*Justice Murray Wilcox**

THE ROLE OF ENVIRONMENTAL GROUPS IN LITIGATION

ENVIRONMENTAL GROUPS

A feature of the development of environmental awareness during the last 10 to 15 years has been a considerable increase in the number and diversity of environmental groups in Australia. From time to time the Australian Conservation Foundation ("A.C.F.") publishes a directory of such groups, the "green book". The most recent edition of this directory includes over 1000 separate environmental organizations. Total membership exceeds half a million people.

The groups listed in the green book vary immensely. At one end of the spectrum are the major permanent organizations with wide ranging interests such as A.C.F. itself, the National Trusts established in each State, Total Environment Centre in Sydney, Friends of the Earth and Greenpeace. There are specialist, although geographically wide-ranging, organizations such as the various National Parks Associations and Fund for Animals. At the more local level there are regional groups. Most have been around for a long time. Traditionally, regional conservation groups have been concerned with a multitude of local issues. They come together under the rubric of the relevant State Conservation Council; and thereby achieve more influence than they otherwise would. In addition, there are many local groups concerned with a single issue. People come together in response to that issue and, once it is all over, the group often dies away. There are, of course, all sorts of permutations on these categories. Organisations sometimes change their nature. For example the organisation which was once solely concerned with the wilderness in south-west Tasmania and which was a leading protagonist in the battle for the Franklin River, has now become The Wilderness Society. It is operating Australia-wide with a concern for wilderness generally.

LITIGATION

The title of this paper refers to the role of environmental groups in litigation. I should immediately distinguish, and then say nothing further about, that form of litigation which is administrative review. Participation in administrative review has been a familiar role for environmental groups and other public interest groups for many years; particularly in regards to opposing the grant of planning consents or the rezoning of land for particular developments. Numerous groups have been involved in these types of proceedings, and often with success; but they present no particular difficulties or points of interest from the legal point of view. I do not think that I am asked to speak about these proceedings.

THE CAUSE OF ACTION

The focus of the morning is intended to be litigation in the strict sense, in courts; that is judicial review of decisions made or to be made

* Judge of the Federal Court of Australia.

in relation to environmental matters. There are three main areas for consideration in relation to the role of an environmental group in such litigation. The first, a basic question: is there a legal cause of action? That sounds elementary to lawyers, but this matter sometimes is overlooked by non-lawyers who are concerned with environmental matters. They will point to the environmental horrors of a particular proposal and they will instinctively expect that the courts can do something to prevent its execution. This is an entirely understandable reaction; but of course it is absolutely essential to identify a legal cause of action, if the courts are going to be of any assistance. The most likely causes of action are for a procedural irregularity or for a substantive irregularity arising under administrative law. In relation to procedural irregularities, it is possible only to generalise. Environmental legislation varies from State to State and, of course, as between Commonwealth legislation and State legislation. However, it is common to find in environmental legislation provision for mandatory procedural steps such as the giving of notice. I have in mind *Scurr* v *Brisbane City Council*[1]. Less frequently, the making of an environmental impact statement may be mandatory. If mandatory procedures are not undertaken, there is an obvious cause of action available. There may be decisions in relation to which the rules of natural justice apply. I was a participant in a decision of the Full Court of the Federal Court in Darwin last May, *Perron* v *Central Land Council,*[2] a case involving an application to rezone land in Alice Springs in which we held that the rules of natural justice applied. The Court upheld a decision of the Supreme Court of the Northern Territory to set aside the Minister's decision to refuse the application to rezone.

It may be possible – indeed it usually will be possible – for the decision-maker to cure a procedural irregularity. Under those circumstances, the question arises whether it is worthwhile going to court. Often it is worthwhile. Often there is an advantage in setting aside a decision, which is objected to on environmental grounds and which is tainted with some procedural irregularity, in order to obtain time to persuade the decision-maker to think again. There are occasions when the decision-maker realises that the decision is a bad one or politically difficult and where he or she is happy to have the opportunity to give effect to a changed view. There are other occasions upon which the decision-maker is presently less receptive, but where there is a possibility of marshalling public opinion to cause the decision-maker to become more so. The result is that, in many cases, the gaining of time and of political opportunities will justify legal action to bring down an initial decision, even if it is legally curable.

Substantive irregularity depends, of course, upon the common law rules of administrative law as to the matters by reference to which an administrative decision may be invalid; for example failure to take into account a relevant consideration, taking into account an extraneous matter, the making of a decision so unreasonable that no reasonable person could have arrived at it. Section 5 of the *Administrative Decisions (Judicial Review) Act* 1977, contains a list of grounds applicable to review of Commonwealth administrative decisions. I think that list does

1 (1973) 133 CLR 242.
2 (1985) 60 ALR 575.

no more than reproduce the various categories of invalidity which have been developed under the common law.

A victory on the basis of a substantive irregularity is more likely to give a permanent benefit than is victory upon a merely procedural matter. It is often more difficult for a decision-maker to disentangle such an irregularity. If, for example, it is shown that he or she has taken into account an extraneous consideration, the decision-maker will have to take elaborate steps to ensure that the extraneous consideration is left out of account when the matter is reconsidered. It is even more difficult where a decision is brought down on the basis of unreasonableness. Of course, in dealing with the matter of unreasonableness, one has to bear in mind the distinction between a sound decision and a defensible decision. This distinction is discussed, particularly by Mr Justice Menzies, in *Parramatta City Council* v *Pastell*,[3] a case dealing with the validity of a local rate. There are not a lot of cases on unreasonableness as a ground for invalidity, particularly in Australia. I had occasion recently, in a quite different context, migration administration, to look at and to collect the devisions: see *Prasad* v *Minister for Immigration*,[4] I there attempted to set out what had emerged from the cases to date but this is, I think, an area that is going to develop. Harking back to what the Chief Justice said last night, some good work at the quarry face by academic lawyers considering how far the doctrine of unreasonableness extends, and should extend, would be extremely valuable to judges dealing with administrative law.

In relation to Commonwealth decisions, it is useful to note the availability of two pieces of legislation. One is the *Freedom of Information Act*. Although this Act is subject to important exemptions from disclosure, it will often be useful, first to obtain information about what has happened and, secondly, to identify documents which may then be subpoenaed in the principal proceedings. There is, of course, freedom of information legislation also in Victoria; but not yet in the other States. Secondly, in the Commonwealth sphere, there is s 13 of the *Administrative Decisions (Judicial Review) Act* which requires the statement of reasons by a person making a decision under legislation. That requirement is subject to the limitation that the claimant must be "a person aggrieved", that is a person having a direct association with the subject matter. In that connection there is a decision in the Supreme Court of Victoria, *National Trust (Victoria)* v *T. & G. Society*,[5] in which it was held that the National Trust was a "person aggrieved" in relation to a decision involving the demolition of a building in the City of Melbourne because it was an environmental group with appropriate objects. That decision has subsequently been followed, at least in Victoria. It might usefully be borne in mind in relation to s 13 of the *Judicial Review Act*. The *Judicial Review Act* provides a simple expeditious method of review but one should always bear in mind that there is a 28 day time limit for commencing proceedings in the Federal Court. There is power to extend the time but the Court has taken the view that time should not be extended in a case where, in the meantime,

3 (1972) 128 CLR 305.
4 26 February 1985, not yet reported.
5 [1976] VR 592.

other people have acted in reliance upon the decision. It may be important not to get out of time.

STANDING

The next question for any prospective litigant is what standing it, or a member, has to embark upon litigation. The traditional rule, which was enunciated in the well known case of *Boyce* v *Paddington Borough Council,*[6] requires the fiat of the Attorney-General except where a plaintiff can show the possession of a private right, which is affected by the decision under challenge, or that he or she has some special interest — that is pecuniary or other material interest — in the subject matter of the decision. Very often it will be difficult for an environmental group to show either of those things. It will normally be the case that no private individual owns any land in the vicinity. In the most recent decision in the High Court dealing with standing, *Onus* v *Alcoa,*[7] the Court took a more liberal view on special interest than previously. You will recall that in that case the Court accorded standing to two members of an aboriginal clan group, the members of which — according to aboriginal custom — were custodians of relics affected by the development of the aluminium smelter at Portland. No private interest was involved but those two persons were affected in a manner different in kind from members of the public generally. It is possible that *Onus* will open the way to decisions in favour of environmental groups; on the basis that their members, as members of environmental groups, are affected in a way different from people outside those groups. However, this is not certain. The courts may take the view that there is a critical difference between the obligation imposed by aboriginal custom upon a handful of clan members to do something about a threat to relics and the less direct demands of environmental consciousness on those who choose to attune to them. The extent to which *Onus* applies to other factual situations is an open question. In particular, it is doubtful whether it goes so far as to indicate that the High Court would depart from its previous decision in *Australian Conservation Foundation* v *Commonwealth.*[8]

The Law Reform Commission, as most of you know, has — and has had for a long time — a reference on Access to the Courts. One of the major matters for concern in that reference is the law of standing. I am happy to say that a report on standing will be tabled in the current session of Federal Parliament. It is with the printer at the present time. One option which was considered by the Commission in the course of that investigation was to recommend the allowance to any person of an entitlement to take proceedings. There is a precedent for that course in the environmental field, in s 123 of the *Environmental Planning and Assessment Act* (NSW) 1979. That legislation has been in operation now for five years and, in my judgment, has worked well in respect of standing. Personally, I would be happy to see an "any person" standing provision come into more general effect. In fact, and without disclosing more than I should do, the Commission will recommend a slightly more stringent approach, enabling the courts to deny standing to persons who appear to lack either the interest or the capacity properly to prosecute

6 [1903] Ch 109.
7 (1982) 149 CLR 27.
8 (1980) 146 CLR 493.

the matter. I am confident that this recommendation, if it becomes the law, will not restrict access to the courts in the case of genuine environmental groups adequately pursuing the merit of a case. It is also possible that there will be enlarged rights of intervention, and perhaps the lodgement of amicus curiae briefs, in litigation as a result of the Law Reform Commission report. But, of course, those are very limited rights because they do not affect the extent or content of the evidence before the court. All they do is to enable groups to draw attention to particular aspects of the case, which may cause them concern, so that the courts may consider those matters. The Law Reform Commission recommendations are, of course, restricted to Commonwealth law. The problem of limited standing is likely to remain under State laws, except in New South Wales. One has to hope that there will be a flow through into the law of the other States, so that rights will be given to people to test the legality of environmentally sensitive decisions.

I should perhaps mention that, even under the present rules, it is often possible to find persons with standing who are prepared to act as a plaintiff if indemnified in relation to costs. I can cite two cases of which I have some personal knowledge. In 1981 the A.C.F. was keen to prevent the then threatened clearing of native forests in the Ovens Valley in Victoria for the purpose of planting pine trees. It contended that this action was unlawful having regard to certain Victorian legislation. There was a problem, about standing but some local beekeepers were found whose bees used the native forests. The beekeepers were very willing to act as plaintiffs. The case did not go to trial because there was a change of government and the new government agreed not to proceed with the programme, at least for the time being. So it has not been necessary for the court to determine whether the beekeepers have standing but I see no reason to doubt that this issue would have been resolved in their favour. The other example involves Fraser Island. The Fraser Island Defence Organisation, which is an environmental group, was held to have standing to take action to challenge a decision affecting the island because it earns revenue from wilderness expeditions around the island. So there are ways of getting around the problem even under the present rules. But the situation is not satisfactory. The search for a possible plaintiff inevitably creates delays; and there will not always be an available plaintiff.

RESOURCES

Thirdly, the matter of resources, and by that I really mean money to get lawyers, expert witnesses and so on. This is always a problem for environmental groups. Environmental groups run tight budgets which do not provide free funds for litigation. Even an organisation such as the ACF or a National Trust has difficulty in raising the necessary funds for litigation. It is, however, sometimes possible to obtain donations from members of the public who support the objects of the group. Most of you will be aware of the remarkable degree of public support for the Franklin River campaign. I do not know the final figures, but I do know that at least $250,000 was provided in public donations to the two major combatants in that campaign, that is to say ACF and TWS, in connection with the 1983 election. It was a remarkable demonstration of public concern and support. In relation to litigation, the Western Australian Conservation Council some years ago engaged in an American class action, the Jarrah class action case, against companies engaged in

bauxite mining on the south-west coast of Western Australia. Public donations raised about $40,000 within a very short time. These examples show that it is possible, if the cause has public support, to raise money. In practice this may be necessary in order to fund litigation.

It has been the experience of environmental groups that many lawyers and other professionals are prepared to act for nominal fees, or indeed no charge at all, in relation to particular cases about whose merit they feel strongly. The big problem about taking offers for free work or for reduced fees is to ensure that there is no sacrifice of the quality of the work obtained. Offers of free work or reduced fees come most readily from those who are less experienced, perhaps less busy, and who see the case as an opportunity to become better known or simply, who find it easier to make the time available. If they are suitable people, this is exccellent but it is necessary for environmental groups to be quite rigorous about capacity. A good case can be ruined by someone who is charitably acting without charge or for a nominal fee. It is often difficult for environmental groups, particularly if they do not have experienced lawyers amongst their members, to assess whether it is really a good idea to take up a particular offer. But I hasten to add that it would be wrong to suggest that all people who make this sort of offer are less than fully capable. There have been many examples of first class lawyers who have given their time for nothing in particular cases. The same statement is true of members of other professional groups. It is a matter of picking the right people, and sometimes leaning upon them a little to make a suitable gesture.

The major problem environmental groups have in regard to costs is not so much the costs of their own side but rather the fear of having to pay the costs of the other side. Unfortunately, the group often finds that it has to face two separate opponents: the developer who wishes to do something and a government instrumentality or Minister whose decision is under attack. In such a case there will be two defendants to the proceedings. Typically they will both come armed with senior counsel and a battery of supporting lawyers. There is a formidable cost per day in that situation, forcing the environmental group to engage in a David and Goliath contest in the knowledge that if Goliath wins the cost to the group is likely to be devastating. This knowledge is one of the major inhibitions upon environmental groups taking cases to court, even cases which are highly arguable and have good prospects of success. I think that there is a real question whether the courts should continue to follow the course that costs follow the event, especially in relation to cases where the issue was fairly arguable and where the court is asked to make an order for costs in favour of an agency of government. There is a comment to that effect by Mr Justice Fox in the ACT Supreme Court in *Kent* v *Cavanagh*.[9] That was an application for an interlocutory injunction in regard to the Black Mountain Tower. Although the comment related to an interlocutory application, and may not be directly applicable to an application for costs after a final hearing, it is worth noting:

> It seems to me undesirable that responsible citizens with a reasonable grievance who wish to challenge Government action should only be able to do so at risk of paying costs to the

9 (1973) 1 ACTR 43 at 55.

> Government if they fail. They find themselves opposed to parties who are not personally at risk as to costs and have available to them almost unlimited public funds. The inhibiting effect of the risk of paying costs is excessive and not in the public interest. Once, not so long ago, litigation was more of a luxury than it now is and for the most part only wealthy people could engage in it. To them was usually left any action necessary to vindicate rights of the public. This is not now regarded as an acceptable situation. The courts must be, in practice and not simply in theory, available to all.

We have yet to resolve that problem. The courts, in injunction proceedings, almost as a matter of rule make orders that costs follow the event. One possible solution is legal aid. It is probably the desirable solution if we can get the legal aid system working adequately in regard to these types of cases. I do not want to say much on this because Ben Boer is going to speak about it in a special interest group later this morning. One of the problems is that the guidelines of most legal aid commissions were designed for entirely different types of litigation: litigation by people unable to afford legal expenses who are seeking to vindicate a private interest; typically to recover damages for personal injuries. So the guidelines require an impoverished plaintiff having a reasonable prospect of obtaining a personal material benefit. That prescription is the opposite to what is typically found in environmental litigation. Plaintiffs in such cases are not normally impoverished. They are rarely wealthy but they are usually people earning average or perhaps above average wages who understandably are unwilling to put at risk their homes should the action fail and an order for costs be made against them. And of course such persons stand to obtain no material benefit from the litigation. There is a need for guidelines to recognise public interest motivations and to provide financial assistance, especially an indemnity against the costs of the other side; provided of course, that the case is fairly arguable and that it involves a wider public interest. I will not elaborate but I draw attention to the fact that there was recently established in Sydney an Environmental Defender's Office. This office is funded substantially by the Legal Services Commission of New South Wales. It is designed to provide services for groups or individuals who are concerned with public environmental litigation. It is a step in the right direction.

THE PURPOSE OF LITIGATION BY ENVIRONMENTAL GROUPS

In conclusion may I just say that, in the context of any environmental campaign, it is necessary to ask oneself what is the purpose of any proposed litigation. Sometimes litigation is approached as if it is an end in itself. I believe this to be a mistake. As with any administrative law question, on a matter of public importance, ultimately the considered view of the elected government will prevail. If we believe in democracy, that is as it should be. Environmental litigation should be brought only to serve one or both of two purposes. The first is to enforce the proposal examination mechanisms of environmental legislation — for example environmental impact statements — thus maximising the information available to the decision-maker and ensuring that any decision by Government is made with a full understanding of the issues and consequences of the proposal. The second purpose is to gain time, thus neutralising the ambush tactics of the developer who prepares his

plans over a lengthy period and then publishes it only shortly before the decision is to be taken. Time is often needed to explore the facts, to inform affected persons, to build public support. It sometimes leads to a rethinking of the desirability of the project by the developer, or more frequently, by the decision-maker. I think those are the two purposes for which one sensibly engages in litigation. It is essential, therefore, that a wider campaign by the group continue while litigation is under way. In the nature of things, only a minority of any environmental group can make a useful contribution to litigation. The remaining members of the group should be encouraged to proceed with the task of winning to their cause the minds of the public and of the decision-maker.