

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.