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.

* *Matthew Groves is Professor of Public Law, Law School, La Trobe University.* *Thanks are due to reviewers for their comments.*

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.