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The politics of public interest environmental litigation: lawfare in Australia

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Introduction

In August 2015, the Australian Government moved to restrict the capacity of environmental groups to challenge major developments under Commonwealth environment law in direct response to a successful appeal against the approval of a controversial new coal mine (*Mackay Conservation Group Inc v Commonwealth*[1] (*Adani* case)). According to the government, this litigation was part of an illegitimate coordinated strategy among environmental groups to use "green lawfare" to "disrupt and delay key projects and infrastructure" and to increase investor risk.[2] The Attorney-General further characterised the *Adani* case as "vigilante litigation by people ... who have no legitimate interest other than to prosecute a political vendetta against development and bring massive developments ... to a standstill".[3]

This characterisation is significant given that the litigation was settled by consent orders under which the Environment Minister accepted he had breached the Environmental Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act) by failing to consider conservation advice provided by the Department of Environment on the impact of the proposed mine on two vulnerable species. In this context, it is concerning that the government is now attempting to limit standing under the EPBC Act to those persons aggrieved by the decision. By doing so, the government would not only limit the scope for public interest litigation in defence of the environment, it would also curtail the rule of law by restricting the public's capacity to challenge decisions made in breach of the law.

The Australian Government's attempts to shut down community access to environmental adjudication is out of step with emerging international norms around the right to participate in environmental governance, as outlined in Principle 10 of the Rio Declaration on Environment and Development (Rio Declaration) and the Aarhus Convention.[4] Although Australia is one of few countries that have not explicitly adopted this right, the Australian community have demonstrated a growing expectation that they will have the right to participate in decision-making that affects the environment.[5] Underlying the *Adani* case (and the subsequent proposed legislative change) is a widening divide between the Australian Government's commitment to encouraging large-scale development, particularly from the resource extraction industry, and the public's growing concern with the environmental impact of these projects.

Legitimate interests

The government's characterisation of the *Adani* case as "vigilante litigation by people ... who have no legitimate interest",[6] and its stated goal of limiting standing to "persons aggrieved by the Minister's decision",[7] raises the question of what qualifies as a legitimate interest when it comes to the approval of mining projects. The legal meaning of a "person aggrieved" is defined in s 7 of the Judicial Review Act 1991 (Qld) as "a person whose interests are adversely affected by the decision". While the High Court has made it clear that this should not be interpreted narrowly,[8] the clear intention of the government in proposing this change is to primarily limit standing to those with an ***economic*** interest at stake.

This narrow definition of what constitutes a legitimate interest is out of step with emerging international norms around public participation in governance and, particularly, the right of the community to participate in decisions that affect the environment. As the International Law Association (ILA) have noted:

> In contemporary society, legitimacy largely depends on the consent of the governed, and hence on the sense that the governed have a voice through direct participation, representation, deliberation, or other methods.[9]

This expectation of participation has its roots in liberal theories of citizenship,[10] under which democratic governments historically relied on representative democracy to justify their legitimacy. However, as the United Nations Development Programme (UNDP) argues,[11] elections are not enough to guarantee inclusive democracy. Contemporary citizenship theory reflects a more active concept of citizenship — as "one which recognises the agency of citizens as 'makers and shapers' rather than as 'users and choosers' of interventions or services

designed by others".[12] From this perspective, ***meaningful*** participation can be seen as a fundamental citizenship right, one that empowers citizens to protect and realise their other human rights.[13]

This shift towards the recognition of (meaningful) participatory rights has been most developed within the international instruments relating to environmental management. The first instrument signalling a shift in this direct was the 1972 Stockholm Declaration,[14] which recognises both a right to a healthy environment and a responsibility to "protect and improve the environment for present and future generations".[15] This was followed in 1992 by the Rio Declaration[16] and Agenda 21,[17] and the 2002 Johannesburg Plan of Implementation,[18] all of which call for increased community involvement in environmental decision-making. Unifying these instruments is a recognition of the interdependent nature of human rights and the environment and an understanding that communities need to directly participate in environmental management decisions in order to ensure these rights are protected.

These procedural justice rights associated with protecting the right to a healthy environment have been given their most explicit protection in the Aarhus Convention (1998),[19] which is devoted entirely to participatory rights, including:

- a right to access publicly held environmental information;
- a right to participate in environmental decision-making; and
- (significantly for our purposes) a right to challenge public decisions made in violation of environmental laws in court.[20]

Although it is a regional agreement, having been developed by the United Nations Economic Commission for Europe (UNECE), Art 19(3) of the Aarhus Convention provides that it is open to accession by any UN member state "upon approval by the Meeting of the Parties". Following the Aarhus Convention, the ILA asserts that "there can be little doubt that a right of public participation has now become a general rule of international law regarding environmental management".[21]

This right of community participation has also been recognised in the procedural rights associated with the right to a healthy environment.[22] This is significant because it has been estimated that at least 177 nations recognise this right through their constitution, environmental legislation, court decisions, or ratification of an international agreement.[23] It is also evolving to incorporate a more Earth-centric approach to environmental protection, as can be seen in the recent Constitutions of Bolivia and Ecuador, which call on their communities "to respect the rights of nature".[24]

Although Australia is one of few nations that have not recognised the right to a healthy environment, it cannot ignore the almost universal recognition of the interdependent nature of human rights and environmental protection,[25] or of the procedural rights necessary to enable the community to protect their environment.[26] Relevant to the government's attempt to limit standing, Dinah Shelton argues:

> Establishing a strict scrutiny standard of judicial review for any measure that would implicate the right to a clean and healthful environment is one of the most important practical consequences of taking a rights-based approach to environmental protection.[27]

Community expectation of a right to participate

Shelton also argues that the speed with which the right to a healthy environment has been incorporated into national law:

> ... and invoked in judicial actions throughout the world attest[s] to the public support for environmental rights, but also indicate[s] concern for the continuing degradation of the environment, with its impact not only on present values but on future human security.[28]

The Australian community has demonstrated that it shares this growing concern over the impact of resource extraction on the state of the local and global environment and a clear expectation of a right to actively participate in environmental management.

Over the last decade in Australia, there has been a marked increase in visible community concern over both the impact of resource extraction and the lack of community power to influence decision-making around mining development.[29] This increase can be attributed to a number of factors, but the most significant of these are:

- the ease with which local communities can now create alliances with other like-minded local, national and international organisations; and
- mounting community concern around environmental degradation and climate change.

Historically, when mining companies moved into a rural area in Australia, the community had little political power to oppose new development.[30] As Linda Connor and others describe, the political capital of communities has traditionally been limited because the mining companies and the government carefully restrict access to information about the development process, and deliberately divide the community by negotiating secret land access deals.[31] These tactics often resulted in isolating and disempowering small local social action groups, but are losing their effectiveness in an age of digital activism.

Today, local activists are able to draw on support from national and international environmental non-governmental organisations (NGOs) to enhance their visibility and gain access to the information they had previously been denied.[32] Most significant have been the alliances formed between local groups. One particularly successful example is the Lock the Gate coalition — a national alliance formed in 2010 between farmers, conservationist and other community groups concerned with gas and coal developments.[33] A unifying concern among these groups has been the lack of transparency and community participation in past mining development processes, in addition to the environmental impact of these developments.

Studies of mine-affected communities have reported that landholders start out being concerned about direct impacts, including noise, reduced property values and traffic,[34] but that broader environmental concerns such as water quality, contamination, biodiversity and climate change have become more significant as awareness about these issues spreads and landholders start to form alliances with conservationists and local Indigenous peoples.[35]

Public concern about climate change has been increasing in Australia as the community has become more aware of climate science and experienced more of the effects.[36] The significant of these tangible effects is reflected in surveys of community attitudes. A 2013 survey found that the three top concerns of the Australian community in relation to climate change were:

1) "droughts affecting crop production and food";
2) pollution; and
3) "destruction of the Great Barrier Reef".[37]

As a direct result of these concerns, a majority of Australians (63%) would like the government to take climate change more seriously and, particularly, to start planning to move away from coal (72%).[38]

Political influence of mining sector

Given the community's increasing insistence on participating in development decisions around mining, why is the Australian Government seeking to curtail avenues for this participation? The likely explanation goes to the heart of the functioning of Australia's democracy, because it raises the question of whose interests our government is most committed to representing.

The mining industry exerts a disproportionate level of political influence in Australia and has successfully leveraged this influence to protect its profitability.[39] One of the outcomes of this influence has been the industry's successful rent-seeking.[40] Richard Denniss and David Richardson report that the industry "pays the lowest rate of tax on profits of any industry [in Australia] ... due primarily to ... generous tax concessions".[41] Sandi Keane reports that "Australia's effective tax rate for foreign multinational miners is a mere 13%".[42] This has resulted in high levels of profit, which mostly goes offshore since the mining industry is estimated to be 83% foreign-owned and to employ just 2.3% of the Australian workforce.[43]

One of the most pointed examples of the mining industry's influence was its campaign against the Rudd Government's proposed Resource Super Profits Tax (RSPT), which was designed to collect around 40% of mining profits in Australia. In May and June of 2010, the mining industry spent just over $22 million to run an aggressive 6-week advertising and public relations campaign against the RSPT.[44] As part of the lobbying campaign:

> Lurid articles were planted, suggesting that overseas investment in Australia would dry up, tens of thousands of jobs would be lost and the mining boom, the saviour of the economy, would grind to a halt.[45]

The campaign was extremely damaging to the government's political standing and ended when the Prime Minister was replaced by his party just 53 days after announcing the tax.[46] In her first public speech after her installation, the new Prime Minister committed to negotiating a more favourable deal with the industry — so favourable, in fact, that it raised almost no revenue in its first few years of operation.[47] As one UK newspaper stated in response to these unfolding events: "the awesome political power of the mining companies that has been revealed by this affair is ... breathtaking."[48]

Discussion

In their analysis of the discursive factors that dominate public debate around coal seam gas (CSG) in Australia, Alexandra Mercer, Kim de Rijke and Wolfram Dressler argue that the language used by both industry and government demonstrate a "neoliberalising political economy" that serves to normalise particular perspectives and "foreclosure" others.[49] This same discourse of normalising neoliberal perspectives, while delegitimising and silencing opposing viewpoints, can also be seen in political discourse around coal mining and, particularly, in the government and the Minerals Council of Australia's response to the *Adani* case.[50] From within a neoliberal framework, the only legitimate concerns are those relating to profit or private property rights, but this framework does not reflect the views of the Australian community. Unless this tension is resolved, we can expect to see a lot more conflict between the government and the community in rural and regional areas of Australia.

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Footnotes

1. *Mackay Conservation Group Inc v Commonwealth* [2015].
2. Commonwealth. *Parliamentary Debates Second Reading Speech of the Environment Protection Biodiversity Conservation Amendment (Standing) Bill 2015 (Cth)* (20 August 2015) (Greg Hunt MP).
3. SkyNews Interview with Senator George Brandis (16 August 2015) available at www.attorneygeneral.gov.au/transcripts/Pages/2015/ThirdQuarter/16-August-2015-Australian-Agenda-program-SkyNews.aspx.
4. See Rio Declaration on Environment and Development (1992); and Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) opened for signature 25 June 1998 (entered into force 30 October 2001).
5. See for example *Metgasco Ltd v Minister for Resources and Energy* [2015] NSWSC 453; BC201502970; and the "Bentley" blockade mentioned therein.
6. SkyNews Interview with Senator George Brandis (16 August 2015) available at www.attorneygeneral.gov.au/transcripts/Pages/2015/ThirdQuarter/16-August-2015-Australian-Agenda-program-SkyNews.aspx.
7. *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development* (2014) 145 ALD 473; (2014) 315 ALR 44; [2014] HCA 50; BC201410457.
8. Above n 7.
9. International Law Association *The Berlin Rules on Water Resources* Final Report (2004) available at http://internationalwaterlaw.org/documents/intldocs/ILA_Berlin_Rules-2004.pdf.
10. J Gaventa "Exploring citizenship, participation and accountability" (2002) 33(2) *IDS Bulletin* 1 at 4.
11. United Nations Development Programme *Beyond Scarcity: Power, Poverty and the Global Water Crisis* Human Development Report (2006) at 7–9, available at www.undp.org/content/dam/undp/library/corporate/HDR/2006%20Global%20HDR/HDR-2006-Beyond%20scarcity-Power-poverty-and-the-global-water-crisis.pdf.
12. A Cornwall and J Gaventa *From Users and Choosers to Makers and Shapers: Repositioning Participation in Social Policy* Institute of Development Studies Working Paper 127 (June 2001) available at www.ids.ac.uk/files/Wp127.pdf.
13. See for example above n 10, at 4.
14. United Naions *Report of the United Nations Conference on the Human Environment* UN Doc A/CONF.48/14/Rev.1 (1972) (Stockholm Declaration), p 3, Chapter I points 1, 6 and 7 and p 4, Principle 1, available at www.un-documents.net/aconf48-14r1.pdf.
15. Above n 14, p 71.
16. United Nations *Report of the United Nations Conference on Environment and Development* UN Doc A/CONF.151/26/Rev.1 (1992) (Rio Declaration), Principle 10 available at www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.
17. United Nations Conference on Environment and Development *Agenda 21* (1992) available at www.unep.org/documents.multilingual/default.asp?documentid=52.
18. United Nations *Report of the World Summit on Sustainable Development* UN Doc A/CONF.199/20 (2002) (Johannesburg Plan of Implementation) available at www.unmillenniumproject.org/documents/131302_wssd_report_reissued.pdf.
19. Aarhus Convention, above n 4.
20. Aarhus Convention, above n 4, Arts 4, 6–9.
21. Above n 9, p 25.
22. Razzaque J "Public participation in water governance" in Dellapenna J and Gupta J (eds) *The Evolution of the Law and Politics of Water* Springer Science and Business Media, 2009 p 363.
23. D Boyd "The Constitutional right to a healthy environment" (July–August 2012) available at www.environmentmagazine.org/Archives/Back%20Issues/2012/July-August%202012/constitutional-rights-full.html.
24. Constitución Política del Ecuador 2008, Art 83(6). See also Bolivia (Plurinational State of)'s Constitution of 2009, Art 108(16).
25. R Bratspies "Do we need a human right to a healthy environment?" (2015) 13(1) *Santa Clara Journal of International Law* 31 at 48–61.
26. Above n 25; S Atapattu "The right to a healthy life or the right to die polluted?: the emergence of a human rights to a healthy environment under international law" (2002) 16 *Tulane Environmental Law Journal* 65 at 90–96.
27. D Shelton "Whiplash and backlash — reflections on a human rights approach to environmental protection" (2015) 13(1) *Santa Clara Journal of International Law* 11 at 16–17.
28. Above n 27, at 17.
29. See for example D Turton "Unconventional gas in Australia: towards a legal geography" (2015) 53(1) *Geographical Research* 53.
30. See for example L Connor, S Freeman and H Higginbotham "Not just a coalmine: shifting grounds of community opposition to coal mining in Southeastern Australia" (2009) 74(4) *Ethnos* 490; and D Lloyd, H Luke and W Boyd "Community perspectives of natural resource extraction: coal-seam gas mining and social identity in Eastern Australia" (2013) 10 *Coolabah* 144.
31. Connor et al, above n 30 at 490.
32. See for example Connor et al, above n 30; and Lloyd et al, above n 30 at 150.
33. For more details, see Lock the Gate Alliance, accessed 6 June 2016 available at www.lockthegate.org.au/about_us.
34. See for example, Lloyd et al, above 30 at 150.
35. See Lloyd et al, above n 30 at 150; Connor et al, above n 30 at 500; and Turton, above n 29 at 59.

36. See for example The Climate Institute *Climate of the Nation 2015: Australian Attitudes on Climate Change* (August 2015) available at www.climateinstitute.org.au/climate-of-the-nation-2015.html; and A Oliver *The Lowy Institute Poll 2015* (June 2015), p 13 available at www.lowyinstitute.org/files/final_2015_lowy_institute_poll.pdf.
37. The Climate Institute, above n 36, p 11.
38. The Climate Institute, above n 36, pp 2–3.
39. See for example D Marsh, C Lewis and J Chesters "The Australian mining tax and the political power of business" (2014) 49(4) *Australian Journal of Political Science* 711; A Mitchell "Lobbying for the dark side" (2012) 71(2) *Meanjin Quarterly*; and G Pearse "Quarry vision" (2009) 33 *Quarterly Essay*.
40. H Aulby and M Ogge *Greasing the Wheels — The Systemic Weaknesses that Allow Undue Influence by Mining Companies on Government: A Qld Case Study* (June 2016) available at www.tai.org.au/sites/default/files/P266%20Greasing%20the%20Wheels%20160726_0.pdf; and The Australian Institute "Mining subsidies vs public services" (2015) available at www.tai.org.au/sites/default/files/Brief%20-%20Mining%20subsidies%20vs%20public%20services_Final.pdf.
41. R Denniss and D Richardson "Corporate power in Australia" Policy Brief No 45 (February 2013), p 5 available at www.tai.org.au/sites/default/files/PB%2045%20Corporate%20power%20in%20Australia_4.pdf.
42. S Keane "The fossil fuel industry and who really runs Australia" (6 May 2014) available at https://independentaustralia.net/business/business-display/who-really-runs-australia-the-miners-and-the-moguls,6450.
43. Above n 41 at 4; Australian Bureau of Statistics *Labour Force, Australia, Detailed, Quarterly* (November 2012) available at www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/E52AB9DE81FE87C0CA257B340011115C?opendocument; and N Edwards *Foreign Ownership of Australian Mining Profits* (2011).
44. M Davis "A snip at $22m to get rid of PM"(2 February 2011) available at www.smh.com.au/business/a-snip-at-22m-to-get-rid-of-pm-20110201-1aegj.html#ixzz45TUYrXy5.
45. Mitchell, above n 39.
46. Mitchell, above n 39.
47. Above n 40 at 5.
48. Editorial "The real political power Down Under" *Independent* 3 July 2010, cited in Mitchell, above n 39.
49. A Mercer, K de Rijke and W Dressler "Silences in the midst of the boom: coal seam gas, neoliberalizing discourse, and the future of regional Australia" (2014) 21 *Journal of Political Ecology* 279.
50. Above n 49 at 282.