**Reforming the Law of Environmental
Standing and Third Party Appeal Rights
in Victoria***

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I. Introduction

This Occasional Paper considers the need to update Victorian environmental law in connection with the law of standing and the rights of third parties to appeal the decisions of environmental regulators. Two recent events have combined to make such a consideration timely and appropriate.

First, during the recent election strong commitments were made “to give Victorians a better Government by revitalising Victoria's democracy, restoring the checks and balances that keep government honest and accountable, and returning proper standards of conduct to government”. In the environmental context, it was emphasised that “[u]nderpinning Labor’s approach to conservation and the environment is a fundamental commitment to greater accountability and public scrutiny”. As discussed below, opening up the law of standing and expanding third party appeal rights would help to ensure that these important commitments are met.

Second, the impetus to consider reforming the law of standing in the environmental realm has also been prompted by the recent unanimous High Court of Australia ruling in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Management Ltd*.¹ The High Court held that open standing provisions are beyond any doubt constitutional. More importantly, however, in *Truth About Motorways* the High Court emphasised that open standing provisions serve salutary public interest purposes in contemporary administrative circumstances.

Accordingly, it seems advisable in such circumstances to seriously the adequacy of the current standing and third party appeal arrangements in Victoria. The need for such a review becomes even more apparent when one discovers, as discussed below, that except in two important but limited circumstances, open standing and third party appeal rights in Victorian environmental law are lacking.²

This memorandum proceeds as follows. It first highlights current opportunities for the reform of Victorian environmental law to provide for open standing and third party appeal rights. It next turns its attention to contemporary international norms that reflect the considered view of the international community about the importance of public participation, including by use of the courts, in the environmental field. It then considers the pros and cons of reforming the law to provide for open standing and third party appeal rights.

This memorandum also includes a detailed Appendix which sets out statutory provisions across Australia, and internationally, that provide both unqualified and qualified open standing to members of the public to enforce environmental law. The Appendix also contains a large number of examples of Australian statutes that provide third party appeal rights in connection with administrative environmental decision-making.³

¹ (2000) 169 ALR 616.

² See Appendix 1, *infra*.

The compilation of Australian and international examples in the Appendix are designed to demonstrate “best practice” environmental law in connection with standing and third party appeal rights. A careful study of the statutory provisions and discussion contained in these Appendices leads to the conclusion that it is necessary to revise the law of standing and third party appeals in Victorian environmental law in order to bring it in line with cutting edge 21st Century practice.

II. Current opportunities for reform

A further factor in the need to consider the current state of the law of standing and the rights of third party appeal of administrative regulatory decisions in the field of the environment is that, with the change in Government, a host of amendments to Victoria’s environmental laws are starting to filter through Parliament. In most, if not all cases, this will be the first time the opportunity has presented itself to update these laws and bring them in line with current “best practice” in connection with the law of standing and the rights of third party appeal.

For instance, current amendments are being considered in connection with the *Environment Protection Act 1970* (‘the *EP Act*’) that would enhance enforcement and penalty provisions. Unfortunately, however, due to an explicit policy of the Environment Protection Authority (EPA) against open standing, including such a provision in the proposed amendments to the Act has not even been considered. It also appears that policy makers responsible for anticipated amendments to the *Flora and Fauna Guarantee Act 1988* (‘the *FFG Act*’) and the *Fisheries Act 1995* have also failed, so far as the EDO is able to discern, to consider open standing provisions or third party appeal rights.

Similarly, it appears that the opportunity to consider including third party appeal rights in connection with licensing and permitting decisions by administrative regulators under all three Acts will be missed. None of the current amendments that are being proposed address third party appeals in connection with licensing or permitting decisions.

As this memorandum concludes (and Appendix 1 bears this out), the failure to take advantage of the current opportunities to consider open standing for any person to sue to restrain or remedy a breach or threatened breach of the Act is out of synch with contemporary “best practice” environmental law.⁴ The same appears to be true for

³ For other good comparative analysis of expanding international trends in public participation in environmental decision-making, see M NAGY, ET AL, EDS, *MANUAL ON PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONMAKING: CURRENT PRACTICE AND FUTURE POSSIBILITIES IN CENTRAL AND EASTERN EUROPE* (1994); W Tilleman, *Public Participation in the Environmental Impact Assessment Process: A Comparative Study of Impact Assessment in Canada, the United States and the European Community* (1995) 33 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 337; W Partridge, *People’s Participation in Environmental Assessment in Latin America: Best Practices* (1998). If a copy of any article cited in this memorandum is desired, please contact the EDO.

⁴ For other excellent articles highlighting the increasing use and benefits of expansive public participation in environmental decision-making, including through open access to courts by citizens to enforce environmental law and to challenge administrative environmental decisions, see N Pain, *Third Party Rights: Do the Floodgates Need Opening or Closing* (1989) 6 ENVIRONMENTAL AND PLANNING

third party appeal rights in connection with administrative decisions to grant licences or permits under various environmental laws.

III. International support for broad environmental public participation

It is important, in considering whether Victorian environmental law ought to be reformed to expand on the current limited open standing provisions and third party appeal rights, to examine international experience. Such an examination can provide an indication of the level of support of the international community, or lack thereof, for environmental public participation, including by citizens suits in the courts to enforce environmental law or challenge environmental decision-making.

At an international level, the need for public participation in environmental decision-making is reflected in a increasing number of instruments relating to both the environment and human rights. While a full discussion of the connection between international human rights and the environment is beyond the scope of this memorandum, it should be recognised that the strongest argument linking the environment and human rights focuses not on environmental quality, but on procedural rights, including participation in environmental decision-making and access to environmental justice.⁵

This approach rests on the view that environmental protection and sustainable development cannot be left to governments alone. Rather, they require and benefit from notions of civic participation in public affairs, which are already reflected in existing international civil and political norms. At its broadest, open and extensive participation in environmental decisions can be viewed as the application of democratic governance to environmental matters.⁶

LAW JOURNAL 26; D Robinson, *Public Participation in Environmental Decision-Making* (1993) 10 ENVIRONMENTAL AND PLANNING LAW JOURNAL 320; D Mossop, *Citizen Suits – Tools for Improving Compliance with Environmental Law*, in N GUNNINGHAM, ET AL, EDS, ENVIRONMENTAL CRIME: PROCEEDINGS OF A CONFERENCE (Australian Institute of Criminology, 1993); M Baird, *The Appeal of Third Parties* (1991) 1/1 POLEMIC; Justice P Salmon, *Access to Environmental Justice* (1998) 1 NEW ZEALAND JOURNAL OF ENVIRONMENTAL LAW 1; N Spyke, *Public Participation in Environmental Decisionmaking at the New Millenium: Structuring New Spheres of Public Influence* (1999) 26 BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW 263; A Simon, *Valuing Public Participation* (1999) 25 ECOLOGY LAW QUARTERLY 757; R Collin & RM Collin, *The Role of Communities in Environmental Decisions: Communities Speaking for Themselves* (1998) 13 JOURNAL OF ENVIRONMENTAL LAW AND LITIGATION 37; Adam Babich, *Citizen Suits: The Teeth in Public Participation* (1995) 25 ENVIRONMENTAL LAW REPORTER: NEWS & ANALYSIS 10141; B French, *More Effective Citizen Participation in Environmental Decisionmaking* (1993) 24 UNIVERSITY OF TOLEDO LAW REVIEW 389; E Roberts & J Dobson, *The Role of the Citizen in Environmental Enforcement*, in PROCEEDINGS OF AN INTERNATIONAL CONFERENCE ON ENVIRONMENTAL ENFORCEMENT (1992), pp 531-559; C Glinski, *Public Interest Environmental Litigation in South Africa* (March 1999); L Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff* (1968) 116 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1033.

⁵ M Schwartz, *International Legal Protection for Victims of Environmental Abuse* (1993) 18 YALE JOURNAL OF INTERNATIONAL LAW 355, 368.

⁶ S Stec, *Access to Justice in Environmental Matters*, in DOORS TO DEMOCRACY: A PAN-EUROPEAN ASSESSMENT OF CURRENT TRENDS AND PRACTICES IN PUBLIC PARTICIPATION IN ENVIRONMENTAL MATTERS (Regional Environmental Center for Central and Eastern Europe, 1998); M Anderson, *Human Rights Approaches to Environmental Protection: An Overview*, in A BOYLE & M ANDERSON, EDS., HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION (1996), pp. 4-10, 18-21.

The obligation of governments to provide the public access to environmental decision-making was first articulated in 1979 by the Organisation for Economic Cooperation and Development (OECD). Following developments in some of its largest member states, OECD adopted texts recommending that its members encourage public participation when making decisions having potential adverse consequences on the environment, notably by furnishing information on risks, the costs and disadvantages and advantages accompanying the decision.⁷

In 1982, more progressive and expansive rights in connection with public participation, including through the use of courts, was recognised by the international community in the World Charter for Nature, as adopted by the General Assembly of the United Nations.⁸ Principle 16 of the Charter provides the all planning shall include among its essential elements, strategies for the conservation of nature, the establishment of inventories of ecosystems and assessments of the effects on nature of any proposed activity or policy. All of this is to be disclosed to the public in time to permit effective consultation and participation. More importantly for the purposes of this memorandum, Principle 23 provides in pertinent part:

*All persons . . . shall have the opportunity to participate , individually and with others, in the formulation of decision of concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation.*⁹

Ten years later, Principle 10 of the 1992 United Nations Rio Declaration on Environment and Development added substantial support, in mandatory language, for participatory rights of a comprehensive kind. Principle 10 provides in pertinent part that:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, *each individual* shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.¹⁰

⁷ OECD, The Assessment of Projects with Significant Impact on the Environment, Recommendation C(79)116 (8 May 1979).

⁸ G.A. Res. 37/7, 37 U.N. GAOR Supp. (No. 51 at 17, U.N. Doc. A/37/51 (1982).

⁹ *Id.*

¹⁰ Report of the United Nations Conference on Environment and Development (UNCED), U.N. Doc. A/CONF.151/26 (vol. I), reprinted in (1992) 31 INTERNATIONAL LEGAL MATERIALS 874. See also Chapters 8 and 27 of *Agenda 21*, also adopted by the UNCED, *Id.* (vol. III).

The elements of Principle 10 are fully reflected in the Draft Principles on Human Rights and the Environment contained in the final report of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities (known as the Ksentini Report after its rapporteur).¹¹ Essential procedural rights of all persons identified by Ksentini include:

- The right to information concerning the environment
- The right to receive and disseminate ideas and information
- the right to participate in planning and decision-making processes, including prior environmental impact assessment
- The freedom of association for the purpose of protecting the environment
- The right to effective remedies to protect the environment, including effective access to courts.

The most recent manifestation of the international recognition of the importance of public participation is to be found in the 1998 Århus Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters.¹² It is a testament to the *bona fides* of the Århus Convention that non-governmental organizations were actually allowed to *participate* in the discussions at the negotiating table— *as opposed to merely observe* -- during the course of drafting the Convention – something that has not happened before or since.

The Århus Convention contains comprehensive provisions to force open government files and allow the wider community to have its say in relation to environmental decision-making,¹³ including by the use of the courts. While this Convention was negotiated regionally in Europe and only open for signature by State members of the Economic Commission for Europe, under Article 19 any State member of the United Nations, including Australia, is entitled to accede to the Convention. It is to be hoped that this important treaty will become global in scope.

IV. Weighing the need to expand environmental standing and appeal rights in Victoria

A. Reasons supporting expanded standing and third party appeal rights

1. Open government and participatory democracy

In an open democracy, it is essential that the citizenry be able to test the validity of legislation and governmental decisions in order to restrain what would otherwise be unbridled power. Indeed, as early as Bracton the superiority of the law over the King

¹¹ U.N. ESCOR, United Nations Human Rights Commission, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 43rd Sess., Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/1991/8 (6 July 1994)(F Ksentini, Special Rapporteur).

¹² U.N. ECE Doc. ECE/CEP/43 (21 April 1998), reprinted in (1999) 38 INTERNATIONAL LEGAL MATERIALS 517.

¹³ See also Article 16 of 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources, reprinted in (1985) 15 ENVIRONMENTAL POLICY AND LAW 64.

has been emphasised as an norm necessary for any state based on the rule of law.¹⁴ This is a paramount incentive for good government. Because no political party is in power forever, this key ingredient of democracy ought to hold sway, as a matter of simple self-interest (if nothing else), no matter what the current political bent of the government happens to be. By giving the public a practical way of seeking redress when unelected bureaucrats decline to enforce or execute environmental laws, third party enforcement rights strengthen the democratic character of implementation of environmental policy.¹⁵

The traditional doctrinal requirements of standing, however, often serve as a barrier and deterrent to this vital democratic testing of the metes and bounds of permissible decisions or exercises of power. The right to go to Court to enforce the law, often against government itself, as well as private entities, goes to the heart of the balance to be struck between the role of the Courts and government, in a democratic society. The legal system must protect the rights of all citizens to enforce public and individual rights to maintain a healthy relationship between government and the legal system, and thereby maintain a strong democracy.

2. Legitimizing decision making

By providing generous open standing provisions and third party appeal rights, the legitimacy of the governmental decision-making process is strengthened. People have a strong sense that losing is not quite so bad if we have had a fair chance at playing the game. Sir Robert Megarry once observed that the most important person in a courtroom was the litigant who was about to lose, and it was the primary duty of the court to convince that person that his or her point of view had been heard and understood, even if the court found it necessary to reject it.¹⁶

One can be assured that, if important decisions are made in which those who are substantially affected are unable to make their views known to the courts, the esteem with which those decisions are held is bound to differ. Thus judge Jack Weinstein, a highly regarded United States District Court judge who has been involved in much important Public law litigation, has commented:

Widespread access to the courts for people as well as ideas is desirable. Generally, all those who may be affected by judicial decisions which are quasi-legislative in character should have some channel of communication with the court. Based on my own experience, I doubt that liberality [in open standing provisions and third party appeal rights] will produce costs in terms of complexity that outweigh the advantage of access to the courts by those who may be affected by the judicial decisions.¹⁷

¹⁴ BRACTON, DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE (mid 13th Century). See also SIR EDWARD COKE, INSTITUTES OF THE LAW OF ENGLAND, 4 pts (1629-1646); JOHN LOCKE, TWO TREATISES OF GOVERNMENT, bk 2, ¶ 149 (1689).

¹⁵ See GE Fitzgerald, *Commission of Inquiry into the Conservation Management and Use of Fraser Island and the Great Sandy Region*, Report on Public Issues, 13 May 1991, Brisbane, at 118.

¹⁶ Sir Robert Megarry, V. C., *The Judge* (1983) 13 MANITOBA LAW JOURNAL 189, at pp. 193-94.

Public interest intervention helps to legitimise decisions in the following two ways, even when it does not appear that the public interest litigants have had a significant impact on the outcome of the decision-making process. First of all, the willingness of courts to listen to intervenors is a reflection of the value that judges attach to people. Our commitment to hearing rights and public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self respect.¹⁸ Few would deny that our respect for the courts and other governmental institutions is enhanced by their willingness to have regard for these values.

Secondly, participation by public interest intervenors in litigation creates a moral obligation on their part to respect the outcome of the litigation. It is inevitable that some people will be dissatisfied with the decisions that administrators and courts make about contentious issues, just as it is inevitable that some people will be disappointed by the outcome of a hotly contested election. But a willingness to take part in these processes is generally thought to imply a willingness to abide by the result.¹⁹

3. Efficiency

In an era of governmental frugality and budget-cutting, broad environmental standing is justified on a host of economic grounds. From a market perspective, private environmental action is by far less costly than public enforcement.²⁰ This would remain true even if legal aid were available in public interest environmental matters in Victoria.

Not only is the vast expense and lethargy of bureaucratic departments avoided, but private enforcers are in a better position to weigh costs and benefits of a particular initiative. Of course, effective and adequately resourced governmental regulation is still necessary – indeed, it is vital -- but the total resources devoted to the enforcement of environmental law is augmented through private involvement, thereby enhancing regulatory efficacy.²¹ Moreover, public participation helps sharpen the response of public officials responsible for executing environmental law.

¹⁷ J Weinstein, *Litigation Seeking Changes in Public Behavior and Institutions - Some Views on Participation* (1979-80) 13 UNIVERSITY OF CALIFORNIA DAVIS LAW REVIEW 231 at page 246.

¹⁸ See J MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* (1985) at Pp. 177-80. See also C PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* (1970), who argues that participation is a form of civic education that enhances the dignity of the citizen.

¹⁹ L FULLER, *THE MORALITY OF LAW* (Rev. ed., 1969), at 39-40.

²⁰ Macfarlane & Terry, *Citizen Suits: Impact on Permitting and Agency Enforcement* (Summer 1997) 11 NATURAL RESOURCES & ENVIRONMENT (American Bar Association), at 20.

²¹ Z Plater, *The Embattled Social Utilities of the Endangered Species Act – A Noah Presumption and Caution Against Putting Gasmasks on the Canaries in the Coalmine* (1997) 27 ENVIRONMENTAL LAW 845, 871-72.

These rationalisations accord with recent trends in Australian Government in which historically public activities are privatised, rightly or wrongly, on the grounds of efficiency. Accordingly, the State Government should be embracing, not retreating from, the proposed reform in standing to ensure the Victoria's environmental law are "best practice".²²

4. Effective Enforcement of the environmental laws made by Parliament

The law of standing is fundamental to the effective operation of environmental laws. The current doctrine of standing often thwarts the intention of Parliament in establishing laws and regulations for environmental protection. The need for reform is in this context is best highlighted by reference to an example that shows the effect of the failure to provide standing on the achievement of the purposes and objectives set by Parliament for its environmental legislation.

One of the best examples in the failure of the intended effect of environmental law is the case of *Central Queensland Speleological Society Inc v Central Queensland Cement Pty Ltd*.²³ Section 54 of the *Fauna Conservation Act 1974* (QLD), at issue in the case, provided that it was an offence to take fauna without an authority granted under the Act. "Take" was defined to include "disturb" or "damage". The public interest plaintiff was concerned that the blasting of limestone caves, which disturbed endangered ghost bats that roosted in the caves, constituted an offence under that section, as the mining company had not obtained an authority under the Act. It sought an injunction to restrain the company from carrying out its mining activities until the proper authority was issued.

The plaintiff alleged an interest in the study of the caves and their wildlife, and had conducted tours over the land so that the public could observe the bats. The Full Court of the Supreme Court of Queensland, however, decided that the Society did not have standing to maintain the proceedings. This was in spite of the fact that a majority of the Court did find that there was a prima facie case to be tried on the question of whether or not an offence had been committed under the Act. Ultimately the finding on the right of the Society to bring the proceedings operated to render nugatory the environmental law passed by the Queensland Parliament and excluded a final decision on whether the law had been broken.

By way of contrast, similar issues were raised in *Corkill v Forestry Commission of NSW*²⁴ which proceedings were brought in relation to *National Parks and Wildlife Act 1974* (NSW). Under that Act it is an offence to take or kill any protected or endangered fauna, again, without the relevant authority. However, the Act also provides that "any person" can bring proceedings to remedy or restrain a breach of the Act. Relying on that provision, John Corkill, an environmentalist, was able to injunct

²² See also the comments of Kirby J in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 169 ALR 616, at 661 ("At a time when so many other activities, formerly performed by Ministers or public authorities are being 'privatised' or 'outsourced', it may be more efficient to leave it to 'persons' other than a public body to seek relief in respect of designated contravention of an Act").

²³ (1991) 73 LGRA 218.

²⁴ (1991) 73 LGRA 247

imminent breaches of the Act by proposed logging operations of the Forestry Commission in relation to a large range of endangered and protected species of fauna found in the Chaelundi forests.

The key point of difference between the two cases, which involved very similar substantive provisions, was the permissive operative standing provision in the New South Wales legislation and the absence of a similar provision in the Queensland legislation. However, that point of difference translated into very different practical outcomes -- environmental protection and the achievement of the objects of the Act in New South Wales and environmental destruction in Queensland in contravention of substantive law enacted by Parliament.

5. Avoidance of self-help

Providing open standing and third party appeal rights to the wider community concerned about environmental issues can serve as a disincentive to individuals, who would otherwise have no other avenue for redress, to exercise self-help or take direct action against activities perceived to be harmful to the environment.²⁵ As noted above, because open access to the courts to challenge decisions and enforce environmental serve to legitimise the system and process of law, those who have had an opportunity to participate are less likely to take matters into their own hands.

6. Avoidance of regulatory “capture”

Finally, broad open standing provisions and third party appeal rights help to prevent the phenomenon known as agency capture. Agency capture refers to a situation where environmental regulators shift from enforcing public interest law to serving the corporate identities being regulated. In the Australian context, it has been said “despite wide variation across Australia in policies relating to prosecution, environmental regulators invariably seek co-operative relationships with industry.”²⁶

Avoiding regulatory capture, or at least mitigating the influence of regulated entities on regulatory decisions, can be greatly enhanced by wide public access to the enforcement process and in the ability to challenge agency decision making.²⁷ While administrators may be bullied by corporate elites, judges are unlikely to fall under undue influence. The judiciary, by its very nature, is more independent than regulatory agencies.²⁸

²⁵ See A Ricketts & N Rogers, *Third Party Rights in NSW Environmental Legislation* (1999) 16 ENVIRONMENTAL AND PLANNING LAW JOURNAL 157, at 163.

²⁶ P GRABOSKY & J BRAITHWAITE, OF MANNERS GENTLE: ENFORCEMENT STRATEGIES OF AUSTRALIAN BUSINESS REGULATORY AGENCIES (1986), at 47. See also J Norberry, *Australia* in A ALVAZZI DEL FRATE & J NORBERRY, EDS, ENVIRONMENTAL CRIME, SANCTIONING STRATEGIES AND SUSTAINABLE DEVELOPMENT (1993).

²⁷ M Briody & T Prenzler, *The Enforcement of Environmental Protection Laws in Queensland: A Case of Regulatory Capture?* (1998) 15 ENVIRONMENTAL AND PLANNING LAW JOURNAL 54, at 56.

²⁸ A Chayes, *The Role of the Judge in Public Law Litigation* (1979) 89 HARVARD LAW REVIEW 1281.

*B. Reasons against expanding standing and third party appeal rights*²⁹

1. Wide public intervention is inappropriate in judicial proceedings

Detractors of open standing and third party appeal rights argue that public participation in adjudicative proceedings, especially criminal prosecutions, is inappropriate. It is claimed that a fair trial is a matter of private law and public interest groups are merely officious interlopers.

The problem with this argument, however, is that it misses the fundamental point that the environment is essentially a public good and that decisions concerning appropriate uses and development of the environment are an inescapable public interest matter.³⁰ As the United States' Senate has recognised in including open standing enforcement provisions in all US federal environmental law bar two:

[Citizen suits] perform a public service. Citizen groups are not to be treated as mere nuisances or troublemakers but rather welcomed participants in the vindication of public environmental interests.³¹

Moreover, as early as 1973, the Chairman of the Council on Environmental Quality in the US, Robert Train, argued:

The environment is just too important to be left to us bureaucrats . . . Public participation provides critical input from those who actually live in the particular environment at issue. The public can provide an essential source of information in providing an early warning system of the existence of problems, in developing realistic solutions to those problems, and then in holding bureaucratic feet to the fire to see to it that regulatory programmes are implemented . . . Only through active citizen involvement can we set goals that have the consent of the public. Only through public participation can we have a truly effective control and feedback programme . . .³²

2. Opening the "floodgates"

Critics of public interest adjudication frequently raise the fearful spectre of the "floodgates argument". It is asserted that open standing and third party appeal rights

²⁹ This section is drawn largely from D Robinson, *Public Participation in Environmental Decision-Making* (1993) 10 ENVIRONMENTAL AND PLANNING LAW JOURNAL 320, at 321-26.

³⁰ See T Bonyhandy, *Property Rights* in T BONYHANDY, ED, ENVIRONMENTAL PROTECTION AND LEGAL CHANGE (1992)

³¹ U.S. Senate Rep. No. 92-414, quoted in *Friends of the Earth v Carey*, 535 F.2d 165, 172 (2d Cir. 1976).

³² See Train, R. (Chairman Council of Environmental Quality, US EPA), "Address to a National Conference on Managing the Environment", National Technical Information Service US Department of Commerce, Washington, May 1973.

will ensure that the courts and the legal system are inundated with a deluge of frivolous law suits. Thus, wide access to judicial proceedings must be avoided.

In no jurisdiction, however, has there been any empirical evidence of such a mischief. Rather, the evidence has accumulated to discount any such argument. This is seen in the experience over fifteen years of the open standing provisions of the *Environmental Planning and Assessment Act* 1979 (NSW). From 1980 to 1990, there had only been 125 full hearings brought under section 123 of the Act and of those only 32% were brought by resident action groups or in the "general public interest". Indeed, the Chief Judge of the Land and Environment Court in 1989, noted then that -

It was said when the legislation was passed in 1980 that the presence of section 123 would lead to a rash of harassing and vexatious litigation. That has not happened and, with the greatest respect to people who think otherwise, I think that that argument has been wholly discredited.³³

Similarly, the remarks of His Honour Mr Justice Wilcox in *Ogle v Strickland*, reflect the reality of the motivations of those that commence legal proceedings in the public interest -

The idol and whimsical plaintiff, a dilettante who litigates for a laugh, is a spectre which haunts the legal literature, not the court room. Litigation - in the public interest and for no personal advantage, especially against a wealthy opponent and under a cost regime requiring the losing party to pay the costs incurred by the victor - has some similarity to marriage as described in the Book of Common Prayer: it is not by any to be enterprised nor taken in hand, unadvisedly, lightly or wantonly.³⁴

3. Unrepresentative nature of individual intervention

Those who oppose wide standing provisions and third party appeal rights often point out that concerns of many individuals across the community go silent in a system that allows generous intervention. This is because only well organised groups and affluent individuals are likely to take advantage of such provisions and rights and they do not necessarily represent the wider community. Such an assertion seems intuitively plausible, even though the critics have consistently failed to provide empirical evidence to back up their claims.

However, it does not follow and is an illogical step to conclude that participation and the right to access environmental justice should be reduced are completely curtailed on account of problems of representation.³⁵ Even if public interest groups that take advantage of open standing and third party appeal right are unrepresentative of the public whose interests they claim to be protecting, or that public interest intervention

³³ Jerold S Cripps, *Administration of Social Justice in Public Interest Litigation*, in PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON ENVIRONMENTAL LAW (Sydney 14-18 June 1989), pp. 92-93.

³⁴ (1987) 14 FCR 474

³⁵ J Welch, *No Room at the Top: Interest Group Intervenors and Charter Litigation in the Supreme Court of Canada* (1 985) 43 UNIVERSITY OF TORONTO FACULTY OF LAW REVIEW 204, at 229-30.

presents the courts with an unbalanced or unreliable picture of the world it is difficult to see how the alternative, which would be to make no attempt to allow for the representation of different perceptions of the public interest, would produce a more accurate or representative picture of society.³⁶ As David Robinson, a lawyer with the EPA in NSW, points out:

If the potential for participation is not taken up by some, they should be provided with the means to do so [ie legal aid for public interest environmental matters]. If others abuse the process, the quality of the process needs to be reviewed so it is not hijacked by them. The likelihood of arbitrary representation of interest is reduced if a number of avenues for representation exist.³⁷

4. Cost and inconvenience

Some opposition to public interest intervention is undoubtedly due to the belief that it represents a waste of resources and, in particular, of the court's time. We are sensitive to the demands placed on the judiciary's time by ever-expanding litigation dockets, and we agree that it is desirable to minimize the burden we place on our courts wherever possible. We do not believe, however, that judicial economy that open standing and third party appeals be absolutely prohibited. Some degree of economy can be achieved with the co-operation of all concerned. To quote once again from Judge Weinstein's remarks:

My experience ... in handling at least a score of cases that might be characterized as public litigations is that granting an opportunity to be heard in such cases at the district court level is entirely practicable. The number of those who will want to appear in court is generally quite small in proportion to those who might be affected. Moreover, most people are quite sensible – they understand the burdens on court time and will accede to reasonable requests to limit participation.³⁸

5. Inconsistent prosecution

The EPA has sought to justify the EPA policy against open standing by claiming such as policy is necessary to ensure uniform application of the law by the EPA under its prosecution guidelines. Of course, the implicit message is that not all breaches of the law will be prosecuted. If you are well versed in the EPA prosecution guidelines, then you know just how much you can break the law before the EPA will come after you. However, the EPA prosecution guidelines **are not the law**. The law is set by the *Environment Protection Act 1970*. If the EPA refuses to institute an action to restrain or remedy a breach because it does not fall within its prosecution guidelines,

³⁶ British Columbia Civil Liberties Association, *Public Interest Intervention Before Courts* (1986), at n. 36.

³⁷ D Robinson, *Public Participation in Environmental Decision-Making* (1993) 10 ENVIRONMENTAL AND PLANNING LAW JOURNAL 320, at 324-25.

³⁸ J Weinstein, *Litigation Seeking Changes in Public Behavior and Institutions - Some Views on Participation* (1979-80) 13 UNIVERSITY OF CALIFORNIA DAVIS LAW REVIEW 231 at page 246.

undoubtedly the public should have the right to compel compliance. In current circumstances, the lesson that is taught is some violation of the law is appropriate because it will not be punished.

V. Conclusion

Looking at both Australian and international practice, it appears that contemporary “best practice” environmental regulatory regimes almost uniformly incorporate open standing provisions and third party appeal rights. Such provisions and rights serve a large number of salutary purposes as the both the High Court of Australia and environmental protection authority administrators in other jurisdictions have recognised.

The provision of open standing and third party appeal rights in the environmental context is part and parcel of a democratic and accountable government. Such provisions go a long way in helping legitimise controversial decisions about public resource allocation and environmental burdens. They greatly enhance the efficiency and effectiveness of the laws passed by Parliament to protect and conserve the environment. They also help avoid recourse to self-help by individuals who would otherwise be shut out of the system and help insure against regulatory capture by the regulated industry.

In short, open standing and third party appeal rights have all the hallmarks of contemporary “best practice” environmental regulation. We strongly endorse such provisions and recommend them to your serious consideration in the overdue reform of Victoria’s environmental law.

Appendix 1

The following table set out Australian and international open standing provisions in environmental law, as well as third party appeal rights in connection with environmental decision making. The plethora of these provisions, both in Australia and around the world, demonstrates that they constitute “best practice” environmental regulation.

I. Unqualified Open Standing Provisions in Australian Environmental Law (Civil proceedings)

1. Victoria

HERITAGE ACT 1995 (VIC)

Section 167 - Remedy or restraint of contraventions of this Act

The Heritage Council, the Executive Director, the Director of Public Prosecutions **or any other person** may bring proceedings in the Supreme Court for an order to remedy or restrain a contravention of this Act.

Note: This provision is similar to the one found in s 80 of the *Trade Practice Act* 1974 (Cth), that was recently looked on favourably by the High Court in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 169 ALR 616.

PLANNING AND ENVIRONMENT ACT 1987 (VIC)

Section 114 - Application for enforcement order

(1) A responsible authority **or any person** may apply to the Tribunal for an enforcement order against any person specified in sub-section (3) if a use or development of land contravenes or has contravened, or, unless prevented by the enforcement order, will contravene this Act, a planning scheme, a condition of a permit or an agreement under section 173.

Note: This provision is perhaps the single most important avenue for Victorians to obtain access to environmental justice in connection with planning law. The words “any person” are to be read literally and it is not necessary for an applicant to identify and interest or establish the his or her interest are affected. *Jeffs v City of Keilor* (1996) 7 AATR 134, 138.

2. New South Wales

CONTAMINATED LAND MANAGEMENT ACT 1997 (NSW)

Section 96 -- Restraint of breaches

(1) **Any person** may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach (or a threatened or apprehended

breach) of this Act or the regulations, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.

(2) Proceedings under this section may be brought by a person on the person's own behalf or on behalf of the person and other persons (with their consent), or a body corporate or unincorporated (with the consent of its committee or other controlling or governing body), having like or common interests in those proceedings.

ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979 (NSW) ('EPA Act')

Section 123 -- Restraint etc of breaches of this Act

(1) **Any person** may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.

(2) Proceedings under this section may be brought by a person on his or her own behalf or on behalf of himself or herself and on behalf of other persons (with their consent), or a body corporate or unincorporated (with the consent of its committee or other controlling or governing body), having like or common interests in those proceedings.

Note: In commenting on this open standing provision and associated third party appeal rights, Justice Stein of the NSW Supreme Court has emphasised:

One emphatic theme which ran through the comprehensive package of [1979] legislation was the right of the general public to participate in the process of environmental planning. This is a specific objective under s 5 of the EPA Act. The objective is strengthened by other provisions in the Act relating to environmental plan-making, third-party appeals and open standing in order to enforce compliance with environmental laws. The legislation [is] . . . a recognition and acknowledgment of the importance of the environment and the development of Environmental Law, as well as the right of members of the general public to participate in the processes and in decision-making.³⁹

ENVIRONMENTALLY HAZARDOUS CHEMICALS ACT 1985 (NSW)

Section 57 -- Restraint etc. of breaches of this Act

(1) **Any person** may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.

(2) Proceedings under this section may be brought by a person on the person's own behalf or on behalf of the person and other persons (with their consent),

³⁹ P Stein, *New directions in the prevention and resolution of environmental disputes - specialist environmental courts* (Paper delivered in Manila 6 March 1999 to "The South-East Asian Regional Symposium On The Judiciary And The Law Of Sustainable Development". Sponsored By UNEP/UNDP, Hanns Seidal Foundation And The Government Of The Philippines).

or a body corporate or unincorporated (with the consent of its committee or other controlling or governing body), having like or common interests in those proceedings.

FISHERIES MANAGEMENT ACT 1994 (NSW)

Section 282 -- Restraint of breaches of Act

(1) **Any person** may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.

(2) Proceedings under this section may be brought by a person on the person's own behalf or on behalf of another person (with their consent), or a body corporate or unincorporated (with the consent of its committee or other controlling or governing body), having like or common interests.

HERITAGE ACT 1977 (NSW)

Section 153 -- Restraint etc of breaches of this Act

(1) **Any person** may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been infringed by or as a consequence of that breach.

(2) Proceedings brought under subsection (1) shall be brought in accordance with the rules of Court.

NATIONAL PARKS AND WILDLIFE ACT 1974 (NSW)

Section 176A -- Restraint etc of breaches of Act

(1) **Any person** may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.

(2) Proceedings under this section may be brought by a person on the person's own behalf or on behalf of the person and other persons (with their consent), or a body corporate or unincorporated (with the consent of its committee or other controlling or governing body), having like or common interests in those proceedings.

NATIVE VEGETATION CONSERVATION ACT 1997 (NSW)

Section 63 -- Restraint of breaches of this Act

* * *

(2) **Any person** may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.

(3) Proceedings under this section may be brought by a person on the person's own behalf or on behalf of that person and on behalf of other persons (with their consent), or a body corporate or unincorporated (with the consent of its committee or other controlling or governing body), having like or common interests in those proceedings.

PROTECTION OF THE ENVIRONMENT OPERATIONS ACT 1997 (NSW)

Part 8.4 – Civil Proceedings to Remedy or Restrain Breaches of Act or Harm to Environment

Section 252 -- Remedy or restraint of breaches of this Act or regulations

(1) **Any person** may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of this Act or the regulations.

(2) Any such proceedings may be brought whether or not proceedings have been instituted for an offence against this Act or the regulations.

(3) Any such proceedings may be brought whether or not any right of the person has been or may be infringed by or as a consequence of the breach.

Section 253 -- Restraint of breaches of an Act or statutory rules that harm the environment

(1) **Any person** may bring proceedings in the Land and Environment Court for an order to restrain a breach (or a threatened or apprehended breach) of any other Act, or any statutory rule under any other Act, if the breach (or the threatened or apprehended breach) is causing or is likely to cause harm to the environment.

Note. Statutory rule is defined in section 21 of the Interpretation Act 1987.

(2) Any such proceedings may be brought whether or not any right of that person has been or may be infringed by or as a consequence of the breach (or the threatened or apprehended breach).

SYDNEY WATER ACT 1994 (NSW)

Section 102 -- Restraint of breaches of Act

(1) **Any person** may bring proceedings, concerning matters relating to the protection of the environment, in the Land and Environment Court for an order to restrain a breach of this Act (or a threatened or apprehended breach of this Act).

(2) Any such proceedings may be brought whether or not any right of that person has been or may be infringed by or as a consequence of the breach (or the threatened or apprehended breach).

THREATENED SPECIES CONSERVATION ACT 1995 (NSW)

Section 147 -- Restraint of breaches of Act

(1) **Any person** may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.

(2) Proceedings under this section may be brought by a person on the person's own behalf or on behalf of the person and other persons (with their consent), or a body corporate or unincorporated (with the consent of its committee or other controlling or governing body), having like or common interests in those proceedings.

URANIUM MINING AND NUCLEAR FACILITIES (PROHIBITIONS) ACT 1986 (NSW)

Section 10 -- Restraint etc. of breaches of Act

(1) **Any person** may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.

(2) Proceedings under this section may be brought by a person:

(a) on the person's own behalf; or

(b) on behalf of the person and on behalf of:

(i) other persons (with their consent); or

(ii) a body corporate or unincorporated (with the consent of its committee or other controlling or governing body),

having like or common interests in those proceedings.

WILDERNESS ACT 1987 (1987)

Section 27 -- Restraint etc. of breaches of this Act

(1) **Any person** may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of this Act, whether or not any right of

that person has been or may be infringed by or as a consequence of that breach.

(2) Proceedings under this section may be brought by a person on the person's own behalf or on behalf of the person and other persons (with their consent), or a body corporate or unincorporated (with the consent of its committee or other controlling or governing body), having like or common interests in those proceedings.

3. Queensland

ENVIRONMENTAL PROTECTION ACT 1994 (QLD)

Section 195A - Proceeding for orders

(1) **A person** may bring a proceeding in the Court--

(a) for an order to remedy or restrain the commission of a development offence (an "enforcement order"); or

(b) if the person has brought a proceeding under paragraph (a) and the Court has not decided the proceeding—for an order under section 195C (an "interim enforcement order"); or

(c) to cancel or change an enforcement order or interim enforcement order.

(2) The person may bring a proceeding under subsection (1)(a) whether or not any right of the person has been, or may be, infringed by, or because of, the commission of the offence.

INTEGRATED PLANNING ACT 1997 (Qld)

Proceeding for orders

4.3.22.(1) **A person** may bring a proceeding in the court--

(a) for an order to remedy or restrain the commission of a development offence (an "enforcement order"); or

(b) if the person has brought a proceeding under paragraph (a) and the court has not decided the proceeding—for an order under section 4.3.24 (an "interim enforcement order"); or

(c) to cancel or change an enforcement order or interim enforcement order.

(2) However, if the offence under subsection (1)(a) is an offence under section 4.3.1, 4.3.2 or 4.3.3 about the Standard Building Regulation, the proceeding may be brought only by the assessing authority.

(3) The person may bring a proceeding under subsection (1)(a) whether or not any right of the person has been, or may be, infringed by, or because of, the commission of the offence.

4. South Australia

DEVELOPMENT ACT 1993 (SA)

Section 85 - Applications to the Court

(1) **Any person** may apply to the Court for an order to remedy or restrain a breach of this Act or a repealed Act (whether or not any right of that person has been or may be infringed by or as a consequence of that breach).

(2) Proceedings under this section may be brought in a representative capacity (but, if so, the consent of all persons on whose behalf the proceedings are brought must be obtained).

WILDERNESS PROTECTION ACT 1992 (SA)

Section 34 - Jurisdiction of the Court

(1) Where a person contravenes or fails to comply with a provision of this Act, the Director **or any other person** may apply to a District Court for an order under this section.

5. Tasmania

ENVIRONMENT PROTECTION (SEA DUMPING) ACT 1987 (Tas)

Section 28 - Injunctions

(1) The Supreme Court may -

(a) upon application by the Attorney-General **or by an interested person**, grant an injunction restraining a person from engaging in conduct that constitutes, or would constitute, an offence under Division 1 or 2 of Part II; and

(b) make any order incidental or supplementary to an order made or an application under paragraph (a), including an order as to costs.

(2) The reference in subsection (1)(a) to **an interested person** shall be read as including a reference to a person whose use or enjoyment of any part of the sea, or of the air space above, or of the sea bed or subsoil beneath, any part of the sea, is, or is likely to be, adversely affected by the conduct concerned.

6. Western Australia

HERITAGE OF WESTERN AUSTRALIA ACT 1990 (WA)

Section 69 - Injunctions, etc

(1) The Supreme Court or the District Court, on the application of the Minister, the Council *or any other person*, where the Court is satisfied that a person --

(a) has engaged, or is proposing to engage, in conduct that constitutes or would constitute; or

(b) is involved in, a contravention of this Act or under any other written law by reason of the operation of this Act (whether or not there is an imminent danger of substantial damage to any person), may make such order or orders as the Court thinks fit for the purpose of securing compliance with this Act or that written law and giving effect to the objects of this Act, including an injunction or other order directing a person to do or refrain from doing a specified act, and any ancillary order deemed to be desirable in consequence.

8. International examples⁴⁰

CANADA

NEW ZEALAND

RESOURCE MANAGEMENT ACT 1991

Section - 316 Application for enforcement order

(1) *Any person* may at any time apply to the Planning Tribunal in the prescribed form for an enforcement order of a kind specified in paragraphs (a) to (d) of section 314 (1), or in section 314 (2).

* * *

(3) An application for an enforcement order under section 314 (1) (f) may be lodged---

(a) By a local authority (or the Minister of Conservation in regard to a regional coastal plan) at any time; or

(b) By *any other person*, no later than 3 months after the date on which the policy statement or plan becomes operative.

⁴⁰ In addition to the legislation set fourth in this section, see also the discussion in Appendix 2 and the sources cited in note 1 above.

Note: Section 316 of the *Resource Management Act* allow open standing to any person to participate in the enforcement of the provision of the Act. It also allows all members of the community to participate in the preparation of planning instruments and the hearing and appeal of consent conditions. Similar public consultation processes are embodied in other New Zealand environmental law, including the *Conservation Act* 1987 and the *Fisheries Act* 1996.⁴¹

SOUTH AFRICA

NATIONAL ENVIRONMENTAL MANAGEMENT ACT

32 (1) ***Any person or group of persons*** may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or any other statutory provision concerned with the protection of the environment or the use of natural resources-

- (a) in that person's or group of person's own interest;
- (b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;
- (c) in the interest or on behalf of a group or class of persons whose interests are affected;
- (d).in the public interest; and
- (e).in the interest of protecting the environment.

UNITED STATES OF AMERICA

Beyond administrative rights to participate in an agency's decision-making process, and the rights to challenge an agency's decision in court, the public is also often invited to play a role in a statute's enforcement through the provision of citizen suits. The following major pieces of federal environmental legislation, amongst others, all include citizen suit provisions:

- § 505(a) *Clean Water Act*, also known as the Federal Water Pollution Control Act, 33 U.S.C. §1365(a)
- § 304 *Clean Air Act*
- § 11 *Endangered Species Act*
- § 7002 *Resource Conservation and Recovery Act*
- § 20 *Toxic Substances Control Act*
- *Solid Waste Disposal Act*, 42 U.S.C. § 6972(a)

⁴¹ See B Richardson & K Palmer, *The Emerging "Citizenship" Discourse in Environmental Law: A New Zealand Perspective* (2000) 17 ENVIRONMENTAL AND PLANNING LAW JOURNAL 99, 112-114.

- *Emergency Planning and Community Right to Know Act*, 42 U.S.C. §11406.
- §310 *Comprehensive Environmental Response, Compensation, and Liability Act*.

These provisions authorize private individuals and organizations to enforce environmental regulatory schemes by directly suing violators in federal district courts when public authorities have not acted against the violators. Under these provisions, generally "Any person" is authorized to commence a civil action in federal district court against any other person, including most government agencies, to enforce a standard, regulation, rule, order or permit established pursuant to the statute.

Under the Clean Air Act (CAA), "person" is defined as "an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof." The Clean Water Act (CWA) uses the term "any citizen" and defines "citizen" as "a person or persons having an interest which is or may be adversely affected." Thus, the "person" (CAA) or "individual" (CWA) need not be a citizen to maintain a suit. Because of these broad provisions, standing has not posed a barrier to commencing citizen suits.

II. Qualified Open Standing Provisions in Australian Environmental Law

1. Victoria

BUILDING ACT 1993 (VIC)

Section 253 - Additional orders that may be made by the court

(1) The Commission or a municipal building surveyor or any other prescribed body or person may bring proceedings in any court of competent jurisdiction for an order under this section in the event of a breach, or threatened or apprehended breach, of this Act or the regulations or a notice, permit, order or determination issued or made under this Act (including a notice or order or determination of the Building Appeals Board).

HEALTH ACT 1958 (VIC)

Section 45 - Failure of council to investigate complaint

(1) If the council does not within a reasonable time of being notified of an alleged nuisance investigate the subject-matter of the notification, the person who notified the council may make a complaint to the Magistrates' Court of the existence of the alleged nuisance.

2. Australian Capital Territory

ENFORCEMENT OF PUBLIC INTERESTS ACT 1973 (ACT)

Section 2 - Form of certain proceedings instituted with consent of Attorney-General

(1) Where the Attorney-General gives his consent to the institution of proceedings in a court on the relation of a person, the title of the proceedings shall, if the Attorney-General so directs-

- (a) describe that person as the plaintiff in the proceedings; and
- (b) contain words to the effect that the proceedings are instituted with the consent of the Attorney-General.

(2) Where, either before or after the commencement of this Act, proceedings have been instituted in a court in the name of the Attorney-General as plaintiff on the relation of a person, the Attorney-General may, if he thinks fit, direct that, on and from the date of the direction, the title of the proceedings shall be changed so that the person named in the proceedings as the relator is described as the plaintiff in the proceedings.

(3) Where a direction is given under subsection (2) in relation to proceedings, the title of the proceedings shall, on and after the date on which a copy of the direction is lodged with the registrar of the court, be deemed to have been changed so that the person named in the proceedings as relator is described as the plaintiff with the addition of the words "with the consent of the Attorney-General".

ENVIRONMENT PROTECTION ACT (ACT)

Division 3 Injunctive orders

Section 127 -Application for order

(1) An application for an order under section 128 may be made to the Supreme Court by—

- (a) the Authority; or
- (b) any other person with leave of the Court.

(2) The Court shall not grant leave under paragraph (1) (b) unless satisfied that—

- (a) the person has requested the Authority to take action under the Act and the Authority has failed, within a time that is reasonable in the

circumstances, to notify the person in writing that it has taken any action that is appropriate in the circumstances; and

(b) it is in the public interest that the proceedings should be brought.

3. New South Wales

CONTAMINATED LAND MANAGEMENT ACT 1997 (NSW)

Section 95 - Other persons may institute proceedings with leave

(1) Any person may institute proceedings in the Land and Environment Court for an offence against this Act or the regulations if the Court grants the person leave to bring the proceedings.

(2) The Court is not to grant leave unless satisfied that:

(a) the EPA has decided not to take any relevant action (as defined in subsection (3)) in respect of the act or omission constituting the alleged offence or has not made a decision on whether to take such action within 90 days after the person requested the EPA to institute the proceedings, and

(b) the EPA has been notified of the proceedings, and

(c) the proceedings are not an abuse of the process of the Court, and

(d) the particulars of the offence disclose, without any hearing of the evidence, a prima facie case of the commission of the offence.

(3) Relevant action for the purposes of subsection (2) is not limited to the institution of criminal proceedings, but includes action under this Act to require the defendant to comply with an investigation or remediation order. Division 3 Restraint of breaches without prosecution for offence.

PROTECTION OF THE ENVIRONMENT OPERATIONS ACT 1997 (NSW)

Part 8.2 – Proceedings for Offences

219 Other persons may institute proceedings with leave of Land and Environment Court

(1) Any person may institute proceedings in the Land and Environment Court for an offence against this Act or the regulations if the Court grants the person leave to bring the proceedings.

(2) The Land and Environment Court is not to grant leave unless satisfied that:

(a) the EPA has decided not to take any relevant action (as defined in subsection (3)) in respect of the act or omission constituting the alleged

offence or has not made a decision on whether to take such action within 90 days after the person requested the EPA to institute the proceedings, and

(b) the EPA has been notified of the proceedings, and

(c) the proceedings are not an abuse of the process of the Court, and

(d) the particulars of the offence disclose, without any hearing of the evidence, a prima facie case of the commission of the offence.

(3) Relevant action for the purposes of subsection (2) is not limited to the institution of criminal proceedings, but includes action under this Act to require the defendant to prevent, control, abate or mitigate any harm to the environment caused by the alleged offence or to prevent the continuance or recurrence of the alleged offence.

4. Queensland

COASTAL PROTECTION AND MANAGEMENT ACT 1995 (Qld)

Section 84 - Restraint of contraventions of Act etc.

(1) A proceeding may be brought in the Planning and Environment Court for an order to remedy or restrain an offence against this Act, or a threatened offence against this Act, by--

(a) the Minister; or

(b) the chief executive; or

(c) someone whose interests are affected by the subject matter of the proceeding; or

(d) someone else with the leave of the court (even though the person does not have a proprietary, material, financial or special interest in the subject matter of the proceeding).

(2) In deciding whether or not to grant leave to a person under subsection-(1)(d), the court--

(a) must be satisfied--

(i) harm has been or is likely to be caused to the coastal zone; and

(ii) the proceeding would not be an abuse of the process of the court; and

(iii) there is a real or significant likelihood that the requirements for the making of an order under this section would be satisfied; and

(iv) it is in the public interest that the proceeding should be brought; and

(v) the person has given written notice to the Minister asking the Minister to bring a proceeding under this section and the Minister has failed to act within a time that is a reasonable time in the circumstances; and

(vi) the person is able to adequately represent the public interest in the conduct of the proceeding; and

(b) may have regard to other matters the court considers relevant to the person's standing to bring and maintain the proceeding.

(3) However, the court must not refuse to grant leave merely because the person's interest in the subject matter of the proceeding is no different from someone else's interest in the subject matter.

ENVIRONMENTAL PROTECTION ACT 1994 (Qld)

Section 194 - Restraint of contraventions of Act etc.

(1) A proceeding may be brought in the Court for an order to remedy or restrain an offence against this Act, or a threatened offence against this Act, by--

(a) the Minister; or

(b) the chief executive; or

(c) someone whose interests are affected by the subject matter of the proceeding; or

(d) someone else with the leave of the court (even though the person does not have a proprietary, material, financial or special interest in the subject matter of the proceeding).

(2) In deciding whether or not to grant leave to a person under subsection-(1)(d), the court--

(a) must be satisfied--

(i) environmental harm has been or is likely to be caused; and

(ii) the proceeding would not be an abuse of the process of the court; and

(iii) there is a real or significant likelihood that the requirements for the making of an order under this section would be satisfied; and

(iv) it is in the public interest that the proceeding should be brought; and

(v) the person has given written notice to the Minister or, if the administering authority is a local government, the administering executive, asking the Minister to bring a proceeding under this section and the Minister has failed to act within a time that is a reasonable time in the circumstances; and

(vi) the person is able to adequately represent the public interest in the conduct of the proceeding; and

(b) may have regard to other matters the court considers relevant to the person's standing to bring and maintain the proceeding.

(3) However, the court must not refuse to grant leave merely because the person's interest in the subject matter of the proceeding is no different from someone else's interest in the subject matter.

5. South Australia

ENVIRONMENT PROTECTION ACT 1993 (SA)

Part 11 – Civil Remedies

104. (1) Applications may be made to the Environment, Resources and Development Court for one or more of the following orders:

(a) if a person has engaged, is engaging or is proposing to engage in conduct in contravention of this Act-an order restraining the person from engaging in the conduct and, if the Court considers it appropriate to do so, requiring the person to take any specified action;

(b) if a person has refused or failed, is refusing or failing or is proposing to refuse or fail to take any action required by this Act-an order requiring the person to take that action;

(c) if a person has caused environmental harm by a contravention of this Act or a repealed environment law-an order requiring the person to take specified action to make good any resulting environmental damage and, if appropriate, to take specified action to prevent or mitigate further environmental harm;

(d) if the Authority or any other public authority has incurred costs or expenses in taking action to prevent or mitigate environmental harm

caused by a contravention of this Act or a repealed environment law, or to make good resulting environmental damage-an order against the person who committed the contravention for payment of the reasonable costs and expenses incurred in taking that action;

(e) if a person has suffered injury or loss or damage to property as a result of a contravention of this Act, or incurred costs and expenses in taking action to prevent or mitigate such injury, loss or damage-an order against the person who committed the contravention for payment of compensation for the injury, loss or damage, or for payment of the reasonable costs and expenses incurred in taking that action;

(f) if the Court considers it appropriate to do so, an order against a person who has contravened this Act for payment (for the credit of the Consolidated Account) of an amount in the nature of exemplary damages determined by the Court;

(g) an order for enforcement of the provisions of an environment performance agreement.

(2) The power of the Court to make an order restraining a person from engaging in conduct of a particular kind may be exercised-

(a) if the Court is satisfied that the person has engaged in conduct of that kind-whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; or

(b) if it appears to the Court that, in the event that an order is not made, it is likely that the person will engage in conduct of that kind-whether or not the person has previously engaged in conduct of that kind and whether or not there is an imminent danger of substantial harm or damage if the first-mentioned person engages in conduct of that kind.

(3) The power of the Court to make an order requiring a person to take specified action may be exercised-

(a) if the Court is satisfied that the person has refused or failed to take that action-whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to take that action; or

(b) if it appears to the Court that, in the event that an order is not made, it is likely that the person will refuse or fail to take that action-whether or not the person has previously refused or failed to take that action and whether or not there is an imminent danger of substantial harm or damage if the first-mentioned person refuses or fails to take that action.

(4) In assessing an amount to be ordered in the nature of exemplary damages, the Court must have regard to-

- (a) any environmental harm or detriment to the public interest resulting from the contravention; and
- (b) any financial saving or other benefit that the respondent stood to gain by committing the contravention; and
- (c) any other matter it considers relevant.

(5) The power to order payment of an amount in the nature of exemplary damages may only be exercised by a Judge of the Court.

(6) The power of the Court to make an order for enforcement of an environment performance agreement includes any power to make orders or provide relief that the District Court has in relation to a contract.

(7) An application under this section may be made-

- (a) by the Authority; or
- (b) by any person whose interests are affected by the subject matter of the application; or
- (c) by any other person with the leave of the Court.

(8) Before the Court may grant leave for the purposes of subsection (7)(c), the Court must be satisfied that-

- (a) the proceedings on the application would not be an abuse of the process of the Court; and
- (b) there is a real or significant likelihood that the requirements for the making of an order under subsection (1) on the application would be satisfied; and
- (c) it is in the public interest that the proceedings should be brought.

6. Tasmania

ENVIRONMENT PROTECTION (SEA DUMPING) ACT 1987 (Tas)

Section 28 - Injunctions

(1) The Supreme Court may -

- (a) upon application by the Attorney-General *or by an interested person*, grant an injunction restraining a person from engaging in

conduct that constitutes, or would constitute, an offence under Division 1 or 2 of Part II; and

(b) make any order incidental or supplementary to an order made or an application under paragraph (a), including an order as to costs.

(2) The reference in subsection (1)(a) to *an interested person* shall be read as including a reference to a person whose use or enjoyment of any part of the sea, or of the air space above, or of the sea bed or subsoil beneath, any part of the sea, is, or is likely to be, adversely affected by the conduct concerned.

ENVIRONMENTAL MANAGEMENT AND POLLUTION CONTROL ACT 1994 (Tas)

Division 3 - Civil enforcement Civil enforcement proceedings

SECT. 48. (1) Where -

(a) a person has engaged, is engaging or is proposing to engage in conduct in contravention of this Act; or

(b) a person has refused or failed, is refusing or failing or is proposing to refuse or fail to take any action required by this Act; or

(c) a person has caused environmental harm by contravention of this Act, any other Act or the repealed Act -

the Director, a council or a person who has, in the opinion of the Appeal Tribunal, a proper interest in the subject matter may apply to the Appeal Tribunal for an order under this section.

7. Western Australia

WESTERN AUSTRALIAN MARINE (SEA DUMPING) ACT 1981 (WA)

Section 27 - Injunction

27. (1) The Supreme Court may --

(a) upon application by the Attorney General or by an interested person, grant an injunction restraining a person from engaging in conduct that constitutes, or would constitute, an offence against section 5, 6, 7 or 9; and

(b) make any order incidental or supplementary to an order made on an application under paragraph (a), including an order as to costs.

(2) The reference in paragraph (a) of subsection (1) to an interested person shall be read as including a reference to a person whose use or enjoyment of --

(a) any part of the sea; or

(b) the air space above, or of the sea-bed or subsoil beneath, any part of the sea, or

is likely to be, adversely affected by the conduct concerned.

Third Party Appeal Rights in Australian Environmental Law

1. Victoria

PLANNING AND ENVIRONMENT ACT 1987 (Vic)

Section 39 - Defects in procedure

(1) A person who is substantially or materially affected by a failure of the Minister, a planning authority or a panel to comply with Division 1 or 2 or this Division or Part 8 in relation to an amendment which has not been approved may, not later than one month after becoming aware of the failure refer the matter to the Tribunal for its determination.

Section 82 - Appeals where objectors

(1) An objector may apply to the Tribunal for review of a decision of the responsible authority to grant a permit.

(2) A planning scheme may set out classes of applications for permits the decisions on which are exempted from sub-section (1).

(3) If a planning scheme exempts a decision of an application for a permit from sub-section (1), an application for review cannot be made under that sub-section in respect of that decision.

ENVIRONMENT PROTECTION ACT 1970 (Vic)

Section 33B - Applications for review by third parties

(1) If the Authority or a delegated agency-

- (a) issues a works approval; or
- (b) issues a licence on an application to which section 20(8) applies; or
- (c) amends a licence on an application to which section 20A(6) applies; or
- (d) removes the suspension of a licence-

a person whose interests are affected by the decision (other than the applicant or licence holder) may apply to the Tribunal, within 21 days after the decision is made, for review of the decision.

Note: There are a number of other exceptions to the rights of third parties to obtain review in subsections (1A) through (2C).

2. Australian Capital Territory

ENVIRONMENT PROTECTION ACT 1997 (ACT)

Part XIV – Administrative Review

Section 135 - Review of decisions

(1) An eligible person may make application to the Administrative Appeals Tribunal for review of a decision of the Authority-

- (a) under subsection 21 (1) excluding or refusing to exclude a document or part of a document from public inspection;
- (b) under subsection 43 (1) notifying a person that the person is not to conduct, or continue to conduct, a specified activity unless the person holds an environmental authorisation;
- (c) under subsection 43 (4) refusing to revoke a notice under subsection 43 (1);
- (d) under paragraph 49 (1) (a), (2) (a), (3) (a) or (4) (a) granting an environmental authorisation;
- (e) under paragraph 49 (1) (a), (2) (a), (3) (a) or (4) (a) granting an environmental authorisation for a specified period;
- (f) under paragraph 49 (1) (a), (2) (a), (3) (a) or (4) (a) granting an environmental authorisation subject to a specified condition;
- (g) under paragraph 49 (1) (b), (2) (b), (3) (b) or (4) (b) refusing to grant an environmental authorisation;
- (h) under subsection 57 (2) deciding not to take any action under this Act;
- (j) under section 58 to cancel an accredited environmental authorisation;
- (k) under subsection 60 (1) varying an environmental authorisation;
- (l) under subsection 60 (1) refusing to vary an environmental authorisation on the application of a person under paragraph 60 (1)(a);

- (m) under subsection 63 (1) suspending an environmental authorisation;
- (n) under subsection 63 (1) cancelling an environmental authorisation;
- (p) under subsection 63 (1) suspending an environmental authorisation until a specified condition referred to in subsection 63 (2) has been fulfilled;
- (q) under subsection 63 (2) refusing to lift a suspension of an environmental authorisation on the ground that a specified condition has not been fulfilled;
- (r) under subsection 69 (1) requiring a person to prepare and submit for approval a draft environmental improvement plan;
- (s) under paragraph 71 (1) (d) rejecting a draft environmental improvement plan and requiring the plan to be amended and resubmitted;
- (t) under paragraph 71 (2) (b) rejecting a draft environmental improvement plan;
- (u) under subsection 72 (3) accrediting or refusing to accredit an environmental improvement plan;
- (v) under subsection 75 (1) refusing to approve a person to conduct a particular environmental audit;
- (w) under subsection 75 (4) removing the name of an auditor from the list of auditors maintained by the Authority;
- (x) under subsection 76 (1) requiring a person to commission an environmental audit and submit a report on the audit;
- (y) under subsection 78 (3) refusing to grant protection in respect of an environmental audit report;
- (z) under subsection 78 (3) granting protection in respect of an environmental audit report subject to a specified condition referred to in subsection 78 (4);
- (za) under subsection 82 (1) requiring a person to prepare and submit for approval a draft emergency plan;
- (zb) under paragraph 84 (1) (d) rejecting a draft emergency plan and requiring the plan to be amended and resubmitted;
- (zc) under paragraph 84 (2) (b) rejecting a draft emergency plan;

(zd) under subsection 110 (4) that disposal of a thing seized is necessary;

(ze) under subsection 125 (1) serving an environment protection order;
and

(zf) under subsection 125 (1) serving an environment protection order imposing a specified requirement referred to in subsection 125 (3).

(2) Where a decision of a kind referred to in subsection (1) is made, the Authority shall give notice in writing of the decision to-

(a) in the case of a decision referred to in paragraph (1) (a), (d), (e), (f), (g), (y) or (z)-the applicant;

(b) in the case of a decision referred to in paragraph (1) (b), (c), (r), (s), (t), (u), (x), (za), (zb) or (zc)-the person conducting, or proposing to conduct, the relevant activity;

(c) in the case of a decision referred to in paragraph (1) (h), (j), (k), (l), (m), (n), (p) or (q)-the holder of the environmental authorisation;

(d) in the case of a decision referred to in paragraph (1) (u)-the person who is refused approval under subsection 75 (2) and the person commissioning the environmental audit; or

(e) in the case of a decision referred to in paragraph (1) (ze) or (zf)-the person on whom the order is served.

(3) A notice under subsection (2) shall be in accordance with the requirements of the Code of Practice in force under subsection 25B (1) of the Administrative Appeals Tribunal Act 1989.

(4) For the purposes of this section, a decision of the Authority under paragraph (1) (d), (e) or (f) does not include a decision granting an environmental authorisation in respect of an activity of a kind listed in paragraph 2 (t) of Schedule 1.

(5) In subsection (1)-

"eligible person", in relation to a decision, means-

(a) a person to whom a notice is required to be given under subsection (2); or

(b) any other person whose interests are affected by the decision.

Section 136 - Review of Minister's decisions

(1) Application may be made to the Administrative Appeals Tribunal for review of a decision of the Minister under paragraph 92 (2) (b).

(2) Where a decision of the kind referred to in subsection (1) is made, the Minister shall give notice in writing of the decision to the person to whom notice would have been given under subsection 135 (2) had the decision been made by the Authority.

(3) A notice under subsection (2) shall be in accordance with the requirements of the Code of Practice in force under subsection 25B (1) of the Administrative Appeals Tribunal Act 1989.

LAND (PLANNING AND ENVIRONMENT) ACT 1991 (ACT)

Section 277 - Review-orders

(1) Application may be made to the Administrative Appeals Tribunal for review of a decision of the Minister-

- (a) making an order under section 256;
- (b) refusing to make an order under section 256; or
- (c) making an order subject to a direction of a kind referred to in paragraph 256 (5)(b).

+Note+ See also section 282A – Review of Decisions

* * *

(5) An application may be made to the Administrative Appeals Tribunal for review of the following decisions:

- (a) a decision referred to in subsection (1), (2), (3) or (4);
- (b) a decision not to register a place under paragraph 69 (1) (b) or 73(1)(b).

NATURE CONSERVATION ACT 1980 (ACT)

Part VIII – Review by the Administrative Appeals Tribunal

Section 74 -- Review of Conservator's decisions

Application may be made to the Administrative Appeals Tribunal for the review of a decision of the Conservator-

- (a) giving a direction under section 47 or 49;

- (b) restricting or prohibiting access to a reserved area or part of a reserved area under section 53;
- (c) refusing to grant consent under subsection 56 (1), (2) or (3) or 57 (1);
- (d) granting a licence under paragraph 62 (1) (a);
- (e) refusing to grant a licence under paragraph 62 (1) (b);
- (f) granting a licence subject to any condition under paragraph 62 (2)(a);
- (g) granting a licence for a particular duration under paragraph 62 (2)(b);
- (h) varying a licence condition under subsection 63 (4); or
- (i) cancelling a licence under section 69.

ROADS AND PUBLIC PLACES ACT 1937 (ACT)

Section 15G - Review of decisions of Minister

(1) Application may be made to the Administrative Appeals Tribunal for a review of a decision of the Minister or his delegate—

- (a) under paragraph 15C (1) (b) to refuse to grant a permit;
- (b) under section 15D to grant a permit subject to a condition; or
- (c) under section 15F to cancel a permit.

(2) Where the Minister or his or her delegate makes a decision of the kind referred to in subsection (1), the Minister or the delegate, as the case may be, shall cause notice of the decision to be given to a person whose interests are affected by the decision.

3. New South Wales

BIOLOGICAL CONTROL ACT 1985 (NSW)

Section 54 - Appeals to Land and Environment Court

(1) Any person whose interests are affected by:

- (a) a decision of the Authority for the purposes of section 17 not to hold an inquiry;

(b) a decision of the Authority for the purposes of section 18, being a decision that is inconsistent with a finding or recommendation of a Commission referred to in Part 7;

(c) a decision of the Authority under section 24 not to publish a notice in any newspaper or journal;

(d) a decision of the Authority for the purposes of section 26 not to hold an inquiry;

(e) a decision of the Authority for the purposes of section 27, being a decision that is inconsistent with a finding or recommendation of a Commission referred to in Part 7;

(f) a decision of the Authority for the purposes of section 28;

(g) a decision of the Authority for the purposes of section 29, being a decision that is inconsistent with a finding or recommendation of a Commission referred to in Part 7;

(h) a decision of the Authority for the purposes of section 31 not to hold an inquiry; or

(i) a decision of the Authority under section 51 to revoke a declaration, may appeal to the Land and Environment Court against the decision.

(2) In subsection (1), "decision" has the same meaning as in the Administrative Appeals Tribunal Act 1975 of the Commonwealth.