STANDING TO SUE UNDER FEDERAL ADMINISTRATIVE LAW

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"Generalizations about standing to sue are largely worthless as such."[1]

INTRODUCTION

This paper will examine the principles governing standing to seek judicial review under the Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act) and administrative review under the Administrative Appeals Tribunal Act 1975 (Cth) (AAT Act), with particular emphasis on standing problems in actions brought by individuals and organizations seeking to raise broad or non-traditional claims of public interest.

Even though the tests for standing under the ADJR Act and the AAT Act are formulated in different terms than the common law rules[2] and were specifically drafted to broaden restrictive common law requirements,[3] a review of decisions by the Federal Court and the Administrative Appeals Tribunal (AAT) shows that each has often limited itself to familiar common law concepts of standing, without clearly exploring whether such limits and the doctrines or policies which support them are appropriate to the form of review being exercised.

Before examining the ADJR and AAT decisions in detail and discussing their significance in light of the Australian Law Reform Commission (ALRC) report on *Standing in Public Interest Litigation*,[4] it is necessary to establish the background against which the statutory schemes and the ALRC proposals operate.

(1) *Standing of Non-traditional Plaintiffs Seeking Common Law Administrative Review in Australia*

Standing, or locus standi, is the term for the bundle of rules and concepts which determine who may bring and maintain legal actions. A party with standing can obtain judicial or administrative review. A party without standing cannot.[5]

Discussions of standing explicitly focus on the relationship of the party seeking relief to the subject matter of the action. Specifically, the focus is on the nature of the interest the plaintiff seeks to protect.[6] In Australia, the

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[1] Douglas J, *Assn of Data Processing Service Organizations* v *Camp* (1969) 397 US 150, 151

[2] Briefly, the common law requires a special interest in the subject matter. The ADJR gives standing to persons aggrieved. The AAT gives standing to persons whose interests are affected and to organizations in light of their purposes. See text below pp 320, 326, 337 and footnotes therein.

[3] *Tooheys Ltd* v *Minister for Business and Consumer Affairs* (1981) 36 ALR 64.

[4] Australian Law Reform Commission Report No 27: *Standing in Public Interest Litigation* (1985).

[5] *Ibid* para 20.

[6] *Australian Conservation Foundation v Commonwealth* (1980) 28 ALR 257; *Tooheys supra* n 3; *Re Control Investments Pty Ltd (No 1)* (1981) 3 ALD 74.

"special interest" test formulated by Gibbs J in *Australian Conservation Foundation* v *Commonwealth* (the *ACF* case)[7] is the currently authoritative test applied to plaintiffs in actions for declaration and injunctions who seek to raise broad public interest issues.[8]

In that case, the Australian Conservation Foundation, an organization whose objects included the preservation of the environment, made submissions opposing Reserve Bank approval necessary for a land development project in Queensland. The Environment Protection (Impact of Proposals) Act 1974 (Cth) and regulations thereunder required that the environmental impact statement (EIS) for the project be revised after receiving submissions or objections, and further required that the Minister consider such revised statement before rendering a decision on the project. In the instant case, the Minister approved the project before the revised EIS was completed.

ACF then sought various injunctions and declarations regarding the validity of the Minister's actions. As a basis for standing, ACF alleged a number of factors, including its purposes as an organisation, the involvement of some of its members in the location, the use by the general public of the location for outdoor purposes, and its own role as an objector in the proceedings.

The court examined several different standing tests, but held ACF had no standing under any available theory. Gibbs J stated that a person "having a special interest in the subject matter of the action" would have standing, and held that ACF did not meet this requirement:[9]

> However, an interest, for present purposes, does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or 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.[10]

The justices were all at great pains to point out that a belief, however strongly held, however long standing and sincere, whether asserted by an individual or an organization was not going to be sufficient.[11]

In some respects the most interesting aspects of the *ACF* case are the issues not discussed. Plaintiff alleged that ACF members used the area, apparently legitimately, in ways which would be detrimentally affected by the defendant's action.[12] The substance of this allegation, and its implications for standing in future cases, where members might sue on their own behalf, was not men-

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[7] *Ibid* 268, 270.
[8] The main features of this test are summarized by the ALRC report paras 125 and 126 at pp 65-69.
[9] The *ACF* case *supra* n 6, 268.
[10] *Ibid* 270.
[11] *Ibid* 270 *per* Gibbs J; 277 *per* Stephen J; 283 *per* Mason J.
[12] *Ibid* 261, 289.

tioned. This lapse is noteworthy in light of the court's discussion of United States cases which upheld standing on substantially identical allegations.[13]

This allegation was apparently, though never explicitly, dismissed on the basis of a common law rule that an organization cannot assert the interest of its members,[14] and would not have standing even if its members did.

Thus, by refusing to allow an organisation to assert either the interests of individual members or interests based on its own goals and objectives, and the characterization of ACF's interest as a mere belief, the court has denied standing in a case raising important issues about the accountability of government officials for their actions.

The reasons, in policy or jurisprudence, to support this position are not adequately discussed in the *ACF* case or in subsequent cases.

An important case after the *ACF* case is *Onus* v *Alcoa*.[15] The plaintiffs were aboriginals of a tribe from an area of land owned by Alcoa on which construction work had begun. The land included areas which were sacred sites within the definition of "relics" under legislation[16] making it a criminal offence to deface or destroy aboriginal relics.

Plaintiffs gave evidence of their involvement with the land, to the effect that plaintiffs went there sometimes and used the land to educate their children in the customs of their people.

The court looked to see if the plaintiffs had a special interest in the subject matter of the action beyond that of the general public. Such an interest was found, and the plaintiffs were held to have standing:

> The present is not a case in which a plaintiff sues in an attempt to give effect to his beliefs or opinions on a matter which does not affect him personally except in so far as he holds beliefs or opinions about it. The appellants claim not only that their relics have a cultural and spiritual significance, but that they are custodians of them according to the laws and customs of their people, and that they actually use them. The position of a small community of Aboriginal people of a particular group living in a particular area which that group has traditionally occupied, and which claims an interest in relics of their ancestors found in that area, is very different indeed from a group of white Australians associated by some common opinion on a matter of social policy which might equally concern any other Australian.[17]

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[13] *Ibid* 277. It is well recognized in the US that non-traditional interests ("aesthetic, conservational, and recreational, as well as economic" *Sierra Club* v *Morton* (1972) 405 US 727, 788); or extremely slight injury (*US* v *Scrap* (1973) 412 US 669: possible loss of recreational opportunities in public outdoor area); *Flast* v *Cohen* (1968) 392 US 83 (portion of taxes used for allegedly unconstitutional purpose); *Baker* v *Carr* (1962) 369 US 186, 204 (a fraction of a vote)) can be the basis for standing to bring a lawsuit where the actual purpose and effect is to litigate broader claims of public interest or social policy. It is clear that an organisation can have standing as a representative of its members who are injured, or who have a certain interest, though the organisation itself may suffer no injury; *Scrap; Sierra Club*. It is also clear that standing can exist in a particular plaintiff, whether an individual or organisation, to seek redress of harm which is identical to that of any or all members of the general public: "standing is not to be denied merely because many people suffer the same injury." *US* v *Scrap* (1973) 412 US 669, 687.

[14] *ACF* case *supra* n 6, 271; ALRC paras 125-126.

[15] (1981) 36 ALR 425.

[16] Archaeological and Aboriginal Relics Preservation Act 1972 (Vic).

[17] *Supra* n 15, 432 *per* Gibbs J.

Onus expanded the *ACF* case in an important way, because it recognized a non-traditional interest as a basis for standing. Nonetheless the court still felt compelled to characterize the interest in a fairly traditional way ("custodian"), and still did not resolve any procedural and doctrinal issues. For example, Gibbs J recognized that the court has discretion to hear the merits before resolving a standing challenge, and was critical of the determination of standing as a preliminary question by the lower court, but went on to decide standing "on such scanty material" anyway.[18] The propriety of using injunctions to enforce a criminal statute is brushed over,[19] as is the issue of adequacy of relief.[20]

Later cases applying the principles of the *ACF* and *Onus* cases to plaintiffs raising issues of general public concern are *Coe* v *Gordon*,[21] *Fraser Island Defenders Organization Ltd (FIDO)* v *Hervey Bay Town Council*[22] and *Tasmanian Wilderness Society* v *Fraser*.[23]

The plaintiff in *Coe* sought an order appointing himself as representative of aboriginal people in New South Wales and a further declaration that revocation of certain aboriginal reserves was illegal. To uphold standing, plaintiff pointed to his aboriginal ancestry and his involvement in various aboriginal right groups.

The court held that the plaintiff had no special interest in the subject matter of the action beyond that of a member of the general public. The court pointed out that the plaintiff had no particular interest in the land subject to revocation. There was no claim of detriment or damage to aboriginals in general or to him in particular. There were no allegations that the plaintiff had any involvement with the land in issue.

There was no discussion of broader analytical issues, or of procedural issues such as the standard or burden of proof required.

Another noteworthy state court case raising public interest claims is *Fraser Island Defenders Organisation Ltd* v *Hervey Bay Town Council*[24] *(FIDO)*. That case involved a challenge to the issue of a subdivision permit for Fraser Island. Plaintiff claimed that certain by-laws had not been observed in approving a subdivision plan. Had these procedures been followed, plaintiffs could and would have objected. Plaintiff further alleged its aims as an organization in preserving the natural state of the island and its business of running tours for profit to the island, whose unspoiled character was an essential feature of their profit making organization.

Standing was granted on the basis that running tours for profit was clearly a special interest which plaintiffs could show would be adversely affected by the subdivision.[25]

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[18] *Ibid* 433; see text below p 331-332; ALRC para 128.

[19] *Ibid* 437.

[20] Alcoa, as the landowner, could totally exclude plaintiffs from their sacred sites even if the court decided to prohibit destruction of relics. *Ibid* 432; see text below p 333-334.

[21] [1983] 1 NSWLR 419.

[22] [1983] 2 Qd. R. 72.

[23] (1982) 42 ALR 51.

[24] *Supra* n 22.

[25] *Supra* n 22.

There was no discussion of the crucial point raised in the *ACF* case, whether the organisation was asserting its own interest or that of its members, nor was there any discussion of analytical or doctrinal issues, merely an application of the special interest test in a traditional fashion, recognizing a fairly conventional economic interest.

If the previous cases are noteworthy for what they leave out, as well as for what they say, then *Tasmanian Wilderness Society* v *Fraser*[26] is particularly interesting. Plaintiffs in that case sought an injunction preventing defendants from considering approval of federal funds for the Gordon below Franklin dam, on the basis that such action was illegal under the Heritage Commission Act 1975 (Cth) and the Environment Protection (Impact and Proposals) Act 1974 (Cth). The court reached the merits and ruled against the plaintiffs on the substance of their claim. There is absolutely no discussion of standing principles at all, and no citation of any case on the point. Mason J simply recited plaintiffs' allegations regarding the harm alleged and their interest as a society and its "limited commercial interest . . . in selling articles relating to the region".[27]

It may be that none of the defendants challenged the plaintiff's standing because they assumed that the commercial interest alleged would be sufficient under the special interest test in light of *FIDO*. Possibly, the High Court is deliberately, though not explicitly, moving away from the *ACF* case.† Nonetheless, the case is similar enough to the *ACF* case on its facts to raise many of what the court perceived as serious objections to standing in that

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[26] *Supra* n 23.

[27] *Supra* n 23.

†The most recent expression of views by the High Court on standing is *Davis* v *Commonwealth* (1986) 68 ALR 18. In that case, a group of Aboriginals sought a declaration that certain sections of the Australian Bicentennial Authority Act 1980 (Cth) were invalid. The Defendants moved to strike out certain parts of the claim, mainly those relating to standing.

The Plaintiff's claimed standing on three grounds:

(1) Pecuniary interest in selling articles decorated with symbols subject to control by the ACT.
(2) Special cultural interest as Aboriginals under the standard established in *Onus* v *Alcoa*.
(3) Financial interest as taxpayers for whom the expenditure of public money on the Bicentennial would "increase the burden of revenue collection".

The matter was heard by Gibbs CJ, who applied the principles of the *ACF* case and *Onus*, through recognising that these cases were challenges to administrative action whereas *Davis* was a direct challenge to validity of a Commonwealth statute.

Standing on the first ground was clearly upheld as valid. As to the second ground, Gibbs CJ expressed difficulty "in accepting that the interest is other than emotional or intellectual", (23) but also stated that "plaintiff's argument cannot be dismissed as frivolous" and avoided expressing "any concluded view" at the preliminary stage. (24) This suggests that *Onus* may well be seen as a case limited closely to its facts rather than as a broadening of standing principles.

The most important aspect of the decision in *Davis* is the view expressed on taxpayer standing. Gibbs CJ referred first to *Attorney-General (Vic); ex rel Black* v *Commonwealth* (1981) 146 CLR 559, 588–90, as having left open the question of taxpayer standing in Australia, then reviewed developments in Canada, the UK and the US supporting taxpayer standing and concluded:

> It would not be right for me on this application to decide whether the fact that the plaintiffs are taxpayers gives them standing to challenge the validity of the Act under which public moneys have been and will be disbursed. The question is arguable and that is enough. (25)

If the claim of standing as a taxpayer is pursued and ultimately accepted, this would, of course, create a much greater opportunity for plaintiffs who wish to challenge government action on non-traditional or public interest grounds.

case, especially the role of organizations, a crucial holding of the *ACF* case not really touched on in the later cases.

(2) *Theory and Function of Standing Requirements*

The ALRC in its report has quite thoroughly identified and explained the significant weaknesses in the line of cases just reviewed.[28] For present purposes only a few observations are pertinent.

Australian courts have used standing rules to curtail public interest actions, generally in two ways: by narrowing the zone of interests protected and by limiting the role of organizations. In doing this, the courts have not clearly stated what, in theory or policy, is the basis for their decisions, nor do they adequately address the underlying doctrinal, procedural and policy problems raised by plaintiffs seeking standing to assert non-traditional interests or general public concerns.

There are many concepts outside the limited scope of the special interest test which are significant in determining who has or ought to have standing.[29]

Standing decisions may implicitly reflect constitutional limitations,[30] limitations inherent in judicial power especially in a system of separation of powers,[31] concerns about justiciability of the substantive issue,[32] assumptions about parties required for an adequate presentation of the issues in an adversary setting,[33] requirements of the law of rights and remedies,[34] or considerations of judicial economy.[35]

These concerns have been discussed thoroughly in the ALRC report and are summarized in a frequently cited passage in a leading United States decision *Flast* v *Cohen*.[36]

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[28] ALRC Chapter 4.

[29] ALRC paras 18-29; H M Hart and H Wechsler, *The Federal Courts and the Federal System* (eds P M Baker et al) (2nd ed 1973) 150-177; G Gunther and Dowling, *Constitutional Law* (8th ed 1970) 85-108.

[30] One sense in which judicial standing requirements may be said to be constitutionally compelled and jurisdictional is the requirement under Chapter III, s 77 of the Australian Constitution of a "matter". It is at least theoretically possible for a plaintiff to attempt to maintain an action whose subject is so remote from the plaintiff's interests that it would not constitute a matter. Thus, a federal court would lack jurisdiction to hear such a case. Similarly, it is possible that Parliament could enact legislation which attempts to authorise such actions. Presumably, such legislation would be unconstitutional, and any action brought pursuant to such legislation would be beyond the court's jurisdiction. In this sense, the requirement of a "matter" may impose an absolute minimum standing requirement which a court must enforce: the *ACF* case, (1980) 28 ALR 257, 286-287 *per* Mason J; ALRC paras 80-81. (Under the US Constitution, Article III, s 2 limits the judicial power of the federal courts to "cases" and "controversies". This limit is analogous to the "matters" limit in the Australian Constitution but is probably more restrictive: the *ACF* case 286 *per* Mason J)

[31] *Ibid;* ALRC paras 26-27.

[32] ALRC paras 26-27; *Flast* v *Cohen* (1968) 392 US 83.

[33] ALRC paras 253-254; *Baker* v *Carr* (1962) 369 US 186, 204.

[34] *Robinson* v *Western Australian Museum* (1977) 138 CLR 283; ALRC paras 89, 125 and 210-12; Hart and Wechsler *supra* n 29 156.

[35] ALRC paras 188-196; the *ACF* case, *supra* n 6, 292 *per* Murphy J.

[36] *Supra* n 13.

Standing is an aspect of justiciability and, as such, the problem of standing is surrounded by the same complexities and vagaries that inhere in justiciability. Standing has been called one of "the most amorphous [concepts] in the entire domain of public law". Some of the complexities peculiar to standing problems result because standing "serves, on occasion, as a shorthand expression for all the various elements of justiciability". In addition, there are at work in the standing doctrine the many subtle pressures which tend to cause policy considerations to blend into constitutional limitations.

> The fundamental aspect of standing is that it focuses on the party seeking to get his [sic] complaint before a federal court and not on the issues he [sic] wishes to have adjudicated. The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions": *Baker* v *Carr* (1962) 369 US 186, 204. In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable. Thus, a party may have standing in a particular case, but the federal court may nevertheless decline to pass on the merits of the case because, for example, it presents a political question.
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> Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. It is for that reason that the emphasis in standing problems is on whether the party invoking federal court jurisdiction has "a personal stake in the outcome of the controversy."[37]

Though it may not always be necessary to sort through all these factors to decide any particular case, a consistent failure to recognize their existence in a systematic way has led to an inconsistent pattern of results within the common law[38] and a confused state of affairs in standing decisions in statutory schemes for administrative and judicial review.

The ALRC has responded to these problems with a full examination of the theoretical and practical concerns which underlie standing rules. In light of its observations and criticisms of the present state of the law, the Commission recommends that any person who is adequately able and willing to

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[37] *Ibid.* The US cases involve fairly extensive discussion and disagreement about the appropriate jurisprudential and constitutional bases for their decisions. They more clearly relate their conclusions about standing to underlying principles about the nature of judicial power. They suggest that there is no limit inherent in the nature of judicial power in a system of separation of powers which requires that lawsuits be brought by a party which has a bona fide traditional legal interest. They also demonstrate that adequate adversary presentation of issues can be achieved between parties who lack traditionally recognized legal interests. Hart and Wechsler *supra* n 29, and *supra* n 13. This is not to suggest that the US cases are intended as a model in analysing standing. Indeed "there is a general belief in the US . . . that the Supreme Court doesn't really understand the concept either." Bronstein, "An American Perspective on *ACF* v *Commonwealth* and the Status of Environmental Law in Australia" (1982) 13 FLRev 76, 80.

[38] "Because Australian courts have adhered to traditional assumptions as to the respective roles of private plaintiffs . . . they have not often addressed the basic question whether a personal stake in the litigation is necessary at all for private plaintiffs. The judicial discussion of standing . . . has been generally as to the nature of the personal stake required not as to whether a personal stake should be required at all." ALRC para 209.

represent the public interest may bring an action (para 252, 253) unless such person is "merely meddling" (para 252). The intent to change current law and practice is emphasized by the recommendation that there be a presumption in favour of standing (para 259) and that standing be decided as part of the merits and not as a preliminary matter (para 262).

To fully evaluate the ALRC proposals, it is useful to look closely at previous legislative schemes for simplifying or broadening standing. The ALRC itself relied in part on interpretations of the open standing requirements under trade practices legislation:

> . . . where the courts have been called on to interpret a statutory provision as to standing which does not require a personal stake in the litigation, they have emphasised that the provision should be interpreted literally and without adherence to traditional assumptions as to the need and the justifications for such a requirement.[39]

However, the following examination of the ADJR Act and AAT Act decisions show that, in spite of clear legislative direction to broaden standing, both the Federal Court and the AAT have relied on common law restrictions on standing. They have failed to examine whether or why those common law standing principles have continued to have validity in the context of statutorily defined schemes of judicial and administrative review. They have not independently developed a clear view of the principles which ought to govern standing in their particular context. This experience must be considered carefully in evaluating the ALRC recommendations.

1. STANDING UNDER THE ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) ACT 1977 (CTH)

(1) *Introduction*

The ADJR Act sets up broad grounds for judicial review of the actions of Commonwealth officials. The type of review available in many respects duplicates that available under common law avenues of review, but the grounds of review are now clearly set out, and somewhat expanded.[40]

Besides specifying grounds for review, Parliament has also specified a test for standing to seek the review made available in this statutory scheme which is different from the tests used to determine standing in common law actions.

The basic principle of the ADJR Act with respect to standing is the notion of a "person aggrieved". In stating who is entitled to seek review, s 5(1) refers to a person aggrieved by a decision, s 6(1) to a person aggrieved by conduct in relation to a decision, and s 7(1) to a person aggrieved by failure to decide.

A "person aggrieved" is also entitled to seek reasons for certain government actions (s 13(1)), subject to the Federal Court's power to declare a person not entitled to make such a request (s 13(4A)(6)).[41]

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[39] ALRC para 209.

[40] D C Pearce, (ed), *Australian Administrative Law Service* 2091 ff; G A Flick, *Federal Administrative Law* (1983).

[41] Note that the ALRC has recommended that s 13 be retained in its present form and that standing to seek reasons *not* be broadened in accordance with the general recommendations.

The one place where the ADJR Act falls away from the person aggrieved standard is in s 12 which gives "persons interested" the right to seek to be made a party to proceedings already under way.

The statutory provisions themselves say nothing explicit about a case where an organisation or an individual seeks review which raises the kinds of political and social questions which came up in the *ACF* case and cases following it and in the US cases. Nor has a case arisen under the ADJR Act which clearly raises these issues. Consequently, the problems which troubled the *ACF* case of the role of organizations and the nature of the interests protected have not yet arisen under the ADJR Act.

Other procedural, analytical and doctrinal problems lurking in standing decisions do arise, but they are rarely discussed more than superficially. Usually in developing and applying the ADJR Act standing tests, the court has stayed with a conventional analysis based closely on the common law restrictions, in spite of clear legislative intent to broaden standing.[42]

The ADJR Act empowers the Federal Court to grant review to persons aggrieved, and it is this term which has received the bulk of attention.

The only statutory elaboration of the meaning of person aggrieved is in s 3(4) which states that a person aggrieved "*includes* . . . a person whose interests are adversely affected . . ." (emphasis added). The formulation leaves it "open for the court to hold that other persons not falling within the description contained in the subsection are to be treated as persons aggrieved for the purposes of the Act".[43] It does not appear, however, that any court has relied on this statutory interpretation point in applying or determining the scope of the meaning of "persons aggrieved".

(2) *Leading Interpretation: Tooheys Case*

The leading case defining "person aggrieved" under the ADJR Act is *Tooheys Ltd* v *Minister for Business and Consumer Affairs*.[44] In that case an importer acting on behalf of the applicant Tooheys had been obliged to pay a 40% duty on items imported. Tooheys paid this additional sum to the import agent, then sought to directly challenge the duty assessment itself.

The initial standing question was raised on the grounds that the import agent paid the duty, and if the duty were improper, it was the import agent who would receive any refund. Thus, it was argued, Tooheys was not in any way directly affected by the government action it was seeking to overturn.

In ruling on the matter, Ellicott J upheld the plaintiff's standing and discussed the person aggrieved standard in terms that are widely cited in later cases:

> The words "a person who is aggrieved" should not, in my view, be given a narrow construction. They should not, therefore be confined to persons who can establish that they have a legal interest at stake in the making of the decision. It is unnecessary and undesirable to discuss the full import of the phrase. I am satisfied

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[42] *Tooheys Ltd* v *Minister for Business and Consumer Affairs, supra* n 3 (on other grounds (1982) 42 ALR 260).

[43] D C Pearce, *supra* n 40, 2104.

[44] *Supra* n 3.

> from the broad nature of the discretions which are subject to review and from the fact that the procedures are clearly intended in part to be a substitute for the more complex prerogative writ procedures that a narrow meaning was not intended. This does not mean that any member of the public can seek an order of review. I am satisfied, however, that it at least covers a person who can show a grievance which will be suffered as a result of the decision complained of beyond that which he or she has as an ordinary member of the public. In many cases that grievance will be shown because the decision directly affects his or her existing or future legal rights. In some cases, however, the effect may be less direct. It may affect him or her in the conduct of a business or may, as I think is the case here, affect his or her rights against third parties.[45]

This passage clearly states a policy that the ADJR Act standard of "persons aggrieved" should not be given a narrow construction, and in its holding recognizes an indirect effect as giving sufficient grounds for standing. However, by continuing to stress the need for a grievance beyond that of an ordinary member of the public and by referring to business interests and legal rights as examples, the judgment forms a basis for the Federal Court to continue to apply the common law limits excluding persons seeking to raise intangible or non-traditional interests.[46]

It may well be that this language in one of the first important cases defining "person aggrieved" has been sufficient to deter public interest groups who wish to raise broader questions, and to send them back to the common law courts or to the AAT.[47]

Later applications of this language from *Tooheys* case suggest that the court still relies heavily on common law principles limiting standing when applying the ADJR Act statutory standard, without considering whether the reasons for the restrictions chosen by a common law court are necessarily applicable to a court created by statute with a particular substantive jurisdiction.[48]

(3) *Early Cases Denying Standing*

A case refusing relief on the basis of lack of standing is *Fowell* v *Ioannou*.[49] The applicant was hired by a Commonwealth agency for a temporary position for a specified term. The director of the agency which employed the applicant wrote a letter to the applicant referring to the applicant's incompetence and stating that the employment would end when the original term expired and that there would be no renewal either of the

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[45] *Ibid* 290.

[46] The ALRC confirms this characterisation to some extent in its brief comments on the ADJR Act. Though it characterises the remarks in *Tooheys* case as a "liberal interpretation", the report also points out that "The meaning given to 'person aggrieved' . . . seems very close to the special interest test required . . . under the general law." ALRC para 142.

[47] *Tooheys* case does at least touch upon significant procedural and analytical points which arise in determining standing challenges, including whether standing is to be determined as a preliminary matter solely on allegations or whether evidence must be taken and what standard of certainty that evidence must reach. See discussion p 331-332.

[48] Indeed, the *ACF* case itself clearly recognized that courts interpreting statutory grants of standing have greater leeway. It was on this basis that the *ACF* case distinguished earlier cases such as the *National Trust of Aust* v *Aust T & G Mutual Life Assurance Society Ltd* [1976] VR 592 and the *ACF* case *supra* n 6, 280.

[49] (1982) 42 ALR 491 (on other grounds (1984) 52 ALR 460).

position or of the applicant for that or any similar position. Citing *Tooheys* case the Federal Court held that the applicant was not a person aggrieved by the actions of the Director. The reasons are not clearly stated but the decision appears in part to rest upon the inability of the Director to extend the employment upon his own authority. In dicta, the court goes on to suggest that had someone other than the respondent been employed to perform services previously performed by the respondent, it was possible that the respondent would be a person aggrieved by the decision to employ that person and would have standing to bring an application to challenge such appointment under the ADJR Act.

It is hard to imagine someone who fits the notion of a person aggrieved better than a person whose employment has been terminated, especially when the termination is accompanied by a harsh statement of poor performance. It may be that *Fowell* is confusing the remedies problem with standing. If, in fact, it was not within the power of any of the parties before the Court to continue the applicant's job, there may have been no order the Federal Court could make.[50]

A second case which refused relief on the grounds of standing is *Vangedal-Nielsen* v *Smith*.[51] In that case, the court ignored the substance of the interests among the parties and chose instead to rely entirely on a technical feature of proof. Mr Vangedal-Nielsen was the holder of an overseas patent. He applied for an Australian patent on the same device. During the time this patent application was pending, the product was licensed to certain manufacturers in Australia. The stated licensor was not Vangedal himself, but a company, Vangedal-Plast ApS, operating under his name. While the patent application was pending, the application was challenged by a company which claimed a pre-existing license on the product. The actual issue before the court was an application for extension of time for this company to oppose the patent sought by Vangedal himself.

The court found standing on the part of Mr Vangedal-Nielsen himself to oppose the extension of time. However, the licensees who were joined as applicants opposing the extension of time were found not to have standing. The reason given for this ruling is that the licensees were not shown, in any explicit proof, to have any relation with Mr Vangedal-Nielsen himself or his patent application. The court stated that "no evidence was before the examiner or before me of any relationship between Vangedal-Plast and Mr Vangedal-Nielsen".[52]

This case can be explained in a number of ways. One is to describe it as a very narrow reading of standing rules. A second is to see it as reflecting a rule about the sufficiency of proof required to show standing. A third is that the courts are inclined to read standing narrowly in applications involving a procedural question. Had a substantive issue been involved, it is possible that the court might have been somewhat more realistic in its assessment of the relationship of parties and the actual interests involved.

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[50] See further discussion on this point below p 333.
[51] (1981) 33 ALR 144.
[52] *Ibid* 147.

(4) *A Broad Application of Standing Principles*

One case which does appear to go beyond the common law standing limitations in its application of the person aggrieved standard is *Hawker Pacific Pty Ltd* v *Freeland*.[53] In that case Hawker was one of seven companies which had registered interest in a public invitation by the Department of Aviation to supply aircraft. The department then invited tenders from Hawker and three others. On this information it determined that Hawker and one other tenderer had the only suitable aircraft. The contract was ultimately awarded to the competitor. Hawker then applied under the ADJR Act for various orders that certain aspects of the department's procedures were invalid or incorrect.

The court stated as

> trite law that the applicant must suffer as a result of the decision complained of beyond the suffering of an ordinary member of the public. The mere fact that the applicant and the third respondent were business competitors does not make the former a person aggrieved.[54]

This statement about the standing of business competitors is a conventional though criticised common law principle.[55]

However, the court did find that Hawker was a person aggrieved. The court pointed to the "practical considerations . . . by virtue of its submission of a tender. The cost of tendering and the volume of documentation alone indicate this".[56] The court goes on to say that "the applicant's claim to be a person aggrieved is supported by its receipt of an invitation to tender. This selective invitation initiated the applicant's commitment to prepare a tender and placed it far beyond the position of a member of the public".[57] While the court's reasoning distinguishes Hawker from any member of the public, it does not necessarily distinguish the common law rule denying standing to a business competitor. Thus, it appears that *Hawker* may go beyond the common law on this one issue.[58]

(5) *Examples of Typical ADJR Act Standing Decisions*

In general, other cases interpreting the person aggrieved standard of the ADJR Act are simply examples of interests that may well have been protected under conventional standing rules, though they may raise analytical or procedural problems which merit discussion.

Ralkon Agricultural Pty Ltd v *Aboriginal Development Commission*[59] was a dispute among various government sponsored aboriginal groups regarding the title to land. Ralkon had been farming the land under a vague arrangement with the Point McLeay Council and the Commonwealth

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[53] (1983) 52 ALR 185.
[54] *Ibid* 1910.
[55] ALRC para 126.
[56] *Hawker supra* n 53, 192.
[57] *Ibid.*
[58] Note *ACT Health Authority* v *Berkeley Cleaning Group Pty Ltd* (1985) 7 ALD 752. In that case, an action by a losing tenderer for a cleaning contract, the Court refused leave to amend to include the question whether the loser was a person who is aggrieved.
[59] (1982) 43 ALR 535.

Aboriginal Land Fund Commission (ALFC). The Aboriginal Development Commission (ADC), a successor to the ALFC, proposed changes in the title and/or the lease to the land. Ralkon objected and applied for review under the ADJR Act. The defendants argued that Ralkon could not have any interest in the land anyway, since it was not an aboriginal body. The court found that Ralkon, under the proposed actions of the government bodies, risked ejectment from the land and therefore was a person aggrieved.[60]

In *Canberra Labor Club Ltd* v *Hodgman*[61] the club sought an order stopping the sale of federal land situated between the applicant's club and the lakeshore. If the land sale went through and the land were built upon, this would destroy the applicant's view of the lake. Without discussion, the club was held to be a person aggrieved.

In *Parkes Rural Distributions Pty Ltd* v *Glasson*[62] a certificate was issued the effect of which was to require repayment by the applicant of approximately $150,000 which had previously been paid in connection with a petroleum purchase scheme. The major issue in the case was whether the applicant was a person aggrieved under a *Commonwealth* enactment, since the obligation to repay was an obligation to pay to the State of NSW rather than to the Commonwealth. The court held that the applicant was a person aggrieved since the amount of over payment was determined under a Commonwealth scheme even though the states were the actual participants in the scheme.

In *Safadi* v *Minister for Immigration*,[63] the court held that a person subject to a deportation order was clearly a person aggrieved.

In *Rice Growers Co-operative Mills Ltd* v *Bannerman*[64] the applicant had received a request for documents under the Trade Practices Act. The court found that the decision to issue this request for documents had a substantial effect on the applicant's company, including a disclosure of confidential information, the trouble and expense of preparing the documents, and the risk of penalties for false or misleading information. The court held that this impact was sufficient to establish an interest or grievance beyond that which would be suffered by a member of the public and sufficient to confer standing. This is similar to one aspect of the holding in *Hawker Pacific Pty Ltd* v *Freeland*[65], where the effort involved in responding to the Government's invitation to tender for the building of airplanes was held to be sufficient to confer standing.

(6) *Adequacy of Evidence to Support Standing*

There is a procedural point which previously arose in common law cases and in *Tooheys* case: how much evidence, and to what standard or proof, will be required to support standing. In *Tooheys* case the Court held that

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[60] See further discussion below p 333-334.
[61] (1982) 47 ALR 781.
[62] (1983) 48 ALR 601.
[63] (1981) 38 ALR 399.
[64] (1981) 38 ALR 535.
[65] *Supra* n 53.

some evidence establishing a serious non-frivolous claim of reimbursement was a basis for standing, even if the right were not certain.

> The question whether an applicant is a person aggrieved is one of mixed law and fact and in many cases would be best determined at a final hearing when all the facts are before the court and the court has the benefit of a full argument in the matter . . .
> . . . I have formed the view that it is unnecessary for the applicant to show that it has a right to a refund in the circumstances mentioned in order to establish locus standi to bring these proceedings.
> . . . the applicant will be able to assert a claim for a refund against the importer. On what is before me, I am satisfied that this would be a serious and not a frivolous claim and one which the applicant, on some legal ground, might be well advised to pursue. In these circumstances, I think it clearly has a grievance . . . over and above that which it would have as an ordinary member of the public. The fact that it might pursue the claim and lose is not, in my view, to the point.[66]

In *Kioa* v *Minister for Immigration and Ethnic Affairs*[67], an applicant was a one year old infant Australian citizen whose parents were subject to a deportation order which they could not challenge directly on their own behalf. The infant, though not subject to the deportation order, was of necessity compelled to leave Australia with its parents.

The court ruled that the infant was a person aggrieved and did have standing to challenge the deportation order against its parents. This determination was based on the statement by the applicant's mother that the infant would be economically, socially and educationally disadvantaged by being brought up in Tonga as compared to being brought up in Australia, but if left in Australia to enjoy the benefits of Australian citizenship, would be deprived of its right to enjoy an upbringing by its parents.

In *Kioa*,[68] virtually no evidence of the facts or details underlying the interest alleged was required beyond the mother's bare assertions. These two cases are in contrast to *Vangedal*,[69] where direct proof of an issue which could have been inferred easily from the available facts was required. The issue was also raised in *Onus*,[70] where the court expressed some concern about determining standing on the basis of inadequate evidence.[71] In *FIDO*,[72] the court expressed a similar concern about the meagre but uncontradicted evidence supporting standing.[73]

None of these cases, however, presents a thorough analysis of principles upon which the procedural aspect of the decision was based. There may be reasons to accept slim evidence for standing sometimes, while other situations may require a stronger showing, but none of the cases gives any guidance

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[66] *Supra* n 3, 79.
[67] (1984) 53 ALR 658.
[68] *Supra* n 67.
[69] *Supra* n 51.
[70] *Supra* n 15.
[71] *Ibid* 431.
[72] *Supra* n 22.
[73] *Supra* n 22, 79.

as to when different requirements will be imposed, or which kind of case is appropriate for which view.

The ALRC has directly raised this problem. The state of present law is characterized as one where the court has a discretion to treat standing either as a preliminary question or as one on the merits.[74] Reasons are given supporting and criticizing each approach.[75] The recommendation is that:

> standing should not be determined as a preliminary or interlocutory matter unless the court considers it desirable to do so for special reasons in the particular circumstances of the case. The normal approach should be to reserve standing for determination along with the merits.[76]

This recommendation still leaves the issue in the discretion of the court, but weights the discretion against an early determination of standing. It is an improvement on present law in that it provides some specific criteria for courts (and advocates) to point to in choosing when a standing issue should be raised or decided. As a practical matter, its effect would be to reduce the significance of standing as a barrier to obtaining a hearing on the merits.

(7) *Standing and Adequacy of Remedies*

In *Doyle* v *Chief of General Staff*,[77] a major in the army was rejected for promotion and sought an extension of time to apply for review of the decision. The court directly addressed the relationship between the remedies available and standing requirements.

The respondents moved to dismiss on the basis that Doyle was not a person aggrieved and that there was no relief the court could grant since Major Doyle was in fact retired from the military when the case was actually heard.

The court refused to determine either issue at the early stage raised. Commenting that "defendants are not contending the court has no jurisdiction",[78] the court quoted *Tooheys* case in support of its refusal to determine the standing issue and stated that "it is not correct at a preliminary stage to be too concerned regarding the lack of material benefit to the applicant of the court's decision".[79]

This ruling in *Doyle* is similar to that in *Tooheys* case itself where the court found that a possibility of obtaining reimbursement was sufficient to confer standing but that certainty that the court's ruling would provide a remedy was not required. "[T]he fact that it might pursue the claim and lose is not, in my view, to the point".[80]

This is also similar to the ruling in *Onus*. Even though Alcoa had the power to exclude the aboriginals from their land, the court still felt there was a cultural interest which the aboriginals had in the land which the court should act to protect. "Once the appellants show that they have a sufficient interest,

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[74] ALRC para 128.
[75] ALRC para 261.
[76] ALRC para 262.
[77] (1982) 42 ALR 283.
[78] *Ibid* 287; Presumably, "jurisdictional" in this sense means within the scope of the judicial power granted by the ADJR Act. See text below p 335.
[79] *Ibid* 288.
[80] *Supra* n 3, 80.

they do not lose standing to bring an action because the only remedy which they may obtain may afford less than complete relief."[81]

A similar point was raised in *Ralkon*,[82] where the applicant was asserting a grievance based on an interest in land. The court rejected the respondent's contention that the applicant, a non-aboriginal group, could not have any interest in the land under dispute. In contrast to these cases is *Fowell*,[83] where the remedies issue seemed dispositive.

None of these cases, though ruling on the issue, ever really confronts or analyses the implications of or presents a coherent structure for what is obviously a recurrent problem.[84]

(8) *ADJR Act s 12: Intervention by "Person Interested"*

Besides the person aggrieved standard for persons seeking review, the ADJR Act has set up the standard of a "person interested" as the rule for who may seek to intervene.[85]

Clearly, "person interested" is a broader verbal formula than "person aggrieved", and should include persons favorably affected. However, there is no definition of "person interested" in the statute itself, and no particular indication why a different standard was chosen for standing to intervene.

There are only two cases which touch on the person interested standard for intervention in s 12, and they are not particularly helpful, though one of them comments about an organization seeking standing.

Accident Insurance Mutual Ltd v *TPC*[86] involves intervention, but there is no special discussion of the content of the phrase "person interested" as distinguished from "person aggrieved". The facts of the case are not particularly illuminating, since the situation of the parties clearly meets traditional notions of sufficiency of interest.

Citicorp obtained a favorable determination from the Trade Practices Commission on a trading arrangement. Nineteen months later Accident Insurance Mutual asked the Trade Practices Commission to revoke the approval. The Commission refused. The insurance company applied for review of the refusal to revoke the approval. Citicorp applied under s 12 to be joined as a party in that review. The insurance company objected and argued that Citicorp was not a person interested, since, if the appeal were granted, Citicorp would be a participant in a later hearing so that Citicorp would be heard eventually. The court rejected that argument, ruling that as Citicorp had the benefit of the present approval, any steps regarding that approval would involve a legally cognizable interest. The court went so far as to say that joinder would be required in the interests of justice.

A more recent case involving judicial comment on standing under s 12 is *ABC Staff Association* v *Bonner*.[87] The procedural history of the case is

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[81] *Supra* n 15, 433.
[82] *Supra* n 59.
[83] *Supra* n 49.
[84] The ALRC touches on it only very briefly in paras 26-29 contrasting standing with justiciability and hypothetical questions.
[85] ADJR Act s 12.
[86] (1983) 51 ALR 792.
[87] (1984) 54 ALR 653.

complex and not clearly reported. The underlying dispute was between two persons, one of whom had been provisionally promoted to a vacant position, the second of whom had not received the promotion and had appealed the decision to the ABC Appeals Board. The appeal to the Federal Court apparently rested on the basis that the Promotion Appeals Board which heard the challenge in the first instance was improperly constituted.

Stautory provisions governing appointment of persons to the ABC Promotions Appeal Board require the chairman of the Board to seek nominations from the staff association or registered industrial organisation for the vacant position which is the subject of the appeal. Both the successful applicant and the opponent were members of the Association of Professional Engineers Australia (APEA). However, the Chairman asked for nomination from the ABC Staff Association (ABCSA) rather than the APEA. At some point both industrial organizations became participants in the appeal.

The only judge who commented on the standing issue was Kirby J in dissent on the other substantive issues. He assumed the Staff Association was made a party under s 12 and discussed the Association's standing to appeal:

> [I]t is clear that s 12 of the Judicial Review Act is a beneficial provision. It ought not to be construed narrowly so as to undermine the legislative intent. In the present case, ABCSA might be regarded as "interested in a decision" on a number of bases, including the legitimate industrial claim to assert the appropriateness of its representation of staff members generally and engineers in particular in the promotions appeals of the ABC. Clearly, if excluded from such appeals, either generally or in particular cases, its claims to represent staff members and engineers in particular might, in the eyes of some employees in the ABC, be diminished. In these circumstances, *even on orthodox tests of interest for the purposes of standing* it seems clear that the appellant had the standing to make the application contemplated by s 12(1) of the Judicial Review Act (emphasis added).[88]

Kirby J seems to base the association's standing, at least in part, on an abstract interest related to the role and goals of the organization and its status as a representative of its members. This, of course, goes well beyond the "orthodox tests of interests" which is required by the *ACF* case,[89] *Tooheys* case[90] and even by some of the AAT cases, with its very dramatically broader standing rule for organisations.[91]

Kirby J also recognizes the jurisdictional aspect of standing: "Where an issue going to the court's jurisdiction arises . . .".[92] However, he does not elaborate on this, though he presumably means jurisdiction in the sense of statutory authorisation. The Federal Court is created by statute and empowered to hear actions brought under that statute only by parties with a certain interest defined in that statute. Review sought by a person whose interest is inadequate will be beyond the jurisdiction of the court.

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[88] *Ibid* 665-666.
[89] *Supra* n 6.
[90] *Supra* n 3.
[91] It is possible that Kirby J could have been referring to some special status for industrial organizations; see Murphy J in the *ACF* case. *supra* n 6, 290-291.
[92] *ABC. Supra* n 87, 665.

(9) *ADJR Standing: Conclusion*

So far, the Federal Court under the ADJR Act has escaped the obvious problems raised by the public interest law suits which have plagued the common law courts.[93] *ABC* v *Bonner*[94] is the only ADJR Act case involving an organisation as such and that case arose under the person interested standard of s 12 and was not a significant aspect of the result of the case.

There have been several cases which implicitly raised significant procedural, if not doctrinal questions about the nature of standing. Unfortunately, treatment of these issues in the ADJR Act cases has generally been superficial at best and has not advanced or added much to the development of a coherent doctrine of standing analysis. In spite of a clear policy to expand access to the courts, only one case even arguably does so (*Hawker*).[95] Cases under the ADJR Act have stayed solidly within the common law analytic framework, requiring harm to a narrow range of interests as the basis to confer standing on a party seeking to challenge government action.††

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[93] There are, of course, other possible explanations for this pattern. It may be that public interest groups simply have not challenged the Federal Court to expand standing to permit non-traditional plaintiffs. Or it could be a conscious choice by the court to keep the scope of the definition of person aggrieved narrowly defined since an expansion of the meaning of this term to broaden standing to seek review would automatically expand the range of persons who could compel a statement of reasons, since both are based on the person aggrieved standard. See the ALRC discussion of the problem. ALRC para 269 and p 327-328 above.

[94] *Supra* n 87.

[95] *Supra* n 53.

†† One recent decision by the Full Court of the Federal Court suggests that this summary may not be entirely correct. In *Ogle* v *Strickland* (1986) 11 FCR 462 (reversed on appeal to Full Court, (1987) 71 FLR 41), an Anglican Priest and a Roman Catholic Priest challenged the registration of an imported film on the basis that it was blasphemous, a ground for exclusion under Reg 13 of the Customs (Cinematograph Films) Regs 1956 (Cth). The basis for standing was that:

> the film had desecrated fundamental Christian beliefs and teaching and that ministers of religion had a special interest, and thus a greater interest than an ordinary member of the community, in preventing such a film being shown if it was unlawful under the relevant regulations to allow its importation. (471)

At first instance, Sheppard J dealt with the standing issue at some length and very much in the manner suggested in the preceding summary. First, concern was expressed about the stage at which standing must be determined and the standard of proof required:

> I have given some consideration as to whether I should make a direction that a question as to the standing of the applicants to sue be tried separately but, on reflection, have decided not to take that course. In those circumstances it is important that I bear in mind that for the respondents to succeed they need to demonstrate that on no basis can it be held that ministers of religion have a sufficient interest to maintain that a film which they claim to be blasphemous should not have been approved and registered by the respondents. (471)

Sheppard J then expressed the clear view that standing decisions under the general law were appropriate in determining the scope of standing under the ADJR statutory test:

> Although there needs to be a degree of caution exercised in applying to applications under the Act authorities decided under the general law, it would seem to me that the general law authorities are of relevance in the interpretation of the words, "a person aggrieved" in the Act, simply because the Act was intended to provide a more streamlined alternative for judicial review of administrative action in the Commonwealth field. If it had been intended to affect the long established approach of the courts to this problem, one would have expected appropriate language to indicate clearly that this was the legislature's intention. There is, in my opinion, no such language used. Furthermore, the test propounded by the judges of this Court in the decisions earlier cited do not suggest that the position is very different from what it is under the general law. I should therefore regard the decisions of the High Court

2. STANDING BEFORE THE ADMINISTRATIVE APPEALS TRIBUNAL

(1) *Introduction*

The Administrative Appeals Tribunal Act (AAT Act) presented enormous possibilities for expanding the range of parties who could seek review of government actions. The Tribunal set up in the Act is not a part of the judicial branch[96] and is empowered to review administrative decisions on their merits.[97] Because the Tribunal is not a court[98] it is not subject to the Constitutional limit of s 77 to hear only "matters". Similarly, because it does not exercise judicial power, it is not necessarily limited by any of the jurisprudential concerns implicit in the Australian cases and explicit in the US cases, such as a concern for separation of powers[99] or justiciability.

The only mandatory standing limit for the AAT is contained in the terms of the statutory enactment itself. The basic principle with respect to stand-

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to which I have referred, and the English cases upon which they are based, as indicative of the approach to the problem which the Court should adopt. (470)

It was argued in an analogy to *Onus* that plaintiffs should have standing to prevent desecreation of sacred or spiritual values of which they were teachers. Sheppard J rejected this argument stressing the proprietary type interest shown by the Aboriginals in *Onus* Sheppard J concluded:

I have reached the clear conclusion that this case is not one in which the standing of the applicants to sue should be recognised. Notwithstanding their special position as ministers of religion, I do not think that they stand in any different position from countless other members of the community who, with varying degrees of commitment, profess the Christian faith. That circumstance, coupled with the absence of any threat to any proprietary or possessory interest, persuades me that there is no conclusion openother than that standing to sue should be denied. (472)

On appeal to the Full Court, the decision was unanimously reversed. Fisher J, Lockhart J and Wilcox J all agreed that the spiritual concerns of the plaintiffs put them in a significantly different posiion from other members of the community (Fisher J 43, Lockhart J 52, 53, Wilcox J 59). Fisher and Lockhart JJ based this conclusion on plaintiffs' status as priests and teachers, whereas for Wilcox J their interest as Christians was sufficient.

All three judges were conscious that they were broadening the scope of standing under the ADJR and gave extensive consideration to many of the aspects of standing raised in this paper and in the ALRC report. They seemed to rely on decisions under the general law as a source of a *broader* standing rule than would ordinarily be available to persons aggrieved. Wilcox J expressed concern that the Federal Court not "lag behind any expansion of attitude which is occurring". (55)

The "floodgates" argument was rejected, though some concern was expressed that expanded standing for actions under s5 would also expand the class of persons who could seek reasons under s13. (Lockhart J 49, 50).

One factor important to both Fisher and Lockhart JJ was the possibility if standing were denied to these plaintiffs, that no one except the Attorney-General, could challenge the propriety of the government action. This is often the case with many public interest lawsuits, brought by parties who wish to raise non-traditional interests.

Ogle is a very important development in the law of locus standi under the ADJR. It will be interesting to see to what extent its suggestion of a wider scope for standing is recognised in the case of other plaintiffs seeking to assert non traditional or general public interests.

[96] G A Flick, *supra* n 40; D C Pearce, *Supra* n 40; the *Boilermakers'* case (1957) 95 CLR 529.

[97] *Ibid.*

[98] *Ibid.*

[99] There is, of course, the converse separation of powers issue – that the AAT may not encroach on judicial function, but that is not raised by the issues discussed in this paper.

[100] Procedurally, the AAT itself decides if a person seeking standing is one whose interests are affected. If standing is permitted, the Tribunal's decision is conclusive (s 31). If the Tribunal denies standing, then that decision is appealable (s 44 (2)).

ing before the AAT is the requirement of a "person whose interests are affected." A person whose interests are affected may seek review of an administrative decision (s 27(1)), may seek reasons for an administrative decision (s 28(1)), and may intervene in administrative appeal proceedings already begun before the Tribunal (s 31(a)).

The verbal formulation "interests . . . affected" can clearly be read very widely. However, nowhere does the AAT Act define "interests".[100] It is left up to the Tribunal to decide many aspects of the scope of interests which may be the basis for standing, including whether parties beneficially affected by a decision may participate in review, how immediate the effect on the interest must be, and most important, whether to confer standing on an applicant for review who seeks to raise broad social or political concerns or to assert interests which may be shared by many others.

By far the most significant innovation in the AAT Act regarding standing is its treatment of organisations in s 27(2):

> An organisation or association of persons whether incorporated or not, shall be taken to have interests that are affected by a decision if the decision relates to a matter included in the objects or purposes of the organisation or association.

This provision flatly reverses the requirement for standing for judicial review upheld in the *ACF* case, which explicitly held that an organisation did not have standing merely to promote its abstract interests.

A review of the AAT decisions shows that the Tribunal has accepted some of the clearest statutory directions to broaden standing but, in many applications, has recited and relied on common law concepts and imposed common law requirements without any particular analysis of the actual needs of administrative as opposed to judicial review. The Tribunal has not recognized the tensions created by the very broad grant of standing for organizations, which of necessity allows the assertion of non-traditional interests by such a party, and the Tribunal's choice for narrower common law views in its general definition of interests which individuals may assert.

(2) *Early Interpretations of "Person Whose Interests Are Affected"*

An early AAT case which is striking for its refusal to grant standing to an individual is *Re McHattan*.[102] In that case the applicant was a customs agent who sought review of an imposition of duty on a client's goods. The duty was paid by the client, not the agent. The affected interests alleged included injury to his commercial reputation because of wrong advice given to a client and possible liability in negligence or indemnity to the client for the duty paid. The Tribunal denied standing on the basis that there was no proof of harm to reputation and that the possible liability was hypothetical.

The result in this case seems particularly inappropriate when compared with *Tooheys* case,[103] which permitted standing to seek judicial review on

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[101] *Supra* n 6.
[102] (1977) 1 ALD 67.
[103] *Supra* n 3.

almost identical facts under the more restrictive judicial standing requirements.

In both *McHattan* and *Tooheys* case the actual applicant for review was a customs agent, though the client importer had paid the duty being challenged, and any refund would be paid back to the importer. In *Tooheys* case the agent had already indemnified the client. Standing was based on the agent's claim to get any refund awarded from the client. In *McHattan* the agent had not yet indemnified the client.

The result in part reflects an unresolved common law uncertainty about the directness of harm required to show an interest which may be protected, as well as about the standard of proof necessary to support a standing claim.[104] The important question for the AAT is whether, even if a showing of direct harm were required by a court, such a requirement ought to be imposed by an administrative tribunal. This is not addressed at all.[105]

Re McHattan, however, is the most restrictive of all the AAT cases, and later rulings do follow, at least in some respects, the apparent intention of Parliament to broaden access for review.

Later cases make it clear that standing can be based on an interest beneficially affected, as implied in the statutory language.

For example, in *Re Saint-James*[106] a beneficial interest was upheld as a basis for standing. A de facto widow was denied death benefits under a military insurance scheme and she appealed. The parents, who were administrators of their son's estate, were permitted to intervene in the review on the basis of their beneficial interest, since they would be the insurance beneficiaries rather than the widow if the decision were upheld.

(3) *Recognition of Remote Interests*

It appears that, in contrast to common law standing limits, the AAT will permit review brought by an applicant whose interest, though apparent, may be only remotely affected and who is, in reality, asserting the very clear interest of someone else. The deportation cases demonstrate this pattern.

A person is not entitled to seek review of a deportation order unless that person is an Australian citizen or a person who was admitted to Australia on terms that were not subject to any time limitation imposed by law.[107] A substantial line of cases has developed where a person in a significant relation to a deportee (who is barred from appealing) seeks to show that an interest has been affected by the deportation order and to seek review of the order.

If such an application for review is successful, then the deportee may join as an intervenor, as a person interested, thereby circumventing the ban on

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[104] See discussions above p 331-332.

[105] This criticism is perhaps unfair, given Brennan J's remark: "neither party has provided the assistance of reasoned argument or an analysis of relevant precedents drawn either from Australian or other common law jurisdictions".

[106] (1981) ALN Note 59.

[107] S 22 (2) (a)(b) of Part XXII of the Schedule to the AAT Act 1975, prior to amendment in 1981.

direct appeal by the deportee. Examples of the application of this device include *Re Kannan*[108] which permitted a wife to apply for review; *Re Akuhata-Brown*[109] defacto wife and child; *Re Ang*[110], wife and child, mother and brother, *Re Agamian*, the son of the deportee; *Re Kiely*,[112] a person cohabiting with the deportee; *Re Buckett*,[113] the deportee's mother.

In several of the deportation cases,[104] standing was simply assumed without discussion of the nature of the interest at stake. In *Re Buckett*[115] the Tribunal "concurred in the submission of counsel that it should approach the case as if the deportee were the applicant thus openly recognizing the fiction of permitting appeal by someone other than the deportee.

The most extreme example of this line of cases is *Re Akuhata-Brown*.[116] In that case the applicants for review were a defacto wife and a child of the deportee, a relationship established while the deportee was in fact legally married to someone else. The defacto wife and child were in Australia when the appeal was filed but had moved to New Zealand at the time of the hearing. It was contended on their behalf that the de facto wife planned to return with the child to Australia to rejoin the deportee. These representations and circumstances were regarded as demonstrating a sufficient interest affected to confer standing before the tribunal.

Another case where intent was sufficient to confer standing is *Re Dies*.[117] The applicant sought review of cancellation of Social Security sickness benefits. The cancellation was based on the income of his estranged wife who resided in the marital home, though evidence was given that the marriage relation was at an end. After cancellation, the wife moved out and benefits were resumed. The Department argued that the applicant had no standing to seek review of the initial cancellation because his interests were no longer affected by that decision. The Tribunal set aside the cancellation and stated that "the applicant was a person whose interests were affected by the decision; the applicant's wife intended to return to the jointly owned home and it was important that the applicant should know where he would stand in that event".[118]

Another example of the AAT permitting standing on the basis of an interest which is clear but only remotely affected by the subject of review is *Re Control Investments Pty Ltd (No 3)*[119]. This case involved an application for joinder by Publishers and Broadcasters Ltd, owner of TV stations in Melbourne and Sydney, in the fight over Rupert Murdoch's multiple media ownership. The interest alleged was a concern about the implications for media ownership

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[108] (1978) 1 ALD 489.
[109] (1981) 3 ALN Note 55.
[110] (1980) 2 ALD 785.
[111] (1979) 2 ALN Note 37.
[112] (1978) 2 ALN Note 1.
[113] (1979) 2 ALN Note 71.
[114] *Re Ajamian supra* n 111 *Re Kiely supra* n 112 *Re Ang supra* n 110.
[115] *Supra* n 113.
[116] *Supra* n 109.
[117] (1984) 6 ALN Note 183.
[118] *Ibid.*
[119] (1981) 4 ALD 1.

of a ruling about someone else's multiple ownership. There was no direct concern in the facts under review, only an interest in the principles or ramification which might emerge from the Tribunal's decision. The possibility that a negative ruling on Murdoch's application could lead to opposition to the renewal of Publisher's and Broadcaster's licence was seen as a sufficient interest to permit joinder.

(4) *Standing Based on Financial Interests*

There are other cases permitting standing on the basis of relatively non-controversial economic interests or impact. These cases include *Re Loschiavo*,[120] *Re Western Australia Lamb Marketing Board*,[121] *Re Dowling*,[122] *Re Mrs B*[123] and *Re Gleeson*.[124]

In *Re Loschiavo*,[125] the administrator of an estate pursued an application for a home savings grant on behalf of his deceased son. The Tribunal found that the applicant, who was a beneficiary of the estate as well as the administrator, would benefit financially if the application begun by the son was successful, and so permitted standing.

Re West Australia Lamb Marketing Board[126] involved a dispute between Austral Exports and the Board. Both organizations claimed a grant from the Export Grants Board in respect of the same transaction. Austral claimed as a principal and the Lamb Board claimed that Austral was their agent and not a principal. The Board applied for review and Austral applied to be made a party, Austral having already received the grant. Austral was permitted to intervene on the basis of an interest in supporting the decision of the government agency and retaining an economic benefit which had already been conferred on them.

In *Re Dowling*,[127] two divorced parents were allocated portions of the child endowment award. The father was allowed standing to appeal the decision granting a portion of the endowment to his former wife who was a step-parent of the child.

In *Re Mrs B*[128] the applicant sought review of the allocation of the social security family allowance as between herself and her former husband. The husband was invited to apply to intervene under s 30(1A) and was made a party.

In *Re Gleeson*,[129] a land owner sought to appeal a land valuation. A lessee who acquired a lease after the valuation and subsequent sale to a new owner sought to continue the previous owner's action, since some of the lease

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[120] (1980) 2 ALD 757.
[121] (1982) 4 ALN Note 111.
[122] (1981) 4 ALN Note 113.
[123] (1984) 6 ALD 609.
[124] (1979) 2 ALN Note 75.
[125] *Supra* n 120.
[126] *Supra* n 121.
[127] *Supra* n 122.
[128] *Supa* n 123.
[129] *Supra* n 124.

terms were based on that valuation. The Tribunal granted standing to the lessee as a person whose interests were affected.[130]

The cases discussed above (except *Re McHattan*)[131] suggest some willingness on the part of the Tribunal to accept and implement broader standing requirements than those imposed by courts for judicial review. However, the Tribunal has quite explicitly stopped short of allowing either an individual or an organization to assert a more general view of public interest, or even a fairly specific interest if that interest is widely shared. The Tribunal has relied on and quoted from common law standing rules in reaching these decisions.

(5) *Standing of Organisations under AAT Act s 27(2)*

As noted previously, the most significant aspect of the AAT Act standing provisions is the treatment of organizations. Organizations are granted standing to seek review of a decision which relates to a matter within the objects and purposes of the organisations. There is, however, only one case where an organisation has applied for review, and in that case, standing was denied. It is also the only deportation case denying standing to a applicant for review on behalf of a deportee.

In *Re Gay Solidarity*[132] the deportee was a homosexual convicted of buggery. The Gay Solidarity Group applied for review of the deportation decision on its own behalf and as an organisation under section 27(2). Standing was denied first on the basis of the requirement that an applicant for review must be a citizen, and an organisation is not a citizen,[133] but there was dicta regarding the AAT standing provisions, had the citizenship requirement been applicable. The organisation's objectives included discrimination against homosexuals in immigration matters. The organisation alleged that the deportation was an example of discrimination against homosexuals. The Tribunal simply stated that the deportation did not in fact relate to the objectives and the purposes of the organization but rather to the rules relating to deportation of persons with criminal convictions.

An extreme and somewhat cynical reading suggests that certain social or political interests will not be recognized by the AAT as a basis for standing, even if embodied in an organisation. However, the result can certainly be justified on other, legal grounds.

There are a number of other cases involving standing for organisations, but all arose when the organisation was seeking to intervene in a review sought by parties with a very direct interest.

The first case of this sort is *Re Phillips*.[134] In that decision, an applicant who was refused an aircraft maintenance licence sought review of this decision. The Engineers Association was permitted to intervene in support of the denial of the licence, on the basis that the objects of the organisation included the maintenance of high standards for aircraft engineers, and a

[130] Note that this case raises a remedies problem, since the AAT, even if it changed the valuation, could do nothing directly to change the lease terms.
[132] (1983) 5 ALD 389.
[133] See n 106 above and accompanying text.
[134] (1978) 1 ALD 341.

decision which denied an aircraft maintenance licence to an unqualified applicant benefitted the association and gave the association an interest in supporting the decision.

Phillips also resolved a preliminary point of statutory interpretation in favour of broad standing. Under s 27(2), organisations may apply directly for review. However, s 30, conferring standing to intervene, simply refers to any other person whose interests are affected and does not include an additional special standing provision like s 27(2), allowing organisations to intervene. *Phillips* determined that joinder under s 30 was available to an organisation whose standing would be established under section 27(2).[135]

The most important case illustrating the tension within the AAT standing rules is *Re Control Investments Pty Ltd (No 1)*.[136] This case treats both the nature of the interest which the AAT will accept to create standing for individuals as well as establishing some of the basic principles for interpreting s 27(2), involving the special standing rules for organisations.

Control Investments (No 1) involved the refusal by the Australian Broadcasting Tribunal to approve certain transactions regarding multiple ownership of television stations. The participants in the proposed transactions sought review and a number of individuals and groups sought to intervene.

The Tribunal began by pointing out that an interest which would be sufficient to confer standing for judicial review would be sufficient for AAT standing, but that the opportunity to seek review before the Tribunal could well be broader than the requirements for judicial review. The Tribunal stated that the interest affected had to be an interest "other than as a member of the general public and other than as a person merely holding a belief [regarding] a particular type of conduct or law . . .".[137] The interest need not be a legal or pecuniary interest but the party seeking review must be able to identify a relevant interest as its own and it must be an interest which is genuinely affected.

In stating these requirements, the Tribunal relied heavily on and quoted from common law cases such as the *ACF* case and cases involving judicial review under the "person aggrieved" standard.[138]

All individuals and one organisation were denied standing. The Tribunal refused to grant standing to members of the public who were residents of the viewing area of the stations whose licences were at issue,[139] and to individual members of the Australian Labor Party (ALP).[140] The Tribunal also denied standing to the Rupert Public Interest Movement, Inc.[141]

This group was founded by Rupert Murdoch. Its objects were stated as involving the responsiveness of government and improving public participation in government decisionmaking. The Tribunal decided that this organisation had interest in the general practices of the AAT but no real or genuine

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[135] *Ibid* 344-345.
[136] (1981) 3 ALD 74.
[137] *Ibid* 79.
[138] *Ibid* 77-80.
[139] *Ibid* 82.
[140] *Ibid* 82.
[141] *Ibid* 84-87.

interest in the specific subject of the appeal.[142] The two factors of having made a submission to the Broadcasting Tribunal and making an appearance to argue on behalf of that submission were not sufficient to create an interest in the decisions under review.[143] Note that this follows the common law rule holding that participating in and making submissions to administrative proceedings does not necessarily create a sufficient interest for standing.[144]

Organisations which were granted standing were the ALP, the Australian Journalists Association and Justice in Broadcasting.

The Tribunal had two reasons for permitting the ALP, then in opposition, to have standing. One was the substantial effect of the media on the political processes and the second was that the Labor Party platform had a clearly stated policy on ownership of media.[145] In permitting the ALP to intervene, the Tribunal remarked that individual members (whose interest in the political process and the party platform is presumably substantially the same as that of the party itself) would not be allowed to intervene in the action.[146]

The Australian Journalists Association was granted standing on the basis that the organisation on its own and as a representative of its members had interests in maintaining ethical standards in news reporting which were affected by the issues before the Tribunal.[147]

Justice in Broadcasting had made submissions before the Broadcasting Tribunal but did not participate in the hearing. The AAT permitted joinder on the basis that one of the objectives of the organisation was public access to media. The Tribunal explicitly rejected the argument that Justice in Broadcasting could have standing to represent some general public interest.[148]

Control Investments (No 1) clearly reflects the tensions inherent in seeking to apply the broad standing allowed for organisations while narrowly interpreting the person interested standard for individuals. Granting standing to an organisation in light of its goals and purposes of necessity broadens the interests which such a party can assert. However, individuals have not been allowed standing to raise such non-traditional interests, as the ALRC has recognized.[149] This results in the anomaly of denying standing to an individual with a clear, adverse, but non-traditional interest, permitting standing for an organisation with vague objects, and no particular relationship to the dispute while denying standing to another organisation with only slightly vaguer objects. Denying standing to individual viewers whose programming may be affected while granting standing to Justice In Broadcasting illustrates this problem.

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[142] *Ibid* 86.
[143] *Ibid* 86.
[144] The *ACF* case *supra* n 6; *FIDO supra* n 22; ALRC para 125. cf, *Sinclair* v *Mining Warden at Maryborough* [1975] 132 CLR 473.
[145] *Ibid* 81-82.
[146] *Ibid* 82.
[147] *Ibid* 83.
[148] *Ibid* 83.
[149] "The criterion for standing under the AAT Act again seems very close to the 'special interest' test applied by the High Court." ALRC para 143.

This tension is not resolved or even very clearly handled in the other AAT cases involving challenges to the standing of organisations.[150]

Three other cases where organisations sought standing to intervene pursuant to s 30 are *Re Maunsell & Partners Pty Ltd*,[151] *Re C*[152] and *Re Marine World*.[153] None of these decisions granted full standing to an organisation seeking it. Though practical considerations are a factor, this situation is at least partly based on the failure of the Tribunal to sort out the relationship between the narrow interpretation of the kinds of interests which individuals can assert as a basis for standing, and the kinds of interests necessarily asserted when standing is given to an organisation under the AAT Act criteria.

In *Maunsell*[154] the applicant was an overseas consultant who had applied for an export development grant after the stated closing date. The Grants Board had previously permitted late filings, but in this case the Board refused to act on the applicant's filing because it was late. The applicant sought to have the application heard in spite of the late filing. The Australian Professional Consultants Council sought to intervene. The objectives of the organisation which were relevant to the intervention included protection of members' interests and the general encouragement of members to seek overseas activity. In rejecting standing, the Tribunal said that the dispute was not related to the objects or purposes of the organisation, and that the organisation was not affected simply because a member of the organisation was affected.

Clearly, a goal or object of an organisation will be to further the interests of its members. Logically, this interest should be recognized to give standing to an organisation seeking review pursuant to s 27(2), as was done in *Phillips*.[155] However, the Tribunal, without discussion or reference to *Phillips*, simply relied on the common law limitation, though wholly inappropriate under the AAT Act.

Re C[156] involved the suspension of a customs agent's licence pending an inquiry. The Customs Agents Institute sought to be joined. The Tribunal found that the Institute had no real or direct interest itself and could not become involved under section 27(1). The Tribunal remarked that, by asserting a s 27(2) interest, in light of the objects and purposes of the organisation to elevate the profession of customs agency, the Institute was effectively asserting entitlement to apply for review in the first place and denied standing. *Maunsell*[157] was relied on for the proposition that the interest of the organisation is not the same as the interest of its members and distinguished *Phillips*[158] by pointing out that at the time of *Phillips* joinder was

[150] It is, however, recognized by the ALRC and is part of the reason why the ALRC does not recommend special standing status for organisations: ALRC para 229-230.
[151] (1980) 2 ALD 813.
[152] (1983) 5 ALN Note 157.
[153] (1986) 10 ALD 262.
[154] *Supra* n 151.
[155] *Supra* n 134.
[156] *Supra* n 152.
[157] *Supra* n 151.
[158] *Supra* n 134.

mandatory wheras at the time of *Re C*[159] the Tribunal had a discretion to permit intervention. The Tribunal also pointed to the limited nature of the decision under review; that is, it was a temporary suspension pending an inquiry. The Tribunal had accepted a submission from the Institute on the Act generally as well as on the merits of this licence suspension, and the tribunal commented that the submission on the Act generally showed that there was "a lack of a real affection of the Institute's interests" and "demonstrated the dangers of making other persons parties to an application for review where particular rights are in question."[123]

The real explanation for the unduly negative results in *Maunsell* and *Re C* may be that the immediate issue in each case was procedural rather than substantive, and that the discretion which is now given by s 30(1A) was appropriately exercised in light of the preliminary status of the review when intervention was sought.

However, this is a fairly nebulous proposition. It is possible that the very negative view expressed in *Maunsell* and *Re C*, that an organisation is not interested in a decision on the basis that a member is affected, will be relied upon as authority to unjustifiably narrow the innovative standing provisions of s 27(2) in AAT proceedings, even where the intervention sought is at the point of a decision on the merits, or where the organisation is properly seeking to initiate the review itself.

However, this pessimistic view is somewhat belied by *Re Marine World*,[160] a recent case dealing with standing of organisations seeking to intervene. Marine World sought review of a decision by the Minister for Arts, Heritage and the Environment denying a permit to capture whales pursuant to the Whale Protection Act 1980 (Cth). A number of environmental groups[161], all of which had previously made written submissions directly to the Minister, sought to intervene. All were granted standing, but the court, exercising its discretion under s 30(1A), imposed a condition that all parties intervening undertake to be represented together by a single person.

Counsel for Marine World relied on the common law case *Australian Conservation Foundation* (the *ACF* case)[162] and the AAT cases *Gay Solidarity*,[163] *Re Maunsell*[164] and *Re C*[165] in opposing the grant of standing. The tribunal rejected arguments from the *ACF* case on the basis that the Tribunal's function is different from that of a court, and the interests required by the AAT Act for access to administrative review are not necessarily the same as those required by courts for access to judicial review.[166]

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[159] *Supra* n 152.
[160] *Supra* n 153.
[161] Australian and New Zealand Federation of Animal Societies; Australian Conservation Foundation Inc; Project Jonah (Victoria); Greenpeace Australia Inc; Dolphin Freedom Campaign; Whale Rescue Centre; Animal Liberation Victoria Inc; and Lake Tyers Dolphin Protection Group. Reasons for order at 263.
[162] *Supra* n 6.
[163] *Supra* n 132.
[164] *Supra* n 151.
[165] *Supra* n 152.
[166] *Supra* n 153. Reasons for order at 267.

The Tribunal relied heavily on *Control Investments (No 1)*[167] and extracted from it (and from the later cases denying standing) the proposition that

> careful attention had to be paid to the objects or purposes of the organisation or association seeking to be made a party and to the decision under review to ensure that the decision did in fact relate to a matter included in those objects or purposes.[168]

The Tribunal carefully examined each organisation's objects and purposes in light of the decision being reviewed and concluded that all had interests which were affected, within the meaning of s 30.

The decision clearly accepts the point that organisations as defined in s 27(2) can intervene pursuant to s 30, and rejected the argument that organisations cannot intervene because s 30 does not specifically refer to organisations.[169]

The decision provides strong support for broad standing for organisations seeking to intervene in administrative review. It appears to recognize the different interests involved in standing to seek administrative as opposed to judicial review. Standing is granted to permit a variety of relatively informal organisations to be heard on the merits. However, the Tribunal did not clearly reject the authority of previous cases denying standing. Rather than distinguishing them as limited decisions authorizing a denial of standing only at a very early procedural stage when the merits were not at issue, they were seen as applicable to and giving guidance for deciding whether organisations should be granted standing to participate in review on the merits.

There is likely to be considerable controversy about the condition of joint representation which was imposed. Reasons given for this condition were the need to resolve the review expeditiously and to avoid increased cost to parties and to public funds. It was recognized that, because s 32 of the AAT Act provides that parties may appear in person or by representatives, "it is arguable that, once a person has been made a party to a proceeding, he is entitled to be represented as he chooses".[170] The tribunal treated this issue simply as a factor to be considered in exercising its discretion. In determining whether joint representation was appropriate, the tribunal took the view that, though there were differences among the objects and the purposes of the organisations, the interests of each which were affected by the decision under review were the same.

One question which is raised by these conflicting cases on intervention by organisations is their applicability to situations where organisations seek standing to initiate review. The statutory definition for standing is, of course, identical in both instances. However, the Tribunal may, as a practical matter, be readier to permit organisations to intervene than to initiate a review since intervention assumes a review which will have to be heard and decided between parties with traditionally direct interests. To put the question another way, had the Minister permitted the capture of whales by Marine World,

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[167] *Supra* n 136.

[168] *Supra* n 153. Reasons for order at 268.

[169] This point was previously dealt with in *Phillips* (1978) ALD 341, though apparently that decision was not submitted to the Tribunal on the point. See discussion above p 344.

[170] *Supra* n 153. Reasons for order at 273.

and the environmental organisations sought to initiate a review, rather than to intervene in an existing proceeding, would the Tribunal have been as ready to find the same interests affected?

(6) *AAT Standing: Conclusion*

An important point which emerges from many of the AAT cases is the extent to which access to administrative review is sometimes inappropriately limited by policy and doctrines which underlie limitation on access to judicial review.[171] To determine the appropriate scope for access to administrative review is a difficult inquiry at best, but it is made even more challenging by the failure of the courts in the first instance to identify and articulate their reasons for the limitations imposed on judicial review.

When the courts, the legislature and the tribunals all formulate and apply standing rules without reference to a coherent underlying analytical structure, one finds rules developed for one set of needs being applied in other proceedings where they may be totally inappropriate, but are very difficult to challenge, because the reasons for the rules are not clearly articulated and may not really be understood.

CONCLUSION

No doubt there is a need for flexibility in standing requirements. It is well recognised that what is necessary in one context may be inappropriate in another.[172]

However, flexibility is best achieved when the different policies and doctrines which underlie different requirements are made clear and developed systematically.

The Australian system of judicial and administrative review has been challenged by plaintiffs, as individuals and as groups, seeking to assert non-traditional interests in order to litigate broader public issues of government accountability. The response to this challenge has sometimes been imaginative and creative, but more often has been limited, unsystematic and confused.[173]

In order to resolve the present difficulties in standing, it is first necessary to identify the purposes which standing requirements do and should serve. What is the justification for broad standing? What is the justification for narrow or restrictive standing rules? Are these reasons the same for judicial review arising under the common law or under the ADJR Act or for administrative appeals under the AAT Act?

The ALRC report has done the analytical work which the courts have not. It has explored the theoretical and practical justifications for a variety of

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[171] The ALRC recognizes that the AAT has given the "person whose interests are affected" standard much the same scope as the common law "special interest" test. Nonetheless, the ALRC regards the AAT as applying a "fairly generous" interpretation: ALRC para 143.

[172] "The nature of the interest required in a particular case will be influenced by the subject matter and context of the decision under review." *Robinson* (1977) 138 CLR 283; the *ACF* case *supra* n 6, 284; *Tooheys* case *supra* n 3, 79; ALRC para 225.

[173] ALRC para 224.

standing rules. It has clearly identified the competing interests for broad as well as restricted standing.

The entire thrust of the report is for broad and open access. The major feature of the ALRC recommendations is that a personal stake no longer be required for standing to seek judicial review, whether by statute or common law.[174] However, the Commission has rejected completely open standing. Courts may deny standing to persons who are shown to be "merely meddling".[175]

Elaboration of this phrase in statutory definition and later by the courts will be crucial to the effectiveness of the proposal to broaden present standing limits.

The foregoing review of AAT Act and ADJR Act decisions suggests that judicial and administrative decisionmakers are, for whatever reasons, reluctant to hear and resolve cases brought by non traditional parties who raise non-traditional interests and may well interpret any exception in a way that will result in a continued application of traditional restrictive standing principles.

The ALRC attempts to overcome this tendency by what it characterises as a "presumption" that a party is not merely meddling "in the absence of compelling argument put forward by other parties to the proceedings, the court will be bound to accept that the plaintiff has standing".[176] To further emphasise its determination to break with previous requirements, the draft legislation provides

> (3) The plaintiff shall not be taken to be so meddling by reason only that—
> (a) the plaintiff does not have a proprietary interest, a material interest, a financial interest or a special interest in the subject-matter of the proceeding; or
> (b) the interest of the plaintiff in the subject-matter of the proceeding is no different from the interest of any other person in that subject-matter.[177]

However, the necessity for these procedural devices is partly a result of the weakness of the "merely meddling" exception itself.

The "merely meddling" exception does not appear to be as well thought out as the other aspects of the report and its recommendations. It smacks of a compromise view, between those who favoured open access and those who oppose it.

It may well be that a proposal to have open access is politically or practically unworkable, and that some limit is necessary. If so, the experience with the interpretation of AAT and ADJR Act standing rules clearly shows that a very narrow and carefully drawn exception will be needed to prevent the proposed rule opening access from being swallowed by the exception.

A vague concept like "meddlers" increases the risk that the crucial recommendation to broaden standing will be rendered ineffective, even with the strong procedural directions which the recommendation includes.

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[174] ALRC para 222. Under the ALRC recommendations, a traditional personal stake would, of course, continue to be a sufficient basis for standing, but not a necessary one.
[175] ALRC para 252.
[176] ALRC para 259.
[177] ALRC Appendix A, p 216.