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'Standing' for the environment: Problems with locus standi

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'STANDING' FOR THE ENVIRONMENT

Problems With *Locus Standi*

CLASS EXERCISE

Outline ways in which DNA testing and evidence could be made more reliable.

A QUESTION OF THEORY

Generally, humans have seen themselves as the centre of existence, with the world around of value only to the extent that it is useful to them. Therefore, animals, vegetation, the land and so forth, have been not been seen as having a value in themselves, but as having a value only with regard to their usefulness to humans.

There are people however, who have rejected this concept as being too narrow. For example, some spiritualists have maintained that all things have a 'soul' and therefore have an entity and value of their own which has nothing to do with their usefulness to humans. Some philosophists have also insisted that animals have an intrinsic value. Some legal theorists have argued that conservation laws should be developed which recognise the intrinsic value of the environment.

Also, with the increasing knowledge of ecosystems and the importance of each organism of these systems to the whole and to the survival of the world, the idea of intrinsic value of each part of nature has become more widespread.

A QUESTION OF RIGHTS

Law reflects the overriding morals and standards of a society. Because of this, to date in Australia the law has been structured to recognise and protect the rights of people and has not granted the environment the same rights.

A tree therefore, does not have a legal right to exist and remain free from interference. A river does not have a legal right to remain running free from being dammed. A rabbit does not have the legal right to remain burrowing its way around the countryside free from being trapped.

DISCUSSION QUESTIONS

1. In what situations does the law protect parts of nature such as animals, trees and rivers? What examples can you give?
2. If some inanimate objects like trusts, banks, corporations and ships have rights protected by the law, why don't all inanimate objects?

A QUESTION OF *LOCUS STANDI*

The law is designed to provide a remedy if legal rights are breached. Therefore, remedies are linked directly to rights and only those whose rights are involved are eligible to be awarded a remedy by the court.

To bring a case before the court, it is necessary to have legal 'standing' which is referred to as *locus standi*. That is, the court recognises the person/s as an appropriate party to bring a court action in a matter because it is their rights involved.

Rights are interpreted as the level of *personal* or *special interest* a person has in a case and they therefore determine an applicant's eligibility to 'standing' before the court. Therefore, if a person's legal right has been breached, or there has been a breach of a legal right they have a special interest in, then they can bring the matter to court.

What makes up a special interest was defined in the common law test case of *Boyce v Paddington Borough Council* (1903) 1 Ch 109 (the *Boyce* case). In this case it was held that there had to be:

- interference with the public right in such a way that some private right was interfered with at the same time; **and**
- where no private right is interfered with, the public right of a plaintiff who suffers special damage peculiar to them from the interference with the public right. Any exception to this requires leave from the Attorney- General.

What this means is that, a private person or group, with no greater interest than any other member of the public in a situation, is not able to bring a proceeding before the court because they have no *locus standi*.

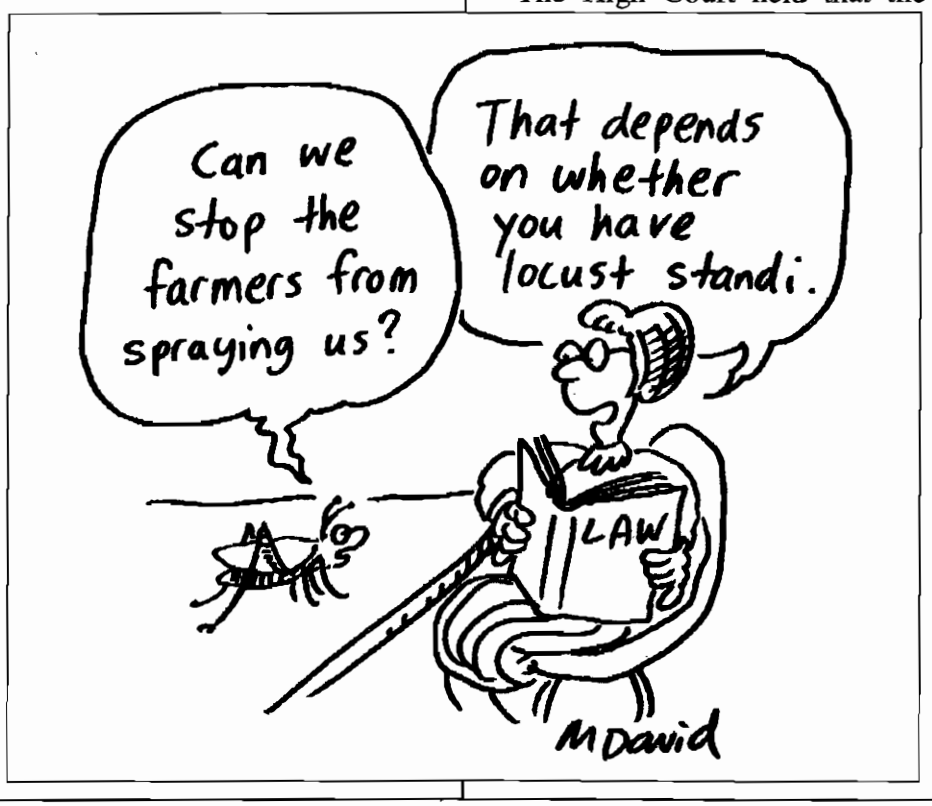
SPECIAL INTEREST, LOCUS STANDI AND THE ENVIRONMENT

A person or a group might have a very strong belief or emotional concern regarding the preservation of a particular part of the environment. Even though in a general sense this is what we would call a special interest, it isn't what the courts would consider a special interest. For example:

- The Australian Conservation Foundation (ACF) in *ACF v the Commonwealth* (1980) 146 CLR 493, tried to make the Federal Ministers account for ignoring the provisions of the *Environment Protection (Impact of Proposals) Act* 1975 (Cth) when they approved the Iwasaki Resort on the Rockhampton Coast.
  The High Court held that the ACF did not have any special interest just because they are an environmental group and therefore they did not have 'standing' to bring a case;
- In *Onus and Frankland v Alcoa of Australia Ltd* (1981) 149 CLR 27, an Aboriginal group tried to bring a case before the court to have some Aboriginal relics preserved on the basis of their special interest. They argued that they had a case under s21 of the *Aboriginal Relics Preservation Act* 1972 (Vic.) which made the damage or interference with Aboriginal relics an offence.
  The court held that under s21 all Australians and not just Aborigines were beneficiaries and that this group did not have a special interest and therefore had no 'standing';
- In *Australian Conservation Foundation and the Conservation Council of South Australia v State of South Australia and Ophix* (1990) 53 SASR 349 the ACF and Conservation Council of South Australia tried to bring a case to court regarding the Flinders Ranges. They argued that the aesthetic quality, use and enjoyment of this area was being eroded by the Government allowing commercial activities in the area.
  The court held that individual members of these groups were ordinary members of public regardless of their affiliation to a conservation group, and therefore they had no special interest and no 'standing' to bring a case.

What these cases show is that it is very difficult to bring a 'class action' (an action by a group of people all joined as one plaintiff) on the basis of special interest. In these cases, the group was held to be made up of individuals who had no greater right than other members of the public regarding the issue and therefore, they had no special interest.

In the *Boyce* case, Mr Justice Gibbs stated that a person is not 'interested' within the meaning of the law unless they are likely to gain some advantage, other than



the satisfaction of righting a wrong, upholding a principle or winning a contest, or they suffer some disadvantage other than a sense of grievance [at 530-1].

There are however many people who would argue that any negative interference with the environment, given the fragile state of ecosystems and our reliance for future survival on them being protected, is a matter which the law should recognise as a special interest of each and every person.

CLASS EXERCISES

1. Outline situations involving concern about the environment in which a group of people might have standing before the court.
2. Outline situations involving concern about the environment in which an individual might have standing.

For both exercises, state what criteria they must satisfy and how they might do this.

ESSAY QUESTION

"Protection of the environment is now widely recognised as a central issue to the survival of the human race. Until the law reflects the right of every individual to a 'special interest' in the environment it remains outdated and perhaps even a danger to society".

Discuss with reference to examples.

TURNING TO A FIAT

As stated in the *Boyce* case above, any exception to special interest to gain standing before a court would need leave from the Attorney-General. This means that the Attorney-General has the discretion to give leave for a party to appear without having satisfied the criteria set out. This is called the granting of a *fiat*.

DISCUSSION QUESTIONS

1. The Attorney-General is the guardian of the public interest and at the same time, a Member of Parliament. What problems do you think could arise with regard to the granting of a *fiat* by a person who plays this dual role? What different pressures might come to bear on the Attorney-General?
2. To what extent do you think that issues concerning the environment are political in nature?

LAW AND ORDER

Laws are enacted with the intention of protecting rights and creating order in society. There is some merit to the argument however, that by insisting on such a narrow construction of the special interest criteria for *locus standi* in environmental cases, that the law may in fact encourage disorder.

There have been many situations reported in the media where people have resorted to mass protest in an effort to voice their concerns about the protection of some part of the environment. One of the most recent examples of this is the protest against the construction of the M2 motorway north of Sydney. In this case, people chained themselves to trees, set up barricades and threw themselves in front of bulldozers.

Where people are denied legal access to fight for what they strongly believe are their rights, history has shown time and time again that these people no longer see the law as relevant and as a result act outside it. As a result, the law then can create the opposite of what it set out to do.

Rather than prosecute people expressing their concerns over the environment in an inappropriate way, perhaps it is time the common law on special interest was regarded as inappropriate and changed to more closely reflect the views of society.

FEAR OF OPENING THE FLOODGATE

One way to bring the common law on *locus standi* more closely in line with the needs of society is to create 'open standing' provisions. This suggestion tends to bring the doom and gloom types out of the woodwork shaking their heads and mumbling about the courts being clogged with a flood of vexatious or frivolous litigation, and the end of the legal system as we know it.

In answer to such predictions, section 123 of the *Environmental Planning and Assessment Act* 1979 (NSW) permits any person to take proceedings in the New South Wales Land and Environment Court to remedy or restrain a breach of the Act, to date there has been no flood.

Such an example illustrates that the introduction of open standing provisions is viable, and in the present climate it may well be argued, is crucial to the on-going viability of the legal system..

DEBATING TOPICS

1. "As the environment cannot defend itself 'friends of the environment' should be granted locus standi".
2. "Recognising the intrinsic value of all things in nature and designing laws to protect them will stand in the way of human progress"

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