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

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

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

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

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

There are no public rights and other curious remarks

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Liberal standing rules and the rule of law

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

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

From there he argues:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Elsewhere, the ANAO states:

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

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

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

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

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

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

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

Conclusion

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

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

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

Endnotes

1 Russell J Dalton, *Democratic Challenges, Democratic Choices: The Erosion of Political Support in Advanced Industrial Democracies* (Oxford University Press, 2012); Ian McAllister and Sarah M Cameron, *Trends in Australian Political Opinion: Results from the Australian Election Study 1987–2013* (Australian National University, 2014); Andrew Markus, *Trust in the Australian Political System*, Papers of Parliament No 62, Parliament of Australia, October 2014; Pew Research Center, *Beyond Distrust: How Americans View their Government* (Pew Research Center, 2015); OECD, *Government at a Glance 2017* (OECD, 2017); Alex Oliver, *The Lowy Institute Poll 2017* (Lowy Institute, 2017).

2 David Denver, Christopher Carman and Robert Johns, *Elections and Voters in Britain* (Palgrave Macmillan, 2012); Sarah Cameron and Ian McAllister, *Trends in Australian Political Opinion: Results from the Australian Election Study 1987–2016* (Australian National University, 2016).

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

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

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

6 Brandis, above n 4, 13.

7 [1903] 1 Ch 109.

8 [1978] AC 435, 477–8.

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

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

11 Brandis, above n 4.

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

13 Brandis, above n 4, 16.

14 Ibid.

15 Ibid 15.

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

17 Brandis, above n 4, 14.

18 Ibid.

19 Ibid.

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

21 Brandis, above n 4, 14.

22 Ibid.

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

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

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

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

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

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

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

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

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

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

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

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

34 Ibid.

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

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

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

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

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

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

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

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

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

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

45 Farber, above n 41, 297.

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

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

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