THE PROSPECTS OF JUDICIAL REVIEW IN RELATION TO FEDERAL ENVIRONMENTAL IMPACT STATEMENT LEGISLATION

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[*The Federal Environmental Impact Statement Legislation and Procedures Order vest in the Minister of the Environment a discretion as to whether or not to require the production of an EIS. Mr Fowler here examines case law to determine whether opportunities exist under the legislation for judicial review of the Minister's actions: in particular whether the environmental effect of a proposed action is a 'relevant consideration' to be taken into account in the exercise of the discretion. The remedy or remedies appropriate to such actions are considered, together with the problems of* locus standi *associated with an action brought by a private litigant, and the potential role of the Attorney-General as protector of the public interest, by virtue of the relator action.*]

INTRODUCTION

The introduction of the Environmental Protection (Impact of Proposals) Act 1974-1975 ('the Impact Act') was hailed by federal politicians as a major step toward ensuring the protection and proper management of the Australian environment.[1] The legislation was supported by the subsequent issue of an Executive Order approving Administrative Procedures thereunder ('the Procedures Order').[2] Together, these measures introduce into government decision-making processes the procedure known as the environmental impact statement (EIS) technique, so that the environmental consequences of any major federal action may be thoroughly considered before a final decision is made.

The Impact Act has already survived a challenge to its constitutional validity. In *Murphyores Incorporated Pty Ltd v. The Commonwealth*;[3] the plaintiff argued that the Minister for Minerals and Energy was not entitled to take into account the report of a public inquiry convened

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[1] See e.g. comments by Senator M. Everett, *Parl. Debs. Senate*, 11 December 1974, 3410; Mr R. Hunt, *Parl. Debs. Reps.*, 4 December 1974, 4559; and Mr J. Kerin, *Parl. Debs. Reps.*, 4 December 1974, 4563.

[2] Australian Government *Gazette* s. 120, 24 June 1975.

[3] (1976) 9 A.L.R. 199.

under section 11 of the Impact Act, in determining (under Regulation 9 of the Customs (Prohibited Exports) Regulations) whether to grant export licences for mineral concentrates extracted by the plaintiff from Fraser Island. The plaintiff also argued that the Act and the inquiry directed thereunder were invalid. This contention was apparently based on the previous argument as to the limited scope of the Minister's discretion.[4] As that argument failed, in view of the broad scope and purpose of the particular legislation,[5] so also did the challenge to the validity of the Impact Act and the inquiry.

However, several members of the High Court ventured opinions on the question of the validity of the Act which went beyond what was strictly necessary to resolve the plaintiff's particular challenge. Both Barwick C.J. and Murphy J. declared the Act to be valid without qualification.[6] Gibb J. declared section 11 valid and reserved his opinion concerning the remainder of the Act.[7] McTiernan J. did not discuss the issue, but appears to give tacit approval to the Act through his detailed reference to various provisions without any query or qualification as to their validity. Present indications are that the Act is to be regarded as constitutionally valid and this will be assumed for the remainder of this article.

The federal EIS measures have no legislative precedent within Australia, and appear to have been derived, at least in concept, from the American National Environmental Policy Act 1969,[8] which introduced similar EIS requirements at federal government level there. This has resulted in a large increase in the volume of environmental litigation challenging the implementation of federal projects on the grounds of non-compliance with NEPA: in the first five years after NEPA was enacted, there were nearly 500 such cases.[9] This flood of litigation caused time-consuming and expensive delays to many projects, and Congress found it necessary on occasions to expressly override the NEPA requirements to allow projects to proceed without further court challenges.[10]

[4] *Ibid.* 208, *per* Stephen J. and 216, *per* Mann J. This was a curious argument, since the Act imposed no responsibility upon the Minister to consider or take into account the report of the public inquiry; the report is to be submitted to the Minister for Environment for his comments and recommendations (see s. 11(4)), but it is not required to be passed on to any other concerned Minister thereafter, or to be directly acted upon.

[5] This aspect of the decision is discussed in further detail, *infra*, 8-13.

[6] *Ibid.* 201 and 217.

[7] *Ibid.* 203.

[8] 42 U.S. Code, s. 4321 (hereinafter referred to as 'NEPA').

[9] See Deutsch S. L., 'The National Environmental Policy Act's First Five Years' (1975) 4 *Env. Affairs* 3. A comprehensive survey of the initial judicial reaction to NEPA is contained in Anderson F. R., *NEPA in the Courts* (1973) (hereinafter cited as 'Anderson').

[10] *E.g.* the Trans-Alaska Pipeline project was rendered exempt, after prolonged litigation, by the Trans-Alaska Pipeline Authorization Act, 43 U.S. Code, s. 1651 (1973), which specified that the EIS rendered by the U.S. Department of the Interior be deemed sufficient under NEPA.

In his second reading speech concerning the proposed Impact Act, the then Minister for Environment, Dr Cass, explained that the new federal measures hoped to avoid a similar result in Australia.

> In developing the impact statement procedure, we have noted difficulties that have accompanied its use in the United States. These have largely stemmed from mandatory requirements for statements and from procedures which result in too frequent a resort to the Courts. We hope to avoid these difficulties, firstly, by making the impact statement requirement discretionary so that we can concentrate on the most significant proposals, and, secondly, by incorporating the requirement into the normal process of governmental decision-making.[11]

There is at present an absence of academic or judicial comment concerning the possibility of judicial enforcement of the EIS measures. The *Murphyores* decision offers some indirect guidance on the judicial review possibilities,[12] and one writer has examined the question of 'enforceable obligations' under the measures in some detail without reaching any firm conclusions.[13] Obviously, the matter still awaits a clear judicial pronouncement at the present time.

The purpose of this article is to outline the judicial review framework within which a claim to enforce the EIS measures could be fashioned, *viz.*, the most appropriate grounds for review, the remedies available, and the specific problem of *locus standi* which raises particular difficulties in relation to environmental litigation. Considerations of length prevent an analysis of each individual provision of the EIS measures in the light of the judicial review background examined. The article is confined therefore to outlining possible approaches to the task of obtaining judicial review of administrative action under the EIS measures. However, a considerable proportion of the material discussed may have some broader relevance in relation to the initiation of judicial review litigation in environmental disputes generally, and not simply on the basis of the EIS measures.

SHORT OUTLINE OF THE FEDERAL EIS MEASURES

Before proceeding to a detailed consideration of the judicial review prospects, a brief outline of the EIS measures may be helpful.

The Impact Act is intended, according to its recital, 'to make provision for protection of the environment in relation to projects and decisions of,

[11] *Parl. Debs. Reps.* 26 November 1974, 4082.

[12] *Infra*, 8-13.

[13] Kelly G., 'Commonwealth Legislation Relating to Environmental Impact Statements' (1976) 50 *A.L.J.* 498, 509-11: '. . . the question whether judicially enforceable obligations have been created must be regarded as being open until the courts finally rule upon it. However, the writer is disposed to think that the courts will regard the legislation as leaving the assessment of environmental considerations predominantly in the hands of the Minister for Environment, Housing and Community Development and his Department' (at 509). See also Clark S., 'Redcliff and Beyond: The Commonwealth Government and Environmental Planning' (1975) 5 *Adelaide L.R.* 165, 169; and Whalan D., 'Legal aspects of effecting a compromise between development and environment protection', paper presented to the Conference on Managing the Environment, Institute of Engineers, Canberra, 18-21 June 1975.

or under the control of, the Australian government'. However, the Act merely contemplates the use of the EIS and the public inquiry for this purpose, and does not actually specify how or when the procedure is to operate. Instead, the Governor-General is given, by section 6, the task of approving administrative procedures relating generally to the object of the Act, and particularly to the implementation of the EIS technique. The Procedures Order therefore provides the details as to how the EIS procedure is to operate.

After a 'proposed action'[14] has been formulated, a proponent is to be designated by the appropriate Minister (the 'action Minister')[15] as the person responsible for that action. The proponent must supply information[16] to the Minister of Environment to enable a decision to be made whether to require an EIS concerning the action. If the Minister requires an EIS, a draft copy of the same must normally be made available for public comment.[17] The Minister may also decide to conduct a public inquiry concerning the proposed action. The proponent must subsequently revise the draft EIS to take account of all comments and reports received, if it is still intended to proceed with the action.[18] The final, revised EIS is then to be circulated to all interested parties and made available to the public. The Department of Environment must examine the final EIS, and the Minister may make comments or suggest conditions to which the proposed action should be subject, for the protection of the environment.[19] Finally, each Minister must seek to ensure that any final EIS, and any suggestions or recommendations relating thereto, are taken into account in matters in which they relate.[20] This brief survey of the measures reflects therefore that they contain a number of duties and discretionary powers which may be subject to judicial review.

THE FORM OF THE PROCEDURES ORDER

It is curious that the Impact Act provides for the introduction of the EIS procedure by Order of the Governor-General rather than by regulations. Section 6(1) of the Act makes a clear distinction in this regard:

[14] *I.e.* a matter referred to in s. 5 of the Impact Act: see the Procedures Order, para. 1.1 for this definition.

[15] *I.e.* 'The Minister of State for Australia responsible for the proposed action': see Procedures Order, para. 1.1.

[16] The information is to be supplied in the form of a document which will apparently be known as a 'Notice of Intention', although no reference to this term is contained in either the Impact Act or the Procedures Order. The term is used in a pamphlet magnanimously entitled 'Everything you always wanted to know about... The Environment Protection (Impact of Proposals) Act . . . but were afraid to ask' published by the Department of Environment (June 1975).

[17] Procedures Order, para. 6.2.1.

[18] Procedures Order, para. 8.1.

[19] Procedures Order, para. 9.3.

[20] Procedures Order, para. 9.5; see also Impact Act, s. 8(b).

> The Governor-General may, from time to time, *by order*, approve and approve variations of, administrative procedures for the purpose of achieving the objects of this Act, being procedures that are consistent with relevant laws, as affected by *regulations* under this Act. (emphasis added)

The requirement that the procedures must comply with existing 'laws' including regulations which, on the other hand, are recognised as being able to affect existing laws, suggests that the procedures may therefore not be intended to operate as laws themselves. If the Procedures Order is in fact merely an executive direction as opposed to a form of legislation, then the basis for contemplating judicial review under the measures is almost completely removed.

The distinction in the Impact Act between an Order and regulations does not appear to be explicable simply as an accidental or unintended choice of alternative nomenclature.[21] In section 25 of the Act, there is a standard form of delegation of regulation-making power to the Governor-General 'for carrying out or giving effect to this Act', whilst an entirely separate procedure for promulgating an Order is set out in section 7 of the Act.

The draftsman of the Act may have adopted the form of an Order of the Governor-General to implement the EIS procedures, with the aim that the Order not be regarded as legislative in effect, but rather merely as an executive or policy direction. This would certainly conform with the suggestion that the Act preserves full administrative discretion, and would result in a virtual preservation of the *status quo* in relation to the need to prepare an EIS. Virtually every Australian State has introduced EIS procedures as a matter of administrative policy rather than legislative dictate, and it seems beyond question that such policies are not legally binding. It may have been desired to follow the precedent set in this regard by the United States Council on Environmental Quality Guidelines to NEPA, which prescribe the bulk of the EIS procedures but are not legally binding.[22]

It is interesting to note that Benjafield and Whitmore[23] consider that an Order may be one of a variety of forms of legislation, or an executive

[21] In *Law and Orders* (3rd ed., 1965), Sir C. K. Allen concludes that there is no substantial distinction between an order, a rule and a regulation, and that 'the distinction is one of name rather than of substance' (at 92). It is submitted that this does not satisfactorily explain the distinction between an order and regulation in s. 6(1) of the Impact Act, since the choice of 'Order' as opposed to regulation in the Impact Act appears to be a deliberate one.

[22] Although the Guidelines have been held not to have legislative effect (*Hiram Clarke Civic Club v. Lynn* (1973) 476 F. 2d 421, 424; *Sierra Club v. Callaway* (1974) 499 F. 2d 982, 990) the American courts have frequently resorted to them to assist in their interpretation of NEPA's responsibilities, and they have as a result considerably influenced the development of the EIS process under NEPA: see Lynch, 'The 1973 CEQ Guidelines: Cautious Updating of the Environmental Impact Statement Process' (1975) 11 *Calif. West. L.R.* 297; Note, 'The Council on Environmental Quality's Guidelines and their Influence on the National Environmental Policy Act' (1974) 23 *Cath. Uni. L.R.* 547.

[23] Benjafield and Whitmore, *Principles of Australian Administrative Law* (1972), 102-3.

order. Certainly, the Procedures Order has the appearance of legislation in terms of its form and style, despite an unusual method of paragraphing. Furthermore, the Procedures Order clearly affects the public in a number of ways. The provisions relating to publication of a draft EIS, obtaining public comment thereon, and the conduct of public inquiries, deal with public involvement in the EIS process, and could be expected to be found, in the normal course, in a statutory enactment. Section 8(a) of the Act also arguably gives statutory effect to the Order by creating a clear statutory duty upon each Minister to ensure that its procedures are observed.

The only simple reason that might be offered for the distinction is, as already suggested, that the Order was intended to be merely an executive direction. But if this were so, it would render the passing of the Impact Act itself quite pointless, since that Act contains no substantive directions as to the method of the EIS procedure, and the whole process could just as easily have been implemented without any legislative framework whatsoever.

If the Impact Act is to be given its fullest possible effect, then the Procedures Order ought to be regarded as a piece of delegated legislation pursuant to the Act. It is much more in accord with the tenor of the Act and the Procedures Order as a whole to regard the latter as legislative in effect, although it must be conceded that no clear reason can be produced to explain the distinct form used for introducing the EIS procedures under the Act.

THE BASIS FOR JUDICIAL REVIEW UNDER THE EIS MEASURES

Judicial review rules were developed historically to apply in a very different context from that presently under consideration. Most arguments against environmental harm centre around broad notions of public interest and the common good, whereas traditionally, the common law system has concentrated its attention upon the protection of private, and often property interests and the remedying of individual loss.[24] Litigation aimed at averting environmental harm is therefore dependent to a considerable extent upon its ability to fit within these traditional legal concepts. In the case of judicial review under the EIS measures, it will be seen that this 'uncomfortable fit' is particularly apparent in relation to the *locus standi* requirements for commencing an action, and in some of the technical limitations upon the availability of the prerogative writs. It is important not only to examine the present state of the law, but to look for indications of a change in conventional judicial attitudes toward

[24] The more common wrongs, involving environmental depredation, are likely to be the subject of actions in negligence, private or public nuisance, or the rule in *Rylands v. Fletcher*, in which an individual must seek a remedy for some particular damage caused by actions having a broader overall effect on the environment.

such matters as protection of the environment, which may lead to further development of the traditional requirements for judicial review through environmental litigation. The question in this regard is whether Australian courts are likely to follow the initiative of their less conservative counterparts in the United States, and seek to effectively help resolve environmental problems.

In considering, firstly, the basis for judicial review under the EIS measures it is intended to concentrate on those grounds which most effectively could support the broad purpose of the EIS measures, that is, 'to make provision for the protection of the environment'. There are two such grounds which it is submitted will enable a court to relate its decision to the environmental issues involved in the case before it, and which are therefore particularly appropriate in relation to the EIS measures:

(i) failure to take into account relevant considerations, in the course of exercising a discretionary power under the EIS measures; and

(ii) breach of a statutory duty imposed by the EIS measures.

The environmental aspects of the action under review come into consideration in a slightly different manner in relation to these respective grounds of review. Where the 'relevant considerations' argument is put forward, it will be alleged that certain environmental factors relevant to the decision have been overlooked and should have been taken into account. The 'breach of statutory duty' ground will only involve the examination of environmental factors where the duty concerned relates to such factors. But of course, the EIS measures are basically designed to ensure consideration of all relevant environmental factors, and there is therefore a strong possibility that such factors will come into consideration in any argument based on the 'breach of statutory duty' ground.

It is not suggested that either ground of judicial review enables the reviewing court to usurp the administrative function so as to consider afresh the environmental issues involved in the case before it. The scope of judicial review is clearly confined to assessing the legality of the action under review, and not its environmental merit. But the two grounds referred to appear as the most appropriate and convenient forms of review to be employed in order to challenge an action for environmental reasons on the basis of the EIS measures. To this extent, judicial review supplements the measures by ensuring that they are complied with in the light of their broad purpose. A very similar view of the role of the courts in relation to the EIS measures is adopted by the writer of the following passage:

> In emphasising the necessity for an adequate framework of environmental law I am not assuming that the law would be a panacea. It would merely provide a framework for sound planning. . . . Courts are generally ill-equipped and no doubt unwilling to be environmental decision-makers. But there is obviously scope for

> judicial review where duties are cast on administrators and not performed, or where they are performed without taking into account criteria imposed by law. But there the court is not making the decision, merely saying that the administrator must start again and perform his functions properly. This I see as a valid role for the courts.[25]

This approach does not preclude other grounds of judicial review of administrative action, which comprise a quite broad range,[26] from being applied to the EIS measures. In appropriate circumstances, an action pursuant to or in derogation of the EIS measures might be set aside because of error of law, or failure to observe the rules of natural justice; or otherwise, because a discretion created by the measures may have been exercised in bad faith, unreasonably, or for an improper purpose. However, in such cases, the environmental effects of the particular action will be quite insignificant in relation to the actual result, even though those effects could be the main reason for the case having come to court. This type of situation reflects the frequent difficulty, already referred to, of accommodating environmental litigation within the existing framework of legal rules, so that cases tend to be decided upon technical or procedural grounds rather than in relation to the environmental merits of the action impugned. The two suggested grounds of review would at least focus the reviewing court's attention on the environmental issues involved.

(a) *The 'relevant considerations' ground*

If the administration, in the exercise of a statutory discretion, takes into account irrelevant considerations, or overlooks relevant considerations, then the re-exercise of that discretion in a proper manner may be compelled by the courts.[27] Thus, the creation of discretionary procedures by the Impact Act and Procedures Order[28] may not remove altogether the possibility of review by the courts, since it could be argued that in the exercise of the particular discretion created, the appropriate official or administrative body has overlooked a relevant factor, *viz.*, the significant environmental effects of the action concerned. One of the principal discretionary powers created by the measures rests in the Minister of Environment, to determine whether or not to require an EIS, and the possibility of the 'relevant considerations' ground applying to that particular discretion certainly deserves consideration.[29]

[25] Higgs, 'An administrator's view of environmental law'; paper delivered to the Seminar on 'Environmental Law: The Australian Government's Role', Canberra, 13-14 December 1974 (published by the Attorney-General), at 21.

[26] The grounds of judicial review available in Australia are summarised in the *Report of the Administrative Review Committee* (Kerr Committee), Australian Parliamentary Paper No. 144/1971, para. 24-41.

[27] *R. v. Vestry of St. Pancras* (1890) 24 Q.B.D. 371, *per* Lord Esher M.R. See also *Andrews v. Diprose* (1937) 58 C.L.R. 299; *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997.

[28] See, for examples of discretionary powers, Impact Act, s. 11 (public inquiries) and Procedures Order, para. 3.1.1. (requiring an EIS).

[29] Paragraph 3.1.2. itself provides guidance as to the possible 'relevant considerations' by listing 13 factors that the Minister should take into account in deciding whether to require an EIS.

A number of obstacles confront a plaintiff who wishes to argue that relevant factors have been overlooked in the performance of a discretionary power. One practical problem is to obtain the necessary evidence of the disregard of certain factors, particularly where no reasons are offered by the decision-maker for his action. Obviously, this problem will have to be considered in the particular circumstances of each situation.

A further difficulty is that the identification by the courts of a particular factor as 'relevant' is often arbitrary and difficult to predict, and there is no certainty therefore that a court will regard any particular environmental effects as relevant in the circumstances. The Kerr Committee Report makes particular reference to this problem, in its discussion of the 'relevant considerations' ground:

> It is very difficult, from the cases, to deduce fixed criteria for deciding what are relevant and what are irrelevant or extraneous considerations. The subject matter and the scope and purpose of legislation must be looked at to see whether or not extraneous considerations have been taken into account. The relevance of considerations is a matter of law and the courts decide the question from case to case by reference to assessments of what is proper or improper, just or unjust.[30]

This case by case approach, whilst rendering difficult the task of anticipating how a particular issue will be decided, nevertheless provides the courts with a substantial power to intervene and regulate an apparently unlimited discretion in circumstances seen as appropriate by the courts. If an attitude of judicial concern for environmental issues develops in Australia, the likelihood of the 'relevant factors' ground being adopted to ensure proper consideration of environmental factors under the EIS measures will certainly be increased.

Whether such an 'environmental consciousness' has permeated the Australian judiciary is not yet clear, but there is some evidence of this in the High Court decision in *Sinclair v. Mining Warden at Maryborough*.[31] The High Court reviewed a decision by the Mining Warden to grant certain mining leases of Crown Land at Fraser Island in Queensland and directed the Warden to reconsider the applications. The principal issue before the Warden was whether the 'public interest' would be prejudicially affected by the grant of the leases. The evidence which had been put before the Warden by the appellant on the issue of 'public interest', both on his own behalf and on behalf of a conservation group, the Fraser Island Defence Organisation, related to the likely irreversible environmental harm that would result from the grant of the leases.[32]

The High Court found that the Warden had confused the identity of the objectors with the nature of their objection in concluding that the public interest as a whole was not affected by the grant of the leases, but only the interests of those persons objecting. The Warden had not therefore effectively exercised his discretion at all.

[30] Kerr Committee Report *op. cit.* 12.
[31] (1975) 5 A.L.R. 513.
[32] *Ibid.* 515-6, *per* Barwick C.J.

The arguments in favour of review in *Sinclair's* case were particularly strong, and were based on grounds of review other than those under consideration in this article. Nevertheless, the judgments and the decision itself appear to reflect a greater judicial receptiveness toward litigation seeking to ensure protection of the environment. By way of contrast, the High Court in *Johnston v. Kent*,[33] decided only six months prior to *Sinclair's* case, rejected a challenge to the construction by the P.M.G. of a telecommunications tower at the top of Black Mountain overlooking Canberra, on the basis that the Commonwealth had executive power to perform works in the A.C.T. without statutory authority. Only one judgment[34] reflects any appreciation of the environmental issues at stake, and all four Judges ultimately rested their decision on the question of the Commonwealth's executive power.[35] However, the grounds for review were distinctly clearer in *Sinclair's* case than in the *Black Mountain Tower* case, as possibly also was the particular environmental damage alleged as likely to result from the challenged action.

Whilst the notion that environmental factors are relevant to government decision-making has not yet been adopted by Australian courts, some attention has recently been given to the converse proposition that environmental factors are not extraneous or irrelevant. In *Murphyores Incorporated Pty Ltd v. The Commonwealth*,[36] the High Court found that the Minister of Minerals and Energy was not precluded by the scope and purpose of the Customs Act 1901 or the Customs (Prohibited Exports) Regulations from having regard to environmental considerations in deciding whether to grant export licenses for mineral concentrates extracted from Fraser Island.[37] This decision represents the first concession by an Australian court as to the potential relevance of environmental factors to the exercise of an administrative discretion; whilst it was based on the scope and purpose of the particular legislation concerned, it is the clearest indication yet that the Australian courts are concerned about the environment.

There are problems of judicial attitude of a different nature from those just mentioned, which have also previously mitigated against judicial review of executive action. There has been a traditional judicial reluc-

[33] (1975) 5 A.L.R. 201.

[34] *Ibid.* 206, *per* Jacobs J.

[35] At first instance (*Kent v. Johnson* (1973) 21 F.L.R. 177), Smithers J. considered whether the proposed tower would constitute a public nuisance, holding that failure to ensure adequate road traffic facilities would do so, but that the interest of even a broad section of the community in the enjoyment of a particular skyline implied no public right the invasion of which constituted a public nuisance. It was not necessary, in view of subsequent events, for the High Court to deal with these interesting issues, which were quite directly connected with the allegations by the complainants of likely environmental damage.

[36] (1976) 9 A.L.R. 199.

[37] *Ibid.* 207, *per* Stephen J., 215, *per* Mason J.

tance about reviewing administrative action at all,[38] particularly where the exercise of discretionary powers is in question.[39] In recent years however, administrative law has developed considerably as a means of public regulation of the actions of the executive, and it has been said that judicial review has become 'more imaginative'.[40]

There does appear to be an increasing judicial willingness to review exercises of administrative discretion, and to become involved in matters previously regarded as 'policy', and outside the province of the courts. One prominent example is the decision in *Padfield v. Minister of Agriculture, Fisheries and Food.*[41] The House of Lords there held that the Minister, in refusing to exercise a statutory power to set up a committee of investigation into a milk marketing scheme, had failed to take into account relevant considerations and wrongly considered irrelevant matters. The application of the 'relevant considerations' ground to the exercise of a Ministerial discretion which it had been argued was completely unfettered is of considerable significance to the new EIS measures. *Padfield's* case demonstrates the wider powers of review which the courts are now willing to assert, even where Parliament has used language designed to keep the courts at bay. Lord Upjohn emphatically rejected the notion of unfettered discretion:

> My Lords, I believe that the introduction of the adjective 'unfettered' and its reliance thereon as an answer to the appellants' claim is one of the fundamental matters confounding the Minister's attitude, bona fide though it be . . . the use of that adjective, even in an Act of Parliament, can do nothing to unfetter the control which the judiciary have over the executive, namely that in exercising their powers the latter must act lawfully and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion upon the Minister rather than by the use of adjectives.[42]

Since the EIS measures establish a number of Ministerial discretions (for example, whether to require an EIS or to conduct a public inquiry), *Padfield's* case is a useful reminder that such discretions may not necessarily be unlimited and that there is a possibility of judicial review of the manner of their exercise on the ground that relevant environmental considerations have been overlooked.

The decision has received cautious treatment by Australian courts to date. It was considered by the South Australian Full Supreme Court in *Michell v. Minister of Works*,[43] where Bray C.J. adopted to some extent the language of Lord Upjohn in the following passage:

[38] See de Smith S. A., *Judicial Review of Administrative Action* (3rd ed.), particularly at 28-31. In relation to environmental disputes in Australia, see the comments by Clark S. D., in 'Conservation and Government: Toward an Understanding of Roles' 5 *Search* 241, particularly at 243-4.

[39] *E.g. Swan Hill Corporation v. Bradbury* (1937) 56 C.L.R. 746, particularly at 757 (*per* Dixon J.), and *Water Conservation and Irrigation Commission (N.S.W.) v. Browning* (1947) 74 C.L.R. 492, 504.

[40] de Smith *op. cit.* 38.

[41] [1968] A.C. 997.

[42] *Ibid.* 1060.

[43] (1974) 8 S.A.S.R. 7.

> . . . a purported exercise of discretion by a Minister may not be a true exercise of it at all. A discretion, on its proper construction, may not be an unfettered one, but may be one which can only be exercised for certain purposes and in accordance with certain criteria. In such cases the Minister may misunderstand the law, take irrelevant matters into account or fail to take relevant matters into account. He may have acted on some ground outside the statutory criteria. In these events mandamus will go to command him to deal with the matter according to law. . .[44]

However, the other judges were more wary. Bright J. indicated that he would award mandamus against the Minister if 'the facts justified an order', but declined to consider the 'full import' of *Padfield's* case.[45] Zelling J. found that 'the decision in *Padfield* is still far removed from these facts'[46] and was reluctant to favour interference with a Ministerial decision where policy considerations might normally be expected to be weighed by the Minister.[47]

Indeed, it would seem that a Court not willing to commit itself to 'judicial activism'[48] in this area of the law could easily approve the exercise of a discretionary power by taking a generous view of the 'scope and object' of the legislation before it. Such an approach makes it particularly difficult for the applicant to prove that a discretion has been used contrary to the policy and objects of the particular legislation.[49] Australian courts tend to view a very broad range of factors as relevant to the exercise of a Ministerial discretion, thereby rendering the 'relevant considerations' ground much less likely to succeed. On the whole, English 'judicial activism' does not yet appear to have made any substantial impression upon Australian courts, which still regard Ministerial discretions as only slightly fettered by the 'scope and object' of the enactment concerned.[50]

It is significant that a number of the discretionary powers conferred by the federal EIS measures are to be exercised by reference to specific

[44] *Ibid.* 15. However, even in this passage, the control of a statutory discretion is regarded as dependent upon the 'proper construction' of the statute, an approach emphasized by all three Judges in this case. This is a more conservative attitude than that of Lord Upjohn, in that it appears to contemplate the construction by a court of a discretion as completely unfettered in appropriate circumstances.

[45] *Ibid.* 26.

[46] *Ibid.* 32.

[47] See similarly, *Lady Vestey (dec'd) v. Minister for Lands* [1972] W.A.R. 98, 110-1 *per* Lawson J., citing *R. v. Anderson; ex parte Ipec-Air* (1965) 113 C.L.R. 177. Zelling J. declared a preference for the reasoning of Lord Morris in *Padfield's* case, whilst conceding that the majority speeches ought to be followed 'because of the eminence of the court' (*ibid.* 32).

[48] The phrase used by Professor de Smith to describe a trend of which he found *Padfield's* case 'perhaps the most outstanding recent example': *op. cit.* 572.

[49] Such an approach is evident in the decision of the Victorian Full Supreme Court in *City of South Melbourne v. Hamer* [1970] V.R. 471, 474-5 *per* Winneke C.J.

[50] The topic of Ministerial discretions has also received attention in Australia, in the *Report on Prerogative Writ Procedures* (Ellicott Committee Report), Australian Parliamentary Paper No. 56 of 1973. The Report recommends the provision of a general system of review which would provide relief wherever a Minister has exercised a discretion contrary to law (at 6-7). The Report notes the large number of discretionary powers that are reposed in Ministers, and advocates that the same be subject to review, except in fields where policy content would override, such as for reasons of defence or national security.

criteria,[51] since the identification of 'relevant considerations' for the purposes of review becomes considerably easier as a result. Furthermore, section 5 of the Act, which purports to define the object of the legislation may also assist a court to determine whether a discretion has been validly exercised in the light of the scope and objects of the Act.

Review along the 'relevant considerations' line appears to have been developing in the United States prior to the introduction of NEPA's mandatory EIS requirement. For example, in the *Scenic Hudson* case,[52] Judge Hays held that the Federal Power Commission had not fulfilled its duties in granting a licence for the construction of the Storm King power plant, because it had based its decision on an incomplete record. He said:

> It is our view, and we find, that the Commission has failed to compile a record which is sufficient to support its decision. The Commission has ignored certain relevant factors and failed to make a thorough study of possible alternatives to the Storm King project.[53]

It is interesting to observe that even prior to NEPA, the American courts were willing to review agency action on grounds akin to the 'relevant considerations' ground, which is much more familiar to English and Australian courts. This ground of review is naturally suited to an environmental action, and may ultimately have considerable relevance to the reviewing of discretionary power contained in the federal EIS measures.

(b) *Breach of Statutory Duty*

The right to enforce the performance of a statutory duty by a government official or body is not widely recognised by text-writers as a ground for judicial review, except under the heading of *ultra vires*.[54]

In a brief paragraph at the end of a lengthy section on judicial review, under the topic 'Failure to exercise powers', Benjafield and Whitmore state that '[s]ome administrative powers are, however, granted in the language of duty rather than discretion and when this is so the administrator may be compelled to perform his duty. This type of control is examined in connection with the prerogative writ of *mandamus*'.[55]

Indeed, it seems more appropriate to consider this particular basis for review under the topic of the remedy of *mandamus*, which appears to be specifically directed toward the control of breaches of statutory duty.

[51] *E.g.* Procedures Order, para. 3.1.2. (requiring of an EIS), paragraphs 4.1. and 4.3. (contents of an EIS) and para 7.2. (conducting of a public inquiry).

[52] *Scenic Hudson Preservation Conference v. Federal Power Commission* (1965) 354 F. 2d 608; cert. denied, (1966) 384 U.S. 941. This case was first decided several years prior to NEPA, but litigation continued in protracted form after the first hearing and ultimately involved an appraisal of the role of NEPA in relation to the project. See also *Udall v. Federal Power Commission* (1967) 387 U.S. 428.

[53] (1965) 354 F. 2d 608, 612.

[54] *E.g.* Benjafield and Whitmore, 163-4; de Smith, *op. cit.* 122-6. The Kerr Committee Report does not expressly include even procedural *ultra vires* in its summary of the grounds of review.

[55] Benjafield and Whitmore, *op. cit.* 186.

This is an area in which the grounds of judicial review and the remedies available appear to overlap to some extent. The rules regulating the availability of the remedy of *mandamus* certainly affect the basis upon which relief will be granted by the courts for breach of a statutory duty.

The relationship between procedural *ultra vires* and the right to *mandamus* for failure to perform a statutory duty is obscure. Little has been said either by the courts or by the text writers as to what is a 'procedural' provision,[56] and certain of the requirements to establish procedural *ultra vires* do not coincide with those for obtaining *mandamus*. For example, there is the rule that where a procedural requirement imposed by statute is disregarded, the court must first decide whether that requirement was intended by Parliament to be mandatory or merely directory.[57] Yet there appears to be no such limitation upon the availability of *mandamus*, and the mandatory-directory distinction seems to be confined, in its application, to provisions of a procedural nature. In relation to non-procedural statutory duties, review by way of *mandamus* depends upon whether there has been a 'substantial compliance' with the particular requirement.[58]

It may therefore be necessary to determine whether the duty-creating provisions of the EIS measures are procedural in nature before proceeding to review the performance of those duties. Compliance may have to be substantial in the case of a non-procedural requirement. On the other hand if the provision is considered to be procedural and merely directory, non-observance may be disregarded by a court, whilst strict compliance may be required if it is classed as mandatory in nature.

Some guidance to these problems may be obtained from the High Court decision in *Scurr v. Brisbane City Council*[59] where the mandatory-directory distinction was found to be inappropriate to the statutory provision under consideration. The provision required that when Council consent to a particular use of land was sought, the Council should advertise the application by setting out particulars thereof and calling for objections to be made. The High Court held that the public notice given by the Council concerning a proposal to construct a shopping centre was defective for lack of adequate particulars and that the consent of the Council to the proposed centre was therefore of no effect.

Stephen J., who delivered the unanimous judgment of the Court, appears to adopt a quite narrow view of what constitutes a 'procedural' requirement:

[56] de Smith *op. cit.* 122, regards a requirement as procedural or formal 'when Parliament describes the manner or form in which a duty is to be performed or a power exercised'. Unfortunately, this definition does not assist greatly in the task of identifying a 'procedural' provision in the context of the Procedures Order, which is in a sense entirely devoted to prescribing the manner and form of Federal impact assessment.

[57] *Liverpool Borough Bank v. Turner* (1861) 30 L.J. Ch. 379; *Howard v. Bodington* (1877) 2 P.D. 203; *S.S. Constructions Pty Ltd v. Ventura Motors Pty Ltd* [1964] V.R. 229.

[58] *Scurr v. Brisbane City Council* [1973] 1 A.L.R. 420.

[59] *Ibid.*

> When the requirement is that 'particulars of the application' should be given by public advertisement and when once it is accepted that there must be an advertisement which gives some such particulars, it is difficult to discern any distinction between a strict observance of this requirement, such as a mandatory interpretation would call for, and the substantial observance of it, as called for by a directory interpretation. The situation is quite different from that encountered when some formality of time or procedures has been neglected. . . . That which the statute calls for is not compliance with precise and detailed formalities, some of which might be omitted without affecting substantial compliance; substantial compliance calls for no more than the giving of the same adequate particulars.[60]

The requirement that 'adequate particulars' be notified obviously influenced the Court's view, since such an obligation is incapable of precise definition and may vary in its nature from one situation to another. Strict compliance, such as would be required by a mandatory classification of the requirement, would still be relative in the circumstances involved. But the suggestion that only those provisions containing 'precise and detailed formalities' are to be regarded as procedural, so as to attract the operation of the mandatory-directory distinction, suggests that the bulk of the duties contained in the federal EIS measures should be treated as non-procedural.

Judicial review of the EIS duties on the 'statutory duty' ground seems likely therefore to depend in most cases upon whether or not there has been 'substantial compliance' with the particular duty imposed by the measures. The duties imposed by the measures include a duty to 'supply to the Minister, through the Department, such information as is required by these procedures';[61] to 'consult with the Department with a view to agreeing upon the matters to be dealt with' by an EIS:[62] to 'revise the draft EIS to take into account' comments and reports received in relation thereto;[63] and to 'examine' the final EIS.[64] All of these duties are incapable of a precise definition and their performance may vary according to the circumstances. It is much more appropriate to ask whether there has been substantial compliance with these requirements than arbitrarily to apply the mandatory-directory distinction.

There is, accordingly, less likelihood of the courts adopting a directory interpretation of a statutory duty, and thus disregarding non-compliance, except in relation to those provisions which are clearly procedural in nature.[65] On the whole, review by way of procedural *ultra vires* appears less appropriate to most of the EIS duties imposed by the measures than does the use of *mandamus* for failure substantially to comply with a statutory duty.[66]

[60] *Ibid.* 429-30.
[61] Procedures Order, para. 2.1 (and also para. 3.2.2).
[62] *Ibid.* para. 4.2.
[63] *Ibid.* para. 8.1.
[64] *Ibid.* para. 9.1.
[65] Examples of what may be clearly regarded as procedural provisions in the Procedures Order are the requirements as to the provision of specified numbers of copies of the draft and final forms of EIS (see paras. 6.1, 7.3 and 8.2), and para. 7.4, which requires the Minister of Environment to provide a copy of any public inquiry report to the proponent.
[66] *Mandamus* is considered more fully, *infra*, 16 *et seq.*

THE APPROPRIATE REMEDIES FOR JUDICIAL REVIEW UNDER THE EIS MEASURES

The remedies available generally to obtain judicial review of administrative action are the prerogative writs, the injunction and the declaratory order. Of the prerogative writs, only *mandamus* can be regarded as appropriate to the grounds of review previously discussed in relation to the EIS measures. *Certiorari* and *prohibition* lie to regulate 'judicial' or 'quasi-judicial' acts, normally where a decision affecting individual rights is in issue,[67] and are usually employed in cases of breach of natural justice or want of jurisdiction on the part of the decision-maker. The distinction drawn in this context between 'judicial' and 'administrative' acts is not clearly defined, and has been further blurred by recent decisions in relation to the rules of natural justice.[68] Nevertheless, both *certiorari* and *prohibition* appear inappropriate to judicial review under the EIS measures on either the 'relevant considerations' ground or the 'statutory duty' ground.[69] *Mandamus*, the only relevant prerogative remedy, will be examined here, together with the injunction and declaratory judgment remedies.

(a) *Mandamus*

Mandamus is an appropriate remedy to compel the performance of either a statutory duty or a discretionary power by an administrator. The remedy evolved in the early seventeenth century to compel the performance of a wide range of public duties, where performance had been refused.[70] In the case of abuse of a discretionary power, the relevant duty is to exercise the power in a legal and proper manner.[71] *Mandamus* can therefore be invoked in relation to both the grounds of review discussed above.

To obtain *mandamus*, the applicant must show that he has asked for the particular duty to be performed and has been met with a refusal.[72] Such a request could be appropriately made by an interested party in relation to matters such as the conducting of a public inquiry, the

[67] *R. v. Electricity Commissioners* [1924] 1 K.B. 171.

[68] *Ridge v. Baldwin* [1964] A.C. 40; *Durayappah v. Fernando* [1967] 2 A.C. 337; and *R. v. Hillingdon London Borough Council; ex parte Royco Homes Ltd* [1974] 1 Q.B. 720, in which *certiorari* was awarded for the first time to quash an invalid planning permission.

[69] A possible exception to this proposition is that the improper conduct of a public inquiry might be reviewable by *certiorari* or *prohibition*, if the applicant could establish that his rights were directly affected.

[70] See the discussion of the development of *mandamus* in de Smith *op. cit.* 515.

[71] *E.g.* by taking account of relevant considerations: *Ex parte S.F. Bowser and Co., Re Municipal Council of Randwick* (1927) 27 S.R. (N.S.W.) 209; *R. v. Anderson; ex parte Ipec-Air* (1965) 39 A.L.J.R. 66.

[72] *R. v. Bristol and Exeter Railway* (1843) 4 Q.B. 162; *R. v. Commonwealth Court of Conciliation and Arbitration; ex parte Ozone Theatres (Australia) Ltd* (1948) 78 C.L.R. 389. It should be noted that this requirement does not apply where the respondent is under a duty to do the act within a fixed time, which has elapsed: *R. v. City of Richmond; ex parte May* [1955] V.L.R. 379.

requiring of an EIS, or the publication of an EIS. It is also said that the duty to be enforced must be 'public' in nature, but this requirement appears to have been broadly interpreted by the courts. Examples of situations in which it is not satisfied include if the applicant's claim is to be restored to a private office, or to have a private dispute resolved.[73] The duties cast upon administrators by the EIS measures certainly seem to be public in nature.

Mandamus will not be granted where another specific remedy is available, since *mandamus* is regarded as an extraordinary remedy to be adopted only where there is no more convenient one available. The availability of an action for a declaratory order may not affect *mandamus* in this regard, since there is no directly coercive effect in such an order.[74] It seems likely that an injunction, if available, will be regarded as a more appropriate and effective remedy than *mandamus*.[75]

One further requirement which may cause difficulty to an applicant seeking *mandamus* in relation to the EIS measures is the rule that the writ does not lie against the Crown to compel performance of a Crown function.[76] De Smith has suggested that the situations in which *mandamus* will not be awarded for this reason alone are 'comparatively few'.[77] In his view, most statutory duties imposed upon a Crown servant (including a Minister) are enforceable by *mandamus* on the application of a member of the public (provided the applicant can establish *locus standi*).

However, this requirement may be a considerably larger obstacle in Australia. According to Benjafield and Whitmore:

> It is, to say the least, difficult to know when the courts might treat a duty as being imposed upon a *Minister* as *persona designata*, in favour of the subject, but the approach of the New South Wales Supreme Court in *Ex parte Cornford*; *Re Minister for Education* seems to suggest that such a duty will rarely be found to exist under modern legislation. Perhaps a more liberal attitude is now being shown in England.[78]

The divergence of opinion seems to arise from differing attitudes toward the proposition that '*mandamus* will lie against a Minister when he is acting, not simply under a duty to the Crown as its servant, but as a *persona designata*'.[79] Since considerable responsibility is placed upon

[73] *R. v. Stepney Borough Council; ex parte John Walker & Sons Ltd* [1934] A.C. 365; *Armstrong v. Kane* [1964] N.Z.L.R. 369.

[74] de Smith *op. cit.* 502-3; *Contra*, the recent decision in *R. v. Hillingdon London Borough Council; ex parte Royco Homes Ltd* [1974] 1 Q.B. 720, 729, *per* Lord Widgery C.J.: '. . . there are in some instances reasons for saying that an action for a declaration is more appropriate and more convenient than an order of *certiorari*, and in cases where such an argument can be used *certiorari* should not in my opinion go . . .'. His remarks would seem to be equally applicable to *mandamus*.

[75] *Ex parte Cornford* (1962) 62 S.R. (N.S.W.) 220, 224.

[76] *R. v. Secretary of State for War* [1891] 2 Q.B. 326.

[77] de Smith *op. cit.* 495.

[78] Benjafield and Whitmore *op. cit.* 215.

[79] *Michell v. Minister of Works* (1974) 8 S.A.S.R. 7, 14 *per* Bray C.J. The requirement was laid down in these terms by Charles J. in *R. v. Secretary of State for War* [1891] 2 Q.B. 326, 334: 'Now there are no doubt cases where servants of the Crown have been constituted by statute agents to do particular acts, and in those cases *mandamus* would lie against them as individuals designated to do those acts'.

the Minister of Environment and his fellow Ministers to implement the EIS measures, it is essential to determine whether these will be regarded solely as Crown functions.

In *Michell v. Minister of Works*, Bray C.J. and Bright J. were both of the view that *mandamus* could be sought where the Minister's function was to consider applications for, or to revoke, permits to drill wells for water. On the other hand, Zelling J., in a lengthy analysis of the history of *mandamus*, queried the utility of the *persona designata* test, the real question being (in his view) the nature of the duty designated by the statute.

> If what he (the Minister) was designated to do was a completely ministerial act with no discretion involved at all, or no duty towards the public as distinct from the individual, then it may well be that *mandamus* will lie to correct non-action, default or error of law.[80]

To apply this approach to the duties imposed upon the Minister for Environment by the federal EIS measures would almost certainly result in a finding that their performance is not reviewable by *mandamus*. Tasks such as determining whether to require an EIS, conduct a public inquiry, determine the subject-matter of an EIS, or whether to exempt compliance with the measures in a particular case each involve a degree of discretionary judgment by the Minister for Environment, and it could also be argued that he is under a public duty to perform such functions.

Michell's case highlights the diversity of judicial opinion on this particular issue. The view taken by Zelling J. would appear to be a minority one, and even *ex parte Cornford* may not support the conservative stance attributed to it by Benjafield and Whitmore, since counsel there conceded in argument that the legislation did not expressly impose any personal duty.[81] It was argued that the legislative scheme as a whole did so impliedly, but this argument failed, and *mandamus* was accordingly refused.

The extent to which the English authorities have moved on this particular point is demonstrated by the following statement from the judgment of Lord Parker C.J. in *R. v. Commissioners of Customs and Excise*:

> It is sometimes said as a general proposition that mandamus will not lie against the Crown or an officer or servant of the Crown. I think that we all know in this day and age that that as a general proposition is quite untrue; there have been many cases, of which the most recent one is *Padfield v. Minister of Agriculture, Fisheries and Food*, in which a mandamus was issued to a Minister.[82]

Even given that the Australian courts have adopted a more conservative approach on this particular issue, it still seems unlikely that they would regard the requirement as an obstacle to awarding *mandamus* in relation to the duties imposed by the EIS measures. Difficulty will be

[80] (1974) 8 S.A.S.R. 7, 30.
[81] (1962) 62 S.R. (N.S.W.) 220, 223.
[82] [1970] 1 All E.R. 1068, 1072.

more likely to arise with the *locus standi* requirements for the remedy, a matter which is examined separately later in this article.

(b) *The Injunction and the Declaratory Order*

Both of these remedies appear attractive as a means of regulating government behaviour on environmental grounds, and have enjoyed increasing popularity for judicial review purposes generally in recent years. The declaratory judgment has been the subject of a fairly rapid development during this century, both in England and Australia, as a means of determining the scope of powers of administrators.[83] However, there has been less resort in Australia than in England to the remedy, resulting in *mandamus* retaining a correspondingly greater importance.[84]

The popularity of the injunction is undoubtedly related to its prohibitive or restrictive effect. Especially in the context of environmental disputes, the possibility of securing a judicial restraint upon a particular project renders the injunction an attractive remedy to prospective litigants. The remedy has been frequently sought in Australia for judicial review purposes, usually at the instance of private individuals who are able to establish the requisite *locus standi*, but also on occasions by the Attorney-General in order to restrain interference with public rights or to prevent *ultra vires* actions.[85] The possibility of resorting to the Attorney-General's relator action in connection with the EIS measures is examined more fully at a later stage of this article.

The grounds of review previously suggested as appropriate to enforcement of the EIS measures may relate more readily to the declaration than the injunction. Although the injunction can be used to compel the performance of an act (a mandatory injunction), it has been held that the performance of a positive statutory duty cannot be enforced by mandatory injunction at the suit of a private person unless that individual has a sufficient private right of action to enable him to obtain damages for breach of statutory duty.[86] It would seem therefore that a prospective plaintiff would be better advised to seek *mandamus* than an injunction in order to compel performance of a mandatory duty. In any event, where the prerogative writ remedy of mandamus is appropriate, it is likely that mandatory injunctive relief would be denied, in the exercise of the discretion which the courts retain not to grant equitable relief where an adequate alternative exists.[87] On the other hand, the 'relevant consider-

[83] See Kerr Committee Report, *op. cit.*, 19. An Australian text on the topic of declarations has recently appeared, Young P. W., *Declaratory Orders* (1975).

[84] Benjafield and Whitmore, *op. cit.*, 213-4.

[85] The most outstanding Australian instance of an application through an Attorney-General for an injunction in an environmental dispute is the *Black Mountain Tower* case: *Johnston v. Kent* (1975) A.L.R. 201, discussed, *supra.*

[86] *Glossop v. Heston and Isleworth Local Board* (1879) 12 Ch. D. 102. However, this proposition is open to some doubt: see discussion by de Smith *op. cit.* 390.

[87] See *Glossop's* case; *Attorney-General v. Clerkenwell Vestry* [1891] 3 Ch. 527, 537. See also de Smith *op. cit.* 390.

ations' ground could be the basis of an application for a prohibitory injunction to restrain the performance of an *ultra vires* action where environmental factors are alleged to have been disregarded. The injunction is therefore not totally without relevance to the EIS measures.

The declaratory judgment has considerable potential application to the EIS measures, since it may be sought either to review the exercise of a discretionary power[88] or to review the failure to perform a public duty.[89] Its attractiveness is further enhanced by the fact that the remedy is free from a number of the technical restrictions which hamper the obtaining of the prerogative writs, including *mandamus*; the principal advantage of the declaration in this regard is its availability against the Crown or its servants,[90] which may render it a preferable remedy to *mandamus*[91] in circumstances where there is substantial doubt as to whether a particular duty is imposed by the EIS measures upon a Minister as *persona designata.*

The principal criticism of the declaratory judgment as a means of reviewing the failure to perform a public duty is that it is said to lack 'coercive effect'.[92] No direct relief flows from the making of a declaratory order, and the most that could be hoped for by a plaintiff who has successfully sought such an order only to find it subsequently disregarded is that the actions in disregard of the order could be challenged as invalid in themselves. However, there is little evidence that public authorities would ever disregard declaratory findings by the courts, and little practical disadvantage appears to arise from this aspect of the remedy.

Thus, it appears that a plurality of remedies exists for the purpose of enforcing the EIS measures. Benjafield and Whitmore suggest that the declaratory judgment is the 'best remedy available' to challenge the actions of administrative bodies on the grounds of *ultra vires.*[93] This would seem true where the remedy can be successfully coupled with an injunction so as to give greater effect to any judgment in favour of a plaintiff, and *mandamus* would probably be considered inappropriate in such circumstances. Furthermore, in the absence of any simpler pro-

[88] *Hoggard v. Worsbrough U.D.C.* (1962) 2 Q.B. 93; *Ridge v. Baldwin* [1964] A.C. 40. See also *Attorney-General for N.S.W. v. Cooma Municipal Council* (1962) 80 W.N. (N.S.W.) 477 (proposed use of land dedicated for public recreation for improper purpose).

[89] *Mills v. Avon and Dorset River Board* [1955] Ch. 341; *Barber v. Manchester Regional Hospital Board* [1958] 1 W.L.R. 181 (declaration that Minister of Health failed to exercise statutory duty to hear appeal against dismissal by hospital specialist); *Tonkin v. Brand* [1962] W.A.R. 2.

[90] *E.g. T.V. Corporation Ltd v. The Commonwealth* (1963) 109 C.L.R. 59. Injunctive relief against the Crown may be obtained in Australia, in contrast with the English position under the Crown Proceedings Act 1947, s. 21.

[91] Young, *op. cit.*, considers the declaration to be preferable to *mandamus* in general, since it is 'a modern remedy free from the technicalities that beset *mandamus*' (at 119).

[92] de Smith, *op. cit.*, 501-3; Benjafield and Whitmore, *op. cit.*, 241.

[93] *Ibid.*

cedural stipulations as to judicial review,[94] the declaration remains a comparatively uncomplicated and non-technical remedy to seek, and may even be considered by a court on occasions to be more appropriate than *mandamus*.[95] The choice between *mandamus* and the declaration in relation to non-observance of duties imposed by the EIS measures may therefore be quite arbitrary in the light of these considerations.

The choice of an appropriate remedy is also likely to be conditioned by the *locus standi* requirements relevant to each of the remedies under consideration. Some divergence between these requirements is apparent, and in fact *locus standi* represents possibly the principal obstacle to the employment of any of these remedies in relation to the EIS measures.

Locus standi requirements for the Judicial Review Remedies

The plan to exclude the courts from the EIS process may be accomplished, not by the wording of the measures themselves, (as was apparently intended), but rather by the restrictive legal rules of *locus standi* relating to the appropriate remedies.[96] Review of actions under the federal EIS measures is likely to be more limited than it is under NEPA for this reason alone, irrespective of the language used in the measures in a further attempt to exclude the courts.

Review under NEPA has been held possible where the plaintiff can establish 'damage in fact', which includes aesthetic environmental damage, and can show a connection with the area allegedly affected by the action in question.[97] Thus, it has been possible for environmental groups such as the Sierra Club and the Environmental Defence Fund to involve themselves in NEPA litigation by carefully selecting co-plaintiffs with clear standing to bring the action.

[94] The Kerr Committee Report, *op. cit.*, stated (at 58) that the 'complex pattern of rules as to appropriate courts, principles and remedies is both unwieldy and unnecessary' and recommended that a simple form of originating summons be introduced for judicial review purposes. In Victoria, the court may, if a particular prerogative writ remedy is sought, grant any of other review remedies, including a declaratory judgment or injunction (Supreme Court (Prerogative Writs) Rules, 1966 (Order LIII); and in New Zealand, the Judicature Amendment Act 1972 has substituted an action for review for actions for the prerogative writs, declaration or injunction.

[95] The declaratory judgment was regarded on one recent occasion as more appropriate than *certiorari*: see *Ex parte Royco Homes* [1974] 1 Q.B. 720, discussed *supra*, n. 74. Young, *op. cit.*, refers to several English decisions in which it was presupposed that declaratory proceedings would be possible even though *mandamus* was available (at 118). It has also been suggested that in Australia application might possibly be made simultaneously for both a declaration and 'statutory *mandamus*', a form of ancillary relief provided for originally by the English Common Law Procedure Act, 1854, and adopted in most Australian States: *Mudge v. Attorney-General for Victoria* [1960] V.R. 43. And in *Dickinson v. Perrignan* [1973] 1 N.S.W.L.R. 72, an order 'in the nature of' *mandamus* was made together with a declaration, the former order being pursuant to the New South Wales Supreme Court Act 1970, s. 65.

[96] On standing in environmental suits generally, see Loorham, 'The Impact of Environmental Legislation in the Seventies' (1975) 49 *A.L.J.* 407, and Taylor, 'Rights of Standing in environmental matters', paper delivered to the Seminar on 'Environmental Law: The Australian Government's Role', Canberra, 13-14 December 1974 (published by the Attorney-General).

[97] *Sierra Club v. Morton* (1972) 405 U.S. 727; *United States v. S.C.R.A.P.* (1973) 412 U.S. 678.

Australian and English courts have generally taken a more restrictive stance in relation to standing, whilst making some concessions towards a broader concept in recent years. The most liberal view advanced in relation to *mandamus* is that any member of the public is entitled to apply for the remedy subject to the over-riding discretion of the Court to refuse it.[98] This view derives virtually no support, however, from the case-law, which suggests that the applicant needs to establish some special interest in the performance of the particular duty or discretion in question before he will be allowed standing to seek *mandamus*. It is frequently stated that the applicant must show that he has a specific legal right to enforce,[99] and this no doubt stems from the historical fact that *mandamus* lies to direct the performance of public duties seen as giving rise to corresponding individual rights.[1]

The term 'legal right' is susceptible to a variety of interpretations, and in *mandamus* cases it has not been consistently interpreted to mean a conventional, civil right. For example, in *R. v. Whiteway*, Dean J. said of this requirement:

> What amounts to such a right is by no means clear. It means something less than a definite legal right enforceable in the courts, and has in some cases been of a vague nature.[2]

Some recent English decisions have suggested that less tangible interests are adequate to provide *locus standi* for *mandamus*. English courts appear to be steering away from the 'legal right' formula so as to define *locus standi* in terms of whether the applicant can establish a 'personal' or 'special' interest in the performance of the appropriate statutory duty.[3] However, it is not particularly clear as yet what constitutes such an interest. In *R. v. Commissioners of Customs and Excise, ex parte Cooke*,[4] the Court of Appeal denied standing to two bookmakers who sought to prevent the Commissioners from allowing other bookmakers unauthorised time to pay an excise duty, since the complainants only interest was that of putting their competitors out of business. In the course of his judgment, Lord Parker C.J. found that the applicants had no specific legal right, but that 'it might be sufficient [to establish standing] if they were able to show that they had some interest, although not a direct personal

[98] Yardley D. C. M., 'Prohibition and Mandamus and the Problem of *Locus Standi*' (1957) 37 *L.Q.R.* 534, 539.

[99] *E.g. R. v. Guardians of Lewisham Union* [1897] Q.B. 498.

[1] It has also been suggested that the applicant must show that the duty he is seeking to have enforced is owed *to him*: *R. v. Lords Commissioners of the Treasury* (1872) 7 Q.B. 387; *R. v. Secretary of State for War* [1891] 2 Q.B. 326. But this formula appears to be a paraphrase of the requirement that the duty be imposed on the Crown as *persona designata*, and is not in fact a separate *locus standi* requirement. See Thio S. M., *Locus Standi and Judicial Review* (1971), 117-8.

[2] [1961] V.R. 168, 172.

[3] See esp., *R. v. Commissioner of Police; ex parte Blackburn* [1968] 1 All E.R. 763; *R. v. Commissioner of Customs and Excise; ex parte Cooke* [1970] 1 All E.R. 1068. An earlier example of a 'special interest' test is *R. v. Manchester Corporation* [1911] 1 K.B. 560, 564 *per* Pickford J.

[4] [1970] 1 All E.R. 1068.

interest, but some interest over and above the interests of the community as a whole'.[5] This approach reflects the wider view that may now be taken by English courts of the standing requirement, but the result indicates also that limitations still exist on the availability of *mandamus* to the public generally.

The possibility that the courts may now be prepared to apply wider rules of standing in relation to *mandamus* is also indicated by two other English decisions. In *R. v. Metropolitan Police Commissioner, ex parte Blackburn*,[6] the applicant, a private citizen, sought to compel the London Police Commissioner to reverse his policy decision not to enforce a gambling statute against certain London clubs. The policy was ultimately reversed by the Commissioner before the hearing of the case was completed, thereby rendering *mandamus* unnecessary. The Court of Appeal indicated that relief would have been forthcoming anyway, subject to its doubts about the applicant's standing. Whilst all three judges each regarded the 'personal' or 'special' interest tests as appropriate, serious doubts were expressed as to whether the applicant could have established the necessary interest in the circumstances.[7] The most favourable reception to the applicant's claim to standing was that of Lord Denning M.R., who considered that a person who was 'adversely affected by the action of the Commissioner in making a mistaken policy decision would have such an interest'.[8]

It is surprising, after considering the doubts raised as to *locus standi* by this case, to find that three years later the same applicant appears to have been accorded standing without question in order to initiate a fresh challenge against the Police Commissioner, on this occasion to compel him to perform his public duty to enforce the law relating to seizure of obscene publications and prosecution of offending book-sellers.[9] Nevertheless, the application failed on the merits, since the evidence showed that the Commissioner was making every effort to enforce the law, and was therefore in no breach of his duty so to do. *Ex parte Blackburn (No. 3)* is noticeable more for its omission to discuss the *locus standi* issue than for any positive statement on that matter. Standing simply appears to have been presumed in the applicant's favour, which may reflect the distance which the English courts had moved toward accepting a broad standing requirement for *mandamus* in the interim period between the two *Blackburn* decisions. During that period, *Ex parte Cooke*

[5] *Ibid.* 1071.
[6] [1968] 1 All E.R. 763.
[7] *E.g. ibid.* 777, *per* Edmund Davies L.J.: '. . . it may be that a private citizen, such as the applicant, having no special or peculiar interest in the due discharge of the duty under consideration, has himself no legal right to enforce it'. (See also *per* Salmon L.J. 775.)
[8] *Ibid.* 770.
[9] *R. v. Metropolitan Police Commissioner; ex parte Blackburn (No. 3)* [1973] 1 All E.R. 324.

had been decided, and Lord Parker's approach in that case certainly reflects a broader view of the standing requirements for *mandamus.*

Australian courts have not yet indicated any clear adoption of this English trend. *Ex parte Blackburn (No. 1)* was cited by the New South Wales Court of Appeal in its judgment in *Ex parte Mullen*,[10] but was not discussed at all. The Court rejected the view that a person could seek *mandamus* solely in his capacity as a member of the public to compel the issue of a warrant of commitment by a Court Clerk. Some 'legal, pecuniary or special interest' above that of an ordinary member of the public would have to be established.[11]

In *Bilbao v. Farquar*,[12] the New South Wales Court of Appeal applied *Ex parte Blackburn (No. 1)* in granting an order of *mandamus* to compel a coroner to reopen an inquiry into a death, on the application of the nearest living relative of the deceased man. However, standing was obtained under section 65(1) of the Supreme Court Procedure Act, 1965, (N.S.W.) which required the applicant to be 'personally interested', and Hutley J.A., after referring to *Ex parte Blackburn (No. 1)*, was able to conclude that that requirement was satisfied in the circumstances. The remaining two judges, Hardie and Bowen JJ.A., agreed with that conclusion. Hutley J.A. observed that *Ex parte Blackburn (No. 1)* supported the 'contrary theory' to the oft-quoted restriction placed upon *mandamus* that the applicant must have 'a legal specific right'.[13]

In a test case brought by a New Zealand environmental group, *Environmental Defence Society Inc. v. Agricultural Chemicals Board*,[14] Haslam J. found that 'the most that can be deduced from the two *Blackburn* decisions is that strong intrinsic merits may let the Court take a more lenient view of the plaintiff's deficiency in standing'. The Society was held to lack *locus standi* to compel performance by the respondent of an alleged public duty to restrict the use of a toxic chemical. The decision is somewhat arbitrary in its dismissal of the *Blackburn* decisions and has been criticized for its failure to provide 'guidance to prospective litigants'.[15]

At present, Australian courts appear to be willing to acknowledge the diverse *locus standi* requirements that exist in relation to *mandamus*, and may grant standing if the applicant can bring himself within any of the various formulae. The 'special interest' formula suggested in *Ex parte Blackburn (No. 1)* could be tenable in relation to the EIS measures where non-compliance 'adversely affects' the applicant, or the applicant

[10] [1970] 2 N.S.W.R. 297, esp. 300-1.
[11] *Ibid.* 301.
[12] [1974] 1 N.S.W.R. 377.
[13] *Ibid.* 380.
[14] [1973] 2 N.Z.L.R. 758, 766.
[15] Williams D. A. R., 'Environmental Law — Some Recurring Issues' (1975) *Otago L.R.* 372, 379.

can establish an interest slightly beyond that of the general community. People such as bush-walkers or members of locally-concerned environmental groups may be able to establish a 'personal' interest in the preservation of a scenic or ecologically valuable area; their interest could hardly be said to be more remote than that of the applicant in *Ex parte Blackburn (No. 3).* Whilst it cannot be suggested that *locus standi* to bring *mandamus* in order to enforce the federal EIS measures will be readily available to most members of the general public, there is an apparent trend toward widening the previously restrictive rules of standing in this area, and the common scepticism as to the possibility of acquiring standing to bring environmental actions may not be justified in the case of *mandamus* and the EIS measures.

The *locus standi* requirement for an injunction appears to be well-settled. An individual applicant must establish that the action in question amounts to a breach of a public right, which also occasions an interference with a private right of his own or causes him some 'specific damage'.[16] This requirement raises a number of considerations in relation to the EIS measures.

In the first place, it is necessary to determine whether the measures are enacted for the benefit of the public, so that the breach of a public right could be established in situations where the measures have been disregarded. The court must be able to 'discern in the Act some provision enacted for the benefit of, or in the interest of the public'.[17] The avowed purpose of the Impact Act is 'to make provisions for the protection of the environment', and section 3 defines 'environment' to include 'all aspects of the surroundings of man whether affecting him as an individual or in his social groupings'. The underlying purpose of the Act may therefore readily be viewed as the benefit of the public through the protection of the environment. Most of the provisions in both the Impact Act and Procedures Order should therefore comply with this requirement, the only doubt being whether those specifying that a duty is owed to another government official are of a 'public' nature.[18] However, as has already been suggested, duties imposed by the measures may be difficult to enforce by individuals through an injunction in view of the alternative remedy of *mandamus.*

The remaining *locus standi* requirements in relation to the injunction present a more substantial hurdle to a prospective litigant, reflecting once more the traditional legal concern for individual rather than common interests. The term 'private right' is regarded as denoting a right, the

[16] *Boyce v. Paddington Council* [1903] 1 Ch. 109.
[17] *Ramsay v. Aberfoyle Manufacturing Co.* (1935) 54 C.L.R. 230, 249. See also: *Cooney v. Ku-ring-gai Municipal Council* (1963) 37 A.L.J.R. 212 (injunction available to restrain breach of law restricting land use for the public benefit or advantage).
[18] *E.g.* the duty of a proponent to supply information to the Minister of Environment (by notice of intention): see Procedures Order, para. 2.1.

invasion of which gives rise to an actionable wrong under civil law, such as illegal entry upon land.[19] This is a more stringent requirement than even the 'legal right' formula adopted in relation to *mandamus*, and would be very difficult to establish in relation to the EIS measures.

The alternative test of 'special damage' has been the subject of a variety of judicial interpretations and no single definition has yet been agreed upon.[20] Thio concludes that the term 'special damage' denotes 'an injury judicially recognised as redressible even though it falls short of that which gives rise to civil actionability within the categories of private law'.[21] Professor de Smith has suggested that the term means 'detriment attributable to an injury which is either distinct in character or significantly different in degree from any inconvenience suffered by other members of the public'.[22] This latter definition is particularly restrictive, in that it involves the applicant in establishing either a public nuisance, or a wrong remediable by an action for damages. Thio also points to instances where suits for injunction by property owners to challenge illegal grants of planning permission, by traders to challenge illegal ventures by public bodies interfering with their business, and by ratepayers to check misapplication of council funds, have failed for lack of *locus standi*.[23]

Thus, injunctive relief under the 'special damage' test seems less likely to be available to an individual applicant than *mandamus*, provided the broad 'special interest' formula is adopted by Australian courts. The requirements for *locus standi* for an injunction reflect a clear preference for the protection of individual proprietary rights, which renders the remedy unsuitable in most circumstances to restrain the performance of administrative action which is in disregard of the EIS measures.

In the case of the declaratory judgment, the situation does not appear to be so drastically weighted against the prospective private litigant. The *locus standi* requirements for a declaration are more relaxed than those relating to injunctions, although *Boyce's*[24] case is commonly accepted as correctly stating the law in relation to both injunctions and declarations. The divergence arises from the willingness of the courts to adopt on occasions a more liberal definition of 'special damage' in relation to declarations.

In *Dyson v. Attorney-General*,[25] the applicant was held to have *locus standi* to seek a declaration although he was simply a tax-paying member

[19] *Boyce v. Paddington Council* [1903] 1 Ch. 109. Similarly, *White v. Mellin* [1895] A.C. 154, 163-4. See also Thio, *op. cit.*, 161.
[20] See Thio, *op. cit.*, 163-203 for a detailed examination of the various judicial approaches to the 'special damage' test.
[21] *Ibid.* 171.
[22] de Smith *op. cit.* 402.
[23] Thio, *op. cit.*, 191-203.
[24] [1903] 1 Ch. 109.
[25] [1911] 1 K.B. 410.

of the public wishing to challenge the action of the Inland Revenue Commissioners in requiring certain information from taxpayers.[26] Declaratory orders have also been obtained by ratepayers against corporations to restrain illegal actions,[27] and by a trader affected in the course of his business by invalid delegated legislation.[28] These few examples reflect the considerably broader notion of 'special damage' that has developed in relation to declarations as opposed to injunctions. The requirement appears to be more flexible since it is not so rigidly tied to the concept of private interests. The declaration therefore, is more likely to be available than is the injunction in the 'public interest' style of litigation that is involved in enforcing the EIS measures. Furthermore, as the declaratory judgment is proceeding along its course of evolution as a modern form of judicial review remedy, it appears that *mandamus* is simultaneously undergoing a resurrection particularly by virtue of the recent English developments as to its *locus standi* requirements. Although *locus standi* remains a substantial obstacle to the initiation of litigation to enforce the EIS measures, these difficulties need not be regarded as insurmountable in relation to *mandamus* and the declaratory judgment.

The Potential role of the Attorney-General in Obtaining Judicial Review under the EIS Measures

Whilst the private individual may be substantially hampered in challenging government action by the restrictive rules of *locus standi*, the Attorney-General is in a more advantageous position, as *parens patriae*, or the representative of the public interest. He is entitled to institute proceedings whenever a public right is infringed or threatened with infringement,[29] either at his own initiative or on the relation of a private individual. It is usually the case that the assistance of the Attorney-General is sought where there is no individual or group of citizens peculiarly affected by the actions to a sufficient extent to claim *locus standi* to directly obtain judicial review. The relief commonly sought is an injunction, since this is the most effective form of order in most circumstances.[30] Injunctions have been granted in relator actions even to restrain breaches of the law by private citizens, when no civil

[26] de Smith *op. cit.*, 529, suggests that *locus standi* existed because the taxpayer had been threatened with penal sanctions if he refused to comply with the invalid demand. But surely the sanctions potentially affected every member of the public subjected to the demand, and the threat of enforcement against the applicant was quite superfluous?

[27] *Prescott v. Birmingham Corporation* [1955] Ch. 210; see also *Stockwell v. Southgate Corporation* [1936] 2 All E.R. 1343, 1351. *Contra, Gregory v. Camden L.B.C.* [1966] 1 W.L.R. 899.

[28] *Crouch v. The Commonwealth* (1948) 77 C.L.R. 339.

[29] *Cooney v. Council of the Municipality of Ku-ring-gai* (1963) 37 A.L.J.R. 212; *Attorney-General for N.S.W. v. Greenfield* (1962) S.R. (N.S.W.) 393.

[30] *E.g. London County Council v. Attorney-General* [1902] A.C. 165; *Attorney-General v. Ashborne Recreation Ground Co.* [1903] 1 Ch. 101.

right of any individual, and no material interest of the public, was alleged to be involved.[31]

The principal issue will be obviously whether the EIS measures can be taken to create public rights of a nature which the Attorney-General is empowered to protect. Although the situations in which the Attorney-General may commence an action are said to remain open,[32] three main groups of cases appear to exist.[33] These are public nuisance, excess of power by public bodies, and breach of duty imposed for the benefit of the public. The third category appears to be the most appropriate in relation to the EIS measures, and in fact the second *ultra vires* category appears to be confined to the regulation of public bodies, such as municipal corporations and public utilities. Under the third category, any action by the Attorney-General would be likely to be confined to enforcing duties imposed by the EIS measures, and not extend to obtaining review of the exercise of discretionary powers, such as requiring an EIS.

The types of duties enforced by the Attorney-General relate usually to matters of public health, comfort, safety and planning or building requirements. It is likely that courts would regard duties imposed for the purpose of environmental protection as being sufficiently in the public interest to enable the Attorney-General to take action to enforce them. It also appears well-settled now that the Attorney-General may represent a section of the community as opposed to the entire public.[34]

Action may be commenced by the Attorney-General either at his own initiative (*ex officio*) or at the request of a private individual (*ex relatione*) who becomes involved in the proceedings as a relator. In a relator action, the *fiat* of the Attorney-General must be obtained by the relator in order for the action to be commenced, and although the Attorney-General is technically the plaintiff in the action, the relator in fact conducts the entire proceedings through his counsel.

The decision whether to grant a *fiat* has for many years been considered to rest entirely within the discretion of the Attorney-General and to be beyond review.[35] However, the English Court of Appeal has recently suggested, in *Attorney-General (on the relation of McWhirter) v. Independent Broadcasting Authority*,[36] that the Attorney-General's decision may not be conclusive. Lord Denning M.R. said, in the course of his judgment:

[31] *Attorney-General v. Huber* [1971] 2 S.A.S.R. 142 (Bray C.J. dissenting); *Attorney-General for Victoria v. Lido Savoy Pty Ltd*, unreported, 23 February 1970 (Little J.). See also *Gouriet v. Union of Post Office Workers* (1977) 2 W.L.R. 310.

[32] *Ramsay v. Aberfoyle Manufacturing Co.* (1935) 54 C.L.R. 230, 249 *per* Starke J., approved in *Cooney's* case (1963) 37 A.L.J.R. 212, 221.

[33] See Thio, *op. cit.*, 141-6; also Zamir, *The Declaratory Judgment* (1962) 257-62.

[34] *Cooney's* case, *op. cit.*; *Wyld v. Silver* [1963] Ch. 243. Both decisions reject previous authority to the contrary: see *Attorney-General and Lumley v. Gill* [1927] V.L.R. 22; *Attorney-General and Spalding Rural District Council v. Garner* [1907] 2 K.B. 480.

[35] *London County Council v. Attorney-General* [1902] A.C. 165, 169; *Collins v. Lower Hutt City Corporation* [1961] N.Z.L.R. 250.

[36] [1973] 1 All E.R. 689.

> . . . in the last resort, if the Attorney-General refuses leave in a proper case, or improperly or unreasonably delays in giving leave, or his machinery works too slowly, then a member of the public, who has a sufficient interest, can himself apply to the court itself.[37]

He preferred to leave open the circumstances in which a person might be held to have a 'sufficient interest'.

Lawton L.J. expressed agreement with Lord Denning's views,[38] but they proved to be hypothetical in the circumstances of the case, as a relator action was ultimately instituted by amendment to the proceedings. Cairns L.J. maintained the view throughout the proceedings that the Attorney-General must be a party to an action to protect the public interest.[39] As yet there is no indication that these opinions will be followed in Australia. However, the potential for the issue to be raised in relation to the federal EIS measures seems considerable.[39a]

If non-observance of the EIS measures is regarded by the courts as breach of a duty imposed for the public benefit, there could be considerable pressure on the Attorney-General to grant his *fiat* in such circumstances. *McWhirter's* case suggests not only that the Attorney-General's reasons for a refusal may be reviewed, but also that private individuals may proceed to seek injunctive or declaratory relief in the case of an improper refusal of the Attorney-General's *fiat*, by establishing a slender special interest in the matter so as to acquire individual *locus standi*.[40] This certainly represents a departure from the restrictive *locus standi* requirements in relation to injunctions discussed previously. The EIS measures could easily become the subject of an Australian test case on the basis of the suggestions made in *McWhirter's* case, should the Attorney-General's *fiat* be withheld.

[37] *Ibid.* 698.

[38] *Ibid.* 705.

[39] However, he also qualified his views in this regard by suggesting (*ibid.* 703) that consideration would have to be given to whether any remedy other than Parliamentary supervision would be available if the Attorney-General refused to grant his *fiat* 'on wholly improper grounds'.

[39a] Since writing this article, the Court of Appeal has considered and applied *McWhirter's* case. In *Gouriet v. Union of Post Office Workers* (1977) 2 W.L.R. 310, it allowed a member of the public to sue on his own behalf, where the Attorney-General had refused to consent to a relator action, in order to restrain a breach of the criminal law (wilful interference with the post, occasioned by a threatened trade union boycott on mail to South Africa). Although Lawton and Ormrod L.JJ. disagreed with the view of Lord Denning M.R. that the court could review a decision by the Attorney-General not to grant consent to a relator action, all three judges agreed that where such a refusal had occurred, a member of the public could sue to restrain threatened breaches of the criminal law. The decision therefore confirms the inference from *McWhirter's* case that *locus standi* may accrue to the individual where the *fiat* has been wrongly refused, but it is possible that such recourse may be limited to situations in which it is sought to restrain a breach of the criminal law, and not extend to breaches of statutory duty by government departments or officials, involving no criminal offence. Nevertheless, the fact that *McWhirter's* case involved a breach of statutory duty, and that the decision was approved on the *locus standi* issue in *Gouriet's* case, is likely to provide strong support for the argument that an individual could sue to enforce the EIS measures, where the Attorney-General had previously declined to provide his consent to a relator action.

[40] See esp. Lord Denning M.R. (*ibid.* 698-9), citing with approval *Ex parte Blackburn (No. 1)*, (discussed *supra*, on the question of 'special interest').

Obtaining the *fiat* does not resolve all of the relator's difficulties, as was discovered in the relator action instituted by a group of Canberra citizens in connection with the proposed construction of the Black Mountain telecommunications tower in Canberra.[41] The parties in that case encountered numerous unexpected difficulties arising out of the procedural requirements for a relator action. Because the Attorney-General remains in control of the action, his signature is required on the statement of claim and any amendment thereof. His agreement is also required for any application to compromise or discontinue the action. The relators in *Johnston v. Kent* were to their surprise liable in the normal course for the costs of the action although they did not occupy the ordinary position of plaintiffs in the litigation.

The practical consequences of these requirements are considerable. The relator action emerges as a 'semi-private' remedy whereby the individuals pursuing the claim must employ their own counsel and meet all legal costs in the action if they are unsuccessful, yet retain no control over the action, being at all times dependent upon the co-operation of the Attorney-General. This situation is likely to deter many would-be applicants from seeking the Attorney-General's *fiat* in the first place, and the procedure may not therefore be at all frequently resorted to in relation to non-observance of the EIS measures.[42] Whether *McWhirter's* case will mark the beginning of a substantial increase in the number of requests for *fiats* is yet to be seen. Its principal effect may be not to resurrect the relator action so much as to expand the situations in which private individuals will be granted *locus standi* to challenge governmental actions, in cases of unjustified refusal of the *fiat*. It is in this unexplored area that the EIS measures may produce litigation of a most interesting nature.

CONCLUSIONS

It can be seen from this account that the traditional, property-oriented concepts underlying the rules relating to judicial review are in a process of gradual change, as the courts become more concerned to control the

[41] *Johnston v. Kent* (1975) 5 A.L.R. 201, discussed *supra*. An account of the history of the action is given by Professor Hancock W. K., The Battle of Black Mountain Tower (1975).

[42] A survey of Australian State and Federal Attorneys-General conducted by the writer revealed the following information concerning the relator action: during the period of three years between June 1973 and June 1976, the number of requests received for a *fiat* were two (federal), seven (Victoria), seven (New South Wales), one (Tasmania), two (South Australia) and an average of three to four annually in Queensland. No information was available for Western Australia. The New Zealand Attorney-General also advised that he received 'several' requests each year. Correspondence relating to this survey is on file with the writer. Of the above requests, replies received indicated that an environmental issue was involved in one of the two requests to the Federal Attorney-General (the Black Mountain Tower issue), two of the New South Wales requests (both concerning transport issues), the Tasmanian request (*fiat* refused concerning Lake Pedder) and in the two South Australian requests.

powers of government departments and public authorities. Thus, Ministerial discretions need not be regarded as 'unfettered'; individual members of the public claiming only the slightest special interest may be able to compel by way of *mandamus* the performance of statutory duties by government officers; and the Attorney-General may be obliged to consider carefully his position in relation to requests for a relator action to be instituted in his name.

On the other hand, none of these propositions can be said to have found complete acceptance in Australia, and there remain obvious and substantial limitations on the available remedies to review action in disregard of the EIS measures. The injunction in particular appears to be incapable of applying to the measures, except in the case of a relator action. To these legal limitations there must be added the evidentiary burdens which must be overcome by prospective litigants.

The most important conclusion which it is submitted arises from the foregoing examination is that the federal EIS measures are not necessarily beyond the purview of those remedies, despite the apparent desire of the legislators to keep the EIS scheme in Australia outside of the courts. A combination of factors renders it possible that administrative action will be challenged upon the two grounds suggested. These factors include an increasing public and judicial awareness of the need to protect the environment from unnecessary exploitation, continuing development of administrative law as an effective means of regulating government action, and particularly the resurgence and expansion of the old prerogative remedies of judicial review. The obvious and foremost difficulty in mounting such challenges is the need for the private citizen to establish *locus standi*, but it certainly seems that the time has come for those concerned at the environmental consequences of government action to test their position in this regard.

The stages of the EIS process at which it could be argued that judicial review is possible would appear to include the duty to appoint a proponent, the discretionary power to require an EIS, the publication requirements imposed upon a proponent, the duty to revise the draft EIS and the duty to take into account the final EIS and any comments or suggestions of the Minister of Environment. Although the American experience with judicial enforcement of the NEPA EIS process may serve as a warning against allowing frequent resort to the courts under the Australian measures, the efficacy of the procedure could nevertheless be improved by at least a limited form of judicial review. The capacity of the federal measures to produce full environmental assessment of government proposals may require more than the mere specification of the administrative devices within the measures themselves. In cases of obvious non-observance of the measures, it can be argued that judicial review should, and, according to the present state of the law, could be available to the public to exact compliance with their requirements.