ENABLING DEMOCRACY: THE ROLE OF PUBLIC INTEREST LITIGATION IN SUSTAINING AND PRESERVING THE SEPARATION OF POWERS

ANDREA DURBACH, ISABELLE REINECKE AND LOUISE DARGAN

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UNSW Law
UNSW Sydney NSW 2052 Australia

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ARTICLE

Enabling democracy: the role of public interest litigation in sustaining and preserving the separation of powers

Andrea Durbach[a], Isabelle Reinecke[b] and Louise Dargan[b]

[a]UNSW Law, University of New South Wales, Sydney, Australia; [b]The Grata Fund, UNSW Law, University of New South Wales, Sydney, Australia

ABSTRACT

In a representative democracy, the judiciary—the "third pillar of the state"—performs a dual function that acknowledges the importance of the separation of powers to democratic governance: to act as a check on the exercise of state power and to protect individual rights and interests that have been violated. These core elements of the judiciary's role similarly reflect the claims that often underlie public interest litigation (PIL), which seek to promote accountability for incursions by the executive and legislature, and secure appropriate redress. Despite these analogous objectives, this article argues that the application and endorsement of procedural mechanisms can often undermine or stifle the realisation of PIL and erode the principles of access and participation that underlie its rationale. By reference to cases where issues of standing and costs considerations have served to filter or bar public interest litigants, the article maintains that the ventilation and adjudication of issues of critical social concern (pursued via PIL) can play a vital role in enabling and reinvigorating the independence and institutional objectives of the judiciary in an aspirant democracy.

KEYWORDS

Representative democracy; separation of powers; public interest litigation

Introduction

> And if in our own society the rule of law is to mean much, it must at least mean that it is the obligation of the courts to articulate and uphold the ground-rules of ethical social existence-which we dignify as fundamental human rights. (Sedley 1995)

In November 2005, the Honourable Michael Kirby, former Justice of the High Court of Australia, addressed law graduates at a gathering in Sydney. "We have until now," said Justice Kirby, "cherished the belief that democratic governance is a temperate and moderate form of government with many checks and balances that save it from extremes." He cautioned however that trust in the majoritarian parliamentary system, simply maintained by the periodic exercise of voting by citizens with little subsequent restraint on power during periods in between, amounted to "an infantile conception of a modern democracy" (Kirby 2005). The classical idea of the judiciary—"the third pillar of the state" (Mance 2017, 1)—as an independent arbiter fundamental to the effective operation of democracy, as a reliable check on executive power and impartial mechanism

CONTACT Andrea Durbach a.durbach@unsw.edu.au

for securing government accountability, (Fredman 2008, 129–49) may be equally misconceived and at significant risk in a professed democracy where citizens might have become inured to insidious executive overreach or content with (or perhaps blind to) a "shift in interpretive method" (Cameron 2017, 2).

This article addresses the role of public interest litigation (PIL) in Australia as a mechanism that seeks to both expose and resist executive encroachment. In addition, it argues that PIL enables diverse and expansive deliberations critical to the preservation of effective democratic governance and its safeguards, such as judicial independence. The article first explores the evolution of the critical balance between the perceived congruent arms of government and the role of the judiciary as a "counter-weight" (Mance 2017, 2) to the exercise of executive or legislative power and as protector of rights and the rule of law (Handsley 1998, 183). The second part of the article seeks to reinforce the place of the courts in the Australian democratic polity via the exploration of two essential procedural features of PIL, namely access and participation. It does so by focusing first on issues of standing and costs—often barriers to consideration of the "real", as opposed to the legal, issues (Mason 1987, 159) brought before the courts—and second, on amicus curiae as a mechanism for expanding the role of the courts in articulating and upholding "the ground rules of ethical social existence" (Sedley 1995). The article concludes that the approach by the judiciary to these barriers of entry, particularly when invited to adjudicate an issue of significant social importance, is critical to enabling the conscientious operation of courts as part of the core "infrastructure of our representative democracy" (French 2012b, 8).

The judiciary and democracy in Australia

> The judiciary is not simply a publicly funded provider of dispute resolution services; it is the third branch of government. It performs the governmental function of enforcing legal rights and obligations to the benefit of society as a whole … (Gleeson 2005, 5).

Representative democracy is traditionally described as a system of government which facilitates indirect governance by citizens through their elected representatives (*Australian Capital Television Pty Limited and Others and The State of New South Wales v The Commonwealth of Australia and Another* [1992], Mason CJ at [37]; Kirk 1995, 205).[1] While more complex than "the making of decisions in [a] town meeting by a show of hands" (Bickel 1986, 17), representative democracy also envisages that the power of the majority is checked or regulated to ensure equal due consideration and respect for the interests of all members of society (Rawls 1971; Holmes 1995; Dworkin 1996; Cohen 1998). This limitation on the exercise of political power is a key "assumption" associated with democratic governance in Australia (*Australian Communist Party v Commonwealth* (1951), Dixon CJ at [193]), reinforced by an adherence to the maintenance of the separation of powers and the application of the rule of law (Allsop 2018).

The doctrine of separation of powers—reflected in Chapters I, II and III of the Australian Constitution—vests legislative, executive and judicial powers in the three institutions of government (Kinley 1994, 197). Federal Parliament is limited to acting within its constitutional powers primarily set out in section 51 of the Constitution that provides "justiciable limitations on the *vires* of the Parliament" (Feldman 1990, 13). Judicial review, a check on

legislative and executive power, is an essential component of the infrastructure of Australian representative democracy (French 2012a, 7), securing "the practical manifestation of rule of law principles" (Feldman 1990, 11).

The historic intent or aspiration underlying the separation of the three pillars of democratic government was that each branch of government would operate independently but with regard to one another, the "work of the court in its decisions," for example, "reacted to by the legislature in the passing of new legislation" (*Vriend v Alberta* [1998], Iacobucci J at [136]). Ideally, this architecture of mutual reference and accountability generates a "healthy tension" between each branch of government (Mance 2017, 2), potentially enhancing democratic processes and legitimate outcomes (*Vriend v Alberta* [1998], Iacobucci, J at [136]).

The perceived role of the judiciary—the "third pillar of the state" (Mance 2017, 1) within a democratic ecosystem (Prendergast 2019)—is that it stands "as a counter-weight" (Mance 2017, 2) to the executive and legislative pillars by ensuring they remain "within their spheres and act in accordance with the law" (Mance 2017, 2). This balancing mechanism enables the executive-legislative-judicial trio to execute both the pragmatic ("necessarily intended") and normative ("perhaps unintended or unappreciated") functions of government (Bickel 1986, 24). The Australian High Court has observed that this distinct role of the third pillar of the state, the judicial branch of government, is fundamental to "the way in which [Australian] society is governed" (*D'Orta-Ekenaike v Victoria Legal Aid* [2005] at [32]).

The depiction of the judiciary in a representative democracy as a check on executive or legislative power has attracted criticism when the exercise of judicial power is viewed as interventionist, and particularly where courts are asked to adjudicate on issues that are seemingly normative or value-laden. Bickel's (1986) "counter-majoritarian difficulty" argument, following his analysis of a number of prominent US Supreme Court decisions on judicial review and desegregation (*Brown v Board of Education* (1954); *Bolling v Sharpe* (1954); *Brown v Board of Education II* (1955)), contends that the exercise of judicial power to invalidate laws democratically enacted "thwart[s] the will of representatives of the actual people of the here and now" (Friedman 1998, 334–9). The argument, which positions judicial review in tension with democratic theory, asserts that the legal process (of judicial review) lacks the elements of the democratic process which permits citizens "to define and protect their rights on an equal basis" (Bellamy 2013, 334).

While this potential check or limitation on executive and legislative power by the courts may be perceived as counter-majoritarian, Ronald Dworkin has argued that this assessment does not necessarily position courts as anti-democratic (Dworkin 1996, 17–19). For Dworkin, courts are exemplars of democratic deliberation: rights-based litigation offers a form of democratic participation and judges operate similarly to elected representatives, although as trustees rather than delegates (Dworkin 1996). In contrast to the counter-majoritarian difficulty argument, Dworkin's perspective suggests that courts can offer a "superior form of democracy that can legitimately oversee and correct the supposed failing of electoral forms of democracy" (Bellamy 2013, 335).

Similarly, David Feldman sees judicial review as a "corrective" to some of the democratic limitations intrinsic to the Westminster constitutional model. He argues that if appropriately applied, legal or judicial accountability mechanisms such as judicial review "can usefully complement other (political) means of constraining tendencies towards

arbitrary government" (Feldman 1990, 14). Thus, courts can exercise a restraining function by ensuring that those executing public powers do so within their limits, including where an "act or decision under scrutiny" is politically popular or viable but is legally and constitutionally questionable (Feldman 1990, 13). In this sense, intervention by the courts serves as compensation for or repair of the "dysfunctions in the democratic process" (Sedley 1995).

In the High Court of Australia 2017 public lecture, former Justice of the Constitutional Court of South Africa, Edwin Cameron, argued that the effective functioning of the judiciary and the survival of the rule of law within a democracy can only be realised in a political environment that openly reinforces "moral engagement and moral choice in expounding constitutional values and protecting constitutional mechanisms" (Cameron 2017, 87). In the absence of the operation of foundational attributes and methods of democracy, the efficacy of courts as conduits of legal power is deficient or undermined. The viability of courts in democracies, argues Cameron, is strengthened when the mainstay procedural elements of democracy realised via fair and free elections, freedom of speech and accountability, are maintained in a "vibrant and functioning form" (Cameron 2017, 93–4).

In addition to the influence of context on the character, substance and exercise of the judicial role in democracies, effective judicial activity also relies on some key preconditions which may be articulated as "part institutional, part personal" (Mance 2017, 2). Lord Mance suggests that personal pre-conditions include incorruptibility and non-partisanship; government adherence to the separation of powers principle and the consequent existence of an independent and contemporary judicature, unconstrained by "past history or the current legislature", connotes an institutional pre-condition (Mance 2017, 14) as does acceptance by society of the necessary, at times fraught, dialogue between the three pillars of the state (Mance 2017, 3).

Underlying these markers of and considerations for the effective exercise of the judicial role—contextual, personal and institutional—is the aspiration that all three pillars of the state are "sensitive to and respect each other's roles" (Mance 2017, 3). In referring to the landmark human rights decision of the Canadian Supreme Court, *Vriend v Alberta* [1998], Lord Mance emphasises that this interaction or "dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it" (Mance 2017, 4).

While the model of checks and balances germane to the separation of powers may appear "beguilingly simple" (French 2012a), it becomes less so when these powers intersect and jostle for supremacy, particularly when interpretations of law are advanced, contested and ultimately determined by the courts. This battle between political considerations and the achievement of justice, both substantive and procedural, is often played out in the context of PIL which seeks to enforce and extend fundamental rights, challenge executive action and limit or transform the impact of legislative intervention. Given that the *substantive* content and claims of PIL are often "inescapably political" (Kirby 2004, 35) and have at times "sparked a reconsideration of [the High Court's] place in the Australian polity," (Lynch 2001, 295) regulating and restricting access to the judicial process via the application of *procedural* rules—for example in relation to costs and standing provisions—may become a vehicle for diverting judicial attention away from issues of public significance. Where more

powerful or influential litigants consistently seek to exploit these devices to oust the judiciary from its proper purpose of protecting the rights of individuals and "hold[ing] other branches of government to account consistently with the rule of law" (Bathurst 2013, 18; Sackville 1975, 13),[2] community confidence in the administration of justice—a critical important component in preserving the separation of powers (Bathurst 2013, 4)—risks attenuation.

The next section considers the approach adopted by courts to procedural barriers of entry to litigation that calls for the judicial deliberation and determination of claims of social, economic and/or cultural importance, particularly where political processes have failed to effect desirable societal change. The focus on procedural mechanisms is employed to demonstrate how novel claims or so-called test cases with transformative potential may be thwarted by the employment (and possible endorsement) of narrow arguments of process that undermine or obstruct judicial consideration of matters of profound social consequence. This "undue emphasis" on the procedural issues, to the detriment of an examination of the "real issues underlying the case as the public sees them" (Mason 1987, 159), may also restrict the vital contribution by the courts to the constructive operation of a representative democracy.

Enabling democracy: the courts as sites of civic engagement

> [Procedural] characteristics … are not just arbitrary abstractions. They capture a deep and important sense associated foundationally with the idea of a legal system, that law is a mode of governing people that treats them with respect (Waldron 2011, 15, 23).

Barrier to access – costs: "undue inhibitions" on seeking vindications of rights (Green v CGU Insurance Ltd [2008] quoted in *Gunns Limited v Tasmanian Conservation Trust Inc* [2012])

As outlined above, two persistent barriers to enabling points of entry for potential public interest litigants are the rules in relation to standing and costs. Linking these two significant factors, Justice Toohey has observed that "[t]here is little point in opening the doors to the courts if litigants cannot afford to come in" (Toohey and D'Arcy 1989). In PIL, the application of the principles regulating standing can often determine who represents the public interest. Having been granted standing in litigation does not necessarily ensure access to the courts; public interest litigants are also constrained by considerations relating to costs, for example where the opposing party seeks an application for security for their costs should the legal proceedings initiated by the litigants fail and a costs order is made against them.[3]

Australian courts have recognised that particular cases of public interest may demonstrate "sufficient special circumstances to justify a departure from the ordinary rule as to costs" (*Oshlack v Richmond River Council* (1998)), but no general rule or provision exists that would permit displacing the usual costs rule to provide adequate protection for "public interest litigants" (*Oshlack v Richmond River Council* (1998) at [136]). At most, the High Court has held in the case of *Oshlack* that an application for a costs order (which in this case arose in an environmental legislative context) be evaluated against certain criteria ("special circumstances") such as whether the applicant's key motivation "was to uphold the public interest and the rule of law", the absence of personal gain in bringing the litigation, and "where a significant number of members of the public shared the

stance of the applicant" (*Blue Wedges Inc v Minister for Environment, Heritage and the Arts and Others* (2008), North J).

The discretionary or ad hoc nature of the determination of costs awards in public interest cases was also exemplified in the so-called *Tampa* litigation where despite the Commonwealth Government ultimately succeeding in preventing the release of 433 asylum seekers detained on a Norwegian vessel, their application for costs against the applicants who sought an order for *habeas corpus* and *mandamus* was rejected by the Federal Court. Despite the unsuccessful outcome of the litigation, the Court noted that the case involved matters of critical public importance and raised concerns about the liberty of individuals unable to take action on their own behalf to determine their rights. In added support for a no costs award, Justice French referred to the fact that the lawyers for the applicants who had acted *pro bono*, had sought to "hold the Executive accountable for the lawfulness of its actions" and in so doing had "served the rule of law and so the whole community" (*Ruddock v Vadarlis* [2001], French J at [216]), distinct hallmarks of PIL.

In the absence of a general rule regarding costs in PIL, or the availability of legal aid funding with associated costs indemnity provisions in public interest matters or test cases, public interest litigants may at best attempt to invoke potential safeguards such as protective or pre-emptive costs orders which seek to cap a party's potential exposure to pay their opponent's costs if they are unsuccessful (*Corcoran v Virgin Blue Airlines Pty Ltd* [2008], at [6]). The factors considered in awarding the first protective costs order under the Federal Court Rules in the case of *Corcoran* included a concern that the applicant might be forced to abandon the proceedings, and the existence of a clear public interest component to the litigation. The "public interest" in securing access to documents of historical significance from the National Archives was the primary rationale for an application before the Federal Court initiated by Professor Hocking in 2018 to seek the release of correspondence between the then Governor-General of Australia, Sir John Kerr, and The Queen regarding the dismissal of the Whitlam government. In her appeal against the refusal by the National Archives to permit access to the documents, Professor Hocking welcomed an agreement reached between the parties to limit the maximum costs recoverable (in accordance with Federal Court Rule 40.51(1)). The Federal Court order, she said, was "extremely significant" for the case and "for public interest cases generally" allowing such cases to proceed through all legal stages without fear of prohibitive costs effectively denying them full access to the legal system (Pitch Projects Communications 2018).

While these examples have permitted public interest litigants entry to courts, they are incremental developments of limited utility to enabling PIL more broadly. A general rule regarding costs awards in PIL similar to the rule applicable to cases of a constitutional or public interest nature brought before the South African Constitutional Court, would serve to remove the "chilling effect" that adverse costs orders would have on parties seeking to assert constitutional rights (*Affordable Medicines Trust and Others v Minister of Health and Another* [2005] at [138]). Such a rule—which provides that the state pays the costs of a successful private litigant and that each party pay their own costs if the litigant is unsuccessful (*Trustees for the time being of The Biowatch Trust v Registrar Genetic Resources & Others* [2009] at [22])—opens up the possibility of courts engaging with "meritorious claims" that have a bearing "not only on the interests of the particular litigants involved, but on the rights of all those in similar situations" (*Trustees of The Biowatch Trust* [2009] at [23]).

Barrier to access – standing: regulating and restricting public access to the courts

In PIL, the contested concept of standing not only extends to an examination of a party's interests in the litigation, but can also operate to determine who legitimately represents the public interest. In writing about the origins and evolution of public interest standing in Australia, Matthew Groves argues that the process of evaluation undertaken by judges to determine whether to admit or decline a public interest litigant "reveals much about their personal attitudes to the nature of public law litigation" (Groves 2016, 189). The "gatekeeper" justification for rules of standing may undoubtedly serve to filter out "busybodies and cranks and persons actuated by malice" (*Onus v Alcoa of Australia* (1981), Gibbs CJ at [35]) but can equally function to "regulate and restrict public access to the courts" (Groves 2016, 189) potentially thwarting and excluding judicial consideration of significant socio-political issues.

The application and interpretation of rules of standing primarily seeks to define the relationship or connection of an applicant/claimant to a dispute and the remedy claimed by demonstrating a material or "special interest" (*Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) at [267]) in the litigation which goes beyond a "mere intellectual or emotional concern" (*Australia Conservation Foundation v Commonwealth* (1980), Gibbs J). Justice Murphy's dissenting judgment on standing in *Australian Conservation Foundation v Commonwealth* (1980) (*ACF*) forty years ago laid the ground for the emergence of a less restrictive approach. This more expansive evaluation found application in *North Coast Environmental Council Inc v Minister for Resources* (1994) almost fifteen years later when Justice Sackville endorsed the standing of an organisation that demonstrated "a specific concern with and interest in" the subject matter of the proceedings and was well positioned and equipped to represent the public interest in the litigation (*North Coast Environmental Council Inc v Minister for Resources* (1994) at [88] and [44]).

While the sufficiency of the interest of the plaintiffs to challenge the Commonwealth Government initiated same-sex marriage postal survey in 2017 was averted by the High Court (after concluding that the claim was without merit), the Court did however note that the "contest as to standing gave rise to a number of significant issues," including the right of the plaintiffs to dispute government appropriation of funds to execute the survey and "the relevance to standing … of conceptions of public interest." (*Wilkie v Commonwealth* (2017) at [56]). The utility of admitting a public interest litigant that has an interest beyond a narrow material or special connection to the litigation is their capacity to offer a broad perspective on the issues in dispute and their wide-reaching systematic impact. In the marriage equality case, for example, an organisation that had spent years advocating for the "legalisation of marriage between consenting adults irrespective of gender" (*Wilkie v Commonwealth* (2017) at [52]) had the potential to make a genuine and substantial contribution to developments in law and policy and to the prevention of harmful practices, particularly when drawing on their empirical research and advocacy.

The notion of permitting a "sufficiently concerned, and sufficiently well-informed" (*Walton v Scottish Ministers* [2012], Lord Hope at [153]) party to have a claim adjudicated as contemplated by Justice Murphy in the *ACF* litigation, has subsequently found application in environmental legislation. Justice Murphy's assertion that the ACF—a long-standing "well-established and … well-known and reputable conservation organization"

that had "made submissions to governments and public authorities in respect of environmental matters" (*ACF*, Murphy J at [5])—be considered a legitimate party affected by the outcome of the litigation was based on criteria largely reflected in s 487 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). This provision, which permits broad standing to an individual or organisation seeking judicial review of certain decisions made under the Act,[4] came under attack following a successful challenge by the Mackay Conservation Group against a ministerial approval of the controversial Carmichael (Adani) coal mine and rail project (*Mackay Conservation Group v Commonwealth of Australia* [2015]). Portraying these proceedings as "vigilante litigation by people … who have no legitimate interest" (Brandis 2015), the Australian Government sought to introduce a bill to repeal s 487 of EPBC Act and limit standing to review such approvals to a "person aggrieved" in accordance with the *Administrative Decisions (Judicial Review) Act 1977* (Explanatory Memorandum, *Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015* (Cth)). The potential impact of this bill was the ousting of litigants with a genuine, long-standing and demonstrated interest in the preservation and enhancement of the environment in favour of those "with an economic interest at stake" (Clark 2016, 258).

Noting that the "Courts have mechanisms for managing frivolous and vexatious applications and there are numerous disincentives to litigate", the Law Council of Australia (2015) rejected the proposed amendment to s 487 of the EPBC Act in a submission which underscored the rationale for expanded standing provisions and their contribution to facilitating judicial consideration of matters of public interest through the "involvement and input of concerned members of the community" (*Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* [2007], Stone J at [2]). Referring particularly to the environmental context, but of equal relevance to matters concerning public health, consumer protection and the proper appropriation of government funds, the submission highlighted the critical role of the courts in providing "access to remedies (as) an important safeguard for the rule of law … (and) for accountable and responsible government" (Law Council of Australia 2015, 8).[5]

Participation – amicus curiae: recognising "consequences [that extend] beyond the particular litigation" (*Re McHatton and Collector of Customs* (1977), Brennan J [at 157])

The role of the courts as a forum for engagement with issues of public interest through the "involvement and input of concerned members of the community" (*Anvil Hill* at [2]) has evolved considerably in Australia over the last three decades via increasing judicial receptivity of public interest *amicus curiae* or friend of the court. The reticence to permit parties the right to intervene in litigation to which they are not party has been justified by Australian courts as prolonging the time and increasing the costs of litigation to the detriment of the parties or supporting a party who was adequately represented (*Breen v Williams* (1994)).[6] The more magnanimous view adopted by the United States Supreme Court almost 140 years ago was that the purpose of allowing *amicus curiae* interventions was to "prevent a failure of justice" (*Krippendorf v Hyde* (1884) at [285]).

The expanded use of *amicus curiae* interventions in Australian courts has largely been the consequence of individuals and public interest organisations seeking their protection and the judicial deliberation of matters of significant public interest, particularly where government and institutional conduct and practices have overlooked or violated rights and/or caused extensive harm. Many of these cases have explored critical issues of social

importance including the preservation of a world heritage site (*Commonwealth v Tasmania* (1983)), discriminatory work practices (*Human Rights and Equal Opportunity Commission v Mt Isa Mines* (1993)), patient access to medical records (*Breen v Williams* (1994)), consumer protection and banking practice (*National Australia Bank Limited v Hokit Pty Ltd* (1996)), and more recently, the constitutional validity of "safe access zone" legislation prohibiting particular forms of communication in the vicinity of abortion clinics (*Clubb v Edwards; Preston v Avery* [2019]; Gibson 2019). The increasing acceptance by Australian courts of participation in litigation by those other than the parties directly affected by its outcome has been in part recognition of a reliance on the "elucidation of complex questions of legal principle and legal policy" (*Levy v Victoria* (1997), Kirby J) by experts and special interest organisations closely associated with the subject matter of a judicial dispute. In addition, the contribution of *amicus curiae* in PIL affords an insight into the "practical experience in the operation" (*Levy v Victoria* (1997), Kirby J) of particular laws beyond that of the parties to litigation and provides courts with some appreciation of the potential impact (including adverse) of, and community adherence to, their final determinations.

Both the Federal Court (Rule 9.12) and the High Court (Rules 42.08A, 44.04) have developed rules regarding the intervention of *amicus curiae* that reflect some of the common law principles developed in the earlier cases mentioned above. These include that the *amicus curiae* intervener demonstrate an authentic connection to the issue raised by the litigation which speaks to a "special knowledge and expertise relevant to the disputed issue"; represents an interest (or interests) or a dimension that the parties have omitted to raise or are unable or reluctant to do so; offers a unique or novel perspective which is "likely to assist the court in its determination" (Durbach 1998, 180; Kenny 1998). In recognition of the fact that *amicus curiae* are not parties to proceedings, the rules also regulate the nature of the intervention so as not to "unreasonably interfere with the ability of the parties to conduct the proceeding as they wish" (e.g. Federal Court Rules 2011, Rule 9.12(20)(b)). This often translates into the provision of written rather than oral submissions by the *amicus curiae* or their agreement to a time limitation within which to address the court.

In the oft-quoted dicta from the 1989 reproductive rights case, *Webster v Reproductive Health Services* (1989), former US Supreme Court judge, Justice O'Connor observed that the "willingness of courts to listen to interveners is a reflection of the value that judges attach to people" (at [522]). The principle of participation that underlies the practice of *amicus curiae* interventions invites a diversity of voices to engage in open deliberation and contestation of important issues of public interest, a key measure of the health of a representative democracy. Importantly, judicial endorsement of the principle of participation signals acknowledgement that the "utility of the courts to modern dispute resolution" (*Breen v Williams* (1994) at [533]) is enhanced by informed public participation in judicial decision-making that can serve to "improve the accuracy of decisions" (*Webster v Reproductive Health Services* (1989) at [522]). Judicial engagement with individuals and organisations who allow for the "protection of outside interests and … ensure all relevant arguments are put to the court" (Australian Law Reform Commission 1985, 158) can enable a broader awareness of the "legitimate concerns of society to which the law can sometimes respond" and in so doing, "enliven a more active democracy in appropriate instances" (Kirby 2011, 48).

Conclusion

> In the context of modern Australian governance … apart from elections, the people have little influence over the Legislature's modus operandi and the Legislature exercises little control over the Executive. As a result, the courts have become an increasingly important forum … for the public to enforce legal obligations and review administrative action (Dwyer 2011, 87-8).

While the independence and impartiality of the judiciary in Australia may be legitimately secured by insulating courts from the vagaries of democratic processes and pressures, Richard Bellamy has argued that this insulation might engender a perception that the courts are "cognitively biased towards the assumptions and attitudes of those best placed to get their voices heard by entering the legal profession or making use of the courts" (Bellamy 2013, 334). To counter this criticism that powerful interests such as governments and corporate actors might exercise some insidious influence on judicial decision-making, Bellamy suggests that courts "need to possess certain democratic qualities" (Bellamy 2013, 334). These democratic credentials by the third arm of government might be apparent, for example, when courts determine a challenge to the standing of a public interest litigant by reference to the appropriate criteria in support of a party seeking adjudication of a specific issue rather than invoking standing as a proxy for (pre-) determining the justiciability of the issue (*ACF*, Murphy J at [7]).

Similarly, the "democratic qualities" of courts are revealed when they award a protective or pre-emptive costs order in favour of a public interest litigant, capping their potential exposure to pay their opponent's costs if unsuccessful in the litigation. Such awards or a court's rejection of an order for costs where the matter adjudicated had clear human rights or pioneering public interest implications, signal judicial acknowledgement that equitable access to justice is often predicated upon equitable access to resources. A court's inclination to listen to *amicus curiae* interveners might further indicate a caution not to "unjustifiably favour certain groups within the community at the expense of others" and a desire to counter a perception that the judiciary is "a class apart," willingly insulated and "out of touch with the circumstances and values of the broader society" (Bellamy 2013, 334).

Where the electoral process has failed to capture and reflect some of the significant concerns of citizens, often relating to the rights of minorities, courts have been looked to as the protector of rights and the bulwark against prejudicial government practices or failures to act in circumstances that demanded legislative or executive intervention (Sedley 1995). The role of the judiciary is perhaps even more acute in a democracy where there is an absence of a "constitutional Bill of Rights, [and] … national overarching human rights legislation" (French 2010, 19).

As many of the cases referred to above demonstrate, courts in a democracy can offer alternative sites of civic engagement, where issues omitted from a political process can be evaluated and resolved via judicial enquiry (Bellamy 2013, 340). When governments turn towards conservative ideologies and rights are downgraded or ousted—when "democracy is in peril" (Baer 2019, 142)—public interest litigation can serve to both secure judicial declarations about the content and application of substantive rights and ensure the implementation of procedural justice in the form of access and participation, both of which are fundamental to the functioning of democracy. And even in times of political equanimity, "critical lawyering" can invite a reinvigoration of the "independence and

institutional integrity of courts as fundamental components of a democratic society" (Baer 2019, 140). Additionally, such litigation "enriches the general body of … jurisprudence and adds texture to what it means to be living in a constitutional democracy" (*Trustees of The Biowatch Trust* [2009] at [23]).

Notes

1. Richard Bellamy defines democracy as: " … a procedure involving regular elections for competing parties, universal suffrage based on one person one vote, and majority rule is held to provide a mechanism whereby all citizens can see they are treated as equals by virtue of having an equal say in making collective decision and rules that shape their common institutions and social interactions, albeit indirectly through their electorally authorised and accountable representatives in the legislature" (Bellamy 2013, 333).
2. See also Law and Poverty in Australia, Australian Government Commission of Inquiry into Poverty: "[G]roups in Australia which are denied access to the courts to present novel claims or test matters of principle will find their interests ignored or suppressed. More influential groups are able to shape the law for their own benefit, and the law becomes an instrument for magnifying inequality" (Australian Government 1975, 13).
3. In Australian civil litigation, the usual rule is that costs follow the event i.e. the successful party's legal costs are paid by the unsuccessful party.
4. The section provided that an individual or organisation or association must demonstrate that "at any time in the 2 years immediately before the decision" they had "engaged in a series of activities in Australia or an external Territory for protection or conservation of, or research into, the environment" and that "the objects or purposes of the organisation or association included protection or conservation of, or research into, the environment." https://www.legislation.gov.au/Details/C2015C00422/Html/Volume_2.
5. The Government's bill to repeal s 487 of EPBC Act introduced in 2015 lapsed at the end of the Parliamentary session in April 2016.
6. As a non-party—typically with no right to file pleadings, lead evidence or cross-examine witnesses, or lodge an appeal—amicus curiae will generally seek leave of a court to intervene in proceedings. In so doing, they are required to demonstrate that they have a real, not merely theoretical or intellectual, stake in the outcome of the litigation.

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Notes on contributors

Andrea Durbach is Professor of Law, UNSW Sydney and formerly Executive Director of the Public Interest Advocacy Centre (1991–2004) and Director of UNSW's Australian Human Rights Centre (2004–2017).

Isabelle Reinecke is the Executive Director and Founder of the Grata Fund, a non-profit organisation established to develop, build campaigns around and fund strategic litigation in Australia.

Louise Dargan is Head of Strategic Litigation Development at the Grata Fund.

References

Australian legislation

Administrative Decisions (Judicial Review) Act 1977 (Cth)
Explanatory Memorandum, *Environment Protection and Biodiversity Conservation Amendment (Standing) Bill* 2015 (Cth)
Environment Protection and Biodiversity Conservation Act 1999 (Cth)
Federal Court Rules 2011 (Cth)
High Court Rules 2004 (Cth)

Australian cases

Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources [2007] FCA 1480
Australian Capital Television Pty Limited and Others and The State of New South Wales v The Commonwealth of Australia and Another [1992] HCA 45
Australian Communist Party v Commonwealth (1951) 83 CLR 1
Australia Conservation Foundation v Commonwealth (1980) 146 CLR 493
Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd (1998) 194 CLR 247
Blue Wedges Inc v Minister for Environment, Heritage and the Arts and Others (2008) 165 FCR 211
Breen v Williams (1994) 35 NSWLR 552
Clubb v Edwards; Preston v Avery [2019] HCA 11
Commonwealth v Tasmania (1983) 158 CLR 1
Corcoran v Virgin Blue Airlines Pty Ltd [2008] FCA 864
D'Orta-Ekenaike v Victoria Legal Aid [2005] 223 CLR 1
Green v CGU Insurance Ltd [2008] NSWCA 148
Gunns Limited v Tasmanian Conservation Trust Inc [2012] TASSC 51
Human Rights and Equal Opportunity Commission v Mt Isa Mines (1993) 118 ALR 80
Levy v Victoria (1997) 189 CLR 579
Mackay Conservation Group v Commonwealth of Australia [2015] FCA NSD33
National Australia Bank Limited v Hokit Pty Ltd (1996) 39 NSWLR 377
North Coast Environmental Council Inc v Minister for Resources (1994) 127 ALR 617
Onus v Alcoa of Australia (1981) 149 CLR 27
Oshlack v Richmond River Council (1998) 193 CLR 72
Re McHatton and Collector of Customs (1977) 18 ALR 154
Ruddock v Vadarlis [2001] FCA 1329
Wilkie v Commonwealth (2017) 263 CLR 487

Canadian cases

Vriend v. Alberta [1998] 1 S.C.R. 493

South African cases

Affordable Medicines Trust and Others v Minister of Health and Another [2005] ZACC 3 (CCT27/04)
Trustees for the time being of The Biowatch Trust v Registrar Genetic Resources & Others [2009] ZACC 14 (CCT 80/08)

United Kingdom cases

Walton v Scottish Ministers [2012] UKSC 44

United States of America cases

Bolling v Sharpe, 347 U.S. 497 (1954)
Brown v Board of Education of Topeka, 347 U.S. 483 (1954)
Brown v Board of Education II, 349 U.S. 294 (1955)
Krippendorf v Hyde, 110 U.S. 276 (1884)
Webster v Reproductive Health Services, 492 U.S. 490 (1989)

Other references

Allsop, Hon. Justice James. 2018. "The Rule of Law Is Not a Law of Rules." Lecture, Annual Quayside Oration, November 1.
Australian Government. 1975. *Law and poverty in Australia. Australian Government Commission of Inquiry into Poverty*. AGPS.
Australian Law Reform Commission. 1985. *Standing In Public Interest Litigation*, Report No. 27.
Baer, Susanne. 2019. "Democracy in Peril: A Call for Amici and Amicae Curiae and Critical Lawyering." *Transnational Legal Theory* 10 (2): 140–162. doi:10.1080/20414005.2019.1635810.
Bathurst, Hon. Thomas Frederick. 2013. "Separation of Powers: Reality or Desirable Fiction?" Colloquium, Judicial Conference of Australia, October 11.
Bellamy, Richard. 2013. "The Democratic Qualities of Courts: A Critical Analysis of Three Arguments." *Representation* 49 (3): 333–346. doi:10.1080/00344893.2013.830485.
Bickel, Alexander M. 1986. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. United States of America: Yale University Press.
Brandis, George, Attorney-General for Australia. 2015. Interview by Sky News. August 16.
Cameron, Edwin. 2017. Lecture, High Court of Australia Public Lecture, October 11.
Clark, Cristy. 2016. "The Politics of Public Interest Environmental Litigation: Lawfare in Australia." *Australian Environment Review* 31 (7): 258–262.
Cohen, Joshua. 1998. "Democracy and Liberty." In *Deliberative Democracy*, edited by Jon Elster, 185–231. Cambridge Studies in the Theory of Democracy. Cambridge: Cambridge University Press.
Durbach, Andrea. 1998. "Interveners in High Court Litigation: A Comment." *Adelaide Law Review* 20: 177–182.
Dworkin, Ronald. 1996. *Freedom's Law: The Moral Reading of the American Constitution*. Oxford: Oxford University Press.
Dwyer, Guy. 2011. "Standing, Adaptive Management and the Queensland Lungfish: Wide Bay Conservation Council Inc V Burnett Water Pty Ltd." *Macquarie Journal of International and Comparative Environmental Law* 7 (1): 81–93.
Feldman, David. 1990. "Democracy, the Rule of Law and Judicial Review." *Federal Law Review* 19 (1): 1–30. doi:10.1177/0067205X9001900101.
Fredman, Sandra. 2008. *Human Rights Transformed: Positive Rights and Positive Duties*. Oxford: Oxford University Press.
French, Chief Justice Robert. 2010. "Courts in a Representative Democracy." Lecture (University of Southern Queensland), June 25.
French, Chief Justice Robert. 2012a. "The Courts and the Parliament." Lecture, Queensland Supreme Court Seminar, August 4.
French, Chief Justice Robert. 2012b. "Unelected Judges in a Representative Democracy." Lecture (St Thomas More Society), Sydney, June 22.

Friedman, Barry. 1998. "The History of the Countermajoritarian Difficulty. Part One: The Road to Judicial Supremacy." *N. Y. U. L. Rev* 73 (2): 333–433.
Gibson, Josh. 2019. "Clubb V Edwards; Preston V Avery: The High Court and the Role of Amicus Curiae." *AUSPUBLAW*, May 3.
Gleeson, Chief Justice Murray. 2005. "The Right to an Independent Judiciary." Lecture (14th Commonwealth Law Conference), London. September.
Groves, Matthew. 2016. "Justice Murphy's Dissent in Australian Conservation Foundation V Commonwealth (1980): The Birth of Public Interest Standing in Australia?" In *Great Australian Dissents*, edited by Andrew Lynch, 189–208. Cambridge: Cambridge University Press.
Handsley, Elizabeth. 1998. "Public Confidence in the Judiciary: A Red Herring for the Separation of Judicial Power." *Sydney Law Review* 20 (2): 183–215.
Holmes, Stephen. 1995. *Passions and Constraint: On the Theory of Liberal Democracy*. Chicago and London: The University of Chicago Press.
Kenny, Susan. 1998. "Interveners and Amici Curiae in the High Court Special Issue: Critical Perspectives on Australian Constitutional Law." *Adelaide Law Review* 20: 159–172.
Kinley, David. 1994. "Constitutional Brokerage in Australia: Constitutions and the Doctrines of Parliamentary Supremacy and the Rule of Law." *Federal Law Review* 22 (1): 194–204. doi:10.1177/0067205X9402200107.
Kirby, Michael. 2004. *Judicial Activism*. London: Sweet & Maxwell Limited.
Kirby, Michael. 2005. "Kirby Urges Lawyers to Stay True to the Principle of Justice." Interview, ABC AM, November 24.
Kirby, Michael. 2011. "Deconstructing the Law's Hostility to Public Interest Litigation." *Law Quarterly Review* 127: 1–48.
Kirk, Jeremy. 1995. "Constitutional Implications from Representative Democracy." *Federal Law Review* 23 (1): 37–76. doi:10.22145/flr.23.1.2.
Law Council of Australia. 2015. "Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015." Submission, Senate Environment and Communications Legislation Committee, September 10. https://www.lawcouncil.asn.au/docs/b4af6262-5110-e711-80d2-005056be66b1/150910-Submission-3050-environment-protection-biodiversity-conservation-amendment-standing-bill-2015.pdf
Lynch, Andrew. 2001. "Book Review: The High Court – Legitimacy and Change: Review Essay: Haig Patapan, Judging Democracy – The New Politics of the High Court of Australia." *Federal Law Review* 29 (2): 295–317. doi:10.22145/flr.29.2.7.
Mance, Lord Jonathan. 2017. "The Role of Judges in a Representative Democracy." Lecture, Judicial Committee of the Privy Council's Fourth Sitting, The Bahamas, February 24.
Mason, Sir Anthony. 1987. "Future Directions in Australian Law." *Monash University Law Review* 13 (3–4): 149–163.
Pitch Projects Communications. 2018. "Federal Court Grants Protective Costs Order to Professor Jenny Hocking in 'Palace Letters' Case." Media Alert, June 26. https://gallery.mailchimp.com/3255e694e25f4bba4ed1c56cb/files/1e18c2b7-1ddd-4421-bc1c-9001722c5a3f/Hocking_MR_26_June_2018.pdf
Prendergast, David. 2019. "The Judicial Role in Protecting Democracy from Populism." *German Law Journal* 20 (2): 245–262. doi:10.1017/glj.2019.15.
Rawls, John. 1971. *A Theory of Justice*. Oxford: Oxford University Press.
Sackville, Ronald, eds. 1975. *Law and Poverty in Australia: Second Main Report*, October. Second Main Report. Canberra: Australian Government Publishing Service.
Sedley, Stephen. 1995. "Rights, Wrongs and Outcomes." *London Review of Books* 17 (9). https://www.lrb.co.uk/the-paper/v17/n09/stephen-sedley/rights-wrongs-and-outcomes
Toohey, John, and Anthony D'Arcy. 1989. "Environmental Law – Its Place in the System." Lecture, Lawasia and National Environmental Law Association of Australia International Conference on Environmental Law, June 16.
Waldron, Jeremy. 2011. "The Rule of Law and the Importance of Procedure." *Nomos* 50: 3–31.