

HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, GUMMOW, KIRBY AND HAYNE JJ

BATEMAN'S BAY LOCAL ABORIGINAL
LAND COUNCIL & ANOR

APPELLANTS

AND

THE ABORIGINAL COMMUNITY BENEFIT
FUND PTY LIMITED & ANOR

RESPONDENTS

*Bateman's Bay Local Aboriginal Land Council v The Aboriginal
Community Benefit Fund Pty Limited (S114-97)*
[1998] HCA 49
6 August 1998

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation:

T S Hale with G O'L Reynolds for the appellants (instructed by
Denis Solari, Son & Associates)

J S Wheelhouse with K P Smark for the respondents (instructed by
Thomas & Company)

Notice: This copy of the Court's Reasons for Judgment is
subject to formal revision prior to publication in the
Commonwealth Law Reports.

CATCHWORDS

Bateman's Bay Local Aboriginal Land Council and Anor v The Aboriginal Community Benefit Fund Pty Limited and Anor

Administrative law – Standing – Application for injunctive relief to restrain alleged ultra vires activities by statutory authority with recourse to public moneys – Operation of contributory funeral benefit business by statutory authority – Attorney-General's fiat refused – Whether applicant has sufficient special interest – Commercial activities of applicant in competition with statutory authority.

Words and phrases – "special interest".

Funeral Funds Act 1979 (NSW), s 11.

Aboriginal Land Rights Act 1983 (NSW), ss 12, 23.

1 GAUDRON, GUMMOW AND KIRBY JJ. The question in this appeal is the criterion for the determination of standing in a case where a plaintiff seeks injunctive relief to prevent apprehended economic loss as a consequence of ultra vires activities by a statutory body using or enjoying recourse to public moneys. The respondents were the plaintiffs in the Supreme Court of New South Wales and complained of the conduct of the appellants with respect to the operation of a contributory funeral fund business in contravention of the *Funeral Funds Act* 1979 (NSW) ("the Funeral Funds Act") and the *Aboriginal Land Rights Act* 1983 (NSW) ("the Land Rights Act").

2 On 27 May 1996, the respondents commenced proceedings in the Equity Division of the Supreme Court in which they sought an order restraining the appellants from carrying on or advertising that they carry on or are willing to carry on a contributory funeral fund business in New South Wales. McLelland CJ in Eq held that the respondents did not have standing to maintain the proceedings¹. An appeal to the New South Wales Court of Appeal was allowed in a judgment delivered on 1 April 1997². McLelland CJ in Eq then heard the case on the merits and on 25 August 1997 his Honour granted declaratory and injunctive relief³. This Court subsequently granted special leave to appeal against the decision of the Court of Appeal, but on the condition that the appellants withdraw their appeal against the adverse decision of the Chief Judge given on 25 August 1997. The result is that, unless they succeed in this Court on the question of standing, the appellants will be bound by the adverse decision on the merits.

The facts

3 As far as is relevant, s 11 of the Funeral Funds Act provides:

"(1) A person shall not carry on or advertise that he carries on or is willing to carry on any contributory funeral benefit business unless that person is:

(a) a funeral contribution fund; or

1 *Aboriginal Community Benefit Fund Pty Ltd v Batemans Bay Local Aboriginal Land Council* (1996) 92 LGERA 212.

2 *Aboriginal Community Benefit Fund Pty Ltd v Batemans Bay Local Aboriginal Land Council* (1997) 41 NSWLR 494.

3 *Aboriginal Community Benefit Fund Pty Ltd v Batemans Bay Local Aboriginal Land Council* (1997) 42 NSWLR 593.

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- (b) exempt from the application of this section pursuant to subsection (3).

...

- (3) A person is exempt from the application of this section if:

- (a) that person is:

...

- (v) a person for the time being declared by the Minister by order published in the Gazette to be a person exempt from the application of this section or a person belonging to a class of persons so declared".

4 The first respondent, The Aboriginal Community Benefit Fund Pty Limited, operates a contributory funeral benefit fund business catering for members of the New South Wales Aboriginal community and is the trustee of the Aboriginal Community Benefit Fund ("the Benefit Fund"). The Benefit Fund provides a payment on the death of a member to assist in covering the cost of that member's funeral. By June 1996, the Benefit Fund had approximately 3,000 members, all of whom were members of the Aboriginal community resident in New South Wales. By notice in the *New South Wales Government Gazette*⁴ ("the Gazette") published on 15 April 1994, the then Minister for Consumer Affairs declared that the first respondent was exempt from the application of s 11 of the Funeral Funds Act.

5 The second respondent, the Aboriginal Community Benefit Fund No 2 Pty Limited, is under the same management as the first respondent and operates a contributory life insurance business for members of the Aboriginal community in New South Wales. By June 1996 this fund had approximately 4,000 members. Both respondents are bodies corporate registered pursuant to the Corporations Law.

6 The first appellant, the Bateman's Bay Local Aboriginal Land Council, was constituted as a body corporate by s 6 of the Land Rights Act. The functions of Local Aboriginal Land Councils are set out in s 12(1) of the Land Rights Act and, so far as is relevant to these proceedings, include:

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"(d) to implement the wishes of its members (as decided at a meeting of the Council) with respect to:

...

(ii) the acquisition, establishment and operation of enterprises".

7 The second appellant, the New South Wales Aboriginal Land Council ("the NSWALC"), was constituted as a body corporate by s 22 of the Land Rights Act. Its functions are listed in s 23(1) of the Land Rights Act and include:

"(f) with the agreement of a Local Aboriginal Land Council, to manage any of the affairs of that Council,

...

(h) to make grants or lend money to, or invest money for or on behalf of, Aborigines".

8 The Land Rights Act guaranteed a prescribed level of public funding for the second appellant. Section 28 of that Act provided for an annual payment into the New South Wales Aboriginal Land Council Account of "7.5 per cent of the amount certified from time to time by the Treasurer as having been paid as land tax under the *Land Tax Management Act*" 1956 (NSW). Section 29(1) required the second appellant to establish the "New South Wales Aboriginal Land Council Account". Payments could be made from that Account in respect of:

"[29(1)](c) money to be provided from that Account to Regional Aboriginal Land Councils and Local Aboriginal Land Councils for the purposes of this Act,

(d) amounts required to meet expenditure incurred by the [NSWALC] in the execution or administration of this Act, and

(e) any other payments authorised by or under this or any other Act".

9 The appellants, namely the Bateman's Bay Local Aboriginal Land Council as trustee and the NSWALC as guarantor, and the State of New South Wales are included in the parties to a deed of trust dated 22 May 1996 which established the New South Wales Aboriginal Land Councils Funeral Contribution Fund ("the ALC Fund"). The deed provided for its execution for and on behalf of the State by the Minister for Fair Trading. The power to appoint a new trustee in place of a trustee or in addition to any existing trustee, as well as the power to remove

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any trustee, was vested in the second appellant. The class of persons who were entitled to subscribe to and become beneficiaries of the ALC Fund was defined as "[a]ll Aboriginal persons and the spouses and/or children of Aboriginal persons".

- 10 The appellants and the State made a separate agreement on 22 May 1996 titled "Management Agreement in Relation to New South Wales Aboriginal Land Councils Funeral Contribution Fund" ("the management agreement"). By this agreement the second appellant agreed to "undertake the management of the affairs of the [first appellant]". The "affairs" of the first appellant was defined to include "anything done pursuant to its duties responsibilities and obligations as Trustee in relation to the management and administration of the [ALC] Fund". The second appellant was "solely responsible for all expenses incurred by [it] in performance of" the management agreement (cl 9).

- 11 Clause 13 of the management agreement dealt with the liability of the second appellant under the agreement as follows:

"In consideration of [the second appellant] managing the affairs of the [first appellant, the second appellant] hereby indemnifies and holds harmless the [first appellant] against all actions, liabilities, proceedings, claims, costs and expenses which the [first appellant] may suffer in connection with or arising in any way whatsoever out of the affairs."

The effect of the management agreement was that the first appellant delegated its powers and duties under the trust deed establishing the ALC Fund to the second appellant. This was apparently because of an awareness on the part of the second appellant that it might lack power to operate a funeral fund in its own right⁵.

- 12 That concern is borne out by a consideration of the functions conferred on the first and second appellants by the Land Rights Act. While one of the functions given to the first appellant, by s 12 of the Land Rights Act, related to "the acquisition, establishment and operation of enterprises" (par (d)(ii)), no similar function was conferred on the second appellant. By contrast, the second appellant had the power, conferred by s 23, "to make grants or lend money to, or invest money for or on behalf of, Aborigines" (par (h)) and "to manage any of the affairs" of a Local Aboriginal Land Council with its agreement (par (f)).

5 (1997) 42 NSWLR 593 at 597.

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- 13 By a notice published in the Gazette⁶ on 17 May 1996, the Minister for Fair Trading declared pursuant to s 11(3)(a)(v) of the Funeral Funds Act that the "[ALC Fund] is exempt from the application of section 11 of the Act".

The proceedings in the Supreme Court

- 14 The respondents sought to restrain the appellants from carrying on the contributory funeral benefit scheme proposed to be carried on pursuant to the two instruments dated 22 May 1996. The source of the respondents' objection to the operation of the ALC Fund was described by McLelland CJ in Eq as follows⁷:

"The [respondents], based in Coffs Harbour, have two working directors, three office staff and 13 commission agents. Subscription rates to the first [respondent's] fund range from \$4 to \$26 per fortnight depending on age, for the provision of funeral benefits of varying amounts up to a maximum of \$6,000. Subscription rates to the second [respondent's] fund range from \$6 to \$26 per fortnight, again depending on age, for the provision of payments on death in the sum of \$6,000.

In contrast, the subscription rates proposed for the ALC [Fund] are \$15 per annum for person up to 19 years of age, and \$40 per annum for persons 20 years and over, for the provision of basic funeral costs, within certain limits. It is clear that the benefits payable under the ALC [Fund] could not be fully funded from subscriptions and that the economic viability of the ALC [Fund] would be heavily dependent on subsidisation by the NSWALC. Accordingly, *since the ALC [Fund] would operate in substantially the same limited market as the [respondents'] funds, it is highly probable that the commencement and operation of the ALC [Fund] would have a severe detrimental financial effect on the businesses of the [respondents] (and particularly that of the first [respondent])*. It is on that basis that the [respondents] claim standing to maintain these proceedings." (emphasis added)

- 15 The respondents claimed that the establishment and operation of the ALC Fund was unlawful on the grounds that it was contrary to the prohibition imposed

6 No 61.

7 (1996) 92 LGERA 212 at 217.

by s 11(1) of the Funeral Funds Act, and that the functions of the appellants under the scheme were beyond their respective powers under the Land Rights Act⁸.

16 On 3 June 1996, McLelland CJ in Eq granted interlocutory injunctions and fixed an early final hearing. On 14 June, two further notices were published in the Gazette⁹ pursuant to s 11(3)(a)(v) of the Funeral Funds Act. The first notice declared that the first appellant, as trustee for the ALC Fund, was exempt from the application of s 11 of the Funeral Funds Act. The second notice revoked the declaration published on 17 May, exempting the ALC Fund from the application of s 11.

17 On 28 October 1996, McLelland CJ in Eq delivered the judgment in which he held that the respondents did not have standing to maintain the proceedings. His Honour stated that it was necessary that "civil proceedings to restrain any violation of the public rights involved be taken by the Attorney-General ... or by some person with a sufficient special interest"¹⁰. He continued the interlocutory injunctions and stood the proceedings over to enable the fiat of the Attorney-General to be sought. The Attorney-General declined to grant a fiat. On 22 November 1996, his Honour dismissed the proceedings, but temporarily continued the injunctions pending an appeal to the Court of Appeal.

18 In dealing with the question of "sufficient special interest", McLelland CJ in Eq referred to passages in *Onus v Alcoa of Australia Ltd*¹¹ and *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)*¹² and went on to identify the present case as one where the actual or likely effect on the plaintiff was not "direct". His Honour said¹³ that an example of "direct" effect was *Phillips v New South Wales Fish Authority*¹⁴. In that case, "as a matter of commercial reality", the plaintiffs were required to pay fees exacted without

8 (1996) 92 LGERA 212 at 214.

9 No 71.

10 (1996) 92 LGERA 212 at 220.

11 (1981) 149 CLR 27 at 35-36.

12 (1995) 183 CLR 552 at 558.

13 (1996) 92 LGERA 212 at 219.

14 (1969) 91 WN (NSW) 905.

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authority by the defendant in order to carry on their business as fish merchants¹⁵. The Chief Judge took the view that in the present case the "special interest" of the respondents must be of a kind which it was the intention of the relevant legislation to protect. His Honour concluded¹⁶:

"The prohibition in s 11 of the *Funeral Funds Act* was intended to protect subscribers or potential subscribers to contributory funeral benefit businesses, and the limitation of function conferred on Local Area Land Councils and the NSWALC by the *Aboriginal Land Rights Act* was intended to protect the interests of those for whose benefit those bodies were established, and of the members of those bodies. The [respondents] fall into neither of these categories, and for that reason I do not consider that they have standing to maintain these proceedings."

The Court of Appeal disagreed with this approach to the matter, but in this Court the appellants seek to reinstate it.

- 19 At the rehearing after the appeal to the Court of Appeal, McLelland CJ in Eq held that the second appellant did not have the capacity to indemnify the first appellant in the manner set out in cl 13 of the management agreement¹⁷. It followed that entry into the management agreement exceeded the powers of the second appellant and that, as a consequence, the ALC Fund was not validly constituted. His Honour also held that the order published in the Gazette of 14 June 1996 exempting the first appellant as trustee of the ALC Fund from the application of s 11 of the *Funeral Funds Act* was invalid¹⁸.

15 (1969) 91 WN (NSW) 905 at 915.

16 (1996) 92 LGERA 212 at 220.

17 (1997) 42 NSWLR 593 at 598.

18 (1997) 42 NSWLR 593 at 598-599.

The issues

20 The appellants' submission that the Court of Appeal erred in differing from the primary judge should not be accepted. To the contrary, the primary judge took too narrow a view of the matter.

21 This case fell well within the requirement established by the decisions of this Court and recently repeated in *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)*¹⁹ that a plaintiff have "a special interest in the subject matter of the action". This formulation was reached after expression in various authorities²⁰ of dissatisfaction with the application in public law of the statement apparently made with respect to the tort of public nuisance in *Boyce v Paddington Borough Council*²¹. It will be necessary to return to these authorities later in these reasons.

22 The circumstances of the present litigation indicate particular deficiencies in the *Boyce* model which may still linger to constrain the application of the criterion which has been settled upon in this Court. In *Boyce*, and in the present litigation, insufficient attention was given to the basis upon which equity intervenes in public law matters, particularly to restrain apprehended ultra vires activities of statutory authorities which involve recourse to public moneys. Further, the characteristics of the office of Attorney-General in this country differ from those of the Attorney-General for England and Wales, in particular with respect to the Attorney-General's fiat.

23 A critical matter in this litigation has been whether, having regard to the terms of the legislation under which they are constituted, the appellants have the legal capacity to undertake the activities, involving recourse to public moneys, of which the respondents complain. The second appellant was in a financial position to subsidise the ALC Fund because of the guarantee of a percentage of land tax revenue provided by s 29 of the Land Rights Act. Such a circumstance was not present in the controversies in which equitable relief was sought in *Australian Conservation Foundation v The Commonwealth*²² and *Onus v Alcoa of Australia*

19 (1995) 183 CLR 552 at 558.

20 *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 530-531; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 61, 69; *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672 at 680.

21 [1903] 1 Ch 109.

22 (1980) 146 CLR 493.

*Ltd*²³, and is significant for the application of the criterion "sufficient special interest" and for consideration of the basis upon which equity intervenes in public law cases.

Equity and public law

24 Writing extrajudicially, Sir Anthony Mason has said that²⁴:

"[E]quitable relief in the form of the declaration and the injunction have played a critical part in shaping modern administrative law which, from its earliest days, has mirrored the way in which equity has regulated the exercise of fiduciary powers".

25 In this field, equity has proceeded on the footing of the inadequacy (in particular the technicalities hedging the prerogative remedies²⁵) of the legal remedies otherwise available to vindicate the public interest in the maintenance of due administration²⁶. There is a public interest in restraining the apprehended misapplication of public funds obtained by statutory bodies and effect may be given to this interest by injunction²⁷. The position is expressed in traditional form by asking of the plaintiff whether there is "an equity" which founds the invocation of equitable jurisdiction²⁸.

23 (1981) 149 CLR 27.

24 Mason, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World", (1994) 110 *Law Quarterly Review* 238 at 238.

25 *de Smith's Judicial Review of Administrative Action*, 4th ed (1980) at 429; Schwartz, *Administrative Law*, 3rd ed (1991), §9.8. The declaratory relief given in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 where certiorari and mandamus were not available is a recent example.

26 See *The Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 49-51; Hanbury, "Equity in Public Law" in *Essays in Equity*, (1934) 80 at 112; Sykes, "The Injunction in Public Law", (1954) 2 *University of Queensland Law Journal* 114 at 117.

27 *Attorney-General v Mayor, &c, of Newcastle-upon-Tyne and North-Eastern Railway Co* (1889) 23 QBD 492 at 497; affd [1892] AC 568; Sykes, "The Injunction in Public Law", (1954) 2 *University of Queensland Law Journal* 114 at 119-120.

28 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 434-435.

- 26 This public interest in due administration had been expressed in the Crown's power of visitation of municipal and other chartered corporations which had no private founders with rights of visitation²⁹. The power of the Crown was enforced primarily in the King's Bench by mandamus, *quo warranto* and *scire facias*³⁰. Chancery intervened not only in respect of charitable trusts, where it had a broad jurisdiction, but also more generally. It did so on two bases. First, it was "the privilege of the Attorney-General, acting on behalf of the public, to come into this Court, even for a legal demand"³¹. Secondly, the legal remedies were inadequate³².
- 27 In this and in related areas of public law (for example, the enforcement by injunction of certain statutory prohibitions which are attended by criminal sanction), the ground of equitable intervention has not been the protection of any particular proprietary right of a plaintiff³³. It would be an error to proceed on any basis which assumed, as a governing principle, that in its auxiliary jurisdiction equity intervenes solely to protect a proprietary or other legal right advanced by a plaintiff. The so-called anti-suit injunction is an example which illustrates the contrary³⁴.
- 28 Long before the development of modern public law, the due administration of charitable trusts was a matter of public concern. These being trusts for public purposes and not for persons with proprietary interests in the funds bound by the
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- 29 Chitty, *A Treatise on the Law of the Prerogatives of the Crown*, (1820) at 130-131; *Norrie v Auckland University Senate* [1984] 1 NZLR 129 at 131-133. See also generally as to visitors *Thomas v University of Bradford* [1987] AC 795; *R v Lord President of the Privy Council, Ex parte Page* [1993] AC 682.
- 30 Blackstone, *Commentaries on the Laws of England*, 1st ed (1765), Bk 1, Ch 18 at 469; Pound, "Visitatorial Jurisdiction Over Corporations in Equity", (1936) 49 *Harvard Law Review* 369 at 374-375.
- 31 *Attorney-General v Mayor, &c, of Galway* (1829) 1 Molloy 95 at 103; cf *Attorney-General v The Corporation of Carmarthen* (1805) G Coop 30 [35 ER 466].
- 32 Pound, "Visitatorial Jurisdiction Over Corporations in Equity", (1936) 49 *Harvard Law Review* 369 at 374-375.
- 33 *Cooney v Ku-ring-gai Corporation* (1963) 114 CLR 582 at 603-605; *Associated Minerals Consolidated Ltd v Wyong Shire Council* (1974) 48 ALJR 464 at 470; 4 ALR 353 at 365; [1975] AC 538 at 560 (PC); *NRMCA (Qld) Ltd v Andrew* [1993] 2 Qd R 706 at 711.
- 34 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 389-394.

trusts³⁵, special considerations attended the curial enforcement of due administration. The position was expressed as follows by Lord Macnaghten in *Wallis v Solicitor-General for New Zealand*³⁶:

"It is the province of the Crown as *parens patriae* to enforce the execution of charitable trusts, and it has always been recognised as the duty of the law officers of the Crown to intervene for the purpose of protecting charities and affording advice and assistance to the Court in the administration of charitable trusts."

- 29 Apparently by analogy to this role with respect to charitable trusts, and as a development of the more general visitatorial jurisdiction outlined above, the English Attorney-General moved in Chancery to restrain municipal corporations misapplying funds which they held upon charitable or statutory trusts³⁷. Some of these authorities were then relied upon, more broadly, to support the restraint of statutory bodies from unauthorised application of their funds³⁸. Finally, it was decided that where a public authority clothed with statutory powers exceeds them by some act which tends to interfere with public rights and so to injure the public, the Attorney-General may move to protect the public interest, although there may be no evidence of actual injury to the public³⁹. In *London County Council v Attorney-General*, Lord Halsbury LC said⁴⁰:

"If there is excess of power claimed by a particular public body, and it is a matter that concerns the public ... it is for the Attorney-General and not for

35 *Attorney-General (NSW) v Perpetual Trustee Co (Ltd)* (1940) 63 CLR 209 at 222.

36 [1903] AC 173 at 181-182.

37 *Attorney-General v The Mayor of Norwich* (1837) 2 My & Cr 406 [40 ER 695]; *The Attorney-General v Aspinall* (1837) 2 My & Cr 613 [40 ER 773]; *Attorney-General v Corporation of Lichfield* (1848) 11 Beav 120 [50 ER 762]; Joyce, *The Law and Practice of Injunctions in Equity and at Common Law*, (1872), vol 1 at 728-730.

38 *The Attorney-General v The Guardians of the Poor of Southampton* (1849) 17 Sim 6 [60 ER 1028]; *The Attorney-General v Andrews* (1850) 2 Mac & G 225 [42 ER 87]; *Attorney-General v Mayor, &c, of Newcastle-upon-Tyne and North-Eastern Railway Co* (1889) 23 QBD 492 at 497; affd [1892] AC 568.

39 *Attorney-General for NSW v Brewery Employés Union of NSW* (1908) 6 CLR 469 at 550-552; *Tasmania v Victoria* (1935) 52 CLR 157 at 186-187.

40 [1902] AC 165 at 168. See also *Attorney-General for NSW v Brewery Employés Union of NSW* (1908) 6 CLR 469 at 598.

the Courts to determine whether he ought to initiate litigation in that respect or not."

30 In this regard, the Attorney-General may act on his own account or upon the relation of third parties. The courts have refused to examine the grant or refusal of a fiat in connection with a relator action⁴¹. Where the Attorney-General moves upon the relation of another, it is unnecessary that the relator have any interest in the proceedings⁴². A relator or other person with a sufficient interest to enforce the public duty in question may pursue the matter concurrently with relator proceedings by the Attorney-General⁴³. In general, in the absence of particular statutory provision, costs were not awarded against the Attorney-General in a relator action and one of the uses of a relator was to provide a person to bear the costs of an unsuccessful suit⁴⁴.

31 In considering the development of the law with respect to that sufficiency of interest to support a suit for equitable relief independently of the Attorney-General, two related but distinct principles upon which the Court of Chancery acted are to be kept in mind. First, all parties "materially interested in the subject ought generally to be made parties to the suit, either as plaintiffs or defendants", the object being to do complete justice in the matter⁴⁵. Secondly, where there were numerous parties in the same or a common interest, representative orders might be made, a subject discussed by McHugh J in *Carnie v Esanda Finance Corporation*

41 *Barton v The Queen* (1980) 147 CLR 75 at 90-91.

42 *Attorney-General (Q); Ex rel Duncan v Andrews* (1979) 145 CLR 573 at 582.

43 *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672 at 681; *The Attorney-General v Vivian* (1826) 1 Russ 226 at 235-236 [38 ER 88 at 91-92].

44 *Wentworth v Attorney-General (NSW)* (1984) 154 CLR 518 at 526-527.

45 *Daniell's Chancery Practice*, 5th ed (1871), vol 1 at 172. The rigour of the rule as to joinder of necessary parties was relaxed by statute: see *Fell v Fell* (1922) 31 CLR 268 at 285.

*Ltd*⁴⁶. These principles were, as Lord Lindley put it, "to be applied to the exigencies of modern life as occasion requires"⁴⁷.

- 32 The question whether the interest of a particular person made that person a necessary party or placed it in the same or in a common interest with others did not dictate the answer to the question whether that person had an interest sufficient to render it a competent plaintiff in the absence of the Attorney-General. Further, special considerations intruded where the subject-matter of the suit was not confined to the protection of proprietary interests, but involved public rights or interests.

Standing in the absence of the Attorney-General

- 33 As Chancery in nineteenth century England extended the application of the injunction to restrain the ultra vires activities of public bodies, a narrow view was taken as to the competency of plaintiffs who sued in the absence of the Attorney-General. In *Evan v The Corporation of Avon*⁴⁸, Sir John Romilly MR allowed the demurrer to a bill in which a senior burgess of the borough of Avon sought to restrain the borough from selling certain land in alleged breach of its constitution. The Master of the Rolls said that "there is a public trust for the town and inhabitants, and a suit to enforce such a trust ought to be by information by the Attorney-General, and not by a private individual"⁴⁹. The result was decisions in which suits were dismissed for want of an equity and the court expressed the view that the defendant body was exceeding its statutory powers but regretted its lack of authority to give any remedy⁵⁰.

- 34 Such a state of affairs can have little to recommend it. While equitable remedies are generally described as discretionary in nature, standing to institute a suit for such relief turns upon whether particular criteria are met in the case in

46 (1995) 182 CLR 398 at 428-429. See also Weinstein, "The Effect of Equity on Mass Tort Law" in Goldstein (ed), *Equity and Contemporary Legal Developments*, (1992) 668 at 690-695.

47 *Taff Vale Railway v Amalgamated Society of Railway Servants* [1901] AC 426 at 443.

48 (1860) 29 Beav 144 [54 ER 581].

49 (1860) 29 Beav 144 at 152 [54 ER 581 at 585].

50 See *Pudsey Coal Gas Company v Corporation of Bradford* (1873) LR 15 Eq 167 at 172; *Helicopter Utilities Pty Ltd v Australian National Airlines Commission* [1962] NSW 747 at 753-754.

question. Yet the effect of decisions such as *Evan* is that in many instances it is the Attorney-General who determines whether there is to be curial enforcement of the requirement that statutory bodies observe the law. This, it has been said, "is a matter which should be determined by known rules of law, and not by the undisclosed practice of a minister of the Crown"⁵¹. The evolution of the *Boyce* doctrine of "sufficient special interest" represents an attempt to alleviate that state of affairs whilst keeping at bay "the phantom busybody or ghostly intermeddler"⁵². The result is an unsatisfactory weighting of the scales in favour of defendant public bodies. Not only must the plaintiff show the abuse or threatened abuse of public administration which attracts equitable intervention, but the plaintiff must also show some special interest in the subject-matter of the action in which it is sought to restrain that abuse.

- 35 In 1978, Lord Wilberforce declared in *Gouriet v Union of Post Office Workers*⁵³ that "the exclusive right of the Attorney-General to represent the public interest" was not technical, procedural or fictional but "constitutional", even where individuals "might be interested in a larger view of the matter"⁵⁴. His Lordship said that, in dealing with fiat applications, the Attorney-General

51 Wade and Forsyth, *Administrative Law*, 7th ed (1994) at 607.

52 Craig, *Administrative Law*, 3rd ed (1994) at 484.

53 [1978] AC 435.

54 [1978] AC 435 at 481. In *The Stockport District Waterworks Company v The Mayor, &c of Manchester* (1863) 9 Jurist (NS) 266 at 267, Lord Westbury LC had spoken of the usurpation by a private individual of the privilege "wisely intrusted" to the Attorney-General by "the constitution of the country".

"has the right, and the duty, to consider the public interest generally and widely"⁵⁵ and stated⁵⁶:

"It can properly be said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney-General enforces them as an officer of the Crown. And just as the Attorney-General has in general no power to interfere with the assertion of private rights, so in general no private person has the right of representing the public in the assertion of public rights. If he tries to do so his action can be struck out."

36 In England itself, the subsequent procedural changes incorporated in s 31 of the *Supreme Court Act* 1981 (UK) have resulted in the prerogative and equitable remedies all becoming available in a single form of proceeding instituted by leave given to an applicant with a "sufficient interest in the matter to which the application relates" (sub-s (3)). In Australia, with respect to review of decisions under federal laws, significant changes with respect to standing had already been made by the *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

37 Moreover, there are particular difficulties with the adoption in Australia of the reasoning in *Gouriet*. First, if it be correct in its terms, no room is left for the "special interest" which is short of a personal right to equitable relief but sufficient to supply standing⁵⁷. The reasoning in *Gouriet* appears to reflect a view of standing which sees administrative review as concerned with the vindication of private not public rights. Secondly, care is required in translating to the legal structure and practical circumstances applying in Australia doctrines which in England have been identified as "constitutional". The inapplicability in federal jurisdiction of the maxim that the Crown can do no wrong is one example⁵⁸. Further, in federal jurisdiction, questions of "standing", when they arise, are

55 [1978] AC 435 at 478.

56 [1978] AC 435 at 477.

57 *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672 at 681.

58 See *The Commonwealth v Mewett* (1997) 71 ALJR 1102 at 1104, 1127, 1136-1137; 146 ALR 299 at 301, 332, 345-346.

subsumed within the constitutional requirement of a "matter"⁵⁹. This emphasises the general consideration that the principles by which standing is assessed are concerned to "mark out the boundaries of judicial power" whether in federal jurisdiction or otherwise⁶⁰.

- 38 One consideration, which was relevant in England before the post-*Gouriet* legislation replaced the *Boyce* principle, was the confidence placed in the special position occupied by the Attorney-General. In England, the Attorney-General is almost invariably a leading counsel of established reputation who, whilst usually sitting in the House of Commons, has limited administrative responsibilities. Key political functions are discharged by the Lord Chancellor⁶¹. The Attorney-General is rarely a member of Cabinet, thereby assisting the provision to Cabinet of independent advice on important issues⁶². On the other hand, it has long been widespread practice in Canada and Australia, both in federal and provincial or State governments, and in New Zealand, to include the Attorney-General as a member of Cabinet⁶³. In Australia, both at federal and State levels, the Attorney-General is a minister in charge of a department administering numerous statutes⁶⁴, is likely to be a member of Cabinet⁶⁵ and, at least at State level, may not be a lawyer⁶⁶. At the present day, it may be "somewhat visionary" for citizens in this country to suppose that they may rely upon the grant of the Attorney-General's

59 *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 550-551; *Croome v Tasmania* (1997) 71 ALJR 430 at 432, 436-437; 142 ALR 397 at 400, 405-406.

60 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582, 595-596.

61 "Note", (1975) 49 *Australian Law Journal* 210 at 211-212.

62 Edwards, *The Law Officers of the Crown*, (1964) at 171-175; Edwards, *The Attorney General, Politics and the Public Interest*, (1984) at 67-70; cf Jones, "The Office of Attorney-General", [1969] *Cambridge Law Journal* 43 at 50.

63 Edwards, *The Law Officers of the Crown*, (1964) at 176; Edwards, *The Attorney General, Politics and the Public Interest*, (1984) at 71-74, 379-388.

64 Renfree, *The Executive Power of the Commonwealth of Australia*, (1984) at 205; see also *Law Officers Act 1964* (Cth), s 17.

65 "Note", (1978) 52 *Australian Law Journal* 4 at 4-5.

66 See The Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27, (1985), par 160.

fiat for protection against ultra vires action of statutory bodies for the administration of which a ministerial colleague is responsible⁶⁷.

39 In a case where the plaintiff has not sought or has been refused the Attorney-General's fiat, it may well be appropriate to dispose of any question of standing to seek injunctive or other equitable relief by asking whether the proceedings should be dismissed because the right or interest of the plaintiff was insufficient to support a justiciable controversy, or should be stayed as otherwise oppressive, vexatious or an abuse of process. The plaintiff would be at peril of an adverse costs order if the action failed. A suit might properly be mounted in this way, but equitable relief denied on discretionary grounds. Further, declaratory rather than injunctive relief may be sufficient.

40 The result would not be a unique situation. It will be recalled that, in this Court, there is a body of authority that, even in the absence of a legal interest, "a stranger" to an industrial dispute has standing as a prosecutor to seek prohibition under s 75(v) of the Constitution although in such cases the discretion to refuse the remedy may be greater than would otherwise be the case⁶⁸. In *R v Federal Court of Australia; Ex parte WA National Football League*⁶⁹, Barwick CJ relied upon the more generally stated proposition of Brett J in *Worthington v Jeffries*, namely⁷⁰:

"These authorities shew that the ground of decision, in considering whether prohibition is or is not to be granted, is not whether the individual suitor has or has not suffered damage, but is, whether the royal prerogative has been encroached upon by reason of the prescribed order of administration of justice having been disobeyed. If this were not so, it seems difficult to understand why a stranger may interfere at all."

67 See the remarks of Gibbs J in *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 383.

68 *R v Graziers' Association of NSW; Ex parte Australian Workers' Union* (1956) 96 CLR 317 at 327; *R v Watson; Ex parte Australian Workers' Union* (1972) 128 CLR 77 at 81; *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 201-202.

69 (1979) 143 CLR 190 at 201.

70 (1875) LR 10 CP 379 at 382.

- 41 Special considerations would apply, with as well as without the fiat, to the attempted "exceptional" enforcement by injunction of the criminal law⁷¹, particularly where the only injury alleged is to the moral well-being of the public⁷². However, in the present case, what is at stake is not the operation of censorship or Sunday trading laws and the like, but the public interest in due administration of public bodies with recourse to public revenues. Nevertheless, such an approach to the matter was roundly rejected in *Gouriet v Union of Post Office Workers*⁷³ and has not been put forward in argument in the present case. Rather, the argument has turned upon the "special damage" requirement derived from *Boyce v Paddington Borough Council*⁷⁴.

The Boyce principle

- 42 There is an incongruity in a principle which takes as its starting point the proposition that the statute in question has stopped short of creating a personal right which equity may protect by injunction, but nevertheless enables an individual who suffers "special damage peculiar to himself" to seek equitable relief in respect of an interference with the public interest.
- 43 In private law there is, in general, no separation of standing from the elements in a cause of action. Further, the requirement of a legal right determines the availability of injunctive relief and there is no separate requirement which determines entitlement to approach a court of equity. Yet the formulation of principle in *Boyce* was not attended by any indication that the court perceived any distinction between equitable relief in respect of a cause of action in public nuisance and a challenge to the legality of public action⁷⁵. Further, the reference

71 *The Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 49-50.

72 See the remarks of Harvey J in *Attorney-General v Mercantile Investments Ltd* (1920) 21 SR (NSW) 183 at 187, 189; the dissenting judgment of Bray CJ in *The Attorney-General v Huber* (1971) 2 SASR 142 at 161-162; and *Attorney-General (ACT) v ACT Minister for the Environment* (1993) 43 FCR 329 at 332-334, 340-341; 115 ALR 161 at 164-165, 171-172. See also Wade and Forsyth, *Administrative Law*, 7th ed (1994) at 608-610.

73 [1978] AC 435 at 482, 489.

74 [1903] 1 Ch 109 at 114.

75 A point made in Craig, *Administrative Law*, 3rd ed (1994) at 483, 500. See also Cane, "The Function of Standing Rules in Administrative Law", [1980] *Public Law* 303 at 305-307.

to the suffering of special damage peculiar to the plaintiff⁷⁶ may have been no more than a repetition of the orthodox view that one who sustains particular damage attributable to a public nuisance has a private right of action in tort⁷⁷.

44 In *Onus v Alcoa of Australia Ltd*⁷⁸, Wilson J⁷⁹ and Brennan J⁸⁰ set out the passage from the judgment of Gibbs J in *Australian Conservation Foundation v The Commonwealth*⁸¹ in which he described the formulation in *Boyce* as "not altogether satisfactory". Brennan J also observed⁸² that Buckley J's notion of special damage may have been "derived from the notion of particular damage occasioned by a public nuisance and recoverable at common law".

45 Thereafter, in the joint judgment of Gibbs CJ, Mason, Murphy and Brennan JJ in *Wentworth v Woollahra Municipal Council*⁸³, this Court dealt further with the apparent conundrum. After referring to the judgment of Bray CJ in *Neville Nitschke Caravans (Main North Road) Pty Ltd v McEntee*⁸⁴, their Honours continued⁸⁵:

"It is true, as Bray CJ noted, that the circumstances of *Boyce*, a public nuisance case, provided a somewhat unpromising foundation for the establishment of a general principle that whenever a plaintiff suffers special damage from interference with a public right, including within that concept a violation or intended violation of a statute dealing generally with matters of social or economic regulation, he can obtain an injunction and damages. None the less he thought that the existence of a general principle should be

76 [1903] 1 Ch 109 at 114.

77 *de Smith's Judicial Review of Administrative Action*, 4th ed (1980) at 451.

78 (1981) 149 CLR 27.

79 (1981) 149 CLR 27 at 61.

80 (1981) 149 CLR 27 at 69.

81 (1980) 146 CLR 493 at 527.

82 (1981) 149 CLR 27 at 71.

83 (1982) 149 CLR 672 at 680.

84 (1976) 15 SASR 330 at 341.

85 (1982) 149 CLR 672 at 680.

acknowledged. His Honour has been vindicated by the recognition by this Court of the existence of this principle, at least in its application to declaratory and injunctive relief: [*Australian Conservation Foundation v The Commonwealth*⁸⁶] and *Onus v Alcoa of Australia Ltd*⁸⁷. In *Onus* the Court accepted the statement of Gibbs J in *ACF*⁸⁸ that the expression 'special damage peculiar to himself', used by Buckley J with reference to the second limb of the proposition which he enunciated in *Boyce*, was equivalent in meaning to 'having a special interest in the subject matter of the action' - see *Onus*⁸⁹; cf Aickin J⁹⁰."

- 46 In the joint judgment of Brennan, Dawson, Toohey, Gaudron and McHugh JJ in *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)*⁹¹, reference was made to the requirement that the plaintiff have "a special interest in the subject matter of the action". Their Honours stated⁹² that the rule is flexible and continued that "the nature and subject matter of the litigation will dictate what amounts to a special interest". This emphasises the importance in applying the criteria as to sufficiency of interest to support equitable relief, with reference to the exigencies of modern life as occasion requires⁹³. It suggests the dangers involved in the adoption of any precise formula as to what suffices for a special interest in the subject-matter of the action, where the consequences of doing so may be unduly to constrict the availability of equitable remedies to support that public interest in due administration which enlivens equitable intervention in public law. That would be the consequence of the adoption of the approach taken by the primary judge in this litigation. It will be recalled that, in *Onus v Alcoa of Australia Ltd*⁹⁴, Brennan J warned that to deny standing may be to "deny to an

86 (1980) 146 CLR 493.

87 (1981) 149 CLR 27.

88 (1980) 146 CLR 493 at 527.

89 (1981) 149 CLR 27 at 35-36, 42-43, 60-61, 68-69.

90 (1981) 149 CLR 27 at 56-57.

91 (1995) 183 CLR 552 at 558.

92 (1995) 183 CLR 552 at 558.

93 cf *Taff Vale Railway v Amalgamated Society of Railway Servants* [1901] AC 426 at 443.

94 (1981) 149 CLR 27 at 73.

important category of modern public statutory duties an effective procedure for curial enforcement".

47 In *Australian Conservation Foundation v The Commonwealth*⁹⁵, Aickin J suggested a course which in the present case would involve asking whether the interest of the respondents in the observance by the appellants of the prohibition in s 11(1) of the Funeral Funds Act and of the limitations upon their statutory powers is sufficiently related to the relief claimed. His Honour said⁹⁶:

"The 'interest' of a plaintiff in the subject matter of an action must be such as to warrant the grant of the relief claimed. ... [T]he plaintiff's interest should be one related to the relief claimed in the statement of claim."

48 Upon the true construction of its subject, scope and purpose, a particular statute may establish a regulatory scheme which gives an exhaustive measure of judicial review at the instance of competitors or other third parties. An example is the special but limited provision by the legislation considered in *Alphapharm Pty Limited v SmithKline Beecham (Australia) Pty Limited*⁹⁷ for judicial review of successful applications for registration. However, the circumstance that the plaintiff conducts commercial activities in competition with those which it seeks to restrain is not necessarily insufficient to provide it with a sufficient interest in the subject-matter of the action⁹⁸. In *Attorney-General v London County Council*⁹⁹, the plaintiffs were both the Attorney-General and omnibus proprietors who were ratepayers of the defendant and who competed with the business conducted by the defendant which they sought to restrain¹⁰⁰. More recently, the interest of a union of shop assistants in the trading hours of the enterprises employing its members was held by this Court to be an interest with respect to a

95 (1980) 146 CLR 493 at 511.

96 (1980) 146 CLR 493 at 511.

97 (1994) 49 FCR 250; 121 ALR 373. See *Right to Life Association (NSW) Inc v Department of Human Services and Health* (1995) 56 FCR 50 at 68-69, 84-85; 128 ALR 238 at 255, 269-270.

98 See *Hawker Pacific Pty Ltd v Freeland* (1983) 79 FLR 183 at 187; 52 ALR 185 at 189-190, an application under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) by a disappointed tenderer.

99 [1901] 1 Ch 781; affd [1902] AC 165.

100 See [1901] 1 Ch 781 at 781, 802-803, 807.

statutory power to permit Sunday trading sufficient to ground standing for the union¹⁰¹.

Conclusion

49 The nature and subject-matter of the present litigation is the observance by the appellants of the statutory limitations placed upon their activities. In an immediate sense these prohibitions serve to protect the interests of subscribers and those referred to by the primary judge. Those persons, even if not given by the legislation personal rights which would be protected by injunction, may well have a sufficient special interest.

50 But it does not follow that such persons alone have standing. It would be wrong to take this as a starting point. The first question is why equity, even at the instance of the Attorney-General, would intervene. The answer given for a long period has been the public interest in the observance by such statutory authorities, particularly those with recourse to public revenues, of the limitations upon their activities which the legislature has imposed. Where there is a need for urgent interlocutory relief, or where the fiat has been refused, as in this litigation, or its grant is an unlikely prospect, the question then is whether the opportunity for vindication of the public interest in equity is to be denied for want of a competent plaintiff. The answer, required by the persistence in modified form of the *Boyce* principle, is that the public interest may be vindicated at the suit of a party with a sufficient material interest in the subject-matter. Reasons of history and the exigencies of present times indicate that this criterion is to be construed as an enabling, not a restrictive, procedural stipulation.

51 Moreover, the use of equitable remedies to ensure compliance by the executive and legislative branches of government with the requirements of the Constitution should not be overlooked. No doubt special considerations may apply in that context, but it would be an odd result if the requirements for standing outside the constitutional sphere were more stringent than within it. Prejudice to a sufficient material interest, such as that in the practice of a profession or occupation, will suffice in constitutional cases¹⁰².

52 Here, the respondents had an interest in the observance by the appellants of the statutory limitations upon their activities with respect to contributory funeral

101 *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552.

102 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 257; *Croome v Tasmania* (1997) 71 ALJR 430 at 433, 439; 142 ALR 397 at 401, 410.

23.

funds which, as a matter of practical reality, was immediate, significant and peculiar to them. The primary judge found that because the parties would be operating in substantially the same limited market it was highly probable that, if not restrained from commencing and concluding their activities, the appellants would cause severe detriment to the business of the respondents¹⁰³. That, in the circumstances of this litigation, gave the respondents a sufficient special interest to seek equitable relief.

53 The appeal should be dismissed with costs.

103 (1996) 92 LGERA 212 at 217.

54 McHUGH J. The question in this appeal is whether the Court of Appeal of New South Wales erred in finding¹⁰⁴ that the respondents had standing to commence proceedings restraining the appellants from operating a contributory funeral fund business. The respondents claimed that the business was ultra vires the powers of the appellants and the subject of an invalid exemption under the *Funeral Funds Act* 1979 (NSW) ("the Funeral Funds Act").

55 In my opinion, the Court of Appeal did not err in holding that the respondents had standing. The respondents stood to suffer financial detriment if the appellants were allowed to conduct the funeral fund business. Moreover, it can safely be inferred that that detriment would be greater than the detriment suffered by other persons as the result of the appellants' activities in breach of the law. Nothing in the Funeral Funds Act or the *Aboriginal Land Rights Act* 1983 (NSW) ("the Land Rights Act") indicates that those Acts had any object or purpose of protecting the interests of the respondents. However, because the detriment to the respondents gives them a special interest in enforcing those Acts, they can bring proceedings to force the appellants to comply with the terms of that legislation.

The factual and procedural background

56 The first and second respondents are, respectively, the owners and operators of a contributory funeral fund benefit business and a contributory life insurance business for Aborigines in New South Wales. Pursuant to the gazettal of an exemption granted by the Minister for Fair Trading ("the Minister") under s 11(3)(a)(v) of the Funeral Funds Act¹⁰⁵, the first respondent commenced operation of its contributory funeral fund business ("the first respondent's funeral fund") in April 1994.

57 The first and second appellants are the Bateman's Bay Local Aboriginal Land Council ("the local Council") and the New South Wales Aboriginal Land Council ("the State Council") (collectively, "the Councils"). The Councils sought to establish a contributory funeral fund business for Aborigines in New South Wales in direct competition with the first respondent's funeral fund. On 17 May 1996, the Minister granted the necessary exemption under the Funeral Funds Act to the "New South Wales Aboriginal Land Councils Funeral Contribution Fund" ("the

104 *Aboriginal Community Benefit Fund Pty Ltd v Batemans Bay Local Aboriginal Land Council* (1997) 41 NSWLR 494 at 502, 512.

105 Section 11(3)(a)(v) of that Act provides that a person wishing to operate a contributory funeral benefit business will be exempt from the requirement under s 11(1) to be a registered funeral contribution fund if the person is:

"for the time being declared by the Minister by order published in the Gazette to be a person exempt from the application of this section or a person belonging to a class of persons so declared".

State Fund"). On 22 May 1996, the Councils executed a deed of trust which established the State Fund, made the local Council the trustee of the fund and made the State Council the guarantor of the local Council. All Aboriginal persons and the spouses and/or children of Aboriginal persons were entitled to subscribe to and become beneficiaries of the Fund. The Councils also entered into a management agreement under which the local Council delegated its powers and duties under the trust deed to the State Council which agreed to "undertake the management of the affairs of the [local Council]". Those "affairs" included "anything done pursuant to its duties responsibilities and obligations as Trustee in relation to the management and administration of the [State] Fund". The management agreement made the State Council "solely responsible for all expenses incurred by [it] in performance of" the management agreement. Clause 13 of the management agreement also provided:

"In consideration of [the State Council] managing the affairs of the [local Council], the [State Council] hereby indemnifies and holds harmless the [local Council] against all actions, liabilities, proceedings, claims, costs and expenses which the [local Council] may suffer in connection with or arising in any way whatsoever out of the affairs."

Thus, the local Council delegated its powers and duties under the trust deed establishing the funeral fund to the State Council.

58 No doubt the arrangements were structured in this way because the State Council knew that it might not have power to operate a funeral fund in its own right¹⁰⁶. The State Fund commenced operation on 24 May 1996.

59 On 27 May 1996, the respondents commenced proceedings against the Councils in the Equity Division of the Supreme Court of New South Wales. Those proceedings sought to restrain the Councils from operating the State Fund on the basis that the exemption granted by the Minister was void, the trust deed and management agreement were ultra vires the Councils and the Councils, in operating the Fund, were acting beyond the powers conferred on them by the Land Rights Act. The respondents claimed standing to injunct the Councils on the ground that the Councils were operating in substantially the same limited market as the respondents who would suffer severe financial detriment as a result of the Councils' unlawful activities¹⁰⁷. McLelland CJ in Eq granted interlocutory injunctions to the respondents. Before the hearing of the application for permanent injunctions, the Minister revoked the exemption granted to the State Fund and

106 *Aboriginal Community Benefit Fund Pty Ltd v Batemans Bay Local Aboriginal Land Council* (1997) 42 NSWLR 593 at 597.

107 *Aboriginal Community Benefit Fund Pty Ltd v Batemans Bay Local Aboriginal Land Council* (1996) 92 LGERA 212 at 214.

granted a new exemption to the "Bateman's Bay Local Aboriginal Land Council, as trustee for the New South Wales Aboriginal Land Councils Funeral Contribution Fund".

60 On 28 October 1996, McLelland CJ in Eq found that the respondents lacked standing to bring proceedings against the Councils. However, he continued the interlocutory injunctions and stood over the proceedings to enable the Attorney-General to consider whether to grant a fiat. The Attorney-General declined to do so. As a result, McLelland CJ in Eq dismissed the proceedings on 22 November 1996. He continued the interlocutory injunctions pending an appeal to the Court of Appeal of New South Wales.

61 The Court of Appeal unanimously allowed the respondents' appeal and remitted the proceedings to the Equity Division of the Supreme Court¹⁰⁸. After further hearing, McLelland CJ in Eq found the purported exemptions to be invalid and the deed of trust and management agreement to be ultra vires the Councils. He ordered declaratory and injunctive relief¹⁰⁹.

The statutory arrangements of the Councils

62 The Councils are statutory corporations established under ss 6(1) and 22 of the Land Rights Act. They have limited powers and functions which are set out in ss 12 and 23 of the Land Rights Act. Under s 12, the local Council's functions include implementing "the wishes of its members (as decided at a meeting of the Council) with respect to ... the acquisition, establishment and operation of enterprises"¹¹⁰. Section 23 gives the State Council power "with the agreement of a Local Aboriginal Land Council, to manage any of the affairs of that Council"¹¹¹ and "to make grants or lend money to, or invest money for or on behalf of, Aborigines"¹¹².

63 The income of the State Council is derived from distributions made from the Consolidated Revenue of the State of New South Wales. Section 28(1) of the Land Rights Act allots to the State Council annually the equivalent of 7.5 per cent of the amount certified from time to time by the Treasurer as having being paid as land tax in the previous year. Section 29(1) of the Land Rights Act requires the State

108 (1997) 41 NSWLR 513.

109 (1997) 42 NSWLR 593.

110 s 12(d)(ii).

111 s 23(1)(f).

112 s 23(1)(h).

Council to establish the "New South Wales Aboriginal Land Council Account". Relevantly, that section allows payments from that account in respect of:

- "(c) money to be provided from that Account to Regional Aboriginal Land Councils and Local Aboriginal Land Councils for the purposes of this Act,
- (d) amounts required to meet expenditure incurred by the [State Council] in the execution or administration of this Act, and
- (e) any other payments authorised by or under this or any other Act".

64 The State Fund charged subscription fees that were substantially less than those charged by the first respondent's funeral fund. The first respondent's fund charged subscription rates of between \$4 and \$26 a fortnight for the provision of funeral benefits of up to \$6,000. On the other hand, the State Fund provided basic funeral costs upon payment of \$15 per annum for persons up to 19 years of age and \$40 per annum for persons 20 years of age and over. The State Fund was able to provide funeral benefits at these low rates only because of the guarantee and indemnity provided by the State Council.

65 The Councils no longer contend that in conducting the State Fund they were acting within the powers conferred on them by the Land Rights Act. The only question in the appeal is whether the respondents had standing to challenge the unlawful activities of the Councils. That is to say, whether they had standing to commence proceedings in a civil court for the purpose of enforcing the terms of the Land Rights Act.

The proceedings before McLelland CJ in Eq

66 At first instance, McLelland CJ in Eq held that only the Attorney-General (New South Wales) had standing to seek the relief sought by the respondents¹¹³. His Honour did not think that the respondents came within the exceptions to the general rule that only the Attorney-General has standing to enforce public rights. McLelland CJ in Eq identified this case as one where the respondents were seeking to enforce a public right on the basis that they had a special interest arising out of the adverse impact that the conduct of the Councils was likely to have on their commercial interests. His Honour said that, where the infringement of a public right is alleged to impact adversely on the pecuniary interests of a plaintiff, the case will fall into one of two categories. In the first category, the actual or likely effect on the plaintiff's interests is direct; in the second category, the actual or likely effect on the plaintiff's interests is indirect. It is only if the case falls within the first category that the plaintiff has standing to restrain breaches of public law

113 (1996) 92 LGERA 212.

affecting a plaintiff's interests. Thus, in *Phillips v New South Wales Fish Authority*¹¹⁴, fish merchants in Sydney were found "as a matter of commercial reality" to have standing to sue a defendant statutory corporation in relation to parking fees which the defendant was said to have no power to exact. Similarly, in *Robinson v Western Australian Museum*¹¹⁵, a person who discovered the remains of a shipwreck was found to have standing to challenge legislation which vested proprietary rights in such wrecks in the State museum. McLelland CJ in Eq described these cases as "analogous to infringement of a private right"¹¹⁶.

67 His Honour said, however, that where breach of a public duty has only an indirect effect on a plaintiff's pecuniary interests the plaintiff has no standing. Thus in *Helicopter Utilities Pty Ltd v Australian National Airlines Commission*¹¹⁷, the New South Wales Supreme Court denied standing to a plaintiff who sought to restrain the Australian National Airlines Commission from carrying out a contract on the ground that the contract had been accepted in preference to the plaintiff's tender and was beyond the Commission's powers. Jacobs J found that the plaintiff's commercial interest was not sufficiently direct to ground standing.

68 In the crucial passage in his judgment, McLelland CJ in Eq adopted the reasoning of Jacobs J. McLelland CJ in Eq said that where a plaintiff's pecuniary interests were indirectly affected¹¹⁸:

"it seems to me that in order to attract standing to sue, a plaintiff's 'special interest' must as a matter of principle be an interest of the general kind which the relevant public right was intended to safeguard or protect, or, where the 'special interest' consists in a vulnerability to 'special damage', the damage must be 'within the same class of damage as the public suffers as a whole' and not just 'any side effect of the infringement of the public right'¹¹⁹".

69 Although acknowledging that "this view appears inconsistent with what was said by Lehane J in [*Boots Company (Australia) Pty Ltd v SmithKline Beecham Healthcare Pty Ltd*¹²⁰]", McLelland CJ in Eq stated that he found the reasoning in

114 (1969) 91 WN(NSW) 905.

115 (1977) 138 CLR 283.

116 (1996) 92 LGERA 212 at 219.

117 (1963) 80 WN(NSW) 48.

118 (1996) 92 LGERA 212 at 219.

119 See *Helicopter Utilities* (1963) 80 WN(NSW) 48 at 54.

120 (1996) 65 FCR 282; 137 ALR 383.

that case to be unpersuasive¹²¹. His Honour found that the prohibition on operating a contributory funeral fund except as prescribed by s 11 of the Funeral Funds Act was intended to protect actual and potential subscribers to contributory funeral fund businesses¹²². Similarly, the limitations on the Councils' functions under the Land Rights Act were intended to protect the interests of the members of the Councils and those for whose benefit the Councils were established. Because the respondents fell into neither of these categories, his Honour found that they lacked the requisite standing¹²³.

The Court of Appeal

70 In the Court of Appeal, Handley JA found that not all of the prior cases fell within the two categories of "direct" and "indirect" effect, as the trial judge had held¹²⁴. Handley JA held¹²⁵ that "the decisive case for present purposes" was *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd*¹²⁶, a case in which this Court found that Ansett had standing to seek an injunction restraining the Director-General of Civil Aviation from granting Air Express permission to import commercial aircraft to be used in competition with Ansett. In *Air Express*¹²⁷, Aickin J said:

"It appears to me to be clear that Ansett had sufficient interest in the proper performance of the duties of those responsible for the administration of the relevant regulations to support its claim in these proceedings. It was affected in its private rights and had a greater interest than other members of the public."

71 Handley JA said that, although *Helicopter Utilities* had never been expressly overruled, it had been "decided when economic interests received less recognition

121 (1996) 92 LGERA 212 at 219.

122 (1996) 92 LGERA 212 at 220.

123 (1996) 92 LGERA 212 at 220.

124 (1997) 41 NSWLR 494 at 501.

125 (1997) 41 NSWLR 494 at 501.

126 (1981) 146 CLR 249.

127 (1981) 146 CLR 249 at 256.

generally" and should now be regarded as overruled by High Court decisions such as *Air Express*¹²⁸.

72 His Honour held that the respondents had standing to seek injunctive relief against the Councils because they "have existing businesses threatened by unlawful and subsidised competition from the [Councils]"¹²⁹. Because the respondents were "the only other organisations that have marketed funeral and life insurance benefits specifically to the Aboriginal community", they were "in a special, indeed unique, situation" that was sufficient to give standing¹³⁰.

73 Sheller JA, with whom Simos AJA agreed¹³¹, also found that the principle "cannot be formulated as precisely as McLelland CJ in *Equity* suggested"¹³². His Honour made it clear he did not accept that, because relevant statutory duties are expressed in the language of a prohibition against the doing of certain acts subject to criminal sanction, standing is necessarily dependent upon the prohibition being shown to be for the benefit or protection of a class of individuals of which the plaintiff is a member¹³³. His Honour thought that "[a] sufficient closeness to the subject of litigation may be found in other considerations"¹³⁴. Sheller JA placed considerable emphasis on *Boots*¹³⁵, a decision that, as I have said, McLelland CJ in *Eq* sought to distinguish.

74 In *Boots* the Federal Court held that the plaintiff, who alleged that one of its competitors had breached the *Therapeutic Goods Act* 1989 (Cth), had standing to sue. The interests of the plaintiff, which gave it standing, were¹³⁶:

"first, a purely commercial interest, lost sales and lost ability to establish a market for [the plaintiff's] product; secondly, a commercial interest of a different sort, that is, damage to commercial reputation ... and, thirdly, an

128 (1997) 41 NSWLR 494 at 501.

129 (1997) 41 NSWLR 494 at 499, 501-502.

130 (1997) 41 NSWLR 494 at 502.

131 (1997) 41 NSWLR 494 at 513.

132 (1997) 41 NSWLR 494 at 510.

133 (1997) 41 NSWLR 494 at 510-511.

134 (1997) 41 NSWLR 494 at 511.

135 (1996) 65 FCR 282; 137 ALR 383.

136 (1996) 65 FCR 282 at 287; 137 ALR 383 at 387.

interest, as a drug supplier, in ensuring the credibility of the system of registration and approval provided by the Act".

Lehane J said¹³⁷:

"I cannot see why a commercial or financial interest, if sufficiently substantial, should not afford standing. There is, after all, nothing in the nature of a commercial interest which necessarily excludes it from the category of special interest [for] these purposes".

75 Lehane J distinguished *Alphapharm Pty Ltd v SmithKline Beecham (Australia) Pty Ltd*¹³⁸, in which the Full Court of the Federal Court held that "the commercial interest of a competitor of the sponsor of a product for which registration was sought was not one entitling the competitor to request a review of a decision, made under the [*Therapeutic Goods Act 1989* (Cth)], to enter the product in the Register"¹³⁹. Lehane J held that *Alphapharm* was a decision that had been made under statutory provisions setting out the criteria for the making of such decisions¹⁴⁰. He distinguished *Alphapharm* because the commercial interest of the applicant in that case was irrelevant to the criteria contained in these provisions.

76 Applying *Boots*¹⁴¹, Sheller JA found that the special interest that the respondents had in preventing the alleged breaches of public duty was "plain". His Honour saw no reason why they should be refused standing merely because "the effect upon their commercial interest is not direct and the duty the performance of which they seek to uphold is not a duty intended for their protection"¹⁴².

The private rights and public rights dichotomy

77 An early common lawyer would have some difficulty in comprehending the modern doctrine of standing, a doctrine basically created in the nineteenth century. Until the great pleading reforms in the middle of the nineteenth century abolished the forms of action, questions of standing could hardly arise in private law litigation. A plaintiff either came within the form of action or was outside it.

137 (1996) 65 FCR 282 at 289; 137 ALR 383 at 389.

138 (1994) 49 FCR 250; 121 ALR 373.

139 *Boots* (1996) 65 FCR 282 at 287; 137 ALR 383 at 387.

140 (1996) 65 FCR 282 at 288; 137 ALR 383 at 388.

141 (1997) 41 NSWLR 494 at 512.

142 (1997) 41 NSWLR 494 at 512.

However, in matters concerned with the issue of the prerogative writs of mandamus, prohibition and certiorari, support can be found in the cases for the proposition that the person applying for the writ had to have some interest in the remedy. In the case of mandamus, it may even have had to be a legal right¹⁴³. On the other hand, prohibition may have been obtainable by a stranger to the dispute¹⁴⁴.

78 However, it is equity, rather than the common law, from which much of the modern doctrine and many of the controversies concerning standing have arisen. Suits seeking equitable remedies to determine, restrain or enforce public rights and duties have played a major role in the development of the doctrine of standing.

79 By the end of the nineteenth century, it was generally accepted that an ordinary member of the public had no general right to invoke the aid of the civil courts to enforce public law rights or duties. Subject to exceptions, that remains the basic position in Australia today. In *Australian Conservation Foundation v The Commonwealth*¹⁴⁵, Gibbs J said:

"It is quite clear that an ordinary member of the public, who has no interest other than that which any member of the public has in upholding the law, has no standing to sue to prevent the violation of a public right or to enforce the performance of a public duty."

80 Absent interference or threatened interference with a private legal right¹⁴⁶, an ordinary member of the public generally has no standing in the civil courts. Those courts exist to protect the legal rights of individuals, not to ensure that individuals or public officials obey the law. Protecting the legal rights of individuals may often result in a civil court examining, restraining or directing the conduct of private persons or public officials. But such a result is merely an incident of the protection of the rights of the individual, except in those cases where the court is acting under a statute that gives it jurisdiction to review such conduct.

81 It is a corollary of the proposition that the basic purpose of the civil courts is to protect individual rights that it is not part of their function to enforce the public law of the community or to oversee the enforcement of the civil or criminal law, except as an incident in the course of protecting the rights of individuals whose rights have been, are being, or may be interfered with by reason of a breach of law.

143 *R v Lewisham Union* [1897] 1 QB 498.

144 *Mayor of London v Cox* (1867) LR 2 HL 239.

145 (1980) 146 CLR 493 at 526.

146 I use the term "right" to include those interests and legitimate expectations that the law protects.

Courts do not initiate prosecutions, for example; nor do they initiate civil actions¹⁴⁷. Traditionally, they have permitted their processes to be used only by a litigant who can demonstrate that the conduct of another person has invaded or threatens to invade some legal right of the litigant¹⁴⁸. The requirement of an interference or potential interference with a legal right of the plaintiff applies whether the defendant is a private citizen or a government official.

- 82 Under the doctrine of the separation of powers, whether it is formally enshrined in a Constitution or not, the Attorney-General of the relevant jurisdiction is regarded as the appropriate person to determine whether civil proceedings should be commenced to enforce the public law of the community. When the Attorney-General thinks that it is proper to enforce the public law in those courts, he or she may decide to proceed *ex officio* or on the relation of a private individual¹⁴⁹. If the Attorney-General declines to exercise his or her prerogative to commence proceedings "to prevent the violation of a public right or to enforce the performance of a public duty"¹⁵⁰, a private individual is unable to challenge the Attorney-General's decision¹⁵¹. As Jacobs J said in *Helicopter Utilities*¹⁵²:

"The court has no jurisdiction to interfere with the discretion of the Attorney-General in [consenting] or refusing to put the law in motion in such a case."

- 83 The enforcement of the public law of a community is part of the political process; it is one of the chief responsibilities of the executive government. In most cases, it is for the executive government¹⁵³ and not for the civil courts acting at the behest of disinterested private individuals to enforce the law. There are sometimes very good reasons why the public interest of a society is best served by not attempting to enforce a particular law. To enforce a law at a particular time or in particular circumstances may result in the undermining of the authority of the

147 *Gouriet v Union of Post Office Workers* [1978] AC 435 at 496.

148 *Gouriet* [1978] AC 435 at 483, 501, 508.

149 *Australian Conservation Foundation* (1980) 146 CLR 493 at 526.

150 *Australian Conservation Foundation* (1980) 146 CLR 493 at 526.

151 *Stockport District Waterworks Co. v Manchester Corporation* (1862) 7 LT(NS) 545 at 548; *London County Council v Attorney-General* [1902] AC 165 at 168-169; *Gouriet* [1978] AC 435 at 478, 488, 505-506.

152 (1963) 80 WN(NSW) 48 at 53.

153 Where federal laws are involved, s 61 of the Constitution expressly states that the executive power of the Commonwealth "extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth."

executive government or the courts of justice. In extreme cases, to enforce it may lead to civil unrest and bloodshed.

- 84 Moreover, any realistic analysis of law, politics and society must recognise that not every law on the statute books continues to have the support of the majority of members of the community or always serves the public interest. Laws that once had almost universal support in a community may now be supported only by a vocal and powerful minority. Yet to attempt to repeal them may be more socially divisive than to allow them to lie unenforced. Moreover, the interests of a society arguably are often furthered by not enforcing particular laws. Some arguments supporting that view were powerfully articulated by Justice Scalia in an extra-judicial address¹⁵⁴:

"Does what I have said mean that, so long as no minority interests are affected, 'important legislative purposes, heralded in the halls of Congress, [can be] lost or misdirected in the vast hallways of the federal bureaucracy?' Of *course* it does - and a good thing, too. Where no peculiar harm to particular individuals or minorities is in question, lots of once-heralded programs ought to get lost or misdirected in vast hallways or elsewhere. Yesterday's herald is today's bore - although we judges, in the seclusion of our chambers, may not be *au courant* enough to realize it. The ability to lose or misdirect laws can be said to be one of the prime engines of social change, and the prohibition against such carelessness is (believe it or not) profoundly conservative. Sunday blue laws, for example, were widely unenforced long before they were widely repealed - and had the first not been possible the second might never have occurred."

- 85 Attorneys-General have long taken the view that the institution of legal proceedings is not justified simply because there is *prima facie* evidence of a breach of the law¹⁵⁵. In *Gouriet v Union of Post Office Workers*¹⁵⁶, Viscount Dilhorne, a former Attorney-General, said:

"The Attorney-General did not in my opinion act improperly as now suggested on behalf of Mr Gouriet.

'there is no greater nonsense talked about the Attorney-General's duty', said Sir John Simon in 1925, 'than the suggestion that in all cases the Attorney-General ought to decide to prosecute merely because he thinks

154 Scalia, "The Doctrine of Standing as an Essential Element of the Separation of Powers", (1983) 17 *Suffolk University Law Review* 881 at 897.

155 *Gouriet* [1978] AC 435 at 489.

156 [1978] AC 435 at 489.

35.

there is what the lawyers call "a case". It is not true, and no one who has held that office supposes it is.¹⁵⁷

However clear it appears to be that an offence has been committed, it is, as Sir Hartley Shawcross then Attorney-General said in 1951, the Attorney-General's duty

'in deciding whether or not to authorise the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order.'¹⁵⁸

...

In deciding whether or not to prosecute 'there is only one consideration which is altogether excluded', Sir Hartley Shawcross said, 'and that is the repercussion of a given decision upon my personal or my party's or the Government's political fortunes.'¹⁵⁹

86 The decision when and in what circumstances to enforce public law frequently calls for a fine judgment as to what the public interest truly requires. It is a decision that is arguably best made by the Attorney-General who must answer to the people, rather than by unelected judges expanding the doctrine of standing to overcome what they see as a failure of the political process to ensure that the law is enforced¹⁶⁰. As Lord Wilberforce pointed out in *Gouriet*¹⁶¹:

"More than in any other field of public rights, the decision to be taken before embarking on a claim for injunctive relief, involving as it does the interests of the public over a broad horizon, is a decision which the Attorney-General alone is suited to make.

... The decisions to be made as to the public interest are not such as courts are fitted or equipped to make. The very fact, that, as the present case very well shows, decisions are of the type to attract political criticism and controversy, shows that they are outside the range of discretionary problems

¹⁵⁷ Quoting from Edwards, *The Law Officers of the Crown*, (1964) at 222.

¹⁵⁸ See Edwards at 223.

¹⁵⁹ See Edwards at 222-223.

¹⁶⁰ cf *Gouriet* [1978] AC 435 at 482 per Lord Wilberforce, 510 per Lord Edmund-Davies.

¹⁶¹ [1978] AC 435 at 482.

which the courts can resolve. Judges are equipped to find legal rights and administer, on well-known principles, discretionary remedies. These matters are widely outside those areas."

- 87 Many lawyers are sceptical, however, as to whether the Attorney-General is the person best fitted to determine whether the public interest will be served on occasions by not enforcing the public law. One commentator has pointed out that¹⁶²:

"The Attorney-General is a quasi-political figure, and the day-to-day process of political responsibility may not be the most appropriate backdrop from which to make decisions about whether a case should proceed."

- 88 Moreover, in England the Attorney-General is ordinarily not a member of Cabinet. That means that he or she is not so closely identified with political controversies and can give independent advice¹⁶³. In Australia, however, both federal and State governments frequently have the Attorney-General as a member of Cabinet¹⁶⁴. Indeed, he or she may not be a lawyer¹⁶⁵. For these reasons, Gibbs J thought that individuals may not be able to obtain the Attorney-General's fiat for protection against the ultra vires action of a statutory body where a ministerial colleague was responsible for its conduct¹⁶⁶.

- 89 The recent report on standing by the Australian Law Reform Commission concludes that there is no necessity for the Attorney-General to be the primary party to instigate actions for injunctive or declaratory relief in relation to public wrongs¹⁶⁷. The Commission has proposed the following test to replace all the

162 Craig, *Administrative Law*, 3rd ed (1994) at 501.

163 Edwards, *The Law Officers of the Crown*, (1964) at 171-175; Edwards, *The Attorney General, Politics and the Public Interest*, (1984) at 67-70.

164 Renfree, *The Executive Power of the Commonwealth of Australia*, (1984) at 205.

165 Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27, (1985), par 160.

166 *Victoria v The Commonwealth and Hayden* ("the AAP Case") (1975) 134 CLR 338 at 383.

167 Australian Law Reform Commission, *Beyond the door-keeper: Standing to sue for public remedies*, Report No 78, (1996) at 57.

common law standing tests and almost all of the statutory tests in public law proceedings¹⁶⁸:

"Any person should be able to commence and maintain public law proceedings unless

- the 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
- in all the circumstances it would not be in the public interest to proceed because to do so would unreasonably interfere with the ability of a person having a private interest in the matter to deal with it differently or not at all."

Such a test of standing was regarded by the Australian Law Reform Commission as necessary to facilitate the role of private plaintiffs in public law proceedings.

90 Furthermore many people, particularly those who are lawyers, think it wrong that breaches of the law should go unpunished. In their view, the law must be enforced whatever the circumstances.

91 There can be little doubt that the present law of standing is far from coherent. Even if its current rationale is maintained, it is apparent that it is in need of rationalisation and unification¹⁶⁹. However, given divergent opinions as to whether the public interest is best served by maintaining the Attorney-General as the primary protector of public rights, it seems prudent for this Court to maintain current doctrine leaving it to the legislature, if it thinks fit, to rationalise, modify or extend that doctrine.

The test of standing in relation to public rights where declaratory or injunctive relief is sought

92 In the present case, the issue concerns the right of the respondents to obtain equitable relief to restrain public corporations from conducting unlawful activities which would cause serious financial detriment to the respondents. It is to that area of the law of standing that recourse must be had. The doctrine of standing is a

168 Australian Law Reform Commission, *Beyond the door-keeper: Standing to sue for public remedies*, Report No 78, (1996) at 57.

169 cf Aronson, *Judicial Review of Administrative Action*, (1996) at 660-664.

house of many rooms. What constitutes standing in an application for a prerogative writ may be insufficient for equitable relief.¹⁷⁰

93 In the nineteenth century, the Court of Chancery often restrained the ultra vires activities of public bodies such as the Councils in this case. Its jurisdiction arose out of the Crown's power of visitation of public bodies¹⁷¹. The Court of Chancery had long accepted that the Crown, as *parens patriae*, could enforce the execution of charitable trusts. It saw no difficulty in extending this jurisdiction to the supervision of the expenditure of funds by public bodies¹⁷². However, the accepted doctrine was that a suit for injunction in such a case required the presence of the Attorney-General either as the principal party or on the relation of a private individual. In *Evan v The Corporation of Avon*¹⁷³, where the plaintiff sought to restrain ultra vires activities, Romilly MR said that "there is a public trust for the town and inhabitants, and a suit to enforce such a trust ought to be by information by the Attorney-General, and not by a private individual"¹⁷⁴.

94 The principle that the Attorney-General is the proper plaintiff in actions which seek to protect or enforce public rights in the courts of equity is, however, subject to two exceptions. These exceptions were first outlined by Buckley J in *Boyce v Paddington Borough Council*¹⁷⁵ and were derived largely from the law relating to the tort of nuisance. His Lordship said¹⁷⁶ :

"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

170 Different tests for standing also exist in a number of statutes, including the *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 5(1), "person aggrieved". For a full examination of the statutory standing tests, see Australian Law Reform Commission, *Beyond the door-keeper: Standing to sue for public remedies*, Report No 78, (1996), Appendix C.

171 Pound, "Visitorial Jurisdiction Over Corporations in Equity", (1936) 49 *Harvard Law Review* 369.

172 *Attorney-General v Mayor etc of Newcastle-upon-Tyne and North-Eastern Railway Co* (1889) 23 QBD 492.

173 (1860) 29 Beav 144 [54 ER 581].

174 (1860) 29 Beav 144 at 152 [54 ER 581 at 585]. See also *Pudsey Coal Gas Company v Corporation of Bradford* (1873) LR 15 Eq 167 at 172; *Helicopter Utilities* (1963) 80 WN(NSW) 48 at 53.

175 [1903] 1 Ch 109.

176 [1903] 1 Ch 109 at 114.

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."

- 95 Although attempts have been made to move away from the requirements of the second limb of Buckley J's formulation¹⁷⁷, it has been applied on many occasions. In *Gouriet*¹⁷⁸, the House of Lords held that a plaintiff had no standing to restrain a threatened breach of the criminal law by a trade union because he had no private right and no greater interest in the observance of the criminal law than any other member of the public. Consequently, he did not suffer the necessary "special damage peculiar to himself". Lord Wilberforce said that "the exclusive right of the Attorney-General to represent the public interest" was not technical, procedural or fictional but "constitutional"¹⁷⁹. His Lordship said¹⁸⁰:

"It can properly be said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney-General enforces them as an officer of the Crown. And just as the Attorney-General has in general no power to interfere with the assertion of private rights, so in general no private person has the right of representing the public in the assertion of public rights. If he tries to do so his action can be struck out."

- 96 This Court has also applied the second limb of Buckley J's formulation although it has modified that part of the test that requires a plaintiff to suffer "special damage peculiar to himself". In *Australian Conservation Foundation*¹⁸¹, Gibbs J concluded that this phrase was "not altogether satisfactory" and should "be

¹⁷⁷ See, for example, in England, *Attorney-General; Ex rel McWhirter v Independent Broadcasting Authority* [1973] QB 629 at 648-649 per Lord Denning MR; in Australia, *Benjamin v Downs* [1976] 2 NSWLR 199; in Canada, *Thorson v Attorney-General of Canada* (1974) 43 DLR (3d) 1.

¹⁷⁸ [1978] AC 435.

¹⁷⁹ [1978] AC 435 at 481. Over a hundred years earlier, Lord Westbury LC had expressed a similar view in *The Stockport District Waterworks Company v The Mayor, &c of Manchester* (1863) 9 Jurist (NS) 266 at 267 when he said that the privilege was "wisely intrusted" to the Attorney-General by "the constitution of the country".

¹⁸⁰ [1978] AC 435 at 477.

¹⁸¹ (1980) 146 CLR 493 at 527.

regarded as equivalent in meaning to 'having a special interest in the subject matter of the action'. Applying the "special interest" test, the Court found that the Australian Conservation Foundation did not have standing to maintain an action challenging the validity of Commonwealth decisions relating to a tourist resort proposal. Gibbs J stressed that an emotional or merely intellectual interest would be inadequate to ground standing¹⁸². Significantly, his Honour added¹⁸³:

"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."

97 Aickin J said¹⁸⁴:

"The 'interest' of a plaintiff in the subject matter of an action must be such as to warrant the grant of the relief claimed. ... [T]he plaintiff's interest should be one related to the relief claimed in the statement of claim."

98 A year later, the special interest test was again applied by this Court but with a different result. In *Onus v Alcoa of Australia Ltd*¹⁸⁵, the Court held that members of an Aboriginal tribe had a special interest in the prevention of construction works on land which contained Aboriginal relics of which the tribe was custodian. Brennan J initially expressed the special interest test in terms that were consistent with the broad terms outlined by Gibbs J in *Australian Conservation Foundation*¹⁸⁶, by saying¹⁸⁷:

"A plaintiff must show that he has been specially affected, that is, in comparison with the public at large he has been affected to a substantially greater degree or in a significantly different manner. It is not necessary to show that the plaintiff is uniquely affected."

182 (1980) 146 CLR 493 at 530.

183 (1980) 146 CLR 493 at 530.

184 (1980) 146 CLR 493 at 511.

185 (1981) 149 CLR 27.

186 (1980) 146 CLR 493.

187 *Onus* (1981) 149 CLR 27 at 74.

99 However, his Honour then sought to explain how the test formulated by Gibbs J should be applied. In so doing, Brennan J effectively narrowed the test by reference to the content of the statute allegedly breached. He said¹⁸⁸:

"The starting point is the statute, which defines the public duty said to rest upon the defendant, and thus the nature of the interest which the plaintiffs may have in enforcing its performance."

100 Recent applications of the special interest test by this Court and by the Federal Court of Australia have not adopted the narrower approach formulated by Brennan J. In decisions which include findings in favour of the standing of a trade union to challenge a Minister's decision to approve an alteration of Sunday trading hours¹⁸⁹ and against the standing of a Right to Life Association to challenge a government decision to refuse to cease trials of an abortion drug¹⁹⁰, a "flexible"¹⁹¹ approach to the identification of a special interest has been adopted.

101 In *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)*¹⁹², this Court said that "the nature and subject matter of the litigation will dictate what amounts to a special interest". As Brennan J recognised in *Onus*¹⁹³:

"Whether a plaintiff has shown a sufficient interest in a particular case must be a question of degree, but not a question of discretion."

The respondents had standing to take action against the Councils

102 In my view, the Court of Appeal correctly held that the respondents had standing to sue. To deny the respondents standing on the basis that they did not fall within the scope of protection afforded by the relevant provisions of the Funeral Funds Act or the Land Rights Act or that their injury was not direct would be to adopt a test of standing which is inconsistent with the statements of principle

188 (1981) 149 CLR 27 at 76.

189 *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552.

190 *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 128 ALR 238.

191 *Shop Distributive and Allied Employees Association* (1995) 183 CLR 552 at 558. See also *Onus* (1981) 149 CLR 27 at 35-36 per Gibbs CJ.

192 (1995) 183 CLR 552 at 558.

193 (1981) 149 CLR 27 at 75.

made by the majority of members of this Court in *Australian Conservation Foundation* and *Onus*. This is not a case that is analogous with *Alphapharm* - there are no statutory criteria in the present legislation which render the commercial interests of an individual an inadequate basis for standing.

103 As *Australian Conservation Foundation* and *Onus* show, a special interest in the subject matter of the proceedings is sufficient to give standing in a case such as the present. The subject matter of this suit is the legality of the Councils' arrangements setting up the State Fund. The respondents had a special interest in that subject. The allegedly unlawful activities of the appellant affected them financially and to an extent that exceeded the injury to any other individual. Moreover, if the arrangement between the appellants was illegal, the continuing financial injury to the respondents, caused by the arrangement, would be remedied by a grant of the injunction they sought.

104 Furthermore, the claim of the respondents involves few, if any, of the types of controversial issues that often make it wise to leave to the Attorney-General the question of whether or not a statute should be enforced in the civil courts. The substantive issue in this suit is concerned with whether a public corporation is acting contrary to a statute in the way that it disburses public funds and enters into contractual arrangements. It involves a purely legal issue. It is hard to see how it could ever be contrary to the public interest to require a statutory corporation to spend its money and make contracts only in accordance with the statute which creates it and defines its powers and purposes.

105 I agree with the Court of Appeal that the learned trial judge was in error in holding that, because of the relevant provisions of the Funeral Fund Act and Land Rights Act, only actual and potential subscribers to contributory funeral fund businesses and members of the Councils respectively are entitled to challenge the actions of the Councils.

Order

106 The appeal should be dismissed.

107 HAYNE J. I agree that the appeal should be dismissed. For the reasons given by the other members of the Court, the respondents had a special interest in the subject-matter of the proceedings¹⁹⁴.

108 I do not think it necessary, in this case, to consider whether a refusal of fiat by the Attorney-General, or a plaintiff's failure to seek a fiat, may affect the plaintiff's standing to bring a proceeding or may affect the exercise of any discretion to grant relief that is sought in the proceeding. As the reasons given by the other members of the Court show, the position of an Attorney-General in this country is different from the position of the holder of that office in England. Whether those differences suggest, or warrant, departure from the application of a test for standing of "special interest" is a difficult question which may require consideration of matters of the kind mentioned in the reasons of the other members of the Court.

109 To mention only one of those matters, much may depend upon what is meant by saying, as the Australian Law Reform Commission has said, that "[t]he public has an interest in ensuring that government decision-makers are accountable and that their decisions are made in accordance with the law. The public also has an interest in ensuring compliance with legislation that creates public rights and duties."¹⁹⁵ It is necessary to identify the exact nature of those interests. Only then is it possible to consider how and at whose instance decision-makers are to be made accountable and compliance with legislation ensured. At present, accountability and compliance are sought at two levels: by means that might be described broadly as "political" and, if a plaintiff has a special interest in the subject-matter of the proceedings, by legal process. References in cases such as *Gouriet v Union of Post Office Workers*¹⁹⁶ to the role of the Attorney-General as being "constitutional" rather than technical or procedural can be seen as emphasising what I have referred to as the political aspects of ensuring accountability and compliance.

110 Because the respondents had a special interest in the subject-matter of these proceedings, it is not necessary to decide in this case whether the balance between the legal and the political aspects of ensuring accountability and compliance should be struck differently.

194 *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552 at 558; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 35-36 per Gibbs CJ, 74 per Brennan J; *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493.

195 Australian Law Reform Commission, *Beyond the door-keeper: Standing to sue for public remedies*, Report No 78, (1996) at 5.

196 [1978] AC 435 at 481 per Lord Wilberforce.