IMPACT

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8th Floor, 280 Pitt St., Sydney 2000 DX 722 Sydney Phone (02) 261 3599 Editor: Brian J. Preston

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STANDING: RECENT DEVELOPMENTS AND FUTURE POSSIBILITIES

by Linda Pearson
Solicitor of Supreme Court of New South Wales
Lecturer in Law, University of Technology, Sydney

Locus standi, or the right of an individual or group to litigate a particular matter, is regarded by the courts as a preliminary or jurisdictional issue separate from the merits of the action in public law matters. In contrast to private law litigation, such as that involving claims of breach of contract, where the question of the plaintiff's standing to sue is merged with the elements of the cause of action, the plaintiff in public law litigation must not only show that the defendant or respondent has infringed some principle of law but that his or her connection with or interest in the matter provides a reason why he or she should be allowed to complain to the court[1]. Standing is used in public litigation as a screening device, since the practical effect of denying that a particular plaintiff has standing is to prevent that person obtaining a remedy without a conclusion necessarily having been reached on the merits of the case[2].

Public law can be defined as being that system of law which is concerned with the enforcement of the proper performance by public bodies of the duties which they owe to the public, rather than the protection of the private rights of private individuals or public bodies[3]. Challenges to the actions of administrative decision makers in all environmental protection measures are thus public law matters, and standing will be an issue in all but a few cases.

One area in which standing is not an issue is in actions for the enforcement of the *Environmental Planning and Assessment Act* 1979 (NSW),s123 of that Act conferring a right to initiate proceedings to any person acting on his or her own behalf or representing a group. It is clear that the interest of the applicant is not relevant to the right to initiate the proceedings, but rather to the availability of a remedy on discretionary grounds[4]. So for litigation concerning a breach of the *Environmental Planning and Assessment Act* itself, an environmental planning instrument, a consent granted under the Act or a condition subject to which a consent was granted, the question of standing should not arise.

In other litigation concerning matters such as breaches of the *Local Government Act* 1919 (NSW) or pollution control legislation the question of standing will arise. An individual wishing to enforce statutory obligations faces the tasks of demonstrating either that the statute confers some private right on the individual or that the individual has a special interest in the enforcement of the statute not shared by every other member of the public. Until 1980 the formula used by Australian courts was that of Buckley J in *Boyce v Paddington Borough Council*[5]:

> "A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with; and secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right."

In *Australian Conservation Foundation Inc v Commonwealth*[6] Gibbs J considered that test concluding that "the expression 'special damage peculiar to himself' in my opinion should be regarded as equivalent in meaning to 'having a special interest in the subject matter of the action'"[7]. The case concerned a challenge to a decision made to approve a resort proposed for Queensland, alleging a failure to comply with the *Environmental Protection (Impact of Proposals) Act* 1974(Cth) and the Administrative Procedures approved thereunder in granting approval under the Banking (Foreign Exchange) Regulations. Applying the "special interest" test, Gibbs J concluded that the ACF lacked standing[8]:

> "I would not deny that a person might have a special interest in the preservation of a particular environment. However, an interest, for present purposes, does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi. If that were so, the rule requiring special interest would be meaningless. Any plaintiff who felt strongly enough to bring an action could maintain it."

While Stephen and Mason JJ agreed with Gibbs J, Murphy J in dissent emphasised that the ACF had made a submission in response to the draft Environmental Impact Statement, concluding that "it is not sensible to deny standing to members of the public to enforce rules under the Act by which Parliament has provided that they shall be consulted."[9]

The "special interest" requirement outlined in *Australian Conservation Foundation Inc v Commonwealth* has become the standard test for standing in Australia. It was

applied shortly after that case in *Onus & Anor v Alcoa of Australia Ltd*[10]. The majority of the High Court held that the applicants, two members of the Gournditch-jmara community in the Portland area has standing to seek to prevent Alcoa from carrying out works which it was claimed would interfere with aboriginal relics, such interference being a breach of s21 of the *Archaeological and Aboriginal Relics Preservation Act* 1972 (Vic) which made it an offence to damage or interfere with relics. It was the applicants' special custodial status as members of the Gournditch-jmara community, not simply as Aborigines, which gave them standing, their interest being not a mere intellectual or emotional concern. The test was applied in *Everyone v Tasmania*[11] to deny standing to an individual alleging breach of the *Rivers Pollution Act* 1881 (Tas), and to allow standing in a challenge to approval of a subdivision in *Fraser Island Defenders Organisation Ltd v Hervey Bay Town Council*[12], the difference being that in the latter case the applicant ran tours to Fraser Island for profit and alleged that the subdivision would have an adverse effect on its business. It was the potential adverse effect on business interests, and not the fact that the applicant's objects included the preservation of the natural resources of the island and that it had a right in common with all members of the public to object to the rezoning which would be necessary before the subdivision could be lawfully approved, which gave it the required "special interest". The "special interest" test was also applied in *Day v Pinglen Pty Ltd*[13] in which the applicant sought a declaration that development consent and building approval in respect of neighbouring premises had lapsed, and an injunction to restrain the continuation of the work. The applicant had standing to bring the action because the work would interfere with her existing panoramic views and would thus have an effect on the value of her property.

The "special interest" test is clearly the applicable test of standing in applications for declarations and injunctions in respect of enforcement of public duties. It is encouraging to note that the test is now being applied in other situations, so that Australian law is moving closer to a standard test for standing for all public law remedies, and away from the confusion of different tests for each of the prerogative and equitable remedies[14].

The "special interest" test has recently been applied in an action under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). That Act provides its own test of standing in s5(1), that is, a "person who is aggrieved" by a decision to which the Act applies. Section 5(1) is amplified by s3(4), which provides that a reference to a person aggrieved by a decision includes a reference to a person whose interests are adversely affected by the decision. The Full Court of the Federal Court in *Ogle v Strickland*[15] applied the "special interest" test, and held that the applicants, a priest of the Anglican Church and a priest of the Roman Catholic Church, had standing to seek review of a decision of the Censorship Board that a film was not blasphemous, allowing its importation. Fisher and Lockhart JJ considered that the applicants as priests had a duty and vocation to repel blasphemy and thus were in a special position compared with ordinary members of the public; for Wilcox J it was enough that they were committed Christians.

Particular categories of cases in which there is potential for further development in the law are as follows:

1. Objectors

The position of members of the community who exercise a statutory right to object or make submissions in the course of decision making and who then seek to challenge the resulting decision, in the absence of a right of appeal[16], was recently considered in *R v Liquor Commission of the Northern Territory; ex parte Pitjantjatjara Council Inc*[17]. A member of the committee of the Council sought certiorari, prohibition and mandamus in respect of a decision by the Liquor Commission to grant an "off" and "on" licence to a tavern at the Yulara Resort, arguing than in reaching the decision the Commission had not considered the needs and wishes of the Aboriginal people who formed part of the local community. The applicant had objected to the application for the grant of the licence at hearings before the Commission and the Chairman of the Commission, and Muirhead J held that as an objector with a statutory right to be heard he had standing to claim that there was an error of law on the face of the record, that is, to bring the application. In the course of reaching this conclusion Muirhead J relied, inter alia, on *Sinclair v Mining Warden at Maryborough*[18], in which an objector to an application for mining approvals on Fraser Island was held to have standing to challenge the resulting decision of the Mining Warden. While the standing of an objector in these circumstances is supported by a long line of case law[19], the majority of the High Court in *Australian Conservation Foundation Inc v Commonwealth*[20] did not take advantage of the opportunity to extend the principle further by according standing to the ACF on the basis of its submission in response to the Environmental Impact Statement; only Murphy J was prepared to according standing on that basis. Gibbs J, with whom Mason J agreed, distinguished the situation of an objector with a right to be heard as in *Sinclair v Mining Warden at Maryborough*[21] from that of the ACF, which could be characterised as simply being a person submitting written comments with no further rights[22]. It appears that there is a difference between exercising a statutory right to be heard in objection, as in the liquor and mining legislation, and exercising the right to make a submission in response to a proposal or EIS.

2. Residents/Ratepayers

It is clear that residents have standing to challenge allegedly illegal activities on neighbouring premises which may affect property values[23]. The position of residents seeking to challenge actions or decisions of a more general nature of the local council has been considered in surprisingly few cases. Young J made some obiter comments on the issue in *Sutton v Warringah Shire Council*[24], concluding that a "mere resident usually does not have sufficient standing to sue a council in respect of an administrative function which affects all residents equally"[25]. The issue was dealt with directly by the Supreme Court of South Australia in *Clothier and Simper v City of Mitcham*[24] which involved a challenge to the validity of decisions of the council to acquire land for the purpose of civic and community facilities and for that purpose to conduct a memorial over the whole of the council area and over the two wards most likely to gain the benefit of the project. Under the *Local Government Act* 1934 (SA) the council could levy a separate rate to cover the cost of works if it had received a memorial, or petition, defining the portion of the council's area which would benefit by the construction of the works, signed by a majority of the electors for that portion of the area requesting that the works be carried out by council. The action was brought by the acting secretary and a member of a residents' group in the area who alleged that the memorial procedure could only be initiated by the electors, that the memorial had to state the portion of the council area which would benefit from the work, and that the memorial could not be held over the whole of the council area. White J held that the applicants had standing - they were

ratepayers in the two wards where residents were likely to benefit from the work and where ratepayers were likely to suffer most if a separate rate were to be declared. That gave them a "special interest" over and above that of other electors, and even of other ratepayers (though presumably not ratepayers in the same wards). White J was careful to emphasise the financial detriment likely to be suffered by the applicants as ratepayers, and his finding that they had standing would not necessarily be applicable to other electors or residents in the area in the absence of financial detriment. Young J in *Sutton v Warringah Shire Council*[27] indicated that at least in New South Wales the standing of ratepayers might be approached differently: while the point was obiter, he concluded that since 1972 in New South Wales a ratepayer does have standing without needing to show that he or she has a greater interest than that of one of a series of ratepayers.

The position of ratepayers generally was considered by the House of Lords in *Arsenal Football Club Ltd v Ende*[28]. The case is not directly applicable in New South Wales, since Ende was taking advantage of a right conferred by the *General Rate Act* 1967 to make a proposal for an alteration in the valuations list as regards the land owned by Arsenal, arguing that the rateable value of the land in the list was too low, but in the course of its decision the House of Lords made some interesting remarks about standing. The particular statutory provision under which Ende made the proposal required him to establish that he was a person "who is aggrieved": he argued that he was such as a ratepayer in the same borough as Arsenal, as a ratepayer in the adjoining borough (both boroughs being levied for the purposes of the Greater London Council and the Metropolitan Police) and as a taxpayer. On his first claim the House of Lords held that while he could not show any financial or other loss as a ratepayer, the basic standards behind rating were fairness and uniformity and he therefore had standing. He also had standing on his second claim, provided his proposal was not frivolous or vexatious, but not the third.

3. Taxpayers

While the House of Lords in *Arsenal Football Club Ltd v Ende*[29] concluded Ende's interest as a taxpayer in the valuation list was too remote, there are encouraging signs that the High Court of Australia is moving towards recognising the interest of taxpayers for the purpose of according standing in claims challenging the expenditure of public moneys. Gibbs CJ in *Davis v Commonwealth*[30] was prepared to consider the possibility that a taxpayer could have standing to challenge the validity of an Act under which public moneys will be disbursed. Three individuals, Aborigines, challenged the constitutional validity of certain sections of the Australian Bicentennial Authority, sought to have the statement of claim in the proceedings struck out on the basis that the plaintiffs lacked standing to bring the action. The plaintiffs claimed standing on three grounds, first on a direct pecuniary interest, secondly on the basis that they were Aborigines, and thirdly, on the basis that they were taxpayers. The first was accepted, and on the second, Gibbs CJ expressed doubt that the plaintiffs' interest as Aborigines was other than emotional or intellectual. On the question of standing as taxpayers Gibbs CJ concluded that it was arguable that the plaintiff as taxpayers had standing to challenge the validity of an Act under which public moneys had been and would be disbursed. That conclusion was reached on the basis of English[31] and Canadian[32] authorities, together with *Attorney-General (Vic); ex rel Black v Commonwealth*[33] in which Gibbs J (as he then was) had left the question open and Murphy J had expressed the view that any one of the Australian people had standing to proceed in the courts to secure the observance of constitutional guarantees. While that case is not directly applicable to the situation in *Davis v Commonwealth*, and, accepting that Gibbs Cj was not requied to reach a final conclusion on the issue in *Davis v Commonwealth*, it is nonetheless encouraging to note that Gibbs CJ was at least prepared to concede that the proposition was arguable, thus leaving the way clear for further development in this area.

4. Environmental/Resident Groups

The status of a group formed with objects relating to the preservation of a particular environment or the environment generally has been considered in a number of cases. In 1976 the Supreme Court of Victoria held in *National Trust of Australia (Vic) v Australian Temperance and General Mutual Life Assurance Society Ltd*[34] that the National Trust was a representative of cultural interests centred on buildings of historical, architectural or other special interest, and that the rejection of an objection by it in furtherance of such interests could be regarded as putting it in the position of a person who felt aggrieved. The case was distinguished by Gibbs J in *Australian Conservation Foundation Inc v Commonwealth*[35] on the basis that the National Trust had been accorded statutory recognition, and the majority considered that the fact that the ACF was incorporated with particular objects did not strengthen its claim to standing. A similar view was expressed in *Fraser Island Defenders Organisation Ltd v Hervey Bay Town Council*[36] (an incorporated group) and *Clothier and Simper v City of Mitcham*[37] (an unincorporated group). This is in contrast with the views of the New Zealand Court of Appeal in *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 3)*[38] in which the court held that the Environmental Defence Society and the Royal Forest and Bird Protection Society, as responsible public interest groups, could be accepted as having sufficient standing to challenge the illegality of government action under the *National Development Act* 1979 (NZ). Unfortunately Australian courts are precluded by *Australian Conservation Foundation Inc v Commonwealth* from taking a similar view, and it will be necessary to establish either that individual members of incorporated or unincorporated groups have a special interest as individuals, or that the group has, through for example its status as an objector, that interest before standing can be accorded.

5. Council Members

The position of aldermen and councillors was considered in *Sutton v Warringah Shire Council*[39], in which an elected councillor sought a declaration that a resolution of council delegating authority to the Shire Clerk/General Manager was invalid. Young J held that she was directly affected in the way in which she could participate as a member of council in carrying out the council's statutory functions; further, applying *Onus v Alcoa of Australia Ltd*[40], that she was a representative of a special class of people, that is, the ratepayers and people of her riding and the whole shire; and finally, that s23 of the *Supreme Court Act* 1970 (NSW) conferred power to do all that was necessary to administer justice in New South Wales[41].

The above discussion of some of the case law indicates that there are several areas of possible opportunity to develop the law of standing, particularly in relation to the standing of residents and ratepayers. In other areas, particularly concerning objectors and environmental groups, the decision of the High Court in *Australian Conservation Foundation Inc v Commonwealth* appears to stand as a barrier. The Australian Law Reform Commission has proposed[42] that in civil proceedings involving the Constitution, Commonwealth Acts and Australian Capital

Territory Ordinaces, or against the Commonwealth or Commonwealth officers, a statutory test of standing should be introduced to allow any person to initiate public interest litigation unless the court finds that he or she is merely meddling. It remains to be seen whether such legislation will be introduced by the Commonwealth, or an equivalent in any State, or whether it will be left to the courts to continue to develop the law.

[1] P Cane "The Function of Standing Rules in Administrative Law" [1980] Public Law 303 at 303-4
[2] Australian Law Reform Commission, Standing in Public Interest Litigation Report No 27, 1985, p13
[3] H Woolf "Public Law - Private Law: Why the Divide? A Personal View"[1986] Public Law 220 at 221
[4] Rowley v New South Wales Leather & Trading Co Pty Ltd (1980) 46 LGRA 250; Sydney City Council v Building Owners and Managers Association of Australia Ltd (1985) 55 LGRA 444
[5] [1903] 1 Ch 109 at 114
[6] (1980) 146 CLR 493
[7] (1980) 146 CLR 493 at 527
[8] 146 CLR 493 at 530-1
[9] 146 CLR 493 at 557
[10] (1981) 149 CLR 27
[11] (1983) 49 ALR 281
[12] [1983] 2 Qd R 72
[13] (1981) 148 CLR 289
[14] For a summary of the current law, see Australian Law Reform Commission, Standing in Public Interest Litigation at pp 47-61
[15] (1987) 71 ALR 41
[16] Such as the right of appeal conferred on objectors to applications for approval of designated development under s98 of the Environmental Planning and Assessment Act.
[17] (1984) 31 NTR 13
[18] (1975) 132 CLR 473
[19] See, for example, R v Bowman [1898]1 QB 663
[20] See note 6 above
[21] See note 18 above
[22] (1980) 146 CLR 493 at 531-2
[23] See Day v Pinglen Pty Ltd (1981) 148 CLR 289, and obiter comments of Cripps J in Rowley v New South Wales Leather & Trading Co Pty Ltd (1980) 46 LGRA 250 at 257
[24] (1985) 4 NSWLR 124 - see5. Council members below
[25] (1985) 4 NSWLR 124 at 128
[26] (1981) 45 LGRA 179
[27] (1985) 4 NSWLR 124 at 129
[28] [1977] AC 1
[29] See note 28
[30] (1986) 61 ALJR 32
[31] R v HM Treasury; ex parte Smedley [1985]QB 657; R v Inland Revenue Commissioners; ex parte National Federation of Self-Employed and Small Businesses Ltd[1982]AC 617
[32] Minister of Justice of Canada v Borowski(1981) 130 DLR (3D) 588
[33] (1981) 146 CLR 559
[34] [1976] VR 592 at 605
[35] See note 6 above
[36] See note 12 above
[37] See note 26 above
[38] [1981] 1 NZLR 216
[39] (1985) 4 NSWLR 124
[40] (1981) 149 CLR 27
[41] (1985) 4 NSWLR 124 at 130-2
[42] Standing in Public Interest Litigation Report No 27, para 252 at p138

THE DISCRETION OF JUDGES TO GRANT OR REFUSE RELIEF IN THE LAND AND ENVIRONMENT COURT

by
NICOLA PAIN
Solicitor of the Supreme Court of New South Wales
Principal Solicitor of Environmental Defender's Office

The discretion of judges in the Land and Environment Court to grant or refuse relief is an important component of the powers conferred on those judges. The existence of a discretion to grant or refuse relief where a breach of environmental or planning laws is proved is generally undisputed, but the scope of the discretion can be difficult to define.

In two fairly recent Court of Appeal of N.S.W decisions ***A.C.R. Trading Pty. Limited & Anor v Fat-Sel Pty. Ltd. & Anor****, unreported, CA 216 of 1985, 17 November 1987 and* ***Council of the Shire of Warringah v Sedevcic****, unreported, CA 180 of 1986, 19 August 1987 that Court has ruled on the nature and scope of the discretion to grant or refuse relief where a breach of the* ***Environmental Planning & Assessment Act*** *1979 (the EPA Act) has been found.*

THE LEGISLATION

Section 124 of the EPA Act provides that:- "Where the Court is satisfied that a breach of this Act has been committed or that a breach of this Act, will, unless restrained by the Court, be committed, it may make such orders as it thinks fit to remedy or restrain the breach". This section also sets out the orders the Court can make in exercising its powers under the section.

Section 20 of the **Land & Environment Court Act** (the L&E Ct Act) states that the court has the same civil jurisdiction as the Supreme Court had to hear and dispose of proceedings concerning planning or environmental laws before the Land & Environment Court came into existence. Other relevant provisions of the Land & Environment court Act include sections 22 and 23.

Section 22 of the L&E Ct Act provides that it shall "in every matter before the Court grant all remedies to which the parties appear to be entitled in respect of a legal or equitable claim brought by them so that all matters between the parties may be completely and finally determined". The purpose of this section is to ensure that a multiplicity of proceedings is avoided.

Section 23 of the L&E Ct Act states that the Court "has power, in relation to all matters in which it has jurisdiction, to make orders of such kind, including interlocutory orders, as the Court thinks appropriate".

The discretion accorded to the judges of the Land & Environment Court is a wide one. McClelland J in his judgment in **Council of the City of Sydney v O'Riordan** (unreported 29 May 1984) held that discretionary powers conferred by the Courts' statutory jurisdiction were as wide as that exercised by the Supreme Court in Equity.

In **F. Hannan Pty Ltd. v The Electricity Commission of NSW** unreported CA 31 of 1985, 28 August 1985, (Hannan No.2) Street CJ commented on the nature of the Land & Environment Court's role under the EPA Act in the following terms:

> "Here, then is the legislative scheme both establishing the substantive law governing environmental matters and setting up the curial structure charged with the exclusive jurisdiction to determine disputes arising within that field of substantive law. The width of the powers and jurisdiction of the Land and Environment Court is apparent from the legislative provisions that I have mentioned. These need no elaboration. Likewise it is apparent that the court enjoys a wide discretionary range within which to consider the formulation of orders or to remedy or restrain breaches of the planning legislation. It by no means follows that the mere demonstration of a right that a party would be entitled to expect to have enforced by the ordinary civil courts will be afforded equivalent enforcement by the Land and Environment Court. It is the duty of that Court, in formulating "such order as it thinks fit", to have regard at all times to the pursuit of the objects of the Environment Planning and Assessment Act in s.5. This involves, in appropriate cases, the evaluation of matters extending beyond the mere determination of the rights and matters in dispute between the immediate parties. It involves due weight being given to the public interest and the interests of other affected persons in the overall context of the pursuit of the objects broadly set out in s.5."

The discretion of the Court to grant relief must be viewed in this overall framework.

SEDEVCIC'S CASE

The decision of the Court of Appeal in **Council of the Shire of Warringah v Sedevcic** unreported, CA 180 of 1986, 19 August 1987, was an appeal from a decision of Cripps CJ in the Land & Environment Court. The development the subject of the appeal was a shop located on land zoned for residential use. The use was a prohibited use under the Warringah Local Environmental Plan. Cripps CJ in the Land & Environment Court held, inter alia, that the applicant failed to establish that it had an existing use but in the circumstances refused, in the exercise of his discretion, to make an order that the prohibited use cease on the site. On appeal the decision of Cripps CJ was upheld, including his exercise of discretion in the circumstances.

Cripps CJ endorsed the Privy Council's decision in **Associated Minerals Consolidated Ltd v Wyong Shire Council** 48 LGRA 464 to the effect that a court has a discretion whether it should grant relief in proceedings where a local council seeks to enforce a public obligation. Relevant to the exercise of that discretion are matters of delay in bringing proceedings and hardship caused to any parties if orders are made as well as consideration of injury to the public by denial of relief. It is relevant to consider the lack of any specific ham beyond the general harm resulting from a breach of the lack of any specific harm beyond the general harm resulting from a breach of the law. Cripps CJ accepted the submission that where a local council is the applicant the court will be much slower to deny relief on discretionary grounds. In the circumstances of this case, where it was not possible to conclude whether or not the shop activity was lawful, and the lack of any disadvantage to members of the public over and above that which is said to flow from the actual breach of the law, Cripps CJ considered it was appropriate that he withhold the relief sought by the council.

In the Court of Appeal, Kirby P sets out at pages 7 and 8 of his judgment a number of guidelines for the exercise of discretion in the Land & Environment Court. These can be summarised as follows:-

(a) Section 124 of the EPA Act confers a wide discretionary power on judges in the Land & Environment Court. This discretion is as wide as the discretion exercised by the Supreme Court of NSW in its equitable jurisdiction.

(b) The discretion is unfettered by statute and should not be limited by particular factual situations or for particular cases. Regard should be had to the nature of the breach when deciding how to exercise discretion. For example, in the case of a technical breach of legislation noticed only by a person versed in the law the Court will be more likely to exercise its discretion not to grant relief.

(c) The judge exercising his discretion must keep in mind that the restraint sought is not the enforcement of a private right but a public duty imposed under the EPA Act, following **Attorney General** v **BP Australia Ltd** (1964) 12 LGRA 209. The broadstanding provisions provided by s.123 of that Act indicate a legislative intention to uphold a system of planning laws. It is the purpose of that environmental law to avoid damage to the environment and it is the obvious intention of the Act that the terms of the environmental legislation be complied with.

(d) The judge must balance:-

  (i) the public interest in equal compliance with the law, and

  (ii) the degree of irremediality occasioned by the breach and the expense and inconvenience which would follow enforcement of the law through the granting of an injunction.

(e) Where relief from the court is sought against a "static" development, such as a completed building requiring no on-going activity to sustain it, discretion may be more readily exercised against the granting of injunctive relief that a development which involves a continuing breach by conduct. **Blacktown Municipal council** v **Friend & Ors** (1974) 29 L.G.R.A. 192.

(f) Where the discretion is exercised in circumstances which may produce an unjust result a softening of the effect may be achieved by postponing the enforcement of injunctive relief eg. **Woollahra Municipal Council** v **Carr** (1982) 47 L.G.R.A. 105.

(g) Where the application for the enforcement of the Act is made by the Attorney-General, or a council, a court may be less likely to deny equitable relief that it would in litigation between private citizens. **Associated Minerals Consolidated Ltd & Anor** v **Wyong Shire Council** [1974] 2 NSWLR 681.

On appeal from the Land & Environment Court due regard must be had to the exercise by a judge of that Court of his discretion to decide or grant an injunction because that

court is a specialist court, established by Parliament with a large exclusive jurisdiction.

The Court of Appeal affirmed Cripps CJ's decision to exercise his discretion and not grant relief because of the "very special circumstances" in the case i.e. a very long use of the land in a prominent position without any previous attempt by the Council to restrain the prohibited use and lack of evidence of detriment complained of by the public.

It is important to analyse the **Sedevcic** decision in view of the particular circumstances of that case. The result should not be extrapolated to apply to all cases where the Land & Environment Court has a discretion whether or not to grant relief in the case of a breach of the planning laws which has gone unchecked for a period of time. Indeed, Kirby P points out at p.9 that the application of discretion to refuse relief should only be used in special cases, given that it is an object of the EPA Act that the terms of that Act be complied with. Kirby P comments that the exercise of discretion by judges is an important part of the planning scheme framework, providing as it does for "salutary" discretion.

FAT-SEL'S CASE.

In the decision of the Court of Appeal in **A.C.R. Trading Pty Limited & Anor v Fat-Sel Pty Ltd & Anor**, unreported, CA 216 of 1985, 17 November 1987, the Court of Appeal considered the exercise of the court's discretion to grant injunctive relief under s.124(1) of the EPA Act. The case concerned the use of land for activity which the applicant in the Land & Environment Court claimed was an offensive or hazardous industry and therefore prohibited development on the site.

The development in question was a grease waste-disposal industry. The question arose of whether an injunction ought be granted in the Land & Environment Court pending an appeal against that court's decision to the Court of Appeal.

In the Land & Environment Court, **Fat-Sel Pty Ltd & Anor v A.C.R. Trading Pty Ltd** (1985) 58 LGRA 164, Bignold AJ (as he then was) held that he would exercise his discretion and not grant the injunctive relief sought by the applicant.

His decision was overturned by the Court of Appeal who held that the exercise of discretion had been miscarried and the matter should be remitted back to the Land & Environment Court to give that Court opportunity to exercise its discretion in accordance with its decisions. The Court of Appeal held that Bignold AJ had taken irrelevant matters into account and failed to mention other relevant factors in exercising his discretion. It is instructive to briefly examine some of the factors referred to by the Court of Appeal as this provides some indication of those matters which it considered relevant or irrelevant in the exercise of the Land & Environment Court's discretion.

The Court of Appeal held that Bignold J applied a wrong test in exercising his discretion. Evidence of this was Bignold J's acceptance of certain premises in the appellant's favour which the Court of Appeal considered irrelevant. These included that:

(a) the appellants activities promoted the public interest.

(b) they were conducted in an environmentally satisfactory manner.

(c) they contributed to a solution of an important problem of disposing of waste products.

(d) the injunction would result in the elimination of one of three existing depots in the region,

(e) this would cause considerable inconvenience because of loss of trading profits and loss of employment to the employees and

(f) to solve that inconvenience increased loads would be imposed on the other two approved depots or new depots would have to be approved.

The Court of Appeal held there were a number of factors relevant to the exercise of discretion not referred to in his Honour's judgment and these were that:

(a) a form of distillation had been carried out on the subject premises for many years without complaint;

(b) there were no complaints from the neighbourhood;

(c) the complaint eventually came from a trade competitor who stood to gain commercial advantage from injunctive relief;

(d) the Council commenced court proceedings only after the trade competitor had also initiated proceedings;

(e) there was no hazard to the environment and the appellants had controls which were reliable;

(f) the activity had been carried out for many years without interruption and without environmental damage; and

(g) the only environmental consideration suggesting the need for injunctive relief apart from the existence of a breach of EPA Act was the potential of an offensive activity.

Kirby P at p.31 of his judgement states that the scope and purpose of the discretion referred to in s.124 is a wide one and should not be given an unduly restrictive operation as it is part of the general structure and scheme of the EPA Act. He further states that the "discretion is a mollifying one. It permits, in appropriate cases, the refusal of injunctive relief where to grant such relief would work such an injustice as to be disproportionate to the ends secured by the enforcement of the legislation included by injunction". Kirby P followed his earlier decision in **Sedevcic** in this regard.

In reaching its decision that the matter should be remitted back to the Land & Environment Court, the Court of Appeal commented that the Land & Environment Court is a specialist jurisdiction. "Its judges have the responsibility of administering the Act in a coherent way" (Kirby P at page 31) and accordingly the matter was remitted back to that Court rather than, as would be the usual case, the Court of Appeal substituting its own decision for that of the lower Court.

CONCLUSION

Ultimately in any exercise of discretion conferred by a statute on a particular court the judges of that court must have regard to the legislative intent of a particular statutory provision in determining the nature and scope of the discretion exercisable by them. An informative case in this regard is that of the High Court in **Scurr & Ors v Brisbane City Council & Anor** (1973) 47 ALJR 532. That case was concerned with mandatory public notification provisions concerning development under section 22 of the City of Brisbane Town Planning Act.

It is clear from the Court of Appeal's comments in **Sedevcic** and **Fat-Sel** that where a statutory provision is mandatory, as in the planning and environmental law area, the ready exercise of discretion not to grant relief will thwart the legislative objectives of the legislation. It is obvious, but useful, to state that the Court is more likely to withhold relief where the breach is a technical one, not

resulting in the deprivation of individual rights or harm to the environment.

The lack of discretion when a breach of mandatory provisions of the planning laws is proved was considered by Stein J in **Broomham & Owen v Tallaganda Shire Council** (unreported) L&E No.40172 of 1985, 31 October 1986. The case concerned the breach of a provisions of the EPA Act which required notice of a development to be given to the public. At page 5 of this judgment Stein J. said that he had "considerable doubt as to the extent of the application of the discretion where mandatory requirements in the public interest are breached".

LEGAL BRIEFS

FREEDOM OF INFORMATION FOR NEW SOUTH WALES

The State government has tabled for discussion in parliament a Freedom of Information Bill 1988. This was one piece of legislation the present government promised to pass prior to election in March 1988. Effective freedom of information legislation is important in New South Wales.

Unfortunately the range of government documents which are exempt from access to the public under the legislation is very broad. There is provision under the present draft bill for Cabinet Ministers to declare particular documents to be restricted documents. No review mechanism of such a decision is provided.

An important question in any such legislative scheme is the cost of the use of the scheme to an applicant for information. There is provision in the Act for guidelines to be passed, pursuant to s.64 of the Bill, concerning fees to be charged. There is no indication as yet as to what these guidelines will be. Apart from any guidelines passed under that section, the agencies to whom application for information is made have a discretion as to what they should charge. In addition the agency can require an advance deposit before providing any information.

The Bill also provides for access to personal files and records held by numerous government agencies. Certain government agencies, such as the Government Insurance Office, are completely exempt from the provisions of the Bill.

A public seminar on the Freedom of Information Bill was held at the Parliament House theatre on Wednesday 21 September 1988. Speakers included the Premier, Mr. Greiner, and spokepersons from the Opposition, the Council for Civil Liberties, the Council of Social Services, the Law Society of NSW and the Free Speech Society.

Anyone interested in learning more about the government's Bill should ring the Premier's department. All persons interested should ensure that they are informed about the Bill and make appropriate submissions about it to the government. The legal policy/reform group convened by the EDO has written to the Premier expressing support for the concept of freedom of information legislation and stating some concerns about the Bill in its present form.

REGENT THEATRE – AN ITEM OF ENVIRONMENTAL HERITAGE UNDER THREAT

On the 12th April, 1988 Mr. David Hay the new Minister for Planning and Local Government revoked a Permanent Conservation Order protecting the facade, foyer, grand stairway and upper foyer of the Regent Theatre in George Street, Sydney and a section 130 order, which was due to expire on the 9th October, 1988 protecting the auditorium of the Theatre.

The Theatre was first protected by the provisions of the **Heritage Act** 1977 (NSW) in 1979, becoming one of the first buildings to be given protection under that Act. The Permanent Conservation Order was placed on the Theatre in 1981. The Theatre closed in May 1984 following a successful season of "Pirates of Penzance". A public campaign to save the Theatre was started immediately by Actors Equity of Australia, the National Trust and the Royal Institute of Architects among others.

Actors Equity approached the EDO early in April 1988 to take action in the Land & Environment Court challenging Minister Hay's decisions. An interim injunction was granted by Mr. Justice Hemmings on the 22nd April, 1988 preventing Bevelon Investments, the owner of the Theatre, from demolishing it. No undertaking as to damages was required by the Court, the matter being one of clear public interest. In this regard Mr. Justice Hemmings followed the decision of Mr. Justice Cripps in **Ross v State Rail Authority** (unreported) and his own decision in **Jarasius v Forestry Commission of NSW** in December 1987 (unreported).

Legal Case

The matter came on for hearing on the 4th July, 1988 before Cripps CJ. Actors Equity alleged that prior to revoking a Permanent Conservation Order the Minister was obliged to comply with provisions of the Heritage Act. In revoking the two orders the Minister purported to rely on a report of a Commission of Inquiry held in July-September 1986. The report of the Commissioner, Mr. Simpson, dated November 1986 recommended that the whole of the theatre be protected by Permanent Conservation Order. The Heritage Act provides that the Minister must consider this report. Actors Equity alleged that the Minister did not read this report or an adequate summary of it, nor did he attempt to up-date the information necessary for him to make an informed decision. The Minister appeared to have decided to "let the Regent go because the Capitol was likely to be restored". However the evidence did not support this.

Cripps CJ found that the revocation of the Permanent Conservation Order by Mr. Hay was invalid as alleged by Actors Equity. His reasons were that the Minister "must consider the Commissioner's report" and "must consider his summary of submissions made, his findings with respect to those submissions and any recommendations as to how those submissions should be dealt with". He found that "the Minister's attention was not directed to a fair report of a summary of submissions made at the Inquiry or the findings of the Commissioner of Inquiry". Cripps CJ also found that the Minister must consider "whether or not there is new material or changed circumstances between the publication of the report and the decision which he makes". As eighteen months had elapsed between the report and the decisions of the Minister he was obliged to consider relevant matters such as the status of the Capitol Theatre which was within the knowledge of his department. Cripps CJ found that on the evidence it was not open to the Minister to come to the conclusion that the Capitol Theatre was certain to be refurbished.

However, Cripps CJ found that the same level of consideration did not apply to the revocation of s.130 order which he ruled was a valid one. Thus upon the orders of Cripps CJ the threat of demolition to the auditorium of the Theatre again became a reality.

The matter was complicated by the fact that on the first day of the hearing, the 4th of July, the Minister announced that he had made further decisions of revocation against the contingency that the challenge by Actors Equity of his first