

Submission by Assistant Professor Narelle Bedford to the Senate Standing Committee on Environment and Communications Legislation in relation to the *Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*

September 2015

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N Bedford Submission to the Senate Standing Committee on Environment and Communications
Legislation

Summary of major points:

1. Standing generally has a role in upholding fundamental legal and democratic principles.
2. The ADJR Act test for standing has a detailed history of consideration by the High Court of Australia and the Federal Court of Australia.
3. This case law has recently been characterised by a more expansive judicial attitude towards applicants seeking standing.
4. The issue of standing has in the past been considered by various expert legal advisory bodies.
5. However, there are specific considerations that apply in respect of concerns that may arise under the EPBC Act.
6. These specific considerations will not be efficiently and adequately addressed by adopting the ADJR Act test.
7. Adopting the ADJR Act test would have a flow-on consequence of increasing the workload of the courts by focusing legal argument on standing rather than compliance with the provisions of the EPBC Act.
8. The conclusion presented is that the present provisions should be retained and the Bill opposed.

Introductory comments

1. I welcome the opportunity to make a submission on the *Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015* (the Bill). The Bill, if passed, would amend the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) so that only aggrieved persons, as defined by section 5 of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act), may make an application for judicial review of decisions made under the EPBC Act. Currently section 487 of the EPBC Act clarifies who may have standing under the EPBC Act. This section would be repealed.
2. This submission is intended to be made public.

Generally about standing

3. Standing is an important concept in public interest litigation. Standing can be defined as the ability of an individual or organisation to commence legal proceedings. Public interest litigation is a legal accountability mechanism to ensure government decisions are legal and made with integrity and rigour. Access to justice is a priority matter for the Federal Government, as evidenced by the recent Australian Productivity Commission (APC) Report titled "Access to Justice Arrangements" published in 2014.
4. On the matter of access to justice, the APC quoted Justice Sackville who noted that;
"Like other catchphrases, such as 'fairness' and 'accountability' (if not 'democracy' itself), the expression 'access to justice' survives in political and legal discourse because it is capable of meaning different things to different people. (APC Report, page 3)
5. The APC explained the term 'promoting access to justice' meant, 'making it easier for people to resolve their disputes'. In public interest litigation, standing is the first step in the process of resolving a dispute over legality of a government decision. Accordingly standing is an important factor in achieving access to justice.
6. The current provision contained in section 487 of the EPBC Act provides appropriate limits on standing under the EPBC Act. This section does not go so far as to confer "open standing" which is a general right to commence legal proceedings without any restrictions.
7. Certainty in standing is one way of making it easier for people to commence resolving their disputes with government, thereby enhancing access to justice.
8. Public interest litigation also has an important role to play in terms of achieving accountability and transparency in government decision-making. These concepts, like access to justice, can also be imprecise. However accountability is a widely used term in public discourse and refers to the need to hold people responsible for the exercise of power. Transparency refers to the visible method of decision-making according to known criteria. Standing in public interest litigation is one means to ensure that government decision-making is held to account and that decision-makers comply with relevant statutes and rules when making decisions.
9. The rule of law is a foundational concept in the Australian legal system. Although it is similarly an elastic concept in terms of it having no fixed definition, it can be distilled to refer to the principle that all members of society are equally held responsible under the law. Legislative provisions that provide clarification on standing are the first step in a process of judicial review. Judicial review is concerned with the legality of decision-making. Justice Brennan of the High Court explained that:

Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by the law and the interests of the individual are protected accordingly. [*Church of Scientology v Woodward* (1982) 154 CLR 25, 71]

10. Standing is also important in allowing access to the courts and for the courts to consider whether a decision-maker has complied with any relevant legislative provisions. This is a mechanism to ensure that the intent of the Parliament is upheld. Thus standing is an element of the system that recognises Parliamentary supremacy in its role as the maker of laws in Australia.

ADJR Act test for standing

11. The ADJR Act contains in section 5 reference to a person entitled to commence judicial review proceedings as a '*person aggrieved*'. The term person aggrieved is further defined in section 3(4) of the Act as '*a person whose interests are adversely affected*'. No further legislative guidance or definition is given in the Act.
12. Indeed, the Federal Court of Australia and the High Court of Australia have developed a body of case law which considered the meaning to be applied to a person whose interests are adversely affected. This body of case law is highly context specific and deeply dependent on the specific factual circumstances in each case. Thus there is a lack of clarity and predictability about whether there has been an interest adversely affected.
13. The provisions on standing in the ADJR Act have not been amended since the Act was originally passed in 1977. It can therefore be argued that those provisions whilst providing a general test, do not reflect any refinements reflecting modern developments.

Recent ADJR Act case law

14. There are two very recent cases that emphasize the operation of the ADJR Act test for standing in a modern context. The first is the High Court decision in *Argos Pty Ltd v Minister Environment & Sustainable Development* ((2014) 89 ALJR 189). In the context of a planning decision at a local shopping centre in suburban Canberra, the High Court held that an economic interest, which was able to be demonstrated in (financial terms), was sufficient to amount to a special interest. This was a notable decision for the clarity it provided on whether economic interests could satisfy the ADJR Act standing requirements.
15. The second case is the decision by the Full Court of the Federal Court in *Animals' Angels v Secretary, Department of Agriculture* ((2014) 228 FCR 35). This case concerned live animal exports and whether an animal rights group had standing to challenge the legality of a live animal export permit. The Federal Court adopted a multi-factorial approach to standing which was highly context dependent rather than developing a set of general application principles. Factors taken into account included the objects and activities of Animals' Angels in Australia over eight years and the recognition by the relevant Australian Government Department of its particular status in the area of live animal export
16. The issue of standing and being able to access the courts does not automatically translate into a successful challenge of government decision-making. Ultimately in the Animals' Angel case the public interest litigation was unsuccessful.

Expert legal advisory bodies

17. The Australian Law Reform Commission (ALRC) has considered the issue of standing twice in the last thirty years, demonstrating the ongoing relevance of standing and the fact that it remains an area of debate for reform. Both of the ALRC reviews have occurred notwithstanding the existing provisions in the ADJR Act.
18. The most recent ALRC review was contained in its report titled *Beyond the Doorkeeper; Standing to Sue for Public Remedies* (Report 78, 1996), where it recommended that ‘any person should be able to commence and maintain public law proceedings’. This recommendation has not been implemented by any Federal Government since 1996. The previous review was conducted in 1985, titled *Standing in public Interest Litigation* (Report 27, 1985) reached a similar conclusion, which was further refined in the later report.
19. Even more recently, the Administrative Review Council, an expert body established under the *Administrative Appeals Tribunal Act 1975* (Cth) (the AAT Act) also considered the issue of standing as part of its broader inquiry titled *Federal Judicial Review in Australia* (Report 50, 2012). It concluded that ‘*having some restrictions on standing provides a means of managing unmeritorious applications, and that providing for open standing would not produce major benefits for applicants*’ (page 150).
20. Finally there was an independent review of the EPBC ACT, as required under the Act after ten years of its operation (Report of the Independent Review. 2009). On standing, the Independent Review concluded;
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...These provisions have created no difficulties and should be maintained. The question is whether these provisions should be expanded further. (page 261).

Specific considerations under the EPBC Act

21. According to the ALRC, “the law of standing is the set of rules that determine whether a person who starts legal proceedings is a proper person to do so” (Report 27, page xviii). In respect of environmental decisions this raises particular complexities, as the ‘proper person’ will necessarily need to be able to represent the interests of flora and fauna. Further the land area affected by the government decision may be remote. Therefore tests for standing focused on geographic proximity or adjoining land titles may be futile.
22. The provisions in the EPBC Act mirror the requirement for standing under the AAT Act, which conducts merits review of decisions. These provisions centre attention on the objectives and purposes of an organisation. In fact the provisions in the EPBC Act are more prescriptive and introduce a time requirement, so that the current formulation achieves a delicate balance whereby the gateway to the courts is opened by subject to appropriate criteria.

Specific considerations and the ADJR Act test

23. The specific considerations in respect of environmental litigation raised above, may not be addressed by the application of the general test in the ADJR Act. For example the recent decisions in paragraphs 14 and 15 above do not have particular application in an environment context. The current test in the EPBC Act is tailored and targeted to the unique nature decisions made under the EPBC Act. Comparisons made in the Second Reading Speech of the Minister for the Environment (House Hansard, Thursday, 20 August 2015) to the *Australian Crime Commission Act 2002*, the *Biosecurity Act 2015* and *Australian Energy Market Act 2004* are not applicable or relevant as there is no recognition of the specific context in environmental matters. This is the very reason such standing provisions were originally introduced into the EPBC Act.
24. These specific considerations will not be efficiently and adequately addressed by adopting the ADJR Act test.
25. A counter argument to the current test in EPBC Act, is the present standing rules have resulted in too high a number of public interest litigation being commenced; and courts are in turn obliged to hear unmeritorious claims or many claims dealing with the same issue. These claims are unfounded. It is important not to be concentrated on one recent example, and consider the entirety of the operation of the current test.
26. Moreover, courts can be relied upon to manage their own processes, and using existing discretionary powers deal with any applications that amount to an abuse of process or applicants who are vexatious.
27. Furthermore, the repeal of the current test in the EPBC Act will lead to the Federal Court and the High Court spending time and resources on determining legal argument related to standing and not being focused on matters of substance concerning the legality of decision-making.

Conclusion

28. The Second Reading Speech of the Minister for the Environment referred to the 'Americanisation' of our legal process due to the current test. Again, the full perspective of the amount of litigation since the provision has been in the EPBC Act does not bear this characterisation. Furthermore, the factual circumstances of the recent events in relation to the Adani project should be understood. The Federal Court made the orders by consent and although specific provisions of the EPBC Act were not complied with, this will not automatically mean that the project is aborted. Rather by consent, it will ensure that the formal process created by Parliament is adhered to.
29. Therefore, on the basis of the above analysis it is submitted that the preferred course of action should be to retain the present provisions. Concerns about any trend of increased litigation should be based on factual evidence and Parliament could insert or amend provisions in the EPBC Act to ensure that regular reviews are undertaken.
30. This submission recommends the Senate oppose the Bill.