

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**