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

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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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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.