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

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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]

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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

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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]

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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.