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]

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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noted that, given the limited number of legal challenges, the Government's assertion that section 487 must be repealed because environmental groups are increasingly using it to deliberately delay projects cannot be sustained.[4] Dr Chris McGrath commented that the explanatory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

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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

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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]

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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]

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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]

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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]

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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]

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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.