

[Chapter 17 - Standing - Week 9]

Introduction

- **Locus Standi**: the right to commence a legal proceeding in a court or tribunal.
- ‘Metaphor’ to ‘describe interest acquired to obtain various common law, equitable and constitutional remedies’ [*Allan v Transurban City Link Ltd*]. Usual categories:
 - Public interest group or community organisation, seeking to challenge the validity of a government decision that is of public policy concern to the organisation [*ACF v Cth*].
 - Trade union/association seeking to challenge a government decision that adversely affects the members of the union/association [*Australian Institution of Marine and Power Engineers v Secretary*].
 - Commercial entity seeking to challenge a government decision that is favourable to a commercial rival [*Bateman’s Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund*].
 - A ‘concerned citizen’ who is seeking to challenge a government decision that does not affect that person’s private rights [*Croome v Tasmania*].

The Role of Standing in Public Law Litigation

- The case for restricting standing in public law litigation
 - Law should limit class of people with standing: should have standing in respect of an infringement on their private rights, not public rights [*Boyce v Paddington Borough Council*].
 - More and more, requires a special interest in the subject matter of the litigation [*ACF; Onus v Alcoa*].
 - Also, that interests are adversely affected by the challenged decision/conduct [*ADJR ss3,5*].
 - Common theme:
 - Liberal doctrine = courts more frequently called upon.
 - Binding precedent of a court ruling = important that parties have an interest in outcome to ensure that ‘legal issues are properly framed and argued’.
 - Distinction between ‘busy bodies’ and ‘genuine grievance’ - government agencies make ‘countless decisions, granting and denying benefits and concessions’.
 - ‘Meddles officiously in other people’s affairs’ [*R v Inland Revenue Commissioners*].
 - Federal jurisdiction - can only deal with a ‘matter’ or justiciable controversy.
 - Established element of public law - radical changes in law made by legislature, not courts.
 - Elected representatives of the people v the unelected and unrepresentative judges.
 - *Bateman’s Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund*
 - Courts protect individual rights, not enforcement. Req. of an interference where D is private citizen/government official. Decided by A-G to enforce public law in courts or not - courts can’t interfere.
- The case against restricting standing in public law litigation
 - Along three lines:
 - (i) Open standing to apply in all public law proceedings [outlined in ‘Still Standing’ - Fisher & Kirk]
 - Democratic theory: democracy = rule by people = citizen participation, no real reason to restrict.
 - (ii) Modified doctrine of open standing - proposed by ALRC.
 - Any person able to commence/maintain public law proceedings unless (i) relevant legislation clearly indicates an intention that the decision or conduct sought to be litigated should not be the subject of challenge by a person such as the applicant; or (ii) not in public interest to proceed as that’d unreasonably interfere with ability of a person with a private interest in the matter to deal with it differently or not at all.
 - (iii) Existing test for standing applied less restrictively.
 - Other points from the ALRC:
 - Law of standing should not inhibit the ability of courts to restrain unlawful government action and to safeguard the rule of law.
 - Law of standing hampers the valuable role that public interest litigation can nowadays play in enforcing legal compliance and government accountability.
 - Law of standing rests upon elastic phrases that are hard to apply in a meaningful way (jurisprudential perspective).
 - Difference between ‘mere busybody’ v special interest person.
 - Emotional interest ever amount to a special interest?
 - Law of standing does not accomplish the objectives it is supposed to achieve - inappropriate litigation can be better controlled through courts’ powers to manage the litigation process (practical perspective).
 - Standing rules do not filter out inappropriate/futile disputes. Unnecessary & unnecessarily costly and delayed.
- The interrelationship of standing and other public law principles
 - None can be examined in isolation from the others.
 - Need for a ‘matter’, which involves a controversy about ‘some immediate right, duty or liability to be established by the determination of the Court’ [*In re Judiciary and Navigation Acts*]
 - i.e. needs more than a ‘theoretical interest’ in the subject matter.

Standing - Foundation Cases

- High Court Decisions
 - *Australian Conservation Foundation v Commonwealth*
 - (i) Two principles: (a) that a 'special interest' confers standing, and (b) that an emotional or intellectual concern in an issue will not of itself confer standing.
 - (ii) Proceedings were instituted by a public interest organisation - usually organisations raise issues of public policy nature. Rather than to safeguard a right of the organisation.
 - (iii) Equitable remedies of declaration and injunction sought - they play a pivotal role in the growth of public law.
 - A plaintiff can sue without joining the A-G in two instances: (a) where the interference with the public right is such as that some private right of his is at the same time interfered with and (b) 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.
 - 'Interest does not mean a mere intellectual or emotional concern ... mere belief/concern'.
 - *Onus v Alcoa of Australia Ltd*
 - Persons who claimed to be descendants and members of the Gourditchjmara Aboriginal people and thus custodians of the relics of cultural and spiritual importance of those people according to their laws and customs, had standing to commence an action to restrain another citizen from contravening section 21 of the AARPA.
 - Flexible rule as 'sufficient interest' varies in meaning according to subject.
 - *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)*
 - While some flexibility in applying this rule and the 'nature and subject matter of the litigation will dictate what amounts to a special interest', the requirement has never been doubted.
 - Test of whether a party has a 'sufficient material interest in the subject matter' of the action 'is to be construed as an enabling, not a restrictive procedural stipulation'.
- Other illustrative cases
 - 'Whilst no single of the above matters might be adequate, looking to the picture they build up, the applicant does have a sufficient interest to constitute it a person aggrieved by the decision of the Secretary' [*Australian Institute of Marine and Power Engineers v Secretary Department of Transport*]
 - North coast = peak environmental organisation, significant and responsible - 'deserving of financial support and participation in government decision-making processes' [*North Coast Environment Council v Minister for Resources*]
 - 'Right to speak and to influence opinions of the public and of politicians ≠ right of standing' - 'intellectual, philosophical and emotional concern' [*Right to Life Association v Secretary Department of Human Services and Health*].
 - 'Association could point to little more than its public concern with the issue challenged' [*Animal Liberation*].
 - 'Usually be necessary [to point to] an interest different to that of the public' [*McGuirk v NSW Ombudsman*].

Specific Remedies and the Principles of Standing

- Non-statutory remedies
 - Declaration and injunction
 - Req: applicant has a special interest in the subject matter of the proceedings [*ACF; Onus; Shop Employees*].
 - Mandamus
 - Req: performance of a duty of a public nature that remains unperformed. For example, mandamus granted to a prosecutor who demonstrates a sufficient interest/legal right in enforcing a public duty owed to them.
 - More liberal approach: newspaper had standing to seek mandamus in relation to a decision of a coroner to prohibit the publication of evidence in a murder investigation [*Mirror Newspapers v Waller*].
 - Habeas corpus
 - Req: 'anybody in the community who knows that a person is wrongfully imprisoned has a right to have the writ to discharge that person out of the imprisonment' [*R v Waters*].
 - To seek the release from detention or imprisonment of a person who is being unlawfully detained.
 - Certiorari and prohibition
 - To ensure that a public body (usually inferior court/tribunal) acts according to law in discharging its functions.
 - *Re McBain*: a stranger can initiate proceedings in superior court for a prerogative writ - public benefit in ensuring bodies act within jurisdiction.
 - But lack of standing = court refusing to issue either writ on discretionary grounds.
 - Crown ≠ stranger.
- Administrative Decisions (Judicial Review) Act
 - Proceedings can be instituted by an aggrieved person [ss 5,6] - 'whose interests are adversely affected' [s3(4)].
 - Not a narrow meaning [*Tooheys Ltd v Minister for Business and Consumer Affairs*].
 - Must suffer beyond ordinary member of public: existing/future legal rights, conduct of business/rights against third parties.
 - A person aggrieved entitled to a written statement of reasons for a decision at no cost [s13] - burdens if 'person aggrieved' is given a broad meaning, not burdensome as courts dismiss or strike out proceedings [*Ogle v Strickland*].

- Other statutory phrases
 - ‘Any person who feels aggrieved thereby’ [ACF]; ‘The rights of the person are substantially and adversely affected by the decision’ [*Canberra Tradesmen’s Union Club v Commissioner for Land and Planning*]; ‘Interested person’ [*Booth v Bosworth*]; ‘Has an interest in the benefit’ [*HEST Australia v Sykley*].
- Administrative Appeals Tribunal Act 1975
 - Section 27(1):
 - (1) [A]n application may be made to the Tribunal for a review of a decision ... or on behalf of any person or persons (including the Commonwealth or an authority of the Commonwealth or Norfolk Island or an authority of Norfolk Island) whose interests are affected by the decision. [The enactment may be regulations made for the purposes of subsection 25(2) (review of decisions made in the exercise of powers conferred by a Norfolk Island enactment)].
 - (2) An organization 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 organization or association.
 - Section 30A: Commonwealth A-G can intervene in any proceeding before tribunal.
 - Section 30: Tribunal has discretion to allow ‘any other person whose interests are affected’ by a decision to be made a party to the proceedings.
 - Case law:
 - ‘The problem which is inherent in the language of the statute is the determination of the point beyond which the affection of interests by a decision should be regarded as too remote for the purposes of ss27(1). ... Must be some evidence to show that the interests are in truth affected’ [*Re McHattan and Collector of Customs (NSW)*].
 - Not sufficient that the objects or purposes [s30] permit the association to concern itself with the decisions under review; rather, it is required that the decisions under review concern themselves with a matter that is an object or purpose of the association ... The relationship must be a real or genuine one. It is not sufficient that some points of correlation can be found [*Re Control Investments and Australia Broadcasting Tribunal*].
 - Joinder of a party has been granted where:
 - It would expedite the disposition of the substantive issue in contention [*Re Stemcor and CEO of Customs*].
 - The interests of a party would be affected by disclosure of a document [*Re Duncan & Department of Health*].
 - The joinder applicants were journalists who had made the initial FOI request for documents about a person who had initiated proceedings to restrain disclosure [*Re Einfield and Human Rights*].
 - ADT Act 2007 (NSW): an application for review may be made by ‘an interested person’ [ss42,55] which is defined to mean ‘a person who is entitled under an enactment to make an application’ for review [s4]. Joinders allowed ‘if the Tribunal considers that the person ought to have been joined as a party or is a person whose joinder is necessary to the determination of all matters in dispute in the proceedings’ [s67].
- Open standing - exceptional feature!
 - Example: FC may grant an injunction to restrain a breach of the Act upon application being made by the ACCC ‘or any other person’ [s80 of *Competition and Consumer Act 2010*].
 - Applied literally without qualification i.e. ‘any person’ is literal, i.e. ‘the fact that no private right or special interest of the applicant is at stake in the present case does not deny it the character of a justiciable controversy’.

Special Issues

- The role of the Attorney-General
 - A-G was seen as more appropriate party to vindicate a public right in two ways:
 - (i) Own motion - *ex meru motu*.
 - (ii) At the suit - *ex relatione* - of a private individual.
 - State A-G has standing to commence proceedings to challenge the validity of a federal statute.
 - Two examples of relator actions are *Kent v Johnson* and *McBain*: A-G lends standing to the relator, but still A-G’s proceeding, relator has no standing!
 - More significant in theory than in practice? *Bateman’s Bay* finds that A-Gs have limited administrative responsibilities, but Australia includes the A-G as a member of Cabinet, not independent from it.
 - Certain exceptional circumstances where other governmental authorities (not a party) have standing. ‘In circumstances where there are specific statutory authorities having responsibility for the administration of particular laws, the court will accept such an authority as a body entitled to enforce a relevant provision’ [*Roads and Traffic Authority of NSW v Higginson*].
 - ‘He is entitled to see and approve the statement of claim and any amendment in the pleadings, he is entitled to be consulted on discovery, the suit cannot be compromised without his approval; if the relator dies, the suit does not abate’ [*Gouriet v Union of Post Office Workers*].
 - A-G’s decision to grant/refuse a fiat was a non-justiciable prerogative power - beyond realm of judicial oversight.
- Joinder and *amicus curiae*
 - Discretion on the court to allow ‘a person interested in a decision’ that is being challenged in proceedings before the court to be made a party to those proceedings [s12 ADJR Act].
 - Discretion on tribunals concerning ‘any other person whose interests are affected by the decision [s30 AAT Act].
 - Less likely to allow intervener if + expense + length.
 - A-Gs of Cth/state power to be joined as a party in any case in which a constitutional issue arises [section 78A].
 - *Amicus*: a commissioner may assist a federal court if an order sought in a proceeding ‘may affect to a significant extent the human rights of persons who are not parties to the proceedings’ for example [s46PV(1) *Aust Human Rights Comm Act*].