

## MS ONUS AND MR NEAL: AGITATORS IN AN AGE OF ‘GREEN LAWFARE’<sup>1</sup>

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. Let me explain.

### 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*) (**the Adani litigation**).<sup>2</sup>

The challenge was brought under s 487 of the EPBC Act, which provides broad, but not open, standing to individuals or organisations<sup>3</sup> seeking judicial review<sup>4</sup> of certain decisions made under the 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.<sup>5</sup>

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

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<sup>1</sup> The considerable assistance of Ms Rachael Chick, the research assistant to the Scientific Inquiry into Hydraulic Fracturing in the Northern Territory (the Inquiry) and my tipstaff, in the production of this paper is gratefully acknowledged. All errors are, of course, my own.

<sup>2</sup> *Mackay Conservation Group v Commonwealth of Australia* (Federal Court of Australia, NSD33/2015) (**Adani litigation**).

<sup>3</sup> Whose objects include the protection or conservation of, or research into, the environment.

<sup>4</sup> It should be noted that the EPBC Act also makes provision for standing to commence civil enforcement proceedings on similar terms – see s 475.

<sup>5</sup> *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) s 487.

requesting that the decision be set aside,<sup>6</sup> the federal Government proceeded to attack the Court,<sup>7</sup> attack the applicant, attack the applicant's legal representatives, and finally, for completeness, attack the EPBC Act itself.<sup>8</sup> The Government's characterisation of the *Adani* litigation was that of "vigilante litigation by people...who have no legitimate interest".<sup>9</sup>

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:

"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."<sup>10</sup>

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".<sup>11</sup> Litigation by community environmental groups was henceforth branded 'green lawfare' by the federal Government; a phrase oft repeated in the media.<sup>12</sup>

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<sup>6</sup> Senate Environment and Communications Legislation Committee, Parliament of Australia, *Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015* (2015) (**Senate Report**) 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](http://www.edonsw.org.au/carmichael_shows_the_law_is_working_well)>.

<sup>7</sup> Daniel Hurst, 'Abbott warns against courts 'sabotaging' projects such as Carmichael coalmine', *Guardian Australia*, 7 August 2015 <<https://www.theguardian.com/environment/2015/aug/07/abbott-warns-against-courts-sabotaging-projects-such-as-carmichael-coalmine>>.

<sup>8</sup> See, for example, Attorney-General for Australia '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>>.

<sup>9</sup> Cristy Clark, 'The politics of public interest environmental litigation: lawfare in Australia', (2016) 31(7) *Australian Environment Review* 258, 258.

<sup>10</sup> Federal Court of Australia, 19 August 2015, 'Statement re NSD33/2015 *Mackay Conservation Group v Minister for Environment*', quoted in University of Adelaide Public Law and Policy Research Unit, submission 35 to the *Senate Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*.

<sup>11</sup> Attorney-General for Australia '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>>.

<sup>12</sup> 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.

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.<sup>13</sup>

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 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, 5,364 projects had been referred to the Department of the Environment under the EPBC Act, and 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.<sup>14</sup> That is, of the projects referred to the Minister since the commencement of the EPBC Act, approximately 0.43% were subject to a challenge.<sup>15</sup> Furthermore, of the 37 applications for third party judicial review, only four were successful,<sup>16</sup> that is, 0.12%. 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

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<sup>13</sup> Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015.

<sup>14</sup> Senate Report, 4.

<sup>15</sup> 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.

<sup>16</sup> Noting that the outcome in the *Adani* litigation is not classed as ‘successful’ because the proceeding settled.

on judicial review proceedings under [environmental impact and assessment] provisions... the empirical foundation for these concerns is weak.”<sup>17</sup>

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’”<sup>18</sup>.

The assertion was premised on a resource produced for, amongst others, Greenpeace, in 2011, entitled *Stopping Australia's Coal Export Boom*. 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.”<sup>19</sup> 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”.<sup>20</sup> Curiously, notwithstanding that the document had been in the public domain since 2012,<sup>21</sup> and notwithstanding that public interest environmental litigation was constant,<sup>22</sup> 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 were the Carmichael coal mine and rail project.<sup>23</sup> In addition, the learned

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<sup>17</sup> 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.

<sup>18</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 20 August 2015, 8987 (the Hon Greg Hunt, Minister for the Environment).

<sup>19</sup> J Hepburn, B Burton, and H Hardy, November 2011, *Stopping Australia's Coal Export Boom*, available at <[http://www.abc.net.au/mediawatch/transcripts/1206\\_greenpeace.pdf](http://www.abc.net.au/mediawatch/transcripts/1206_greenpeace.pdf)>, 2.

<sup>20</sup> Hepburn et al, above n 19, 6

<sup>21</sup> See, for example, Annabel Hepworth, 6 March 2012, ‘Coal activists strategy exposed’, *The Australian Online*, <<http://www.theaustralian.com.au/business/mining-energy/coal-activists-strategy-exposed/news-story/306fcd94537964a78c50ddd3938f21d9>>.

<sup>22</sup> 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).

<sup>23</sup> Macintosh et al, above n 17, 110.

authors concluded that the primary cause of delay for the two capital intensive projects was financial.<sup>24</sup>

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.”<sup>25</sup>

And a review conducted in 2009 by Dr Allan Hawke AC into the operation of the EPBC Act found that, to similar effect, 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.”<sup>26</sup>

The results are similar in other jurisdictions. For example, in New South Wales, in the Land and Environment Court – 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 2008/2009 there were approximately 87,056<sup>27</sup> development applications and of these, approximately 884<sup>28</sup> were the subject of challenge (both merits and judicial review). That is, 1.02%.<sup>29</sup> In 2014/2015, there were 61,108 development applications,<sup>30</sup> of which there were approximately 872<sup>31</sup> applications for review. That is, 1.43%. And moreover, while I do not have the figures, it may be safely assumed that the challenges did not enjoy a 100% success rate.

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<sup>24</sup> Macintosh et al, above n 17, 108.

<sup>25</sup> C McGrath, ‘Myth drives Australian Government attack on standing and environmental “lawfare”’, (2016) 33 *Environmental and Planning Law Journal* 3, 12.

<sup>26</sup> Dr Allan Hawke, *The Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (Commonwealth of Australia, 2009) 261.

<sup>27</sup> For 2008/2009 financial year. Local Government and Planning Minister’s Council, *First National Report on Development Assessment Performance 2008/09*, (Council of Australian Governments, 2010), 7.

<sup>28</sup> 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.

<sup>29</sup> McGrath, above n 25, 10.

<sup>30</sup> For 2014-2015 financial year. NSW Department of Planning and Environment, 2017, *Local Development Performance Monitoring, Executive Summary*, available at <<http://www.datareporting.planning.nsw.gov.au/ldpm-executive-summary>>.

<sup>31</sup> Average of 2014 and 2015 figures, Class 1 and Class 4 proceedings. The Land and Environment Court of NSW, *Annual Review 2015*, (state of New South Wales, 2016), 44.

Second, 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<sup>32</sup> was to effect that the project would create approximately 1,500 jobs.<sup>33</sup> This was markedly less than the 10,000 jobs subsequently claimed by both the proponent, and the federal Government, that would purportedly be lost as a result of the *Adani* litigation.<sup>34</sup>

The other is the case of *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited*,<sup>35</sup> 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".<sup>36</sup> 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.<sup>37</sup> The decision was upheld on appeal.<sup>38</sup>

Third, 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 claims - a power that is, albeit not lightly, but nevertheless regularly, exercised - 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

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<sup>32</sup> *Adani Mining Pty Ltd v Land Services of Coast and Country Inc* [2015] QLC 48

<sup>33</sup> *Ibid*, [508], [575] and [585].

<sup>34</sup> See, for example, Hurst, above n 7.

<sup>35</sup> [2013] NSWLEC 48

<sup>36</sup> *Ibid* at [470] and [496].

<sup>37</sup> *Ibid*, [496]- [500].

<sup>38</sup> *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* [2014] NSWCA 105; (2014) 86 NSWLR 527.

mistake, this an obligation that legal practitioners take seriously. The NSW Environmental Defenders Office 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 powerful deterrent to even the most enthusiastic environmental litigant.<sup>39</sup>

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:<sup>40</sup>

“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.”

### **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<sup>41</sup> – indeed, according to Sir Owen Dixon in the *Communist Party Case*, it is “an assumption” on which the Constitution was framed<sup>42</sup> – its precise content is contestable. As the Hon Robert French AC has very recently opined, “the meaning of the term ‘rule of law’ is

<sup>39</sup> *Federal Court Rules 2011* (Cth), r 40.03.

<sup>40</sup> The Hon Murray Wilcox AO QC, submission 19 to the *Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*, 2.

<sup>41</sup> See A V Dicey, *Introduction to the study of the law of the Constitution* (10th ed, Macmillan, 1959).

<sup>42</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).

much debated. At its core, is the notion that no-one, private citizen, public official or government, is above the law.”<sup>43</sup>

At the risk of over simplification, 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 that
- the courts are readily accessible.<sup>44</sup>

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

In 2016, the IUCN World Congress on Environmental Law<sup>45</sup> 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”,<sup>46</sup> without which “environmental governance and the enforcement of rights and obligations may be arbitrary, subjective, and unpredictable.”<sup>47</sup> 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:<sup>48</sup>

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<sup>43</sup> Robert French AC, ‘Rights and Freedoms and the Rule of Law’, (2017) 28 *Public Law Review* 109, 109.

<sup>44</sup> Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 2009), 214-218, quoted in Crawford L, *The Rule of Law and the Australian Constitution*, (The Federation Press, 2017), 21.

<sup>45</sup> Available at <<http://www.unep.org/environmentalgovernance/erl/iucn-world-declaration-environmental-rule-law>>.

<sup>46</sup> IUCN, World Declaration on the Environmental Rule of Law, Rio de Janeiro, 29 April 2016.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*



- 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 that the courts should be readily accessible - to which 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.<sup>49</sup>

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”.<sup>50</sup> 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

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<sup>49</sup> George Pring and Catherine Pring, *Environmental Courts & Tribunals: a Guide for Policy Makers*, United Nations Environment Programme, 2016.

<sup>50</sup> Chief Justice Murray Gleeson, ‘Courts and the Rule of Law’ (Paper delivered to the Rule of Law Series, Melbourne University, 7 November 2001), 2.

compromised access to justice detracts from the strength of the rule of law as part of our societal infrastructure.”<sup>51</sup>

At common law, the High Court of Australia in the seminal case *Australian Conservation Foundation v Commonwealth* determined that individual standing requires that a person have a “special interest” in the impugned decision.<sup>52</sup>

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.

ACF 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 ACF did not have the requisite special interest.<sup>53</sup>

In *ACF*, “special interest” was held to mean more than “a mere intellectual or emotional concern”.<sup>54</sup> 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”.<sup>55</sup> 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”.<sup>56</sup>

Subsequent to *ACF*, in *Onus v Alcoa of Australia Ltd*,<sup>57</sup> Gibbs CJ summarised the competing considerations in determining whether or not a special interest exists:

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<sup>51</sup> French, above n 43 at 112.

<sup>52</sup> *Boyce v Paddington Borough Council* (1903) 1 Ch 109; *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493.

<sup>53</sup> *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 at 531 per Gibbs J.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> (1981) 149 CLR 27.

“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.”<sup>58</sup>

Importantly, his Honour noted that “what is a sufficient interest will vary according to the nature of the subject matter of the litigation.”<sup>59</sup>

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”.<sup>60</sup> 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,<sup>61</sup> and have reiterated that the test is flexible,

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<sup>58</sup> *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 36 per Gibbs CJ.

<sup>59</sup> *Ibid.*

<sup>60</sup> ADJR Act, s 3(4)

<sup>61</sup> See, for example, *Australian Conservation Foundation v Minister for Resources* (1989) 19 ALD 70 at [7].

requiring an examination of the standing of the applicant “in the light of the issue which is to be considered”.<sup>62</sup>

In *Batemans Bay Local Aboriginal Council v Aboriginal Community Benefit Fund*,<sup>63</sup> 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.”<sup>64</sup> This approach was affirmed in 2014 by the High Court in *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development*<sup>65</sup> 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.<sup>66</sup>

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”,<sup>67</sup> 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.<sup>68</sup>

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

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<sup>62</sup> Ibid at [11].

<sup>63</sup> (1998) 194 CLR 247.

<sup>64</sup> Ibid at [50].

<sup>65</sup> *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development* (2014) 254 CLR 394 at [60].

<sup>66</sup> See, for example, *Tarkine National Coalition Inc v Schaap* (unreported, Blow CJ, 18 June 2014); *Tarkine National Coalition Inc v Minister Administering the Mineral Resources Development Act 1995* [2016] TASSC 11, discussed in Jess Feeheley, ‘Standing up for Standing’ (2016) 31(4) *Australian Environment Review* 106, 108; and *Minister Administering the Mineral Resources Development Act 1995 v Tarkine National Coalition Inc* (2016) 214 LGERA 327

<sup>67</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 20 August 2015, 8987 (the Hon Greg Hunt MP, Minister for the Environment).

<sup>68</sup> See, for example, Feeheley, above n 66, on the experience of the Tarkine National Coalition.

“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.”<sup>69</sup>

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.<sup>70</sup>

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.”<sup>71</sup>

### **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

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<sup>69</sup> Wilcox, above n 40, 2.

<sup>70</sup> See, for example, Law Council of Australia, submission 61 to the *Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*; EDOs of Australia, submission 114 to the *Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*; Nature Conservation Council of NSW, submission 43 to the *Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*; Environmental Justice Australia, submission 93 to the *Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*; Lock the Gate Alliance, submission 109 to the *Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*. 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 at [7].

<sup>71</sup> Law Council of Australia, above n 70.

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 Prof 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 that the courts declare them to be so.”<sup>72</sup>

Dr Andrew Edgar has correctly, in my view, observed, “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.”<sup>73</sup>

Neither the rule of law nor the interests of justice would have been served had the proponent in the *Adani* litigation 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.

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<sup>72</sup> Rosemary Lyster, submission 55 to the *Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*, 2.

<sup>73</sup> *Ibid*, Attachment.

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, it 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 and Arts 4, 6-9 of the 1998 Aarhus Declaration.

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.<sup>74</sup> 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 demanding 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 has been consistently on display during the extensive and continuing community consultations undertaken by the *Scientific Inquiry into Hydraulic Fracturing in the Northern Territory*.<sup>75</sup>

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<sup>74</sup> Clark, above n 9, 258.

<sup>75</sup> Scientific Inquiry into Hydraulic Fracturing in the Northern Territory, July 2017, *Interim Report*, Chapter 4.

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.<sup>76</sup> Australia has seen one of the sharpest declines, with trust in the government now at 37%, a decrease of 10% since 2012, and falling 8% alone last year.<sup>77</sup>

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”.<sup>78</sup>

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.<sup>79</sup> 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,

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<sup>76</sup> Edelman, *2017 Edelman Trust Barometer* (2017) <<http://www.edelman.com/trust2017/>>.

<sup>77</sup> David Donaldson, *Trust in government in sharp decline, survey shows* (22 February 2017) The Mandarin <<http://www.themandarin.com.au/75831-trust-in-government-in-sharp-decline-edelman-trust-barometer/>>.

<sup>78</sup> Law Society of New South Wales, ‘Environment Act amendment erodes fundamental legal principles’ (media release, 21 August 2015) <<https://www.lawsociety.com.au/about/news/1045332>>.

<sup>79</sup> Scientific Inquiry into Hydraulic Fracturing in the Northern Territory, above n 75, Chapter 13.



“there is little point in opening the doors to the courts if litigants cannot afford to come in”.<sup>80</sup>

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<sup>81</sup> 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 chilling effect on the very idea of litigation.<sup>82</sup>

The deterrent effect of costs sanctions endures even in jurisdictions such as the Land and Environment Court of New South Wales where in Class 4 (judicial review) proceedings parties can apply for protective costs orders<sup>83</sup> 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.<sup>84</sup> 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 (**EDO**), acts to filter and prevent untenable cases from ever seeing the light of day, or at the very least, the stale air of a dimly lit courtroom.

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<sup>80</sup> Quoted in *Oshlack v Richmond River Council* (1994) 82 LGERA 236 and see also Australian Law Reform Commission, *Costs-shifting – Who Pays For Litigation?*, Report No. 75 (1995), [13.9].

<sup>81</sup> With the notable exception of Class 1 merits review litigation in the Land and Environment Court of New South Wales.

<sup>82</sup> Chris McGrath, ‘Flying foxes, dams and whales: Using federal environmental laws in the public interest’, (2008) 25 *Environmental and Planning Law Journal* 324, 345-348.

<sup>83</sup> *Land and Environment Court Rules 2007* (NSW), r 4.02.

<sup>84</sup> *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.

It is therefore regrettable that while funding to many community legal centres has been restored by the federal Government, this did not include EDOs.<sup>85</sup>

### **Mr Neal is Entitled to be an Agitator**

The central issue in the celebrated case of *Neal v The Queen* 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, namely, "I blame your type for this growing hatred of black against white."<sup>86</sup> 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."<sup>87</sup> And 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."<sup>88</sup>

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.

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<sup>85</sup> Noting that the Victorian branch of the EDO is now a separate entity, Environmental Justice Australia.

<sup>86</sup> *Neal v R* (1982) 149 CLR 305, at 316 per Murphy J.

<sup>87</sup> *Ibid* at 317.

<sup>88</sup> *Ibid* at 316.