The Issue of Standing: Proposed Amendments to Clause 487of the Environment Protection and Biodiversity Conservation Bill 1998

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'The environment' as a single concept is perhaps the ultimate example of a purely public good. Its non-excludable, non-avoidable nature means that all humans are subject to the environment, just as the global environment is subject to the participation of all humans. In confining the ability to judicially protect the environment to certain groups or persons, the legislature restricts a person's ability to protect what is essentially theirs. This problem can only be remedied by broadening provisions for standing with respect to environmental concerns.

Clause 487 of the *Environment Protection and Biodiversity Conservation Bill 1998* extends the standing provisions of the *Administrative Decisions (Judicial Review) Act 1977* with respect to decisions made under the proposed Act. This extension does not go far enough. It includes those persons who have previously been active in protection, conservation or research into the environment, but excludes those who are merely active with respect to the issue at hand.

The most popular argument against loosening the rules on standing is that such action will open the floodgates with respect to environmental litigation, creating a plethora of unmeritous cases for the courts to deal with. In *Phelps v. Western Mining Corp* (1978) 33 FLR 327 Deane J considered this argument both 'irrelevant and somewhat unreal'. An appropriate illustration of the Justice's sentiments is in the standing provisions of the *EPA (NSW) Act 1979*. Section 123 of that Act reads that 'any person may bring proceedings in the court for an order to remedy or restrain a breach of this Act'. Between 1980 and 1993 only 125 cases have proceeded to hearing under s.123.[1] The floodgates argument is simply not a valid reason for restraining standing on environmental issues.

In its 1995 discussion paper "Who can sue? A review of the law of standing" (ALRC 61) the ALRC stated that public interest litigation was an "important mechanism for clarifying legal issues or enforcing laws to the benefit of the general community" (par 2.19).[2] The ALRC proposed a test in that discussion paper to replace all existing tests of standing under the general law and most statutes (par 3.34). This test includes two limbs. The first is the 'person aggrieved' test as set out in the *AD(JR)* Act 1977. The second, and alternate limb, allows standing to any other person where:

- the litigation is in the public interest and;
- he/she has the capacity to represent that interest.

This test broadens standing provisions while allowing the courts to reject unmeritous or malicious actions. The ALRC went on to suggest that there "may be particular areas of law, such as environmental protection, where a broader test for standing is appropriate" (par 3.34).[3]

An open standing provision as seen in s.123 of the *EPA (NSW)* Act 1977 would be ideal with respect to the objectives of the *Environment Protection and Biodiversity Conservation Bill 1998*. However the more restrictive provisions put forward by the ALRC (ALRC 61) would at least be an improvement on Clause 487 in its current form. In order to provide for the protection of the environment and promote ecologically sustainable development, a flexible and open avenue to justice should be available for those who discover potential or actual breaches of the Act.

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[1] Ramsey & Rowe (1995) p771
[2] Quoted in (1996) ABLR 24 p253
[3] Quoted in (1996) ABLR 24 p253

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