

The Senate

Environment and Communications
Legislation Committee

Environment Protection and Biodiversity
Conservation Amendment (Standing) Bill
2015 [Provisions]

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Chapter 1

Introduction

1.1 On 20 August 2015, the Senate agreed to amend the report of the Selection of Bills Committee and referred the provisions of the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 to the Environment and Communications Legislation Committee for inquiry and report by 12 October 2015.¹ The reporting date was subsequently extended to the second last sitting day in February 2016² with the committee then agreeing to present its report on 18 November 2015.

Conduct of the inquiry

1.2 In accordance with its usual practice, the committee advertised the inquiry on its website and wrote to relevant individuals and organisations inviting submissions. The closing date for submissions was 11 September 2015. The committee received 292 submissions, which are listed at Appendix 1. The submissions may be accessed through the committee's website: www.aph.gov.au/senate_ec.

1.3 In addition to the published submissions, the committee received a significant number of form letters and other correspondence that expressed the view that the bill should not be passed. The committee agreed to publish an example of each of the eight types of form letter received on its website. In total, 21,117 form letters were received.

1.4 The committee had initially scheduled public hearings in Canberra, Melbourne, Sydney and Brisbane. These hearings were postponed and the committee subsequently determined that it would complete the inquiry through consideration of the submissions received.

Acknowledgement

1.5 The committee thanks all of the organisations and individuals who assisted the committee with the inquiry.

Purpose of the bill

1.6 The bill proposes to amend the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) to repeal section 487. The repeal of this section would result in the removal of the extended standing provisions to bring proceedings in relation to decisions under the EPBC Act.

1 *Journals of the Senate*, 2013–15, No.110, 20 August 2015, p. 3008.

2 *Journals of the Senate*, 2013–15, No.119, 12 October 2015, p. 3196.

1.7 In his second reading speech, the Minister for the Environment, the Hon Greg Hunt MP, noted that 'contrary to the intentions of the EPBC Act, the federal law is now being used to "disrupt and delay" infrastructure' by environmental organisations. The Minister went on to state:

This is the explicit Americanisation of environmental campaigning with its focus on tying up projects in legal challenges where the goal is not to win, but to disrupt and delay.³

1.8 The Minister concluded:

The EPBC Act standing provisions were always intended to allow the genuine interests of an aggrieved person whose interests are adversely affected to be preserved. This will continue to be the case.

The EPBC Act standing provisions were never intended to be extended and distorted for political purposes as is now occurring with the US style litigation campaign to 'disrupt and delay key projects and infrastructure' and 'increase investor risk'.

Changing the EPBC Act will not prevent those who may be affected from seeking judicial review. It will maintain and protect their rights. However, it will prevent those with no connection to the project, other than a political ambition to stop development, from using the courts to disrupt and delay key infrastructure where it has been appropriately considered under the EPBC Act.⁴

Background to the bill

1.9 Certain administrative decisions made under the EPBC Act are subject to judicial review by the Federal Court of Australia. Judicial review is concerned with the legality of the way in which a decision is made by the statutory decision-maker. Ordinarily, applications for judicial review would be made under:

- section 5 of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) which concerns applications made to the Federal Court; or
- more rarely, under section 39B of the *Judiciary Act 1903* which concerns the applications made to the Federal Court as part of its original jurisdiction, for instance, an application to seek an injunction or a declaration against an officer of the Commonwealth.⁵

1.10 Before a person or an organisation can commence proceedings for a judicial review, they must be recognised by the court as having the right or 'standing' to do so. Standing to make an application under section 5 of the ADJR Act is determined by

3 The Hon Greg Hunt MP, Minister for the Environment, *House of Representatives Hansard*, 20 August 2015, p. 8989.

4 The Hon Greg Hunt MP, Minister for the Environment, *House of Representatives Hansard*, 20 August 2015, p. 8990.

5 Department of the Environment, *Submission 135*, p. 2.

whether someone is a 'person aggrieved' by a decision of an administrative character made under an enactment. An aggrieved person includes a person whose interests are adversely affected by the decision. Generally, a person or organisation would need to show a 'special interest' that is adversely affected by the relevant decision.

1.11 Standing to make an application under section 39B of the Judiciary Act is determined by the common law. The applicant must either have a private right or be able to establish that he or she has a 'special interest in the subject matter'. 'Special interest' would generally require that the applicant show an interest in the subject matter of the action which is beyond that of a member of the public.⁶

Extended standing provisions in the EPBC Act

1.12 Section 487 of the EPBC Act extends standing of parties for the purpose of judicial review of decisions made under the EPBC Act. It does this by extending the meaning of the term 'aggrieved person' in the ADJR Act beyond its normal application. Under section 487 an 'aggrieved person' for the purposes of making an application under the ADJR Act means:

- in the case of a person – an Australian citizen or ordinarily resident in Australia or an external Territory;
- in the case of an organisation or association – the organisation or association is incorporated, or was otherwise established, in Australia or an external Territory and has included in its objects or purpose, the protection or conservation of, or research into, the environment; and
- at any time in the two years immediately before the relevant decision, failure or conduct to which the application relates, the person, organisation or association has engaged in a series of activities in Australia or an external Territory for protection or conservation of, or research into, the environment.⁷

1.13 Associated with this, section 488 provides that a person acting on behalf of an unincorporated organisation is also a 'person aggrieved', and therefore may also apply for review under the ADJR Act.⁸

1.14 Section 487 was part of the EPBC Act when it was enacted in 1999 and has not been amended since that time. The Explanatory Memorandum to the EPBC Bill, commented that this clause extends (and does not limit) the meaning of the term 'aggrieved person' in the ADJR Act.⁹

6 Department of the Environment, *Submission 135*, p. 2.

7 Department of the Environment, *Submission 135*, p. 3.

8 Department of the Environment, *Submission 135*, p. 3.

9 Environment Protection and Biodiversity Conservation Bill 1998, *Explanatory Memorandum*, p. 113.

1.15 The Department of the Environment (the department) commented that:

Section 487 was intended to recognise the general public interest in the protection of matters of national environmental significance under the EPBC Act. This is on the basis that the public interest is separate from a personal interest, such as property right or business interest, affected by a decision under the EPBC Act.¹⁰

Third party applications for judicial review under section 487

1.16 From the commencement of the EPBC Act in 2000 until 19 August 2015, 817 projects had been approved by the Minister or his or her delegate under the EPBC Act while 5,364 projects had been referred to the department.¹¹

1.17 The department noted that, since 2000, 22 different third party applicants have sought judicial review of decisions made by the Minister or his or her delegate under the EPBC Act in reliance on section 487. Seventeen of these applicants were environmental and community groups and five applicants were individuals.

1.18 There have been 37 third party legal challenges to approval decisions made under Parts 7, 9 and 10 of the EPBC Act since 2000. These challenges concerned 23 separate projects. Third party applicants have been successful in four legal challenges relating to three separate projects. In addition, eight of the 37 legal challenges were discontinued with either the consent of the parties or were withdrawn by the applicant.¹²

1.19 The grounds for third party legal challenges to EPBC Act approval decisions include that the decision maker:

- did not take into account relevant considerations;
- took into account irrelevant considerations; or
- provided insufficient time for particular elements of the decision process.¹³

1.20 The department commented that, in the majority of cases, the courts have found that the EPBC Act decision makers' decisions made were valid. However, in the following three cases the courts found against the validity of the decision:

- *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463 (Nathan Dam Case) and *Minister for the Environment and Heritage v Queensland Conservation Council Inc* [2004] FCAFC 190 (Appeal). The Federal Court found that the Minister failed to

10 Department of the Environment, *Submission 135*, p. 1.

11 Department of the Environment, *Submission 135*, p. 4.

12 Department of the Environment, *Submission 135*, p. 4.

13 The full list of grounds is contained in section 5 of the ADJR Act.

take into account a relevant consideration in the exercise of power (under section 75);

- *Lansen v Minister for Environment & Heritage* [2008] FCAFC 189: The majority of the Full Federal Court found that the Minister had failed to consider a relevant consideration under paragraph 134(4)(a) and to comply with a statutory obligation when he did not consider the NT conditions on the approval. The Court found that these failures made the decision to attach conditions invalid, and that in turn made the approval decision itself invalid; and
- *Tarkine National Coalition Inc v Minister for SEWPAC* [2013] FCA 694 (Shree Minerals): The Federal Court held that in deciding to approve the taking of the action, the Minister had failed to have regard to a document called Approved Conservation Advice for *Sarcophilus harrisii* (Tasmanian Devil) as required under sub section 139(2) of the EPBC Act.¹⁴

1.21 In 2013, the Environment Legislation Amendment Bill 2013 was introduced to address the implications arising from the Federal Court's decision in the Tarkine Case.¹⁵ Schedule 1 of the bill proposed to amend the EPBC Act so as to clarify that a failure by the Minister to have regard to any relevant approved conservation advice when making a decision under the EPBC Act would not render such decisions, taken prior to the commencement of the bill, invalid. However, the Senate amended the bill to omit these proposed amendments and the bill was subsequently passed by both Houses without Schedule 1.

1.22 On 4 August 2015, Justice Katzmann of the Federal Court made orders in a case brought by the Mackay Conservation Group in relation to the approval of the Adani Carmichael mine (*NSD33/2015 Mackay Conservation Group v Commonwealth of Australia and Others*). The Mackay Conservation Group's challenge was based on three grounds:

- that the Minister incorrectly assessed the project's climate impacts, including failing to take into account the greenhouse gas emissions that will result from the burning of coal that is mined and the impact of those emissions on the World Heritage listed Great Barrier Reef;
- the Minister ignored Adani's poor environmental record; and
- the Minister failed to consider Approved Conservation Advices from the Department of the Environment on the impact of the mine on two vulnerable species: the Yakka Skink and the Ornamental Snake.¹⁶

14 Department of the Environment, *Submission 135*, pp 4–5.

15 Environment Legislation Amendment Bill 2013, *Explanatory Memorandum*, p. 2.

16 EDOs of Australia, *Submission 114*, p. 6.

1.23 The orders set aside the Minister's decision under the EPBC Act to approve proposed action to develop an open cut and underground coal mine, rail link and associated infrastructure in central Queensland, subject to certain conditions. The orders were made by consent, that is, with the agreement of the parties to the litigation.¹⁷

1.24 The basis for the orders was that the Minister found that the proposed action would have a significant impact on two listed threatened species: the Yakka Skink and the Ornamental Snake. While conservation advices approved by the Minister were in place for these two species, contrary to the requirements of the EPBC Act, the Minister did not have regard to the advices as they were not included in the material before him at the time he made his decision.¹⁸

1.25 On 14 October 2015, the Minister re-approved the Carmichael Coal Mine and Rail project. The Minister stated that the project had been approved 'in accordance with national environment law subject to 36 of the strictest conditions in Australian history'.¹⁹

Consideration of the bill by other committees

1.26 When examining a bill or draft bill, the committee takes into account any relevant comments published by the Senate Standing Committee for the Scrutiny of Bills. The Scrutiny of Bills Committee assesses legislative proposals against a set of accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary propriety. The committee also notes that the bill was the subject of comments by the Parliamentary Joint Committee on Human Rights (PJCHR).

Senate Standing Committee for the Scrutiny of Bills

1.27 The bill was considered by the Scrutiny of Bills Committee in its *Alert Digest* No. 9 of 2015. That committee made extensive comments on the bill and noted that it is 'well accepted' that restrictive standing rules pose particular problems in the area of environmental decision making. In this regard, the Scrutiny of Bills Committee commented that environmental regulation often raises matters of general rather than individual concern. Thus, restrictive standing rules may mean that decisions relating to environmental regulation are, in practice, beyond effective judicial review to ensure that they comply with the law.

17 Federal Court of Australia, *Statement re NSD33/2015 Mackay Conservation Group v Minister for Environment*, 10 August 2015, <http://www.fedcourt.gov.au/news-and-events/20-august-2015> (accessed 30 October 2015).

18 Federal Court of Australia, *Statement re NSD33/2015 Mackay Conservation Group v Minister for Environment*, 10 August 2015; see also Law Council of Australia, *Submission 61*, p. 5.

19 The Hon G Hunt, Minister for the Environment, 'Carmichael Coal Mine and Rail Infrastructure project', *Media Release*, 15 October 2015 <https://environment.gov.au/minister/hunt/2015/mr20151015.html> (accessed 2 November 2015).

1.28 The Scrutiny of Bills Committee went on to comment:

From a scrutiny perspective, it is a matter of concern that the introduction of more restrictive standing rules may result in the inability of the courts, in at least some cases, to undertake their constitutional role (i.e. to ensure that Commonwealth decision-makers comply with the law).²⁰

1.29 The Scrutiny of Bills Committee added that the amendment may not substantially reduce litigation as it may introduce uncertainty as to the circumstances in which environmental non-government organisations will be granted standing.²¹

1.30 The Scrutiny of Bills Committee also commented that no detailed justification for the amendment was provided in the explanatory memorandum, including evidence indicating that section 487 has led to inappropriate litigation or has led to an inappropriately high number of review applications. The Scrutiny of Bills Committee indicated that it had sought detailed advice from the Minister as to why the proposed limitation on the availability of judicial review of decisions under the EPBC Act is justified.²²

1.31 The Minister's response was reported in the Scrutiny of Bills Committee's Eleventh Report of 2015. The Minister stated that the purpose of the bill was to bring the standing arrangements under the EPBC Act 'into line with the standard arrangements for permitting judicial review challenges to Commonwealth administrative decisions as provided for under the ADJR Act and the Judiciary Act'.²³

1.32 The Minister went on to add that there is an emerging risk of the extended standing provisions 'being used to deliberately disrupt and delay key projects and infrastructure developments'. Such actions would pervert the original purpose of the extended standing provisions. The Minister concluded:

The amendments make the minimum change necessary to mitigate the identified emerging risk. Australia has some of the most stringent and effective environmental laws in the world. The proposed amendments do not change Australia's high environmental standards, or the process of considering and, if appropriate, granting approvals under the EPBC Act. The amendments also do not limit what decisions are reviewable.²⁴

20 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 9 of 2015*, 9 September 2015, p. 3.

21 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 9 of 2015*, 9 September 2015, p. 3.

22 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 9 of 2015*, 9 September 2015, p. 4.

23 Senate Standing Committee for the Scrutiny of Bills, *Eleventh Report of 2015*, 14 October 2015, p. 656.

24 Senate Standing Committee for the Scrutiny of Bills, *Eleventh Report of 2015*, 14 October 2015, p. 657.

1.33 Following consideration of the Minister's response, the Scrutiny of Bills Committee stated that it was concerned that the Minister's response 'does not directly address the scrutiny issues which have been raised by the committee'. The Scrutiny of Bills Committee drew the Minister's response to the attention of the Senate, but expressed its 'continuing scrutiny concern that the practical effect of this bill is to limit the availability of judicial review in the absence of sufficient justification for that outcome'.²⁵

Parliamentary Joint Committee on Human Rights

1.34 The Parliamentary Joint Committee on Human Rights (PJCHR), in its Twenty-seventh Report of the 44th Parliament, reported on the bill. The PJCHR commented that its assessment of the proposed amendment 'against article 12 of the International Covenant on Economic, Social and Cultural Rights (right to health and a healthy environment) raises questions as to whether the measure limits the right, and if so, whether that limitation is justifiable'. In addition, the PJCHR stated that 'the measure may engage and limit the right to health and a healthy environment as the bill removes extended standing for judicial review of decisions or conduct under' the EPBC Act.²⁶

1.35 As the bill's statement of compatibility did not justify that possible limitation for the purposes of international human rights law, the PJCHR sought the advice of the Minister for the Environment as to whether the bill limits the right to a healthy environment and, if so:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.²⁷

1.36 The PJCHR had not received a response from the Minister at the time of the committee's consideration of this report.

Structure of report

1.37 Chapter 2 of this report canvasses the evidence submitted in support of the repeal of section 487. Chapter 3 canvasses the evidence submitted in support of the retention of section 487. The committee's view is provided in Chapter 4.

25 Senate Standing Committee for the Scrutiny of Bills, *Eleventh Report of 2015*, 14 October 2015, p. 657.

26 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Twenty-seventh report of the 44th Parliament*, 8 September 2015, p. 7.

27 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Twenty-seventh report of the 44th Parliament*, 8 September 2015, p. 7.

Chapter 2

Evidence in support of the repeal of section 487

2.1 The committee received submissions which identified matters that support the repeal of section 487. These included:

- detriments to business certainty;
- availability of community engagement in environmental approval processes;
- availability of other review processes;
- lack of clear improvement in environmental outcomes through the use of section 487; and
- continuing protection of the environment provided by the EPBC Act.

Detriments to business certainty

2.2 The Minerals Council of Australia (MCA) argued that the definition of who has standing under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) is extremely broad. It noted that it extends beyond that provided under the common law and the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) in that it does not require a connection between the 'aggrieved' person or organisation and the area to which the development approval relates. Further, no other Commonwealth legislation has a similar broad definition for standing in judicial appeals.¹

2.3 Submitters argued that extended standing under section 487 provides little certainty for business. While proponents of development projects engage with those directly or indirectly affected by the project during assessment and approval processes, they cannot account for or undertake similar engagement with those not directly affected.² Ports Australia commented that, while supporting rigorous assessment processes for major development proposals and the need to ensure that new projects are in line with the principles of sustainable development, it was crucial that its members are 'afforded certainty and consistency with respect to regulatory and policy processes'.³

2.4 It was submitted that the extended standing provisions of section 487 has led to delays to, and in some cases the blocking of, development projects. Ports Australia, for example, commented that 'virtually every major coal project or coal enabling infrastructure project in recent years in Australia has been the subject of lengthy and

1 Minerals Council of Australia, *Submission 97*, p. 3.

2 Minerals Council of Australia, *Submission 97*, p. 3.

3 Ports Australia, *Submission 52*, p. 2.

costly legal proceedings'.⁴ Submitters argued that these actions were being undertaken despite the extensive approvals processes and engagement with the community required before approval had been given.⁵

2.5 Of particular concern to those supporting the repeal of section 487 was its use by groups opposed to development generally. For example, the South Australian Chamber of Mines and Energy (SACOME) stated that the extended standing provisions allowed 'in the past, groups who have the primary and stated purpose of disrupting and delaying resources projects in order to meet their anti-mining, anti-fossil fuel agenda' to seek 'judicial review of decisions under the EPBC Act through their extended standing in s 487(3)'.⁶ The MCA and Ports Australia pointed to a strategy developed by a range of environmental groups in 2011 aimed at stopping coal export in Australia.⁷

2.6 The legal appeals instigated by these environmental groups were described as frivolous and vexatious. The MCA argued that it is 'manifestly clear' that some groups are seeking to 'game the unique judicial review provisions' of the EPBC Act and that there is little to deter frivolous and vexatious appeals.⁸ While costs may be awarded against the appellant, the MCA stated this is not common (nor necessarily appropriate) in public interest cases. Further, groups appealing a decision are often unable to pay costs.⁹ The MCA concluded that:

It is plain that this campaign of economic sabotage will continue and even escalate without legislative reform.¹⁰

2.7 The Business Council of Australia (BCA) also commented on vexatious litigation and stated:

It would not be correct to say that all historical cases brought under section 487 are necessarily vexatious, but the broad definition of the section does risk vexatious claims in future. Some groups motivated by issues beyond the matters of environmental significance in the Act intend to use section 487, not to address legitimate claims by aggrieved persons, but rather to delay major capital projects and incur costs substantial enough to make the projects unviable.¹¹

4 Ports Australia, *Submission 52*, p. 2.

5 Minerals Council of Australia, *Submission 97*, p. 5; Ports Australia, *Submission 52*, pp 1–2.

6 South Australian Chamber of Mines and Energy, *Submission 42*, p. 1.

7 Ports Australia, *Submission 52*, pp 1–2; Minerals Council of Australia, *Submission 97*, pp 1, 4.

8 Minerals Council of Australia, *Submission 97*, p. 1.

9 Minerals Council of Australia, *Submission 97*, p. 4.

10 Minerals Council of Australia, *Submission 97*, p. 1.

11 Business Council of Australia, *Submission 111*, p. 8.

2.8 The impact of delays to major development projects was also raised by the MCA. The MCA noted that, even if a legal action is not successful, projects are delayed. Resolution of actions may take some time to conclude, adding to the cost of proponents in terms of delay and expense.¹² The MCA added that 'in total, unnecessary delays can add costs of \$46 million per month to a major greenfields mining project'.¹³

2.9 The BCA also commented that even a small delay may 'have a disproportionate impact on the cost of the project, particularly if it limits the window for investment decision-making, which is often already fairly short'. The BCA pointed to the findings of the Productivity Commission that a one-year delay to a major offshore liquefied natural gas project might incur costs to the proponent of up to \$2 billion.¹⁴

2.10 The costs of delays not only affect proponents, but there are also costs to the broader community from delays to revenue, jobs and other benefits generated by major projects. The BCA commented that 'these costs are ultimately borne by the community in economic activity foregone, which leads to lower income and employment'.¹⁵

2.11 The MCA concluded that the repeal of section 487 will reduce the opportunity for frivolous or vexatious legal challenges which may delay development projects.¹⁶ The SACOME added that it supported measures that would 'close avenues to vexatious claims to prevent development of resources projects that have been assessed and approved under Federal and State laws'.¹⁷ The BCA concluded that:

By repealing section 487, the Bill will improve the efficiency of the assessment and approval of major projects and contribute to a more conducive environment for investment and economic growth.¹⁸

2.12 However, Ports Australia, while supporting the repeal of section 487, remained concerned about legal challenges:

...we are not convinced that the removal of this section will significantly limit the number of legal challenges and hence delays to projects. Any challenge may become more complicated when it gets to arguments of

12 Minerals Council of Australia, *Submission 97*, p. 4.

13 Minerals Council of Australia, *Submission 97*, p. 2.

14 Business Council of Australia, *Submission 111*, p. 5.

15 Business Council of Australia, *Submission 111*, p. 3.

16 Minerals Council of Australia, *Submission 97*, p. 3.

17 South Australian Chamber of Mines and Energy, *Submission 42*, p. 1.

18 Business Council of Australia, *Submission 111*, p. 3.

standing or persons aggrieved as was often the case in public interest environment matters prior to the introduction of the legislation.¹⁹

Availability of other review processes

2.13 Industry submitters noted that judicial review will continue to be available to a person who is genuinely and legitimately aggrieved under the ADJR Act, as well as the common law.²⁰ The MCA commented that the 'ADJR Act seeks to achieve a balance between the right of parties to appeal and the certainty required by the proponent regarding the validity of approval decisions'. The MCA went on to state that the ADJR Act ensures that persons affected by a development will have access to judicial review, 'while constraining, within limits, those persons or organisations not legally connected or affected by the development or the matter under consideration'.²¹

2.14 The BCA also noted that these review process would still be available to those that prove they have sufficient standing as a person aggrieved by a decision. The BCA commented:

Accountability for government decisions would still be possible under standing provisions for judicial review in the ADJR Act: persons whose interests are directly affected still have standing. There would still be avenues for the community to participate in the development of major projects, and for the government to be held to account for decisions under the EPBC Act.²²

2.15 In this regard, the Department of the Environment (the department) noted that the repeal of section 487 would not prevent a person or environmental or community group from applying for judicial review of a decision made under the EPBC Act. The department commented that the 'ability to commence proceedings for judicial review either under the ADJR Act or the Judiciary Act is available to any person or organisation that can establish they have standing'.²³

Availability of public engagement

2.16 Submitters noted that extensive community and stakeholder engagement is undertaken during the approval processes for development projects and this enables the public to raise concerns. The MCA noted that project assessment and approval processes for mining developments include comprehensive environmental requirements which may take many years to complete. These processes provide

19 Ports Australia, *Submission 52*, p. 4.

20 South Australian Chamber of Mines and Energy, *Submission 42*, p. 1; Minerals Council of Australia, *Submission 97*, p. 1.

21 Minerals Council of Australia, *Submission 97*, p. 1.

22 Business Council of Australia, *Submission 111*, p. 3.

23 Department of the Environment, *Submission 135*, p. 6.

multiple opportunities at both the Commonwealth and state level for opponents to lodge objections and have their concerns considered.²⁴

2.17 At the Commonwealth level, the department noted that the EPBC Act contains expansive public engagement requirements in the referral and assessment processes. The department explained that:

Once a matter has been referred under the EPBC Act, the referral will be published and the public has an opportunity to comment on whether or not the action is a controlled action. The Minister must take into account any comments made by the public in making the controlled action decision.

If a controlled action decision is made, the public has an opportunity to comment on the assessment documentation prepared by the proponent. Any comments received by the proponent must be taken into account in the finalisation of the assessment documentation. Following submission of the assessment documentation to the Minister, the EPBC Act enables the Minister to seek public comment on the proposed decision and conditions (if any), which must be taken into account by the Minister before deciding whether to grant an approval and what conditions (if any) to impose on the approval.²⁵

2.18 The department concluded that the public consultation processes for specific approval processes will continue to provide an opportunity for the public to engage in the decision-making process under the EPBC Act. This will not be affected by the repeal of section 487.²⁶

2.19 The MCA also noted that there are numerous formal opportunities for public comment under the various state regimes. The MCA provided the following examples:

- Queensland – Public comment is sought on the draft terms of reference for the assessment and on the draft environmental impact statement, and for major projects the draft conditions of the environmental licence.
- Western Australia – Public comment is sought at the project referral stage (referrals published on the WA EPA website). Submissions are also sought on the assessment documentation.
- Victoria – Public comment is sought on the draft scoping document for the environmental effects statement (EES). Once completed, the EES is released for public submissions, which are considered by the minister. In some cases, the minister may appoint an inquiry, which may include a formal hearing process.²⁷

24 Minerals Council of Australia, *Submission 97*, p. 5.

25 Department of the Environment, *Submission 135*, p. 6.

26 Department of the Environment, *Submission 135*, p. 6.

27 Minerals Council of Australia, *Submission 97*, p. 5.

2.20 In addition to formal public consultation, the MCA noted that companies are required to develop and implement comprehensive and inclusive stakeholder engagement plans. Stakeholders include local councils and communities, adjoining landholders, leaseholders, Indigenous interests, relevant government agencies and relevant parts of the broader community.²⁸

Lack of clear substantial improvement in environmental outcomes

2.21 The BCA argued that section 487 has not led to 'clear substantial improvement in environmental outcomes that would not have been achieved through less costly approaches'. The BCA added that cases made under section 487 focus on minor administrative matters as judicial review examines the process undertaken for the purpose of making a decision.²⁹

2.22 The BCA further commented that successful judicial review decisions may delay projects, but rarely result in a difference between the original decision made by the minister and the subsequent decision made following a case under section 487. It was submitted that most of the 30 cases brought under section 487 have not resulted in a different ministerial decision or a change to the conditions attached to the development approval. While there have been instances of successful cases, they have generally resulted in only minor changes to approval conditions. Only one case has resulted in clear substantial improvements in environmental outcomes.³⁰

2.23 Thus, the BCA argued 'it is not clear' whether section 487 has resulted in substantial improvements in environmental outcomes.³¹ Further:

Because it is limited to judicial review, section 487 does not strengthen the already compelling incentives for project proponents to maintain a 'social licence to operate' and protect environmental outcomes.³²

2.24 It was also stated that the cost to the public of third party judicial review challenges is substantial. The Department of the Environment commented that 'exposure to legal challenges is a necessary and appropriate discipline in the EPBC Act decision-making process'. However, the Commonwealth, and the broader community, bears the significant cost of legal challenges. The department noted that the costs of individual matters typically involve hundreds of thousands of dollars of professional fees. In addition, there are significant internal costs to the department of dealing with the proceedings (both money and time spent by officers involved).

28 Minerals Council of Australia, *Submission 97*, p. 5.

29 Business Council of Australia, *Submission 111*, pp 6–7.

30 Business Council of Australia, *Submission 111*, p. 7.

31 Business Council of Australia, *Submission 111*, p. 6.

32 Business Council of Australia, *Submission 111*, p. 7.

Generally, the department cannot recover its external legal costs when it is successful.³³

2.25 The department provided a list of legal challenges under section 487. In 25 legal challenges, the court ordered the third party applicant to pay the Commonwealth's costs, where the Commonwealth was successful in defending the validity of a decision. In relation to the recovery of these costs, the department stated that:

Based on the information available, the Department has not recovered costs except in seven matters. This is due, in substantial part, to the financial incapacity of relevant applicants to pay the costs of the Commonwealth. Generally, the third party applicant has been an individual or an environmental or community group with limited or no assets.³⁴

Continued protection of the environment

2.26 The department noted that the repeal of section 487 will not result in a reduction in environmental standards. The assessment and approval provisions under the EPBC Act will not be changed and the matters that the minister must have regard to, when deciding whether to grant an approval, will not be altered.³⁵

33 Department of the Environment, *Submission 135*, p. 5.

34 Department of the Environment, *Submission 135*, p. 5.

35 Department of the Environment, *Submission 135*, p. 6.

Chapter 3

Evidence in support of the retention of section 487

3.1 The committee received many submissions which supported the retention of section 487. It was argued that the proposed change will undermine the EPBC Act's purpose of protecting the environment by disregarding the fundamental principle that breaches of environmental law are substantially different in nature from breaches of other legislative provisions. Submitters noted that environment law protects the public interest in a healthy environment and society.¹

3.2 Submitters pointed to specific matters which they argued did not support the repeal of section 487 including that:

- there is limited evidence of vexatious or frivolous litigation;
- the bill will not achieve its purpose;
- access to justice will be limited;
- the rule of law must be maintained;
- reviews have supported the retention of extended standing for environmental matters;
- the repeal will have a retrospective application; and
- compliance with international obligations will be compromised.

Limited evidence of vexatious or frivolous litigation

3.3 Many submitters stated that there is a lack of evidence to support the argument that section 487 allows for vexatious or frivolous litigation. Indeed, it was argued that use of section 487 is the exception rather than routine.² In support of this view, submitters noted that around 0.4 per cent of the 5,500 projects referred to the Department of the Environment for assessment since the EPBC Act came into force in 2000 have been the subject of a legal challenge.³

1 Law Council of Australia, *Submission 61*, p. 4; Conservation Council of South Australia, *Submission 65*, p. 3.

2 Wildlife Preservation Society of Queensland, *Submission 67*, p. 1; Dr Robyn Bartel, *Submission 103*, p. 2.

3 Public Law and Policy Research Unit, University of Adelaide, *Submission 35*, p. 8; The Australia Institute, *Submission 39*, p. 1; Nature Conservation Council of NSW, *Submission 43*, p. 3; WWF-Australia, *Submission 74*, p. 1. Lists and analysis of judicial review cases under the EPBC Act were provided by Dr Chris McGrath (*Submission 96*, pp 10–17) and The Australia Institute (*Submission 39*, pp 1–5).

3.4 Some submitters noted that, given the limited number of legal challenges, the Government's assertion that section 487 must be repealed because environmental groups are increasingly using it to deliberately delay projects cannot be sustained.⁴ Dr Chris McGrath commented that the explanatory memorandum to the bill did not provide any evidence that section 487 had led to inappropriate litigation or has led to an inappropriately high number of review applications as 'there is no such evidence'.⁵

3.5 Dr McGrath was of the opinion that 'the proposed amendment removing this section is out of all proportion to any perceived problems created by the section'.⁶ The Lock the Gate Alliance added that 'the Government appears to be acting solely in knee-jerk response to one Federal Court case where in fact no ruling was made, but where the Government conceded an error of law had been made, and set aside its own decision. This is not a sound basis for law-making'.⁷

3.6 The committee received evidence from those supporting the retention of section 487 which argued that there are numerous mechanisms within the judicial system, and at a practical level, that safeguard against vexatious litigation. As a consequence section 487 has been used sparingly.⁸

3.7 First, litigation may be challenged as frivolous or vexatious or an abuse of process. Dr McGrath noted that none of the cases brought under section 487 have been challenged in this way. In addition, the Federal Court may award indemnity costs if litigation is undertaken without basis and no reasonable prospect of success. No indemnity costs have been awarded by the Federal Court in any case brought under section 487.⁹

3.8 Secondly, the very limited and technical cause of action to challenge administrative decisions under the EPBC Act makes success in judicial review challenges difficult to achieve.¹⁰

3.9 Thirdly, some submitters argued that litigation is only entered into where there is both a meritorious argument and a reasonable prospect of success.¹¹ It was

4 Public Law and Policy Research Unit, University of Adelaide, *Submission 35*, p. 9; Australian Conservation Foundation, *Submission 38*, p. 1; Wildlife Preservation Society of Queensland Fraser Coast, *Submission 58*, p. 1; Professor Jacqueline Peel et al, University of Melbourne, *Submission 76*, p. 3; Climate Change Australia, *Submission 87*, p. 3.

5 Dr Chris McGrath, *Submission 96*, p. 7.

6 Dr Chris McGrath, *Submission 96*, p. 6.

7 Lock the Gate Alliance, *Submission 109*, p. 2.

8 Australian Conservation Foundation, *Submission 38*, p. 3; The Wilderness Society, *Submission 44*, p. 7; EDOs of Australia, *Submission 114*, p. 11.

9 Dr Chris McGrath, *Submission 96*, p. 3; see also Humane Society International, *Submission 106*, p. 4; Assistant Professor Narelle Bedford, *Submission 129*, p. 6.

10 Australian Conservation Foundation, *Submission 38*, p. 3; Dr Chris McGrath, *Submission 96*, p. 3.

also noted that lawyers, acting in environmental matters, vet poor cases thereby preventing abuse of section 487. Mr Murray Wilcox AO QC commented that environmental groups are advised not to bring a legal action 'unless first advised, by a specialist lawyer, that they had a strong legal case'.¹² This view was supported by Dr McGrath who submitted that, in his experience, only around one in five cases in which legal advice on a potential application for judicial review for decisions under the EPBC Act is sought results in proceedings actually commencing.¹³ Dr McGrath added that 'lawyers have a strong ethical duty to prevent abuse of the court system and this provides an important safeguard against s 487 being used in abuse of court process'.¹⁴

3.10 Fourthly, there are significant disincentives for organisations and individuals to bring proceedings which do not have a prospect of success given the complexity of proceedings and time involved. It was argued that there are generally limited resources available to organisations and individuals to commence a costly legal action and little pro bono legal assistance is available. Failure may also result in the possibility of adverse costs orders, orders for security of costs and undertakings as to damages—a strong disincentive for poorly resourced environmental organisations.¹⁵ For these reasons, the submission from the University of Adelaide's Public Law and Policy Research Unit commented that 'for the majority of public interest groups litigation is seen as a last resort measure in the process to retain, protect and conserve the environment'.¹⁶

3.11 Finally, submitters noted that rather than being unusual, there are numerous examples of open standing provisions within a range of state and international legislation. It was argued that these provisions have not resulted in a flood of vexatious or frivolous litigation.¹⁷ For example, NSW environmental and planning laws contain open standing for any person to seek judicial review of a legal error or bring enforcement proceedings where someone has breached the law. Professor Jacqueline Peel et al, from the University of Melbourne, also noted that international

11 Professor Jacqueline Peel et al, University of Melbourne, *Submission 76*, p. 3; Humane Society International, *Submission 106*, p. 3.

12 Mr Murray Wilcox AO QC, *Submission 19*, p. 2.

13 Dr Chris McGrath, *Submission 96*, p. 7.

14 Dr Chris McGrath, *Submission 96*, p. 8; see also Professor Jacqueline Peel et al, University of Melbourne, *Submission 76*, p. 4.

15 Dr Gabrielle Appleby, *Submission 23*, p. 2; Australian Conservation Foundation, *Submission 38*, p. 3; The Wilderness Society, *Submission 44*, p. 5; EDOs of Australia, *Submission 114*, p. 7.

16 Public Law and Policy Research Unit, University of Adelaide, *Submission 35*, p. 6.

17 Public Law and Policy Research Unit, University of Adelaide, *Submission 35*, p. 5; EDOs of Australia, *Submission 114*, p. 7.

best practice reforms have been designed to promote the rule of law, democratic participation in public decision-making and enhanced transparency.¹⁸

The bill is not likely to achieve its purpose

3.12 While not conceding that section 487 was creating a problem with 'vigilante litigation', submitters argued that the bill will not achieve its stated purpose.¹⁹ Rather, as noted above, an applicant for judicial review of a decision made under the EPBC Act would be required to demonstrate standing under the ADJR Act or the Judiciary Act. It was asserted that the use of these means to bring about judicial review will add to complexity, uncertainty and delays as questions of standing will require resolution.

3.13 Mr Wilcox noted that section 487 was included in the EPBC Act 'in order to end the expensive side-issue about standing'. He explained that section 487 provides a clear test so that 'the court would rarely need to spend any time on standing; it could get on with the case itself'.²⁰

3.14 In contrast, section 5 of the ADJR Act contains reference to a person entitled to commence judicial review proceedings as a 'person aggrieved'. While the term person aggrieved is further defined in subsection 3(4) of the ADJR Act as 'a person whose interests are adversely affected', Assistant Professor Narelle Bedford noted 'no further legislative guidance or definition is given in the Act'.²¹

3.15 Submitters argued that, should section 487 be repealed, courts and legal parties will be required to spend extra time initially to resolve the issue of standing before proceeding to matters of substance concerning the legality of the decision-making.²² The ACF concluded that:

Removing the extended standing provision would have the opposite effect to what is intended. The Bill would increase delay for projects as a result of legal proceedings, not reduce it.²³

18 Professor Jacqueline Peel et al, University of Melbourne, *Submission 76*, p. 4.

19 Australian Conservation Foundation, *Submission 38*, p. 3.

20 Mr Murray Wilcox AO QC, *Submission 19*, p. 1.

21 Assistant Professor Narelle Bedford, *Submission 129*, p. 4; see also Mr Murray Wilcox AO QC, *Submission 19*, p. 2.

22 Public Law and Policy Research Unit, University of Adelaide, *Submission 35*, p. 10; Australian Conservation Foundation, *Submission 38*, p. 2; Colong Foundation for Wilderness Ltd, *Submission 41*, p. 2; The Wilderness Society, *Submission 44*, p. 5; Mr Stephen Keim SC, *Submission 78*, p. 3; Environmental Justice Australia, *Submission 93*, p. 5; National Farmers' Federation, *Submission 112*, p. 1; Assistant Professor Narelle Bedford, *Submission 129*, p. 6.

23 Australian Conservation Foundation, *Submission 38*, p. 3.

Limiting access to justice

3.16 It was argued by submitters, including the Law Council of Australia (LCA), that the extended standing conferred under section 487 was intended to broaden access to justice in environmental matters.²⁴ EDOs of Australia submitted that section 487 recognises that all Australians have an interest in the protection of natural heritage and the importance of conservation groups, researchers and educators in safeguarding these interests.²⁵

3.17 The LCA stated that while the provision of extended standing has assisted with public interest environmental law, there still remain numerous constraints that mitigate against public interest litigation including the cost of litigation.²⁶ This will be exacerbated if section 487 is repealed. In particular, it was noted that not only do environmental groups have to prove sufficient standing, but also community groups and farming and landholder organisations.

3.18 The Lock the Gate Alliance pointed to the range of stakeholders, including primary producers, community-based landcare groups, and rural industries and businesses, who are dependent for their livelihoods on the sustainable management of Australia's natural heritage, water resources and internationally recognised icons.²⁷ Environmental Justice Australia also noted the interest of farming and landholder organisations in decisions around the water trigger in light of expansion of mining or coal seam gas projects that will, or are likely to, have significant effects on water resources. Environmental Justice Australia went on to comment that decisions around these projects are likely to be controversial and removal of the standing right of representative landholder organisations may impact people in affected rural and regional areas.²⁸

3.19 The National Farmers' Federation (NFF) raised concern about the loss of standing by individual farmers and their representative bodies should section 487 be repealed. The NFF stated that it had, to date, not received sufficient assurances that the repeal of section 487 would allow farmers and their representative bodies to have continued access to judicial review of government decisions that they believe are going to adversely affect farming communities or individual operations.²⁹

24 Law of Council of Australia, *Submission 61*, p. 8.

25 EDOs of Australia, *Submission 114*, p. 7; see also Nature Conservation Council of NSW, *Submission 43*, p. 2.

26 Law of Council of Australia, *Submission 61*, p. 8.

27 Lock the Gate Alliance, *Submission 109*, p. 3.

28 Environmental Justice Australia, *Submission 93*, p. 7.

29 National Farmers' Federation, *Submission 112*, p. 1; see also Cotton Australia, *Submission 116*, p. 1.

3.20 It was also argued by submitters that the extended standing provisions were appropriate for environmental issues as the inter-connectivity of regional ecosystems means that environmental damage may occur at significant distance from the site of the damage.³⁰ Submitters stated that this is particularly true of large-scale developments such as new coal mines where effects may be felt beyond the immediate vicinity. The Cairns and Far North Environment Centre also pointed to air pollution and water impacts.³¹ It was concluded that it is not possible to 'geo-fence' environmental damage and thus 'interested parties' cannot be restricted to local community groups or individuals.³²

3.21 In addition, it was argued that many of those 'directly' affected by a development decision will not have a full understanding of the long-term effects of a development.³³ Thus, the bill proposes to remove standing for groups and persons who are 'best placed to represent the interests of all Australians regarding environmental matters of national and international significance'.³⁴

3.22 A further matter raised in submissions was the shifting of responsibility and burden for the protection of national icons to those directly affected by a development proposal. The Mackay Conservation Group commented that graziers, who are most directly affected by some developments, generally do not have the time or financial resources to undertake a legal challenge. The Mackay Conservation Group stated that the 'proposed changes would dramatically shift the balance of power even further towards mining companies, who already have access to vast resources and legal avenues that dwarf those available to landholders and communities.'³⁵ This view was supported by 350.org Australia which noted that most cases against mining companies emanate from small regional community groups who are unlikely to gain standing on their own without the provisions of section 487.³⁶

30 South Australian Ornithological Association, *Submission 26*, p. 2; People for the Plains, *Submission 40*, p. 2; Conservation Council SA, *Submission 65*, p. 2; Capricorn Conservation Council, *Submission 72*, p. 2; RMIT Interdisciplinary Conservation Science Research Group, *Submission 102*, p. 2; Yarra Climate Action Now, *Submission 125*, p. 1.

31 Cairns and Far North Environment Centre, *Submission 71*, p. 1; see also Public Health Association of Australia, *Submission 136*, p. 5.

32 Wide Bay Burnett Environment Council, *Submission 20*, p. 3; The Wilderness Society, *Submission 44*, p. 3; EDO of North Queensland, *Submission 56*, p. 1; National Farmers' Federation, *Submission 112*, p. 1.

33 South Australian Ornithological Association, *Submission 26*, p. 2.

34 Public Law and Policy Research Unit, University of Adelaide, *Submission 35*, p. 7; see also North Queensland Conservation Council, *Submission 53*, p. 2.

35 Mackay Conservation Group, *Submission 48*, p. 3; see also North Queensland Conservation Council, *Submission 53*, p. 1.

36 350.org Australia, *Submission 88*, p. 3.

Maintenance of the rule of law

3.23 Submitters argued that the threat of third party appeals creates a stronger incentive for project proponents and government to adhere to the law and to improve environmental assessment of major projects.³⁷ In addition, it was stated that third party appeals have an important role in ensuring accountability and transparency in government decision-making, thereby building public confidence in major environmental decisions and the rule of law.³⁸

3.24 The LCA also commented that 'the provision of access to remedies is an important safeguard for the rule of law, for accountable and responsible government, and as an anti-corruption safeguard'.³⁹ Further, given the broad powers conferred on the Commonwealth to approve development applications affecting matters of national significance, 'it is appropriate that interested stakeholders can ensure that those powers are exercised responsibly and with accountability'.⁴⁰ The EDOs of Australia similarly stated that Australians are entitled to expect that the law will be followed in relation to the protection of threatened species.⁴¹

3.25 This view was also put forward by many other submitters. For example, Professor Rosemary Lyster, Australian Centre for Climate and Environment Law, commented:

In a democracy like Australia, where the Rule of Law is paramount, it is in the interests of every citizen and indeed of the government that lawful administrative decisions be made and that if they are unlawful that the courts declare them to be so.⁴²

3.26 The Public Law and Policy Research Unit, University of Adelaide, commented that:

A fundamental issue at stake, which goes beyond a disagreement as to whether the particular coal mine proposed is environmentally acceptable, is the primary importance of the rule of law. The rule of law requires administrators and politicians, when exercising their duties under

37 South Australian Ornithological Association, *Submission 26*, p. 2; The Wilderness Society, *Submission 44*, p. 4; Trees for Life, *Submission 45*, p. 2; Friends of the Earth, *Submission 46*, p. 2; Environment Institute of Australia and New Zealand, *Submission 54*, p. 7; Environment Centre NT, *Submission 68*, p. 2; Greenpeace Australia Pacific, *Submission 89*, p. 2.

38 Environment Victoria, *Submission 14*, p. 1; EDOs of Australia, *Submission 114*, p. 3; Wildlife Queensland–Townsville Branch, *Submission 117*, p. 3; Places You Love Alliance, *Submission 121*, p. 2; Assistant Professor Narelle Bedford, *Submission 129*, p. 3.

39 Law of Council of Australia, *Submission 61*, p. 8.

40 Law of Council of Australia, *Submission 61*, pp 8–9.

41 EDOs of Australia, *Submission 114*, p. 2.

42 Australian Centre for Climate and Environment Law, *Submission 55*, p. 2.

legislation such as the EPBC Act, to comply with legislative requirements imposed by the statute.⁴³

Reviews of extended standing

3.27 Submitters pointed to the outcomes of reviews which supported the current extended standing provisions in section 487.⁴⁴ The principal reviews cited were the 2009 independent review of the EPBC Act chaired by Dr Allan Hawke (Hawke Review) and the 2013 Productivity Commission (PC) report on major project development assessment processes.

3.28 The Humane Society International commented that the Hawke Review was 'unequivocal' in its support for the extended standing provisions in the EPBC Act.⁴⁵

3.29 The Hawke Review noted that 'in the absence of s.487, some individuals and organisations may not have otherwise had standing to bring an application for judicial review under the general rules'. The Hawke Review went on to comment that the standing provisions had 'created no difficulties and should be maintained'.⁴⁶ The Hawke Review also noted that some Commonwealth and state and territory legislation contained 'open standing' provisions. However, despite the fear that these types of provisions would 'engender a "flood" of litigation', there was no evidence of these provisions being abused and the number of cases to date had been modest.⁴⁷

3.30 The Hawke Review went on to recommend that the EPBC Act be amended to extend the definition of legal standing for merits review applications to include a person who had made a formal comment during the relevant decision-making process.⁴⁸

43 Public Law and Policy Research Unit, University of Adelaide, *Submission 35*, p. 9.

44 Public Law and Policy Research Unit, University of Adelaide, *Submission 35*, p. 8; Nature Conservation Council of NSW, *Submission 43*, p. 4; The Wilderness Society, *Submission 44*, p. 1; WWF-Australia, *Submission 74*, p. 1; Birdlife Australia, *Submission 81*, p. 2; Australian Marine Conservation Society, *Submission 101*, p. 2; Lock the Gate Alliance, *Submission 109*, p. 2; EDOs of Australia, *Submission 114*, pp 11–12.

45 Humane Society International, *Submission 106*, p. 2.

46 Australian Government, Department of Environment, Water, Heritage and the Arts, *The Australian Environment Act – Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, October 2009, p. 261.

47 Australian Government, Department of Environment, Water, Heritage and the Arts, *The Australian Environment Act – Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, October 2009, p. 261.

48 Australian Government, Department of Environment, Water, Heritage and the Arts, *The Australian Environment Act – Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, October 2009, p. 260.

3.31 The PC research report on major project development assessment processes considered the issue of review processes including standing for third parties. The PC commented that:

Determining appropriate standing rights requires a balance to be struck between allowing those who have a legitimate interest in the decision to bring an application, while discouraging undesirable and vexatious reviews and appeals.⁴⁹

3.32 The PC went on to recommend that harmonised provisions be agreed for merit or judicial review applications. The PC further recommended that standing to initiate judicial or merits review of approval decisions be limited to the proponent; those whose interests have been, are, or could potentially be directly affected by the project or proposed project; and, those who have taken a substantial interest in the assessment process. In exceptional cases, the PC recommended that the review body should be able to grant leave to other persons if a denial of natural justice would otherwise occur.⁵⁰

3.33 Submitters also pointed to the New South Wales Independent Commission Against Corruption (ICAC) report on anti-corruption safeguards and the NSW planning system.⁵¹ The report stated that third party appeal rights had the potential to deter corrupt approaches, while their absence creates an opportunity for corrupt conduct to occur, as an important disincentive for corrupt decision-making is absent from the planning system.⁵²

Retrospective application

3.34 The LCA voiced concern that the repeal of section 487 will operate retrospectively. The LCA noted that Schedule 1 of the bill states, in relation to the application of the amendment, that:

The repeal of section 487 of the *Environment Protection and Biodiversity Conservation Act 1999* by this Schedule applies in relation to any application made under the *Administrative Decisions (Judicial Review) Act 1977* after this item commences (whether the decision, failure to make a decision or conduct to which the application relates occurs before or after this item commences).⁵³

49 Productivity Commission, *Major Project Development Assessment Processes*, Research Report, Canberra, November 2013, p. 272.

50 Productivity Commission, *Major Project Development Assessment Processes*, Research Report, Canberra, November 2013, p. 276.

51 Australian Conservation Foundation, *Submission 38*, p. 6; Mackay Conservation Group, *Submission 48*, p. 2; Cairns and Far North Environment Centre, *Submission 71*, p. 2; Queensland Conservation, *Submission 85*, p. 2.

52 Independent Commission Against Corruption (NSW), *Anti-corruption safeguards and the NSW planning system*, ICAC, Sydney, February 2012, p. 22.

53 Law of Council of Australia, *Submission 61*, p. 8.

3.35 The LCA argued that retrospective operation of laws 'causes uncertainty which is undesirable from a rule of law standpoint' and went on to conclude that 'the Executive ought to leave it to the Courts to determine if a claim is frivolous or vexatious or being brought for ulterior motives'.⁵⁴

Compliance with international legal obligations

3.36 The National Environmental Law Association commented that, in enacting the EPBC Act, the Howard Government recognised that 'Australia's new generation of national environmental laws should embrace the principles of public participation and access to justice found in the Rio Declaration on the Environment and Development and the UNECE [United Nations Economic Commission for Europe] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention)'.⁵⁵ EDOs of Australia also commented that broad standing reflects Australia's commitment to international laws and principles such as the International Covenant on Civil and Political Rights and the Rio Declaration on Environment and Development.⁵⁶

3.37 It was argued that the repeal of section 487 undermines these commitments and obligations and damages Australia's reputation.⁵⁷ The LCA commented that many multilateral environmental instruments recognise the importance of public participation in environmental protection 'by all concerned citizens'. The LCA added that 'non-regression' is an emerging principle of international environmental law. The principle 'suggests that public authorities should avoid amending legislation to reduce applicable protections'. The LCA suggested that 'the non-regression principle is particularly apposite in this instance'.⁵⁸

54 Law of Council of Australia, *Submission 61*, p. 8.

55 National Environmental Law Association, *Submission 80*, p. 2.

56 EDOs of Australia, *Submission 114*, pp 9–10.

57 Dr Robyn Bartell, *Submission 103*, p. 2.

58 Law of Council of Australia, *Submission 61*, pp 9–10.

Chapter 4

Committee view

4.1 The committee received submissions which supported the repeal of section 487 and submissions which supported its retention. Submitters who supported the retention of section 487 pointed to the limited number of legal challenges, the possible diminution of access to justice and the need to maintain the rule of law. The committee also notes the arguments put forward by those supporting the repeal of section 487, such as the costs to proponents and consequences for economic activity when major development projects are delayed by judicial review sought by groups granted standing by section 487. The committee also acknowledges the significant cost of these challenges to the Commonwealth. The Department of the Environment indicated that it had not recovered costs in the majority of cases where the Commonwealth had been successful in defending the validity of a decision.

4.2 The committee considers that the repeal of section 487 will not diminish the protection of Australia's environment and the conservation of biodiversity and heritage provided by the EPBC Act. The provisions of the EPBC Act specify the arrangements for environmental impact assessment and the matters that the minister must have to regard to when deciding to grant an approval. These provisions, which are the core of the Commonwealth regime for the protection of matters of national environmental significance, will not be altered by the repeal of section 487.

4.3 The committee notes that review of decisions under the EPBC Act will remain available through the ADJR Act and Judiciary Act. In addition, the committee notes that there is continuous engagement with interested stakeholders, including communities where projects are proposed, in both Commonwealth and state and territory environmental assessment processes.

Recommendation 1

4.4 The committee recommends that the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 be passed.

Senator Linda Reynolds CSC
Chair

Labor Senators' dissenting report

1.1 Labor Senators do not see any merit in the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 and strongly oppose it.

1.2 Good government is based on evidence and appropriate public policy responses. However, Labor Senators consider that the proposed repeal of section 487 cannot be described as anything but a very unsophisticated, and short-sighted, response to an administrative error made by the Government in the approval process for the Adani Carmichael coal mine in Queensland.

1.3 The Government has been caught for not complying with the requirements of the approval processes of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). It was not an example of 'lawfare' or action by 'vigilante' litigants to disrupt and delay key infrastructure projects as the Government has constantly described it. Rather, the challenge brought by the Mackay Conservation Group was based on legitimate grounds.

1.4 This view is borne out by the circumstances around the making of orders by the Federal Court in August this year. The orders were made without a hearing. The Federal Court made no judgment and there were no findings. The orders were, in fact, made after the Australian Government Solicitor had presented a letter to the Court, with the agreement of all parties, with the proposed orders. That letter informed the Court that an error sufficient to set aside the Minister's decision had been made. The parties' request and proposed orders were based upon these significant issues:

- the Minister found that the proposed action would have a significant impact on two listed threatened species: the Yakka Skink and the Ornamental Snake;
- there were conservation advices approved by the Minister for those two species;
- under the terms of subsection 139(2) of the EPBC Act, it was mandatory for the Minister to have regard to the approved conservation advices;
- in deciding whether or not to approve the proposed action, the Minister did not have regard to the approved conservation advices; and
- the Minister did not have regard to the approved conservation advices because they were not included in the material that was before him at the time he made his decision.¹

1.5 Having acknowledged that an administrative error had been made during the approval process, it was then open to the Minister to re-approve the Carmichael mine

1 Federal Court of Australia, *Statement re NSD33/2015 Mackay Conservation Group v Minister for the Environment*, 19 August 2015; see also Public Law and Policy Research Unit, University of Adelaide, *Submission 35*, p. 9.

development in accordance with the provisions of the EPBC Act. This occurred on 14 October 2015.

1.6 The Government has claimed that the repeal of section 487 is necessary because important infrastructure projects have been needlessly delayed by vexatious or frivolous litigation. The few submitters supporting the bill made similar claims and pointed to adverse effects on business certainty, jobs and the economy.

1.7 Labor Senators, however, consider that the evidence presented to the committee convincingly refutes the level of vexatious or frivolous litigation as a ground for the repeal of section 487. Of the 5,500 projects referred to the Department of the Environment for assessment since the EPBC Act came into force, around 0.4 per cent have been the subject of legal challenges.² This does not provide any evidence that section 487 is being used misused and, as noted by Dr Chris McGrath, the Government did not provide any evidence of inappropriate litigation in the explanatory memorandum to the bill.³

1.8 Submitters also provided extensive and compelling evidence regarding the safeguards within the judicial system that stop vexatious or frivolous actions. This includes the awarding of indemnity costs by the Federal Court if litigation is undertaken without basis and no reasonable prospect of success.⁴ The Humane Society International observed that:

Given the restricted resources and time of the courts, if they were being inundated by vexatious litigants advancing causes which were baseless purely to delay projects, they would likely have said so and would have refused to hear cases such as the recent challenge to the Adani coal mine. Considering this case was not thrown out and was indeed successful in court indicates that no such inundation is current occurring. The supposed premise for this Bill is baseless, there being no "lawfare" being waged by environmental groups against developments.⁵

1.9 There are also very practical reasons for the small number of challenges under section 487: success is difficult to achieve and challenges are complex, time consuming, expensive and carry the risk of adverse costs orders if the case is unsuccessful. As described in evidence, 'this is not a low bar which any group wishing

2 The Australia Institute, *Submission 39*, p. 1; Nature Conservation Council of NSW, *Submission 43*, p. 3; WWF-Australia, *Submission 74*, p. 1.

3 Dr Chris McGrath, *Submission 96*, p. 7.

4 Dr Chris McGrath, *Submission 96*, p. 3.

5 Humane Society International, *Submission 106*, p. 4.

to delay a project or advance a vexatious claim can easily jump'⁶ and as a consequence section 487 is seen as a 'last resort'.⁷

1.10 The Government and supporters of the repeal of section 487 have put forward a range of other arguments in support of this very poor piece of legislation. Labor Senators note that, similar to the vexatious or frivolous litigation argument, these do not stand up to even cursory scrutiny.

1.11 The Attorney-General has stated that the extended standing provision in the EPBC Act is 'very unusual, indeed unique'.⁸ This is not the case. The Commonwealth *Hazardous Waste (Regulation of Exports and Imports) Act 1989*, at section 58A, provides for extended standing of individuals and organisations to seek judicial review. There are also examples of extended standing in state legislation.⁹

1.12 Labor Senators also note that there are examples at both the Commonwealth and state level of 'open' standing for any person to commence certain proceedings. These examples include the NSW *Environmental Planning and Assessment Act 1979*. Submitters argued that, far from opening 'floodgates' of litigation, the open standing provisions have been used in a limited number of cases.¹⁰

1.13 The Government has argued that the repeal of section 487 will remove an avenue for groups that seek to delay infrastructure projects. However, while desired by the Government, this may not be the case. The evidence received by committee pointed to another, very likely, outcome: that reliance on the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) and the *Judiciary Act 1903* will introduce uncertainty about who has standing to bring about judicial review. As a consequence, the time of the courts, project proponents, those bringing a challenge and the Government will be diverted to lengthy and unnecessary arguments to clarify the standing issue rather than addressing compliance with legislative provisions. The Law Council of Australia stated in this regard:

The s 487 test is broader and clearer than that under the AD(JR) Act, and has the potential to reduce disputes about whether an applicant has standing, and therefore also the cost and length of litigation.¹¹

6 Humane Society International, *Submission 106*, p. 3.

7 Friends of Stradbroke Island, *Submission 34*, p. 3; Public Law and Policy Research Unit, University of Adelaide, *Submission 35*, p. 6; Wildlife Queensland, Townsville Branch, *Submission 117*, p. 1; Conservation Council ACT Region, *Submission 128*, p. 4.

8 Senator the Hon George Brandis QC, *Interview transcript*, Australian Broadcasting Corporation, Insiders, 29 September 2015
<http://www.abc.net.au/insiders/content/2015/s4320411.htm> (accessed 16 November 2015).

9 S Power, Parliamentary Library, 'Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015', *Bills Digest*, 20 August 2015, p. 25.

10 Public Law and Policy Research Unit, University of Adelaide, *Submission 35*, p. 5.

11 Law Council of Australia, *Submission 61*, p. 5.

1.14 Many other submitters commented on this issue with, for example, Mr Murray Wilcox AO QC stating that that 'the Bill is futile'. Mr Wilcox went on to explain this view:

The Minister apparently assumes the court will apply the standing rule laid down in section 5 of the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act). That section allows a "person aggrieved" to seek review of a decision. The ADJR Act does not define this term and there is no reason to read it as being limited to a person with a financial interest in the decision. It is a safe bet, if this Bill is passed, that the courts will interpret section 5 in a similar way to their adaptation to modern Australian conditions of the old English rule. The only change from the present situation will be that the parties, and so the courts, will spend time examining the details of the applicant's association with the relevant issue or place. And people wonder why litigation is so expensive.¹²

1.15 Labor Senators concur with this assessment: the repeal of section 487 may ultimately not only fail to exclude environmental groups from challenging decisions made under the EPBC Act but the courts will also have to make complex assessments about standing under the ADJR Act and Judiciary Act thus adding to time delays and costs before the facts of the matter are reviewed.

1.16 It was also argued by supporters of the bill that the extended standing provisions have resulted in no clear substantial improvements in environmental outcomes.¹³ Labor Senators consider this to be an unsound argument and note that the Department of the Environment stated that 'exposure to legal challenges is a necessary and appropriate discipline in the EPBC decision-making process'.¹⁴

1.17 Other examples of improved environmental outcomes were provided to the committee. Mr Stephen Keim SC pointed to the Nathan Dam case which resulted in the clarification of matters to be taken into account by the Minister in the approval process. Mr Keim submitted:

If the [Queensland] Conservation Council was not granted standing, the question would have not been decided. Ministers for the Environment, to this day, may have prevented themselves, in breach of the law's requirements, from refusing proposed developments or, more importantly, from imposing crucial conditions to protect down-stream environments (like the Reef in [the Nathan Dam case]) through a misunderstanding of what the law permitted and required the minister to take into account.¹⁵

1.18 The Wilderness Society also commented that the decision by North Queensland Bulk Ports Corporation to look for alternative options to dumping dredge

12 Mr Murray Wilcox AO QC, *Submission 19*, p. 2.

13 Business Council of Australia, *Submission 111*, pp 6–7.

14 Department of the Environment, *Submission 135*, p. 5.

15 Mr Stephen Keim SC, *Submission 78*, pp 2–3.

spoil at sea was prompted by the Carmichael mine court case. The Wilderness Society concluded:

Thus, standing granted under s 487 of the EPBC helped facilitate a better decision-making process and ultimately a better outcome for the environment.¹⁶

1.19 Other submitters also argued that the extended standing provisions have benefited the environment by limiting the potential damage of large development projects. The Conservation Council ACT Region, for example, stated:

The potential for challenges by third parties encourages proponents of projects to fully consider the consequences of insufficient planning and accounting for environmental values, thereby reducing the number of inappropriate proposals that reach a stage where litigation might be pursued.

The Conservation Council has found that our organisation having standing on environmental matters has probably led to better and earlier discussions with proponents, including the Government, and better development outcomes for all parties.¹⁷

1.20 Of particular concern to Labor Senators is the limiting of access to justice if section 487 is repealed. The committee received persuasive evidence of the need to ensure that there is adequate access to justice in relation to environmental matters. First, the protection of the environment is of concern to all Australians. Conservation groups, researchers and educators have an important role in safeguarding the interests of the Australian public generally. They are experts in their field, have great understanding of the consequences of environmental impacts and the ability to monitor these issues. The Nature Conservation Council of NSW commented:

Environment organisations in particular play a key role in defending the public interest, especially when individuals face significant challenges in engaging in environmental decision making, and in particular accessing judicial review mechanisms. In a world that is increasingly under threat from adverse and complex environmental problems, including climate change and unprecedented loss of biodiversity, the ability for democratic societies to participate in environmental decision making is greatly advanced by the role that can be played by environmental organisations.¹⁸

1.21 Secondly, the limiting of standing to those directly affected by development projects fails to recognise the potentially far-reaching environmental effects of those projects. Submitters provided examples of adverse environmental effects occurring at great distances from the project site including effects on water resources and air pollution. The People for the Plains commented that a development in a state forest,

16 The Wilderness Society, *Submission 44*, p. 3.

17 Conservation Council ACT Region, *Submission 128*, p. 4.

18 Nature Conservation Council of NSW, *Submission 43*, p. 2.

where there are no direct neighbour landholders, may have an effect on a community-wide resource such as the Great Artesian Basin.¹⁹

1.22 Labor Senators consider that the bill displays a simplistic approach to protection of matters on national environmental significance and a lack of understanding of the potential far-reaching effect on the environment of large development projects.

1.23 Thirdly, should this bill be passed, individuals directly affected by development proposals will be forced to take on the burden of protection of the Australian environment. EDOs of Australia commented:

By removing standing for third parties other than landholders – conservation groups and individuals concerned about the environment – the Bill *increases* the burden of responsibility on affected landholders to 'put the farm on the line' to obtain private legal advice and challenge the legality of a government decision.²⁰

1.24 Labor Senators do not consider that any government should contemplate shifting the burden of overseeing protection of matters of national environmental significance to individuals, much less expect those individuals to 'put the farm on the line' to ensure that the natural heritage of all Australians is protected. As EDOs of Australia went on to state:

By seeking to draw a hard line between standing for landholders and conservationists, the Bill overlooks the primary role of the EPBC Act – to protect the national environment – which necessarily involves 'the community, land-holders and indigenous peoples'.²¹

1.25 Labor Senators support the maintenance of the rule of law and consider that the Government's response to the Carmichael mine case calls into question the Government's commitment to upholding the rule of law.

1.26 The EPBC Act establishes the assessment and approval process for development projects that have an impact on matters of national environmental significance. In the Carmichael mine case, the Government failed to ensure that that process has been undertaken in accordance with the provisions of the EPBC Act. Submitters asserted that the Government is now responding to an individual case, when the 'primary' importance is the rule of law: decision-makers, when exercising their duties under legislation are required to comply with legislative requirements.²²

19 People for the Plains, *Submission 40*, p. 2.

20 EDOs of Australia, *Submission 114*, p. 8.

21 EDOs of Australia, *Submission 114*, p. 8.

22 Dr Gabrielle Appleby, *Submission 23*, p. 3; Australian Conservation Foundation, *Submission 38*, p. 4; Nature Conservation Council of NSW, *Submission 43*, p. 1; Dr Rosemary Lyster, *Submission 55*; p. 1; Environmental Justice Australia, *Submission 93*, p. 6.

1.27 The Public Law and Policy Research Unit, University of Adelaide, pointed to the importance of compliance with legislated provisions in relation to environmental approvals. It argued that the 'relationship between the rule of law and government decision-making under environmental legislation is absolutely critical to the protection of environmental values'. The Public Law and Policy Research Unit went on to comment that the response to the Carmichael case suggested that the Attorney-General accepted that 'where the Environment Minister makes a lawful decision, as appears to the case in relation to the proposed Carmichael coal mine, he or she should not be subject to legal challenge by the conservation organisation'. As such, it was concluded that the rule of law 'has become secondary to the economic and political goals of the government of the day' and 'such an attitude is of grave concern as it seeks to undermine one of the most fundamental protections against the unlawful exercise of government power'.²³

1.28 Submitters also stated that third party appeals ensure that decision making is in accordance with the provisions of relevant legislation. Third party appeals add to the transparency and accountability of government. In addition, the Law Society of New South Wales warned that the bill 'has the potential to undermine public faith in government because it seeks to limit Court oversight of Executive decision-making and transparency'.²⁴ That this Government should propose the repeal of the extended standing provided by section 487 runs counter to the underlying principles of good government, transparent decision-making and protection of the environment.

1.29 The majority committee report noted that a number of reviews supported the current extended standing provisions in section 487. Notably, the Hawke Review commented that the extended standing provisions 'created no difficulties and should be maintained'.²⁵ The Productivity Commission report on major development assessment processes also acknowledged the value of extended standing.²⁶ The Government is now ignoring the outcomes of these independent and comprehensive reviews and introducing an amendment to the EPBC Act without any evidence that extended standing is causing problems.

1.30 Labor Senators note the comments of both the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) and the Parliamentary Joint Committee on Human Rights (PJCHR) concerning the bill. Both committees raised a number of matters of concern.

23 Public Law and Policy Research Unit, University of Adelaide, *Submission 35*, p. 9.

24 Law Society of New South Wales, cited in Law Council of Australia, *Submission 61*, p. 4.

25 Australian Government, Department of Environment, Water, Heritage and the Arts, *The Australian Environment Act – Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, October 2009, p. 261.

26 Productivity Commission, *Major Project Development Assessment Processes*, Research Report, Canberra, November 2013, p. 276.

1.31 The Scrutiny of Bills Committee noted that it is well accepted that restrictive standing poses particular problems in environmental decision-making. Further, as environmental regulation often raises matters of general, rather than individual concern, restrictive standing can mean that decisions are, in practice, beyond review. The Scrutiny of Bills Committee added that it is a matter of concern that the more restrictive standing rules may result in the inability of the courts, at least in some cases, to undertake their constitutional role of ensuring that Commonwealth decision makers comply with the law. At the same time, the Scrutiny of Bills Committee commented that there may be no substantial reduction in litigation as uncertainty may be introduced as to which groups will be granted standing.²⁷

1.32 The Scrutiny of Bills Committee sought detailed advice from the Minister as to why the limitation on the availability of judicial review of decisions under the EPBC Act was justified. While a response was received from the Minister, Labor Senators note that the Scrutiny of Bills Committee expressed to the Senate that it had 'continuing scrutiny concern that the practical effect of this bill is to limit the availability of judicial review in the absence of sufficient justification for that outcome'.²⁸

1.33 The PJCHR raised questions as to whether the bill limits the right to health and a healthy environment and if so, whether the limitation was justified. The PJCHR sought advice from the Minister.²⁹ However, this had not been received by the time the majority report was considered by the committee.

1.34 Finally, Labor Senators wish to comment on the conduct of the committee's inquiry in the bill. Following referral of the bill to the committee it was agreed that, in order to conduct a thorough examination of the bill and to allow the views of submitters to be fully explored, the committee would hold four public hearings. The committee agreed to postpone the hearings on the day the first hearing was scheduled. In agreeing to postpone the hearings, the non-government members of the committee understood that the date for tabling of the report would be extended and that the committee would reschedule the proposed hearings before finalising its deliberations. This understanding was confirmed by the Senate's decision on 12 October 2015 to extend the reporting date to the second last sitting day in February 2016.

1.35 Despite the committee's earlier decision to postpone the hearings and the Senate's agreement to the extension of the reporting date, the Government members of the committee subsequently used their numbers to bring the presentation of the report forward to 18 November 2015, thereby not allowing time for any hearings to take

27 Senate Standing Committee for the Scrutiny of Bills, *Eleventh Report of 2015*, 14 October 2015, p. 655.

28 Senate Standing Committee for the Scrutiny of Bills, *Eleventh Report of 2015*, 14 October 2015, p. 657.

29 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Twenty-seventh report of the 44th Parliament*, 8 September 2015, p. 7.

place. The absence of hearings limited the ability of committee members to test the Government's justification for the bill and the evidence received in written submissions. Labor Senators consider that in taking this course of action, the committee has abrogated its responsibility to thoroughly scrutinise the bill. This approach also shows no respect for the many submitters who took the time to contribute to the inquiry on the understanding that the committee would carefully perform its duty of scrutinising this bill.

1.36 The Labor Senators conclude that the Government's response to its own error sets a dangerous precedent; one that may, in the long term, result in more delays to approval processes for major infrastructure projects, undermine the faith of the public in the Commonwealth's environmental decision-making and compromise the rule of law.

Recommendation 1

1.37 Labor Senators recommend that the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 not be passed.

Senator Anne Urquhart
Deputy Chair
Senator for Tasmania

Senator the Hon Lisa Singh
Senator for Tasmania

Australian Greens' Dissenting Report

1.1 The Australian Greens stand with Australians from every walk of life who have come together to oppose this reckless and destructive Bill. Traditional owners, farmers, lawyers, environmentalists and ordinary Australians have already demonstrated that they will not allow their rights to enforce our national environment law to be stripped away.

1.2 Australians love our precious places, our clean air and water, our priceless native species and our valuable environmental assets. Over 20,000 Australians took the time to write to the Committee to oppose the Bill, and the Australian Greens applauded them.

1.3 Attacks on public enforcement rights are an attack on democracy and the rule of law. When the Coalition government and its big mining mates break the law, they change the rules.

1.4 All Australians care about the Great Barrier Reef, the Tasmanian forests, and the Liverpool Plains, and we all have a stake in protecting them. This Bill ignores the fact that we all have an interest in a safe climate, clean air, clean water, and thriving biodiversity. It denies that people all across the nation who love our precious places and species have the right to see the laws designed to protect them complied with.

1.5 This Bill is the latest in a long line of attacks by a government that cannot face criticism or dissent on independent voices for the environment. These attacks include including totally defunding EDOs, launching a witch hunt against tax deductible donations to environment groups, slashing funding to community conservation groups and trying to hand over federal environment power to State, Territory and local governments.

1.6 This Bill is Prime Minister Turnbull's next test on the environment. It represents a dummy spit from a Government that broke the law, and now wants to stop the community from enforcing the law. The decision for the Prime Minister is: will he continue the ideological attacks of the Abbott government, or will he listen to the voices of ordinary Australians defending their precious environment?

Our environment laws are already weak enough

1.7 Australia is in a biodiversity crisis, and the current laws are just managing the decline, not protecting our environment. We have one of the worst rates of species loss in the world. We've lost about 10% of all our mammals, or 29 in the last 200 years, out of a total 273. In a global context, that is more than 35% of all of the world's mammal extinctions, anywhere.

1.8 The *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act) only protects the best of the best – things like the Great Barrier Reef, the Tasmanian forests, koalas, bilbies and the Leadbeater's Possum. Only matters of "national environmental significance" are protected, and only a "significant impact" on those matters is regulated.

1.9 That means that the vast bulk of all development falls completely outside the Act. In fact, there are about 250,000 applications under State and Territory planning laws each year. In contrast, our national environment laws only deal with about 400 projects each year.

1.10 The EPBC Act does not allow merits review of decisions, only judicial review, meaning that the substance of the Minister's decision is already immune from challenge – the only thing that can be challenged is whether the Minister followed the correct decision making process.

1.11 Federal, State and Territory governments are in the thrall of the fossil fuel and resources industries. Not one coal mine or CSG well has ever been refused under the Act, and yet the Coalition government insists that our laws must be weakened further.

Barriers to public enforcement are already significant

1.12 There are already very significant barriers to community enforcement of the law. Community groups already face a range of barriers to going to court, including:

- rules against vexatious litigation which allow claims to be 'struck out' by the Federal Court (the Court);
- high legal fees, and the risk of paying the other side's costs if they lose (the Federal Court is a 'costs jurisdiction');
- expensive expert witnesses to testify against well-paid consultants for the other side;
- sometimes, the need to give the Court 'security for costs' in case they lose;
- sometimes, the need to give the Court an 'undertaking as to damages' in case they lose.

1.13 Mining companies often 'buy out' neighbouring farms and other properties, leaving no-one to object. Even where local landholders remain, they often face very significant barriers to taking action to enforce the law. Shontae Moran, a farmer near Clermont in Queensland has said: "As landholders we don't have the time or the funding to be investing in legal action in regards to environmental approvals."¹

1 *Queensland farmer criticises Federal Government plan to limit environmental objections*, 19 August 2015, ABC Rural <http://www.abc.net.au/news/2015-08-19/federal-government-environment-protection-act-reaction/6707696>

1.14 A report by The Australia Institute found that very few projects are ever challenged in court. Only 22 projects, or 0.4% of the 5,500 projects referred for assessment under the EPBC Act have been subject to legal challenge since the Act came into force in 2000. Of the 5,500 projects referred, 1,500 have been assessed under the Act. Only twelve projects have been refused, and 9 have been deemed 'clearly unacceptable' by the Minister. Of those approved, only 22 projects were subject to legal challenge, and only **two projects** have ever been stopped by legal challenges.

Expert advice supports strengthening public enforcement

1.15 If the Coalition government had been looking for a genuine blueprint for reform, instead of an ideological attack, it could have examined the *Independent Review of the EPBC Act*, (the Hawke Review)²—which said that:

Public interest litigation is one of the most significant means of enforcing environmental law and in enhancing the transparency, integrity and rigour of government decision-making about activities which impact on the environment. Often the cases are 'test cases', concerning questions of law that have not previously been considered judicially. **Because public interest litigation plays this role, it is important that the law facilitate it.**³ [emphasis added]

1.16 The Hawke Review also said:

Some pieces of legislation, both at the Commonwealth and State or Territory level, contain 'open standing' provisions that confer standing on all members of the public for all actions. The *Trade Practices Act 1974* (Cth) is one example, as is most NSW environmental legislation such as the *Environmental Planning and Assessment Act 1979* (NSW).

Despite all the fears that the above types of provisions would engender a 'flood' of litigation, they have been unproblematic. There is no evidence of them being abused and the number of cases to date has been modest.

1.17 As a result, one of the "core elements" of the Hawke Review's recommendations was to:

...improve transparency in decision-making and provide greater access to the courts for public interest litigation.⁴

2 The *Independent review of the Environment Protection and Biodiversity Conservation Act 1999* (Hawke Review) can be found here: <https://www.environment.gov.au/legislation/environment-protection-and-biodiversity-conservation-act/epbc-review-2008>

3 Hawke Review, page 261.

4 Hawke Review, page iii.

1.18 The review recommended making it easier to challenge decisions under our national environment law by:

- Removing the requirement for applicants to give an undertaking as to damages which deters many community groups from enforcing the law.
- Creating a new category of proceedings called "public interest proceeding" with more generous costs rules.
- Removing the requirement to give a security for costs.⁵

Australians oppose this reckless attack

1.19 Australians want to see our precious places and species protected. The fact that 21,117 individuals have written to the Committee supporting public enforcement shows the depth of feeling in the community.

1.20 Dr Anne Poelina Nyikina traditional custodian from WA, submitted:

I believe any Australian aggrieved about the destruction of any environmental destruction where ever they live must have the right to be included in any case for defence of the environment...The Act must not be made weaker in fact it must be strengthened...⁶

1.21 The National Farmers Federation (NFF) do not support the Bill,⁷ and NFF Vice President Fiona Simson has said:

The Adani decision seems to have been caused by either Adani or the department not applying the law properly, but then, suddenly and with no warning or consultation, we get this put forward ... we prefer evidence-based policy making.⁸

1.22 Experts in administrative law, Stephen Keim SC and Dr Chris McGrath have said:

...going to court is very difficult, stressful and costly...Removing this potential scrutiny will encourage both public servants and ministers to be less careful about complying with the law's requirements.⁹

5 Hawke Review, page 263.

6 Submission 84.

7 Submission 112.

8 *Farm groups furious at Coalition move to restrict environmental challenges*, 19 August 2015, the Guardian Australia <http://www.theguardian.com/australia-news/2015/aug/19/farm-groups-fear-coalition-move-to-restrict-environment-challenges>

9 *Chicken Little Abbott and Brandis wrong on 'lawfare'*, 21 August 2015, Canberra Times <http://www.canberratimes.com.au/comment/chicken-little-abbott-and-brandis-wrong-on-lawfare-20150821-gj4htj.html>

1.23 Murray Wilcox QC, a former Federal Court judge has said:

[This Bill] will serve no useful purpose; on the contrary, it will complicate and prolong those few legal actions that are brought under the [EPBC Act]...Section 487 has worked well. As anticipated, the section has eliminated arguments about standing, with consequential savings in cost and time. As others have pointed out, section 487 has not opened any floodgates...After 15 years of successful operation, why now the fuss? Apparently because a respected north Queensland conservation organisation had the temerity to point out to the federal court (correctly) that the minister had made a decision approving Galilee basin coalmining without taking into account information (that his department held) about the possible effect of mining on two endangered reptile species.¹⁰

1.24 Unions NSW,¹¹ the Law Council of Australia,¹² Queensland Association of Independent Legal Services,¹³ Cotton Australia,¹⁴ and many other civil society groups have added their voices to the community opposition to this Bill.

1.25 Environmentalists from every major and many smaller organisations have added their voices too. Geoff Cousins, the President of the Australian Conservation Foundation has said: "I believe Australians will not stand for this. What we want is not 'lawfare', but simply fair law."¹⁵ The Australian Greens thank the ACF,¹⁶ Greenpeace Australia Pacific,¹⁷ WWF,¹⁸ Lock the Gate Alliance,¹⁹ The Wilderness Society,²⁰ 350.org Australia,²¹ Environmental Justice Australia,²² the Australian Marine Conservation Society,²³ the EDOs of Australia²⁴ and many others for their

10 Submission 19.

11 Submission 66.

12 Submission 61.

13 Submission 139.

14 Submission 116.

15 Conservation leaders, lawyers say no to Abbott and Brandis' attempt to trash environment law, 19 August 2015 <http://www.acfonline.org.au/news-media/media-release/conservation-leaders-lawyers-say-no-abbott-and-brandis-attempt-trash>

16 Submission 38.

17 Submission 89.

18 Submission 74.

19 Submission 109.

20 Submission 44.

21 Submission 88.

22 Submission 93.

23 Submission 101.

24 Submission 114.

submissions and other public contributions to the debate. The Australian Greens also thanks the hundreds of smaller groups and individuals who have taken the time to write substantive submissions to this inquiry.

1.26 Even the big business lobbies which are usually quick to publically support attacks on our environment laws have been uncharacteristically reticent. On this issue, the Coalition has been left high and dry.

1.27 A clear majority of Senators have now publicly stated that they do not support this Bill. In the face of this overwhelming level of opposition, the Australian Greens call on Prime Minister Turnbull to drop this reckless attack on our national environment laws.

Our plan to strengthen Australia's national environment laws

1.28 Before the 2013 federal election, the Australian Greens announced a comprehensive policy to strengthen our national environment laws: *Environment Laws that Work*.²⁵ That policy is a \$346 million plan which would retain and expand the role of federal oversight. It would create an independent expert Sustainability Commission to offer expert advice, expand federal oversight to include climate change, water, national parks and forests, improve compliance and enforcement, properly consider cumulative impacts from multiple developments, and make sure the precautionary principle is put into action. That would mean binding limits on the federal Minister's discretion to approve damaging projects.

1.29 Good decision making rests on accurate information, which is why we would build a national set of environmental accounts, invest in a scheme to ensure the quality and independence of advice provided by environmental consultants and require all environmental impact statements to be independently reviewed by the Sustainability Commission.

1.30 Crucially, our plan would expand the rights of ordinary Australians to enforce the law where their governments have failed. It would allow courts to review the merits of a decision, not just the process for making the decision (judicial review). It would prohibit costs orders in public interest cases and establish a community information unit to actively support understanding and engagement with our national environment laws.

1.31 *Environment Laws that Work* sits alongside our plan to save our threatened species, protect the Great Barrier Reef and protect our farmland and groundwater from coal and gas. Our policy builds on our earlier position, *Principles to Protect Australia's Environment*.²⁶

25 *Environment Laws that Work* can be found here: <http://greens.org.au/environment-laws-work>

26 *Principles to Protect Australia's Environment* can be found here: http://larissa-waters.greensmps.org.au/sites/default/files/tptl_for_web.pdf

1.32 The Australian Greens applaud the work of the *Australian Panel of Experts on Environmental Law* which has recently begun a process of broad consultation and deliberation on the future of Australia's environment laws.²⁷ The Panel aims to develop recommendations for a new generation of federal environmental legislation which will reflect international best practice and strong and efficient protection and management of Australia's environment, including principles of environmental democracy.

1.33 It is that kind of considered, coordinated approach which should be the starting point for any discussion of environmental law reform. Instead, the Coalition government has launched attack after attack on Australia's environment.

Recommendation 1:

That the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 not be passed.

Recommendation 2:

Expand the rights of ordinary Australians to enforce the law where their governments have failed by allowing merits review of approval decisions rather than only judicial review.

Recommendation 3:

Prohibit costs orders in public interest cases under our national environment laws or implement a presumption that each party bears their own costs.

Recommendation 4:

Remove the requirement to give security for costs and undertakings for damages in public interest cases under our national environment laws.

Recommendation 5:

Limit the Minister's discretion to approve environmentally destructive developments, and require that decisions under our national environment laws are consistent with the precautionary principle and consider cumulative impacts.

Recommendation 6:

Expand scope of our national environment laws by creating a "trigger" for all aspects of the environment when the impact is significant, including water, forests, global warming and national parks.

Recommendation 7:

Restore the \$5.2 million in funding cut from voluntary environment, sustainability and heritage organisations in the 2014 Budget.

27 More information about the Panel is here: <http://www.placesyoulove.org/expertpanel/>

Recommendation 8:

Restore federal funding to Environment Defenders Offices.

Recommendation 9:

Reverse the 26% staff cuts at the Department of Environment which are currently being implemented.

Recommendation 10:

Abandon the plan to hand federal environment powers to State, Territory and local governments.

**Senator Larissa Waters
Senator for Queensland**

Appendix 1

Submissions and Additional Information received by the Committee

Submissions

1. Dr Anna Lashko
2. Ms Jennifer Hole
3. Ms Shelley Douglas
4. Ms Pamela Englander
5. Ms Annie Morris Wieland
6. Mr Michael Asbridge
7. Mr David Anderson
8. Name Withheld
9. Ms Kylie Jones
10. Dr Steven Douglas, Ecological Surveys & Planning
11. Name Withheld
12. Ms Wendy Davies
13. Name Withheld
14. Environment Victoria
15. Mrs R Luckman
16. Ms Julie McLeish
17. Dr Sam Nicol
18. Ms Estelle Ross
19. Mr Murray Willcox AO QC
20. Wide Bay Burnett Environment Council
21. Dr Martine Maron
22. Bush Care East Killara
23. Dr Gabrielle Appleby
24. Mr Alan Thompson
25. Mr John Millane
26. The South Australian Ornithological Association Inc
27. Mr Mark Zanker
28. Mr John Tyne
29. Ms Leonie Stubbs

30. Ms Nanette Nicholson
31. Mrs Joan Payne AM
32. Mr Dierk von Behrens
33. Dr Steve Dennis
34. Friends of Stradbroke Island Inc
35. Public Law and Policy Research Unit, University of Adelaide
36. Friends of Australian Rock Art
37. Friends of Grasslands
38. Australian Conservation Foundation
39. The Australia Institute
40. People For the Plains
41. The Colong Foundation for Wilderness Ltd
42. South Australian Chamber of Mines & Energy
43. Nature Conservation Council of NSW
44. The Wilderness Society
45. Trees For Life Inc
46. Friends of the Earth
47. Mullaloo Beach Community Group Inc
48. Mackay Conservation Group
49. Friends of Shorebirds SE
50. Correct Planning and Consultation for Mayfield Group
51. National Council of Women of Tasmania Inc
52. Ports Australia
53. North Queensland Conservation Council
54. Environment Institute of Australia and New Zealand
55. Australian Centre for Climate and Environment Law, The University of Sydney
56. EDO of North Queensland
57. Logan and Albert Conservation Association
58. Wildlife Preservation Society of Queensland Fraser Coast Branch Inc
59. Birds Queensland
60. Professor Jan McDonald, (and nine others) University of Tasmania
61. Law Council of Australia
62. Frog Safe Inc
63. New South Wales Nurses and Midwives' Association
64. Wildlife Preservation Society of Queensland - Upper Dawson Branch

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65. Conservation Council SA
 66. Unions NSW
 67. Wildlife Preservation Society of Queensland
 68. Environment Centre NT
 69. Darling Downs Environment Council
 70. Clean Up Australia
 71. Cairns and Far North Environment Centre
 72. Capricorn Conservation Council
 73. Yarra Riverkeeper Association Inc
 74. WWF-Australia
 75. Stradbroke Island Management Organisation Inc
 76. Professor Jacqueline Peel, and Professors Michael Crommelin, Lee Goddon, Margaret Young and Brad Jessup
 77. Stop Invasive Mining Group Incorporated
 78. Mr Stephen Keim SC
 79. Hunter Environment Lobby Inc
 80. National Environmental Law Association
 81. BirdLife Australia
 82. Protect the Bush Alliance
 83. Mr Paul Cummins
 84. Dr Anne Poelina Nyikina
 85. Queensland Conservation Council
 86. Environment Council of Central Queensland
 87. Climate Change Australia - Hastings Branch
 88. 350.org Australia
 89. Greenpeace Australia Pacific
 90. Society for Conservation Biology (Oceania)
 91. Central West Environment Council
 92. Friends of the Surry Inc
 93. Environmental Justice Australia
 94. Batwatch Australia
 95. Beyond Zero Emissions
 96. Dr Chris McGrath
 97. Minerals Council of Australia
 98. Australasian Bat Society, Inc
 99. Nature Conservation Society of South Australia

100. Property Rights Australia
101. Australian Marine Conservation Society
102. RMIT Interdisciplinary Conservation Science Research Group
103. Dr Robyn Bartel
104. Clarence Valley Conservation Coalition Inc
105. Confidential
106. Humane Society International
107. Our Land Our Water Our Future Inc
108. North Coast Environment Council
109. Lock the Gate Alliance
110. Wildlife Volunteers Association Inc
111. Business Council of Australia
112. National Farmers Federation
113. Dr Carol Booth
114. EDOs of Australia
115. UQU Environment Collective
116. Cotton Australia
117. Wildlife Queensland - Townsville Branch Inc
118. Kimberley Land Council
119. Sunshine Coast Environment Council
120. Friends of the Koala Inc
121. Places You Love Alliance
122. IFAW - International Fund for Animal Welfare
123. Ryde Hunters Hill Flora and Fauna Preservation Society
124. Dr Paul Hodge
125. YCAN - Yarra Climate Action Now
126. National Parks Association of NSW
127. Animal Defenders Office
128. Conservation Council ACT Region
129. Assistant Professor Narelle Bedford
130. Gecko - Gold Coast and Hinterland Environment Council
131. Ms Kellie Wakely
132. Mr Robert Hunter
133. Ms Pamela Jones
134. Ms Nel Finlayson
135. Department of the Environment

136. Public Health Association of Australia
137. Ms Helen Evans
138. Name Withheld
139. Queensland Association of Independent Legal Services
140. Mr Joe Thwaites
141. Ms Eve Lamb
142. Mr Andrew Barker
143. Ms Kelly Rose
144. Ms Pamela Skirving
145. Miss Hannah Lethlean
146. Mr Blake Davidson
147. Name Withheld
148. Mr Dean McNulty
149. Ms Elke Nicholson
150. Ms Carol Rea
151. Ms Fee Mozeley
152. Ms Alice Nagy
153. Ms Beryn Jewson
154. Miss Rowena Edwards
155. Mr Robert Baker
156. Ms Wendy Dugmore
157. Ms Katie O'Bryan
158. Name Withheld
159. Ms Maree Grenfell
160. Miss Julieanne Webb
161. Mr Marcel Woda
162. Ms Bernadette Tapscott
163. Ms Judith Leslie
164. Ms Jane Judd
165. Mr David Hare-Scott
166. Ms Claire Williams
167. Ms Christa Ludlow
168. Mr Tim Galli
169. Ms Caroline Reid
170. Ms Margaret Airoidi
171. Dr Kristin Metcalfe

- 172. Ms Anne Boehm
- 173. Mr Adrian Ingleby
- 174. Mr Don Owers
- 175. Mr Shay Dougall
- 176. Ms Flora Aynsley
- 177. Ms Penny Claringbull
- 178. Ms Arleen Hanks
- 179. Mr Quentin Hanich
- 180. Ms Joanna Bolte
- 181. Mr Antony Partos
- 182. Mr Sam Daniell
- 183. Mr Agner Sorensen
- 184. Ms Thea Woznitza
- 185. Mr Jeremy Tager
- 186. Mr David Wright
- 187. Mr Andrew Powis
- 188. Ms Maxine Godley
- 189. Ms Sophie LEstrange
- 190. Ms Lisa Arnaud
- 191. Ms Jane Hildebrant
- 192. Mr Charles Street
- 193. Ms Karen Large
- 194. Ms Christina Reitano
- 195. Mr Rob Lucas
- 196. Mr Lex Chalmers
- 197. Ms Mary-Ann von Ballekom
- 198. Ms Helen Palethorpe
- 199. Mr Robbi Bishop-Taylor
- 200. Mr John Gunson
- 201. Mr Nick Regan
- 202. Ms Jenny Chester
- 203. Ms Naomie Sunner
- 204. Mr Alex Moir
- 205. Ms Sarah Thorn
- 206. Ms Maureen McCunnie
- 207. Ms Rosemary Glaisher

- 208. Ms Anne Page
- 209. Ms Phoebe Saunders
- 210. Ms Patsy Lisle
- 211. Ms Aileen Reiter
- 212. Dr Graeme Lorimer
- 213. Ms Meredith Reardon
- 214. Mr Rod Bird
- 215. Ms Marianne McMillan
- 216. Ms Clare Lakewood
- 217. Ms Kaye Proudley
- 218. Ms Anne Kotzman
- 219. Ms Elspeth Ferguson
- 220. Ms Denise Goodfellow
- 221. Mr Malcolm Fisher
- 222. Ms Mary Forbes
- 223. Mr and Ms S and D Mahony
- 224. Ms Rachel Thomson
- 225. Ms Johanna Evans
- 226. Mr Adrian Kristoffersen
- 227. Mr Mike Beresford-Jones
- 228. Mr Trevor Murray
- 229. Ms Sarah Ciesiolka
- 230. Ms Sue Wilmott
- 231. Mr Grant Da Costa
- 232. Mr Robin Clarey
- 233. Mr Kevin McLean
- 234. Ms Wendy Matthews
- 235. Ms Penelope Swales
- 236. Mr Hugh Nicholson
- 237. Mr Dean Davidson
- 238. Ms Amanda Stewart
- 239. Name Withheld
- 240. Ms Katie Peart
- 241. Ms Sarah Maclagan
- 242. Australian Koala Foundation
- 243. Mr Doug Stuart

- 244. Mr Malcolm Mars
- 245. Mr Adrian Heard
- 246. Prof Ian Reid
- 247. Dr James Thyer
- 248. Dr Shauna O'Meara
- 249. Ms Maureen Griffin
- 250. Mr John McInnes
- 251. Ms Alice Arnold-Garvey
- 252. Ms Vicky Shukuroglou
- 253. Mr Kerry Schroeder
- 254. Mr Hugh Barrett
- 255. Mr Chris Walker
- 256. Mr Araron White
- 257. Mr Nigel Waters
- 258. Mr Terry Hillman
- 259. Mr Leo Lazarus
- 260. Ms Courtney Adamson
- 261. Ms Gillian Blair
- 262. Mr Jimmy Malecki
- 263. Ms Maureen Webb
- 264. Ms Marion Cook
- 265. Ms Georgina Gartland
- 266. Mr James Dwyer
- 267. Ms Kimberley Gaal
- 268. Ms Tracey Anton
- 269. Ms Catheryn Thompson
- 270. Ms Carolyn Russell
- 271. Dr Renata Bali
- 272. Mr Daryl Fallow
- 273. Mr Daniel Panek
- 274. Mr David Arthur
- 275. Mrs Paula Deuber
- 276. Ms Julie Devine
- 277. Mr Kelvin Sparks
- 278. Ms Ellen Pustolla
- 279. Dr Anthony Fricker

- 280. Mr Les Johnston
- 281. Ms Bea Bleile
- 282. Ms Alison Clouston and Mr Peter Boyd
- 283. Ms Maureen Cooper
- 284. Ms Jane O'Sullivan
- 285. Mr Peter Cooney
- 286. Ms Christine Murray
- 287. Confidential
- 288. Confidential
- 289. Tumby Bay Residents and Ratepayer Association
- 290. Mr Tony Pickard
- 291. Ms Maria Riedl
- 292. Ms Michelle Wilson

Additional information

- 1. Form letter received from 15,477 individuals
- 2. Form letter received from 124 individuals
- 3. Form letter received from 37 individuals
- 4. Form letter received from 1,265 individuals
- 5. Form letter received from 4,102 individuals
- 6. Form letter received from 65 individuals
- 7. Form letter received from 31 individuals
- 8. Form letter received from 16 individuals

