10 September 2015

Committee Secretary
Senate Standing Committees on Environment and Communications
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Dear Secretary

Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015

Thank you for the opportunity to make a submission.

Summary

Section 487 was included in the EPBC Act by the Howard Government to better facilitate citizen participation in strengthening the transparency and accountability of government decision making on matters of national environmental significance. It has operated as intended by allowing NGOs, in a limited number of cases, to bring to the courts' attention mistakes in Ministerial decision-making contrary to the requirements of the EPBC Act.

No changes to s487 are required or justified. The proper response of the Commonwealth should be to ensure that decision-making under the EPBC Act is carried out in accordance with the existing law.

1. s487's statutory context

The EPBC Act was enacted for a range of reasons, including to give effect to Australia's obligations under a range of international conventions, including:

- World Heritage Convention
- Convention on Biological Diversity
- Convention on Wetlands of International Importance
- Apia Convention
- Migratory Bird Treaties.

The regime established under the Act requires careful assessment of activities that could breach obligations under these treaties. This environmental impact assessment process provides the factual foundation for determining whether approval for an activity should be granted, and the conditions that should apply. Detailed decision-making processes and decision criteria that set out in the Act, aimed at protecting the "matters of national environmental significance" (MNES) that attract approval requirements.

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Section 487 was part of the EPBC Act's original enactment by the Howard Government 15 years ago. It purpose was to address the restrictions imposed by traditional common law rules on who could apply for judicial review of administrative decisions. Inclusion of s487 was part of the Howard Government's support for the principles of public participation and access to justice, reflected in Principle 10 of the *Rio Declaration on the Environment and Development*. While Australia is not a party to it, these principles find broader international reflection in the UNECE *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention).*

2. Application of s487 to applications for judicial review

Section487 extends the meaning of "a person who is aggrieved" for the purposes of the key Commonwealth legislation on judicial review, the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ('ADJR' Act) (ss5-7). In the context of the EPBC Act, the ADJR Act provides an avenue through which parties may seek judicial review of a decision of the Commonwealth Environment Minister to approve a proposed activity that is likely to have a significant impact on one or more of the prescribed matters of national environmental significance, and the conditions attaching to those approvals.

Judicial review applications under the ADJR Act involve a relatively limited assessment by a Federal Court of the lawfulness of an administrative decision; the lawfulness of the decision is determined by reference to the criteria set out in ss5-7 of the ADJR Act. Judicial review applications do not involve a review of the merits of a decision. The result of a successful judicial review application is not to replace the decision of the original decision-maker with a different outcome determined by the Court. Rather, a successful judicial review application may lead to the decision being returned to the original decision-maker to be determined again, this time in compliance with legislative requirements.

For example, in the litigation that prompted the proposal to repeal s487 of the EPBC Act, *Mackay Conservation Group v Commonwealth*[1] (the Carmichael Coal Mine case), the Minister acknowledged that in previously making the decision to approve the mine project, he had erred in failing to consider the relevant Conservation Advices relating to two nationally listed threatened species. The Court was therefore simply reflecting the parties' agreement that the Minister needed to reconsider the decision by taking into account all relevant material in accordance with the law. The consent order in that case does not preclude the Minister from arriving at a similar decision to approve the mine, provided he complies with the legal requirements specified in the Act, including taking into account all relevant material. It is therefore inaccurate to say that s487 prevents development from proceeding *unless* allowing such development is contrary to the procedural or substantive requirements of the EPBC Act, in which case it should not be allowed in any event.

Administrative decision-makers in an accountable, transparent and robust liberal democracy should be expected to follow the requirements of the law, as enacted by Parliament in legislation. The ability of citizens to subject decision-making to judicial scrutiny is fundamental to ensuring that our decision-makers act in accordance with the law. Reducing access to the Courts undermines this fundamental expectation of good governance in a liberal democracy. The High Court recently reaffirmed this in relation to the ACT's ADJR Act:

[1] *Mackay Conservation Group v Commonwealth of Australia and Others*, FCA https://www.comcourts.gov.au/file/Federal/P/NSD33/2015/3715277/event/28181487/document/607760

The availability of judicial review serves to promote the rule of law and to improve the quality of administrative decision-making as well as vindicating the interests of persons affected in a practical way by administrative decision-making. Accordingly, the scope of s 3B(1)(a) of the ADJR Act should not be artificially narrowed by glosses upon its broad language.[2]

3. The common law test for standing

Section 487 as it currently stands extends the test for standing (i.e. the right to bring an action) to - "a person who is aggrieved"- under the ADJR Act. A person is aggrieved under the ADJR Act if their "interests are adversely affected". The key High Court decision interpreting the scope of "person aggrieved" and the related "special interest" test in the context of environment groups is *ACF v the Commonwealth*[3]. In that case, the High Court held in this case that a "special interest" required more than a mere intellectual or emotional interest in the subject matter of an administrative decision. Under this decision, the Australian Conservation Foundation (ACF), whose advocacy work concerned a range of environmental issues, lacked a sufficient economic or proprietary interest to establish standing.

The *ACF v Commonwealth* decision is now over 35 years old, and subsequent Courts (notably the Federal Court) in a series of cases have taken a more expansive view of the operation of the "special interest" test, particularly in relation to the environmental public interest. In 2014, the High Court again emphasized that impacts on a "special interest" required an interest "different from ('beyond') its effect on the public at large"[4] but also noted that "special interest" should not be interpreted narrowly. In addition to economic and proprietary interests, social and cultural interests have been recognized as giving rise to standing in some cases.[5]

A range of features have been identified as indicating a "special interest" in the subject matter of a dispute, including whether the organisation "adequately represent[s] the public interest".[6] Other factors that the Federal Court has considered include:

- the "national importance" of the issue in question;
- whether the group is recognized publicly as the "peak body" on a certain matter;
- their history of engagement on a topic;
- whether government itself recognizes the representative status of the group (through funding or inclusion in consultation processes); and
- the way in which the objectives of the group are articulated in its Articles of Association.[7]

This reasoning has been applied to give standing to national environmental groups such as the ACF, as well as regional bodies and local environment groups.

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[2] *Argos P/L v Minister for the Environment and Sustainable Development,* [2014] HCA 50, Per French CJ & Keane J, at [48]

[3] *Australian Conservation Foundation v the Commonwealth*, (1980) 146 CLR 493.
[4] *Argos P/L v Minister for the Environment and Sustainable Development* [2014] HCA 50, per Hayne & Bell JJ at [61].
[5] E.g. *Onus v Alcoa (1981) 36 ALR 425.*
[6] *Australian Conservation Foundation v South Australia* (1990) 53 SASR 349, per Cox J at 360.
[7] *Australian Conservation Foundation v Minister for Resources* (1989) 76 LGRA 200; *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 85 LGERA 296; *North Coast Environment Council v Minister for Resources* (1994) 85 LGERA 270; *Animals' Angels e,V, v Secretary, Department of Agriculture* [2014] FCAFC 173.

Recent steps to de-fund environmental activities and attempts to remove the tax-deductible status of environmental advocacy groups may make it harder to satisfy the element of Commonwealth government recognition of these groups. However, a Court could recognize other forms of special interest. Historical recognition of the group by Commonwealth government or present recognition by state governments, or a long-track record of public advocacy on matters of national environmental significance in the form of nationwide membership, funding etc may demonstrate that the group adequately represents the public interest.

The earlier court decisions on the right to bring an action for judicial review took place at a time when Courts were concerned that open standing provisions would encourage a flood of frivolous or vexatious litigants. However, the high cost of litigation today, and the power courts have to make costs orders that reflect the legitimacy of the action, serve as powerful disincentives to frivolous or vexatious actions. As the track record on the use of s487 bears out, only groups and individuals who hold a deep commitment to protecting matters of national environmental significance and a clear belief that legislative requirements have not been followed will contemplate legal action.

4. The use of s487 in practice

Although s487 expended third party standing rights, under the EPBC Act, only a minute fraction of approvals have been the subject of an application for judicial review by the Courts. In its 15 years of operation, 5500 projects have undergone some form of scrutiny under the EPBC Act, yet only 22 have been the subject of third party proceedings (such as a challenge by environmental NGOs). Furthermore, only six out of 33 actions for judicial review (relating to 22 projects) have succeeded in requiring the Minister to correct his decision.[8] This restrained use of s487 shows that environmental NGOs have (in general) responsibly used third party standing rights. This view is also supported by the "Hawke" review of the EPBC Act in 2010, which concluded that third party standing rights had not created any problems under the Act and which recommended that they be retained.[9]

3. The future of environmental litigation should s487 be repealed

Section 487removes the need for persons with a two-year record of research or activity in relation to environmental protection, to demonstrate that they have a financial or property interest affected by an administrative decision, in order to establish standing. Section 487 has a similar effect in relation to organisations with the same record of research or activity related to environmental protection. Any repeal of s487 would mean that all applications for judicial review of decisions made under the EPBC Act would effectively involve a two-phase process:

1. applicants would first have to demonstrate that they possess the requisite "special interest" in the subject matter of the decision to give them standing.

2. Only then would the court consider the substantive claim that the decision was made in error.

Any repeal of s487 would impose additional cost on both citizen groups and the Commonwealth and introduce further delay in judicial proceedings. In addition to the risks to good governance

[8] The Australia Institute, *Key administration statistics – 3rd Party Appeals and the EPBC Act,* August 2015.
[9] Australian Government, Department of the Environment, Heritage and the Arts, *The Australian Environment Act: Report of the Independent review of the Environment Protection and Biodiversity Conservation Act 1999* (Dr Allan Hawke AC: Chair) (2009), Chapter 15, [15.78]–[15.85], Rec 50, 260–261.

that may flow from reduced accountability of Ministerial decisions, this may well also have the unintended consequence of imposing longer delays in the commencement of new projects, which is precisely the "problem" which the planned repeal of s487 is supposed to address.

4. Conclusion: standing for environmental purposes

Ultimately, at stake with this amendment are the core objectives of the EPBC Act. Repeal of s487 would jeopardise fulfilment of the Act's core objectives in regard to conservation of biodiversity and in particular the protection of listed threatened species and nationally significant places such as World Heritage areas. Because such areas and species cannot represent themselves in court, it is important that interested citizens can speak on their behalf. In a pioneering article written in 1972, American law professor Christopher Stone argued that standing for environmental groups to act on behalf of trees and animals and indeed entire ecological communities is essential to ensure that their legally protected interests can be safeguarded.[10] If standing is limited to persons with a 'special interest' or some equivalent formula based on having suffered personal injury or property damage, it will become much harder to find interested citizens to speak on behalf of nature. Without its own legally recognised 'special interest', the natural environment will have an even more legally precarious existence in our environmental decision-making.

Yours sincerely

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[10] Christopher D. Stone, 'Should Trees Have Standing--Toward Legal Rights for Natural Objects' *Southern California Law Review* (1972) 45: 450–87.