Labor Senators' dissenting report

1.1 Labor Senators do not see any merit in the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 and strongly oppose it.

1.2 Good government is based on evidence and appropriate public policy responses. However, Labor Senators consider that the proposed repeal of section 487 cannot be described as anything but a very unsophisticated, and short-sighted, response to an administrative error made by the Government in the approval process for the Adani Carmichael coal mine in Queensland.

1.3 The Government has been caught for not complying with the requirements of the approval processes of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). It was not an example of 'lawfare' or action by 'vigilante' litigants to disrupt and delay key infrastructure projects as the Government has constantly described it. Rather, the challenge brought by the Mackay Conservation Group was based on legitimate grounds.

1.4 This view is borne out by the circumstances around the making of orders by the Federal Court in August this year. The orders were made without a hearing. The Federal Court made no judgment and there were no findings. The orders were, in fact, made after the Australian Government Solicitor had presented a letter to the Court, with the agreement of all parties, with the proposed orders. That letter informed the Court that an error sufficient to set aside the Minister's decision had been made. The parties' request and proposed orders were based upon these significant issues:

- the Minister found that the proposed action would have a significant impact on two listed threatened species: the Yakka Skink and the Ornamental Snake;
- there were conservation advices approved by the Minister for those two species;
- under the terms of subsection 139(2) of the EPBC Act, it was mandatory for the Minister to have regard to the approved conservation advices;
- in deciding whether or not to approve the proposed action, the Minister did not have regard to the approved conservation advices; and
- the Minister did not have regard to the approved conservation advices because they were not included in the material that was before him at the time he made his decision.[1]

1.5 Having acknowledged that an administrative error had been made during the approval process, it was then open to the Minister to re-approve the Carmichael mine

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1 Federal Court of Australia, *Statement re NSD33/2015 Mackay Conservation Group v Minister for the Environment*, 19 August 2015; see also Public Law and Policy Research Unit, University of Adelaide, *Submission 35*, p. 9.

development in accordance with the provisions of the EPBC Act. This occurred on 14 October 2015.

1.6 The Government has claimed that the repeal of section 487 is necessary because important infrastructure projects have been needlessly delayed by vexatious or frivolous litigation. The few submitters supporting the bill made similar claims and pointed to adverse effects on business certainty, jobs and the economy.

1.7 Labor Senators, however, consider that the evidence presented to the committee convincingly refutes the level of vexatious or frivolous litigation as a ground for the repeal of section 487. Of the 5,500 projects referred to the Department of the Environment for assessment since the EPBC Act came into force, around 0.4 per cent have been the subject of legal challenges.[2] This does not provide any evidence that section 487 is being used misused and, as noted by Dr Chris McGrath, the Government did not provide any evidence of inappropriate litigation in the explanatory memorandum to the bill.[3]

1.8 Submitters also provided extensive and compelling evidence regarding the safeguards within the judicial system that stop vexatious or frivolous actions. This includes the awarding of indemnity costs by the Federal Court if litigation is undertaken without basis and no reasonable prospect of success.[4] The Humane Society International observed that:

> Given the restricted resources and time of the courts, if they were being inundated by vexatious litigants advancing causes which were baseless purely to delay projects, they would likely have said so and would have refused to hear cases such as the recent challenge to the Adani coal mine. Considering this case was not thrown out and was indeed successful in court indicates that no such inundation is current occurring. The supposed premise for this Bill is baseless, there being no "lawfare" being waged by environmental groups against developments.[5]

1.9 There are also very practical reasons for the small number of challenges under section 487: success is difficult to achieve and challenges are complex, time consuming, expensive and carry the risk of adverse costs orders if the case is unsuccessful. As described in evidence, 'this is not a low bar which any group wishing

2 The Australia Institute, *Submission 39*, p. 1; Nature Conservation Council of NSW, *Submission 43*, p. 3; WWF-Australia, *Submission 74*, p. 1.

3 Dr Chris McGrath, *Submission 96*, p. 7.

4 Dr Chris McGrath, *Submission 96*, p. 3.

5 Humane Society International, *Submission 106*, p. 4.

to delay a project or advance a vexatious claim can easily jump'[6] and as a consequence section 487 is seen as a 'last resort'.[7]

1.10 The Government and supporters of the repeal of section 487 have put forward a range of other arguments in support of this very poor piece of legislation. Labor Senators note that, similar to the vexatious or frivolous litigation argument, these do not stand up to even cursory scrutiny.

1.11 The Attorney-General has stated that the extended standing provision in the EPBC Act is 'very unusual, indeed unique'.[8] This is not the case. The Commonwealth *Hazardous Waste (Regulation of Exports and Imports) Act 1989*, at section 58A, provides for extended standing of individuals and organisations to seek judicial review. There are also examples of extended standing in state legislation.[9]

1.12 Labor Senators also note that there are examples at both the Commonwealth and state level of 'open' standing for any person to commence certain proceedings. These examples include the NSW *Environmental Planning and Assessment Act 1979*. Submitters argued that, far from opening 'floodgates' of litigation, the open standing provisions have been used in a limited number of cases.[10]

1.13 The Government has argued that the repeal of section 487 will remove an avenue for groups that seek to delay infrastructure projects. However, while desired by the Government, this may not be the case. The evidence received by committee pointed to another, very likely, outcome: that reliance on the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) and the *Judiciary Act 1903* will introduce uncertainty about who has standing to bring about judicial review. As a consequence, the time of the courts, project proponents, those bringing a challenge and the Government will be diverted to lengthy and unnecessary arguments to clarify the standing issue rather than addressing compliance with legislative provisions. The Law Council of Australia stated in this regard:

> The s 487 test is broader and clearer than that under the AD(JR) Act, and has the potential to reduce disputes about whether an applicant has standing, and therefore also the cost and length of litigation.[11]

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6 Humane Society International, *Submission 106*, p. 3.

7 Friends of Stradbroke Island, *Submission 34*, p. 3; Public Law and Policy Research Unit, University of Adelaide, *Submission 35*, p. 6; Wildlife Queensland, Townsville Branch, *Submission 117*, p. 1; Conservation Council ACT Region, *Submission 128*, p. 4.

8 Senator the Hon George Brandis QC, *Interview transcript*, Australian Broadcasting Corporation, Insiders, 29 September 2015 http://www.abc.net.au/insiders/content/2015/s4320411.htm (accessed 16 November 2015).

9 S Power, Parliamentary Library, 'Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015', *Bills Digest*, 20 August 2015, p. 25.

10 Public Law and Policy Research Unit, University of Adelaide, *Submission 35*, p. 5.

11 Law Council of Australia, *Submission 61*, p. 5.

1.14 Many other submitters commented on this issue with, for example, Mr Murray Wilcox AO QC stating that that 'the Bill is futile'. Mr Wilcox went on to explain this view:

> The Minister apparently assumes the court will apply the standing rule laid down in section 5 of the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act). That section allows a "person aggrieved" to seek review of a decision. The ADJR Act does not define this term and there is no reason to read it as being limited to a person with a financial interest in the decision. It is a safe bet, if this Bill is passed, that the courts will interpret section 5 in a similar way to their adaptation to modern Australian conditions of the old English rule. The only change from the present situation will be that the parties, and so the courts, will spend time examining the details of the applicant's association with the relevant issue or place. And people wonder why litigation is so expensive.[12]

1.15 Labor Senators concur with this assessment: the repeal of section 487 may ultimately not only fail to exclude environmental groups from challenging decisions made under the EPBC Act but the courts will also have to make complex assessments about standing under the ADJR Act and Judiciary Act thus adding to time delays and costs before the facts of the matter are reviewed.

1.16 It was also argued by supporters of the bill that the extended standing provisions have resulted in no clear substantial improvements in environmental outcomes.[13] Labor Senators consider this to be an unsound argument and note that the Department of the Environment stated that 'exposure to legal challenges is a necessary and appropriate discipline in the EPBC decision-making process'.[14]

1.17 Other examples of improved environmental outcomes were provided to the committee. Mr Stephen Keim SC pointed to the Nathan Dam case which resulted in the clarification of matters to be taken into account by the Minister in the approval process. Mr Keim submitted:

> If the [Queensland] Conservation Council was not granted standing, the question would have not been decided. Minsters for the Environment, to this day, may have prevented themselves, in breach of the law's requirements, from refusing proposed developments or, more importantly, from imposing crucial conditions to protect down-stream environments (like the Reef in [the Nathan Dam case]) through a misunderstanding of what the law permitted and required the minister to take into account.[15]

1.18 The Wilderness Society also commented that the decision by North Queensland Bulk Ports Corporation to look for alternative options to dumping dredge

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12 Mr Murray Wilcox AO QC, *Submission 19*, p. 2.

13 Business Council of Australia, *Submission 111*, pp 6–7.

14 Department of the Environment, *Submission 135*, p. 5.

15 Mr Stephen Keim SC, *Submission 78*, pp 2–3.

spoil at sea was prompted by the Carmichael mine court case. The Wilderness Society concluded:

> Thus, standing granted under s 487 of the EPBC helped facilitate a better decision-making process and ultimately a better outcome for the environment.[16]

1.19 Other submitters also argued that the extended standing provisions have benefited the environment by limiting the potential damage of large development projects. The Conservation Council ACT Region, for example, stated:

> The potential for challenges by third parties encourages proponents of projects to fully consider the consequences of insufficient planning and accounting for environmental values, thereby reducing the number of inappropriate proposals that reach a stage where litigation might be pursued.
>
> The Conservation Council has found that our organisation having standing on environmental matters has probably led to better and earlier discussions with proponents, including the Government, and better development outcomes for all parties.[17]

1.20 Of particular concern to Labor Senators is the limiting of access to justice if section 487 is repealed. The committee received persuasive evidence of the need to ensure that there is adequate access to justice in relation to environmental matters. First, the protection of the environment is of concern to all Australians. Conservation groups, researchers and educators have an important role in safeguarding the interests of the Australian public generally. They are experts in their field, have great understanding of the consequences of environmental impacts and the ability to monitor these issues. The Nature Conservation Council of NSW commented:

> Environment organisations in particular play a key role in defending the public interest, especially when individuals face significant challenges in engaging in environmental decision making, and in particular accessing judicial review mechanisms. In a world that is increasingly under threat from adverse and complex environmental problems, including climate change and unprecedented loss of biodiversity, the ability for democratic societies to participate in environmental decision making is greatly advanced by the role that can be played by environmental organisations.[18]

1.21 Secondly, the limiting of standing to those directly affected by development projects fails to recognise the potentially far-reaching environmental effects of those projects. Submitters provided examples of adverse environmental effects occurring at great distances from the project site including effects on water resources and air pollution. The People for the Plains commented that a development in a state forest,

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16 The Wilderness Society, *Submission 44*, p. 3.

17 Conservation Council ACT Region, *Submission 128*, p. 4.

18 Nature Conservation Council of NSW, *Submission 43*, p. 2.

where there are no direct neighbour landholders, may have an effect on a community-wide resource such as the Great Artesian Basin.[19]

1.22 Labor Senators consider that the bill displays a simplistic approach to protection of matters on national environmental significance and a lack of understanding of the potential far-reaching effect on the environment of large development projects.

1.23 Thirdly, should this bill be passed, individuals directly affected by development proposals will be forced to take on the burden of protection of the Australian environment. EDOs of Australia commented:

> By removing standing for third parties other than landholders – conservation groups and individuals concerned about the environment – the Bill *increases* the burden of responsibility on affected landholders to 'put the farm on the line' to obtain private legal advice and challenge the legality of a government decision.[20]

1.24 Labor Senators do not consider that any government should contemplate shifting the burden of overseeing protection of matters of national environmental significance to individuals, much less expect those individuals to 'put the farm on the line' to ensure that the natural heritage of all Australians is protected. As EDOs of Australia went on to state:

> By seeking to draw a hard line between standing for landholders and conservationists, the Bill overlooks the primary role of the EPBC Act – to protect the national environment – which necessarily involves 'the community, land-holders and indigenous peoples'.[21]

1.25 Labor Senators support the maintenance of the rule of law and consider that the Government's response to the Carmichael mine case calls into question the Government's commitment to upholding the rule of law.

1.26 The EPBC Act establishes the assessment and approval process for development projects that have an impact on matters of national environmental significance. In the Carmichael mine case, the Government failed to ensure that that process has been undertaken in accordance with the provisions of the EPBC Act. Submitters asserted that the Government is now responding to an individual case, when the 'primary' importance is the rule of law: decision-makers, when exercising their duties under legislation are required to comply with legislative requirements.[22]

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19 People for the Plains, *Submission 40,* p. 2.

20 EDOs of Australia, *Submission 114*, p. 8.

21 EDOs of Australia, *Submission 114*, p. 8.

22 Dr Gabrielle Appleby, *Submission 23,* p. 3; Australian Conservation Foundation, *Submission 38*, p. 4; Nature Conservation Council of NSW, *Submission 43*, p. 1; Dr Rosemary Lyster, *Submission 55*; p. 1; Environmental Justice Australia, *Submission 93*, p. 6.

1.27 The Public Law and Policy Research Unit, University of Adelaide, pointed to the importance of compliance with legislated provisions in relation to environmental approvals. It argued that the 'relationship between the rule of law and government decision-making under environmental legislation is absolutely critical to the protection of environmental values'. The Public Law and Policy Research Unit went on to comment that the response to the Carmichael case suggested that the Attorney-General accepted that 'where the Environment Minister makes a lawful decision, as appears to the case in relation to the proposed Carmichael coal mine, he or she should not be subject to legal challenge by the conservation organisation'. As such, it was concluded that the rule of law 'has become secondary to the economic and political goals of the government of the day' and 'such an attitude is of grave concern as it seeks to undermine one of the most fundamental protections against the unlawful exercise of government power'.[23]

1.28 Submitters also stated that third party appeals ensure that decision making is in accordance with the provisions of relevant legislation. Third party appeals add to the transparency and accountability of government. In addition, the Law Society of New South Wales warned that the bill 'has the potential to undermine public faith in government because it seeks to limit Court oversight of Executive decision-making and transparency'.[24] That this Government should propose the repeal of the extended standing provided by section 487 runs counter to the underlying principles of good government, transparent decision-making and protection of the environment.

1.29 The majority committee report noted that a number of reviews supported the current extended standing provisions in section 487. Notably, the Hawke Review commented that the extended standing provisions 'created no difficulties and should be maintained'.[25] The Productivity Commission report on major development assessment processes also acknowledged the value of extended standing.[26] The Government is now ignoring the outcomes of these independent and comprehensive reviews and introducing an amendment to the EPBC Act without any evidence that extended standing is causing problems.

1.30 Labor Senators note the comments of both the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) and the Parliamentary Joint Committee on Human Rights (PJCHR) concerning the bill. Both committees raised a number of matters of concern.

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23 Public Law and Policy Research Unit, University of Adelaide, *Submission 35*, p. 9.

24 Law Society of New South Wales, cited in Law Council of Australia, *Submission 61*, p. 4.

25 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.

26 Productivity Commission, *Major Project Development Assessment Processes*, Research Report, Canberra, November 2013, p. 276.

1.31 The Scrutiny of Bills Committee noted that it is well accepted that restrictive standing poses particular problems in environmental decision-making. Further, as environmental regulation often raises matters of general, rather than individual concern, restrictive standing can mean that decisions are, in practice, beyond review. The Scrutiny of Bills Committee added that it is a matter of concern that the more restrictive standing rules may result in the inability of the courts, at least in some cases, to undertake their constitutional role of ensuring that Commonwealth decision makers comply with the law. At the same time, the Scrutiny of Bills Committee commented that there may be no substantial reduction in litigation as uncertainty may be introduced as to which groups will be granted standing.[27]

1.32 The Scrutiny of Bills Committee sought detailed advice from the Minister as to why the limitation on the availability of judicial review of decisions under the EPBC Act was justified. While a response was received from the Minister, Labor Senators note that the Scrutiny of Bills Committee expressed to the Senate that it had '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'.[28]

1.33 The PJCHR raised questions as to whether the bill limits the right to health and a healthy environment and if so, whether the limitation was justified. The PJCHR sought advice from the Minister.[29] However, this had not been received by the time the majority report was considered by the committee.

1.34 Finally, Labor Senators wish to comment on the conduct of the committee's inquiry in the bill. Following referral of the bill to the committee it was agreed that, in order to conduct a thorough examination of the bill and to allow the views of submitters to be fully explored, the committee would hold four public hearings. The committee agreed to postpone the hearings on the day the first hearing was scheduled. In agreeing to postpone the hearings, the non-government members of the committee understood that the date for tabling of the report would be extended and that the committee would reschedule the proposed hearings before finalising its deliberations. This understanding was confirmed by the Senate's decision on 12 October 2015 to extend the reporting date to the second last sitting day in February 2016.

1.35 Despite the committee's earlier decision to postpone the hearings and the Senate's agreement to the extension of the reporting date, the Government members of the committee subsequently used their numbers to bring the presentation of the report forward to 18 November 2015, thereby not allowing time for any hearings to take

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27 Senate Standing Committee for the Scrutiny of Bills, *Eleventh Report of 2015,* 14 October 2015, p. 655.

28 Senate Standing Committee for the Scrutiny of Bills, *Eleventh Report of 2015,* 14 October 2015, p. 657.

29 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Twenty-seventh report of the 44th Parliament*, 8 September 2015, p. 7.

place. The absence of hearings limited the ability of committee members to test the Government's justification for the bill and the evidence received in written submissions. Labor Senators consider that in taking this course of action, the committee has abrogated its responsibility to thoroughly scrutinise the bill. This approach also shows no respect for the many submitters who took the time to contribute to the inquiry on the understanding that the committee would carefully perform its duty of scrutinising this bill.

1.36 The Labor Senators conclude that the Government's response to its own error sets a dangerous precedent; one that may, in the long term, result in more delays to approval processes for major infrastructure projects, undermine the faith of the public in the Commonwealth's environmental decision-making and compromise the rule of law.

Recommendation 1

1.37 Labor Senators recommend that the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 not be passed.

Senator Anne Urquhart
Deputy Chair
Senator for Tasmania

Senator the Hon Lisa Singh
Senator for Tasmania