings Council and Lesmont Pty Ltd (1995) 87 LGERA 44

Friends of South West Rocks Inc v Machro Pty Ltd (2004) 136 LGERA 198

Hospital Action Group Association Inc v Hastings Municipal Council (1993) 80 LGERA 190

Iron Gates Developments Pty Ltd v Richmond-Evans Environmental Society Inc (1992) 81 LGERA 132

Jarasius v Forestry Commission of NSW (1988) 71 LGRA 79

Kivi v Forestry Commission of NSW (1982) 47 LGRA 38

Loreto Normanhurst Association Inc v Hornsby Shire Council (2001) 122 LGERA 347

Mandalong Progress Association Inc v Minister for Planning (2003) 126 LGERA 408

Malcolm on Behalf of Maryland Residents Group v Newcastle City Council (1991) 73 LGRA 356

Neighbourhood Association DP 285121 v Murray Shire Council (2001) 117 LGERA 95

Nettheim v Minister for Planning and local Government and Bevelon Investments Pty Limited (Unreported, No. 40139. LEC, 16 August 1988)

No Dump Residents Association Inc v Collex Pty Ltd (No 2) [2005] NSWLEC 136

Over our Dead Body Society Inc v Byron Bay Community Association Inc (2001) 116 LGERA 158

Prineas v Forestry Commission of NSW (1981) 49 LGRA 402

Professional Fishers Association Inc v Minister for Fisheries (2002) 120 LGERA 61

Save Blue Lagoon Beach Action Group Incorporated v Kelvest Pty Ltd & Wyong Shire Council (1993) 81 LGERA 144

Save the Showground for Sydney Incorporated v Minister for Urban Affairs & Planning (1997) 95 LGERA 33

Scott and Ors v Wollongong City Council and Anor (1992) 75 LGRA 112

Sustainable Fishing and Tourism Inc v Minister for Fisheries (2000) 106 LGERA 322

Taylor and Anor v Hornsby Shire Council (1990) 69 LGRA 281

Timbarra Protection Coalition Inc v Ross Mining NL (1999) 46 NSWLR 55

Tinda Creek Spiritual & Environment Centre v Baulkham Hills Shire Council (1998) 100 LGERA 432

Valley Watch Inc v Minister for Planning and Ors (1994) 82 LGERA 209

Wolgan Action Group Inc v Lithgow City Council (2001) 116 LGERA 378

#### **APPENDIX 6 – concerned individuals**

Donnelly v Delta Gold Pty Ltd (2001) 113 LGERA 34

Donnelly v Solomon Islands Mining NL (2002) 121 LGERA 264

Fast Buck\$ & Anor v Dudley Pastoral Co Pty Limited & Anor [2001] NSWLEC 183

Rundle v Tweed Shire Council (1989) 68 LGRA 308

Rosemount Estates Pty Ltd v Cleland (1995) 86 LGERA 1

Vaughan-Taylor v David Mitchell-Melcann Pty Ltd (1991) 25 NSWLR 580

Williams v Barrick Australia Ltd (2003) 128 LGERA 80

#### **End Notes**

[1] "Politics", Bk V, Ch 1, sec 2

[2] *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 44

[3] See s 106(3) of the *Local Government Act 1906*

[4] The jurisdiction to grant declarations was authoritatively considered by Street J in *Sutherland Shire Council v Leyendekkers and Anor* [1970] 1 NSW 356

[5] s 587 *Local Government Act 1919*

[6] (1903) 1 Ch 109

[7] *Ibid* at 114

[8] See the discussion by McHugh J in *Bateman's Bay Local Aboriginal Land Council Land Council & Anor v The Aboriginal Community Benefit Fund Pty Ltd & Anor* (1998) 194 CLR 247

[9] (1981) 146 CLR 493

[10] Above n 2

[11] Above n 8

[12] Above n 9 at 527

[13] *Ibid* at 530-531

[14] Above n 2 at 42

[15] *Ibid* at 73

[16] *Ibid* at 74

[17] (1860) 29 Beav 144 [54 ER 581]

[18] *Ibid* at 152 [at 585]

[19] Above at n 8 at 260-261

[20] *Ibid* at 266

[21] *Ibid*

[22] *Ibid* at 276

[23] *Ibid* at 276-277

[24] Eg: in *Jararius v Forestry Commission of NSW* (1988) 71 LGRA 79 and *Kivi v Forestry Commission of NSW* (1982) 47 LGRA 38

[25] (1987) 13 FCR 306

[26] *Ibid* Lockhart J at 318

[27] *Ibid* Fisher J at 308

[28] (1989) 76 LGRA 200

[29] *Ibid* at 205

[30] *Ibid* at 206

[31] *Ibid* at 207

[32] (1994) 85 LGERA 270

[33] (1995) 85 LGERA 296

[34] (1995) 56 FCR 50

[35] *Ibid* at 67-68

- [36] Ibid at 67  
 [37] Ibid at 84  
 [38] (1996) 66 FCR 537  
 [39] Ibid at 567  
 [40] (1997) 74 FCR 142  
 [41] (1989) 68 LGRA 308  
 [42] Above n 40 at 152  
 [43] Ibid at 153  
 [44] Ibid  
 [45] (1999) 93 FCR 264  
 [46] *Grace Bros Pty Ltd v Willoughby Municipal Council & Ors* (1980) 44 LGRA 400  
 [47] (1962) NSWLR 747  
 [48] Above n 46 at 404  
 [49] Ibid at 405  
 [50] *Grace Bros Pty Ltd v Willoughby Municipal Council & Ors* (1981) 44 LGRA 422 at 433-434  
 [51] Australian Law Reform Commission, Report No 78, *Beyond the Door-Keeper: Standing to Sue for Public Remedies*, AGPS, Canberra, 1996 at 5  
 [52] Part IV of the Act  
 [53] Part V of the Act  
 [54] See s 6 of the Act  
 [55] s 71 *Land and Environment Court Act 1979*  
 [56] Fisher CM, *Cognate Environmental Planning Bills 1979* (NSW) (Second Reading), House of Assembly, NSW Parliamentary Debates (Hansard), 15 November 1979 at 3133  
 [57] (1985) 66 LGRA 306  
 [58] Ibid at 310-311  
 [59] Ibid at 313  
 [60] (1998) 193 CLR 72  
 [61] See s 20 *Land and Environment Court Act 1979*  
 [62] Preston BJ, *Environmental Litigation*, The Law Book Company Limited, Sydney, 1989 at 52  
 [63] (1980) 46 LGRA 250  
 [64] Ibid at 256  
 [65] (1984) 53 LGRA 54 and (1985) 54 LGRA 444  
 [66] Ibid at 449-450  
 [67] *Botany and Randwick Sites Development Act 1982*  
 [68] See *Woolworths Ltd v Campbells Cash & Carry Pty Ltd* (1996) 92 LGRA 244  
 [69] (2004) 136 LGRA 288  
 [70] See *Wednesbury* and the discussion of relevant principles in *Centro Properties Ltd v Hurstville City Council & Anor* (2004) 135 LGRA 257  
 [71] (1986) 7 NSWLR 353  
 [72] (1981) 49 LGRA 402  
 [73] Above n 24  
 [74] (1990) 71 LGRA 116 and (1991) 73 LGRA 126  
 [75] Above n 24  
 [76] (1997) 95 LGRA 33  
 [77] (1999) 106 LGRA 243  
 [78] (1998) 100 LGRA 432  
 [79] (2001) 116 LGRA 158  
 [80] [2004] NSWLEC 196  
 [81] (1982) 47 LGRA 269  
 [82] See *Parramatta City Council v Hale* (1982) 47 LGRA 319  
 [83] Above n 41  
 [84] (1995) 86 LGRA 1  
 [85] unreported, Land and Environment Court of New South Wales, 16 August 1988  
 [86] (1987) 70 LGRA 91  
 [87] (1986) 11 ACLR 337  
 [88] Above n 86 at 99  
 [89] (1977) 16 ALR 161 at 169  
 [90] Above n 86 at 100  
 [91] (1994) 82 LGRA 236  
 [92] *Richmond River Council v Oshlack* (1996) 39 NSWLR 622  
 [93] Above n 61  
 [94] Ibid at 79  
 [95] Ibid at 81  
 [96] Ibid at 113-114  
 [97] *Andrew Donnelly v Delta Gold Pty Limited & Ors* [2002] NSWLEC 44; *Carriage v Stockland (Constructors)* [2002] NSWLEC 218; *Engadine Area Traffic Action Group Inc v Sutherland Shire Council & Anor (No 2)* [2004] NSWLEC 434; *Melville v Craig Nowlan & Associates* (2002) 54 NSWLR 82; *Trindall & Ors v Minister for Aboriginal Affairs & Anor* [2004] NSWLEC 181; *Williams v Barrick Australia & Ors* [2004] NSWLEC 306  
 [98] This statement requires qualification having regard to recent amendments to the Act which provide that in

relation to Critical Infrastructure Projects, proceedings to enforce the Act may only be taken by the Minister or with his approval: *Environmental Planning and Assessment Amendment Act (Infrastructure and Other Planning Reform) Act 2005*: section 75T

[99] Many of these decisions are discussed in Bates G, *Environmental Law in Australia*, Butterworths, Sydney, 2002

[100] *C.R.A.P v Wyong City Council & Ors*, unreported, Land and Environment Court of New South Wales, McClelland CJ, 1982

[101] (1991) 74 LGRA 265