AIAL FORUM ISSUE 90

# AIAL FORUM

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Incorporating the 2017 National Lecture on Administrative Law by Peter Hanks QC, barrister practising at Owen Dixon Chambers West, Melbourne.

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# AIAL FORUM

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# RECENT DEVELOPMENTS

*Katherine Cook*

**Royal Commission: banks and financial services**

The Turnbull government will establish a Royal Commission into the alleged misconduct of Australia's banks and other financial services entities.

All Australians have the right to be treated honestly and fairly in their dealings with banking, superannuation and financial services providers. The highest standards of conduct are critical to the good governance and corporate culture of those providers.

We have one of the strongest and most stable banking, superannuation and financial services industries in the world, performing a critical role in underpinning the Australian economy. Our banking system is systemically strong, with internationally recognised, world's best prudential regulation and oversight.

Ongoing speculation and fear-mongering about a banking inquiry or Royal Commission is disruptive and risks undermining the reputation of Australia's world-class financial system.

The government has decided to establish this Royal Commission to further ensure our financial system is working efficiently and effectively.

Instead of the inquisition into capitalism that some have called for, the Royal Commission will take a conventional, focused approach. It will not be a never-ending lawyers' picnic.

Our approach to banking and financial services reform has focused on ensuring that our financial system is resilient, efficient and fair.

We have moved to establish a new one-stop shop to resolve customer complaints; significantly bolstered the Australian Securities and Investments Commission's powers and resources; created a framework to hold banking executives accountable for their actions; and acted to boost banking and financial services competition for the benefit of customers.

We will ensure that the inquiry will not defer, delay or limit, in any way, any proposed or announced policy, legislation or regulation that we are currently implementing.

The inquiry will consider the conduct of banks, insurers, financial services providers and superannuation funds (not including self-managed superannuation funds). It will also consider how well equipped regulators are to identify and address misconduct. It will not inquire into other matters such as financial stability or the resilience of our banks.

This will be a sensible, efficient and focused inquiry into misconduct and practices falling below community standards and expectations. Most Australians are consumers of banking and financial services, and we all have the right to be treated honestly and fairly by banking and financial services providers.

Trust in a well-functioning banking and financial services industry promotes financial system stability, growth, efficiency and innovation over the long term.

The proposed terms of reference will form the basis of the Letters Patent, terms of which will be recommended to His Excellency, pursuant to the *Royal Commissions Act 1902* (Cth).

<https://www.pm.gov.au/media/royal-commission-banks-and-financial-services>

**Final report of Royal Commission into the Protection and Detention of Children in the Northern Territory**

On 17 November 2017, the Australian Government welcomed the final report of the Royal Commission into the Protection and Detention of Children in the Northern Territory.

The Commonwealth acted swiftly to establish this Royal Commission in July 2016 following concerns over the treatment of children at the Don Dale Youth Detention Centre.

While most of the recommendations of this Royal Commission are matters for the Northern Territory, the Australian Government will now carefully consider those findings directed to the Commonwealth. Importantly, many of the recommendations have wider implications for all jurisdictions.

The Australian Government thanks the Commissioners, the Hon Margaret White AO and Mr Mick Gooda, as well as their staff, for their work over the past 16 months. We also acknowledge the individuals, expert witnesses and government and non-government representatives who came forward to give evidence.

The government particularly recognises the courage of the children and young people and their families and communities who have shared their views, experiences and personal stories that have been so critical to informing the Royal Commission's findings.

This is a serious report and the government is committed to ensuring that it carefully, comprehensively and appropriately responds to the substantial work of the Royal Commission.

The Royal Commission's final report is available at the Royal Commission into the Protection and Detention of Children in the Northern Territory website.

<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FourthQuarter/Final-Report-of-Royal-Commission-into-the-Protection-and-Detention-of-Children-in-the-Northern-Territory-17-November-2017.aspx>

**Appointments of new Chief Justice of the Family Court and Chief Judge of the Federal Circuit Court**

On 10 October 2017, the Commonwealth Attorney-General announced the appointment of the new Chief Justice of the Family Court and the new Chief Judge of the Federal Circuit Court.

***Chief Justice of the Family Court of Australia***

The new Chief Justice of the Family Court will be the Hon John Pascoe AC CVO, the current Chief Judge of the Federal Circuit Court.

With Chief Judge Pascoe's elevation, Mr William Alstergren QC will become the new Chief Judge of the Federal Circuit Court. Mr Alstergren is the current President of the Australian Bar Association.

Chief Judge Pascoe has served as the Chief Judge of the Federal Circuit Court of Australia since 2004. He will bring to the Family Court a wealth of experience as the head of jurisdiction of the Commonwealth's busiest trial court, which is also the court which deals with most family law matters. The Federal Circuit Court is the largest Commonwealth court, with a current complement of 67 judges. It deals with more than 85 per cent of all federal family law matters.

Chief Judge Pascoe's eminent service to the law and to the judiciary was recognised by his appointment as a Companion of the Order of Australia in January 2016.

***Chief Judge of the Federal Circuit Court of Australia***

With the appointment of Chief Judge Pascoe as Chief Justice of the Family Court, Mr William Alstergren QC will become the next Chief Judge of the Federal Circuit Court.

Mr Alstergren has practised as a barrister in Melbourne since 1991 and took silk in 2012. His principal areas of practice have included commercial law, tax law, industrial law and family law.

As well as being the current President of the Australian Bar Association, he is a former Chairman of the Victorian Bar. He will bring to the Commonwealth's busiest trial court formidable leadership and legal and administrative skills.

Mr Alstergren has also been issued a joint commission as a Justice of the Family Court of Australia.

Both appointments will commence on 13 October 2017.

On behalf of the government, I congratulate both Chief Judge Pascoe and Mr Alstergren on their appointments.

I also take the opportunity to express my gratitude to the retiring Chief Justice of the Family Court, the Hon Diana Bryant AO, for her lifelong service to the law as solicitor, barrister, senior counsel, Chief Federal Magistrate and Chief Justice of the Family Court.

**MR JOHN PASCOE AC CVO**

| | |
|---|---|
| **Current office** | Chief Judge, Federal Circuit Court of Australia |
| **Previous office** | Australian representative to the Hague Conference on Private International Law Experts' Group on Parentage |
| **Education** | Bachelor of Laws (Honours), Australian National University |
| | Bachelor of Arts, Australian National University |

**MR WILLIAM ALSTERGREN QC**

| | |
|---|---|
| **Current office** | Queen's Counsel, Victorian Bar<br>President, Australian Bar Association |
| **Previous office** | Past Chairman, Victorian Bar |
| **Education** | Masters of Laws, University of Melbourne |
| | Bachelor of Laws, University of Melbourne |
| | Bachelor of Arts, University of Melbourne |

<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FourthQuarter/Appointments-of-new-Chief-Justice-of-the-Family-Court-and-Chief-Judge-of-the-Federal-Circuit-Court-10-October-2017.aspx>

**Oversight of the Public Interest Disclosures Act**

On 22 November 2017, the Acting NSW Ombudsman, Professor John McMillan, tabled in Parliament his annual report on his oversight of the *Public Interest Disclosures Act 1994* (NSW) (the PID Act).

'The focus of this year's annual report is the operational challenges faced by public authorities', said Professor McMillan.

'We listened to the experience of practitioners and unsurprisingly, their most difficult challenge is to manage the human elements — such as creating an ethical climate that welcomes staff speaking up, and dealing with the heightened emotions of the parties involved in the internal reporting process.'

Authorities come to the Ombudsman for advice and assistance on these issues.

We advise that robust public interest disclosure practices within authorities must be underpinned by clear policies and formal reporting systems.

Throughout the report, we highlight examples of the advice we have given to both public officials and public authorities. 'If contacted at an early stage, we can advise public officials on how to make a report, and practitioners on how to respond to reports, in a way that minimises risks', said Professor McMillan. 'We also provide guidance on whether a report meets the criteria of a public interest disclosure as set out in the legislation.'

In many respects, the technicalities and complexities of the PID Act only heighten the challenges faced by both reporters and practitioners.

The Acting Ombudsman welcomes the Joint Parliamentary Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission Committee's recommendations — in a report tabled on 23 October 2017 — to simplify the legislation so that it better achieves its objective to encourage and facilitate disclosures of public interest wrongdoing and provide broad protection to those who make them.

<https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0011/50321/Media-release-Oversight-of-the-Public-Interest-Disclosures-Act-1994-Annual-Report-2016-17.pdf>

***Management of public housing maintenance claims unfair and unreasonable: Victorian Ombudsman***

The Department of Health and Human Services is failing to live up to its commitment as a 'social landlord' and wasting public resources through its inept management of maintenance claims at the end of public housing tenancies.

Disadvantaged Victorians are being charged thousands of dollars for the repair of damaged public housing, even when there is no evidence they caused the damage, Victorian Ombudsman Ms Deborah Glass has found.

'The effect on the lives of already disadvantaged people caught up in the department's egregiously unfair processes cannot be overstated', Ms Glass said. 'The stress of a huge debt which could arrive at random, years after the end of a tenancy often comes on top of the social, economic and other challenges already faced by those dealing with disadvantage. There is the powerlessness of the already powerless, pitted against the State: the refusal of services until they enter a payment plan must be one of the most unconscionable acts of a government department I have encountered.'

Ms Glass said her office had uncovered systemic problems in the way the department manages and pursues maintenance claims against former public housing tenants. This included:

- a default practice of raising maintenance claims against former tenants for almost the entire cost of repairing a vacated property, failing to take into account:
    - special circumstances (such as family violence, mental and physical illness or evidence of third party damage); and
    - fair wear and tear and depreciation, which can add up to thousands of dollars;
- sending letters advising former tenants of claims against them to addresses the department knows they have left;
- failing to negotiate with tenants or their advocates;
- in effect, outsourcing to the Victorian Civil and Administrative Tribunal (VCAT) its responsibility to determine a debt, wasting public resources and breaching its responsibility as a model litigant; and
- withholding future housing from former tenants until a payment plan is agreed to.

'The evidence of this investigation is that department staff wrongly assess debts beyond a tenant's liability, send correspondence to an address they know the tenant has left and routinely use VCAT to determine a debt — in breach of their requirement to be a Model Litigant', Ms Glass said.

The department is the highest sole litigant on the VCAT Residential Tenancies List, and more than 80 per cent of claims proceed uncontested. VCAT rarely awards the full amount claimed; in many cases, compensation awarded to the department is half the original claim.

Public resources are also wasted by the department's pursuit of debts against public housing tenants who are 'judgment proof' (where an order for compensation cannot be enforced due to the debtor's financial situation).

The department has accepted all 18 of the Ombudsman's recommendations, committing to many measures, including:

- removing the requirement for applicants to make a debt repayment plan prior to an offer of public housing where the claim is in dispute;

- implementing a change management package to equip department staff with the necessary knowledge, skills and resources so they engage with former tenants when determining the cause of any damage and liability for the repair costs; and
- establishing a high-level user group for public housing services to monitor the implementation of new and improved guidance.

Ms Glass thanked all parties who contributed to the investigation, including public housing tenants, the Tenants Union of Victoria, Justice Connect Homeless Law, the Victorian Public Tenants Association, Victoria Legal Aid, West Heidelberg Community Legal Service, Inner Melbourne Community Legal, VCAT President the Hon Justice Greg Garde, VCAT CEO Ms Keryn Negri, former VCAT President the Hon Justice Kevin Bell and Department of Health and Human Services staff.

<https://www.ombudsman.vic.gov.au/News/Media-Releases/Media-Alerts/Mgt-of-public-housing-maintenance-claims-unfair>

**Australians continue to exercise information rights: OAIC Annual Report 2016–17 released**

The Office of the Australian Information Commissioner (OAIC) has released its annual report for 2016–17 — highlighting its proactive and engaged approach to privacy and freedom of information (FOI) regulation.

The OAIC continued to deal with a significant workload in its privacy regulator activities, ensuring that businesses and agencies are better placed to meet their responsibilities to communities.

'Developments in technological, social, commercial and government service delivery environments continue to drive increasing community and professional interest in privacy and privacy governance', said Mr Timothy Pilgrim, the Australian Information and Privacy Commissioner.

'This is reflected in the office receiving 17 per cent more privacy complaints than last year.'

But there was also a noticeable increase in businesses showing a commitment to privacy, with a record 369 businesses and agencies signing up to be Privacy Awareness Week Partners — a 49 per cent increase on 2016. Mainstream media attention for Privacy Week has more than tripled compared with 2016, and this also demonstrated privacy as a mainstream community and consumer concern.

Australians continue to be early adopters of new technologies, many of which are reliant on personal information. But Australians also perceive greater risks in interacting with businesses online, and transparency is central to building their trust — as shown in the 2017 Australian Community Attitudes to Privacy Survey.

'That Survey shows 58 per cent of Australians have avoided a business because of privacy concerns and 44 per cent said they had chosen not to use a mobile app for the same reason. These findings reinforce the view that a successful data-driven economy needs a strong foundation in privacy', said Mr Pilgrim.

The office also made progress in resolving more FOI matters, receiving 24 per cent more Information Commissioner reviews — the largest number of applications received by the office since its establishment in November 2010 — and increasing the number of reviews finalised by 13 per cent compared with last year.

'It is interesting to note that 82 per cent of FOI matters received by government departments and agencies are dominated by requests from individuals to access their own information', said Mr Pilgrim.

'While I acknowledge that some are complex cases, it is in the interest, and the efficiency, of agencies to promote and support the right to access one's own personal information held by the agency and to handle these requests administratively where at all possible.'

The report also outlined how the OAIC has been preparing businesses and agencies for the 2018 implementation of both the Australian Public Service (APS) Privacy Governance Code and the Notifiable Data Breaches (NDB) scheme.

'These two important measures will jointly strengthen Australia's privacy governance in both public and private sectors — and represent the most significant updates to our national privacy regulation since 2014.'

For further information about the OAIC, please visit www.oaic.gov.au or follow @OAICgov.

<https://www.oaic.gov.au/media-and-speeches/media-releases/australians-continue-to-exercise-information-rights-oaic-annual-report-2016-17-released>

***New QCAT President appointed***

The Queensland Attorney-General and Minister for Justice, the Hon Yvette D'Ath, has announced that Supreme Court Justice Martin Daubney will be the new President of the Queensland Civil and Administrative Tribunal (QCAT).

Mrs D'Ath said the three-year appointment would start on 16 October 2017.

'QCAT plays an important role in our justice system, as a way to actively resolve disputes in a fair, accessible, quick and inexpensive manner.

'I thank Justice Daubney for taking on this significant role.'

Justice Daubney was appointed to the Supreme Court in 2007. At the time he was the President of the Bar Association of Queensland.

He was admitted to the Bar in 1988 and appointed Senior Counsel in 2000.

Justice Daubney replaces Justice David Thomas, who resigned as QCAT President in June to become President of the Commonwealth Administrative Appeals Tribunal.

'My thanks to QCAT Deputy President Judge Suzanne Sheridan for her work as Acting President in the past few months', Mrs D'Ath said.

<http://statements.qld.gov.au/Statement/2017/10/6/new-qcat-president-appointed>

**Recent cases**

***Appeal as of right?***

*BRF038 v The Republic of Nauru* [2017] HCA 44 (18 October 2017) (Keane, Nettle and Edelman JJ)

The appellant is from the Awdal province in Somaliland — an autonomous region in Somalia. He is a Sunni Muslim and a member of the Gabooye tribe. In September 2013, he arrived by boat at Christmas Island. He was subsequently transferred to the Republic of Nauru under arrangements between Nauru and Australia.

On 26 February 2014, after arriving in Nauru, he applied to the Secretary of the Department of Justice and Border Control of Nauru (the Secretary) for refugee status. As part of that application, the appellant claimed, among other things, that the Somalian authorities were unwilling to assist him and his family due to their ethnicity. He claimed that there was nowhere in Somalia where he would be safe, as racism, discrimination and militant groups existed across the country. His application was refused by the Secretary.

The appellant then applied to the Refugee Status Review Tribunal (the Tribunal) for a review of the Secretary's decision. On 15 March 2015, the Tribunal affirmed the Secretary's decision. While directly addressing the question whether the appellant had a well-founded fear of persecution because of his membership of the Gabooye tribe, the Tribunal observed that there was country information indicating that there are 'police from every tribe in Somaliland, so [the appellant] would have some redress from the acts of others'.

The appellant 'appealed' to the Supreme Court of Nauru (the Supreme Court) pursuant to s 43(1) of the *Refugees Convention Act* 2012 (Nr) (the Refugees Act). Justice Crulci dismissed his appeal.

The appellant subsequently appealed to the High Court. The appellant contended, among other things, that the Supreme Court erred in failing to hold that the Tribunal's failure to put the substance of the country information relating to the tribal composition of the Somaliland police to him constituted a breach of the requirements of procedural fairness contemplated by s 22 of the Refugees Act. While the respondent accepted that procedural fairness requires a person to be given an opportunity to deal with all information that was 'credible, relevant and significant' to the decision, it also argued that disclosure of such information was only required in relation to 'the critical issue or factor on which the administrative decision is likely to turn'. In this case, the information as to the tribal composition of the Somaliland police was not a factor on which the Tribunal's decision was likely to turn.

Initially, an issue was raised as to whether leave to appeal was required in the High Court, on the basis that the order of the Supreme Court was made in the exercise of its appellate rather than original jurisdiction.

The High Court found that appeals to that Court from the Supreme Court are governed by the *Appeals Act 1972* (Nr) and the *Nauru (High Court Appeals) Act 1976* (Cth). Relevantly, s 44 of the Appeals Act 1972 provides that 'an appeal shall lie to the High Court: (a) against any final judgment, decree or order of the Supreme Court in any cause or matter, not being a criminal proceeding or an appeal from any other Court or tribunal; … and (c) with the leave of the High Court, against any judgment, decree or order of the Supreme Court in the exercise of its appellate jurisdiction'.

The High Court held that the Supreme Court was exercising its original jurisdiction in conducting judicial review of the Tribunal's decision. Notwithstanding the use of the word 'appeal' in s 43(1) of the Refugees Act, it is apparent that the Supreme Court was exercising its original jurisdiction in conducting judicial review of the Tribunal's decision. The Tribunal did not exercise judicial power in conducting its review of the Secretary's decision. Rather, the Tribunal conducted an administrative review of the merits of the case. The decision of the Supreme Court, on appeal from the Tribunal, was therefore an exercise by the Supreme Court of its original jurisdiction. Accordingly, the appeal to the High Court lay as of right.

The High Court unanimously held that the Tribunal's reliance on the tribal composition of the Somaliland police force was integral to the Tribunal's reasons for its conclusion; therefore, its failure to bring the country information to the appellant's attention amounted to a failure to accord him procedural fairness.

The High Court allowed the appeal, set aside the order of the Supreme Court and ordered that the decision of the Tribunal be quashed and the matter be remitted to the Tribunal for reconsideration according to law.

***Are the decisions of NSW Ombudsman immune from judicial review?***

*Kaldas v Barbour* [2017] NSWCA 275 (24 October 2017) (Bathurst CJ, Basten JA and Macfarlan JA)

On 6 December 2016, the plaintiff (Naguib (Nick) Kaldas, a former New South Wales Deputy Police Commissioner) commenced proceedings in the Supreme Court of New South Wales before Garling J seeking declaratory and injunctive relief against the defendants (the former NSW Ombudsman and Deputy Ombudsman). The claim arose out of an Ombudsman's report resulting from an investigation known as Operation Prospect. Operation Prospect commenced in October 2012 and four years later culminated in a report which was the subject of these proceedings. The operation was the largest of its kind undertaken by an Ombudsman in Australia. It investigated allegations concerning a broad range of conduct connected to operations of the New South Wales Crime Commission and an operation of the Police Integrity Commission. The allegations included, among other things, the use of false and misleading information in warrant applications and the improper targeting or investigations of individuals.

The plaintiff alleged, among other things, that the Ombudsman failed to accord him natural justice in relation to the adverse findings against him in the report.

The defendants challenged the jurisdiction of the Supreme Court to hear the claims made by the plaintiff, primarily on the basis that the Ombudsman and its officers were immune from the proceedings. Section 35A(1) of the *Ombudsman Act 1974* (NSW) relevantly provides that the Ombudsman 'shall not … be liable whether on the ground of want of jurisdiction … to any civil or criminal proceedings' except in cases involving bad faith. Section 35A(2) similarly provides that such proceedings could not be brought without the leave of the Supreme Court.

Justice Garling referred a number of questions of law to the NSW Court of Appeal, including, but not limited to, whether the plaintiff's claims were precluded by s 35A(1) of the Ombudsman Act.

The Court held that the applicant's claims were wholly precluded by s 35A(1) of the Ombudsman Act.

The Court opined that s 35A is a form of privative clause, which limits the circumstances in which proceedings can be brought against the Ombudsman. However, it is not in the form of a standard privative clause provision, which precludes review of a decision of a specified authority. Rather, it is closer to protective provisions that prevent civil actions against individual officers or authorities.

The Court held that the immunity granted by s 35A of the Ombudsman Act extends to judicial review proceedings in the supervisory jurisdiction of the Supreme Court. The words 'want of jurisdiction' demonstrate an intention by the legislature to exclude personal, and public law, remedies, including those alleging jurisdictional errors. Further, if s 35A did not extend to judicial review proceedings, the power of the Supreme Court to grant leave in s 35B would be unnecessary.

The Court further found that this interpretation is consistent with the Ombudsman's role. The Ombudsman's role is to investigate complaints and make recommendations to the Minister or public authority in question. It recommends rather than adjudicates. This interpretation is also consistent with Parliament's intention that a parliamentary committee, rather than the courts, should oversee the Ombudsman.

***Neither confirm nor deny: section 25 of the FOI Act***

*Re Brooks and Secretary, Department of Defence (Freedom of Information)* [2017] AATA 258 (14 February 2017) (Constance DP)

In 2014, Ms Brooks made a request to the Secretary of the Department of Defence (the Secretary) under the *Freedom of Information Act 1982* (Cth) (the FOI Act) for, among other things:

- briefs or correspondence to the Chief of the Defence Force or Minister that outline any aspect of United States Joint Special Operations Group (JSOC) presence or activities in Australia, including but not limited to Swan Island, Darwin and other bases or training facilities, from 1 January 2005 onwards; and
- any documents regarding the training of SAS 4 Squadron by JSOC in interrogation or other intelligence-gathering techniques, whether on Australian soil or elsewhere (including Africa or the US).

In response, the Secretary notified Ms Brooks that, pursuant to s 25 of the FOI Act, 'the mere acknowledgement that a particular document [such as those sought by her] exists, or denying it exists, will ... cause damage similar to disclosing the document itself'. The Secretary claimed that a document setting out such an acknowledgement or denial would be a document exempted from production under s 33 of the FOI Act. Section 33 refers to the exemption of documents affecting national security, defence or international relations.

Ms Brooks has applied to the Administrative Appeals Tribunal (the Tribunal) for a review of the Secretary's decision.

Ms Brooks contended that, in deciding this issue, the Tribunal must engage in a two-step process:

1. It must be determined that Ms Brooks' 'request related to documents that were, or would be if they existed, exempt from disclosure pursuant to s 33'.
2. If it did, would 'the disclosure of the existence or non-existence of certain documents ... of itself cause the Respondent's response to be exempt by virtue of s 33 of the Act'?

The Secretary contended that the FOI Act does not require a decision-maker to make the first determination set out above and that the only inquiry which should be undertaken is that set out in step 2.

In support of this contention, before the Tribunal, the Secretary filed an affidavit of Brigadier Khan. He also gave oral evidence.

In the opinion of Brigadier Khan, the possible consequences of confirming or denying the documents requested by Ms Brooks must be considered in the context of the current threat environment to Australia. In his opinion, the sources of such threats include military forces, foreign intelligence services, violent extremist groups, domestic terrorism, issue-motivated groups and criminal organisations. The level of threat has materially increased in recent years.

Brigadier Khan also gave evidence that the United States is Australia's most important ally in matters of defence and security and has given Australia privileged access to its sensitive and important military and security assets, capabilities and intelligence. The United States is extremely diligent and sensitive about maintaining the confidentiality of its classified information, capabilities and activities. The manner of the handling of sensitive information between the two countries has been formalised by an agreement. As to the consequences of a breach of the requirements of this agreement, Brigadier Khan said, 'Australia's military and security relationship with the US is built on trust that has been developed over many years. That trust, which has been hard won, could be seriously undermined if Defence were to fail to meet, or be perceived it may not meet, its US counterparts'.

The Tribunal found that it is the fact of denial or confirmation of the existence of documents, if that confirmation or denial was itself recorded in a document, which must meet the requirements of s 33 of the FOI Act to be an exempt document. If the requirements of s 33 are met in these circumstances, the agency or Minister is empowered to give the subject notice. At no stage of this process is the agency or Minister required to consider whether there are, in fact, documents which themselves are exempt under s 33 (*Secretary, Department of Health and Ageing v iNova Pharmaceuticals (Australia) Pty Ltd* [2010] FCA 1442, Forester J). Furthermore, s 25(2) does not require that a 'document' be assumed to exist and then be subjected to the requirements of s 33.

Based on the evidence of Brigadier Khan, the Tribunal was satisfied that documents of such a kind as described above could reasonably be expected to cause damage to the security of the Commonwealth; the defence of the Commonwealth; and the international relations of the Commonwealth. The Tribunal held that on this basis the document would be an 'exempt document' in accordance with s 33 of the FOI Act, and it affirmed the decision under review.

# ‘GREEN LAWFARE’ AND STANDING: THE VIEW FROM WITHIN GOVERNMENT

***Senator the Hon George Brandis QC****

I am delighted to address this plenary session on the vexing and important topic of lawfare. The distinguished legal scholar and my old jurisprudence tutor, Joe Raz, once observed, ‘[n]ot uncommonly when a political ideal captures the imagination of large numbers of people its name becomes a slogan used by supporters of ideals which bear little or no relationship to the one it originally designated’.[1] One ideal that has had that unhappy fate is the rule of law, which is invoked in a remarkable array of contexts in support of a remarkable range of views, many of which have little or nothing to do with the philosophical or jurisprudential basis of the rule of law.

Jeremy Waldron described the rule of law as a ‘star in [the] constellation of ideals that dominate our political morality’,[2] and so it is. But, given that star’s magnetism, we should not be surprised that it features in debates about the law of standing to sue — the star is said to point to a loosening of restrictions upon standing. Rule of law based arguments are frequently invoked, often wrongly and wrongheadedly, and sometimes plainly ignorantly, in support of arguments in relation to the issue of standing to sue. That is the first question I wish to address in this article: does the concept of the rule of law support more liberal or, indeed, non-existent standing rules? By ‘liberal’ I mean anything that relaxes the common law principle that only a person with a ‘sufficient’ interest in the subject-matter of a suit should have the standing to commence a suit.[3]

Statutory expressions of that relaxation may be found in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) — most particularly, s 487 — and there are analogous provisions in state environmental law and some, but few, other Commonwealth statutes.

The second issue I would like to address is the broader public policy merits of relaxing standing restrictions, particularly in environmental law. Rather than offering a definitive view on the merits of liberal standing regimes in all contexts, I propose simply to sound a note of caution about the possibility for abuse of more liberal standing rules captured in the rhetorically challenging word or neologism which is the topic of this plenary — that is, ‘lawfare’ — implying, as it does, in a rhetorically challenging way, that the law and the institutions and processes of the law might be used to conduct a kind of social, political or environmental warfare by other means.

First, though, I will discuss the rule of law. As I have suggested, it is commonly asserted that the rule of law supports a relaxation of standing restrictions. In the *Sydney Law Review* this year, Professor Andrew Macintosh of the Australian National University argued that liberal standing rules in environmental legislation promote the rule of law both

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* *Senator Brandis is the Commonwealth Attorney-General and Leader of the Government in the Senate.* *This article is an edited version of a paper presented to the Australian Administrative Law Forum National Conference, Canberra, on 21 July 2017.*

directly and indirectly — directly, according to Professor Macintosh, 'by enabling courts to restrain breaches of, and compel compliance with, public environmental rights'; and indirectly 'by increasing the probability that those who contravene public rights will be held to account in a court of law, which in turn promotes compliance, even in the absence of proceedings'.[4] The converse of that argument would appear to be that restrictive standing laws have the capacity to impair the rule of law. Thus, in the opinion of at least one legal scholar, reintroduction of a common law standing test under the EPBC Act would curtail the rule of law. If that is our conclusion, I would be concerned about the premise. Put to one side the difficulties with the very notion of a so-called 'public environmental right'. It might be thought that only legal persons, and not amorphous collectives or amorphous bodies of opinion, may claim the mantle of rights-bearers, but let us put that consideration to one side. The real problem with the 'rule of law' based arguments for the relaxation of standing rules is that it commits the intellectual error of conflating the rule of law with the enforcement of law when they are not the same thing.

Let me illustrate by reference to constitutional law. I could not tell you whether there is a so-called 'public right' to be governed in conformity with the *Constitution*, but plainly we all have a legitimate interest in constitutionally licit government. For many, that interest may give rise to an acute level of intellectual or even emotional concern, and it is that concern or that interest, as the layman would use the term, that is the equivalent of a cognisable legal right. We have it on the authority of the High Court that such a concern about constitutional governance without law is insufficient to give a litigant standing. A litigant, as the High Court decided in *Kuczborski v Queensland*[5] (*Kuczborski*), must have an interest that is 'immediate, sufficient and peculiar' to it.[6] According to the majority in that case, this ensures 'that the work of the courts remains focused upon the determination of rights, duties, liabilities and obligations as the most concrete and specific expression of the law in its practical operation, rather than the writing of essays of essentially academic interest'.[7]

At least in the view of Crennan, Kiefel, Gageler and Keane JJ, the limitation on standing for those cognisable legal interest 'serves to maintain the ordinary characteristics of judicial power'.[8] And this is true even when something as fundamental as the constitutionality of legislation is in question. Are we, then, to conclude that what their Honours called the 'ordinary characteristics of judicial power' are somehow inimical to the rule of law? Of course not. But we would not be making that intellectual error were we to adopt an absolutist position on the question of the relaxation of standard. If we were to hold that the rule of law really requires judicial enforcement of the law in all circumstances, irrespective of whether any person's particular interests are at stake, then in my opinion that would be a novel conception of the rule of law: theoretical dogmatism more characteristic of a civilian jurist than of a common lawyer. Perhaps that is why, in *Kuczborski*, in which a bikie challenged Queensland vicious lawless offender legislation, the High Court held said this:

> It may be accepted that there is a general public interest that governments act in accordance with the law enforced by the courts; but to conclude that the plaintiff's sense of grievance at the injustice of these laws is not an interest which suffices to give him standing to challenge their validity is not to undermine the rule of law.[9]

That is the very point I seek to make. The late Justice Scalia expressed the same idea memorably in the American context when he said:

> it is simply untenable that there must be a judicial remedy for every constitutional violation. Members of Congress and the supervising officers of the Executive Branch take the same oath to uphold the Constitution that we do [the justices of the Supreme Court], and sometimes they are left to perform that oath unreviewed, as we [the Supreme Court justices] always are.[10]

In short, the rule of law plainly requires government and citizens alike to be subject to the law, but being subject to law need not mean being subjected to universal judicial policing. To put it another way: if something lessens the likelihood that the law will be judicially enforced, it does not thereby curtail the rule of law. It does not curtail the nature of our society as a society governed by laws. Government action may be bound by law irrespective of whether it is subject to judicial scrutiny, and indeed it is. It is an expectation which goes without saying, although it is sometimes breached, that Ministers who are administrative officials and those who conduct the functions of the executive arm of the government, as well as the legislative arm of government itself, should conduct themselves and make decisions in accordance with legality. So government action is bound by the rule of law, irrespective of whether it is subjected to judicial scrutiny, just as, to use an analogy from private law, a breach of contract is a breach of contract regardless of whether anyone litigates it. After all, if anything lessening the likelihood of judicial law enforcement curtails the rule of law then our entire system of adversarial private litigation requires reinvention. Ultra vires legislation may be on the books, and unlawful executive practices may occur — and both of these things may be true for years before any litigant decides that a challenge is worth the time and money. On an absolutist view that the rule of law always depends upon judicial enforcement of the law, in fact, we detract from the rule of law because, to use Professor Macintosh's language, it lowers the 'probability that those who contravene public rights will be held to account in a court'.[11]

Does that mean, in the absolutist view, that judges are able to institute law suits themselves if they perceive a flaw in ministerial decision-making, just as they might initiate criminal contempt proceedings? Do we perhaps need a body of public interest lawyers whose sole focus is to act as rule of law sentinels — policing governmental action and litigating the otherwise un-litigated? In effect, relaxed or non-existent standing rules move us closer to that scenario — that nightmare dystopia in which the only legitimacy that any government action can have will be had in a litigated outcome. And therein lies the problem. The supposed rule of law argument for loosening standing restrictions is a form of legal fundamentalism: how else is one to describe the notion that the rule of law is an ideal of all-pervasive judicial enforcement, regardless of whether any legal person's direct rights or interests are at stake? And, as with other forms of fundamentalism, adherence to it happens to enrich and empower its fundamentalist proponents, who are almost invariably lawyers. Who benefits when litigation is made more likely? Which group of people necessarily increases its social power in our polity when disputes are resolved litigiously rather than by any other means? It turns out that the supposed rule of law argument for relaxed or non-existent standing rules is not actually about the rule of law so much as the rule of lawyers and the interests of lawyers.

That brings me to arguments about the practical consequences of relaxed or non-existent standing limitations. Thus far, my argument has been a jurisprudential one. I have sought to cast doubt upon the notion that traditional restrictions on standing somehow betoken a deficient commitment to rule of law principles, and I have suggested that the rule of law is, in fact, conceptually compatible with limitations on standing to sue to those with a cognisable legal interest in the suit. But there is an obvious rejoinder that is made in particular, no doubt, by non-lawyers: whatever the rule of law requires in theory, relaxed or non-existent standing provisions are good in practice, at least to achieve certain beneficial social goods, and one of those beneficial social goods is said to be the protection of the environment. Please do not misunderstand: I do not for a moment doubt that the protection of the environment is a social good, but the issue we are addressing in this plenary is the way in which, appropriately, the legal system can be engaged in achieving that beneficial outcome.

The chief advantage of liberal standing provisions, when it comes to the environment, was succinctly expressed in a United States Senate report on the 1972 Clean Water Act, which

permitted citizen suits.[12] The United States Senate said, 'if the Federal, State, and local agencies fail to exercise their enforcement responsibility, the public is provided the right to seek vigorous enforcement action'.[13] The Clean Water Act standing provisions are, if not the first, then certainly one of the earliest relaxations of standing when it comes to environmental suits. In other words, relaxed standing rules increase the likelihood that a valuable resource — that is, the environment — will benefit from legal protection. Ordinarily, the job would be left to government through its agencies; after all, even a staunch small-government libertarian would acknowledge that the protection of public goods such as the natural environment is a legitimate and desirable function of government. However, so the argument goes, executive agencies are ill-placed to fulfil this role, notwithstanding that it is their statutory mandate, because they may be under-resourced, captured by industry or otherwise subject to perverse incentives. But note here that the justification for relaxed standing rules for environmental protection suits is based, among other things, on the unverified and untested assumption that the executive agencies created for that very purpose will fail to discharge their statutory mandate.

The use of relaxed or non-existent standing provisions to overcome these perceived defects owes much to the US law professor Joseph Sax. In 1970, the Michigan legislature passed a state Environmental Protection Act, of which Sax was the draftsman. The statute contained an open standing provision — any person could seek equitable relief 'for the protection of the air, water and other natural resources … from pollution, impairment or destruction'. As we know, the 1970s saw something of a creative efflorescence of American liberal thought concerning environmental protection. In a 1972 dissent, Justice William O Douglas — himself, of course, a famous campaigner for the environment — opined in *Sierra Club v Morton*:

> The critical question of 'standing' would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated … in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers.[14]

Justice Douglas advocated the 'conferral of standing upon environmental objects to sue for their own preservation'.[15] Whether standing is expanded to inanimate objects or to a broad group of human beings suing in their name, the practical goal is the same. It is to redress a perceived deficiency in executive regulatory enforcement, although it is the executive arm of government which is specifically clothed by the legislature with the powers and the responsibility to police environmental standards and otherwise protect the environment from abuse.

I am not going to embark upon an assessment of whether such a deficiency exists in Australia. I merely offer four observations. First, we should instinctively be wary about handing the legislator's pen to academic lawyers. And I speak against my own kind in saying that, having at various stages of my career been an academic lawyer as well as a legal practitioner and legislator and now a member of the executive government. So I think I can say I have seen the issue from all points of view.

Secondly, we should be even warier about embracing an American answer to an Australian question. American and Australian regulatory regimes are very different. In Australia, even in these cynical times, there should be broad acceptance that Commonwealth Ministers, who are members of Parliament by constitutional mandate, remain accountable to the people who elect them, as are the heads of executive agencies who are responsible to the Parliament as well — in particular, through such parliamentary fora as Senate estimates committees. There is a real constraint upon ministerial decision-making — a constraint too often under-appreciated or ignored by a legal profession with a lust to judicialise the solution to every problem, perceived or imagined. In the United States, on the other hand, the power of federal regulatory agencies is so great, and the mechanisms of accountability so

attenuated, that, as Professor Philip Hamburger from the Columbia Law School has argued, it constitutes no less than absolute, supra-legal power — precisely the kind of power that the framers of the Constitution sought to banish from their republic.[16] Liberal standing rules may have a place in that context, but it does not follow that they are appropriate in Australia, with our robust common law traditions more directly and obediently inherited from the English common law.

My third observation concerns the likelihood of regulatory action to protect the environment in this country. As some of you may be aware, the Australasian Environmental Law Enforcement and Regulators network (AELERT) is a regional group comprising regulatory agencies from Australia, New Zealand and other nations in the region. One hundred and ninety constituent bodies exist in Australia alone — that is, there are almost 200 bodies charged with environmental law enforcement and regulation in this country. They include local councils and local government bodies as well as Commonwealth, state and territory departments and agencies. So it can hardly be said that the architecture of executive regulation to protect environmental standards in this country is deficient or inadequate.

My fourth and most important point is this: as with other policies, the supposed benefits of weakening standing restrictions must be weighed against the costs. Seemingly the most obvious of these is the human cost entailed by investment projects being foregone or delayed because of lawsuits that may not otherwise have been launched, with a cost in jobs and prosperity.

I acknowledge that is a contested ground. Professor Macintosh, in the article to which I referred earlier, maintains that between 2000 and 2015 the social cost of citizen suits under the EPBC Act was 'negligible' — so negligible, in fact, that we may need measures 'to boost the amount of citizen suits or compensate for their rarity'.[17] Disappointingly, Professor Macintosh offers no quantifiable measure of the supposedly negligible social cost of environmental citizen suits and no methodology by which quantification may be arrived at. Indeed, the remark seems more like a rhetorical throw-away line than a scholarly conclusion. Nevertheless, let us assume, for the sake of argument, that he is correct and that the social costs are negligible. I know readers are immediately thinking of Coase theorem. Even on that assumption, there remains a problem, because there is a separate social cost to relaxed or non-existent standing rules which is more difficult to quantify than the cost foregone by the loss of a particular project. That cost is the cynicism and a loss of faith in our legal system that opportunistic use may produce. The more that standing rules are relaxed or waived, the further courts will be permitted or even required to depart from the paradigm of the use of judicial power identified by Crennan, Kiefel, Gageler and Keane JJ, referred to earlier. The classical judicial function determining rights, liabilities and obligations becomes a secondary consideration.

Let me give you an example. In 2011, a coalition of environmental activist bodies, led by Greenpeace Australia, Coalswarm and the Graeme Wood Foundation, published a document entitled *Stopping the Australian Coal Export Boom*.[18] It was an advertent exposition of a strategy to use all means at the disposal of those citizen activists to stop coal exports. That document included a strategy which we are addressing in this plenary — that is, lawfare. The document states:

> The first priority is to get in front of the critical projects to slow them down in the approval process. This means lodging legal challenges to five new coal port expansions, two major rail lines, and up to a dozen key mines. This will require significant investment in legal capacity. While this is creating much needed breathing space, we need to continue to build the movement and mobilise to create pressure on politicians and investors alike. We cannot win by taking the industry head on and there is no single point of intervention that we can rely upon. Indeed, we need our strategy to use multiple voices with multiple points of intervention. Our strategy is essentially to disrupt and delay key projects and

> infrastructure while gradually eroding public and political support for the industry and continually building the power of the movement to win more.[19]

Dealing specifically with the opportunistic use of litigation to achieve that purpose of disrupt and delay, under the subheading 'Litigation' the authors say:

> Legal challenges can stop projects outright, or can delay them in order to buy time to build a much stronger movement and powerful public campaigns. They can also expose the impacts, increased costs, raised investor uncertainty and create a powerful platform for public campaign.[20]

Under the subheading 'Objectives', the authors say:

> 1. Mount legal challenges to the approval of several key ports, mines and rail lines (Level 1);
> 2. Run legal challenges that delay, limit or stop all of the major infrastructure projects (mines, rail and ports) that have been identified as a high priority in the strategy (Level 2);
> 3. Create a platform for public campaigning around these projects and on the wider issue of coal regulation …[21]

Under the subheading 'What this looks like', the authors say:

> We will lodge legal challenges to the approval of all of the major new coal ports, as well as key rail links (where possible), the mega-mines and several other mines chosen for strategic campaign purposes. *Legal challenges will draw on a range of arguments relating to local impacts on wetlands, endangered species, aquifers and the World Heritage Listed Great Barrier Reef Marine Park, as well as global climate impacts.*[22]

Perhaps out of prudence the authors go on to say:

> Only legitimate arguable cases will be run. Legal outreach will be conducted to support landowners who are opposing resumption of their land.[23]

But one might well ask how an advertent strategy to use the judicial process to delay and disrupt can be considered legitimate legal tactics, particularly bearing in mind that the body of law which deals with the use or misuse of process or of the courts for collateral purposes. In recent years, those legal principles have been restated by the High Court in *Williams v Spautz*[24] and by the Full Court of the Federal Court in *Ashby v Slipper*.[25] In the case of Mr Ashby's litigation against the former speaker of the House of Representatives, Mr Slipper, which was dismissed as an abuse of process motivated by collateral purpose, Rares J summed up the applicable legal principles in these words:

> The Courts have an unlimited power over their own processes to prevent those processes that are used for the purpose of injustice. That is why the categories of abuse of process are not closed …[26]

His Honour then refers to *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd*[27] (*Katauskas*). He goes on to say:

> Proceedings that are seriously or unfairly burdensome, prejudicial or damaging or productive of serious and unjustified trouble and harassment are examples of abuses of process. So too are proceedings where the Court's process is employed for an ulterior or improper purpose, or in an improper way, or in a way that would bring the administration of justice into disrepute among right thinking people ...[28]

In *Williams v Spautz*, four justices of the High Court — Mason CJ and Dawson, Toohey and McHugh JJ — held that a party alleging that a proceeding that has been brought is being prosecuted as an abuse of process has to show that the predominant purpose of the other party in using the legal process has been one other than that for which it was designed. They held that the onus of satisfying the Court that there was an abuse of process lay upon the party making that allegation.[29] Having regard to the high standard of satisfaction required

in *Katauskas*, *Williams v Spouse* and *Ashby v Slipper*, one might nevertheless wonder whether a declared intention to challenge all projects in a particular industry in order to achieve an advertently political and economic objective — that is, the cessation of coal mining in Australia — and to use legal application, relying upon the relaxed or non-existent standing provisions of the EPBC Act, for the specific strategy of delaying and disrupting could fail to meet that test.

This is of great concern, because lawfare can bring the courts into disrepute, and it can use those courts for its own purpose — plainly and declaredly, for the agitation of political and social arguments rather than for the vindication of legal rights. It encourages judicial proceedings to become vehicles for an ideological agenda and it makes the courts a hapless vehicle for the extraneous ends of others — not an umpire to be approached so much as a weapon to be deployed; hence the term 'lawfare'. It brings legitimate policy disputes into a singularly inappropriate forum to agitate a political grievance. And with that comes the danger that the judiciary itself is politicised, with an attendant erosion of public faith in the judiciary as a result. Those are some of the consequences of lawfare.

**Endnotes**

1 Joseph Raz, 'The Rule of Law and its Virtue', in Aileen Kavanagh and John Oberdiek (eds), *Arguing About Law* (2009) 181.
2 Jeremy Waldron, 'The Rule of Law and the Importance of Procedure', in Robin Bernstein (ed), *Racial Innocence: Performing American Childhood from Slavery to Civil Rights* (2011) 3.
3 The sources of the relevant principles are ably set out in the article by Pritchard J in this issue of *AIAL Forum*.
4 Andrew Macintosh, Heather Roberts and Amy Constable, 'An Empirical Evaluation of Environmental Citizen Suits under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)' (2017) 39(1) *Sydney Law Review* 85.
5 [2014] HCA 46.
6 [2014] HCA 46, [182].
7 [2014] HCA 46, [184].
8 [2014] HCA 46, [184].
9 *Kuczborski v Queensland* [2014] HCA 46, [185].
10 *Webster v Doe* 486 US 592 (1988) 613.
11 Macintosh, Roberts and Constable, above n 4.
12 US Senate, *Senate Report: Federal Water Pollution Control Act Amendments of 1971*, Report No 92-414, Accompanying S2770, 92nd Congress,1st session, USGPO, Washington DC, 1971.
13 Ibid.
14 405 US 727 (1972), 741.
15 405 US 727 (1972), 742.
16 Philip Hamburger, *Is Administrative Law Unlawful?* (University of Chicago Press, 2014).
17 Macintosh, Roberts and Constable, above n 4.
18 John Hepburn, Bob Burton and Sam Hardy, *Stopping the Australian Coal Export Boom: Funding Proposal for the Australian Anti-coal Movement* (Greenpeace Australia Pacific, Coalswarm and Graeme Wood Foundation, 2011) <http://www.abc.net.au/mediawatch/transcripts/1206_greenpeace.pdf>.
19 Ibid 5.
20 Ibid 6.
21 Ibid.
22 Ibid (emphasis in original).
23 Ibid.
24 (1992) HCA 34.
25 [2012] FCA 1411.
26 [2012] FCA 1411, [4].
27 (2009) 239 CLR 75.
28 Ibid.
29 (1992) HCA 34, 42.

# LAWFARE, LIBERAL STANDING RULES AND ENVIRONMENTAL CITIZEN SUITS: A REPLY TO THE ATTORNEY-GENERAL

***Andrew Macintosh****

Over the past decade, there has been a decline in the level of public trust and confidence in democratic governments in Australia and across the western world. Surveys show ambivalence towards democratic principles and institutions and low levels of trust in government.[1] Voting patterns in elections have become increasingly volatile and polarised.[2] Parties of the political extremes are resurgent.[3] For those concerned about the trends in democracy, there is no better symbol of the magnitude of the problem than the election of Donald Trump as President of the United States.

While it would be an overreach to claim the quality of public debate is to blame for the apparent democratic malaise, it cannot help. Our political leaders seem incapable of having informed and respectful debates about the challenges facing our societies. Instead of this, we are forced to endure relentless negative political rhetoric framed around character assassinations of opponents and caricatures of their arguments. While these tactics have always been a part of political discourse, I want to believe there was, at least at some point in the not-too-distant past, more of a balance in the conduct of politics. The flurry of new terms and phrases to describe fact-free, negative political rhetoric — factoids, fake news, alternative facts — would seem to suggest there was a better time before it all went wrong.

Senator the Hon George Brandis' speech at the Australian Institute of Administrative Law 2017 National Conference provides an illustration of the state of the art in modern Australian political discourse.[4] Remember, this is a speech at a professional organisation's annual conference in Canberra. If there was ever an opportunity to engage in considered debate and discussion, this was it. The media was not listening, there was no partisan agenda operating and there were no political points to be scored; only a knowledgeable audience keen to listen. Rather than seize this opportunity, the Attorney-General opted for a negative speech that was designed to tear down an imaginary enemy using the most tired of rhetorical devices: the straw man fallacy.

The fallacy is built around our uncontroversial suggestion that one of the aims, and benefits, of liberal standing rules is that they promote the rule of law.[5] I will return to this shortly. Before doing so, it is worthwhile dealing with the other inadequacies in the Attorney-General's representation of our work and the broader topic of standing.

**There are no public rights and other curious remarks**

Almost immediately after introducing our article, the Attorney-General takes issue with our use of the phrase 'public rights' to describe the correlate of duties owed to the general community (we insert 'environmental' in the middle of the phrase as shorthand to refer to

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instances where the public rights relate to the environment). The Attorney-General's objection to the notion of public rights is that 'only legal persons, and not amorphous collectives or amorphous bodies of opinion, may claim the mantle of rights-bearers'.[6]

This is curious. The common law rules of standing have been framed around the notion of public rights and duties for over 100 years. Justice Buckley made reference to them in his famous judgment in *Boyce v Paddington Borough Council*,[7] as did Lord Wilberforce in *Gouriet v Union of Post Office Workers*, when he remarked, 'in general no private person has the right of representing the public in the assertion of public rights'.[8] In *Australian Conservation Foundation v Commonwealth*, Gibbs J stated:

> It is quite clear that an ordinary member of the public, who has no interest other than that which any member of the public has in upholding the law, has no standing to sue to prevent the violation of a *public right* or to enforce the performance of a *public duty*. There is no difference, in this respect, between the making of a declaration and the grant of an injunction. The assertion of *public rights* and the prevention of *public wrongs* by means of those remedies is the responsibility of the Attorney-General, who may proceed either ex officio or on the relation of a private individual.[9]

Similarly, in *Truth About Motorways v Macquarie*, a case involving a challenge to the expanded standing provisions in the *Trade Practices Act 1974* (Cth), Gleeson CJ and McHugh J commented:

> The common law requirement that a plaintiff who brings an action, not to vindicate a private right, but to prevent the violation of a *public right or to enforce the performance of a public duty*, must have a special interest to protect, is based upon considerations of public policy which the legislature would not lightly disregard. Nevertheless, it is not difficult to understand why, in the case of certain laws, it might be considered in the public interest to provide differently.[10]

If we are in error in employing the phrases 'public rights' and 'public environmental rights' in the context of standing, we are in illustrious legal company.

After questioning the notion of public rights, the Attorney-General turns his ire on our substantive conclusions, asserting:

> Professor Macintosh, in the article to which I referred earlier, maintains that between 2000 and 2015 the social cost of citizen suits under the EPBC Act was 'negligible' — so negligible, in fact, that we may need measures 'to boost the amount of citizen suits or compensate for their rarity'. Disappointingly, Professor Macintosh offers no quantifiable measure of the supposedly negligible social cost of environmental citizen suits and or any methodology by which quantification may be arrived at. Indeed, the remark seems more like a rhetorical throw-away line than a scholarly conclusion.[11]

The rhetorical throw-away line to which he refers was based on an analysis of all environmental citizen suits (proceedings initiated by private parties to uphold public rights or interests for predominantly public purposes in order to generate public environmental benefits) initiated under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) over the period July 2000 to 31 December 2015 (study period). The object of the analysis was to gain insights into the social costs of citizen suit activity under the EPBC Act.

The social costs associated with citizen suits arise mostly from project stoppages and delays. While the costs associated with the litigation itself are typically at the forefront of lawyers' minds, they are relatively inconsequential in economic terms. What matters from an economic perspective is the opportunities foregone when projects that enhance social wellbeing are stopped, temporarily or permanently, by citizen suits; and the resources that sit idle because of the delays arising from the conduct of citizen suits. Due to this, we used four proxies to gauge the costs of citizen suits: their frequency; their legal 'success rates'; whether the substantive impacts of successful citizen suits were reversed by subsequent

executive action; and the extent to which citizen suits caused project delays. The key findings were as follows:

- Almost 5500 projects were referred under the EPBC Act's environmental impact assessment and approval (EIAA) regime (the Act's primary regulatory regime) over the study period. Some 5121 'controlled action decisions' (that is, whether they required formal assessment and approval), 1357 'assessment approach decisions' (that is, what level of assessment was required for projects requiring formal assessment and approval) and 844 'final approval decisions' (that is, whether projects were allowed to proceed and on what conditions) were made in relation to these projects. Approximately 300 000 actions were also regulated under other parts of the EPBC Act over the period.
- Despite the large number of activities regulated, only 129 legal proceedings were identified as having been initiated under the EPBC Act over the study period, of which 44 were citizen suits. The citizen suits related to a mere 34 projects.
- Over the study period, only 0.16 per cent of controlled action decisions (eight out of 5121), 0.15 per cent of assessment approach decisions (two out of 1357) and 2.01 per cent of approval decisions (17 out of 844) were subject to citizen suit judicial review applications.
- Of the 31 identified decided citizen suits (judicial review and civil enforcement), only seven were legally 'successful' (where at least one of the applicant's grounds of review or claims of breach was upheld).
- When citizen suits were legally successful, it was common for their substantive effects on the relevant projects to be reversed or undone by subsequent executive action. This occurred in three of the four (75 per cent) successful decided environmental citizen suit judicial review proceedings and in two of the four (50 per cent) successfully discontinued judicial review proceedings.
- Citizen suits rarely caused material project delays. Only five projects over the 15½-year study period were substantially delayed (greater than 12 months) by citizen suits and only two of these were capital-intensive. The two capital-intensive projects were the Nathan Dam project in Queensland, which has always been a marginal economic proposition and has only recently been approved at the state and federal levels after a nine-year assessment process; and the Venture Minerals Ltd Riley Creek hematite (iron ore) mine in the Tarkine region in Tasmania, which, despite the citizen suit concluding in June 2015, has still not commenced, even though it has had all relevant state and federal approvals for several years.

Do these findings support the conclusion the social costs of citizen suit activity under the EPBC Act were negligible? We know there were only a small number of environmental citizen suits (44) and an even smaller number of affected projects (34).[12] We know few of the citizen suits were legally successful (seven of 31 decided cases). We know the substantive impacts of successful citizen suits were often overturned, particularly in judicial review proceedings (three out of four decided cases and two of four successfully discontinued cases). The data also show only two capital-intensive projects were substantially delayed by citizen suits. While we did not quantify the social costs, there is no way they could be economically significant. There were just too few affected projects, and the projects were not of sufficient size to matter to the health of the broader Australian economy.

Having said this, ideally, a project on the adverse impacts of environmental citizen suits would quantify their social costs. One way to do this is to conduct a financial analysis on affected projects using discounted cash flows. This requires an evaluation of expenses and revenues over the lifetime of all affected projects under two scenarios: one with the relevant citizen suits; and one without. The social costs of the citizen suits are calculated as the difference between the net present value of the affected projects under the two scenarios.

This method captures the resource costs associated with the conduct of the litigation but, more significantly, it also captures the impact of citizen suit related delays and stoppages.

In theory, the application of this method is relatively straightforward. However, there are two practical obstacles to its application: access and time. The conduct of a robust discounted cash flow analysis requires access to the financial data of the actual affected projects or, if this is not available, to similar projects. Gaining this access is difficult and time consuming, as is the conduct of the analysis itself.

We agree the conduct of this type of analysis is desirable. However, the results of our analysis prove that the social costs associated with the citizen suits were negligible. The only open question now is how insignificant they were.

Those without economic training, like the Attorney-General, can be forgiven for not having a full appreciation of the methodological issues associated with the assessment of the social costs of citizen suits. However, surely we can expect the Attorney-General to have an appreciation of his government's policy on standing under the EPBC Act. By this I refer to the Attorney-General's extended critique of liberal standing rules in relation to civil enforcement proceedings. The lion's share of his speech is devoted to this topic. This would be fine but for the fact that the government of which he is a part has never sought to modify the expanded standing provisions in the EPBC Act that concern civil enforcement. The Abbott government's Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 (Cth) sought only to repeal s 487 of the EPBC Act, which relates to judicial review. The government did not propose amendments to s 475, which enables an 'interested person' (including a person or organisation that has engaged in activities related to the conservation of the environment in the preceding two years) to seek injunctions and related orders to restrain contraventions of the Act.

Not only does the Attorney-General stumble over his government's policy but also his case against liberal standing rules for civil enforcement is muddled. He offers us four 'observations' that are supposed to cast doubt on the merits of liberal standing rules for these purposes: they were invented by an academic; they were designed in the context of America's system of government; there are a lot of environmental regulators in Australia; and the 'supposed benefits of weakening standing restrictions must be weighed against the costs', the most obvious of which are project delays and stoppages.[13]

Of the four, only the second and last have any relevance. The fact that our Attorney-General would voice the first and third provides an indication of just how low the bar currently is for public debate and political discourse. It is apparently now acceptable to dismiss the views of opponents solely on the basis of their profession, particularly if they are 'thinkers' rather than 'doers'. His comments that it is possible to judge the 'likelihood of regulatory action to protect the environment in this country' on the basis of the number of regulatory bodies with environmental responsibilities are equally alarming.[14] They are made more so by the fact that they come only two paragraphs after he tells us, 'I am not going to embark upon an assessment of whether [a deficiency in executive regulatory enforcement] exists in Australia'.[15]

The Attorney-General's assertion that liberal standing rules for civil enforcement, which were designed for American conditions, are not necessarily appropriate in Australia is correct, as far as it goes. The fact that the United States introduces something does not mean it is suitable in Australia's system of government. However, this is not an argument for or against liberal standing rules for civil enforcement in Australia. What would have been more relevant to hear from the Attorney-General is an explanation as to why, if these liberal standing rules are so ill-suited to Australian conditions, the Coalition government under Prime Minister John

Howard introduced them. The Attorney-General was a member of the Howard government when the EPBC Act commenced in July 2000. He was there when the Act was subject to substantive amendments in 2004 and again in 2006. The 2006 amendments took steps to curtail citizen suits; specifically, by removing s 478 of the EPBC Act, which prohibited the Federal Court from requiring an applicant for an injunction to give an undertaking as to damages as a condition of granting an interim injunction. However, after including s 475 in the original legislation, no Coalition government has ever sought to repeal it, despite having numerous opportunities to do so.

The Attorney-General's final observation about liberal standing rules suffers a defect that is similar to that of his second. To say the benefits of liberal standing rules must be weighed against their costs is not an argument against liberal standing rules; it is a statement of his preferred position on political philosophy. The Attorney-General is telling us he is a utilitarian and will judge the merits of government policy on the basis of whether it gives rise to 'the greatest happiness for the greatest number'.[16] In order to evaluate the Attorney-General's argument, the reader needs evidence of how material the costs are and whether the benefits justify them. The Attorney-General is happy to critique us for failing to quantify the social costs of the citizen suits initiated under the EPBC Act but offers nothing in the way of evidence on either point.

**Liberal standing rules and the rule of law**

The sharper end of the Attorney-General's argument is the allegation that we conflate the rule of law with the enforcement of the law by suggesting one of the aims, and benefits, of liberal standing rules is they promote the former. The Attorney-General employs a *reductio ad absurdum* argument, asserting the notion that liberal standing rules promote the rule of law is based on an 'absolutist view that the rule of law always depends upon judicial enforcement of the law'.[17] He tells us that:

> government action is bound by the rule of law, irrespective of whether it is subjected to judicial scrutiny, just as, to use an analogy from private law, a breach of contract is a breach of contract regardless of whether anyone litigates it.[18]

From there he argues:

> Do we perhaps need a body of public interest lawyers whose sole focus is to act as rule of law sentinels — policing governmental action and litigating the otherwise un-litigated? In effect, relaxed or non-existent standing rules move us closer to that scenario — that nightmare dystopia in which the only legitimacy that any government action can have will be had in a litigated outcome. And therein lies the problem. The supposed rule of law argument for loosening standing restrictions is a form of legal fundamentalism ...[19]

There is not enough space here to do justice to a topic as broad and contested as the rule of law and its alternative meanings. It is sufficient for current purposes to accept that one of the fundamental elements of the rule of law is the notion that all people, whatever their 'rank or condition', are subject to the law and obey it.[20] In asserting that liberal standing rules promote the rule of law, our intent was to convey the idea that they encourage obedience to the law. They do this directly by enabling courts to uphold the law through citizen suits and indirectly by increasing the perceived risk of judicial scrutiny in the minds of administrative decision-makers and private proponents, which encourages compliance.

To suggest this argument 'commits the intellectual error of conflating the rule of law with the enforcement of law' is to misrepresent it. There is no suggestion the 'rule of law always depends upon judicial enforcement'.[21] Indeed, by its own terms, our argument relies on the

risk of legal proceedings, not necessarily the proceedings themselves, to encourage obedience to the law.

The Attorney-General's argument can be subject to a similar *reductio ad absurdum* critique: is he really claiming that a society can be subject to the rule of law in the absence of any judicial role in enforcement? When he says, 'if something lessens the likelihood that the law will be judicially enforced, it does not thereby curtail the rule of law',[22] does he mean we can eliminate judicial oversight altogether and still be a society ruled by law? I doubt it. In a recent speech, the Attorney-General made clear his understanding of, and support for, the role of the judiciary in our system of government:

> [Defending the rule of law means] that the decisions of those to whom the public have entrusted the democratic mandate, must always be subject to appropriate legal scrutiny; that their decisions are contestable not merely from a policy point of view, in the legislatures, but from a legal point of view, in the courts; and that those who exercise executive power must always accept that they are subject to, and must always be respectful of, the supremacy of the law.[23]

What is required in practice is a balanced approach to enforcement. Overzealous judicial enforcement is fiscally unsustainable and brings the legal system into disrepute. Equally, chronic under-enforcement without recourse to the judiciary undermines faith in the legal system and eats away at the legitimacy of government action and social wellbeing.[24] If this is accepted, the critical question about liberal standing rules is how they help strike a better balance in enforcement.

To answer this question, it is useful to start with the rationale behind the 'traditional position' that access to civil courts to uphold public rights should be limited to the Attorney-General of the relevant jurisdiction and those who suffer 'special damage' from the infringement of the right.[25] The rationale behind this position has two main elements. The first is that civil courts are there to protect the private legal rights of individuals, not to enforce public rights. As McHugh J has said:

> It is a corollary of the proposition that the basic purpose of the civil courts is to protect individual rights that it is not part of their function to enforce the public law of the community or to oversee the enforcement of the civil or criminal law, except as an incident in the course of protecting the rights of individuals whose rights have been, are being, or may be interfered with by reason of a breach of law.[26]

The second is that neither private individuals nor courts are equipped to make the judgment calls associated with the enforcement of public rights.[27] The proposition here is that the mechanical and inflexible implementation and enforcement of the law is contrary to the public interest (the Attorney-General's legal fundamentalism). The need for interest balancing means that the responsibility for making compliance and enforcement decisions should rest with an elected representative.[28] Justice McHugh said:

> The decision when and in what circumstances to enforce public law frequently calls for a fine judgment as to what the public interest truly requires. It is a decision that is arguably best made by the Attorney-General who must answer to the people, rather than by unelected judges expanding the doctrine of standing to overcome what they see as a failure of the political process to ensure that the law is enforced.[29]

Like the Attorney-General and McHugh J, I am instinctively wary of proposals to hand government powers requiring interest balancing to those who are unelected, be they judges, statutory office-holders, lawyers or other third parties. There must be a compelling justification to warrant departure from the principle that elected representatives should decide how competing interests are balanced in the exercise of public powers; in this case, concerning the civil enforcement of public rights.

This compelling justification emerges from the application of utilitarian principles to the rationale behind the traditional position. If a utilitarian frame is adopted, it follows that the fundamental purpose of civil courts should be to advance social wellbeing through the administration of justice. The fact that the traditional role of civil courts has been to protect individual rights should be irrelevant. Under a utilitarian mode of policy-making, all that matters is whether expanding the role of civil courts to oversee the enforcement of public rights will increase social wellbeing and is consistent with applicable constitutional constraints.

The notion that Attorneys-General are best placed to judge the public interest in the enforcement of public rights, and can be relied upon to pursue the public interest, is more compelling but still deficient. The force of the argument relies on a belief in the existence of altruistic Attorneys-General who are consistently motivated by a desire to maximise social wellbeing or a strong faith in classical western democratic theory in which accountability to the people, either directly or via the legislature, sufficiently constrains the scope for shirking by Attorneys-General.[30] Neither of these is particularly convincing.

Politicians may not always be the pathologically self-interested individuals that provide the basis for the more extreme rational actor theories of policy-making,[31] but, equally, there are rarely (if ever) pure altruists.[32] The checks and balances that are a feature of all democratic systems of government are the product of this reality. If there was confidence that the chief concern of government policy-makers was the maximisation of social welfare, neither the checks nor the balances would be necessary.

Similarly, the notion that the traditional mechanisms of democratic accountability in a Westminster parliamentary system are sufficient to prevent, or satisfactorily minimise the opportunities for, deviance from the public interest by Attorneys-General in enforcing the law is difficult to maintain, either theoretically or empirically.[33] It has long been recognised that the chief accountability mechanism in western democracy — popular elections — is a blunt tool that leaves scope for shirking on behalf of governments and elected representatives.[34] As Joseph Schumpeter wrote in 1943:

> [The reader] may have thought that the electorate *controls* as well as installs [their government]. But since electorates normally do not control their political leaders in any way except by refusing to re-elect them or the parliamentary majorities that support them, it seems well to reduce our ideas about this control.[35]

In addition to the inherent limitations of elections, the public's ability to exert influence over Attorneys-General in relation to the enforcement of public environmental rights is impeded by the relative absence of any direct and closely held interests in the issues protected by the rights. For example, a development that destroys a biodiverse forest might greatly upset some, but, for most people, there will be no resulting direct threat to their person, property or livelihood. The lack of such a threat reduces the incentive for citizens to hold their representatives accountable for the administration of relevant public rights.[36] Moreover, even where citizens' direct and closely held interests are threatened by the infringement of public environmental rights, almost by definition, they typically cannot exclude others from benefiting from any steps they take to pressure policy-makers to uphold the rights. There is a free-rider problem that disincentivises active citizenry. These obstacles are exacerbated by the information asymmetry that exists between government officials and the public, which makes it difficult for the less-informed citizens properly to oversee the enforcement of relevant rights.[37]

The obstacles to active citizen engagement leave the policy process susceptible to pressure from interest groups. Within political science, there is now almost universal acceptance that policy processes in western nations are biased.[38] Government decision-makers are not

solely, or even predominantly, driven by a desire to find the socially optimal course of action through a dispassionate weighing of the social costs and benefits of the available options. Equally, policy outputs and outcomes are rarely the result of competition between interest groups that have equality of access to government and equal capacity to prosecute their interests. Policy processes are skewed toward specific interests.[39] In environment policy, the extent of this skew can be significant because of the characteristics of the interests involved.

Regardless of the nature of the environmental issue, there will invariably be a relatively concentrated group of detractors whose financial or proprietary interests are threatened by the implementation of mandatory regulatory requirements aimed at improving the condition of the environment. In contrast, because of the public good nature of environmental laws and the dispersed nature of the associated benefits, there will often be no group of beneficiaries with the capacity to counter the lobbying pressure applied by detractors.[40] The imbalance in the strength of the opposing interests can lead to inefficiencies and injustices in the creation, implementation and enforcement of public environmental rights.[41]

The Attorney-General claims 'there is a real constraint upon ministerial decision-making' that stems from our system of representative and responsible government. In truth, there are a number of characteristics of Australia's Westminster system of government that heighten the risk of shirking on behalf of Attorneys-General and other relevant government officials. The overlap between the legislative and executive arms of government, the dominance of two parties (Liberal and Labor) and increasingly tight party discipline mean that Parliament provides the weakest of constraints on the exercise of executive power.[42] Further, unlike the case in the United Kingdom, Attorneys-General in Australia are, at best, 'quasi-political figures'.[43] They tend to be members of Cabinet and are intimately involved in the development and delivery of the government's policy agenda. The conflict of interest is obvious. As Gaudron, Gummow and Kirby JJ stated in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*:

> In Australia, both at federal and State levels, the Attorney-General is a minister in charge of a department administering numerous statutes, is likely to be a member of Cabinet and, at least at State level, may not be a lawyer. At the present day, it may be 'somewhat visionary' for citizens in this country to suppose that they may rely upon the grant of the Attorney-General's fiat for protection against ultra vires action of statutory bodies for the administration of which a ministerial colleague is responsible.[44]

Despite the conflict of interest, the traditional position on standing and the Attorney-General's argument rest on the assumption it will not cloud the Attorney-General's judgment on how to deal with infringements of public rights by their fellow Cabinet Ministers and other members of the executive for whom Cabinet Ministers are responsible.

Political theory, and the nature of Australia's political institutions, suggest there is likely to be an under-enforcement problem with public environmental rights. The empirical evidence supports this. The American legal scholar Dan Farber once remarked, '[i]n all areas of law, there are gaps between the "law on the books" and the "law in action", but in environmental law the gap is sometimes a chasm'.[45] While Farber is an American, and an academic to boot, there is evidence to suggest his comments are equally applicable in Australia. For example, in a 2014 study on administrative decision-making under the EPBC Act's EIAA regime, Macintosh and Waugh found almost 20 per cent of 'particular manner decisions' (that is, where an action does not require formal assessment and approval if it is carried out in a particular manner) contravened a statutory prohibition on the consideration of beneficial impacts.[46] The rate of apparent noncompliance was almost 50 per cent amongst decisions concerning urban development.

Despite the evidence and likelihood of noncompliance, to the best of my knowledge, judicial review proceedings have never been initiated by the Commonwealth Attorney-General against an administrative decision-maker in relation to noncompliance with statutory requirements in environmental legislation. There are also few instances where a Commonwealth Attorney-General has granted a fiat for another party to undertake judicial review proceedings in the same circumstances.[47] Not all matters need to be determined by a court, but the almost complete absence of any evidence of judicial oversight initiated by an Attorney-General suggests that there is a problem with leaving Attorneys-General to uphold public environmental rights.

The empirical evidence on the enforcement of public environmental rights by environmental regulators against private parties is similar. Over the period July 2000 to the end of 2015, only seven prosecutions were initiated against proponents for breaches of the EPBC Act's EIAA provisions.[48] Other enforcement actions taken against proponents for alleged breaches of the EIAA regime over this period included 14 enforceable undertakings, seven remedial determinations, three conservation agreements, one instance where approval conditions were amended following an alleged breach and nine infringement notices (issued in relation to five projects).[49] For a regulatory regime that applies nationwide, receives more than 350 project referrals per year and should capture almost all actions that could have a significant impact on the 'matters of national environmental significance' and the environment in a Commonwealth area, there appears to be a shortfall in enforcement activity.

The Australian National Audit Office (ANAO) has looked at compliance and enforcement activity under the EPBC Act on three occasions: in 2003, 2007 and 2014.[50] In all three reviews, significant deficiencies in compliance and enforcement were identified. The conclusions from the 2014 ANAO report, which looked at monitoring and enforcement of conditions of approval, provide a flavour of the issues:

> Overall, monitoring undertaken by the department for the controlled actions in the ANAO's sample during the period July 2010 to December 2013 has been insufficient to determine proponents' compliance with their controlled actions' conditions of approval. For most approved controlled actions, the department has not actively monitored proponent's compliance with their approval conditions, to effectively supplement the monitoring undertaken through the department's assessment/approval of management plans and compliance returns. As a consequence, [the department] has limited awareness of the progress of many approved controlled actions.[51]

Elsewhere, the ANAO states:

> The extent of the shortcomings in, and challenges facing, [the department's] regulation of approved controlled actions — particularly in relation to compliance monitoring — does not instil confidence that the environmental protection measures considered necessary as part of the approval of controlled actions have received sufficient oversight over an extended period of time.[52]

While we do not have a complete picture of the extent and nature of compliance and enforcement activities undertaken in relation to the EPBC Act since its commencement — primarily because a lack of transparency — the data available suggest there is a problem. The public environmental rights created under the EPBC Act appear to be inadequately enforced.

This is why a liberal approach to standing helps to strike a better balance in enforcement. There are inadequate incentives for the Attorney-General to oversee compliance with public environmental rights by administrative decision-makers; and inadequate resources and mixed incentives for environmental regulators to ensure compliance with environmental laws by proponents. The absence of appropriate incentives results in inadequate enforcement of public environmental rights by judicial and non-judicial means.

Liberal standing rules, and the environmental citizen suits they facilitate, are intended to provide a partial remedy to address the under-enforcement problem. They allow interested third parties to uphold public rights through litigation where conflicts of interest, interest group pressure and resource constraints dampen the willingness of Attorneys-General and other officials to do so by judicial and non-judicial means.[53]

Concerns about giving unelected third parties the ability to enforce public rights, which I share, are allayed by two factors: the powers of the courts to prevent abuses of judicial processes; and the ease with which the substantive effects of citizen suits can be undone by the government. If a citizen suit obstructs a project that promises to increase social wellbeing, the government can usually rapidly nullify the substantive effects of successful judicial review proceedings by remaking the impugned decision in accordance with the law. The same applies in relation to successful civil enforcement citizen suits: their substantive effects can be rapidly reversed if the government deems that the public interest warrants an alternative course of action.

If there was evidence that citizen suit activity materially hindered economic activity by routinely delaying and stopping projects, there would be grounds for questioning the merits of liberal standing rules. However, this evidence does not exist.[54] On the contrary: the evidence demonstrates citizen suits are rare and rarely cause material delays and stoppages, partially because of the ease with which governments can reverse their substantive effects.[55]

The quantity and nature of citizen suit activity under the EPBC Act raise questions about how effective citizen suits are in addressing the under-enforcement problem associated with public environmental rights. The problem here is not only the small number of citizen suits and relatively low success rates but also the fact that citizen suits tend to focus on high-profile disputes, leaving the more routine regulatory activities free of the elevated risk of judicial scrutiny. Herein lines one of the main outstanding empirical questions about citizen suit activity: to what extent do citizen suits help address the under-enforcement problem? Liberal standing rules and the citizen suits they facilitate are unlikely to be the whole answer to the under-enforcement problem, but there is nothing to suggest that the related costs are a material source of concern.

**Conclusion**

Reasonable minds can disagree about the merits of liberal standing rules. The ongoing debate about their advantages and disadvantages since the 1970s is a testament to this fact. What was so disappointing about the Attorney-General's speech was that he made little attempt to engage with the intellectual position of the supporters of liberal standing rules or the empirical evidence on the impacts of citizen suits. He also failed to look beyond the Abbott government's unsuccessful attempt to reduce the scope for citizen suit activity under the EPBC Act and, in doing so, gave a limited picture of the role of liberal standing rules in Australia's legal system. For example, given the challenges faced by the 45th Parliament of Australia over citizenship and s 44 of the *Constitution*, the Attorney-General might have made mention of the *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth), which gives any person the right to sue a member of Parliament who sits while disqualified under the *Constitution* in the High Court. Similarly, a more balanced consideration of the topic would have explored the logic for the inclusion, and operation, of the expanded standing provisions in the *Trade Practices Act 1974* (Cth), which are now contained in the *Competition and Consumer Act 2010* (Cth).

The Attorney-General and others use the phrase 'lawfare' to suggest that environmental citizen suits involve the use of the 'law and the institutions and processes of the law … to

conduct a kind of social, political or environmental warfare by other means'.[56] The same kind of emotive language could be used to describe the campaign to limit the scope for environmental citizen suits. There is a war on standing and environmental citizen suits which is being played out in several Australian jurisdictions at the behest of the mining and gas sectors. At present, this 'standing war' has entered a lull, mainly as a consequence of the end of the mining boom. However, the Attorney-General's speech suggests it still has a way to run.

**Endnotes**

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3 Matthew Goodwin, *Right Response: Understanding and Countering Populist Extremism in Europe* (Chatham House, 2011); Matthijs Rooduijn, 'The rise of the populist radical right in Western Europe' (2015) 14(1) *European View* 3; Thomas Greven, *The Rise of Right-Wing Populism in Europe and the United States: A Comparative Perspective* (Friedrich-Ebert-Stiftung, 2016).

4 See Senator George Brandis, 'Green Lawfare and Standing: The View from Within Government' (2017) 90 *AIAL Forum* 12.

5 Andrew Macintosh, Heather Roberts and Amy Constable, 'An Empirical Evaluation of Environmental Citizen Suits under the Federal *Environment Protection and Biodiversity Conservation Act 1999*' (2017) 39 *Sydney Law Review* 85.

6 Brandis, above n 4, 13.

7 [1903] 1 Ch 109.

8 [1978] AC 435, 477–8.

9 (1980) 146 CLR 493, 526 (emphasis added).

10 (2000) 200 CLR 591, 599 (emphasis added).

11 Brandis, above n 4.

12 This finding is consistent with the broader literature on environmental citizen suit activity. See, for example, Chris McGrath, 'Myth Drives Australian Government attack on standing and "environmental lawfare"' (2016) 33 *Environmental & Planning Law Journal* 3; Murray Wilcox, 'Loosening the Shackles' (1996) 13 *Environmental & Planning Law Journal* 151; Michael Barker, 'Standing to Sue in Public Interest Environmental Litigation: From *ACF v Commonwealth* to *Tasmanian Conservation Trust v Minister for Resources*' (1996) 13 *Environmental & Planning Law Journal* 186; Australian Law Reform Commission, *Beyond the Doorkeeper: Standing to Sue for Public Remedies*, Report No 78 (1996); Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27 (1985).

13 Brandis, above n 4, 16.

14 Ibid.

15 Ibid 15.

16 Jeremy Bentham, *A Fragment on Government* (Clarendon Press, 1891) 93.

17 Brandis, above n 4, 14.

18 Ibid.

19 Ibid.

20 Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan & Co, 1889) 181. See also Ivor Jennings, *The Law and the Constitution* (University of London Press, 1933); Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979).

21 Brandis, above n 4, 14.

22 Ibid.

23 Senator George Brandis, *Address at the Opening of the International Bar Association Annual Conference, Sydney, Australia, 8 October 2017* (Commonwealth of Australia, 2017).

24 Keith Werhan, 'Delegalizing Administrative Law' (1996) 2 *University of Illinois Law Review* 423; Jan Freigang, 'Is Responsive Regulation Compatible with the Rule of Law' (2002) 8(4) *European Public Law* 463.

25 I stress, as we did in the *Sydney Law* Review article, that the judiciary has shown an increased willingness to grant standing to environment groups (and others) under the 'person aggrieved' and common law 'special interest' tests over the past 30 years. The UK Supreme Court's decision in *Walton v Scottish Ministers* [2012] UKSC 44 suggests this trend is not confined to Australia. For analysis of this issue, see Matthew

Groves, 'The Evolution and Reform of Standing in Australian Administrative Law' (2016) 44 *Federal Law Review* 167. Due to these changes, particularly the evolution of the approach to the person aggrieved test, the repeal of s 487 of the EPBC Act may do very little to reduce citizen suit activity. As Groves argues, the test in s 487 effectively partially codifies the multi-factorial test from *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492. The point of the discussion on the 'traditional position' here is not to suggest the current judicial interpretation of the person aggrieved and special interest tests would necessarily preclude all or most environmental litigants. Rather, it is to ask whether, as a matter of government and judicial policy, environmental litigants should have standing to uphold public environmental rights.

26 *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 276.

27 Roger Cramton and Barry Boyer, 'Citizen Suits in the Environmental Field: Peril or Promise?' (1972) 2 *Ecology Law Quarterly* 407; Jonathan Adler, 'Stand or Deliver: Citizen Suits, Standing, and Environmental Protection' (2001) 12 *Duke Environmental Law & Policy Forum* 39; Matthew Zinn, 'Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits' (2002) 21 *Stanford Environmental Law Journal* 81.

28 *Stockport District Waterworks Co v Mayor of Manchester* (1862) 9 Jur NS 266, 267; Zinn, ibid.

29 *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 278.

30 Australian Law Reform Commission 1985, above n 12, 85–95; Australian Law Reform Commission 1996, above n 12.

31 For examples, see Anthony Downs, 'An Economic Theory of Political Action in a Democracy' (1957) 65 *Journal of Political Economy* 135; George Stigler, 'The Theory of Economic Regulation' (1971) 2 *Bell Journal of Economics and Management Science* 3; and James Buchanan and Gordon Tullock, 'Polluters' Profits and Political Response: Direct Controls versus Taxes' (1972) 65 *American Economic Review* 139.

32 John Quiggin, 'Egoistic Rationality and Public Choice: A Critical Review of Theory and Evidence' (1987) 63 *The Economic Record* 10; Donald Wittman, 'Why Democracies Produce Efficient Results' (1989) 97 *Journal of Political Economy* 1395.

33 Gerard Brennan, 'Courts, Democracy and the Law' (1991) 65 *Australian Law Journal* 32; Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992); Bernard Manin, Adam Przeworski and Susan Stokes, 'Elections and Representation' in Adam Przeworski, Susan Stokes and Bernard Manin (eds), *Democracy, Accountability and Representation* (Cambridge University Press, 1999) 29.

34 Ibid.

35 Joseph Schumpeter, *Capitalism, Socialism and Democracy* (Routledge, 2003) 272.

36 Anthony Downs, 'Up and Down with Ecology—The "Issue-Attention Cycle"' (1972) 28 *Public Interest* 38; Andrew Macintosh and Deb Wilkinson, 'Complexity Theory and the Constraints on Environmental Policymaking' (2016) 28 *Journal of Environmental Law* 65.

37 Xun Cao and Aseem Prakash, 'Trade Competition and Environmental Regulations: Domestic Political Constraints and Issue Visibility' (2012) 74 *Journal of Politics* 66; Macintosh and Wilkinson, ibid.

38 Ayres and Braithwaite above n 33; Macintosh and Wilkinson above n 36.

39 Martin Gilens and Benjamin Page, 'Testing Theories of American Politics: Elites, Interest Groups and Average Citizens' (2014) 12 *Perspectives on Politics* 564; Ayres and Braithwaite, above n 33.

40 Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press, 1965); James Wilson, *Political Organizations* (Basic Books, 1972); Macintosh and Wilkinson, above n 36.

41 Winston Harrington, 'Enforcement leverage when penalties are restricted' (1988) 37 *Journal of Public Economics* 29; Daniel Farber, 'Taking Slippage Seriously: Non-Compliance and Creative Compliance in Environmental Law' (1999) 23 *Harvard Environmental Law Review* 297; German Advisory Council on the Environment (GACE), *Access to Justice in Environmental Matters: The Crucial Role of Legal Standing for Non-governmental Organisations* (GACE, 2005); Jay Shimshack and Michael Ward, 'Regulator Reputation, Enforcement, and Environmental Compliance' (2005) 50 *Journal of Environmental Economics and Management* 519.

42 Elaine Thompson, *Australian Parliamentary Democracy after a Century: What Gains, What Losses?* (Commonwealth of Australia, 2000); Deidre McKeown, Rob Lundie and Greg Baker, *Crossing the Floor in the Federal Parliament 1950–August 2004* (Commonwealth of Australia, 2005); Terry Moran, 'The Challenges for the Public Service in Protecting Australia's Democracy in the Future', in John Wanna, Sam Vincent and Andrew Podger (eds), *With the Benefit of Hindsight: Valedictory Reflections from Departmental Secretaries, 2004–11* (ANU Press, 2012) 177; Brennan, above n 33.

43 Paul Craig, *Administrative Law* (Sweet & Maxwell, 2008) 811. See also Margaret McMurdo, 'Should Judges Speak Out?' (Paper presented at the Judicial Conference of Australia, Uluru, 2001) 3–5.

44 *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 262.

45 Farber, above n 41, 297.

46 Andrew Macintosh and Lauren Waugh, 'Compensatory Mitigation and Screening Rules in Environmental Impact Assessment' (2014) 49 *Environmental Impact Assessment Review* 1.

47 Australian Law Reform Commission 1985, above n 12, 85–95.

48 Macintosh, Roberts and Constable, above n 5.
49 Annual reports of the Commonwealth Department of the Environment, 2000–2016.
50 Commonwealth Auditor-General, *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999* (Commonwealth of Australia, 2003); Commonwealth Auditor-General, *The Conservation and Protection of National Threatened Species and Ecological Communities* (Commonwealth of Australia, 2007); Commonwealth Auditor-General, *Managing Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval* (Commonwealth of Australia, 2014).
51 Commonwealth Auditor-General 2014, ibid, 80.
52 Ibid 17.
53 Gunningham and Grabosky, *Smart Regulation: Designing Environmental Policy* (Clarendon Press, 1998); Joseph Sax, *Defending the Environment: A Strategy for Citizen Action* (Knopf, 1971); Joseph DiMento, 'Citizen Environmental Legislation in the States: An Overview' (1976) 53 *Journal of Urban Law* 413; David Hodas, 'Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority is Shared by the United States, the States, and Their Citizens?' (1995) 54 *Maryland Law Review* 1552; Peter Cane, 'Standing up for the Public' (1995) (Summer) *Public Law* 276; Chris Hilson and Ian Cram, 'Judicial Review and Environmental Law — Is There a Coherent View of Standing?' (196) 16 *Legal Studies* 1.
54 Macintosh, Roberts and Constable, above n 5.
55 McGrath, above n 12; Wilcox, above n 12; Barker, above n 12; ALRC 1996, above n 12; ALRC 1985, above n 12.
56 Charles Dunlap, 'Lawfare Today: A Perspective' (2008) 3 *Yale Journal of International Affairs* 146.

# LAWFARE AND THE ENEMY WITHIN OUR PUBLIC LAW

***Matthew Groves****

In the last few years, a change has occurred in the language used by some government Ministers and parliamentarians. Those people, who seem invariably to come from the conservative side of politics, have begun to describe those who commence legal proceedings against the decisions of public officials variously as terrorists or troublemakers engaging in 'lawfare' against decent society. In one sense, such language is not new. Politicians have long substituted extreme language for reasoned argument or considered policy analysis. But there is something different and more troubling about the growing tendency of government Ministers and other politicians to use the rhetoric of lawfare against those who challenge official decisions in the courts. This language and context in which it is used raise two key problems. One is an apparent belief that the legal process is the legitimate province of only some members of our society. The other is the lack of insight that we have come to expect from our politicians. The politicians who use the language of lawfare seem utterly unaware that similar criticisms can be made of much of their own behaviour. That lack of insight raises an uncomfortable question: who should we be worried about — our governments or the people who occasionally seek to call them to account in the courts? Before considering that question, it is useful to explain the recent history of lawfare and how it has become a favoured term of abuse for some politicians.

**What came before lawfare?**

While this article examines the use of lawfare in the context of environmental law, it is useful to note how that term arose in military law. Lawfare was preceded in military law by a related doctrine that gained a level of acceptance from governments but laid the framework for lawfare. The rise and progress of these doctrines in military law are useful to show how lawfare may unfold in usage outside military law.

The forerunner to lawfare in military law was the doctrine of civilianisation and was one that ran against the grain of several centuries of thinking within the military. The civilianisation of military law referred to the application of legal rights, remedies and standards from civilian society to the military. This osmosis of outside legal requirements into military life posed a fundamental challenge to military officials who long argued that the armed forces require autonomy, perhaps even separation, from the civilian legal system to maintain effective command and control over service members. This view arose from a belief that military law and operations may be undermined by outside influences such as civilian law. The argument was not that military justice should become a law unto itself; it was a more subtle one — that the military required a highly autonomous system of justice to be effective. Any recourse to external civilian courts and civilian processes of law by service members was decried for its potential to undermine or hamper the command structure, operational strength and military culture.

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The increasing influence of civilian legal principles and institutions became widely known as 'civilianisation'. That term was part of the visceral response from military commanders to perceived encroachments into their world by civilian authorities. A leading commentator of military law — Eugene Fidell — referred to civilianisation as 'the "C word," the mere utterance of which still makes the occasional senior military lawyer see red'.[1] It is useful to note, however, that similar themes were long articulated before they were collected under the term 'civilianisation'.

The classic scholarly expression of this view was made by Huntington in *The Soldier and the State*.[2] Huntington spoke in firm opposition to the impending tide of change to the military and its internal justice system and argued in favour of a clear division of military and civilian life. More controversially, he also divided the two according to political ideals. The military was conservative, realistic and pragmatic. The civilian approach was a more liberal and idealistic one. The undertone of this division was one of political and culture separation, which Huntington concluded could and should remain. He did not advocate a total separation of the two, only that the influence of civilian authorities should be limited to setting broad strategic policies for the military. Civilian authorities should thus take a relatively hands-off approach, leaving the military to determine the best means to achieve those objectives. The almost immediate response to the admittedly political approach of Huntington was, perhaps fittingly for the early 1960s, from a sociologist. Janowitz's *The Professional Soldier* argued that the cultural gap between military and civilian life could and should be narrowed. His thesis was almost diametrically opposite to Huntington's, arguing that greater interaction between the two would improve rather than hamper military effectiveness.[3] These two views are intractable, partly because each involves an understandable value judgment and also because neither is objectively right or wrong.

The clash of ideals identified by both Huntington and Janowitz both predated and influenced the subsequent rise of the concept of civilianisation. In simple terms, civilianisation means the incorporation of civilian values into military life. Any attempt to move beyond that apparently simple definition requires an important qualification. Civilianisation presumes that the armed forces are subject to civilian control. There are many nations in which the armed forces may exert considerable control over governments, but that is not the case at present in most western nations. But a lack of overt military influence over civilian government does not itself explain how, or even if, the civilian government controls the military. Some scholars have argued that these references to the civilian control of the military are rhetorical in part because no coherent definition or body of principles to explain the hallmarks of civilian control of the military has ever really emerged.[4] I take civilian control to mean control of key strategic decisions, particularly the power to declare and settle war, and also the power to hire and fire. So long as civilian governments maintain ultimate control over both then, in my view, they retain control over their military. A more textured explanation is that civilian control is marked by the fact that 'the ends of government policy are ... set by civilians; the military is limited to decisions about means', and also that civilian governments determine precisely where 'the line between ends and means (and hence civilian and military responsibility) is to be drawn'.[5]

The civilisation of the military and military justice is an example of civilian control of the military because it is the incorporation of the norms and institutions of civilian society into the military. This typically occurs when an existing civilian legal or regulatory regime is extended to the military. We all know the familiar ones. They include anti-discrimination legislation, freedom of information legislation, the right to complain to an independent Ombudsman about unjust or unfair administrative action and the more mundane procedural ones such as occupational health and safety requirements. There have been individual cases where soldiers have used various rights from civilian law to spark significant changes to policies and practices within the armed forces. In the UK, for example, the longstanding policy that

saw pregnant soldiers face automatic discharge was overturned in the face of repeated challenges launched in discrimination laws.[6]

It has also taken the form of much greater parliamentary scrutiny of the armed forces.[7] Such review introduces a systemic form of political oversight and accountability that in turn can tacitly compel armed forces to undertake significant reform. A further example that has arisen in Australia is the series of constitutional challenges to our military justice system. Earlier cases explored the extent to which military disciplinary tribunals could diverge from the requirements of ch III of the *Australian Constitution*. None of these cases succeeded,[8] but these repeated constitutional challenges made clear that members of the armed forces could challenge the entire structure of the disciplinary system to which they were subject. They eventually led to fundamental reforms to military justice that, in turn, collapsed in 2012 when a soldier succeeded in a claim that the (then) new Australian Military Court was invalid on constitutional grounds.[9]

The use of external legal rights long associated with civilian law is one thing; the introduction of the norms and values of those rights is another. The incorporation of civilian legal norms is a much more subtle process that occurs through either the exposure of military personnel to civilian legal culture or the introduction of civilian lawyers into the military justice system. It is easy to underestimate the impact that civilian legal culture can have on closed environments such as the military. Lawyers carry and transmit a system of professional values that are fiercely independent. This independence is antithetical to the command model of military decision-making, which does not countenance disagreement or dissent.[10] The other important effect of civilian legal norms is that they tend to overwhelm the values of the system into which they are introduced and thereby effect cultural change from within.

**What came after civilianisation: lawfare**

As military law became infused with more civilian legal influences, military commanders and politicians began to perceive the use of those laws in a different way. Civilian law was slowly viewed as not something used by those *within* the military but something used *against* the military. This shift is now known as 'lawfare'. The precise origins of this term are obscure, although central themes of lawfare were raised long before the term was coined. In 1950, for example, the Supreme Court of the United States declined to hear a petition for habeas corpus sought by enemy aliens who were captured and imprisoned, and it did so using language that mirrors lawfare. The Supreme Court felt any use of habeas corpus use during wartime could only damage the military, explaining:

> It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.[11]

These concerns foreshadow the more modern concerns of civilianisation, lawfare and encirclement of military commanders. Those various expressions highlight a common concern that increased legal intervention in modern military life may distract and weaken the military and also provide a new weapon to the enemy.

Waters has traced the early use of lawfare to Australia, of all places, in the 1970s.[12] Use of the term in the military context in more recent times is generally traced to Charles Dunlap. Dunlap first applied the term in 2001 when he explained that lawfare was 'use of law as a weapon of war'.[13] This conception of lawfare saw the use of law, mainly by enemy forces, as a negative and destructive force. A similar conception of law entered and remains in the official parlance of the United States. That country's National Defense Strategy includes

potential legal challenges as one of the many issues that must be monitored. It cautions that potential challenges to the United States 'could come not only in the obvious forms we see today but also in less traditional forms of influence such as manipulating global opinion using mass communications venues and exploiting international commitments and legal avenues'.[14]

Dunlap has since taken a more textured approach in which he conceives of lawfare as a 'strategy of using — or misusing — law as a substitute for traditional military means to achieve an operational objective'.[15] This more refined approach enables lawfare to be seen as one of the supplementary weapons, available to both 'us' and 'the enemy'. Dunlap more recently argued that this more neutral approach was not a new gloss upon lawfare because:

> the term was always intended to be ideologically neutral, that is, harking back to the original characterization of lawfare as simply another kind of weapon, one that is produced, metaphorically speaking, by beating law books into swords. Although the analogy is imperfect, the point is that a weapon can be used for good or bad purposes, depending upon the mindset of those who wield it. Much the same can be said about the law.[16]

A cynical reply might be that the apparently neutral, even accepting, use of the law and its remedies in a strategic manner is a recognition by western liberal democracies that the early use of lawfare by their adversaries was something they should adopt. That was only possible if the legitimacy of lawfare was, like so many effective weapons, accepted. Dunlap has conceded that lawfare must be available to one's enemies and mounted a defence of that possibility that would do Janowitz proud. The basic argument is as follows:

> To some critics, lawfare's expectation that 'bad' people will sometimes be able to use — or abuse — the law to further nefarious purposes is offensive, as it is to them tantamount to saying that there is something inherently 'bad' about the law. This is hardly true. Just because the law is available, for example, to the most evil of criminals who may avail themselves of its protections from time to time does not mean that the law acquires the attributes of the criminal. Nor does it mean, incidentally, that those lawyers who assist such persons in securing their legal rights necessarily share their malevolent intent.
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> It merely means that law — at least ideally — has established norms that, on balance, best serve society as a whole even when it has the effect of protecting people many find odious and even dangerous. There is also no question that society may pay a harsh price in certain instances for its adherence to law. Overall, however, it is indisputable that the public enjoys enormous benefits from the social order law creates — notwithstanding that occasionally evildoers determined to disrupt that social order are among those who profit from the rights and liberties the law produces and protects.[17]

Dunlap provides the obvious examples of recent times in which the United States government has declared the Taliban and related bodies to be terrorist organisations as a means to restrict their access to finance and other support. This is not unlike a turbocharged version of the remedies that have long been used against organised crime.

The more refined and neutral definition of lawfare arguably marks a triumph of civilianisation by its tacit admission that civilian values can and should be marshalled by the military. At the same time, however, it conceives of the law as a weapon. The suggestion that the military might be legally encircled has been voiced by many in recent times, particularly senior military officials who complain that they are threatened and hampered by both the increased use of the law against them and the increasing requirements of compliance with the law that are foisted upon them.[18] Professor Waters has offered a different and quite nuanced approach with his metaphor of encirclement. An early expression of this was used by the English Chief of General Staff (Admiral Lord Boyce), who argued that the military was not simply encircled but that it was 'under legal siege'. He explained, when speaking in the House of Lords:

> [The forces] are being pushed by people not schooled in operations but only in political correctness. They are being pushed to a time when they will fail in an operation because the commanding officer's authority and his command chain has been compromised with tortuous rules not relevant to fighting and where his instinct to be daring and innovative is being buried under the threat of liabilities and hounded out by those who have no concept of what is required to fight and win.[19]

Such statements are typical of the more recent opposition from the military to the increased recourse of enemies, and its own members, to the law. Waters has argued that this problem is not a recent one and that any suggestions of legal encirclement of the military are misleading. He argues that military law has long evolved with reference to civilian law and other civilian influences. A separate but logically related point Waters makes is that international humanitarian law, which so often now troubles military commanders, is simply the most recent example of this influence.[20] Waters also maintains that the civilian legal system continues to maintain a deferential attitude to military operations.[21] In other words, lawfare is largely sporadic and of limited influence.

In his more recent analysis of the issue, Waters argued that the apparent legal encirclement of the military in western nations was more myth than reality.[22] He attributes much of this failure to widespread misconceptions within and outside the military and also a failure of military commanders properly to engage with the issue (and, more controversially, some misinformation on the part of senior commanders about the possible impact of the International Criminal Court). Waters ultimately questions whether lawfare or the increasing civilianisation through legal means poses a significant threat to the military, suggesting instead that the military organisations of liberal democracies are more effective fighting forces than comparable organisations of differently constituted nations. It follows that encirclement, if it exists, is not a true problem because greater civilian oversight of or involvement in the military ensures both compliance with legal norms and makes for a better fighting force.

The jury is still out on this contentious claim. Is it an admission of defeat from a realist or a coherent position? I am unsure, although Waters does not contend that increased civilian oversight and involvement is not without problems. The reason is the banal one of bureaucracy. As the United States National Defense Strategy cautions, 'We must guard against increasing organizational complexity leading to redundancy, gaps, or overly bureaucratic decision-making processes'.[23] It would be interesting to hear the view of Waters and other academics about this Weberian warning about the impact of the potentially stifling bureaucracy which accompanies greater civilian oversight. The useful point would not be simply their perspective from their knowledge of military law but also their own experience as university academics. No academic who drew upon their own experience of the increasingly horrendous bureaucracy that characterises university life would disagree that the increased paperwork that accompanies external oversight is a uniquely destructive force.

The rise of international military operations and international legal influences is not all a one-way phenomenon. Domestic legal remedies are now used by members of the armed forces, their families and foreign nationals and combatants. These changes are well illustrated by the evolution of legal principles in cases stemming from British involvement in Iraq. Prior to the intervention of British forces in Iraq, there was no suggestion that English human rights law might apply to British military operations conducted in other countries. The scope of human rights law was clarified by the UK Supreme Court in *R (Smith) v Oxfordshire Assistance Deputy Coroner*[24] (the *Catherine Smith* case), where the British government acknowledged the growing extraterritorial reach of human rights law. The government conceded that an inquest should be held on the death of a soldier due to heatstroke and that the inquest should comply with art 2 of the *European Convention on Human Rights* (ECHR) as required by English law. That did not mark a great leap of principle because the soldier

had died while on base and aspects of British law had long applied to British forces serving at British bases in other countries.

The novel element of the *Catherine Smith* case was the response of the Supreme Court to a question posed by both parties: would art 2 have applied if the soldier had died *away* from his military base? A majority of the Court held that the EHCR, including art 2, would not have applied. Lord Phillips doubted that an inquest was the right vehicle to investigate cause of deaths in military operation because the traditional role of a coroner could easily move beyond its traditional role into considering wider military operations. Lord Phillips accepted that a coroner could 'properly conclude' a soldier died because his flak jacket was pierced by a sniper's bullet but was clearly uncomfortable that the same coroner might then investigate whether 'more effective flack jackets could and should have been supplied by the Ministry of Defence'.[25]

The *Catherine Smith* case rested on distinctions between both the reach of human rights law over military operations and the expertise of courts and investigative bodies such as coroners to examine the lawfulness, even competence, of military operations. Those distinctions were also supported by clear authority in English and European law, most of which was then swept away by the European Court of Human Rights in *Al-Skeini v UK*[26] (*Al-Skeini*). The Court comprehensively restated the general principles governing the reach of both the ECHR and the power of domestic and European courts to enforce the requirements of the ECHR. The Court held that art 1 of the ECHR applied where 'as a consequence of lawful or unlawful military action' a member state exercised 'effective military control of an area' outside its own territory.[27] This aspect of *Al-Skeini* does not sit easily with earlier European cases,[28] but the Court made clear that the assumption and exercise by British and American forces of some of the public powers normally exercised by a domestic government established a 'jurisdictional link' between the UK and Iraqi people killed during security operations conducted by its soldiers.[29]

The ruling of the European Court of Human Rights required a sudden refinement of domestic law by the UK Supreme Court in *Smith v Ministry of Defence*[30] (the *Susan Smith* case). The Supreme Court felt obliged to depart from its still recent ruling in the *Catherine Smith* case and held that the requirements of art 2 extended to protect members of the armed forces when outside British territory, even if they were in another territory and outside a British base. While the Supreme Court struggled to draw coherent rules from *Al-Skeini*, Lord Hope noted that the European Court had rejected the idea that ECHR rights were an indivisible package that could not be 'divided and tailored'. He explained that the 'concept of dividing and tailoring goes hand in hand with the principle that extraterritorial jurisdiction can exist whenever a state through its agents exercises authority and control over *an individual*'.[31]

This short sketch of cases arising from British military in Iraq demonstrates several points. First, it shows that the legal obligations of countries and their armed forces in a military operation can change over the very life of that operation. When British involvement in Iraq began in 2003, the European Court of Human Rights had confirmed a restrictive approach to the jurisdiction of the ECHR only two years earlier. That approach was changed by a case arising from British military action in Iraq and thus enabled people whose claims were precluded at the early stages of the British military action to commence proceedings many years later. But there were consequences.[32]

The armed forces of the UK served in Iraq for six years — from 2003 to 2009. Six years after that work had ended, Leggatt LJ noted in *Al-Saadoon v Secretary of State for Defence*[33] that 'One of the legacies of the Iraq war is litigation … Although it is some six years since British forces completed their withdrawal from Iraq, the litigation is not abating'.[34] The sense of despair of Leggatt LJ was understandable because he was faced with several complex

questions of law that were raised by the parties at the early stages of legal proceedings that clearly had many years to go.[35] Lord Justice Leggatt was surely mindful that previous comparable cases suggested the ones before him would spend the next several years inching their way through appeal processes in British and then European courts. The question was not whether the legal proceedings would endure longer than the military operations they arose from but, instead, how *much* longer those proceedings would be than the war from which they arose.

Lord Justice Leggatt paused to consider the scale of the wider battle unfolding in the English courts. He noted that 190 such claims in public law had been commenced by the start of 2014, but over 875 claims had been added by the time of his judgment in early 2015. Lord Justice Leggatt also noted that the parties informed the Court they expected *at least* another 165 claims to be added. The cases were not only in public law.[36] Lord Justice Leggatt noted that over 1000 claims in private law had also been commenced and only 294 of those had been settled.[37] That left the astonishing (and growing) number of over 700 extremely complex civil claims about the conduct of English forces during foreign military operations to be determined by English courts.[38] Such a large amount of litigation in both private and public law causes of action make clear that the greatest threat of litigation to armed forces was not, as had long been feared by those who opposed the increased role of domestic and international human rights laws in military life, from members of those forces but instead from foreign nationals (whether civilians or even combatants).

When this claim reached the UK Supreme Court, public and political opinion had clearly hardened against this explosion of litigation. That shift was evidenced by an influential report *Clearing the Fog of War*,[39] published by the English think tank Policy Exchange. That report argued that the British armed forces were 'now thoroughly entangled in the net of human rights law' which had caused them to 'suffer courtroom defeat after courtroom defeat in London and Strasbourg'.[40] Such arguments represented a strong endorsement of the central themes of lawfare but hinted that the real enemy within that doctrine might be the judges and courts rather than the litigants who invoked their jurisdiction.[41] The shift in public opinion was also surely due to a regulatory investigation of some of the law firms that handled claims of foreign nationals against the UK armed forces. A lawyer in one firm was struck off for professional misconduct,[42] while lawyers in another firm survived similar charges but only after a lengthy and costly investigation.[43] The UK Supreme Court did not engage those wider arguments when it upheld the decision of Leggatt LJ, holding that UK military policies governing activities in Iraq provided soldiers with authority for many of the actions for which they had since been sued.[44]

The increasing media and political controversy surrounding actions against the military in the UK arguably divert attention from perhaps the most important aspect of the underlying principles of these cases. The chief beneficiaries of legal actions against the military have been former soldiers and their families. Both *Smith* cases were brought by the families of British soldiers who had died during service. Susan Smith succeeded where Catherine Smith had failed because, in the time between their claims, other grieving relatives had gained a ruling from the European Court of Human Rights that greatly expanded the reach of the ECHR. That extension has been the subject of vigorous academic criticism in the UK,[45] but we should not overlook the valuable protection it provides to injured and deceased soldiers and their grieving families.

**Lawfare in the United States**

While the focus on Britain has largely been on the legal consequences of the involvement of the military forces of that nation in the Middle East in recent years, those same operations have raised quite different issues of public policy in the United States. One has been the

blurring of the public/private divide that has been most acute in the United States, due largely to that nation's almost singular use of private contractors to perform many functions for military operations.[46] Another has been the different forms of hostility that US military forces have increasingly faced in their operations. The Deputy Secretary of the US Defense Department, Mr Robert Work, recently explained that the increasingly fragmented nature of enemy forces had seen US military forces in Iraq and Afghanistan operating in 'a laboratory for irregular warfare'.[47] The Deputy Secretary explained that each side had engaged in its own experiments in those laboratories. Those fighting against US forces had begun to engage in what he labelled as 'hybrid warfare', which he defined as 'combat operations characterized by the simultaneous and adaptive employment of a complex combination of conventional weapons, irregular warfare, terrorism and criminal behaviour'.[48]

Secretary Work also argued that future military operations by the US would rely increasingly on technology, which meant it was crucial for US military forces to be able to attract the right 'talent'. He noted that this task was made more difficult now that US military forces comprised entirely volunteers because, from the view of many, a possible career in the military was considered by prospective recruits on a very pragmatic basis. That assessment accords with recent research that has tracked the declining role of 'public service motivation' as a reason for people to join the military.[49] In simple terms, the reason is that self-interest now exerts at least as much influence over potential recruits as do principles such as a sense of honour or family tradition. These trends are clearly not restricted to the US armed forces. All armed forces are becoming increasingly dependent on technology and therefore require skilled recruits. The reliance of armed forces on volunteer recruits is also clearly growing. A more just form of military justice can provide a vital element to the future needs of military forces because people are more likely to join and remain in the armed forces if they believe that their basic rights will be preserved and respected during their service. The prestige of military service will also be more attractive if recruits can accept that a force acts lawfully and in accordance with the fundamental values of the society it seeks to serve and protect.

The twin considerations raised by Secretary Work provide insight into the statements made by the General Counsel of the US Department of Defense, Mr Stephen Preston. Preston gave a speech that was at pains to stress the legal framework devised by the US government since the attacks of 11 September 2001.[50] He reminded his audience that the US government had relied during this period on a combination of domestic and international legal authority because just days after the 2001 attacks the US Congress enacted legislation which authorised the use of force by US armed forces against those deemed responsible for the attacks.[51] The legislation moved with unprecedented speed — enacted by Congress only three days after the attacks and signed into law by the President just four days later. That haste should not obscure the fact that, even in dire times, the need for a secure legal foundation for military action was thought important.

Preston also noted that the US government had refined its domestic statutes to authorise the use of military force in the years after the attacks of 2001 and expected that this would continue for as long as military action was required. This emphasis on the importance of the legal foundation for military action was hardly surprising given that Preston was speaking to the annual meeting of the American Society of International Law. At the same time, however, his detailed explanation of the domestic legal basis of military action to an audience of international lawyers highlights how domestic and international legal considerations in military life are no longer separate. The blurring of domestic and international law also drove Preston's desire to offer a clear legal foundation for military action. He explained that the continued questioning within the US of the legality of its military operations outside the US greatly disturbed him and that he and other military officials were anxious to ensure the American public and its armed forces that US forces acted under and according to law.

Preston accepted that such issues should be explained rather than assumed by government and military officials because:

> Transparency to the extent possible in matters of law and national security is sound policy and just plain good government … it strengthens our democracy and promotes accountability. Moreover, from the perspective of a government lawyer, transparency, including clarity in articulating the legal bases for US military operations, is essential to ensure the lawfulness of our government's actions and to explain the legal framework on which we rely to the American public and our partners abroad. Finally, I firmly believe transparency is important to help inoculate, against legal exposure or misguided recriminations, the fine men and women the government puts at risk in order to defend our country.[52]

This revealing passage demonstrates how far military justice has come and also where it is headed. The journey of military justice has seen it move from suspicion and the outright rejection of external legal influences, whether domestic or international, to an open acceptance that military forces can and should accommodate those legal requirements. Preston's reference to 'legal exposure and misguided recriminations' draws attention to another direction of military justice — potential legal liability. Legal liability is now an inevitable part of the greater attention to rights and other requirements of law by the military because rights are always accompanied by responsibilities. The barrage of legal actions currently on foot in England is one example. If this is one consequence of the wider legal principles that have provided greater legal protections to members of the armed forces and their families, many might think it is a price worth paying.

**The failure of lawfare to move beyond military claims in the United Kingdom**

The experiences of the UK and the US reveal a steady rise in the use of litigation against armed forces, but the trenchant criticisms of those who make legal claims against governments, and the lawyers they use, do not seem to have spread to other areas of the law. An example relevant to the Australian experience is the muted reception given to an important recent extension of the standing principles in environmental cases, which occurred in the UK at the time lawfare became a controversial political issue. That change occurred with the Supreme Court's decision in *Walton v Scottish Ministers*[53] (*Walton*), which was the last in a long line of legal challenges launched by Mr Walton against a proposed highway in Scotland. The question for the Supreme Court was whether Mr Walton had a sufficient interest to commence his claim or was a mere 'busybody' without a sufficient interest in or connection to the claim.[54] The Supreme Court held that Walton had standing. It also simplified and relaxed public interest standing.

Lord Reed, with whom Lords Carnwath, Kerr and Dyson agreed, accepted that in 'many contexts' litigants must establish that they had 'some particular interest', but he reasoned this was not always the case.[55] He explained:

> there may be cases in which any individual, *simply as a citizen*, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no-one was able to bring proceedings to challenge it.[56]

This reasoning locates an expanded approach standing firmly within rule of law principles, which make clear that the ability of people to question official decisions enables courts to exercise their proper supervisory jurisdiction over the executive. The UK approach is ostensibly one of common law but reflects a long line of modern cases in which the courts have stressed the importance of access to the courts. This has led UK courts to strike down various laws and rules that impede access to the courts, such as significant increases in court fees[57] or rules that prevent prisoners from contacting a court to institute legal proceedings.[58] A liberal approach to standing is consistent with doctrinal principles that

conceive a right of access to the courts as a fundamental constitutional right.[59] Put another way, there is little point in judges straining to preserve a right of access to the courts if they also restrict that access by a restrictive approach to common law doctrines such as standing.

A similar strain of reasoning is evident in modern Australian administrative law, which has seen the affirmation of the role of the courts and the decimation of privative clauses. The central point of those cases is clear. The *Australian Constitution* contains an 'entrenched minimum provision of supervisory judicial review' that the federal Parliament cannot remove or restrict by ordinary legislation.[60] This protected jurisdiction also precludes procedural restrictions that may have a similar substantive effect.[61] The same essential reasoning now protects supervisory review by state Supreme Courts.[62] As with the UK decisions, these cases place considerable importance on the right of access to the courts,[63] although Australian courts have not yet explored the extent to which public law standing could or should evolve to reflect that right.[64]

Another important aspect of *Walton* was its clear acceptance of the public interest in environmental litigation. Lord Hope accepted that claimants in environmental cases could often satisfy traditional standing rules because they were directly or clearly affected by a decision. But he also accepted that many decisions affected no-one in particular. Lord Hope reasoned that these cases raised questions of public importance, which should not be stymied simply because they affected the world at large rather than any particular person. He used the example of 'the risk a route used by an osprey as it moves to and from a favourite fishing loch will be impeded by the proposed erection across it of a cluster of wind turbines':

> Does the fact that this proposal cannot reasonably be said to affect any individual's property rights or interests mean that it is not open to an individual to challenge the proposed development on this ground? That would seem to be contrary to the purpose of environmental law, which proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone. The osprey has no means of taking that step on its own behalf, any more than any other wild creature. If its interests are to be protected someone has to be allowed to speak up on its behalf.[65]

This reasoning is notable on several counts. First, it makes clear that environmental law is intended to protect the natural environment and that the virtue of this is self-evident.[66] Secondly, Lord Hope made clear that environmental decisions should be subject to discrete, more open standing principles. Thirdly, this approach sweeps aside the more technical and detailed Australian approach that has developed in the wake of the multi-factorial approach to standing in environmental cases that began with *North Coast Environmental Council Inc v Minister for Resources*[67] (*North Coast*). Fourthly, the decision of the Supreme Court was not greeted with the outrage or political theatre that typically attends such cases in Australia. Neither Mr Walton nor the Supreme Court were vilified in the media or the Parliament.

Another important aspect of *Walton* was its guidance on precisely who should speak on behalf of the osprey or any other environmental cause. That point was important because Mr Walton had conducted a long and energetic campaign, sometimes as an individual and sometimes as a member of public interest bodies. Lord Hope explained that the loosened approach to standing endorsed by the Supreme Court was not a licence for litigation just because a person objected to a development or proposal. Individuals would normally have to demonstrate an interest or concern. The reason, he explained, was:

> There is, after all, no shortage of well-informed bodies that are equipped to raise issues of this kind … It would normally be to bodies of that kind that one would look if there were good grounds for objection. But it is well-known they do not have the resources to object to every development that might have adverse consequences for the environment. So there has to be some room for individuals who are sufficiently concerned, and sufficiently well-informed, to do this too. It will be for the court to judge in each case whether these requirements are satisfied.[68]

This reasoning confirms the legitimacy of public interest groups as advocates for environmental protection, hinting that such groups normally may be the preferred or expected litigants, although suitable individuals may step into the breech when a suitable group cannot do so. This judicial approach is antithetical to any use of the rhetoric of lawfare against public interest groups who commence environmental litigation.

**The subtle rise of lawfare in conservative Australian politics**

How does the approach of and reception to *Walton* compare with the Australian experience? The early signs were not promising. The conservative government of Queensland, headed by the Premier Campbell Newman, made several reforms designed to minimise the rights of those seeking to challenge environmental decisions and accompanied those changes with strident attacks on anyone who dared question its decisions.[69] A notable instance was the removal of rights to object to development proposals, which was moved as an amendment without notice and late at night during a parliamentary sitting.[70] That change was one of several changes designed to address the supposed lawfare by environmental groups, although it revealed an obvious paradox. The politicians who complained of green lawfare railed against the apparently sly and shifty use of processes by environmentalists and like people. Yet those same politicians moved to change the law without notice and in a manner plainly designed to shield their proposals from effective public scrutiny.

The firebrand rhetoric of lawfare is difficult to contain, and subsequent events in Queensland suggested that little effort was made to do so. The most notorious instance came when Premier Newman criticised lawyers acting for members of motorcycle gangs, who had been the subject of draconian legislation enacted by the government, claiming they were 'part of the criminal gang machine'.[71] That statement was strongly condemned by the President of the Queensland Bar Association as 'misconceived, unfair and objectionable' because defence lawyers 'play an important and integral role in the administration of justice by representing persons'. He added that 'The *machine* of which lawyers are a part is the justice system'.[72] The sequel to those remarks came in the form of a defamation action commenced against the Premier that, according to media reports, led to a huge payment of damages from the government.[73] The payment was reported to have been greater than necessary because the Premier refused publicly to apologise for his remarks.[74]

This incident poses uncomfortable questions for the Premier and others who so quickly embraced the rhetoric of lawfare. Who might the public think poorly about: lawyers who represent clients according to the cab rank and other legal ethical principles, or politicians who rely on the public purse to pay for their mistakes? If the Premier settled the defamation claim against him, and at an enormous sum, surely the defence was hopeless. Should the rhetoric of lawfare therefore be marshalled against the Premier's lawyers for maintaining a hopeless defence? If so, who else? Where does it stop? In my view, the way to avoid such uncomfortable questions arising from the wider use of the language of lawfare is to ensure it never starts.

A similar example arose from recent remarks of the Minister for Immigration and Border Protection, who criticised lawyers acting for applicants for protection visas and claimed they were 'unAustralian'.[75] Interesting questions may be raised about the basis upon which government Ministers are able to declare what is and is not Australian, although three more immediate comments arise from that incident. The first is that such attacks on lawyers represent a version of lawfare, by using inflamed rhetoric to criticise others and suggesting that the use of the legal system by a select part of society is somehow wrong. Secondly, the Minister's comments attracted widespread criticism, including from his Cabinet colleague the Attorney-General.[76] The Attorney-General's response was laudable but invites questions about why his affirmation of the important role that an independent judiciary and legal

profession each play in a modern plural democracy should not extend to environmental groups. A third notable point is the obvious hypocrisy of the comments from the Minister for Immigration and Border Protection. He made no such accusatory statements while he was in opposition and observed many high-profile instances in which the federal Labor government had suffered reversals of its migration policy in the courts. Observers could reasonably ask why the current Minister was not moved to offer the condemnations in opposition that he has made while in government. The answer, of course, is politics. Once viewed from that perspective, rhetorical criticisms of lawyers and litigants weaken greatly.

The inflammatory rhetoric used by various government Ministers contrasts sharply with that of its opponents who supposedly engage in lawfare. A useful example is that of the members of Greenpeace Australia in a strategic document released in 2011.[77] That document made clear that the group would seek, and invite others, to 'disrupt and delay' major new coal mining projects by mounting suitable legal challenges. The strategy explained:

> We will lodge legal challenges to the approval of all of the major new coal ports, as well as key rail links (where possible), the mega-mines and several other mines chosen for strategic campaign purposes. Legal challenges will draw on a range of arguments relating to local impacts on wetlands, endangered species, aquifers and the World Heritage Listed Great Barrier Reef Marine Park, as well as global climate reports. Only legitimate arguable cases will be run. Legal outreach will be conducted to support landowners who are opposing resumption of their land.[78]

There are several notable features of this passage. First, it proposes the use only of 'legitimate arguable' cases. Such criteria make it difficult, if not impossible, to label those who use this strategy as vigilantes or people misusing the legal system. Secondly, the strategy clearly anticipates the use of existing remedies and rights. In other words, courts would not be invited to devise radical or activist solutions. Thirdly, the strategy draws attention to the position of landowners facing compulsory acquisition in the course of development processes. The many critics of environmental litigation have remained strangely silent on the involvement of landowners in many actions against governments. That silence invites questions as to why environmental groups are singled out and labelled as 'the enemy'.

**Lawfare and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)**

The standing provisions in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) have recently become a magnet for political controversy, but that was not always the case. Section 475 of the EPBC Act was reformed to ease, perhaps even remove, standing requirements for public interest groups. The section enables the relevant Minister or individuals to obtain remedies (in the form of injunctions) for any contravention of the EPBC Act, although according to conventional standing rules.[79] Individual members of environmental groups, or a group itself, can also seek that remedy but only if they satisfy the standing requirements governing individuals[80] or if they have 'engaged in a series of activities for the protection or conservation of, or research into, the environment' in the two years before the decision or conduct against which relief is sought.[81] This 'two-year activity' basis for standing effectively codifies and simplifies the multi-factorial approach devised by Sackville J in *North Coast*,[82] although with the important practical advantage of sweeping aside many distinctions between individual members of a group and the activities of the group.

Organisations may establish standing in their own right if they are incorporated or established in Australia or elsewhere and their interests would somehow be affected by the conduct or decision under challenge,[83] or the subject matter of the relevant decision relates to conduct or proposed conduct *and* in the previous two years the organisation's 'objects or

purposes included the protection or conservation of, or research into, the environment' *and* the organisation engaged 'in a series of activities related to' those objects or purposes in the previous two years.[84] These detailed standing rules refine and simplify the approach of *North Coast* by essentially enabling one of the many factors held in that case to be relevant to standing to count strongly, perhaps even conclusively, to standing under the EPBC Act. The standing requirements of the EPBC Act are further amended by an express amendment to the standing requirements of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act). That amendment provides that individuals have standing to commence a challenge under the EPBC Act if they have 'engaged in a series of activities in Australia or an external Territory for protection or conservation of, or research into, the environment' at any time in the two years before the decision or action sought to be challenged.[85] Another section confers standing on associations and organisations that meet those requirements.[86] While these various requirements clearly amend and largely loosen standing requirements, their collective effect is to maintain a standing requirement rather than abolish that principle and usher in some form of open standing.[87]

This novel statutory regime of standing has an interesting history. It was first introduced by the conservative Howard government and attracted no real controversy at the time. The provisions were subject to a detailed official review 10 years after their enactment.[88] That review was conducted under the auspices of a Labor government and was remarkably free of partisan rancour. The review made two findings relevant for present purposes. One was that the standing provisions had not apparently caused significant additional litigation or any other obvious difficulties. This conclusion greatly influenced the recommendation that the standing regime in the EPBC Act should be retained. The second relevant finding was a recommendation for modest possible adjustments to the standing provisions so as slightly to expand their scope and ease their operation.[89]

Justice Logan took a very different view in *Wide Bay Council Inc v Burnett Water Pty Ltd (No 8)*[90] when he reasoned that the EPBC Act standing provisions allowed proceedings by parties who were 'neither responsible to Parliament nor to any other constituency beyond its own membership base, large or small. Neither does it have any formal role' in the processes of the EPBC Act.[91] Justice Logan thought that the people or groups who might use the novel standing provisions when they simply disagreed with a Minister were those who could, for a proper purpose and in good faith, hold a different view about approval or enforcement decisions under the Act.[92]

In my view, that suggestion had four obvious flaws. First, it assumes those who disagree with politicians and Ministers might also do so in good faith and for a proper purpose. Secondly, it ignores the political and other influences for which our politicians show great weakness. Thirdly, the view of Logan J assumes that the best way to manage competing views on a matter of public interest is to exclude them from the courts. His Honour did not precisely make clear why a judge would think that was a good thing. Fourthly, his Honour did not identify, let alone grapple with, various provisions in the EPBC Act that require consultation of some sort with the public.[93] Those provisions are part of a wider regime that involves the public and interested people. Their presence and purpose make the focus of Logan J and others on s 487 a somewhat narrow one.

Academic assessment of the EPBC Act standing provisions have been more nuanced. Edgar's valuable analysis led him to doubt whether the provisions had actually changed standing rules that much.[94] This conclusion arose from two interrelated reasons. First, standing rules at common law and under the ADJR Act had relaxed sufficiently in recent times so that the apparently eased requirements of the EPBC Act did not differ much from other standing rules. Secondly, issues that previously arose in the guise of standing could still arise, albeit in a different form. Edgar's careful analysis did not figure in the recent

parliamentary review of the area, although a cursory inspection of that review suggests much of it was not troubled by evidence or logic.

Proposals to repeal the standing provisions of the EPBC Act were introduced to the last Parliament but were not enacted.[95] The relevant Bill sought to repeal s 487, which is the provision that amends the ADJR Act and effectively enables use of a simplified standing formula for both groups and individuals. The Bill did not include an amendment to, or repeal of, related provisions that confer similar standing rights to parties who seek injunctions. The somewhat confused content of the Bill reflects a classic form of modern government in Australia — legislation drafted as badly as it is quickly, typically in response to a political fuss, which is then pursued with stubborn zeal. In this instance, the relevant fuss was a judicial review application for a ministerial decision to grant permits required for a large and very controversial coal mine in Queensland — the Adani mine. The decision was set aside by consent after the Minister's office essentially conceded it was vitiated for legal error. Political acrimony was not directed at the Minister whose decision-making contained elementary errors but instead at the litigants who dared to identify that error and the EPBC Act they used to launch their challenge. The federal government neither defended the Minister's decision nor explained why its initial defence of the decision collapsed so quickly. The federal Attorney-General was one of several conservative politicians who vigorously attacked the applicants of that case. Those groups were described by the Attorney-General as 'vigilante' environmental groups who were 'sabotaging development'.[96] The Attorney-General and other Ministers failed to acknowledge that the government was not forced to settle the case or that the relevant Minister was able to redetermine the matter after its remittal as part of the consent orders.[97] Precisely why blame lay with 'vigilante' environmental groups rather than the well-paid government Minister and his many advisers, whose erroneous decision-making had essentially compelled the consent orders, was an issue government Ministers did not address. If the language deployed by the Attorney-General against environmental groups was deployed to the Minister, one could call him a 'double agent' or 'saboteur' whose standard of decision-making seemed to be designed mostly to help 'the enemy'.

The failed attempt to amend the standing provisions of the EPBC Act can only be understood fully in light of this highly politicised criticism of recent use of those provisions. The report of the Senate Environment and Communications Legislation Committee was divided along party lines and reflected two quite different views of the standing provisions. Government members of the Senate committee strongly supported the Bill, arguing that repeal of s 487 would not greatly affect the overall statutory scheme for protection of the environment and biodiversity.[98] The government members noted that the existing avenues of judicial review in the ADJR Act and the *Judiciary Act 1901* (Cth) would remain after the repeal of s 487.[99] This remark implies that standing and related rights could and should exist within more general rights of review. A key flaw in the claims of the majority members of the Senate committee was the lack of empirical evidence upon which criticisms of s 487 might have been based or any understanding of whether resort to the standing requirements in the ADJR Act or the Judiciary Act would actually make much difference.

The dissenting Labor members of the committee at least appeared to engage wider questions in some detail, while also displaying an understanding of the possible consequences of the possible repeal of s 487. Those members noted that the Bill appeared to be caused by a single case, in which the Minister effectively had acknowledged his error yet was not precluded from revisiting the matter upon its remittal.[100] The dissenting report also highlighted the lack of evidence that s 487 was used by busybody litigants.[101] The dissenting report noted that similarly broad, sometimes open, standing provisions operated without difficulty in other federal legislation. A notable feature of the dissenting report was its reliance on the submission of a retired Federal Court judge who argued that repealing s 487

would make very little difference.[102] That retired judge reasoned that the standing tests that would take the place of s 487 would present no real difficulty to environmental groups. He noted that this possibility did not simply make the repeal of s 487 a false promise but that it might have the counterproductive effect of leading, in some cases, to complex litigation about standing.[103] Such cases would only serve to entangle developers in the very problems the government had claimed it wished to avoid.[104]

The separate dissenting report from the Green Party member of the Senate committee drew attention to one rather awkward issue, which was that the National Farmers Federation (an organisation one would normally expect a conservative government to take particular notice of) was one of many community and industry groups that opposed the Bill.[105] The majority members dealt with such difficulties by failing to mention such submissions in their report and cancelling planned public hearings on the Bill.[106] There is no small irony in government members complaining about lawfare and vigilante tactics when, in fact, it is they who adopt the classic tactics of vigilantes of devising (legislative) plans in secret and heading off public scrutiny.

The failure of majority members of the Senate committee and the related statements of other government members was later criticised with forensic detail by McGrath.[107] McGrath also made a powerful argument for the retention, perhaps even expansion, of generous standing provisions such as s 487 of the EPBC Act. He argued:

> Empowering members of the community to enforce environmental laws as surrogate regulators is a smart and potentially efficient form of regulation that is a legitimate policy instrument used in legal systems. Allowing members of the community to challenge government decisions in the courts promotes transparency, integrity and rigour in decision-making processes. It can also develop important legal and administrative principles, provide a focus for public debate, and highlight issues for law reform.[108]

McGrath made several key points in support of retaining s 487 and in rebuttal of its critics. The first and most important was his survey of claims under the EPBC Act in the 15 years of its operation. The total number of claims was 37 and many of these were 'doubled up' in the sense that one dispute had, for technical reasons, caused more than one case. This number of cases was tiny in any given year, had not increased over time and clearly dispelled government claims of a tide of litigation under s 487.[109] That empirical assessment was all the more compelling because it was based upon information provided by the Minister's own office. The second key point McGrath made was that s 487 had many similar counterparts in various state statutes, which had also operated without significant difficulty.[110] McGrath suggested that such analysis explained why majority members of the Senate committee provided no empirical evidence on support of their arguments. There was no evidence.[111] He concluded:

> Given the rarity of litigation under the EPBC Act, the claims made about the rise of 'lawfare' and 'vigilante litigation' by the Attorney-General and other advocates of repealing s 487 of the EPBC Act appear to be little more than hyperbolic rhetoric and political games.[112]

I do not necessarily see this as a valid criticism, although my reasoning is admittedly odd. While McGrath was right to conclude that use of the rhetoric of lawfare by the Attorney-General and other government members had no real evidentiary basis, it is odd to criticise politicians for acting in a political manner. That criticism reflects the typical misuse of language in Australia which has seen a standard criticism that politicians direct at each other — namely, that an opposing politician is 'just playing politics'. One can only wait for the day when that criticism is met with the refreshingly honest response of 'of course I am playing politics. I'm a politician. It's my job'. Our politicians rarely seem capable of such honesty or insight, which may be why they struggle to recognise it in others. The so-called environmental vigilantes are an example. Such people and groups profess a wish to protect

the environment and take actions to that effect. How can such conduct be labelled anything other than honest and proper?

The deeper problem for those politicians who regularly round on the advocates of green lawfare draws attention to an important part of our public law framework — namely, the rule against bias. That rule requires decision-makers, including Ministers, to exercise their powers with an open mind. The detail of the rule is complex, but the core function of the rule is clear. It requires a minimum level of impartiality in the exercise of official power. In my view, the inflamed and ill-considered use of the rhetoric of lawfare may lead to claims of bias against government Ministers. The logic of such a claim would be simple. Cabinet solidarity is a cornerstone of responsible government in Australia. The convention surrounding Cabinet governance requires Ministers to act with unity and mutual support. This principle arguably creates a presumption that the statements of one Minister have the support of others. But what if the statement in question suggests some form of bias against a class of people or groups who are affected by the decisions of another Minister? At what point can the inflamed rhetoric of one Minister give rise to an apprehension of bias on the part of his or her colleagues?[113] When must Ministers take active steps to disassociate themselves from the inflammatory rhetoric of a colleague in order to preserve their own perceived impartiality?[114] Or do individual Ministers seriously expect that their impartiality remains intact, as they silently observe their colleagues vehemently attack people and parties who may make submissions concerning an exercise of power by the silent Minister? The High Court has made clear that the bias rule operates with some latitude for government Ministers,[115] but we should not assume that latitude will prevail in the face of fiercely partisan and unwarranted rhetoric by government Ministers and parliamentarians. The more members of a particular government join in such inflamed rhetoric, the more they invite a bias application based on their collective statements. If that problem comes to fruition, government Ministers may learn that friendly fire is the most dangerous weapon of all.

## Concluding observations

While the rhetoric of lawfare is relatively new, the environmental litigation it is directed to is not. Perhaps the best-known example of modern times is one of the several cases arising from the attempts of a conservative state government to build a dam in the Franklin River in Tasmania. That proposal became a national *cause celebre*, and the failure of the conservative federal government to oppose the project was clearly one of the reasons it lost power in 1983. That change of government quickly led to legislation enabling the federal government effectively to block the proposed dam. That legislation was tested in the High Court in *Commonwealth v Tasmania* (the *Dams* case).[116] That case was notable for ushering in a new approach to the external affairs power of the Commonwealth. A lesser-known aspect of the case was that the claims of the Australian Conservation Foundation, which clearly exerted great influence over the decision of the High Court, were made by the Hon Michael Black QC. That greatly respected barrister later became Chief Justice of the Federal Court of Australia and performed that role with great distinction. But what if Black QC ran a similar case in the High Court now? Would he and his clients be labelled environmental vigilantes? The possibility beggars belief. Equally useful guidance can be gained from the fate of the gaggle of politicians and developers who wished to dam the Franklin river. Who remembers them?

**Endnotes**

1 Eugene Fidell, 'The Culture Change in Military Law' in Eugene Fidell and Dwight Sullivan (eds), *Evolving Military Justice* (2002) 163, 163.
2 The political character of Huntington's work is revealed by its full title: Samuel Huntington, *The Soldier and the State: The Theory and Politics of Civil-Military Relations* (1957).
3 Morris Janowitz, *The Professional Soldier: A Social and Political Portrait* (1960).

4 The competing views are analysed in light of the rise of civilianisation in Peter Feaver, 'The Civil-Military Problematique: Huntington, Janowitz and the Question of Civilian Control' (1996) 23 *Armed Forces and Society* 149.
5 Kenneth Kemp and Charles Hudlin, 'Civil Supremacy Over the Military: Its Nature and Limits' (Fall, 1992) 19 *Armed Forces and Society* 2, 8–9.
6 The origin of this change is traced in Anthony Arnull, 'EC Law and the Dismissal of Pregnant Servicewomen' (1995) 24 *Industrial Law Journal* 215. Pregnancy is now common among UK service members, although it is reported that authorities do not routinely offer pregnancy tests to those serving overseas by reason of privacy considerations: '200 Women Sent Home for Being Pregnant' *Daily Mail*, 17 February 2014, <http://www.dailymail.co.uk/news/article-2560898/200-women-troops-sent-home-pregnant-MoD-wont-impose-war-zone-pregnancy-tests-privacy-fears.html>.
7 UK scholars have noted that this has enabled parliamentarians to gain expertise in military law which, in turn, has made their scrutiny of the military more exacting: Bruce George and J David Morgan, 'Parliamentary Scrutiny of Defence' (1999) 5 *Journal of Legislative Studies* 1. In Australia, parliamentary scrutiny has taken the form of lengthy and very far-reaching oversight of the military. See, for example, Senate Foreign Affairs, Defence and Trade References Committee, *The Effectiveness of Australia's Military Justice System* (Parliament of Australia, 2005).
8 See, for example, *Re Tracey; Ex Parte Ryan* (1989) 166 CLR 518; *Re Tyler; Ex parte Foley* (1989) 181 CLR 18; *White v Director of Military Prosecutions* (2007) 231 CLR 570.
9 *Lane v Morrison* (2009) 239 CLR 230. It is important to note that, while this case led to the demise of the new military court, it had no effect on the other changes to military justice, including the use by military personnel of rights from the civilian justice system.
10 Although, in the case of the military, this influence may be lessened because many judicial members allocated to hear matters involving Defence Force members are also members of the Reserve Service of the Australian Defence Force.
11 *Johnson v Eisenstrager* 339 US 763, 779 (1950).
12 Chris Waters, 'Beyond Lawfare: Juridical Oversight of Western Militaries' (2009) 46 *Alberta Law Review* 885, 890 (fn 27), citing John Carlson and Neville Yeomans, 'Whither Goeth the Law — Humanity or Barbarity' in Margaret Smith and David Crossley (eds), *The Way Out: Radical Alternatives in Australia* (1975).
13 Charles Dunlap, Jr, 'Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts', Carr Centre for Human Rights, John F Kennedy School of Government, Harvard University, Working Paper, 2001, p 5 <http://www.ksg.harvard.edu/cchrp/ Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>.
14 US Department of Defense, *National Defense Strategy — June 2008*, p 4 <http://www.defense.gov/news/2008%20national%20defense%20strategy.pdf>.
15 Charles Dunlap Jr, 'Lawfare Today' (2008) 3 *Yale Journal of International Affairs* 146, 146.
16 Charles Dunlap Jr, 'Does Lawfare Need an Apologia?' (2010) 43 *Case Western Reserve Journal of International Law* 121, 122 (citations omitted).
17 Ibid.
18 Five former Chiefs of General Staff in the UK military advocated this view in 'Letter to the Editor: Combat Zones' *The Times*, 7 April 2015, p 26.
19 UK, *Official Report, House of Lords,* 14 July 2005, vol 673, c 1236.
20 Waters also sees international humanitarian law as essentially a permissive rather than restrictive influence.
21 These arguments are made in detail in Christopher Waters, 'Is the Military Legally Encircled?' (2008) 8 *Defence Studies* 26.
22 Christopher Waters, 'Beyond Lawfare: Juridical Oversight of Western Militaries' (2009) 46 *Alberta Law Review* 885.
23 US Department of Defense, *National Defense Strategy — June 2008*, p 23 <http://www.defense.gov/news/2008%20national%20defense%20strategy.pdf>.
24 [2011] 1 AC 1.
25 Ibid 100 [81].
26 [2011] 53 EHRR 18.
27 Ibid [138].
28 Particularly the suggestion that jurisdiction under art 1 of the ECHR was largely territorial and would be otherwise in only the most exceptional cases: *Bankovic v Belguim* [2001] 11 BHRC 435, [59]–[63]. The European Court has since left little doubt this restrictive approach to jurisdiction has been consigned to history because its subsequent decisions have commenced their consideration of jurisdiction with lengthy quotations of the relevant parts of *Bankovic*. See, for example, *Hassan v UK* [2014] ECHR 9936, [74].
29 *Al-Skeini v UK* [2011] 53 EHRR 18, [149].
30 [2014] 1 AC 52.
31 [2014] 1 AC 52, 115 [49] (emphasis added). The concept is also consistent with subsequent European decisions, such as *Hassan v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 29750/09, 16 September 2014) and *Jaloud v Netherlands* (European Court of Human Rights, Grand Chamber, Application No 47708/08, 20 November 2014).
32 The cases discussed in this section were commenced under the *Human Rights Act 1998* (UK), which makes rights under the *European Convention on Human Rights* (ECHR) directly enforceable in British

courts. The departure of Britain from the European Union will clearly change the influence of the ECHR in the UK and perhaps lead to a revision of the Human Rights Act. How those changes will affect the conduct of the proceedings discussed in this section is unclear. Whether the principles established in these cases survive in the form of new principles of English common law is even more uncertain.

33 [2015] EWHC 715 (Admin).

34 [2015] EWHC 715 (Admin) [1].

35 The proceeding before Leggatt J was a test case to determine a mere 11 of the many issues that had arisen in the barrage of public law cases commenced against British authorities.

36 [2015] EWHC 715 (Admin) [2].

37 [2015] EWHC 715 (Admin) [3].

38 As Leggatt LJ was determining a public law case, he wisely refrained from providing any estimate on whether, or how many of, those cases might be settled.

39 Richard Ekins, Jonathan Morgan and Tom Tugendhat, *Clearing the Fog of War*, 2015, <https://policyexchange.org.uk/wp-content/uploads/2016/09/clearing-the-fog-of-law.pdf>.

40 Ibid 7.

41 That conclusion is fortified by the savage media and other public criticisms directed at the judges of the Divisional Court who held that Britain's departure from the European Union could not be triggered by use of prerogative powers: *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] 1 All ER 158. The public attacks on the judges is explained in Patrick Obrien, '"Enemies of the People": Judges, the Media and the Mythic Lord Chancellor' [2017, Brexit Special Extra Issue] *Public Law* 135.

42 Owen Bowcott, 'Phil Shiner: Iraq human rights lawyer struck off over misconduct', *The Guardian*, 3 February 2017 <https://www.theguardian.com/law/2017/feb/02/iraq-human-rights-lawyer-phil-shiner-disqualified-for-professional-misconduct>. That lawyer was bankrupted. His firm, which had commenced about two-thirds of all claims considered by Leggatt J, then collapsed.

43 Owen Bowcott, 'Law firm Leigh Day cleared over Iraq murder compensation claim', *The Guardian*, 10 June 2017 <https://www.theguardian.com/law/2017/jun/09/law-firm-leigh-day-cleared-over-iraq-compensation-claims>. The lengthy official investigation that preceded this and related cases cost over £30 million: United Kingdom, *Report of the Public Inquiry into Allegations of Unlawful Killing and Ill Treatment of Iraqi Nationals by British Troops in Iraq in 2004* (the Al-Sweady Inquiry Report), 2004, <https://www.gov.uk /government/publications/al-sweady-inquiry-report>.

44 This greatly simplifies the reasoning in *Mohammed v Ministry of Defence (No 2)* [2017] 2 WLR 327.

45 A case made in brief but effective terms in Richard Ekins and Guglielmo Verdirame, 'Judicial Power and Military Action' (2016) 132 *Law Quarterly Review* 206.

46 An issue examined by Rain Liivoja in 'Private Military and Security Companies' in Rain Liivoja (ed), *Routledge Handbook of the Law of Armed Conflict* (Routledge, 2016); and Rain Liivoja, 'Trying Civilian Contractors in Military Courts: A Necessary Evil?' in Alison Duxbury and Matthew Groves (eds), *Military Justice in the Modern Age* (CUP, 2016).

47 Bob Work, 'Speech' (Speech delivered at the Army War College Strategy Conference, Carlisle, Pennsylvania, 8 April 2015) <http://www.defense.gov/Speeches/Speech.aspx?SpeechID=1930>.

48 Ibid.

49 Jami Taylor, Richard Clerkin, Katherine Ngaruiya and Anne-Lise Velez, 'An Exploratory Study of Public Service Motivation and the Institutional–Occupational Model of the Military' (2015) 41 *Armed Forces & Society* 142.

50 Stephen Preston, 'The Legal Framework for the United States Military Force Since 9/11' (Speech delivered at the Annual Meeting of the American Society of International Law, Washington DC, 10 April 2015) <http://www.defense.gov/Speeches/Speech.aspx?SpeechID=1931>.

51 The product was the *Authorization for the Use of Military Force in Response to 9/11 Attacks* (PL 107-40, 115 Stat 224 (2001)). This instrument is often referred to simply as 'AUMF'.

52 Preston, above n 50.

53 [2012] UKSC 44.

54 That largely fictional litigant has clearly influenced much modern law on standing but is rarely mentioned openly. One such instance in Australia was *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 261 (Gaudron, Gummow and Kirby JJ). A more recent label used for such cases is 'vexatious'. See, for example, Productivity Commission, *Major Project Development Assessment Processes* (2013) 276–7. Interestingly, that report appeared to accept that many environmental proceedings were vexatious because they lacked a clear or good purpose. This part of the report showed no real understanding that many people might believe that protection of the environment and ensuring that officials observed applicable legislative requirements were each valid and sufficient reasons to support legal proceedings.

55 [2012] UKSC 44, [94].

56 [2012] UKSC 44, [94] (emphasis added).

57 *Raymond v Honey* [1983] 1 AC 1.

58 *R v Lord Chancellor; Ex parte Witham* [1998] QB 575.

59 But to cloak such common law reasoning within the language of fundamental rights is not without conceptual difficulty. See, for example, Philip Sales, 'Rights and Fundamental Rights in English Law' (2016) 75 *Cambridge Law Journal* 86.

60 *Plaintiff S157/2002 v Commonwealth* (2003) 213 CLR 476, 513 [103].
61 *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651.
62 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.
63 *Plaintiff S157/2002 v Commonwealth* (2003) 213 CLR 476, 492–3 [32] (Gleeson CJ).
64 See, for example, *Argos Pty Ltd v Corbell* (2014) 254 CLR 394, where the High Court examined standing in statutory judicial review but showed no inclination to revisit standing more generally.
65 *Walton v Scottish Ministers* [2012] UKSC 44, [152].
66 This issue is examined in Matthew Groves, 'The Evolution and Reform of Standing in Australian Administrative Law' (2016) 44 *Federal Law Review* 167.
67 (1994) 55 FCR 492.
68 *Walton v Scottish Ministers* [2012] UKSC 44, [153].
69 This appeared to reflect a wider strategy of that government. See, for example, the description of changes made to criminal justice in Andrew Trotter and Harry Hobbs, 'The Great Leap Backwards: Criminal Law Reform with the Hon Jarrod Bleijie' (2013) *Sydney Law Review* 1.
70 The relevant statute was the *State Development and Public Works Organisation and Other Legislation Amendment Act 2015* (Qld), which repealed some public objection rights in the *Environment Protection Act 1994* (Qld). It is notable that such changes were at odds with earlier suggestions for streamlining and simplification of environmental regulation made in Queensland Department of Environment and Resource Management, *Greentape Reduction — Reforming licensing under the Environmental Protection Act 1994*, Discussion Paper, 2011 <https://www.ehp.qld.gov.au/management/pdf/greentape-reduction-discussion-paper.pdf>.
71 Kate Kyriacou and Josh Robertson, 'You're Just One of the Gang' *Courier Mail*, 7 February 2014, p 8.
72 Queensland Bar Association, 'Representation of Bikies' (Media Release, 6 February 2014) <http://www.qldbar.asn.au/index.php/news/media-releases/item/download/110_5f869b7a51a3c782033d3e7493877fb4>.
73 Joshua Robertson, 'Campbell Newman Defamation Case: Taxpayers Cover $525,000 Payout' *Guardian Australia*, 16 May 2016 <https://www.theguardian.com/australia-news/2016/may/16/campbell-newman-defamation-case-taxpayers-cover-525000-payout>.
74 Joshua Robertson, 'Campbell Newman Defamation Case: Taxpayers Cover $525,000 Payout', *Guardian Australia*, 16 May 2016 <https://www.theguardian.com/australia-news/2016/may/16/campbell-newman-defamation-case-taxpayers-cover-525000-payout>; Courtney Wilson, 'Hannay Lawyers Settles Defamation Case with Campbell Newman and Jarrod Bleijie', *ABC News*, 16 May 2016 <http://www.abc.net.au/news/2016-05-16/campbell-newman-sued-for-defamation-settles-out-of-court-hannay/7418744>.
75 Bianca Hall, 'Lawyers representing asylum seekers are "un-Australian": Peter Dutton', *Sydney Morning Herald*, 28 August 2017.
76 The Attorney-General did not directly criticise his ministerial colleague but delivered a speech around this time which contained a detailed contrary argument to that of his colleague: Hon George Brandis, 'Address at the Opening of the International Bar Association Annual Conference, Sydney Australia', 8 October 2017, <https://www.attorneygeneral.gov.au/Speeches/Pages/2017/FourthQuarter/Address-at-the-Opening-of-the-International-Bar-Association-annual-Conference-Sydney-Australia.aspx>. The speech was later interpreted as a rebuke to the Minister for Immigration and Border Protection and the Attorney-General did not publicly disclaim that interpretation: James Massola, 'George Brandis Slaps Down Peter Dutton over "un-Australian" Lawyers Attack', *Sydney Morning Herald*, 9 October 2017.
77 J Hepburn, B Burton and S Hardy, *Stopping the Australian Coal Export Boom — Funding Proposal for the Australian Anti-Coal Movement* (Greenpeace Australia, 2011).
78 Ibid.
79 The Minister may seek remedies as of right: s 475(1)(a). Individuals may seek remedies if they are an 'interested person': s 475(1)(b). The slightly different approaches arguably reflect the different standing rights of Ministers and individuals at common law.
80 Section 475(6)(a).
81 Section 475(6)(a).
82 *North Coast Environmental Council Inc v Minister for Resources* (1994) 55 FCR 492. That case and its consequences are examined in Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (6th ed, 2017) ch 11.
83 Section 475(7)(a).
84 Section 475(7)(b)(c).
85 Section 487(2).
86 Section 487(3).
87 This assessment of the EPBC standing provisions is also reached in Andrew Macintosh, Heather Roberts and Amy Constable, 'An Empirical Evaluation of Environmental Citizen Suits under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)' (2017) 39 *Sydney Law Review* 85, 86.
88 *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (2009) ch 15.
89 These recommendations have never gained clear acceptance by either of the two major political parties and can be regarded as a dead letter.
90 (2011) 192 FCR 1.

91 Ibid 5 [23].
92 Ibid 5 [24].
93 Sections 74(3), 75(1A), 98.
94 Andrew Edgar, 'Extended Standing — Enhanced Accountability? Judicial Review of Commonwealth Environmental Rules' (2011) 39 *Federal Law Review* 435.
95 Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 (Cth).
96 See, for example, Lenore Taylor, 'Coalition to Restrict Green Groups' Right to Challenge After Carmichael Setback', *Guardian Australia*, 18 August 2015. In that article, the federal Attorney-General (the Hon George Brandis QC) was quoted as complaining about 'green lawfare'.
97 The Attorney-General would have struggled to attack the Federal Court or its judges because the Court took the rare step of issuing a public statement to explain aspects of the settlement: Federal Court of Australia, 'Statement re NSD33/2015 *Mackay Conservation Group v Minister for Environment*' (Media Release, 20 August 2015) <http://www.fedcourt.gov.au/news-and-events/20-august-2015>. This statement appeared in part designed to correct various public statements that the Federal Court had overturned the Minister's decision, when in fact it was set aside by consent.
98 Senate Environment and Communications Legislation Committee, *Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 Provisions* (Parliament of Australia, November 2015) 4.2.
99 Ibid.
100 Ibid 27.
101 Ibid 30–1. The existence and influence of such litigants has long been doubted. An early empirical assessment of Australian standing cases suggested that the busybody was largely a fiction: Roger Douglas, 'Uses of Standing Rules 1980–2006' (2006) 14 *Australian Journal of Administrative Law* 22.
102 Ibid 32, citing the submission of Murray Wilcox AO QC. The logic of that careful submission is powerful.
103 Ibid 32–4.
104 Ibid 37.
105 Ibid 42.
106 The Labor members complained sourly about the cancellation of public hearings: ibid 36–7.
107 Chris McGrath, 'Myths Drive Australian Government Attack on Standing and Environmental "Lawfare"' (2016) 33 *Environment and Planning Law Journal* 3. McGrath acknowledged his interest in the area by having acted for the claimants in early parts of the litigation that so enraged the government.
108 Ibid 5.
109 Ibid 8–9. McGrath's analysis is consistent with the empirical analysis of claims under the EPBC contained in Macintosh, Roberts and Constable, above n 87.
110 Ibid 8–11.
111 One member of Cabinet made a valiant attempt to argue otherwise. See Joshua Frydenberg, 'Common Sense Demands We Take on Green Lawfare Warriors', *Australian Financial Review*, 1 November 2016. That analysis is notable for misunderstanding the difference between the standing requirements of the ADJR Act and EPBC Act. It also failed to mention whether the suggested jobs that might be created by proposed developments included those initially provided by the proposed Adani coal mine or the vastly lower figures conceded by the developers' own witnesses during one proceeding concerning the mine. See the report of a consultant employed by the company, submitted to a case in the Queensland Land and Environment Court, which estimated that the initial suggested figure of 10 000 jobs was more likely to be 1464: Affidavit of Jerome Gregory Fahrer, p 15 <http://www.abc.net.au/mediawatch/transcripts/1513_adanijobs.pdf>.
112 McGrath, above n 107, 8–9.
113 Whether an apprehension of bias found against one member of a multi-member body affects decisions of the entire body is unclear: *McGovern v Ku-Ring-Gai Council* (2008) 72 NSWLR 504.
114 Such a cautionary step was considered in *Helow v Secretary of State for the Home Department (Scotland)* [2008] 1 WLR 2416.
115 *Minister for Immigration and Multicultural Affairs; Ex parte Jia Legeng* (2001) 205 CLR 507.
116 *Commonwealth v Tasmania* (1983) 158 CLR 1.

# MS ONUS AND MR NEAL: AGITATORS IN AN AGE OF 'GREEN LAWFARE'

***The Hon Justice Rachel Pepper****

There is a concerted campaign underway to silence, if not mute, environmental advocates or 'agitators' who pursue 'vigilante litigation' or 'green lawfare'.

Ignoring ideology and, upon closer examination, the reasons for doing so is, in my view, tenuous and difficult to justify.

**What is 'green lawfare' or 'vigilante litigation'?**

In early 2015, a well-established community environment organisation, the Mackay Conservation Group, challenged the decision of the Minister for the Environment to approve the controversial Carmichael coal mine and rail project under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) in the Federal Court of Australia (*Mackay Conservation Group v Commonwealth of Australia*) (*Adani*).[1]

The challenge was brought under s 487 of the EPBC Act, which provides broad, but not open, standing to individuals or organisations[2] seeking judicial review[3] of certain decisions made under the EPBC Act if that individual or organisation has engaged in a series of activities in Australia for the protection or conservation of, or research into, the environment at any time in the two years immediately before the decision in question.[4]

On 4 August 2015 the decision to approve the mine was, by consent, set aside by the Federal Court.

Despite the fact that there was no written decision, that the relevant Minister had conceded error (which meant that the decision was unlawful in an administrative law sense by reason of a failure to take into account a mandatory relevant consideration concerning a snake and a skink) and that the Minister had written to the Court requesting that the decision be set aside,[5] the federal government proceeded to attack the Court,[6] attack the applicant, attack the applicant's legal representatives and, finally, for completeness, attack the EPBC Act itself.[7] The government's characterisation of *Adani* was that of 'vigilante litigation by people … who have no legitimate interest'.[8]

The attack was so sustained that the Federal Court took the unprecedented step of issuing a media release explaining the making of its orders and emphasising that the decision had been set aside upon the application of all parties. The release stated as follows:

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> On 4 August 2015 a judge of the Court made orders setting aside the Minister's decision. The orders were not made after a hearing. There was no judgment. There were no findings. The orders were made by consent, that is, with the agreement of the parties to the litigation.[9]

Consequently, on 18 August 2015 the Commonwealth announced its intention to repeal s 487, a provision it claimed — without proof — 'allows radical green activists to engage in vigilante litigation to stop important economic projects … sacrificing the jobs of tens of thousands of Australians in the process'.[10] Henceforth, the federal government branded litigation by community environmental groups 'green lawfare' — a phrase oft repeated in the media.[11]

It was thus with alacrity that, two days later, on 20 August 2015, the then Minister for the Environment, the Hon Greg Hunt MP, introduced the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 (EPBC Standing Bill), the principal aim of which was to repeal or replace s 487 to limit standing to those with a direct economic interest at stake.[12]

Condemnation of the EPBC Standing Bill was swift and widespread. The effect of the Bill would have been, for example, to prevent a group of farmers from seeking to challenge the approval of an open cut coal mine in close, but not immediate, proximity to prime agricultural land. The Bill has yet to pass the Senate. It remains uncertain whether or not the present federal government intends to pursue this reform.

**The myth of environmental lawfare**

The concept of 'vigilante litigation' or 'green lawfare' as applied to public interest environmental litigation is, in my view, a myth.

First, the statistics do not support the existence of this political construct. The Senate committee formed to inquire into the EPBC Standing Bill noted that, from the year 2000 (the commencement of the EPBC Act) to 19 August 2015, 5364 projects had been referred to the Department of the Environment under the EPBC Act. Of those, 817 projects had been approved by the Minister. There had been 37 applications for judicial review made by third parties under s 487 in relation to 23 separate projects.[13] That is, of the projects referred to the Minister since the commencement of the EPBC Act, approximately 0.43 per cent were subject to a challenge.[14] Furthermore, of the 37 applications for third-party judicial review, only four — that is, 0.12 per cent — were successful.[15] On any view, this can hardly be characterised as a flood of litigation stymying development and impeding economic growth.

Recent analysis conducted by academics Andrew Macintosh, Heather Roberts and Amy Constable at the ANU College of Law found that, although 'industry and political concerns about EPBC Act related environmental citizen suits have focussed on judicial review proceedings under [environmental impact and assessment] provisions … the empirical foundation for these concerns is weak'.[16]

The central argument for the repeal of s 487 as stated by the then Minister for the Environment was 'the direct Americanisation through the use of litigation to "disrupt and delay key projects and infrastructure" within Australia and to directly "increase investor risk"'.[17]

The assertion was premised on a resource produced for, amongst others, Greenpeace in 2011 entitled *Stopping the Australian Coal Export Boom*.[18] It proposed nine mechanisms to 'disrupt and delay key projects and infrastructure while gradually eroding public and political support for the industry and continually building the power of the movement to win more'.[19]

One of these mechanisms was litigation directed towards coal project approvals and approvals for key infrastructure supporting that industry. But, as was noted in the document, 'only legitimate arguable cases will be run'.[20] Curiously, notwithstanding that the document had been in the public domain since 2012,[21] and notwithstanding that public interest environmental litigation was constant,[22] the issue did not warrant attention until August 2015, by which time it had become 'urgent'.

As to the issue of whether or not public interest environmental litigation has significantly delayed projects by reason of the application of s 487 of the EPBC Act, Macintosh, Roberts and Constable's empirical research found that 'only five projects over the 15½-year study period were judged to have been substantially delayed by an environmental citizen suit and only two of these were capital-intensive'. Neither of these was the Carmichael coal mine and rail project.[23] In addition, the learned authors concluded that the primary cause of delay for the two capital-intensive projects was financial.[24]

A similar analysis conducted by Dr Chris McGrath of the University of Queensland found that 'there is no evidence of actual litigation (as opposed to claims made in the media or the Minister's second reading speech) in which the widened standing provided by s 487 has been abused by taking frivolous or vexatious action, or action merely to delay a project proceeding'.[25]

And a review of the operation of the EPBC Act conducted in 2009 by Dr Allan Hawke AC found, to similar effect, that in respect of ss 487 and 475 of the Act 'despite all the fears that [the] provisions would engender a "flood" of litigation, they have been unproblematic. There is no evidence of them being abused and the number of cases to date has been modest'.[26]

The results are similar in other jurisdictions. For example, in the Land and Environment Court of NSW — where the legislation provides for open standing to challenge decisions made under the *Environmental Planning and Assessment Act 1979* (NSW) (EPAA) — in the financial year 2008–09 there were approximately 87 056[27] development applications. Of these, approximately 884[28] — that is, 1.02 per cent — were the subject of challenge (both merits and judicial review).[29] In 2014–15 there were 61 108 development applications,[30] of which there were approximately 872[31] applications for review — that is,1.43 per cent. Moreover, it may safely be assumed that the challenges did not enjoy a 100 per cent success rate.

Secondly, all too often the claimed economic bonanza that is being thwarted by public interest environmental litigation is grossly exaggerated and the economic evidence relied upon to found such claims is dubious.

Two examples suffice. First, in relation to the Carmichael coal mine, evidence given by the proponent's own expert in an earlier related matter in the Queensland Land Court in 2015[32] was to the effect that the project would create approximately 1500 jobs.[33] This was markedly less than the 10 000 jobs that both the proponent and the federal government subsequently claimed would purportedly be lost as a result of *Adani*.[34]

The other example is the case of *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Ltd*[35] — a third-party merits review matter in respect of a proposed extension of the Warkworth open cut coal mine. In that decision, the Chief Judge of the Land and Environment Court of NSW found that the economic modelling relied on by the proponent and by the Minister to give approval for the expansion contained so many deficiencies it was of 'limited value'.[36] These errors included that the input–output analysis used deficient data and that the cost–benefit analysis relied on a highly flawed survey. As a consequence, Preston J concluded that the social and environmental costs

outweighed any economic benefits, and the application to extend the mine was rejected.[37] The decision was upheld on appeal.[38]

Thirdly, at least in the context of public interest environmental litigation, there are a number of inherent constraints designed to prevent any litigious abuse of process or frivolous or vexation claims proceeding.

Not only does the court have the power to dismiss this class of claim — a power that is not lightly but nevertheless regularly exercised — but also legal representatives are bound by ethical obligations that do not permit the commencement of knowingly unmeritorious cases, however strategic the motivation for doing so. Make no mistake: this is an obligation that legal practitioners take seriously. The Environmental Defenders Office NSW says 'no' much more often than it says 'yes'.

And, of course, the general rule that costs follow the event, and the ability of a court to order security for costs, acts as a powerful deterrent to even the most enthusiastic environmental litigant.[39]

As the former Federal Court judge, the Hon Murray Wilcox AO QC, observed in his submission to the Senate inquiry on the EPBC Standing Bill:

> I know something about litigation instigated by environmental bodies. I spent 22 years at the Bar before my appointment to the Federal Court in 1984. Over almost six of those years I was President of the Australian Conservation Foundation. Either in that role or as counsel, I participated in many meetings during which some enthusiast raised the possibility of legal action against a particular unwanted development. I had to point out the sober facts. If the action failed, the applicant would be ordered to pay the legal costs incurred by the other parties, the amount of which might be devastating. It was my often-expressed view that environmental organisations should not bring a legal action unless first advised, by a specialist lawyer, that they had a strong legal case. Having recently (2007–2013) served as Chair of the NSW Environmental Defender's Office, I am aware this advice continues to be given. That is why section 487 is so sparingly used.[40]

**Access to justice and the rule of law**

There is an unarguable nexus between access to justice, whether for the purpose of conducting environmental litigation or otherwise, and the maintenance of the rule of law.

Although the rule of law is a well-known principle of governance[41] — indeed, according to Sir Owen Dixon in *Australian Communist Party v* Commonwealth[42] (*Communist Party case*), it is 'an assumption' on which the *Constitution* was framed[43] — its precise content is contestable. As the Hon Robert French AC has very recently opined, 'the meaning of the term "rule of law" is much debated. At its core, is the notion that no-one, private citizen, public official or government, is above the law'.[44]

At the risk of oversimplification, the rule of law requires government and its citizens to be bound by the law and that legislative and executive action is authorised by law. Eminent legal theorist Joseph Raz posits that the rule of law generally has the following minimum indicia — namely, and relevantly for present purposes, that:

- laws are generally prospective rather than retroactive;
- laws are transparent;
- laws are relatively stable and not frequently changed;
- there exists transparent and relatively stable rules and procedures for the making of the laws;
- the principles of natural justice are observed in the administration of laws;

- there is an independent judiciary, with power to review subordinate and primary legislation, and administrative action; and
- the courts are readily accessible.[45]

More recently, the concept of an environmental rule of law has emerged.

In 2016, the IUCN World Congress on Environmental Law described the concept as 'the legal framework of procedural and substantive rights and obligations that incorporates the principles of ecologically sustainable development in the rule of law',[46] without which 'environmental governance and the enforcement of rights and obligations may be arbitrary, subjective, and unpredictable'.[47] An environmental rule of law demands the promulgation of laws of general application, which are applied equally and consistently. As distilled by the commentators, including the current Chief Judge of the Land and Environment Court of NSW, Preston J, an environmental rule of law requires, among other things:[48]

- the development, enactment and implementation of clear, strict, enforceable and effective laws;
- measures to ensure effective compliance with laws, regulations and policies, including adequate criminal, civil and administrative enforcement; liability for environmental damage; and mechanisms for timely, impartial and independent dispute resolution; and
- effective rules on equal access to information, public participation in decision-making and, importantly, access to justice.

It is therefore clear that access to justice — to courts, information and decision-making processes — is a fundamental aspect of the rule of law, environmental or otherwise.

And it is to this aspect — namely, that the courts should be readily accessible — that this discussion now turns.

**Barriers to access to justice**

Barriers to access to justice present themselves in many forms. The two most common are those of standing and costs. A third is an inability to access legal assistance. Each is explored in turn.

***Standing***

Standing is considered to be the most significant barrier to access to justice.[49]

As Gleeson CJ formerly noted, 'access to the courts should be available to citizens who seek to prevent the law from being ignored or violated, subject to reasonable requirements as to standing'.[50] Access to the courts, or standing, is therefore an important aspect of the rule of law. This sentiment was expressed recently by the former Chief Justice of the High Court of Australia, the Hon Robert French AC, who captured the critical link between access to justice, the rule of law and our system of governance and who opined that 'impaired or unequal access to justice or compromised access to justice detracts from the strength of the rule of law as part of our societal infrastructure'.[51]

At common law, the High Court of Australia, in the seminal case *Australian Conservation Foundation v Commonwealth*[52] (*ACF*), determined that individual standing requires that a person have a 'special interest' in the impugned decision.[53]

In that case, the Australian Conservation Foundation sought injunctive and declaratory relief in relation to an approval given to develop a tourist resort at Farnborough in Queensland under the *Environment Protection (Impact of Proposals) Act 1974* (Cth) — the precursor to the EPBC Act. The applicant alleged that the Commonwealth had failed to take into account an environmental impact statement in making its decision. The Commonwealth contended that the applicant had no standing to bring the application.

The Australian Conservation Foundation was unsuccessful at first instance before Aickin J. It was similarly unsuccessful on appeal, where the full court of the High Court held that, irrespective of the nature of the organisation, with its broad charter to protect the environment, the Australian Conservation Foundation did not have the requisite special interest.[54]

In *ACF*, 'special interest' was held to mean more than 'a mere intellectual or emotional concern'.[55] What is required is that an applicant is 'likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails'.[56] It is not 'a belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented'.[57]

Subsequent to *ACF*, in *Onus v Alcoa of Australia Ltd*[58] (*Onus*) Gibbs CJ summarised the competing considerations in determining whether or not a special interest exists:

> On the one hand it may be thought that in a community which professes to live by the rule of law the courts should be open to anyone who genuinely seeks to prevent the law from being ignored or violated. On the other hand, if standing is accorded to any citizen to sue to prevent breaches of the law by another, there exists the possibility, not only that the processes of the law will be abused by busybodies and cranks and persons actuated by malice, but also that persons or groups who feel strongly enough about an issue will be prepared to put some other citizen, with whom they have had no relationship, and whose actions have not affected them except by causing them intellectual or emotional concern, to very great cost and inconvenience in defending the legality of his actions.[59]

Importantly, his Honour noted that 'what is a sufficient interest will vary according to the nature of the subject matter of the litigation'.[60]

In *Onus*, Ms Onus, a traditional owner and elder of the Gourndjitch-jmara people, sought an injunction to restrain Alcoa from excavating land containing Aboriginal relics. Her application was dismissed at first instance, and on appeal in the Supreme Court of Victoria, on the basis that she lacked standing. The High Court, however, held that, notwithstanding that she did not possess a private interest in the decision under review, as a traditional owner of the affected land she nevertheless had a spiritual interest in the preservation of relics on that land, which was a sufficiently special interest to confer standing.

The statutory test for standing under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) permits a person to apply for review of a decision if he or she is a 'person aggrieved' by that decision — that is, a person 'whose interests are adversely affected by that decision'.[61] In determining whether a person's interests are adversely affected by a decision, the Court has used the principles espoused in *ACF* and *Onus* as the starting point[62] and have reiterated that the test is flexible, requiring an examination of the standing of the applicant 'in the light of the issue which is to be considered'.[63]

In *Batemans Bay Local Aboriginal Council v Aboriginal Community Benefit Fund*,[64] Gaudron, Gummow and Kirby JJ stated that the 'reason of history and the exigencies of present times indicate that' the criterion of a person whose interests are adversely affected by the decision

'is to be construed as an enabling, not a restrictive, procedural stipulation'.[65] This approach was affirmed in 2014 by the High Court in *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development*,[66] and a number of Federal Court and state Supreme Court authorities have more recently taken a broad view as to what 'a person aggrieved in environmental matters' entails.[67]

It is within this jurisprudential space that any mooted repeal of s 487 of the EPBC Act, or other attempts to legislatively restrict standing, is located. Put another way, any attempt to 'bring the EPBC Act standing provisions in line with the broad Commonwealth standing provisions',[68] such as the ADJR Act or the common law, or any other proposed curtailment of standing to prevent 'green lawfare', is unlikely to have the desired effect. Moreover, rather than the existence of a transparent legislative mechanism clearly articulating who can and who cannot commence litigation, the likely consequence will be the facilitation of an interlocutory imbroglio in order to ascertain if an applicant has standing to sue. The result will be inefficient, expensive and a waste of both the parties' and the courts' resources.[69]

Again, as the Hon Murray Wilcox AO QC, in his submission to the Senate Inquiry on the EPBC Standing Bill, opined:

> the Bill is futile. The Minister apparently assumes the court will apply the standing rule laid down in section 5 of the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act). That section allows a 'person aggrieved' to seek review of a decision. The ADJR Act does not define this term and there is no reason to read it as being limited to a person with a financial interest in the decision. It is a safe bet, if this Bill is passed, that the courts will interpret section 5 in a similar way to their adaptation to modern Australian conditions of the old English rule. The only change from the present situation will be that the parties, and so the courts, will spend time examining the details of the applicant's association with the relevant issue or place. And people wonder why litigation is so expensive.[70]

Leaving aside questions of utility and efficacy, it must also be acknowledged that restricting, or attempting to restrict, the rights of environmental litigants to challenge the lawfulness of executive decision-making is an attack on the rule of law. This proposition is hardly novel and has been the subject of considerable confirmatory commentary by a number of prominent and respected legal organisations and academics.[71]

One example suffices. In the context of the debate surrounding the EPBC Standing Bill, the Law Council of Australia said that 'the extended standing conferred under s 487 was intended to broaden access to justice in the environmental law sphere, where numerous constraints militate against public interest litigation ... the provision of access to remedies is an important safeguard for the rule of law, for accountable and responsible government, and as an anti-corruption safeguard'.[72]

*Benefits of open standing in challenging environmental decisions*

Standing is of central importance to environmental litigation, especially public interest environmental litigation, because, as is generally accepted, administrative challenge to decisions affecting the environment is an exercise of the rule of law — it ensures that executive action does not exceed, and is in accordance with, the law — whereas denying the ability of third parties to challenge decisions affecting the environment diminishes effective executive and administrative decision-making, erodes the rule of law and leads to a loss of faith in public institutions of governance.

According to Professor Rosemary Lyster at Sydney University:

> the effect of judicial review is that it identifies the error of law and requires the decision-maker to reconsider the matter in accordance with the law. In a democracy like Australia, where the rule of law

> is paramount, it is in the interests of every citizen and indeed of the government that lawful administrative decisions be made and that if they are unlawful the courts declare them to be so.[73]

Dr Andrew Edgar has correctly, in my view, observed that:

> in administrative law scholarship, extending standing to allow such litigation is justified on rule of law principles. Extended standing broadens the range of persons who may bring proceedings to ensure, at the minimum, that there is compliance with particular provisions of legislation. Environmental legislation such as the EPBC Act contains provisions designed to ensure consideration by officials of various aspects of the environment. Environmental groups and like-minded individuals are likely to be the only persons with an interest in ensuring compliance with such provisions. The developer's interest, on the other hand, will be to reduce the cost and delay of seeking the required approvals and to limit any regulatory restrictions on the scope of their development. Accordingly, their interests will focus on minimising the effectiveness of environmental legislation rather than the rule of law goal of ensuring compliance with statutory requirements.[74]

Neither the rule of law nor the interests of justice would have been served had the proponent in *Adani* proceeded to develop the mine and rail project premised upon an invalid approval. Such a proposition is utterly unremarkable. It is consistent with both legal orthodoxy and common sense.

Not only does public interest environmental litigation — including the sufficiently broad standing rules to enable it — play an important role in holding decision-makers to account but it also facilitates the development of a proper understanding of the law, the logical corollary of which is improved decision-making in the application of those laws.

It also affords the opportunity to clarify the meaning of opaque laws, which, if necessary or desirable, can be amended by Parliament. And more transparent laws tend towards a more efficient application of those laws and, consequently, less litigation.

*Community participation and trust in the public institutions*

Attempts to deny community access to environmental adjudication is contrary to both emerging international norms and the existence of established international laws concerning the right to participate in environmental governance. Some of these principles are enshrined in, for example, Principle 10 of the *Rio Declaration on the Environment and Development*[75] and arts 4 and 6–9 of the 1998 Aarhus Convention.[76]

While Australia has not expressly adopted these laws domestically, there is nevertheless a palpable and growing expectation in the Australian public that it will have the right to participate in, and challenge, if necessary, decision-making that affects the environment.[77] There can be no doubt that over the past decade there has been a marked increase in community concern over, for example, the impact of resource extraction on the local and global environment, together with a concomitant rise in the community's level of demand to be heard and to participate in decision-making with respect to this type of development.

Electorally driven moratoria or legislative bans on fracking in New South Wales, Victoria, Tasmania, Western Australia and the Northern Territory illustrate the point.

This concern and this desire to participate have been consistently on display during the extensive and continuing community consultations undertaken by the Scientific Inquiry into Hydraulic Fracturing in the Northern Territory.[78]

Much has been written recently about the decline in public confidence in the institutions of governance. The Edelman trust barometer, a global annual study of trust in key institutions of Western democracies — namely, government, business, media and NGOs — has found

that trust in those institutions is 'in crisis' globally.[79] Australia has seen one of the sharpest declines, with trust in the government now at 37 per cent — a decrease of 10 per cent since 2012 and falling 8 per cent in the last year alone.[80]

In an age of social media, action undertaken by parliaments driven by short-term political imperatives designed to limit community participation in, and access to, justice, and which will have a tendency to reduce transparency, circumscribe accountability and diminish the quality of decision-making, is certain to have a correlative negative effect on the public's perception of, and faith in, its democratic institutions.

As the Law Society of NSW said in a media release in 2015 but which resonates even more loudly today, 'legislation to limit court oversight of executive decision-making would constitute a serious erosion of fundamental principles of public accountability of the executive arm of government, and of the transparency of decision-making … such an approach is likely to undermine public faith in government by limiting the Courts' ability to guard against the arbitrary exercise of executive power in decision-making about major development projects at the Federal level'.[81]

And it may also adversely impact on the public's perception of whether or not a specific industry, such as the onshore unconventional gas industry, holds a social licence to operate.[82] Distrust breeds distrust.

***Costs***

The next significant constraint in accessing justice is the cost of litigation, especially in jurisdictions where costs follow the event. As Toohey J was quoted as having said, 'there is little point in opening the doors to the courts if litigants cannot afford to come in'.[83]

These costs can be sizable in environmental litigation, where the competing legal issues often involve complex scientific questions necessitating the provision of costly expert evidence.

The general rule in litigation under both the EPBC Act and the EPAA[84] is that the unsuccessful litigant will suffer a costs sanction. For public interest litigants, which tend to be not-for-profit community groups or individuals, the prospect of paying the costs of the decision-maker and the proponent, in addition to having to bear their own costs, has a very real and chilling effect on the very idea of litigation.[85]

The deterrent effect of costs sanctions endures even in jurisdictions such as the Land and Environment Court of NSW, where in Class 4 (judicial review) proceedings parties can apply for protective costs orders[86] or where in genuine public interest litigation cases — which is not easily demonstrated — losing applicants can seek an order that each party bear their own costs.[87] It remains a simple statistical fact that the Court is not inundated with public interest environmental litigation.

***Access to legal assistance***

Lastly, access to justice also includes access to independent and, where appropriate, suitably specialist legal assistance.

Public interest environmental litigation is difficult to institute and even more difficult to maintain in the absence of proper legal assistance. In most instances, the provision of legal assistance from community legal organisations such as the Environmental Defenders

Offices (EDOs) acts to filter untenable cases and prevent them from ever seeing the light of day or, at the very least, the stale air of a dimly lit courtroom.

It is therefore regrettable that, while funding to many community legal centres has been restored by the federal government, this did not include EDOs.[88]

**Mr Neal is entitled to be an agitator**

The central issue in the celebrated case of *Neal v The Queen*[89] was whether or not the learned magistrate had erred in taking into account the appellant's 'agitation' on behalf of certain Indigenous people in the commission of his offence.

In that matter, Mr Neal, an Aboriginal activist, had been charged with assault for spitting at a non-Aboriginal manager of a local store. He was imprisoned for two months with hard labour. In the course of sentencing, the learned magistrate made the following comment in relation to Mr Neal's activism and advocacy in respect of Indigenous self-management: 'I blame your type for this growing hatred of black against white.'[90] On appeal to the Queensland Court of Criminal Appeal, Mr Neal's sentence was increased to six months.

In upholding Mr Neal's appeal against the increased sentence, Murphy J agreed and went on to famously state that 'Mr Neal is entitled to be an agitator'.[91] Murphy J also said that 'if he is an agitator, he is in good company. Many of the great religious and political figures of history have been agitators, and human progress owes much to the efforts of these and the many who are unknown'.[92]

No less is owed to the modern-day agitators and advocates — known and unknown — involved in entirely legitimate public interest environmental litigation. Debasing their attempts to effect environmental change by the use of two-word epithets such as 'green lawfare' or 'vigilante litigation' is to engage in conduct that has the very real and very dangerous prospect of undermining the rule of law and further eroding the public's fragile faith in the very institutions that are critical to ensuring the longevity and robustness of our democratic system. Ultimately, we will all be the poorer for it.

**Endnotes**

1 *Mackay Conservation Group v Commonwealth of Australia* (Federal Court of Australia, NSD33/2015).
2 Whose objects include the protection or conservation of, or research into, the environment.
3 It should be noted that the EPBC Act also makes provision for standing to commence civil enforcement proceedings on similar terms: see s 475.
4 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 487.
5 Senate Environment and Communications Legislation Committee, Parliament of Australia, *Report on the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015* (2015) 29; Jeff Smith, EDO NSW, 'Carmichael shows the law is working well' (Media Release, 7 August 2015) <http://www.edonsw.org.au/carmichael_shows_the_law_is_working_well>.
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7 See, for example, Senator the Hon George Brandis QC, Attorney-General, 'Government acts to protect jobs from vigilante litigants' (Media Release, 18 August 2015) <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/ThirdQuarter/18-August-2015-Government-acts-to-protect-jobs-from-vigilante-litigants.aspx>.
8 Cristy Clark, 'The politics of public interest environmental litigation: lawfare in Australia' (2016) 31(7) *Australian Environment Review* 258, 258.
9 Federal Court of Australia, 'Statement re NSD33/2015 *Mackay Conservation Group v Minister for Environment*' (Media Release, 20 August 2015), quoted in University of Adelaide Public Law and Policy Research Unit, Submission No 35 to Senate Environment and Communications Legislation Committee, Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015, pp 8–9.

10 Attorney-General, above n 7.
11 The use of the term 'lawfare' in a public interest environmental law context is of concern given, as Matthew Groves notes, 'that it clothes those who seek to question environmental or other decisions with rhetoric normally directed to terrorists. That tactic cannot be defended on any reasonable basis': Matthew Groves, 'The Evolution and Reform of Standing in Australian Administrative Law' (2016) 44 *Federal Law Review* 167, 190.
12 Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015.
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14 Noting that some of the challenges were in relation to decisions made earlier in the environmental assessment process rather than any determination whether or not to approve a project.
15 Noting that the outcome in *Adani* is not classed as 'successful' because the proceeding settled.
16 Andrew Macintosh, Heather Roberts and Amy Constable, 'An Empirical Evaluation of Environmental Citizen Suits under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)' (2017) 39 *Sydney Law Review* 85, 110.
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19 Ibid 2.
20 Ibid 6.
21 See, for example, Annabel Hepworth, 'Coal activists strategy exposed', *The Australian Online*, 6 March 2012 <http://www.theaustralian.com.au/business/mining-energy/coal-activists-strategy-exposed/news-story/306fcd94537964a78c50ddd3938f21d9>.
22 See, for example, *Northern Inland Council for the Environment Inc v Minister for the Environment* (2013) 218 FCR 491; *Northern Inland Council for the Environment Inc v Minister for the Environment* [2013] FCA 1418; *Mackay Conservation Group Inc v Minister for the Environment* (Federal Court of Australia, QUD 118/2014); *Alliance to Save Hinchinbrook Inc v Minister for the Environment* (Federal Court of Australia, QUD 8/2015).
23 Macintosh, Roberts and Constable, above n 16, 110.
24 Ibid 108.
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28 Average of 2008 and 2009 figures, Class 1 and Class 4 proceedings. The Land and Environment Court of NSW, *Annual Review 2009* (State of New South Wales, 2010) 27.
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32 *Adani Mining Pty Ltd v Land Services of Coast and Country Inc* [2015] QLC 48.
33 Ibid [508], [575], [585].
34 See, for example, Hurst, above n 6.
35 [2013] NSWLEC 48.
36 Ibid [470], [496].
37 Ibid [496]–[500].
38 *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* [2014] NSWCA 105; (2014) 86 NSWLR 527.
39 *Federal Court Rules 2011* (Cth) r 40.03.
40 The Hon Murray Wilcox AO QC, Submission No 19 to Senate Environment and Communications Legislation Committee, Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015, p 2.
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58 (1981) 149 CLR 27.
59 *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 36 (Gibbs CJ).
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61 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3(4).
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63 (1989) 19 ALD 70 [11].
64 (1998) 194 CLR 247.
65 (1998) 194 CLR 247, [50].
66 *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development* (2014) 254 CLR 394, [60].
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70 Wilcox, above n 40*,* 2.
71 See, for example, the following submissions to the Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015, Senate Environment and Communications Legislation Committee, above n 5: Law Council of Australia, submission 61; EDOs of Australia, submission 114; Nature Conservation Council of NSW, submission 43; Environmental Justice Australia, submission 93; Lock the Gate Alliance, submission 109. In finding in favour of the applicant in *Onus v Alcoa*, Murphy J noted that 'restrictive rules of standing deny access to justice': (1981) 149 CLR 27, [7].
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85 Chris McGrath, 'Flying foxes, dams and whales: Using federal environmental laws in the public interest' (2008) 25 *Environmental and Planning Law Journal* 324, 345–8.
86 *Land and Environment Court Rules 2007* (NSW) r 4.02.
87 *Land and Environment Court Rules 2007* (NSW) r 4.02 in relation to Class 4 proceedings. See *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* (2010) 173 LGERA 280, where Preston J set out the applicable legal principles governing these applications.
88 Noting that the Victorian branch of the EDO is now a separate entity: Environmental Justice Australia.
89 (1982) 149 CLR 305.
90 *Neal v R* (1982) 149 CLR 305, 316 (Murphy J).

91 (1982) 149 CLR 305, 317.
92 (1982) 149 CLR 305, 316.

# STANDING REQUIREMENTS IN JUDICIAL REVIEW APPLICATIONS

***The Hon Justice Janine Pritchard****

As the theme of this year's Australian Institute of Administrative Law National Conference recalls, in *McHattan v Collector of Customs,* Brennan J (as his Honour was then) observed:

> across the pool of sundry interests, the ripples of affection may widely extend. The problem … is the determination of the point beyond which the affection of interests by a decision should be regarded as too remote.[1]

Standing requirements — the rules which determine who is entitled to pursue public law remedies in our courts — are an attempt to grapple with the problem identified by Brennan J. In *Bridgetown/Greenbushes Friends of the Forest v Executive Director, Department of Conservation and Land Management*[2] Murray J explained:

> [The rules of standing in the public law context seek to strike a] balance so as not to unduly fetter the capacity of interested citizens to bring public law issues before the courts, whilst at the same time, again in the interests of the community as a whole, preventing a multiplicity of actions for which no particular justification can be seen.[3]

The operation and content of the standing requirements which apply to applications for judicial review, in which the prerogative writs or equitable relief are sought, raise questions relating to the three sub-themes for this conference. Do standing requirements reflect community expectations of the extent to which administrative decision-makers should be required to comply with statutory limitations or conditions on the exercise of power or of the importance of certainty in administrative decision-making? Given that standing requirements limit the pool of persons able to participate in the review of the legality of executive decision-making, should standing requirements be broadly or narrowly defined? If standing requirements operate so that, in effect, some decisions in excess of jurisdiction cannot readily be challenged, is that a just outcome?

The thesis of this article is that:

- the standing requirements for the prerogative writs and for equitable remedies in public law (the equitable remedies), and for their equivalents under s 75(v) of the *Constitution* (the constitutional remedies), are 'far from coherent';[4]
- incoherence is unnecessary as a matter of principle and undesirable as a matter of practice;
- there is authority to support the adoption by the High Court of the same rule for standing for the prerogative writs of certiorari, prohibition and mandamus, for injunctions and declarations, and for the constitutional remedies; and
- that rule should be an open standing rule, but, in determining whether to grant any of those remedies in the exercise of its discretion, a court will take into account, as one of

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the factors relevant to that exercise of discretion, the nature and extent of the applicant's interest in the subject-matter of the decision or conduct under challenge.

In short, it is time to adopt an open standing rule, combined with discretionary relief which takes into account an applicant's interest in the decision or conduct under challenge.

In order to advance that thesis, in this article I discuss the following five matters:

- the present state of the law in relation to standing requirements for prerogative writs and for the equitable remedies;
- prospects for achieving greater uniformity in the standing requirements for the prerogative writs and for the equitable remedies;
- the implications of an 'open standing' rule for the prerogative writs and the equitable remedies;
- the role of the discretion to refuse the grant of relief to an applicant who does not have an interest in the decision or conduct under challenge; and
- legislative reform of standing requirements.

For the sake of simplicity, I propose to confine my discussion of the prerogative writs to the writs of certiorari, prohibition and mandamus and to confine my observations to those cases where the writs, or the equitable remedies, are sought on the basis of a jurisdictional error by the decision-maker.

**The present state of the law in relation to standing requirements for prerogative writs and for the equitable remedies**

Prior to the late 1990s, there had been relatively few cases in the High Court in which the requirements for standing to obtain prerogative relief were considered. The standing requirements for each of the prerogative writs, which could be discerned from other cases, were not entirely clear. Those requirements relied heavily on principles set out in English cases and were to some extent influenced by the requirements of the rules of court in each jurisdiction. There was authority, for example, which suggested that the person applying for a prerogative writ had to have some interest in the remedy, over and above that of a member of the public.[5] In other cases, it was recognised that a more liberal test applied for certiorari and prohibition and that even a 'stranger' could apply for those writs;[6] nevertheless, 'the court would not listen, of course, to a mere busybody who was interfering in things which did not concern him'.[7]

***The writs of certiorari and prohibition***

In a series of cases beginning in the late 1990s, however, various justices of the High Court made it clear that a 'stranger' could seek the writ of certiorari and confirmed a line of authority which established that a stranger could also seek the writ of prohibition.

Insofar as the writ of certiorari is concerned, in *Re McBain; Ex parte Australian Catholic Bishops Conference*[8] (*McBain*) McHugh J and Hayne J each expressed the view that a 'stranger' could apply for certiorari. So too did Kirby J and Callinan J in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd.*[9] In *Australian Education Union v General Manager of Fair Work Australia*[10] (*AEU*), Gummow, Hayne and Bell JJ also noted that a 'stranger' to a decision may apply for a writ of certiorari to quash that decision. The absence of any requirement for an applicant for certiorari to establish standing was not endorsed by a majority of the Court in any of those cases. Nevertheless, it is apparent that the prevailing view in those cases was that an applicant for a writ of

certiorari need not establish standing to bring that application. That was the conclusion reached by the New South Wales Court of Appeal in *Motor Accidents Authority of New South Wales v Mills.*[11]

Insofar as the writ of prohibition is concerned, in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*[12] (*Bateman's Bay*), Gaudron, Gummow and Kirby JJ noted that there was a line of authority that a stranger to an industrial dispute had standing to seek prohibition under s 75(v) of the *Constitution.* The issue was put beyond doubt in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd*,[13] in which six members of the Court expressed the view that an applicant for prohibition did not need to demonstrate standing.

The approach taken by the High Court in relation to standing requirements for the writs of certiorari and prohibition has been criticised by the authors of *Judicial Review of Administrative Action and Government Liability.* Professor Groves (who has been responsible for writing the chapter on standing) has suggested that the 'modern cases have engaged in a selective history to propose that [these writs] were and are available to those without any stake in the matter whatsoever'.[14] That point need not be debated here. Irrespective of what the older cases may have said, the High Court's position is now clear. An open standing rule applies in relation to certiorari and prohibition (but the question of the applicant's interest arises for consideration in relation to the discretion to grant the writ, as I discuss below).

***The writ of mandamus***

The standing requirement for the writ of mandamus appears to be different.

There is a dearth of High Court authority on the standing requirement for mandamus. In *Graham Barclay Oysters v Ryan*,[15] and in *Bateman's Bay*,[16] McHugh J, in *obiter*, made some observations about the writ of mandamus and noted that an applicant for the writ must show a 'sufficient interest' in the performance of the duty in question, possibly even amounting to a legal right. In *McBain*, Hayne J noted that it would be incongruous if a stranger could seek to compel the re-exercise of jurisdiction if a party to the original decision (in that case, in the proceedings before the trial judge in the Federal Court) did not seek to compel that result.[17] In making that observation, his Honour was contrasting the standing requirement for mandamus with the standing requirement (or lack thereof) for certiorari and prohibition.

In some of the older cases, there were suggestions that an applicant for mandamus had to be within the ambit of the public duty which it is claimed was not performed.[18] However, there is other authority to the effect that it is not necessary for an applicant to show that the decision-maker owes a duty to the plaintiff directly and personally which is correlative to the plaintiff's right to have it performed but, rather, that standing may be grounded on a less direct interest.[19] More recently, in *Ruddock v Vadarlis*[20] (the *Tampa* case), the relief sought included mandamus and an injunction to compel the respondents to comply with a duty it was said arose under the *Migration Act 1958* (Cth) to bring the rescuees to Australia to be processed. Justice North equated the requirement for standing for mandamus with that for an injunction — namely, that the applicants had to show a 'special interest'.[21]

I note for completeness that, in some jurisdictions, the rules of court contain standing requirements. Under the *Rules of the Supreme Court 1971* (WA), a writ of mandamus or similar relief may only be granted on the application of a person who is 'interested' in the relief sought.[22] This has been equated with a 'sufficient interest',[23] or a 'special interest'.[24]

It thus appears that the content of the common law standing rule for mandamus is similar, if not identical, to the 'special interest' test for standing to seek the equitable remedies but possibly with an additional requirement that the applicant be within the ambit or scope of the legal duty which the person seeks to enforce. Whatever may be the precise content of the standing requirement for the writ of mandamus, it is apparent that it is different from that for the writs of certiorari and prohibition.

***Standing to seek the equitable remedies***

That may be contrasted with the standing requirements for the equitable remedies. Historically, the Courts of Chancery would grant equitable relief by injunction to restrain public bodies from acting beyond their power. To do so, however, it was necessary that the Attorney-General either be the plaintiff or give his fiat to a private plaintiff.[25] An exception to that requirement developed, whereby a plaintiff could bring an action without joining the Attorney-General either where there was an interference with his or her private right at the same time as the interference with the public right or where the plaintiff suffered a special damage, peculiar to the plaintiff, as a result of the interference with the public right.[26]

From that historical foundation the law in Australia developed so that a plaintiff would have standing to seek equitable remedies to prevent or correct the violation of a public right, or to compel the performance of a public duty, if the plaintiff could show a 'special interest' in the subject-matter of the action.[27] It is not necessary that that interest be unique to the plaintiff.[28] However, a plaintiff will have no standing to bring an action for such relief if the plaintiffs have no interest in the subject-matter of the action beyond that of any other member of the public.[29]

A 'special interest' does not mean a mere intellectual or emotional concern about a particular issue.[30] Also, it does not mean that a belief, however strongly felt, that the law generally, or a particular law, should be observed or that conduct of a particular kind should be prevented will be sufficient to give rise to a 'special interest' for this purpose.[31] Having said that, intangible interests have been held to be sufficient to constitute a 'special interest' in some cases, such as where an applicant for an injunction to preserve Aboriginal relics had an interest in the preservation of relics of cultural and spiritual significance to the members of a particular Indigenous community.[32]

The requirement for a 'special interest' is a flexible one.[33] It is a matter of fact and degree and will depend on the nature and subject-matter of the litigation,[34] including the legislation relevant to the decision. It will involve an assessment of the importance of the concern held by the plaintiff with regard to the particular subject-matter and the closeness of the plaintiff's relationship to that subject-matter.[35] What is a sufficient interest in one case may therefore be less than sufficient in another.[36]

Consequently, the cases are replete with discussion about whether an individual or corporate plaintiff is able to demonstrate enough of a connection with the decision under challenge to amount to a 'special interest'. In the context of representative groups, it is common to see discussion about who the plaintiff is said to represent, whether those persons themselves have an interest in the decision under challenge, the history of the representative body and the purpose for which it was formed.[37] So, too, the fact that an organisation has been provided with government funding, and accorded recognition to speak in respect of particular issues, may be a factor that signals that the association has a special interest, beyond a mere emotional or intellectual concern, in that issue.[38]

Some factors will not, on their own, be sufficient to give rise to standing: the fact that a plaintiff is an incorporated body with particular objects,[39] the fact that an association has

voluntarily provided comments or concerns on a particular proposal[40] or the fact that some members of an incorporated body or unincorporated association have a special interest in the decision under challenge does not mean that the association itself will necessarily have a special interest in that decision.[41] However, those factors may still be relevant to an overall assessment of whether a plaintiff has standing.

***Summary of the position in Australia***

The position, in summary, therefore appears to be as follows. In relation to the writs of certiorari and prohibition, an open standing rule applies: anyone, including a person with no interest in the decision under challenge, can apply for the writs. In contrast, an applicant for the writ of mandamus must demonstrate a sufficient or special interest in the performance of the duty which is sought to be enforced and, perhaps, must also show that they are a person within the ambit or scope of the legal duty which they seek to enforce.

In actions for the equitable remedies, a plaintiff will need to show that they have a special interest in the decision or conduct under challenge, which interest is over and above that of other members of the community, although that requirement is applied flexibly.

***Standing requirements under statutory judicial review***

A range of approaches to the requirements for standing have been adopted in those jurisdictions where statutory judicial review is available. The prevailing approach is that an applicant needs to show that their interests are, or would be, affected by the decision or conduct under challenge.

Under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act), for example, a 'person aggrieved' by a decision, or by conduct engaged in for the purpose of making a decision, may seek judicial review.[42] A 'person aggrieved' is a person whose interests are adversely affected by the decision or whose interests are or would be adversely affected by conduct engaged in for the purpose of making, or failing to make, a decision or, in the case of a decision by way of a report or recommendation, a person whose interests would be affected if a decision were made in accordance with a report or recommendation.[43]

That model has been followed in some state jurisdictions, such as in the *Judicial Review Act 1991* (Qld)[44] and the *Judicial Review Act 2000* (Tas).[45]

Other jurisdictions have adopted variations of the 'adversely affected' requirement. The *Administrative Decisions (Judicial Review) Act 1989* (ACT), for example, imposes the 'adversely affected' standing requirement only for decisions concerned with heritage and planning.[46] In the case of all other decisions to which that Act applies, anyone may make an application for review. That open standing rule is subject to two exceptions — namely, where a statute precludes the person from pursuing relief and where the applicant's interests would not be adversely affected and their application does not raise a significant issue of public importance.[47]

Finally, some statutes contain an even broader or more flexible requirement for standing and, in some instances, adopt an 'open standing' rule.[48] Perhaps the most notorious of these is s 487 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), which expressly extended the meaning of the term 'person aggrieved' in the ADJR Act. An Australian citizen or resident, or an organisation or association incorporated or established in Australia, will be a 'person aggrieved' for the purposes of the ADJR Act if, in the two years prior to the decision under challenge, they have engaged in a series of activities in Australia for the protection or conservation of, or research into, the

environment.[49] That provision has generated considerable controversy because of a perception that that liberal standing rule has permitted unmeritorious applications for review to be made. I will return to that issue a little later in this article.

**Prospects for achieving greater uniformity in the standing requirements for the prerogative writs and for the equitable remedies**

Leaving to one side the possibility of legislative reform of standing requirements (to which I will return later in the article), achieving any greater uniformity in the standing requirements applicable to the writs of certiorari, prohibition and mandamus, and to the equitable remedies, would require that the High Court depart from existing authority. That having been said, the foundations for the adoption of a uniform open standing requirement (operating in conjunction with the exercise of a discretion whether to grant the relief sought, which would permit the extent of a plaintiff's interest in the decision or conduct under challenge to be taken into account) can be identified in a number of the judgments of the Court.

Various members of the High Court have expressed the view that the standing requirements for the equitable remedies should reflect the standing requirements for the writs of certiorari and prohibition. In *Victoria v Commonwealth (AAP Case)*, for example, Gibbs J remarked that earlier statements on the issue of standing 'made under the influence of principles of private law' are 'not entirely applicable to constitutional cases'.[50]

In *Bateman's Bay*, Gaudron, Gummow and Kirby JJ noted that the requirement that the plaintiff demonstrate a 'special interest' in the subject-matter of the application for a declaration or injunction to remedy a public wrong, or enforce a public duty, was an attempt to solve the problem that otherwise only the Attorney-General, or a party with the Attorney-General's fiat, could bring such an action but, at the same time, to keep at bay 'the phantom busybody or ghostly meddler'.[51] They concluded that 'the result [was] an unsatisfactory weighting of the scales in favour of defendant public bodies'.[52] That was because an applicant first had to demonstrate a special interest, in addition to demonstrating a basis for the relief sought. Justices Gaudron, Gummow and Kirby were sceptical about the prospect that an applicant could obtain an Attorney-General's fiat to challenge a government decision, given that, in Australia, Attorneys-General are members of the government.[53] For that reason, they suggested that:

> in a case where the plaintiff has not sought or has been refused the Attorney General's fiat, it may well be appropriate to dispose of any question of standing to seek injunctive or other equitable relief by asking whether the proceedings should be dismissed because the right or interest of the plaintiff was insufficient to support a justiciable controversy, or should be stayed as otherwise oppressive, vexatious or an abuse of process. The plaintiff would be at peril of an adverse costs order if the action failed. A suit might properly be mounted in this way, but equitable relief denied on discretionary grounds.[54]

They pointed out that this approach would be no different from that where a stranger is entitled to seek the grant of prohibition under s 75(v), in which case the Court had a discretion to refuse the remedy.[55] In other words, Gaudron, Gummow and Kirby JJ supported the adoption of the same standing requirement for the equitable remedies as applied to the writ of prohibition (and of certiorari). However, as that course was not sought by the parties in *Bateman's Bay*, the need to determine the point did not arise.

Justices Gaudron, Gummow and Kirby were not the only members of the Court in *Bateman's Bay* to express dissatisfaction with the existing standing requirements. McHugh J observed that the law in respect of standing requirements was 'in need of rationalisation and unification'.[56] However, his Honour concluded that in view of the existence of divergent opinions as to whether the public interest was best served by maintaining the

Attorney-General as the primary protector of public rights, either as a party or by the grant of a fiat, it was preferable that the legislature modify or rationalise standing requirements.

More recently, in *Combet v Commonwealth*[57] (*Combet*), Kirby J again expressed his support for a more flexible approach to standing to seek the equitable remedies, at least in a case involving a challenge to a federal statute or some action by the federal executive. He considered that it would be a 'mistake to graft onto a claim for such relief [which involved the exercise of the jurisdiction in s 75(v) of the *Constitution*] the learning that was devised in respect of the provision of equitable relief in private litigation'.[58] His Honour's view was that 'in matters of public law, potentially there is an additional interest' — namely, 'the interest of the public generally to ensure the compliance of officers of the Commonwealth with the law, specifically the law of the *Constitution* and federal enactments that bind such officers'.[59] Ultimately, however, Kirby J was able to decide the issues in *Combet* without having to determine whether such an interest would suffice to entitle a taxpayer or an elector, or others more generally, to bring proceedings pursuant to s 75(v) of the *Constitution.*

***Justifications for adopting the same test for standing for certiorari and prohibition, and for the equitable remedies***

The adoption of the same standing requirement for the writs of certiorari and prohibition, and for the equitable remedies, may be justified on a number of bases. Some of these justifications have been articulated in the authorities, while others have a more practical foundation. They amount to a compelling case for the adoption of a uniform, open standing rule for the writs of certiorari and prohibition, and for the equitable remedies. The same arguments support the adoption of an open standing rule in the case of the writ of mandamus also.

*Public interest — a single (more flexible) standing rule would facilitate the availability of judicial review to enforce the legal limits on the exercise of power*

This justification for a uniform standing rule proceeds on the basis that, where a decision is made in excess of jurisdiction, it is in the public interest for that decision to be susceptible to judicial review, because that encourages better public administration. An argument of that kind was relied upon by a number of members of the High Court in *Bateman's Bay*, in *McBain* and in *AEU* in support of the conclusion that a stranger should have standing to seek the writ of certiorari.[60] By way of example, in *Bateman's Bay* McHugh J observed that:

> [i]t is hard to see how it could ever be contrary to the public interest to require a statutory corporation to spend its money and make contracts only in accordance with the statute which creates it and defines its powers and purposes.[61]

In *McBain*, McHugh J, with whom Callinan J agreed, explained that the rationale for the absence of a standing rule was that '[p]ermitting strangers to apply for certiorari helps to ensure that "the prescribed order of the administration of justice" is not disobeyed'.[62] To similar effect, Hayne J, in *McBain*,[63] and Gummow, Hayne and Bell JJ, in *AEU*,[64] each referred, with approval, to the following observation by Professor Wade:

> [C]ertiorari is not confined by a narrow conception of locus standi. It contains an element of the *actio popularis*. This is because it looks beyond the personal rights of the applicant: it is designed to keep the machinery of justice in proper working order by preventing inferior tribunals and public authorities from abusing their powers.[65]

The argument for adopting an open standing rule, in the public interest, is equally applicable to the standing requirements for the equitable remedies in the public law context. After all, the rationale for equity's intervention in the public law context was to ensure 'the observance

by … statutory authorities, particularly those with recourse to public revenues, of the limitations upon their activities which the legislature has imposed'.[66]

*It is incongruous to require a plaintiff to show a 'special interest' to obtain equitable relief*

The 'special interest' requirement for standing to seek the equitable remedies was developed to avoid the prospect that an equitable remedy would be denied for a decision made in excess of a decision-maker's statutory power, on the basis that the plaintiff did not have a personal interest in the subject of the decision under challenge.[67] The requirement that a plaintiff seeking an equitable remedy demonstrate a 'special interest' is at odds with that objective. That point was made by Gaudron, Gummow and Kirby JJ in *Bateman's Bay.* They observed:

> [t]here is an incongruity in a principle which takes as its starting point the proposition that the statute in question has stopped short of creating a personal right which equity may protect by injunction, but nevertheless enables an individual who suffers 'special damage peculiar to himself' to seek equitable relief in respect of an interference with the public interest.[68]

*It is incongruous to have a different test for standing to seek the constitutional writs, and to seek equitable remedies, under s 75(v) of the Constitution*

The purpose of each of the constitutional writs in s 75(v) of the *Constitution* (and for the prerogative writs more generally) is the same — namely, to ensure that decision-makers obey the law and do not exceed, or ignore the limits of, or refuse to exercise, any jurisdiction conferred on them by statute. In circumstances where they are directed to the same purpose, it is difficult to see any reason, in principle, why there should be a different test to determine whether an applicant has standing to seek a writ of mandamus, as opposed to a writ of prohibition or certiorari.

The remedy of injunction is available under s 75(v) of the *Constitution* and in equity. Injunctions are granted, and declarations are made, in the public law context for the same purpose as the grant of the constitutional or prerogative writs. That being the case, it is difficult to see any reason why a different standing requirement should apply to the equitable remedies.[69] As Leeming has argued, '[t]he current rules regulating standing [for injunctions] sit ill with the constitutional context and purpose'.[70]

The incongruity in the different standing requirements is even more pronounced when the practical effect of the remedies is taken into account. The effect of a writ of prohibition, or of an injunction, in the public law context will be the same — namely, to prevent a decision-maker from exceeding their jurisdiction.

*It is incongruous to have different standing requirements for prerogative relief, or for the equitable remedies, when the basis for the grant of relief is the same in each case*

In the public law context, the basis for the grant of a writ of certiorari or prohibition, or for the equitable remedies, is the existence of a jurisdictional error.[71] (I will leave to one side those cases involving an error of law on the face of the record.) Further, in deciding whether to grant either prerogative or equitable relief, the court will exercise its discretion. In those circumstances, it is difficult to see why a different standing requirement should apply for an applicant for prerogative relief, as opposed to an applicant who seeks an equitable remedy.

*Different standing rules undermine equity's role in public law*

Equitable remedies developed an important role in public law 'because of the inadequacies of the prerogative writs':[72] that of providing an alternative means to ensure that public power was exercised within its statutory limits in those cases where the technical requirements for the writs were not met.[73] There will be cases, such as *Ainsworth v Criminal Justice Commission*,[74] where a jurisdictional error is established, but the grant of prerogative relief would not be appropriate. If an applicant were unable to demonstrate a special interest in the decision under challenge, they would not be entitled to apply to the court for a declaration, with the result that an equitable remedy for the jurisdictional error would not be available.[75] That result would undermine the role of equity in public law.[76]

*Convenience and practicality*

It is very common to see applications for equitable relief made in addition, or in the alternative, to applications for prerogative relief. Under the *Rules of the Supreme Court 1971* (WA), for example, the prescribed form for a judicial review application[77] permits an applicant to select a remedy from a list of possible remedies the court may grant. The list includes the prerogative writs and the equitable remedies. Applicants will frequently seek both prerogative writs and equitable remedies, in the alternative.

In a case where an equitable remedy is sought, in the alternative to a prerogative writ, what test for standing must the applicant meet? Arguably, the applicant is entitled to establish standing according to the least rigorous standing requirement (namely, the open standing requirement applicable to the writs of certiorari and prohibition). If that is the case then the practical effect of any different standing requirement for the equitable remedies will be negated.

*Other practical benefits of the same open standing rule for the writs of certiorari and prohibition, and for the equitable remedies*

The adoption of an open standing rule for the equitable remedies as well as for the writs of certiorari and prohibition would have other beneficial consequences. One would be that time and cost would no longer need to be expended on dealing with the question whether an applicant for relief has standing. Objections to an applicant's standing are often raised, although not always resolved, as a preliminary issue.[78]

On the other hand, if the adoption of an open standing rule results in closer consideration of whether relief should be granted in the exercise of the court's discretion (in the event that jurisdictional error is established), the possibility exists that relief may be denied, because the applicant does not have an interest in the decision sufficient to warrant the grant of a remedy. It might be thought that that would amount to wasted time, resources and costs, for litigants and for the courts, and that that militates against an open standing rule. However, to reach that conclusion would be to ignore one of the benefits of an open standing rule when it is combined with a greater emphasis on discretionary considerations in relation to relief. An open standing rule enables an allegation of jurisdictional error to be examined and, if such an error has been made, for reasons to be given by the court which identify the basis for that error. If the applicant for relief does not have an interest in the decision under challenge then that factor (together with any other relevant discretionary considerations, which are considered below) can be taken into account in determining whether relief should be granted. Even if relief is ultimately denied, the decision-maker, and the community, will nevertheless have the benefit of the court's reasoning in relation to the jurisdictional error. In turn, that will facilitate compliance with applicable statutory limits in the future, even if relief is

denied in the case at hand. That outcome would encourage good public administration and enhance the lawfulness of administrative decision-making in other cases.

***Is there a case for the adoption of the same standing rule for mandamus, as well as for certiorari and prohibition?***

The focus of this article so far has been on the case for uniformity between the standing rules for certiorari and prohibition, on the one hand, and declarations and injunctions, on the other hand. However, many of the justifications (discussed above) for a uniform approach to the standing requirements for the writs of certiorari and prohibition, and for the equitable remedies, are equally apt to support an open standing rule in an application for the writ of mandamus. One counter-argument was identified by Hayne J in *McBain*.[79] His Honour observed that it would be incongruous for a stranger to be able to seek to enforce a law if persons actually affected by the law did not themselves seek to enforce it. However, that concern could be adequately addressed in the exercise of the Court's discretion to grant the relief sought, rather than by a different standing requirement for the writ of mandamus.

***Is there any impediment to the adoption of the same open standing requirements for the prerogative writs and the equitable remedies?***

If uniform standing requirements for the prerogative writs and for the equitable remedies are considered justified on the basis of principle, and on practical grounds, the question then arises as to whether there is any impediment to the adoption by the High Court of the same standing requirement when a suitable case arises. There does not appear to be any such impediment.

It is not infrequently observed that questions of standing are intertwined with the requirement for the existence of a 'matter' in federal jurisdiction. Fundamental to the existence of a 'matter' is that there be a 'justiciable controversy'.[80] No question arises as to the existence of a 'matter' simply by virtue of the fact that an applicant for relief does not have a 'special interest' in the subject-matter of the proceedings.[81] However, questions of standing can overlap with questions relating to the existence of a 'matter' in federal jurisdiction — for example, if a plaintiff seeks a declaration in relation to what is, in effect, a hypothetical question.[82] Provided that the relief sought is actually directed to rectifying a 'public wrong',[83] an open standing rule appears unlikely to give rise to any difficulty in cases in federal jurisdiction.

**The implications of an 'open standing' rule for the prerogative writs and the equitable remedies**

So far, this article has focused on the justifications for adopting the same open standing rule for the prerogative writs and the equitable remedies. However, in the past, proposals to abolish standing rules have been met with considerable opposition on several bases. In this section of the article, I turn to consider the merits of some of these competing arguments before considering whether standing requirements are the best way to deal with the concerns which underlie those arguments.

***Justifications for retaining standing requirements for prerogative writs and the equitable remedies***

*The argument that standing rules are essential to prevent a flood of unmeritorious claims by 'busybodies' and 'meddlers'*

This argument amounts to an assertion that standing rules are essential to prevent 'busybodies' from putting other people to cost and inconvenience by having to defend legal proceedings[84] and to discourage actions which are not justified.[85] The argument assumes that, in the absence of standing rules, there would be a flood of unmeritorious applications for judicial review.

A report published by the Australian Law Reform Commission (ALRC) in 1985 doubted the force of the 'floodgates' argument. The report analysed empirical evidence from jurisdictions overseas and concluded that the 'high costs are a strong disincentive to litigation, even when there is no barrier in the form of a requirement of standing'.[86]

Similarly, in a report published in 1996, the ALRC confirmed its view that relaxing the law of standing was 'unlikely to lead to a significant increase in litigation'.[87]

Other researchers have cast doubt on claims that abolishing standing rules risks a flood of unmeritorious claims. It has been argued, for example, that there is no evidence to suggest that the liberal standing rule under s 487 of the EPBC Act has resulted in inappropriate litigation or an inappropriately high number of review applications[88] and that 'none of the cases brought under s 487 has been challenged as frivolous or vexatious or an abuse of process, nor have indemnity costs been awarded'.[89]

*The argument that an open standing rule will produce greater uncertainty for decision-makers and for the community*

In theory, any exercise of a statutory power gives rise to the possibility that a review of that decision may be sought, whether by judicial review or merits review (if available). But the impact of that possibility on public administration must be kept in perspective. The impact of uncertainty about the finality of a decision depends on the likelihood of a challenge to it. As I have already noted, the empirical evidence suggests that an open standing rule is unlikely to produce a marked increase in the number of applications for judicial review. In addition, the argument tends to overlook the impact of time limits for bringing judicial review applications. Time limits for judicial review applications are commonly imposed by statute or the rules of court[90] and, in any event (as I note below), delay in bringing an application for judicial review is a factor relevant to the exercise of discretion to grant relief.

Finally, this argument also assumes that more applications for judicial review (if there are any) will necessarily result in more decisions being set aside, which in turn would produce greater uncertainty for decision-makers. To that extent, the argument overlooks the benefits for public administration of the process of judicial review itself. Scrutiny of a decision through the lens of judicial review will either confirm the legality of the decision and the decision-making process adopted by the decision-maker or will identify jurisdictional errors so that any failure to observe the limits of statutory powers can be avoided in the future. Either outcome will clarify what is required for future decisions of the same kind.

*The argument that open standing would undermine the reliable and predictable administration of the law*

This argument is that standing rules enhance the reliable and predictable administration of the law because they exclude the possibility of unexpected challenges brought by parties with no relationship to the decision or subject-matter.[91] This argument overlaps, to a considerable extent, with the arguments already discussed. It also appears to assume that challenges by third parties will be unmeritorious. There is no logical basis for that conclusion. Further, narrow standing requirements do not discriminate between applicants whose claims are meritorious and those whose claims have no prospect of success. As I discuss below, other mechanisms than standing requirements are available to screen out unmeritorious claims.

*The argument that increased scope for review by strangers adds to increased delay and cost for all concerned*

The potential additional costs for litigants, other parties affected by a decision, courts and, thus, the community of increasing the avenues for challenging administrative decisions by relaxing standing requirements is a legitimate concern. However, the extent of that potential impact needs to be carefully and realistically assessed. If, as the empirical evidence suggests, open standing rules do not result in a flood of litigation then the additional costs overall are unlikely to be significant. Further, to focus solely on the burden of any additional costs and delay which an open standing rule might cause is to ignore the benefits for public administration that judicial review brings.

*The argument that it is not always in the public interest to enforce all laws on the statute books or to permit all interests to be vindicated*

In *Bateman's Bay,* McHugh J observed that the public interest of a society may not be best served by attempting to enforce a particular law.[92] A somewhat similar argument which is sometimes advanced is that not all 'interests' should be able to be vindicated through judicial review. By way of example, the latter argument was sometimes used in relation to the question whether judicial review should be available to those seeking only to protect their competitive advantage.[93] These arguments tend to involve subjective views about the intrinsic value or importance of an applicant's interest and of the proper role of judicial review. If those arguments have any legitimate role in this context, it lies in the court's discretion to grant or refuse relief. That would ensure transparency in the value judgment being made about the applicant's claim and enable the merits of that judgment to be evaluated against other competing claims and interests relevant to the grant of relief.

***Are standing requirements the best way to discourage unmeritorious claims?***

One of the strongest themes underlying the various arguments in favour of the retention of standing requirements is that those requirements are important in order to weed out unmeritorious claims. However, it must be borne in mind that there are a variety of other means available to the courts to dismiss claims with no merit at an early stage or to discourage frivolous or vexatious litigation.[94] These include applications for the summary dismissal or strike-out of hopeless cases at an interlocutory stage, the potential for costs orders against an applicant in the event that an application for judicial review is unsuccessful, orders for the payment of security for costs, and the prospect that relief will be refused in the exercise of the court's discretion. It has also been suggested that lawyers would have a role to play in screening out possible abuses of any open standing rule, in that unmeritorious claims would be unlikely to attract pro bono assistance.[95]

The practical impact of these avenues should not be overlooked. If the key concern is to exclude unmeritorious claims then one or more of these avenues is the preferable means to achieve that objective, unlike standing requirements, which focus solely on the identity and interest of the applicant in the decision under review.

***Conclusion***

None of the arguments discussed above, either individually or collectively, amount to a compelling case against the adoption of the same standing rule for the prerogative writs and for the equitable remedies. That is especially so in light of the fact that alternative avenues exist to deal with unmeritorious claims for relief.

**The role of the discretion to refuse the grant of prerogative relief or the equitable remedies to an applicant who does not have an interest in the decision under challenge**

The adoption of the same open standing rule for applications for the writs of certiorari, prohibition and mandamus, and for the equitable remedies, would not mean that an applicant's interest (or lack thereof) in the decision under review would be irrelevant. That is because both the prerogative writs[96] and the equitable remedies are discretionary.[97]

It is well established that an applicant's interest in a decision is a factor to be taken into account in determining whether relief should be granted. However, perhaps because of the role played by standing requirements, that factor has not ordinarily attracted much attention. The typical approach of the courts has been that, if the basis for relief has been established, relief will be granted 'unless circumstances appear making it just that the remedy should be withheld'.[98]

The stage at which the grant of relief arises for consideration, rather than the standing stage, is the appropriate juncture at which to consider the applicant's interest in the decision, because it can then be weighed against all other factors relevant to the exercise of the discretion to refuse relief. Furthermore, that evaluation will only take place in the event that a jurisdictional error has been established. In that context, the implications of the jurisdictional error in the decision itself, and the importance of rectifying that error, can also be taken into account.

The question that arises is the impact which an applicant's interest (or lack thereof) in the decision under review is likely to have in the discretion to grant relief. In considering that question, it is appropriate to begin by recalling the factors that may be relevant in assessing whether to grant relief before turning to consider more closely the interaction of a 'stranger's' lack of interest in the decision with those other factors.

***Discretionary factors relevant to the grant of the prerogative writs or the equitable remedies***

Although the categories of case in which relief might be refused on discretionary grounds are not closed,[99] there are numerous factors that may be taken into account in determining whether relief should be granted if a jurisdictional error is made out. These include:

- whether the party seeking prerogative relief could have pursued some other relief, such as an appeal, instead,[100] although if the prospects of obtaining other relief were uncertain then that factor will not carry any weight;[101]

- whether a more convenient and satisfactory remedy exists than that which is sought;[102]
- whether the argument which is the basis for the jurisdictional error was not raised before the decision-maker at first instance;[103]
- whether there would be any utility in the grant of the relief.[104] If the relief would be futile, it will not be granted;[105]
- if the applicant was not a party to the decision under review, whether the applicant could have applied to be joined in the proceedings before the decision-maker;[106]
- bad faith on the part of the applicant;[107]
- undue delay in bringing the application for judicial review,[108] which will often be raised in conjunction with arguments about prejudice to other parties as a result of the grant of relief;[109]
- prejudice to a third party[110] — for example, if a third party may be exposed to the risk of prosecution or disciplinary sanctions for acts done in reliance on the correctness of the decision under challenge[111] or has acted on the correctness of the decision and done work, entered contracts or expended funds;[112]
- the attitude of parties to the decision under challenge. If those parties do not seek to disturb the decision under review, that will be a factor that weighs against the grant of relief (such as certiorari) which would disturb that decision;[113] and
- the fact that the applicant for relief has no interest in the decision under review.[114]

I turn next to consider the role that the latter factor might have in the overall exercise of discretion.

***How is the discretion to be exercised if a 'stranger' seeks judicial review and establishes a jurisdictional error?***

There is no doubt that the discretion whether to grant relief to remedy a jurisdictional error must not be exercised capriciously but, rather, must be exercised in a reasonable manner according to the circumstances.[115] Consequently, a court will not, in the exercise of its discretion, refuse to grant relief simply because the applicant was not a party to the decision under challenge.[116] Instead, the fact that an applicant for relief has no interest in the decision under challenge falls to be weighed up, together with all of the other factors at play in the case. But, in a case where those factors boil down to the competing interests (or lack thereof) of the applicant, on the one hand, and of the parties to the decision under challenge, on the other hand, and where a jurisdictional error has been established, how is the discretion to be exercised?

It seems very likely that the exercise of discretion in this context will be affected by the court's view of the importance of remedying the jurisdictional error, having regard to the nature and significance of the breach of the law involved and 'perceptions of matters of public policy'.[117] Judicial minds may differ on this issue. By way of example, in *McBain,* Kirby J expressed the view that, as a foundation for the exercise of the Court's jurisdiction had been established, there would need to be 'substantial reasons' of a discretionary kind to refuse relief.[118]

Some judges may regard the potential for prejudice to third parties, or to a party to the decision under challenge (which may be no more than that the parties to that decision did not seek to disturb it), as compelling reasons to refuse relief. In *McBain*, McHugh J observed:

> [A]lthough a stranger to the proceedings may apply for certiorari or prohibition to issue, a stranger's lack of standing will *frequently* result in the Court refusing to issue either writ on discretionary grounds. If the applicant is not a person aggrieved, the court will consider 'whether the interest of the applicant

> is so small, or his grievance so like that of the rest of Her Majesty's subjects, as to leave no sufficient ground for the issue of the writ'.[119]

Similarly, as I have already noted, Hayne J thought it would be odd to grant mandamus to compel the exercise of a public duty when the person to whom the duty was owed did not seek that outcome.[120]

**Legislative reform of standing requirements for judicial review**

The focus of this article has been on reform of the standing requirements for the prerogative writs and the equitable remedies, by the evolution of the case law. An alternative means by which reform might be achieved is, obviously, through legislation. Indeed, some judges (such as McHugh J) have expressed the view that legislative reform is the most desirable course.

In this last section of the article I propose to discuss, rather more briefly, first, the prospects for reform of standing requirements for judicial review through legislation; and, secondly, whether there are any impediments to that reform being pursued.

***Prospects for legislative reform of standing rules***

The prospects of legislative reform to remove or liberate standing requirements for judicial review seem to be poor, having regard to two matters.

First, the liberal standing rule in s 487 of the EPBC Act has generated considerable controversy, culminating in an attempt to repeal it in 2015.

Secondly, on two occasions (in 1985 and 1996) the ALRC recommended reform to relax standing rules for judicial review, and those recommendations were not acted upon. In 1985, the ALRC recommended an open standing approach but with the proviso that the courts should still be able to exclude an applicant who was 'merely meddling'[121] by denying standing if the applicant had no personal stake in the subject-matter of the litigation and clearly could not adequately represent the public interest.[122]

In 1996, the ALRC revisited the question of standing and made a somewhat similar recommendation. On that occasion, the ALRC considered that 'the wide range of tests for standing for both general law remedies and statutory relief should be replaced with a single test', that that new test 'should not require a person to have a 'special interest' in order to commence public law proceedings' and that 'the new test should be simple, with as few threshold criteria as possible, and should facilitate, not impede, public law proceedings'.[123] The ALRC's recommendation in 1996 was that:

> any person should be able to commence and maintain public law proceedings unless:
>
> - the relevant legislation clearly indicates an intention that the decision or conduct sought to be litigated should not be the subject of challenge by a person such as the applicant; or
> - in all the circumstances it would not be in the public interest to proceed because to do so would unreasonably interfere with the ability of a person having a private interest in the matter to deal with it differently or not at all.[124]

One reason for reconsidering legislative reform of standing rules, however, is that there is now a clear dichotomy between, on the one hand, the open standing rule applicable to applications for the writs of prohibition and certiorari and, on the other hand, the standing requirements imposed by the various judicial review statutes (both Commonwealth and state) to which I have already referred. In other words, the statutory standing requirements

are now more restrictive than the standing rule for the writs. One of the objectives behind the enactment of statutory avenues for judicial review was to establish a simpler avenue for judicial review than recourse to the prerogative writs, with their technical requirements. That being the case, it might be thought a little odd that a more restrictive standing rule is applied to statutory judicial review than applies in the case of applications for the prerogative or constitutional writs.

Given the reaction to s 487 of the EPBC Act, it might be thought that the more likely objective of any legislative reform of standing rules would be to tighten, rather than to relax, those rules. That warrants consideration of whether there are any impediments to legislative reform of that kind.

***Are there any potential impediments to legislative reform of standing rules?***

Standing rules are not normally considered an aspect of the jurisdiction of a court.[125] Rather, standing rules form part of the procedure pursuant to which the jurisdiction of the court is exercised. As a general rule, then, the position is that 'subject to constitutional limitations, Parliament can confer and remove either or both standing and jurisdiction in respect of a given controversy or species of controversy'.[126]

Subject to the observations made earlier in this article, there does not appear to be any reason why it would not be open to a legislature to adopt more liberal standing rules or to adopt an open standing rule for judicial review. The same conclusion applies to legislation which would refine or limit standing rules, but with one reservation. For state Supreme Courts, that reservation derives from the implications of the decision of the High Court in *Kirk v Industrial Court of New South Wales*[127] (*Kirk*).

Amongst other things, the joint judgment (of French CJ and Gummow, Hayne, Crennan, Kiefel and Bell JJ) in *Kirk* established that the supervisory jurisdiction, which is exercised through the grant of the prerogative writs, or orders in the nature of that relief, is a defining characteristic of state Supreme Courts; that to deprive a state Supreme Court of its supervisory jurisdiction would create islands of power immune from supervision and would remove one of the defining characteristics of a state Supreme Court; and that a privative provision which sought to take from a state Supreme Court the power to grant relief on account of jurisdictional error would be beyond state legislative power.[128] Were a legislature to enact a very narrow standing rule, questions might arise as to whether that rule would render some decisions beyond the scope of judicial review or would so circumscribe the pool of applicants entitled to seek judicial review as to effectively deprive a state Supreme Court of its ability to exercise its supervisory jurisdiction.

An issue of that kind arose in *Haughton v Minister for Planning*.[129] In that case, the applicant sought declaratory relief, and relief in the nature of certiorari, in respect of decisions by a Minister to approve concept plans for two power stations which were declared to be critical infrastructure projects under the *Environmental Planning and Assessment Act 1979* (NSW) (the EPA Act). One of the arguments advanced against the applicant was that he had no standing to challenge those decisions because he had not obtained the approval of the Minister to bring the proceedings. The Minister's approval was required under s 75T of the EPA Act,[130] which provided that proceedings in the Court to remedy or restrain a breach of the EPA Act in respect of a critical infrastructure project could not be taken except on an application made or approved by the Minister. The Minister had refused to approve the applicant's proceedings.[131]

Justice Craig refused to construe s 75T as enabling the Minister to refuse approval, and thereby to exclude the applicant's standing, because that construction would mean that it

was open to the Minister to deny the Land and Environment Court, or the Supreme Court, the power to review, for jurisdictional error, a substantive decision pertaining to critical infrastructure development. Justice Craig concluded that to construe the section in that way would be contrary to the principles established by *Kirk*.[132] Legislative attempts to unduly restrict standing to pursue the remedies in s 75(v) of the *Constitution* would be likely to encounter similar difficulties.[133]

## Conclusion

Standing requirements continue to pose questions which go to the heart of administrative justice. Different standing requirements for the prerogative writs and the equitable remedies are not warranted, either as a matter of principle or having regard to practical considerations. While some commentators have suggested that the adoption of an open standing rule would be a 'radical reform',[134] I am unable to agree. In view of the views expressed by members of the High Court in *Bateman's Bay, McBain* and *AEU,* the adoption by the High Court of the same open standing rule for the prerogative writs and the equitable remedies would be a sensible, incremental development of the law. The development of the law appears unlikely to be achieved by legislative reform.

If the same open standing rule applied to the prerogative writs, and to the equitable remedies, greater attention would be required to whether that relief should be granted in the exercise of the Court's discretion in a case where an applicant had no interest in the decision or conduct under challenge. To consider that issue at the discretion stage would permit all factors relevant to the exercise of the discretion to be weighed up, including the interests of third parties, the extent (if any) of the applicant's interest, and the importance of remedying the jurisdictional error identified in the particular case.

**Endnotes**

1 *McHattan v Collector of Customs* (1977) 18 ALR 154, 157 (Brennan J).
2 *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director, Department of Conservation and Land Management* (1997) LGERA 380; (1997) 18 WAR 126.
3 *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director, Department of Conservation and Land Management* (1997) LGERA 380; (1997) 18 WAR 126, 133 (Murray J).
4 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247 [91] (McHugh J).
5 See, generally, *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247, 275 (McHugh J) (discussion of certiorari, prohibition and mandamus); *State Planning Commission and Beggs; Ex parte Helena Valley / Boya Association (Inc)* (1990) 2 WAR 422, 431 (Rowland J), 434–7 (Ipp J) (an application for certiorari and prohibition); *West Australian Field and Game Association v Minister for Conservation and Land Management and the Environment* (1992) 8 WAR 64, 70 (Malcolm CJ, Ipp J agreeing) (application for mandamus); *Re MacTiernan; Ex parte Coogee Coastal Action Coalition Inc* (2005) 30 WAR 138, 161 [100] (McLure JA, Pullin JA agreeing) (application for certiorari and prohibition).
6 *Master Retailers' Association of New South Wales v Shop Assistants Union of New South Wales* [1904] HCA 39; (1904) 2 CLR 94, 98 (Griffith CJ); *R v Ludeke; Ex parte Customs Officers' Association of Australia* [1985] HCA 31; (1985) 155 CLR 513, 525 (Mason J), 528 (Brennan J); *John Fairfax and Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, 468–9 (Mahoney JA); *Re Smith; Ex parte Rundle* (1991) 5 WAR 295, 305 (Malcolm CJ, Pidgeon and Walsh JJ agreeing); *Re Bromfield; Ex parte West Australian Newspapers Ltd* (1991) 6 WAR 153, 163 (Malcolm CJ), cf 190 (Nicholson J).
7 *Re Bromfield; Ex parte West Australian Newspapers Ltd* (1991) 6 WAR 153, 163 (Malcolm CJ), citing *R v Paddington Valuation Officer; Ex parte Peachey Property Corporation Ltd (No 2)* [1966] 1 QB 380, 400 (Lord Denning).
8 *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 [89] (McHugh J, Callinan J agreeing), [260] (Hayne J).
9 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* [2000] HCA 11; (2000) 200 CLR 591, 652–3 [162] (Kirby J), 669–70 [211] (Callinan J).
10 *Australian Education Union v General Manager of Fair Work Australia* [2012] HCA 19; (2012) 246 CLR 117, 147–8 [70]–[71] (Gummow, Hayne and Bell JJ).

11 *Motor Accidents Authority of New South Wales v Mills* [2010] NSWCA 82; (2010) 78 NSWLR 125 [82] (Giles JA, Tobias and Handley JJA agreeing).
12 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247, 263 [40], citing *R v Graziers' Association of NSW; Ex parte Australian Workers' Union* [1956] HCA 31; (1956) 96 CLR 317, 327; *R v Watson; Ex parte Australian Workers' Union* [1972] HCA 72; (1972) 128 CLR 77, 81; *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190, 201–2.
13 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* [2000] HCA 11; (2000) 200 CLR 591, 599–600 [2] (Gleeson CJ and McHugh J), 611 [44] (Gaudron J), 627–8 [95] (Gummow J), 652–3 [162] (Kirby J), 670 [211] (Callinan J).
14 M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability* (6th ed, Lawbook Co, 2017) 818 [11.210].
15 *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; (2002) 211 CLR 540, 574–5 [79] (McHugh J).
16 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247, 275 [77] (McHugh J), citing *R v Lewisham Union* [1897] 1 QB 498.
17 *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372, 461 [251] (Hayne J).
18 *West Australian Field and Game Association v Minister for Conservation and Land Management and the Environment* (1992) 8 WAR 64, 70–1 (Malcolm CJ, Ipp J agreeing). A similar approach appears to have underlined the decision in *Federal Commissioner of Taxation v Biga Nominees Pty Ltd* (1988) 85 ALR 463, 473 (the Court).
19 *Ettingshausen v Lal* [1981] 1 NSWLR 503, 513 (Mahoney JA).
20 [2001] FCA 1329; 110 FCR 491; 183 ALR 1; 66 ALD 25.
21 *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* [2001] FCA 1297; (2001) 110 FCR 452 [123]–[137], [149] (North J).
22 *Rules of the Supreme Court 1971* (WA) O 56 r 15(1).
23 *Re Environmental Protection Authority; Ex parte Tallott* [2016] WASC 190 [7] (Le Miere J).
24 *Martin v Nalder* [2016] WASC 138 [39] (Tottle J).
25 For a discussion of the history of the equitable remedies in the public law context, see *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247 [92]–[93] (McHugh J).
26 *Boyce v Paddington Borough Council* [1903] 1 Ch 109, 114 (Buckley J).
27 *Australian Conservation Foundation Inc v Commonwealth* [1980] HCA 53; (1980) 146 CLR 493, 527 (Gibbs J).
28 *Onus v Alcoa of Australia Ltd* [1981] HCA 50; (1981) 149 CLR 27, 74 (Brennan J).
29 *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* [1995] HCA 11; (1995) 183 CLR 552, 558 (Brennan, Dawson, Toohey, Gaudron and McHugh JJ); *Australian Conservation Foundation Inc v Commonwealth* [1980] HCA 53; (1980) 146 CLR 493, 526 (Gibbs J), 537 (Stephen J), 547 (Mason J); *Onus v Alcoa of Australia Ltd* [1981] HCA 50; (1981) 149 CLR 27, 36 (Gibbs CJ); *Robinson v Western Australian Museum* [1977] HCA 46; (1977) 138 CLR 283, 292–3 (Barwick CJ), 301–2 (Gibbs J), 327 (Mason J).
30 *Australian Conservation Foundation Inc v Commonwealth* [1980] HCA 53; (1980) 146 CLR 493, 530 (Gibbs J).
31 *Australian Conservation Foundation Inc v Commonwealth* [1980] HCA 53; (1980) 146 CLR 493, 530 (Gibbs J), 539 (Stephen J), 548 (Mason J).
32 *Onus v Alcoa of Australia Ltd* [1981] HCA 50; (1981) 149 CLR 27.
33 *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* [1995] HCA 11; (1995) 183 CLR 552, 558 (Brennan, Dawson, Toohey, Gaudron and McHugh JJ); *Onus v Alcoa of Australia Ltd* [1981] HCA 50; (1981) 149 CLR 27, 36 (Gibbs CJ), 42 (Stephen J).
34 *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* [1995] HCA 11; (1995) 183 CLR 552, 558 (Brennan, Dawson, Toohey, Gaudron and McHugh JJ).
35 *Onus v Alcoa of Australia Ltd* [1981] HCA 50; (1981) 149 CLR 27, 42 (Stephen J).
36 *Australian Conservation Foundation Inc v Commonwealth* [1980] HCA 53; (1980) 146 CLR 493, 528 (Gibbs J), referring to *Robinson v Western Australian Museum* [1977] HCA 46; (1977) 138 CLR 283, 327–8 (Mason J).
37 See, for example, *Ex parte Helena Valley / Boya Association (Inc); State Planning Commission and Beggs* (1990) 2 WAR 422, 437 (Ipp J, Pidgeon J agreeing); *Re MacTiernan; Ex parte Coogee Coastal Action Coalition Inc* [2005] WASCA 109; (2005) 30 WAR 138 [96]–[101] (McLure JA, Pullin JA agreeing).
38 *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director, Department of Conservation and Land Management* (1997) LGERA 380; (1997) 18 WAR 126, 162 (Templeman J); cf *Re MacTiernan; Ex parte Coogee Coastal Action Coalition Inc* (2005) 30 WAR 138 [3] (Wheeler JA); *Re Western Australian Planning Commission; Ex parte Leeuwin Conservation Group Inc* [2002] WASCA 150 [1] (Anderson J); *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director of the Department of Conservation and Land Management* (1997) LGERA 380; (1997) 18 WAR 102, 114 (Wheeler J); *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director of the Department of Conservation and Land Management* (1997) LGERA 380; (1997) 18 WAR 126, 134 (Murray J).

39 *Australian Conservation Foundation Inc v Commonwealth* [1980] HCA 53; (1980) 146 CLR 493, 531 (Gibbs J), 539 (Stephen J).
40 *Australian Conservation Foundation Inc v Commonwealth* [1980] HCA 53; (1980) 146 CLR 493, 531 (Gibbs J), 539 (Stephen J); *Onus v Alcoa of Australia Ltd* [1981] HCA 50; (1981) 149 CLR 27, 74 (Brennan J).
41 *Australian Conservation Foundation Inc v Commonwealth* [1980] HCA 53; (1980) 146 CLR 493, 531 (Gibbs J); cf *Re MacTiernan; Ex parte Coogee Coastal Action Coalition Inc* [2005] WASCA 109; (2005) 30 WAR 138 [6]–[8] (Wheeler JA).
*42* *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5, 6.
43 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3(4).
44 *Judicial Review Act 1991* (Qld) s 7.
45 *Judicial Review Act 2000* (Tas) s 7.
46 *Administrative Decisions (Judicial Review) Act 1989* (ACT) s 4A(2), (5).
47 *Administrative Decisions (Judicial Review) Act 1989* (ACT) s 4A(3).
48 See, for example, the *Environmental Planning and Assessment Act 1979* (NSW) s 123.
49 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 487(2), (3).
50 *Victoria v Commonwealth (AAP Case)* [1975] HCA 52; (1975) 134 CLR 338, 383 (Gibbs J).
51 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247 [34].
52 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247 [34] (Gaudron, Gummow and Kirby JJ).
53 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247 [38] (Gaudron, Gummow and Kirby JJ).
54 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247 [39] (Gaudron, Gummow and Kirby JJ).
55 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247 [40] (Gaudron, Gummow and Kirby JJ).
56 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247 [91] (McHugh J).
57 [2005] HCA 61; (2005) 224 CLR 494.
58 *Combet v Commonwealth* [2005] HCA 61; (2005) 224 CLR 494 [306], [321] (Kirby J).
59 *Combet v Commonwealth* [2005] HCA 61; (2005) 224 CLR 494 [306] (Kirby J).
60 See, for example, *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 [90] (McHugh J, Callinan J agreeing), [260] (Hayne J); *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247 [104] (McHugh J); *Australian Education Union v General Manager of Fair Work Australia* [2012] HCA 19; (2012) 246 CLR 117 [70] (Gummow, Hayne and Bell JJ).
61 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247 [104] (McHugh J). See also M Leeming, 'Standing to Seek Injunctions Against Officers of the Commonwealth' (2006) 1 *Journal of Equity* 3, 3.
62 *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 [89] (McHugh, Callinan J agreeing).
63 *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 [260] (Hayne J).
64 *Australian Education Union v General Manager of Fair Work Australia* [2012] HCA 19; (2012) 246 CLR 117 [70] (Gummow, Hayne and Bell JJ).
65 HRW Wade, 'Unlawful Administrative Action: Void or Voidable? Part 1' (1967) 83 *Law Quarterly Review* 499, 503.
66 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247 [50] (Gaudron, Gummow and Kirby JJ).
67 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247 [50] (Gaudron, Gummow and Kirby JJ).
68 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247 [42] (Gaudron, Gummow and Kirby JJ).
69 *Combet v Commonwealth* [2005] HCA 61; (2005) 224 CLR 494 [97] (McHugh J).
70 Leeming, above n 61, 4.
71 Cf *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; (2000) 199 CLR 135 [22] (Gleeson CJ, Gummow, Kirby and Hayne JJ).
72 *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; (2000) 199 CLR 135 [57]–[58] (Gaudron J); *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247, 257 [25] (Gaudron, Gummow and Kirby JJ).
73 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247 [50] (Gaudron, Gummow and Kirby JJ).
74 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.
75 Cf *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; (2000) 199 CLR 135 [22] (Gleeson CJ, Gummow, Kirby and Hayne JJ).
76 See also Leeming, above n 61, 3.

77 *Rules of the Supreme Court 1971* (WA) Form 67A.
78 R Douglas, 'Uses of Standing Rules 1980–2006' (2006) 14 *Australian Journal of Administrative Law* 22, 34.
79 *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 [251] (Hayne J).
80 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* [2000] HCA 11; (2000) 200 CLR 591 [43] (Gaudron J) and cases there cited.
81 See, for example, *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* [2000] HCA 11; (2000) 200 CLR 591 [44] (Gaudron J), [172] (Kirby J).
82 *Kuczborski v State of Queensland* [2014] HCA 46; (2014) 254 CLR 51 [6], [17]–[19] (French CJ), [99]–[100] (Hayne J), [181]–[187] (Crennan, Kiefel, Gageler and Keane JJ), [283] (Bell J).
83 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* [2000] HCA 11; (2000) 200 CLR 591 [20] (Gleeson CJ and McHugh J), [50] (Gaudron J), [122] (Gummow J), [177]–[179] (Kirby J), [183] (Hayne J), [214] (Callinan J).
84 *Onus v Alcoa of Australia Ltd* [1981] HCA 50; (1981) 149 CLR 27, 35 (Gibbs J).
85 *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director, Department of Conservation and Land Management* (1997) LGERA 380; (1997) 18 WAR 126, 133.
86 Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27 (1985) 108 [192].
87 Australian Law Reform Commission, *Beyond the Doorkeeper: Standing to Sue for Public Remedies*, Report No 78 (1996) 46 [4.42].
88 A Macintosh, H Roberts and A Constable, 'An Empirical Evaluation of Environmental Citizen Suits under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)' (2017) 39 *Sydney Law Review* 85; C McGrath, 'Myth Drives Australian Government Attack on Standing and Environmental "Lawfare"' (2016) 33 *Environmental and Planning Law Journal* 3, 12.
89 McGrath, ibid, 12.
90 See, for example, *Rules of the Supreme Court 1971* (WA) O 56 r 2(4).
91 *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director, Department of Conservation and Land Management* (1997) 18 WAR 102, 107 (Wheeler J).
92 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247 [83] (McHugh J).
93 Although a competitor's economic interests may now be sufficient to give rise to standing, at least under the ADJR Act: *Argos Pty Ltd v Corbell* [2014] HCA 50; (2014) 254 CLR 394.
94 See, for example, Douglas, above n 78, 26.
95 McGrath, above n 88, 13–14.
96 *Waterside Workers' Federation of Australia v Gilchrist, Watt and Sanderson Ltd* [1924] HCA 61; (1924) 34 CLR 482, 517 (Isaacs and Rich JJ) (discussion of certiorari); *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* [1949] HCA 33; (1949) 78 CLR 389, 400 (the Court) (mandamus); *Australian Education Union v General Manager of Fair Work Australia* [2012] HCA 19; (2012) 246 CLR 117 [71] (Gummow, Hayne and Bell JJ) (certiorari); *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 [95] (McHugh J, Callinan J agreeing), [224] (Kirby J), [260] (Hayne J) (certiorari).
97 *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; (2000) 199 CLR 135 [54]–[58] (Gaudron J).
98 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* [1949] HCA 33; (1949) 78 CLR 389, 400 (the Court).
99 *Sasterawan v Morris* [2008] NSWCA 70 [73] (Tobias JA, Beazley JA and McClellan CJ at CL agreeing).
100 See, for example, *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 [120] (McHugh J), [280] (Hayne J); *Dranichnikov v Minister for Immigration and Multicultural & Indigenous Affairs* [2003] HCA 26; (2003) 77 ALJR 1088 [33] (Gummow and Callinan JJ).
101 *Dranichnikov v Minister for Immigration and Multicultural & Indigenous Affairs* [2003] HCA 26; (2003) 77 ALJR 1088 [33] (Gummow and Callinan JJ).
102 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* [1949] HCA 33; (1949) 78 CLR 389, 400 (the Court).
103 *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 [228] (Kirby J).
104 See, for example, *QBE Insurance (Australia) Ltd v Lois Nominees Pty Ltd* [2012] WASCA 186 [209] (Murphy JA).
105 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* [1949] HCA 33; (1949) 78 CLR 389, 400 (the Court); *Varney v Parole Board of Western Australia* [2000] WASCA 393; (2000) 23 WAR 187 [87] (Ipp J, Malcolm CJ and Wallwork J agreeing).
106 *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 [283] (Hayne J).
107 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* [1949] HCA 33; (1949) 78 CLR 389, 400 (the Court).
108 See, for example, *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* [1949] HCA 33; (1949) 78 CLR 389, 400 (the Court); *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 [232] (Kirby J); *Savage v Teck Explorations Ltd* (Unreported, Full Ct Sup Ct of WA, Lib No 7285, 1988) 9–11 (Malcolm CJ), 9 (Wallace J).

109 See, for example, *Savage v Teck Explorations Ltd* (Unreported, Full Ct Sup Ct of WA, Lib No 7285, 1988) 10 (Malcolm CJ).
110 See, for example, *Re Smith and West Australia Development Corporation; Ex parte Rundle* (1991) 5 WAR 295.
111 See, for example, *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 [230] (Kirby J); *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247 [41]; *Re Minister for Indigenous Affairs; Ex parte Woodley (No 2)* [2009] WASC 296 [47] (Martin CJ).
112 See, for example, *Gavranich v Shire of Wanneroo* (Unreported, Sup Ct of WA, Lib No 980473, Miller J, 1988) 20.
113 See *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 [124] (McHugh J), [229] (Kirby J), [251] (Hayne J); *Waterside Workers' Federation of Australia v Gilchrist, Watt and Sanderson* [1924] HCA 61; (1924) 34 CLR 482, 499, 501 (Isaacs and Rich JJ).
114 *Waterside Workers' Federation of Australia v Gilchrist, Watt and Sanderson* [1924] HCA 61; (1924) 34 CLR 482, 517 (Isaacs and Rich JJ); *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 [95] (McHugh J).
115 *Waterside Workers' Federation of Australia v Gilchrist, Watt and Sanderson* [1924] HCA 61; (1924) 34 CLR 482, 519 (Isaacs and Rich JJ).
116 *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 [96], [116] (McHugh J, Callinan J agreeing).
117 *Central Queensland Speleological Society Inc v Central Queensland Cement Pty Ltd* [1989] 2 Qd R 512, 523 (Thomas J).
118 *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 [219] (Kirby J).
119 *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 [109] (McHugh J), citing *R v Nicholson* [1899] 2 QB 455, 472 (emphasis added).
120 *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 [251] (Hayne J).
121 Australian Law Reform Commission, above n 86, 138 [252].
122 Ibid [253].
123 Australian Law Reform Commission, above n 87, 47 [4.50].
124 Ibid 57, Recommendation 2.
125 See, for example, *Haughton v Minister for Planning and Macquarie Generation* [2011] NSWLEC 217; (2011) 185 LGERA 373 [64] (Craig J).
126 *Haughton v Minister for Planning and Macquarie Generation* [2011] NSWLEC 217; (2011) 185 LGERA 373 [64] (Craig J).
127 *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531.
128 *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531 [97]–[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
129 *Haughton v Minister for Planning and Macquarie Generation* [2011] NSWLEC 217; (2011) 185 LGERA 373 [7] (Craig J).
130 Section 75T has since been repealed.
131 *Haughton v Minister for Planning and Macquarie Generation* [2011] NSWLEC 217; (2011) 185 LGERA 373 [7] (Craig J).
132 *Haughton v Minister for Planning and Macquarie Generation* [2011] NSWLEC 217; (2011) 185 LGERA 373 [98]–[99] (Craig J).
133 Cf *Bodruddaza v Minister for Immigration and Multicultural Affairs* [2007] HCA 14; (2007) 228 CLR 651, 672–673 (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).
134 M Groves 'The Evolution and Reform of Standing in Australian Administrative Law' (2016) 44 *Federal Law Review* 168, 184.

# REFLECTIONS FROM THE ALRC'S ELDER ABUSE INQUIRY

***Rosalind F Croucher AM****

In 2002, the World Health Organization said that preventing elder abuse in an ageing world is 'everybody's business'.[1] In finishing the report *Elder Abuse — A National Legal Response*, with 43 recommendations for law reform, the Australian Law Reform Commission (ALRC) sought to make this 'everybody's responsibility'.

One set of the recommendations concerns a new scheme for reportable incident responses, based on the New South Wales Disability Reportable Incidents Scheme (DRIS), managed by the NSW Ombudsman's Office.

**An inquiry most timely**

The ALRC Inquiry into Elder Abuse has been most timely given the problem, the challenge and the opportunity of an ageing demographic. The Australian population, like that of other developed countries, is an ageing one due to the combination of increasing life expectancy and lower fertility levels.[2] Approximately 15 per cent of the population was aged 65 or over in 2014–15, and this is expected to rise to around 23 per cent by 2055 — that is, within 40 years. A female child born in 1900 could expect to live to 59, but in 2017 she can expect to live to 85.

The statistics are quite confronting, however you look at them: whether it is in terms of the numbers of workers that will be needed to support an ageing population or the extent to which health, aged care and disability services will be needed in future, an ageing demographic provides a very intense opportunity for public policy concern.

The experience of ageing is not uniform across Australian communities, however. Overall, 'healthy life expectancy' — that is, the extent to which additional years are lived in good health — is increasing.[3]

By way of personal reflection, my parents turn 96 this year and are living independently. My father still drives — retaining a full unrestricted licence — but also loves the ride-on lawnmower, a new career of sorts after being one of the longest-serving judicial officers in New South Wales.

So, overall, 'health' and 'ageing' are in an improving relationship.

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* *Emeritus Professor Croucher is the President of the Australian Law Reform Commission.* *This article is an edited version of a paper presented to the Australian Administrative Law Forum National Conference, Canberra, on 20 July 2017. It draws on the work of the ALRC in the Inquiry into Elder Abuse. The contributions of the individual legal officers in the team with respect to particular areas of the work are acknowledged.*

There are, however, significant variations in life expectancy among different groups in the population. For example, Aboriginal and Torres Strait Islander persons have a significantly lower life expectancy than other Australians:

> For the Aboriginal and Torres Strait Islander population born in 2010–2012, life expectancy was estimated to be 10.6 years lower than that of the non-Indigenous population for males (69.1 years compared with 79.7) and 9.5 years for females (73.7 compared with 83.1).[4]

**What is elder abuse?**

Elder abuse usually refers to abuse by family, friends, carers and other people where there is a relationship or expectation of trust. While there is not a universally accepted definition, a widely used description is that of the World Health Organization:

> [Elder abuse is] a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.[5]

Commonly recognised categories of elder abuse include psychological or emotional abuse, financial abuse, physical abuse, neglect and sexual abuse. These types of abuse overlap, and the very nature of the abuse, in trusted relationships, makes it difficult to identify and respond to. The World Health Organization has estimated that the prevalence rate of elder abuse in high- or middle-income countries ranges from 2 per cent to 14 per cent. So, while increasing longevity may be seen to represent triumphs for modern medicine and health care, elder abuse perhaps is the nasty underside of an ageing population.

There are many case studies that can be drawn upon to gain an understanding of the elder abuse landscape. The 2016 report by the Australian Institute of Family Studies (AIFS), *Elder Abuse: Understanding Issues, Frameworks and Responses*, commissioned as part of the background to the ALRC inquiry, provided many examples drawn from Queensland elder abuse helpline information. The most commonly reported type of abuse in 2014–15 was financial abuse, accounting for 40 per cent of the reports; and adult children were the largest group of offenders.

Children in their 50s may be the biggest group of abusers — but many of these may also be carers. And for the few 'bad eggs' there are many angel sons and angel daughters out there. One of the personal submissions cautioned against 'punishing those of us who are doing the right things for the sake of a few bad eggs makes a difficult situation that much more complicated and could prevent people from stepping up to care for the elderly'.[6]

In 2017 there were 2.7 million unpaid carers in Australia. Their average age was 55, most were female and 96 per cent were caring for family members. And in 2011 the Productivity Commission noted that, of the group aged 65 and over who were needing care, 24 per cent of primary carers were adult sons or daughters.[7] Many of these may well have held enduring documents in their favour. Indeed, for most people in such circumstances, this is an important exercise of autonomy: they have 'got it in black and white'.[8]

There is also a difference between 'coercion' — forcing someone to do something against their wishes — and what I describe as 'acquiescent exploitation', where a person knows that others may think what they are doing is unwise but they decide to do it anyway for a whole range of often very personal, self-sacrificing reasons.

Clearly, however, there are no bright lines.

**What can law do?**

In the Inquiry into Elder Abuse we looked at Commonwealth laws and frameworks that seek to safeguard and protect older persons from misuse or abuse by formal and informal carers, supporters, representatives and others. The Commonwealth laws included banking, superannuation, social security and, of growing interest, aged care. But we were also asked to examine the interaction and relationship of Commonwealth laws with state and territory laws. This clearly took us into the realm of guardianship and administration; and into laws dealing with 'private' appointments of substitute decision-makers through enduring powers of attorney and the appointment of enduring guardians. A great deal of our work therefore involved state and territory bodies and agencies. The crossing of state and federal borders makes responding to elder abuse a complex issue — from the perspective of laws and also in terms of practical responsibility.

As stakeholders observed, because elder abuse is 'complex and multidimensional', it requires a 'multi-faceted response'. The focus of the ALRC's recommendations was on achieving a nationally consistent response to elder abuse.

The recommendations in the report seek to balance two framing principles: dignity and autonomy, on the one hand, and protection and safeguarding, on the other. Autonomy and safeguarding, however, are not mutually inconsistent, as safeguarding responses also act to support and promote the autonomy of older people.

Dignity in the sense of the right to enjoy a self-determined life is particularly important in consideration of older persons with impaired or declining cognitive abilities. The importance of a person's *right* to make decisions that affect their lives was a fundamental framing idea throughout the ALRC's *Equality, Capacity and Disability in Commonwealth Laws* report.[9] It reflects the paradigm shift towards supported decision-making embodied in the United Nations *Convention on the Rights of Persons with Disabilities* and its emphasis on the autonomy and independence of persons with disabilities, so that it is the will and preferences of the person that drives decisions they make or that others make on their behalf, rather than an objective notion of 'best interests'.

In the Inquiry into Elder Abuse we needed to respond to the plea running through many of the personal submissions that 'someone's got to do something!'. But, at the same time, we needed to resist overzealousness, otherwise the balance between the principles is pushed too much to the 'protective' side.

In thinking about my own parents, and what I would expect when I am their age, it is not to be infantilised or treated as a child but to be *respected*. This was a guiding mantra for me in leading the Inquiry into Elder Abuse: a combination of 'honour thy father and thy mother' and 'do unto others as you would have them do unto you'. The United Nations *Principles for Older Persons* express such commitments thus:

> Older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse.
>
> Older persons should be treated fairly regardless of age, gender, racial or ethnic background, disability or other status and be valued independently of their economic contribution.[10]

**What the ALRC recommends**

In addition to our framing principles, our recommendations embody what I describe as 'the 3 Rs': reducing risk; ensuring an appropriate response; and providing avenues for redress.

There are also recommendations that look to the longer horizon, to inform policy change into the future. The report presents two of these longer-horizon ideas as 'book-ends': first, the National Plan to combat elder abuse; and, secondly, the introduction of state and territory legislation for safeguarding adults 'at risk'.

With respect to the specific areas of law identified in the Terms of Reference, the report begins with a consideration of aged care: a large and growing area of Commonwealth responsibility and an area on which there is much attention at the time of writing the report. The next set of chapters and recommendations focus on advance planning by a person, including enduring documents, family agreements, superannuation, wills and banking. The remaining set of chapters looks at safeguarding against elder abuse in various settings: tribunal-appointed guardians and administrators; social security; health and the National Disability Insurance Scheme (NDIS); and criminal justice responses. It ends with recommendations about new legislation in states and territories for safeguarding 'at-risk' adults.

I will focus on two particular areas: aged care and safeguarding agencies.

***Aged care***[11]

Older people receiving aged care — whether in the home or in residential aged care — may experience abuse or neglect. The newspapers and other media give attention to particularly egregious examples. Abuse may be committed by paid staff, other residents in residential care settings, family members or friends.

The aged care system is in a period of reform, largely in implementation of work of the Productivity Commission in 2011, and there is a legislated review underway now (reporting in August), as well as the independent review of the Commonwealth's aged care quality regulatory processes commissioned by the Australian Government Minister for Aged Care, the Hon Ken Wyatt AM MP (and, behind it, the report of the Oakden Older Persons Mental Health Service, which operated as a Commonwealth-regulated residential aged care facility).[12] There are also concerns that will need to be addressed about how the move to home care will be covered in the consumer-driven demand model of aged care service delivery.

The ALRC recommends reforms to enhance safeguards against abuse, including:

- establishing a serious incident response scheme in aged care legislation;
- reforms relating to the suitability of people working in aged care — enhanced employment screening processes and ensuring that unregistered staff are subject to the proposed National Code of Conduct for Health Care Workers;
- regulating the use of restrictive practices in aged care; and
- national guidelines for the community visitors scheme regarding abuse and neglect of care recipients.

The serious incident response scheme builds on the existing requirements for reporting allegations of abuse in the *Aged Care Act 1997* (Cth) and draws on existing and proposed schemes for responding to abuse in the disability sector. Our concern was to focus on *response* and not just reporting for other purposes — for example, accreditation. The latter is important, but response cannot be overlooked. There is both a systemic and an individual issue.

As the National Older Persons Legal Services Network submitted, the scheme 'needs to balance and address two important interests':

> Firstly, the interests of the individual user. Secondly the interests of the aged care system. … Accountability to each through the reporting process is crucial to its success. For example, a reported incident must provide a critical response to those involved (victim and perpetrator), it must translate into accountability outcomes through systemic accountability including service standards, accreditation etc.[13]

Stakeholders had a lot to say about the existing reporting arrangements, which require providers to report an allegation of a 'reportable assault' to police and the Department of Health within 24 hours. These include 'unlawful sexual contact, unreasonable use of force, or assault specified in the *Accountability Principles* and constituting an offence against a law of the Commonwealth or a State or Territory'.[14]

Some thought this was just 'red tape' and made little or no difference to the safety of residents.[15] In particular, the provisions place no responsibility on the provider other than to report an allegation or suspicion of assault. We also heard conflicting reports about subsequent action taken by the provider or the department. No obligation is placed on the provider to record any actions *taken* in response to the incident; and, while the department submitted that it 'may take regulatory action if an approved provider does not … have strategies in place to reduce the risk of the situation from occurring again',[16] there is no further publicly available information regarding how the department makes an assessment about the suitability of any strategies implemented by the provider.[17]

A telling example was given by the Aged and Community Services Association (ACSA). They considered that there was little value in the existing requirement to report to the department 'when no action is taken by the agency you are reporting to'. To illustrate its point, ACSA noted that:

> on 16 December 2016 in their Information for Aged Care Providers 2016/24, the Department of Health provided the following advice:
>
> > Compulsory reporting of assaults and missing residents over the holiday period. The compulsory reporting phone line will not be staffed from 3 pm Friday 23 December 2016 to 8.30 am Tuesday 3 January 2017. Providers are still required to report within the legislative timeframe. Providers may leave a message but are encouraged to use the online reporting forms during this period.[18]

While the number of notifications is captured in a bulked-up sense, the outcome of the reports is not known. As Leading Age Services Australia summarised:

> what we do not know is the outcome of these reports, whether the allegations were found to have had substance, what local actions were put in place, and if any convictions occurred as a result of Police action.[19]

We considered that there should be a new approach to serious incidents of abuse and neglect in aged care. The emphasis should change from requiring providers to report the *occurrence* of an alleged or suspected assault to requiring an *investigation and response* to incidents by providers. In addition, this investigation and response should be *monitored* by an independent oversight body. The recommended design of the scheme was informed by the DRIS for disability services in New South Wales — overseen by the NSW Ombudsman[20] — and the serious incident reporting scheme planned for the NDIS.[21]

We recommended that the provider be required to report both an allegation or suspicion of a serious incident *and* any findings or actions taken in response to it.[22] The appropriate response will vary according to the specific incident, but in all cases it will require a process

of information gathering to enable informed decisions about what further actions should be taken.[23] Significantly, we did not recommend that providers be *required* to report an incident to police.[24] In part, this is due to the expanded scope of the definition of 'serious incident'. It also reflects an approach that requires an approved provider to turn its mind to the response required in the circumstances. If the systemic side is working well, because accredited providers are being kept up to appropriate standards, then they may need room to exercise their discretion in good decision-making, involving the person who is the subject of the incident in assessing the appropriate action to be taken and responding accordingly.

With respect to overseeing the new scheme, we said that the oversight body's role should be to monitor and oversee the approved provider's *investigation of* and *response to* serious incidents. The oversight body should also be empowered to conduct investigations of such incidents. While it is important that the oversight body have powers of investigation, we anticipated that direct investigations by the oversight body would not be routine. Rather, its focus would be on *overseeing providers' own responses* to serious incidents and building the capacity of providers in doing so.

We suggested that the Aged Care Complaints Commissioner is the most appropriate oversight body but did not make a specific recommendation about this. There had been a mixed response to this proposal in the discussion paper, so in the report we identified our conclusion that the function should sit with an independent body but without making a specific recommendation about where the oversight responsibility should lie, given that none of the current 'regulatory triangle' agencies are an ideal fit for the proposed scheme.

We identified that combination of such functions in the one body — as with the NSW Ombudsman's functions in relation to children and disability. The proposed NDIS Complaints Commissioner under the NDIS Quality and Safeguarding Framework will have responsibility for handling complaints as well as reportable serious incidents.[25] The Australian Health Practitioner Regulation Agency (AHPRA) handles both voluntary complaints and mandatory notifications about health practitioners.[26]

The Department of Health currently receives reports of reportable assaults, but it is not an independent body. The ALRC considers that its mix of responsibility for policy, funding and compliance is not best suited to the monitoring and oversight role recommended in the report.[27] The Australian Aged Care Quality Agency accredits and audits aged care providers, but it is focused on *systemic* issues in aged care. A serious incident may not be an indicator of systemic risk, but it should still be investigated and responded to by the provider with appropriate oversight.

The Aged Care Complaints Commissioner is focused on conciliation and resolution of complaints as well as educating service providers about responding to complaints.[28] The Aged Care Complaints Commissioner can exercise a range of powers when working to resolve complaints and may commence own-initiative investigations.[29] The Aged Care Complaints Commissioner may also appoint 'authorised complaints officers' who may exercise a range of powers.[30] Hence it appeared to be the most amenable in the current triangle to take on the proposed oversight role.

The aged care workforce received a lot of comment. We addressed this in part through recommending enhanced screening, like the 'working with children' checks that are conducted; and also through recommending that unregistered aged care workers should be subject to the planned National Code of Conduct for Health Care Workers. We also recommended that the Department of Health should commission an independent evaluation of research on optimal staffing models and levels in aged care. (Nurses had a lot to say on this score — and many groups are quoted).

***Safeguarding adults at risk***[31]

In the final chapter of the report, the ALRC recommends the introduction of adult safeguarding laws in each state and territory. Most public advocates and guardians already have a role in investigating abuse, particularly abuse of people with impaired decision-making ability, but there are other vulnerable adults who are being abused, many of them older people. The ALRC recommends that these other vulnerable adults should be better protected from abuse. I acknowledge the work of Professor Wendy Lacey, a co-author of the report *Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People* and the co-convenor of the Australian Research Network on Law and Ageing, who urged the need for adult protection legislation in Australia:

> Until strategies are backed by legislative reform, vulnerable adults will continue to fall through the cracks of existing protective mechanisms and specialist services. State-based frameworks presently contain a number of significant flaws: there is no dedicated agency with statutorily mandated responsibility to investigate cases of elder abuse, coordinate interagency responses and seek intervention orders where necessary; … referral services between agencies can provide partial solutions in cases of elder abuse, but do not encourage a multi-disciplinary and multi-agency response in complex cases.[32]

(Professor Lacey also served on the Advisory Committee for the ALRC inquiry.)

What is the current situation for vulnerable adults? For older people experiencing abuse, support and protection is often provided by family, friends, neighbours and carers. Also, support and protection is currently available from a number of government agencies and community organisations, including:

- the police and the criminal justice system — the primary state protection against elder abuse;
- medical and ambulance services;
- elder abuse helplines, which can provide information and refer people to other services;
- advocacy services;
- community-based organisations, such as women's services, family violence prevention legal services and community housing organisations;
- state and territory public advocates and guardians (where the person has limited decision-making ability);[33]
- aged care service providers, such as nursing homes, which must not only meet certain standards of care but are also required to report allegations of abuse by staff and other people in aged care; and
- the Aged Care Complaints Commissioner, who investigates and conciliates complaints about aged care.

Despite this, the protection and support available to adults at risk of abuse may be inadequate.

No government agency in Australia has a clear statutory role of safeguarding and supporting adults. Most public advocates and guardians in Australia have *some* responsibility to investigate the abuse of people with limited decision-making ability but not of other adults at risk of abuse.

Public advocates and guardians play a crucial role in protecting people with limited decision-making ability, and there is a case for giving them additional powers to investigate the abuse of these people. However, many vulnerable and older people do not have such limited decision-making ability but nevertheless also need support and protection.

The ALRC recommended that adult safeguarding services be provided to other at-risk adults, which should be defined to mean adults who:

(a) need care and support;
(b) are being abused or neglected, or are at risk of abuse or neglect; and
(c) cannot protect themselves from the abuse.

Some, but by no means all, older people will meet this definition.

In most cases, safeguarding and support should involve working with the at-risk adult to arrange for health, medical, legal and other services. In some cases, it might also involve seeking court orders to prevent someone suspected of abuse from contacting the at-risk adult. Where necessary, adult safeguarding agencies should lead and coordinate the work of other agencies and services to protect at-risk adults.

Existing public advocates and public guardians have expertise in responding to abuse and may be appropriate for this broader safeguarding function if they are given additional funding and training. However, some states or territories may prefer to give this role to another existing body or to create a new statutory body.

The ALRC recommends that *consent* should be obtained from the at-risk adult before safeguarding agencies investigate or take action about suspected abuse. This avoids unwanted paternalism and shows respect for people's autonomy. However, in particularly serious cases of physical abuse, sexual abuse or neglect, the safety of an at-risk person may sometimes need to be secured even without their consent. Where there is serious abuse, safeguarding agencies should also have coercive information-gathering powers, such as the power to require people to answer questions and produce documents, but not powers of entry.

Whether state agencies should investigate and prosecute abuse when an abused person does not want the abuse investigated or prosecuted is a contested question that figures prominently in debates about responses to family violence. It is also an important question in relation to elder abuse.

Some fear that adult safeguarding laws will result in the state second-guessing or undermining people's choices and that vulnerable people will be given less liberty and autonomy than other people. We therefore recommended that adult safeguarding legislation should provide that consent should be obtained before an adult safeguarding agency investigates or responds to suspected abuse, except in limited circumstances.

In determining a person's need for greater protection from abuse, the person's subjective feeling of vulnerability may be as important as objective risk factors:

> The vast majority of adults who fulfil the criteria for an inherent vulnerability will be able to live full, meaningful and autonomous lives, and should not be judged to be automatically at heightened risk of being constrained, coerced, or unduly influenced, relative to other adults, regardless of their circumstances.[34]

In the discussion paper, the ALRC proposed that a set of principles be included in adult safeguarding legislation that emphasise respecting the autonomy of people affected by abuse:

(a) older people experiencing abuse or neglect have the right to refuse support, assistance or protection;

(b) the need to protect someone from abuse or neglect must be balanced with respect for the person's right to make their own decisions about their care; and
(c) the will, preferences and rights of the older person must be respected.[35]

These principles attempt to strike a balance between respecting people's autonomy and protecting people from abuse, but they give greater 'weight' to respecting autonomy. The principles acknowledge people's right to take risks and make decisions that some others may regard as poor ones. The principles also seek to ensure that people are involved in decisions about how the agency will respond to elder abuse and suggest that safeguarding agencies should play a supportive role. Similar principles also appear in adult safeguarding legislation in other countries, such as in the legislation in British Columbia, Canada; in England and Wales; and in Scotland.

However, given concerns about the potential for adult safeguarding schemes to undermine people's autonomy, the ALRC recommended that the legislation, rather than only feature guiding principles, should *specifically require* an adult safeguarding agency to obtain a person's consent before taking action to support or protect them.

Where someone accepts safeguarding services, the policy justification for providing the support is relatively unproblematic. Questions will remain about the coercive powers the agency should have when dealing with other people, such as the person suspected of committing the abuse. But, as far as the victim of the abuse is concerned, where they give consent, the policy justification for providing support is more straightforward.[36]

However, there are circumstances in which abuse and neglect should be investigated and acted upon even without the affected adult's consent. We concluded that consent should not be required where the at-risk adult is being subject to 'serious' physical or sexual abuse or neglect; where the safeguarding agency has been unable to contact the adult, despite extensive efforts to do so; and where the adult lacks the ability to give consent. These circumstances should be set out in safeguarding legislation.

The ALRC also recommended statutory protections from civil liability, workplace discrimination laws and other consequences that might follow from reporting suspected abuse to authorities. Protocols about reporting abuse should also be developed for certain professionals who routinely encounter elder abuse.

**National Plan to combat elder abuse**

The capstone recommendation of the report is the development of a National Plan to combat elder abuse to provide the basis for a longer-term approach to the protection of older people from abuse. The plan will provide the opportunity for integrated planning and policy development. We suggest a conceptual template for a National Plan and provide a wide range of examples from stakeholders, drawn from over 450 submissions — sharing ideas, illustrations, suggestions and urgings. In a practical sense, much work already undertaken and in train, both at the Commonwealth level and in states and territories, together with recommendations throughout the report, may be seen to constitute strategies in implementation of a commitment to combat elder abuse. As St Vincent's Health Australia observed, the significant attention already on issues concerning family violence has provided 'a climate of opportunity' for a national consideration of elder abuse.[37] Where child abuse and family violence are now 'firmly at the centre of public policy debates', said the Welfare Rights Centre (NSW), '[p]lacing elder abuse on the national agenda must also be a priority. Elder abuse is an issue that, finally, has come of age'.[38]

A national planning process offers the opportunity to develop strategies beyond legal reforms, including national awareness and community education campaigns; training for people working with older people; elder abuse helplines; and future research agendas.

The Australian Government has already committed to a prevalence study,[39] and steps have been taken in this direction with the completion of a scoping study by the Australian Institute of Family Studies in May 2017. This is a significant step towards improving the evidence base to inform policy responses.

A national planning process would help to ameliorate the problems of the distribution of powers in a federal system in which many issues that arise in a consideration of 'elder abuse' sit across federal–state jurisdictional lines. Developing a National Plan will also provide the opportunity to continue and focus national conversation and engagement. AnglicareSA suggested that a national approach would 'promote improved governance through consistent practice' and would lead to 'increased awareness and improved response to elder abuse through the embedding of a consistent supportive framework'.[40]

There is clear commitment and support for a National Plan to combat elder abuse in Australia. The next questions are how a national plan should be developed and what shape it should take.

The ALRC suggests that the National Plan should identify goals, including:

(a) promoting the autonomy and agency of older people;
(b) addressing ageism and promoting community understanding of elder abuse;
(c) achieving national consistency;
(d) safeguarding at-risk adults and improving responses; and
(e) building the evidence base.

These goals are not completely discrete areas, and they are suggested as indicative of key objectives of the National Plan. The National Plan should then identify a range of strategies and actions in pursuit of these goals. The ALRC's recommendations in the report are situated within this framework and mapped under them, together with many initiatives identified by stakeholders, to provide a 'working draft' for the plan.

Crucial to the success of any national planning process is clear leadership. We suggested that this should be led by a steering committee. The Law, Crime and Community Safety Council (LCCSC) of COAG has established a working group to discuss current activities to combat elder abuse in Australian jurisdictions, consider potential national approaches and consider the findings of this inquiry.[41] The LCCSC is well placed to take a lead role in coordinating a planning process. The important role that COAG can play, expressing a commitment of all governments at a senior level, was identified by stakeholders.[42] The Age Discrimination Commissioner, the Hon Dr Kay Patterson AO, is well placed to lead a number of strategies and actions of the plan, involving key stakeholder groups, and will be a fine champion of our work, having served on our advisory committee as well.

**Outcomes**

When it came to drawing together all the various recommendations and analysis throughout the report, in the Executive Summary we summarised the overall effect as being to safeguard older people from abuse and support their choices and wishes through:

- improved responses to elder abuse in aged care;

- enhanced employment screening of aged care workers;
- greater scrutiny regarding the use of restrictive practices in residential aged care;
- building trust and confidence in enduring documents as important advance planning tools;
- protecting older people when 'assets for care' arrangements go wrong;
- banks and financial institutions protecting vulnerable customers from abuse;
- better succession planning across the SMSF sector; and
- adult safeguarding regimes protecting and supporting at-risk adults.

These outcomes should be further pursued through a National Plan to combat elder abuse and new empirical research on the prevalence of elder abuse.

This inquiry has acknowledged that elder abuse is indeed 'everybody's business'. It is also everybody's *responsibility* — a responsibility not only to recognise elder abuse but also, most importantly, to respond to it effectively. The recommendations in the report address what legal reform can do to prevent abuse from occurring and to provide clear responses and redress when abuse occurs.

Ageing eventually comes to all Australians, and ensuring that all older people live dignified and autonomous lives free from the pain and degradation of elder abuse must be a priority.

**Endnotes**

1 World Health Organization, *Toronto Declaration on the Global Prevention of Elder Abuse* (2002).
2 Australian Bureau of Statistics, *Reflecting a Nation: Stories from the 2011 Census, 2012–2013: Who are Australia's Older People?* cat no 2071.0 (2012). Population ageing is also a global phenomenon. In 1950, 8 per cent of the world's population was 60 years or older. In 2011, this rose to 11 per cent, and it is projected to rise to 22 per cent by 2050: World Economic Forum, *Global Agenda Council on Ageing Society, Global Population Ageing: Peril or Promise?* (2011) 5.
3 Australian Institute of Health and Welfare, *Australian Trends in Life Expectancy* (2012) 82. See also Australian Institute of Health and Welfare, *Australia's Welfare 2015* (2015) 237.
4 Australian Institute of Health and Welfare, *Life Expectancy* <www.aihw.gov.au/deaths/life-expectancy/>.
5 World Health Organization, *Toronto Declaration on the Global Prevention of Elder Abuse* (2002).
6 Y Lawrence, Submission No 202 to Australian Law Reform Commission, Inquiry into Elder Abuse.
7 Productivity Commission, *Caring for Older Australians*, Report No 53 (2011) 326–7.
8 As urged by the NSW Trustee and Guardian in the campaign, 'Get it in black and white': write a will, prepare a power of attorney and an advance health directive.
9 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (24 November 2014).
10 United Nations, *Principles for Older Persons*, GA Res 46/91, UN GAOR, 46th Session, 74th Plen Mtg, Agenda Item 94(a), UN Doc A/RES/46/91 (16 December 1991) [17]–[18].
11 I acknowledge the crucial work of Dr Julie MacKenzie, Senior Legal Officer, in having the principal carriage of this section of the report, and the contribution of Vanessa Viaggio, Principal Legal Officer, in aspects of the chapter for the discussion paper.
12 A Groves, D Thomson, D McKellar and N Procter, *The Oakden Report* (Department for Health and Ageing (SA), 2017).
13 National Older Persons Legal Services Network, Submission No 363 to Australian Law Reform Commission, Inquiry into Elder Abuse.
14 *Aged Care Act 1997* (Cth) s 63-1AA(9).
15 Leading Age Services Australia, Submission No 104 to Australian Law Reform Commission, Inquiry into Elder Abuse.
16 Department of Health (Cth), Submission No 113 to Australian Law Reform Commission, Inquiry into Elder Abuse.
17 The online form for reporting reportable assaults requires providers to indicate action taken to ensure the safety of care recipients and minimise risk of recurrence. Given the required timeframe for reporting, this can only document actions taken within the first 24 hours: *Compulsory Reporting Forms* <www.agedcare.health.gov.au>.
18 Aged and Community Services Association, Submission No 217 to Australian Law Reform Commission, Inquiry into Elder Abuse.
19 Leading Age Services Australia, Submission No 377 to Australian Law Reform Commission, Inquiry into Elder Abuse.

20 *Ombudsman Act 1974* (NSW) pt 3C. Part 3C is modelled on pt 3A of the Ombudsman Act, which has provided for a reportable conduct scheme since 1999. From 1 July 2017, Victoria and the ACT will implement reportable conduct schemes in relation to children, and COAG has agreed, in principle, to harmonise reportable conduct schemes: Department of Health and Human Services (Vic), *Creating Child Safe Organisations* <www.dhs.vic.gov.au>; ACT Ombudsman, *Reportable Conduct Scheme* <www.ombudsman.act.gov.au/reportable-conduct-scheme>; Council of Australian Governments, *Communiqué* (1 April 2016).

21 Department of Social Services (Cth), *NDIS Quality and Safeguarding Framework* (2016) 49–53.

22 The reporting systems in place for the DRIS provide instructive guides for how a system could be operationalised: NSW Ombudsman, *Disability Reportable Incidents Forms and Guidelines* <www.ombo.nsw.gov.au>.

23 For examples of how these investigations are expected to be carried out under the DRIS and New South Wales reportable conduct scheme for children, see further NSW Ombudsman, *Planning and Conducting an Investigation* (Child Protection Fact Sheet 4, 2014); NSW Ombudsman, *How We Assess an Investigation — Employee to Client Incidents* (Disability Reportable Incidents Fact Sheet, 2016); NSW Ombudsman, *Risk Management Following an Allegation against an Employee* (Disability Reportable Incidents Fact Sheet, 2016).

24 Nonetheless, some criminal laws may require the reporting of suspicion of serious offences to the police: see, for example, *Crimes Act 1900* (NSW) s 316.

25 Department of Social Services (Cth), *NDIS Quality and Safeguarding Framework* (2016) 47.

26 State and territory health complaints entities may also be involved in investigating complaints about health practitioners: Australian Health Practitioner Regulation Agency, *Other Health Complaints Organisations* <www.ahpra.gov.au>.

27 COTA supported notifying the department: COTA, Submission No 354 to Australian Law Reform Commission, Inquiry into Elder Abuse.

28 Aged Care Complaints Commissioner, Submission No 148 to Australian Law Reform Commission, Inquiry into Elder Abuse; *Aged Care Act 1997* (Cth) pt 6.6.

29 Aged Care Complaints Commissioner, ibid.

30 These include the power to search premises, take photographs, inspect documents and ask people questions: *Aged Care Act 1997* (Cth) s 94B-2.

31 I acknowledge the work of Jared Boorer, Principal Legal Officer, in this chapter of the final report; and of Shreeya Smith, Legal Officer, in relation to it for the discussion paper.

32 Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' (2014) 36 *Sydney Law Review* 99, 105.

33 *Human Rights Commission Act 2005* (ACT) s 27B; *Guardianship of Adults Act 2016* (NT) s 61; *Guardianship and Administration Act 2000* (Qld) sch 4; *Public Guardian Act 2014* (Qld) s 19; *Guardianship and Administration Act 1993* (SA) s 28; *Guardianship and Administration Act 1995* (Tas) 1995 s 17; *Guardianship and Administration Act 1986* (Vic) s 16(h); *Guardianship and Administration Act 1990* (WA) s 97.

34 Michael C Dunn, Isabel CH Clare and Anthony J Holland, 'To Empower or to Protect? Constructing the "Vulnerable Adult" in English Law and Public Policy' (2008) 28(2) *Legal Studies* 234, 244.

35 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) prop 3–2.

36 Whether the support should be provided may then become largely a question of cost.

37 St Vincent's Health Australia, Submission No 345 to Australian Law Reform Commission, Inquiry into Elder Abuse.

38 Welfare Rights Centre NSW, Submission No 184 to Australian Law Reform Commission, Inquiry into Elder Abuse.

39 The Coalition's Policy to Protect the Rights of Older Australians <www.liberal.org.au/coalitions-policy-protect-rights-older-australians>; Senator the Hon George Brandis QC, Attorney-General, 'Protecting the Rights of Older Australians' (Media Release, 15 June 2016).

40 AnglicareSA, Submission No 299 to Australian Law Reform Commission, *Inquiry into Elder Abuse*.

41 Law, Crime and Community Safety Council, Communiqué, 19 May 2017. See also The Coalition's Policy to Protect the Rights of Older Australians <www.liberal.org.au/coalitions-policy-protect-rights-older-australians>.

42 See, for example, Eastern Community Legal Centre, Submission No 357 to Australian Law Reform Commission, Inquiry into Elder Abuse; Financial Planning Association of Australia (FPA), Submission No 295 to Australian Law Reform Commission, Inquiry into Elder Abuse.

# POLICY AS A MANDATORY RELEVANT CONSIDERATION: A REFLECTION ON *JACOB v SAVE BEELIAR WETLANDS (INC)*

***Adam Sharpe****

In late 2015, an application for judicial review was commenced in the Supreme Court of Western Australia to challenge the environmental approval of a flagship project of the Barnett government — the proposed extension of the Roe Highway from the Kwinana Freeway to the Port of Fremantle. The proposal involved taking the Roe Highway through an environmentally sensitive area known as the Beeliar Wetlands. At first instance, the application for judicial review succeeded on the basis that the Environmental Protection Authority (EPA) failed to have regard to its own policies when recommending that the Minister for the Environment approve the project. On appeal, the Supreme Court of Western Australia Court of Appeal held that the EPA's policies were not mandatory relevant considerations, so any failure to consider them could not invalidate the environmental approval. These two decisions provide an ideal context for addressing an important question of administrative law: when, if ever, will government policy be a mandatory relevant consideration for a decision-maker? This article will first consider the use of policy in government decision-making and then analyse why this important question was resolved with opposing results in these two cases.

**Use of policy in government decision-making**

The article adopts a broad working definition of 'policy' as principles stated by the executive which are intended to guide government decision-making in individual cases. The adoption of policy by the executive raises many issues.[1] This article examines the following four issues:

1. Why does the executive make policy?
2. What is the status of policy?
3. How should decision-makers use policy to guide decision-making?
4. What are the consequences of not considering policy?

This article is primarily concerned with the fourth issue. It was this issue which led Martin CJ to conclude that the environmental approval of the proposed extension of the Roe Highway was invalid in *Save Beeliar Wetlands (Inc) v Jacob*.[2] This conclusion was overturned by the Supreme Court of Western Australia Court of Appeal in *Jacob v Save Beeliar Wetlands (Inc)*.[3]

**Why do governments make policy?**

A key reason why the executive government makes policy is to seek to ensure consistency of decision-making. Consistency is an important aim because it is a fundamental tenet of

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administrative justice that like cases should be treated alike. Policy can assist with consistency across decision-makers. For example, in the administration of welfare payments, there are decisions which must be made by a large number of different decision-makers in respect of a far greater number of affected persons. Policy can assist with lessening or removing differences which might arise in decision-making between different government officials as a result of the personal views or approaches of those officials.

Policy can also assist the same decision-maker to make decisions consistently over time. Therefore, a decision made in 2012 by a particular body is more likely to be made in the same way in 2017 if that body is guided by policy.

Justice Brennan eloquently expressed the consistency benefits of policy in *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* in the following terms:

> Decision-making is facilitated by the guidance given by an adopted policy, and the integrity of decision-making in particular cases is the better assured if decisions can be tested against such a policy. By diminishing the importance of individual predilection, an adopted policy can diminish the inconsistencies which might otherwise appear in a series of decisions, and enhance the sense of satisfaction with the fairness and continuity of the administrative process.[4]

Another potential benefit of policy is efficiency. Decisions may be made more quickly if a policy has established a process for decision-making and identified factors for consideration (provided this is done in conformity with statutory requirements). Efficiency may also be enhanced because applicants have greater guidance regarding how to frame applications for consideration by decision-makers and so those applications can be processed more rapidly.

In addition, policy can help to ensure that decision-making accords with political platforms. The electorate expects the party or parties which form government to govern consistently with the policy positions which they announce during an election period. By setting those policy positions as government policy following the election, there is continuity between the promises made to the electorate and the actions of government. In this way, policy which guides decision-making promotes democratic accountability. For this reason, it has sometimes been suggested that policies set by a Minister should be accorded greater weight than policies set by unelected executive bodies.

Finally, policy in technical or specialised fields can be formulated with the benefit of the input of experts. A policy which is formulated by drawing upon the learning of subject-matter experts allows for the pooling of knowledge. It should lead to better decisions than would be made by an individual decision-maker who does not possess the knowledge of all those who contribute to the policy.

**The status of policy**

The legal status of policy is different from the legal status of legislation. This flows from the different source of authority for the making of legislation. Broadly, legislation is made by the Parliament or in the exercise of delegated legislative power, while policy is made in the exercise of executive power.

Legislation has the force of law, but executive policy generally does not.

Executive policy should be distinguished from delegated legislation — namely, legislation made in the exercise of delegated legislative power. In Western Australia, delegated legislation is typically referred to as ‘subsidiary legislation’, which is defined in s 5 of the *Interpretation Act 1984* (WA) as follows:

> [Subsidiary legislation is] any proclamation, regulation, rule, local law, by-law, order, notice, rule of court, local or region planning scheme, resolution, or other instrument, made under any written law and having legislative effect.

For present purposes, the key words in this definition are 'having legislative effect'. Like policy, delegated legislation is generally made by the executive, but, unlike policy, delegated legislation has the force of law.

Legislation, including subsidiary legislation, is binding upon decision-makers because it has the force of law. In contrast, policy does not bind but only guides decision-makers.

**How should decision-makers use policy when making decisions?**

There is a tension between the need for consistency in decision-making and the requirement for each decision to reflect the merits of the individual case. A decision-maker who applies a policy without considering the particular circumstances of a case can be said to have made no decision at all. Policy must therefore guide decision-making but cannot be applied inflexibly. A decision which is made as the result of the inflexible application of policy is liable to be set aside on judicial review as an invalid decision.

In the case of *Falc v State Planning Commission*[5] (*Falc*), the Town Planning Tribunal refused an application for subdivision. The relevant policy was to the effect that land zoned 'Special Rural' which met certain criteria should be given subdivision approval. The Tribunal held that the land that was the subject of the application was ripe for subdivision but refused subdivision approval because the land was zoned 'General Farming'. The Supreme Court of Western Australia held that this decision was invalid on the basis that the policy had been applied inflexibly by refusing subdivision of land which was ripe for subdivision solely on the basis of its zoning.[6]

**What are the consequences of not considering policy?**

*Falc* shows that a decision may be invalid where a decision-maker rigidly adheres to policy. But what are the consequences of not considering policy? It is clear that policy does not bind decision-makers. Does it follow that policy may be ignored without legal consequences? That is, if there is a policy which is relevant to a particular decision, is a decision made without regard to that policy invalid because of a decision-maker's failure to consider it? Two cases concerning the environmental approval of the proposal to extend the Roe Highway provide an opportunity to reflect upon the consequences of not considering relevant policy.

**The Roe 8 extension**

In late 2015, an application for judicial review was commenced to challenge the environmental approval of the proposed extension of the Roe Highway from the Kwinana Freeway to the Port of Fremantle. The project was proposed by Main Roads Western Australia and was for the purpose of improving road freight transport access from the Port of Fremantle to industrial areas in the east of the Perth metropolitan area in particular.

The proposal, known as Roe Highway Stage 8 (or 'Roe 8'), involved extending the Roe Highway through an environmentally sensitive area known as the Beeliar Wetlands. An earlier proposal for Roe Highway Stage 8 had led the EPA to publish Bulletin 1088 in February 2003, which was entitled *Environmental Values Associated With the Alignment of Roe Highway (Stage 8)*. That document contained the following:

> This report provides advice on the key environmental values that would be impacted by construction of a highway within the alignment of Roe Highway Stage 8.
>
> The area within and adjacent to the alignment where it bisects Beeliar Regional Park is considered to be of high conservation value and significance due to the ecological linkages it provides and the wetland, vegetation, faunal, ecological, aboriginal and social values that are represented. In addition to directly impacting on the wetland, vegetation and faunal values, the construction and operation of a highway through the area will also lead to further severance of these ecological linkages, reducing the area's viability and long-term management.[7]

Section 38 of the *Environmental Protection Act 1986* (WA) (EP Act) has the effect of requiring a decision-making authority to refer to the EPA any proposal which is likely, if implemented, to have a significant effect on the environment. The Roe 8 proposal therefore required environmental assessment under the EP Act.

The Roe 8 proposal was referred to the EPA on 20 April 2009.[8] As the Chief Justice found:

> On 13 May 2009 the EPA determined that it would assess the Proposal, and that the level of assessment would be that of a Public Environmental Review (PER), with a review period of six weeks. A PER is the most detailed and intensive level of assessment utilised by the EPA and, as its description implies, involves the provision of an opportunity for public review and for submissions to be provided to the EPA by the public.[9]

Section 41 of the EP Act has the effect of preventing a decision-making authority from implementing a proposal which the EPA has determined that it will assess until the proposal is granted environmental approval by the Minister for the Environment.

**EPA Report**

On 10 September 2013, the EPA provided its report on the outcome of the assessment of the Roe 8 proposal to the Minister in accordance with s 44 of the EP Act (EPA Report). The EPA Report was made public on 13 September 2013. The EPA Report found that the proponent (Main Roads Western Australia) had 'sought to apply innovative planning and design measures' and had 'avoided or minimised impacts on wetlands, native vegetation and native fauna' through a number of measures.[10] The EPA Report then noted that there would be the following residual impacts:

- clearing of 97.8 hectares (ha) of native vegetation which includes 5.4 ha of Beeliar Regional Park and 7 ha of Bush Forever site 244;
- loss of 78 ha of foraging habitat and 2.5 ha potential nesting habitat for the Carnaby's Black Cockatoo and the Forest Red-tailed Black Cockatoo …;
- clearing of 6.8 ha of wetlands … including wetlands protected under the Environmental Protection (Swan Coastal Plan Lakes) Policy 1992 … and Conservation Category Wetlands …; and
- fragmentation of wetlands and fauna habitat.[11]

Critically for the purposes of the application for judicial review, the EPA Report included the following:

> The EPA considers the above residual impacts to be significant and they would therefore need to be counterbalanced through the provision of environmental offsets.[12]

The EPA was satisfied that the offsets proposed by the proponent did in fact 'satisfactorily counterbalance the significant residual impacts'.[13] The EPA Report recommended that the Minister approve the Roe 8 proposal subject to conditions.

On 2 July 2015, the Minister for the Environment published Ministerial Statement 1008, which gave environmental approval for Roe 8.

**Application for judicial review**

In or about September 2015, an application for judicial review was commenced in the Supreme Court of Western Australia in respect of the EPA Report and the Minister's approval. The application was brought by Save Beeliar Wetlands Inc and a second applicant. The active respondents to the application were the Hon Albert Jacob MLA as Western Australian Minister for the Environment, the EPA and the Attorney-General for Western Australia, who intervened in the proceeding. The respondents conceded the standing of the second applicant and so the question of the standing of Save Beeliar Wetlands Inc fell away.[14]

The application, which was heard on 30 November 2015 by Martin CJ, relied upon a number of grounds. Chief Justice Martin delivered his judgment on 16 December 2015, allowing the application on one ground and dismissing the remaining grounds. The ground on which the application succeeded was that the EPA had failed to consider its own policies which, being mandatory relevant considerations, had to be considered by the EPA in order for its report to be lawful. The respondents accepted that the invalidity of the EPA Report would lead to the invalidity of the Minister's environmental approval, so the Minister's approval was also invalid.[15]

**EPA policies**

Chief Justice Martin identified three EPA policies which were in force at the time that the EPA Report was given to the Minister and which were of particular relevance to the environmental assessment of the Roe 8 proposal. Excerpts of the three policies are set out below. His Honour interpreted those policies as stating that:

> [Where the EPA concluded that a proposal] would result in a significant residual impact to critical environmental assets after all efforts to mitigate those impacts on site have been exhausted, then:
>
> (a) the EPA would not consider the provision of environmental offsets to be an appropriate means of rendering such a proposal environmentally acceptable; and
> (b) there would be a presumption that the EPA would recommend to the Minister that the proposal not be implemented.[16]

This policy position had particular significance to the Roe 8 proposal because the Beeliar Wetlands contained environmental assets which were classed as 'critical', and the EPA Report found that there would be significant residual impacts upon those assets from the implementation of the Roe 8 proposal. The EPA Report concluded by recommending that the Roe 8 proposal be approved subject to conditions which included the provision of environmental offsets.

***Position Statement No 9***

The first of the three EPA policies identified by Martin CJ was a January 2006 publication by the EPA entitled *Environmental Offsets — Position Statement No 9*. Chief Justice Martin quoted section 4 of the position statement, including the following paragraph:

> Therefore, when the issue is before the EPA, there is a presumption against recommending approval for proposals that are likely to have significant adverse impacts to 'critical assets'. The EPA does not consider it appropriate to validate or endorse the use of environmental offsets where projects are predicted to have significant impact to the following …[17]

The Chief Justice continued:

> There follows a list of various types of environmental asset which are, by clear implication, to be taken to be 'critical assets'. That list includes the following items relevant to the Proposal for Roe Highway Stage 8:
>
> - regional parks;
> - Bush Forever reserves;
> - Declared Threatened Fauna;
> - Environmental Protection Policy wetlands; and
> - Conservation Category Wetlands.[18]

### *Guidance Statement No 19*

The second EPA policy was published in September 2008 and was entitled *Guidance for the Assessment of Environmental Factors — Environmental Offsets — Biodiversity No 19* (Guidance Statement). That policy stated that it was to be read in conjunction with Position Statement 9. A key passage quoted from the policy by Martin CJ was in section 3.1 of Guidance Statement No 19:

> **Significant adverse impacts to assets**
>
> Where there are significant adverse impacts to 'critical' assets, the EPA will assess the proposal or scheme through EIA. The EPA, in providing its advice to the Minister, will adopt a presumption against recommending approvals of proposals or schemes where significant adverse environmental impacts affect 'critical' assets.[19]

### *Environmental Protection Bulletin No 1*

The third EPA policy, *Environmental Protection Bulletin No 1 — Environmental Offsets — Biodiversity*, was also published in September 2008. Chief Justice Martin quoted a definition of 'environmental offsets' from the bulletin, which included the following:

> Environmental offsets are a package of activities undertaken to counter adverse environmental impacts arising from a development. Offsets are the 'last line of defence' and are considered after all steps have been taken to minimise impacts resulting from a development. Offsets aim to ensure that any adverse impacts from development are counter-balanced by an environmental gain somewhere else.[20]

The Chief Justice also quoted the following passage from the bulletin:

> Offsets should only be considered after all efforts to avoid and minimise environmental impacts have been made and significant environmental impacts still remain.
>
> Major development proposals or schemes that have significant environmental impacts, particularly on 'critical' and 'high' value assets, will usually trigger the EPA's environmental impact assessment process. 'Critical' assets are the most important environmental assets in the State and are listed in EPA Position Statement No 9 ...
>
> The EPA advises the Minister for the Environment on whether a project should be approved or not. In providing its advice to the Minister, the EPA adopts a presumption against recommending approval of proposed projects where significant adverse environmental impacts affect 'critical' assets. The EPA determines on a case-by-case basis how significant is an impact and this in turn influences the decision to assess the project through the environmental impact assessment process and its recommendations to the Minister, including advice on the adequacy of proposed offsets.[21]

### Key findings regarding the EPA policies

Chief Justice Martin carefully reviewed the EPA Report and found that it proceeded on the basis that the significant adverse impacts to critical assets which would result from the Roe 8

proposal being implemented needed to be counterbalanced by environmental offsets.[22] The Chief Justice found that this reasoning was contrary to the policy position stated by the three policies identified above.

On the Chief Justice's understanding of the policies, the application of the stated policy position would have meant that there was a presumption that the Roe 8 proposal would be refused. It would not be consistent with the policies for environmental offsets to render such a proposal environmentally acceptable.

Critically, the Chief Justice also found that the EPA Report made no reference to the policy position enunciated by the three policies.[23] The Chief Justice found that, with the exception of one meeting in April 2010,[24] the minutes of meetings of the EPA at which the Roe 8 proposal was considered did not make reference to the policy position which his Honour found was established by the three published policies referred to above. Moreover, on the Chief Justice's interpretation of the policies, the EPA Report was 'fundamentally inconsistent with, and indeed contrary to' the policies.[25] This led the Chief Justice to conclude that the EPA had not taken these three policies into account when preparing its report.[26]

This squarely raised the issue of whether those policies were mandatory relevant considerations. If they were, the failure to consider them could lead to the conclusion that the EPA Report was invalid.

**Mandatory relevant considerations and *Peko-Wallsend***

The leading statement of principle regarding judicial review for failure to take into account a relevant consideration is that of Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend*[27] (*Peko-Wallsend*). In truncated form, the statement is as follows:

> (a) The ground of failure to take into account a relevant consideration can only be made out if a decision-maker fails to take into account a consideration which he is *bound* to take into account in making that decision …
> (b) What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors — and in this context I use this expression to refer to the factors which the decision-maker is bound to consider — are not expressly stated, they must be determined by implication from the subject-matter, scope and purpose of the Act …
> (c) Not every consideration that a decision-maker is bound to take into account but fails to take into account will justify the court setting aside the impugned decision and ordering that the discretion be re-exercised according to law. A factor might be so insignificant that the failure to take it into account could not have materially affected the decision …[28]

**A freestanding principle that policy is a mandatory relevant consideration?**

Before Martin CJ turned to *Peko-Wallsend*, his Honour reviewed previous cases concerning the issue of whether relevant policy is a mandatory relevant consideration. The Chief Justice identified three decisions of the Federal Court which support the existence of a freestanding principle that relevant policy is a mandatory relevant consideration.[29]

In *Gerah Imports Pty Ltd v Minister for Industry, Technology and Commerce*[30] (*Gerah*), Davies J said:

> Even if non-statutory rules do not, of themselves, have binding effect, the failure of a decision-maker to have regard to them or his failure to interpret them correctly may amount to an error of law justifying an order of judicial review.[31]

Subsequently, Wilcox J in *Nikac v Minister for Immigration and Ethnic* Affairs[32] (*Nikac*) cited *Gerah* with approval and then said:

> Counsel for Mr Sorensen argue that the failure of the Minister to have regard to this policy vitiated the Minister's decision. I think that this submission is correct. Although a non-statutory policy is not binding upon a decision-maker, in the sense that he or she may decide in the particular case not to act in accordance with that policy, a policy applicable to the case is always a relevant consideration in the making of a decision.[33]

Then, in *BHP Direct Reduced Iron Pty Ltd v CEO, Australian Customs Service*,[34] Carr J said:

> I think that it can readily be implied into s 273 [of the *Customs Act 1901* (Cth)] that if the executive arm of government formulated a policy for the making of determinations under that section, then the respondent was bound to take into account such factors as that policy indicated were material to such a decision.[35]

Justice Carr went on expressly to agree with the statement of principle of Wilcox J set out above.

The Chief Justice then referred to the decision of *Minister for Immigration, Local Government and Ethnic Affairs v Gray*[36] (*Gray*), in which a majority of the Full Court of the Federal Court held that the Administrative Appeals Tribunal was bound to consider relevant policies of the decision-maker whose decision was being reviewed. The Chief Justice noted that the majority left open whether the decision-maker was required to consider those policies.[37] In *Gray*, French and Drummond JJ said:

> the existence and content of lawful policy may properly be regarded as a relevant factor which, because it is properly contemplated by the legislature, must be taken into account by the Tribunal. In the case of the power to deport non-citizens convicted of criminal offences, the existence and content of a lawful criminal deportation policy is a matter the Tribunal is bound to take into account and to give such weight as it thinks proper having regard to all the circumstances of the case.[38]

The Chief Justice also identified two previous decisions of single justices of the Supreme Court of Western Australia which supported the existence of a principle that relevant policy is always a mandatory relevant consideration — namely, *Clive Elliott Jennings & Co Pty Ltd v Western Australian Planning* Commission[39] and *Tah Land Pty Ltd v Western Australian Planning Commission*.[40]

Despite these authorities, the Chief Justice cast doubt upon the existence of the principle which they appear to support, stating:

> I hold a considerable reservation as to whether there is a general legal principle of universal application to the effect that a decision-maker is bound to take account of any relevant policy which he or she has formulated as a condition of the valid exercise of jurisdiction.[41]

The Chief Justice determined that he was able to resolve the case by the application of what his Honour 'respectfully describe[d] as the more orthodox approach enunciated by Mason J in *Peko-Wallsend*'.[42] That is, the Chief Justice analysed whether the EPA had an obligation to take its policies into account which arose from the subject matter, scope and purpose of the EP Act.

**The Chief Justice's analysis of the EP Act**

Specifically, the Chief Justice sought to construe pt IV of the EP Act, in the context of the Act as a whole, to discern whether there was an implication that EPA was required to consider its own policies when undertaking an environmental impact assessment.[43] The Chief Justice

conducted a detailed review of the EP Act in carrying out this task and determined that there was such an implication. At the risk of oversimplification, it was the need for procedural fairness to be afforded to participants in the process of environmental impact assessment which guided his Honour to this conclusion.[44]

The Chief Justice identified that:

> [Part IV of the EP Act] expressly contemplates that a proponent may be required to undertake an environmental review and that members of the public may be invited to provide submissions in relation to that review. However, pt IV does not specify the administrative procedures, assessment criteria or policies which a proponent would need to know in order to undertake an effective environmental review, and which interested parties or members of the public would need to know in order to provide meaningful submissions for the consideration of the EPA.[45]

In addition, the Chief Justice observed:

> various provisions of the Act expressly empower the EPA to promulgate administrative procedures 'for the purpose of establishing the principles and practices of environmental impact assessment', assessment criteria, and environmental protection policies.[46]

The Chief Justice reasoned that, when the EPA published policies pursuant to those express powers, it is likely that participants in the process of environmental impact assessment would rely on those policies in deciding whether and how to engage in the process of environmental impact assessment.[47] If the EPA was not required to take its policies into account then participants in the process would be misled and the processes would be likely to miscarry.[48] As a result, the Chief Justice concluded that the legislature should be presumed to have intended that the EPA would consider its policies when conducting an environmental impact assessment.[49]

**Not legitimate expectation**

For completeness, it should be observed that Martin CJ made express reference to the doctrine of legitimate expectation but did not rely upon it in reaching the above conclusion. The Chief Justice identified authority for the proposition that policy may give rise to a legitimate expectation about the nature of decision-making processes.[50] However, the Chief Justice noted that 'these decisions were made at a time when notions of legitimate expectation played a greater role in Australian administrative law than is currently the case'.[51] Moreover, the applicants had not sought judicial review on the ground of denial of procedural fairness.[52] It followed that the doctrine of legitimate expectation was not squarely raised in the proceedings before the Chief Justice.

**The Chief Justice's disposition of the judicial review application**

Chief Justice Martin therefore applied the approach in *Peko-Wallsend* to reach the conclusion that the subject-matter, scope and purpose of the EP Act required the EPA to take its own policies into account when conducting an environmental impact assessment. The Chief Justice found that the EPA had not done so. Finally, the Chief Justice considered whether the failure to consider these policies was sufficiently significant to have materially affected the EPA's decision. His Honour's conclusion that the policy was 'a matter of the utmost significance'[53] to the EPA's assessment of the Roe 8 proposal led to the result that the EPA Report and the Minister's decision relying upon it were invalid.[54]

## Appeal to the Court of Appeal

The Minister, the EPA and Commissioner for Main Roads commenced an appeal in the Supreme Court of Western Australia Court of Appeal. The appeal was heard on 2 May 2016, and judgment was delivered on 15 July 2016.[55] President McLure delivered the lead judgment of the Court, with Buss and Newnes JJA concurring.[56] The Court of Appeal held that the EPA policies were not mandatory relevant considerations but also disagreed with the Chief Justice's interpretation of the policies. The appeal was unanimously allowed.

### *EPA policies were not mandatory relevant considerations*

Like the Chief Justice, the President referred to *Peko-Wallsend* in her review of the law of relevant considerations.[57] The President's reasoning diverged from that of the Chief Justice on the issue of whether the EPA policies were, by statutory implication, mandatory relevant considerations. The President concluded that the express provisions of the EP Act left 'no room for an implication that the Policies, or any of them, are mandatory relevant considerations' in the EPA's assessment of the Roe 8 proposal.[58]

The President held that there were 'a number of aspects of the legislative scheme in the [EP Act] compelling that conclusion'.[59] The 'first and most important' of these was pt III of the EP Act, which concerns 'approved policies'.[60] Policies which have the status of 'approved policies' under pt III of the EP Act are given the force of law by s 33(1) of the Act. The President identified that the 'approved policies' are 'express relevant considerations'.[61] Given that pt III of the EP Act established a 'lengthy, tortuous process' for formulation and adoption of approved policies, the President held that the legislature could not have intended that the EPA could make policies which did not follow the pt III process which the EPA was impliedly required to take into account.[62] None of the policies identified by the Chief Justice were 'approved policies' and therefore they were not mandatory relevant considerations.

Secondly, the President held that the structure of the decision-making process under the EP Act was inconsistent with the implication that all relevant EPA policies were mandatory relevant considerations. Specifically, the President said that an assessment report by the EPA is 'a long way short of any final decision on the proposal in issue' because the Minister had obligations to consult and consider appeals after receiving the EPA's report before making a final decision regarding environmental approval. This process 'strongly weighed' against a statutory implication that the EPA's policies were mandatory relevant considerations at the EPA report stage.[63]

The President identified other indications from the statute which were against the implication found by the Chief Justice. The President referred to s 44(2) of the EP Act, which specified matters the EPA is obliged to set out in its assessment report. The express identification of these mandatory relevant considerations militated against the implication of other mandatory relevant considerations.[64]

Further, the President held that the 'nature and role' of the EPA was significant. In producing its report, the EPA acted as an 'independent expert body' which was 'performing an expert evaluative and advisory function, not exercising a discretionary power'.[65] Finally, the President observed that, in the absence of a ministerial direction, s 40(2)(b) of the EP Act gives the EPA 'sole control of the form, content, timing and procedure' of any environmental review it is required to produce. That provision, together with s 122 of the EP Act, was the source of the EPA's power to give the 'very detailed guidance' which the EPA provided to those 'involved or interested in' the assessment process.[66]

The President therefore concluded that EPA policies (unless approved policies under pt III of the EP Act) were not mandatory relevant considerations for the EPA when carrying out an assessment and allowed the appeal.

***The Court of Appeal's interpretation of the policies***

Although the Court of Appeal allowed the appeal on the basis that no implication could be drawn from the EP Act to the effect that the EPA policies were a mandatory relevant consideration, the Court of Appeal (or at least McLure P and Buss JA[67]) appeared to disagree with Martin CJ's interpretation of the three policies.

As set out above, the three policies had been found by the Chief Justice to establish a policy position that:

> [Where the EPA concluded following environmental assessment that a project] would result in a significant residual impact to critical environmental assets after all efforts to mitigate those impacts on site have been exhausted, then:
>
> (a) the EPA would not consider the provision of environmental offsets to be an appropriate means of rendering such a proposal environmentally acceptable; and
> (b) there would be a presumption that the EPA would recommend to the Minister that the proposal not be implemented.[68]

President McLure quoted the following 'tests' from Position Statement 9:

> Test 3 — are residual environmental impacts expected to have a significant adverse impact on critical or high value assets?
>
> Test 4 — do residual impacts remain significant but not so significant that the activity is likely to be found environmentally unacceptable (including in a cumulative impacts context)?[69]

The President found that:

> The approach in these two questions is in tension with the rigidity of the other quoted statements [which had led the Chief Justice to his interpretation of the policies] but is entirely consistent with the other policies. Guidance Statement 19 and EPA Bulletin 1, both published in September 2008 (the 2008 Policies), also refer to offsets in relation to critical assets.[70]

The President therefore disagreed that the policy position established by the three policies included the proposition that the EPA would not consider the provision of environmental offsets in cases where a proposal would result in significant residual impacts to critical environmental assets. Given that the issue of principal concern for this article is when policies will be a mandatory relevant consideration, the proper interpretation of those EPA policies need not be considered further.

***The outcome in the Court of Appeal***

The active respondent in the Court of Appeal, Save Beeliar Wetlands (Inc), filed a notice of contention raising additional grounds on which it said the primary judge's decision should be upheld. Each of these grounds was rejected by the Court of Appeal. While it is not necessary for the purposes of this article to consider those grounds, it is noteworthy that, in the course of dismissing those grounds, President McLure reached the conclusion that a review of the entirety of the EPA process of environmental impact assessment of the Roe 8 proposal revealed that the EPA had in fact taken the three policies into account.[71]

The result was that the appeal was allowed. The consequence of this was that the EPA Report was valid and, therefore, so was the Minister's environmental approval of the Roe 8 project.

**Application for special leave refused**

There was an application for special leave to appeal to the High Court from the decision of the Court of Appeal. The application for special leave was refused following a hearing on 16 December 2016.[72] The legal issue argued on the application for special leave concerned legal unreasonableness and arose from the notice of contention filed by Save Beeliar Wetlands (Inc) in the Court of Appeal. There was no argument concerning the issue of whether EPA policies were mandatory relevant considerations on a proper construction of the EP Act.

***Current status of Roe 8***

Although the environmental approval of Roe 8 was ultimately held to be valid, the then Labor opposition had adopted a policy that it would not proceed with the Roe 8 proposal if it were elected on 11 March 2017. Labor won the election on 11 March 2017, so the Roe 8 extension is not being implemented.

**Conclusion**

Both the Chief Justice and the Court of Appeal applied the framework established by *Peko-Wallsend* in determining whether relevant policy was a mandatory relevant consideration for the EPA when conducting environmental impact assessments. In both cases, it was accepted that there was no express statutory requirement, so it was necessary to consider whether an implication arose from the subject-matter, scope and purpose of the EP Act. The difference between the Chief Justice and the Court of Appeal concerned the proper construction of the EP Act and its subject-matter, scope and purpose.

The idea that relevant policy must be considered by a decision-maker has an intuitive appeal. It is an incident of good public administration that relevant policy will be considered by a decision-maker. From an Australian administrative law perspective, however, it seems difficult to argue for a freestanding principle that policy should be a mandatory relevant consideration. To be consistent with the framework established by *Peko-Wallsend*, it would seem that the conclusion that policy is a mandatory relevant consideration will need to rest on an express legislative statement to that effect or be 'determined by implication from the subject-matter, scope and purpose of the Act' on a statute-by-statute basis.

It should be acknowledged that the three Federal Court decisions referred to by Martin CJ were decided after *Peko-Wallsend*. Indeed, in *Nikac,* which was decided only two years after *Peko-Wallsend*, Wilcox J expressly refers to Mason J's judgment in *Peko-Wallsend* shortly after stating that 'a policy applicable to the case is always a relevant consideration in the making of a decision'.

With respect, it must be the case that a statute could expressly provide that any executive policy formulated in respect of the EP Act was not a mandatory relevant consideration. However, there might be room for the development of a presumption that a policy is a mandatory relevant consideration as a refinement of *Peko-Wallsend*. This presumption could be grounded in the procedural fairness type considerations identified by Martin CJ. Such a presumption would bear some resemblance to (and may gain some support from) the principle that the requirement to afford natural justice is only excluded by clear language.

The development of such a presumption in the near term in the Western Australian courts appears to be largely foreclosed by the decision of the Court of Appeal. That decision applies *Peko-Wallsend* in an orthodox manner and without any suggestion that relevant executive policy might be in any special category when it comes to the ascertainment of mandatory relevant considerations. If such a development is to occur in the near term, it is likely to be in another jurisdiction.

The decision of the Court of Appeal settles for Western Australian law the question of whether EPA policies (except for policies made under pt III of the EP Act) are mandatory relevant considerations for the EPA when conducting environmental impact assessments with a resounding 'no'. It does leave open the possibility that relevant policy may be implied to be a mandatory relevant consideration in other Acts.

Of course, where a statute makes it express that policy is a mandatory relevant consideration, a decision-maker must consider the policy. There are two examples concerning the WA State Administrative Tribunal (SAT) where such a requirement to consider policy is expressly stated. Section 28 of the *State Administrative Tribunal Act 2004* (WA) provides that the responsible Minister may certify that a gazetted policy was in effect at the time of a relevant decision and, if the original decision-maker had regard to the policy, the SAT must have regard to that policy when conducting its review. As regards the SAT's planning review jurisdiction, s 241(1)(a) of the *Planning and Development Act 2005* (WA) provides that the SAT must have due regard to any state planning policy which may affect the subject-matter of the application.

In the absence of such an express statement, the question of whether relevant policy is a mandatory relevant consideration will need to be determined on a statute-by-statute basis by reference to the subject-matter, scope and purpose of the statute. Given that conclusion, it will continue to be prudent for decision-makers to seek to identify and refer to relevant policy when making decisions. This will be especially important when the decision made does not accord with the policy.

**Endnotes**

1 The legal issues arising from the use of policy in executive decision-making is the subject of ch 11 of the text by Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action* (4th ed, LexisNexis Australia, 2015).
2 [2015] WASC 482.
3 (2016) 50 WAR 313.
4 (1979) 2 ALD 634, 640.
5 (1991) 5 WAR 522.
6 (1991) 5 WAR 522, 529–30.
7 Environment Protection Authority, *Environmental Values Associated With the Alignment of Roe Highway (Stage 8): A Report by the Environmental Protection Authority under Section 16(j) of the Environmental Protection Act 1986*, Bulletin 1088 (February 2003) 16.
8 [2015] WASC 482, [71].
9 [2015] WASC 482, [72].
10 Environmental Protection Authority, *Report and Recommendations of the Environmental Protection Agency: Roe Highway Extension: Main Roads Western Australia*, Report 1489 (September 2013) iii.
11 Ibid iv–v.
12 Ibid v.
13 Ibid.
14 [2015] WASC 482, [11].
15 [2015] WASC 482, [105].
16 [2015] WASC 482, [2].
17 [2015] WASC 482, [49].
18 [2015] WASC 482, [50].
19 [2015] WASC 482, [62] (footnote omitted).
20 [2015] WASC 482, [69].
21 [2015] WASC 482, [70].

22 See, for example, [2015] WASC 482, [88].
23 [2015] WASC 482, [96].
24 The Chief Justice observed that this meeting was 'more than three years before the EPA considered and resolved upon the outcome of its assessment' and, further, that 'only two of the five members of the EPA present at the meeting on 29 April 2010 were present at the meeting on 18 July 2013 when the EPA resolved to recommend that the Proposal may be implemented': [2015] WASC 482, [190].
25 [2015] WASC 482, [191].
26 [2015] WASC 482, [201].
27 (1986) 162 CLR 24, 39–40.
28 (1986) 162 CLR 24, [15].
29 [2015] WASC 482, [137]–[139].
30 (1987) 17 FCR 1.
31 (1987) 17 FCR 1, 15.
32 (1988) 20 FCR 65.
33 (1988) 20 FCR 65, 81.
34 (1998) 55 ALD 665.
35 (1998) 55 ALD 665, 682.
36 (1994) 50 FCR 189.
37 [2015] WASC 482, [140].
38 (1994) 50 FCR 189, 206.
39 [2002] WASCA 276, [24]–[26].
40 [2009] WASC 196.
41 [2015] WASC 482, [151].
42 [2015] WASC 482, [151].
43 [2015] WASC 482, [152].
44 See, for example, [2015] WASC 482, [146], [168], [181].
45 [2015] WASC 482, [165].
46 [2015] WASC 482, [166] (footnotes omitted).
47 [2015] WASC 482, [185].
48 [2015] WASC 482, [186].
49 [2015] WASC 482, [187].
50 *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648; *Century Metals and Mining NL v Yeomans* (1989) 40 FCR 564, 592 (Fisher, Wilcox and Spender JJ).
51 [2015] WASC 482, [145].
52 [2015] WASC 482, [145].
53 [2015] WASC 482, [205].
54 [2015] WASC 482, [211].
55 *Jacob v Save Beeliar Wetlands (Inc)* (2016) 50 WAR 313.
56 Justice of Appeal Buss agreed generally, but Newnes JA specifically referred to the matters set out at [55]–[60] of McLure P's reasons as the basis on which his Honour agreed that none of the policies are mandatory relevant considerations.
57 (2016) 50 WAR 313, [50].
58 (2016) 50 WAR 313, [54].
59 (2016) 50 WAR 313, [55].
60 (2016) 50 WAR 313, [55].
61 (2016) 50 WAR 313, [55].
62 (2016) 50 WAR 313, [56]. Chief Justice Martin had considered pt III of the EP Act but found it to be consistent with the implication that his Honour identified: [2015] WASC 482, [167].
63 (2016) 50 WAR 313, [57]. As with pt III of the EP Act, Martin CJ had also considered the appeals process provided in the EP Act and found this was consistent with the implication that his Honour identified: [2015] WASC 482, [175]–[176], [182], [185](f)–(g).
64 (2016) 50 WAR 313, [58].
65 (2016) 50 WAR 313, [59].
66 (2016) 50 WAR 313, [60].
67 It may be that Newnes JA was seeking to avoid being taken to agree to this different interpretation of the policies by stating that his Honour agreed that the appeal should be upheld but then referring specifically to paras [55]–[60] of her Honour's judgment, which concerned statutory interpretation of the EP Act.
68 [2015] WASC 482, [2].
69 (2016) 50 WAR 313, [18].
70 (2016) 50 WAR 313, [19]. See also [76].
71 (2016) 50 WAR 313, [79]–[82].
72 *Save Beeliar Wetlands (Inc) v The Hon Albert Jacob MLA* [2016] HCATrans 313 (16 December 2016).

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